

Nos. 14-1651 & 14-1934

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

GREATER OMAHA PACKING CO., 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**

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SUMMARY OF THE CASE

The National Labor Relations Board (“the Board”) seeks enforcement of its Order against Greater Omaha Packing Co., Inc. (“the Company”). On May 14, 2012, the Company discharged three employees just before a planned work stoppage in protest of the Company’s production line speeds. Credited testimony and substantial circumstantial evidence support the Board’s findings that the Company unlawfully fired Carlos Zamora, Jorge Degante Enriquez (“Degante”), and Susana Salgado Martinez (“Salgado”) for engaging in protected concerted activities. Applying established law, the Board also reasonably found that the Company’s statements to Zamora before his discharge were coercive, and that its statements to Degante and Salgado created an impression that their protected activities were under surveillance.

The Board acted within its broad remedial discretion in ordering backpay and requiring the Company to reimburse the three employees for the adverse tax impact, if any, of receiving lump-sum backpay awards, and to provide reports to the Social Security Administration allocating their backpay to appropriate periods.

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. If, however, the Court grants the Company’s request for oral argument, the Board asks that it be permitted to participate.

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**STATEMENT OF SUBJECT MATTER AND
APPELLATE JURISDICTION**

This case is before the Court on the petition of Greater Omaha Packing Co., Inc. to review and the cross-application of the National Labor Relations Board to enforce an Order of the Board finding that the Company committed certain unfair labor practices. The Board's Order issued on March 12, 2014, and is reported at

360 NLRB No. 62. (JA 41-52.)¹ The Company filed its petition for review on March 18, 2014. The Board filed its cross-application for enforcement on April 18, 2014. Both filings were timely, as the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (“the Act”), imposes no time limit on such filings.

The Board had subject matter jurisdiction over the proceeding under Section 10(a) of the Act (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 Omaha, Nebraska.

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board’s finding that the Company violated Section 8(a)(1) of the Act by terminating employees Carlos Zamora, Jorge Degante Enriquez, and Susana Salgado Martinez for engaging in protected concerted activity.

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

JCR Hotel, Inc. v. NLRB, 342 F.3d 837 (8th Cir. 2003).

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

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 supporting evidence.

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

2. Whether substantial evidence supports the Board's reasonable finding that the Company's statements to Carlos Zamora just before his discharge coercively conveyed the Company's displeasure with his protected concerted activity in violation of Section 8(a)(1) of the Act.

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

Concepts & Designs, Inc., 318 NLRB 948 (1995), *enforced*, 101 F.3d 1243 (8th Cir. 1996).

3. Whether substantial evidence supports the Board's reasonable finding that the Company created an impression of surveillance in violation of Section 8(a)(1) of the Act when it told Jorge Degante Enriquez and Susana Salgado Martinez that it knew about their involvement in organizing a work stoppage but refused to reveal how it had obtained that information.

Mississippi Transp., Inc. v. NLRB, 33 F.3d 972 (8th Cir. 1994).

NLRB v. Gerbes Super Mkts., Inc., 436 F.2d 19 (8th Cir. 1971).

4. Whether the Board acted within its broad remedial discretion in ordering the Company to compensate Carlos Zamora, Jorge Degante Enriquez, and Susana Salgado Martinez for any adverse tax impact of receiving their backpay awards as lump-sum payments and to provide reports to the Social Security Administration allocating their backpay to appropriate periods.

NLRB v. Beverly Health & Rehab. Servs., Inc., 187 F.3d 769 (8th Cir. 1999).

STATEMENT OF THE CASE

Acting on unfair labor practice charges filed by the Heartland Workers Center, the Board's General Counsel issued a complaint alleging that the Company committed several violations of the Act. Following a hearing, the administrative law judge issued a decision and recommended order finding that the Company violated the Act by discharging Zamora, Degante, and Salgado, and dismissing other complaint allegations. (JA 1-15.)

After considering exceptions to the judge's decision filed by the Company and the General Counsel, the Board issued its Decision and Order affirming, as modified, the findings and recommended order of the judge. (JA 41-52.) The Board amended the judge's order to reflect its additional findings that the Company's statements to Zamora, Degante, and Salgado just before their discharges violated the Act. (JA 41 n.2.) The Board also ordered the Company to take additional remedial measures to make the three employees whole. (JA 41 n.2.)

I. THE BOARD'S FINDINGS OF FACT

A. The Company and Its Operations

The Company operates a plant in Omaha, Nebraska where it slaughters and processes beef. (JA 46; 75.) In March 2012, 430 employees worked in the

Company's fabrication department. (JA 266.) Most of the fabrication employees worked on production lines, or knife lines, where they stood three feet apart and used knives to process different cuts of beef. (JA 76, 257.) The meat moved down the lines at a steady rate of speed set by the Company. (JA 76, 253.) In a packing area at the end of the production lines, employees worked at tables in groups of five packaging the meat. (JA 178.)

B. In April 2012, Immigration Enforcement Causes Numerous Employees to Leave the Company, Increasing the Remaining Employees' Workload

On April 3, 2012, the Department of Homeland Security sent the Company a Notice of Discrepancies stating that it could not verify the identities and employment eligibility of 179 of the Company's employees. (JA 46; 76-77, 361-63.) A short time later, Immigration and Customs Enforcement agents entered the Company's premises and arrested fifteen employees. (JA 46; 78, 110.) Over the following months, dozens of other employees quit (JA 46; 79-80), and the Company hired large numbers of new workers (JA 46; 78-80). Because the new hires were inexperienced, the Company's more senior employees had to work faster to keep up with the speed of the production lines. (JA 46; 138, 183, 202.) In April and early May, employees discussed amongst themselves how they could make the Company listen to their concerns regarding line speeds, their workloads,

and their pay. (JA 47-48; 138-39.) Some employees raised protests with their supervisors on these issues. (JA 46, 49; 80-81, 137, 171.)

C. Employees Concertedly Protest Their Working Conditions in 2008 and 2012

Four years earlier, the Company's employees had successfully organized a work stoppage to protest their terms and conditions of employment. (JA 46; 268-69.) In 2008, the Company's entire fabrication workforce—approximately 400 employees—concertedly stopped working and gathered in the Company's cafeteria. (JA 46; 268-69.) Plant Manager Samuel Correa met with them and tried to convince them to return to work. (JA 269.) When he was unsuccessful, the Company's vice president talked with the employees. (JA 269.) Ultimately, the work stoppage ended only when the Company's owner arrived at the plant and came to terms with the employees. (JA 46 n.2; 269.)

In April 2012, employees again used concerted action in an effort to have the Company address their concerns. (JA 42, 46, 49.) That month, about a dozen employees stopped work on the loin line for twenty or thirty minutes out of frustration with the speed and staffing levels of the line, as well as their wages. (JA 42, 46; 81-82, 201.) As in 2008, the employees congregated in the Company cafeteria, where they were addressed by Plant Manager Correa. (JA 46; 81.) They returned to work after Correa agreed to add another person to the line and talk with the employees after work about their salaries. (JA 201.)

Carlos Zamora, a three-year employee of the Company, participated in the April work stoppage. (JA 199, 201.) Afterward, in a conversation with his supervisor, Saturnino Mora, Zamora continued voicing the employees' shared concerns, insisting that the line still needed another worker. (JA 204.) According to Fabrication Manager Eliseo Garcia, Zamora raised concerns about line speed with him in early May. (JA 46-47; 262-63.)

D. Employees Plan Another Work Stoppage for May 14, 2012, at 10:00 a.m.

In mid May, as the Company continued to lose experienced workers and bring in new hires, some of its employees began organizing another, larger work stoppage. (JA 42; 79.) Jorge Degante Enriquez, an experienced and highly skilled worker who had been with the Company for twelve years, was instrumental in this effort. (JA 43; 135.) Degante could work on five of the Company's six knife lines, and the Company frequently moved him from line to line as needed. (JA 98-99, 124, 135-37.) As a result, Degante had opportunities to converse with employees throughout the fabrication department. (JA 138-39, 141.)

On Friday, May 11, Degante was initially stationed on the loin line, where employees had engaged in a work stoppage the previous month. (JA 138.) There, Degante talked with coworkers about how the line was still too fast and their pay too low. (JA 43; JA 138.) Degante had previously raised these concerns with Company management, telling supervisor Roberto Silva that the line was moving

way too fast, which made it impossible to do a good job. (JA 137.) Silva had assured Degante that he would discuss the matter with Plant Manager Correa, but the issue had not been resolved. (JA 137.)

On the loin line on May 11, Degante and two other employees decided to organize another work stoppage to make the Company listen to their concerns. (JA 138-39, 157-60.) One of the two employees said he would talk to the others. (JA 159.) Later in the day, when Degante was moved to the round line, he talked about the same issues with the employees there, and they also wanted to do something about the excessive line speed. (JA 43; 139.) After work the next day, on Saturday, May 12, five or ten other employees found Degante and asked him, “*Carnal*, are we going to strike?”² (JA 140.) “Yes,” Degante said. (JA 140.) The work stoppage, they decided, would take place on the next workday, Monday, May 14 at 10:00 a.m. (JA 43; 141.)

On Monday, Zamora learned about the work stoppage from a friend on his way to the cafeteria for the morning break. (JA 42; 211.) During that break, Degante talked to his friend Susana Salgado Martinez, a packing-area employee of four years (JA 46; 170), and asked her to tell her friends and coworkers to join the work stoppage (JA 43; 142). Salgado had recently told her supervisor, Alejandro

² Before the judge, Zamora, Degante, and Salgado testified in Spanish through an interpreter. The interpreter explained that *carnal* is a colloquial term of address, “like brother, like the same flesh.” (JA 140.)

Varela, that the line was too fast and that employees did not have time to pack all the meat coming to them. (JA 171.) She assured Degante that the packing employees would walk out with the knife workers. (JA 142, 173.) By the time Salgado returned to her work station and told the other four employees about the work stoppage, they already knew about it. (JA 173.)

E. The Company Removes Zamora, Degante, and Salgado from the Production Floor Shortly Before 10:00 a.m. and Terminates Them; the Work Stoppage Is Averted

During the half hour before the work stoppage was to begin, the Company pulled Zamora, Degante, and Salgado from the production floor and hastily discharged them, one after the other. (JA 48 n.8.) The Company's employees ultimately did not engage in a work stoppage on May 14. (JA 50.)

1. The Company questions Zamora and then terminates him

The Company terminated Zamora first. Just after he returned to work following the morning break, supervisor Mora approached him on the loin line and ordered him to the supervisors' office. (JA 42; 85, 115, 211.) There, Zamora was confronted by Fabrication Manager Garcia and Plant Manager Correa. (JA 42; 212.) In a brief meeting, Correa asked Zamora what he wanted. (JA 42; 212.) He said Zamora had a good job, good insurance, and good overtime, and asked what else he wanted. (JA 42; 212.) Zamora replied that he wanted an increase. (JA 42; 212.) Correa told him he was fired. (JA 42; 212.) Zamora asked to speak with the

Company's human resources representative, but Correa refused to allow it. (JA 42; 212.) Before meeting with Zamora, the Company had called in a security guard for a "termination escort." (JA 47, 50; 234, 236, 367.) After Zamora's discharge, the guard escorted him from the building. (JA 47; 213.)

2. The Company accuses Degante of agitating his coworkers and leading the work stoppage and then terminates him

The Company fired Degante next. (JA 47.) Supervisor Mora found Degante working on the butts line with six other employees and told him to go up to the supervisors' office. (JA 47, 50; 143, 165.) Correa and Garcia were there when he arrived, and Garcia asked Degante what he was doing. (JA 143.) Degante responded that he was not doing anything. (JA 143.) "You are the one agitating people," Garcia said. (JA 43; 144.) Degante denied it. (JA 43; 144.) "Okay," Garcia said, "you are not happy with your salary?" (JA 144.) Degante said this was true—he had told supervisor Silva so several times. (JA 144.) Garcia asked again whether Degante was agitating people, and Degante insisted he was not. (JA 144.) Garcia said: "Just leave your stuff in here and you can go. You are fired." (JA 144.)

Degante argued it was not fair to be fired that way after working for the Company for twelve years. (JA 145.) Garcia said that someone had told him Degante was the leader of the planned work stoppage. (JA 43, 50 n.12; 145.) Degante replied that the Company had to prove that he was the leader, but Garcia

disagreed. (JA 43; 145.) Two security guards then escorted Degante from the building. (JA 50 n.13; 146.)

3. The Company accuses Salgado of being an organizer of the work stoppage and then terminates her

The Company fired Salgado last. (JA 43.) Supervisor Varela led Salgado away from her work station before 10:00 and brought her to the cafeteria. (JA 48; 175.) He waited there with Salgado until Correa called her into the supervisors' office. (JA 175.) Correa told Salgado she was there because she was one of the organizers of the work stoppage. (JA 43, 48; 176.) Salgado asked whether the Company had witnesses that she was involved, but Correa refused to name anyone. (JA 43; 176.) He told Salgado that she was fired. (JA 43; 176.) Correa then refused Salgado's request to speak with human resources. (JA 176.) Security personnel led Salgado out of the building. (JA 50 n.13; 177.)

4. The Company subsequently documents the discharges

Nearly three weeks after it discharged Zamora, Degante, and Salgado, the Company prepared "Employee Exit Interview" documents for each of them. (JA 364-66.) It checked a single line on each document, indicating the same reason for the three terminations: "Conduct – Behavior and/or Language." (JA 47-48; 364-66.) The Company included no additional notes or warnings. (JA 364-66.) At the hearing, the Company produced exit-interview documents for two other employees terminated in May and June 2012, which both contained narrative explanations for

the discharges and included “employee warning” documents dated on each employee’s last day worked. (JA 48; 374-78.) On those documents, the Company had checked a line for “Insubordination.” (JA 374-78.) The Company also produced a third exit-interview document from January 2012, which included a brief narrative explanation and a check mark indicating that the employee was fired for “Refusal to Follow Instructions.” (JA 373.)

II. THE BOARD’S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Pearce and Members Hirozawa and Johnson) found, in agreement with the judge, that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by terminating Zamora, Degante, and Salgado for engaging in protected concerted activity. The Board also found that the Company violated Section 8(a)(1) by making coercive statements to Zamora. In addition, the Board (Chairman Pearce and Member Hirozawa, Member Johnson dissenting) found that the Company violated Section 8(a)(1) by making comments to Degante and Salgado which created an impression that employees’ protected concerted activities were under surveillance.

The Board’s Order requires the Company to cease and desist from discharging or otherwise discriminating against any employee for engaging in protected concerted activities; making coercive statements to employees about their participation in protected concerted activities; creating the impression that it

is engaged in surveillance of its employees' protected concerted activities; and in any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act (29 U.S.C. § 157).

Affirmatively, the Board's Order requires the Company to offer reinstatement to Zamora, Degante, and Salgado, and make them whole, including reimbursing them for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and submitting appropriate documentation to the Social Security Administration.

The Company must also remove any references to the unlawful discharges from its files; provide appropriate records to the Board for the calculation of backpay; and post a remedial notice.

SUMMARY OF ARGUMENT

Substantial evidence on the record as a whole, including the credited testimony of three witnesses, supports the Board's finding that the Company violated the Act by discharging Zamora, Degante, and Salgado for their protected concerted activities. As heavy turnover in the Company's workforce made the three employees' jobs more difficult in April and May 2012, each of them protested to their supervisors. Additionally, Zamora was part of a small work stoppage protesting working conditions. From its experience four years earlier, the Company knew that its workforce was capable of carrying out a large-scale work stoppage. When the Company learned that Degante was leading an effort to do

just that, it quickly discharged him, along with perceived ringleaders Zamora and Salgado. The work stoppage was quashed.

Before firing Degante and Salgado, the Company accused them of organizing the work stoppage but refused to reveal the source of its information. Applying settled law, the Board found that the Company created an impression that employees' protected activities were under surveillance. In addition, the Board reasonably found that the Company's statements to Zamora just before it fired him—insisting that he had a good job and demanding to know what else he wanted—were unlawfully coercive in light of the surrounding circumstances. In its brief, the Company argues that it did not violate Section 8(a)(1) by making these statements, but it does not challenge the Board's finding that the statements were made.

Before this Court, the Company principally challenges the credibility determinations made by the judge and upheld by the Board. As the Company acknowledges (Br. i), its arguments are “a tough sell.” The judge found Zamora's, Degante's, and Salgado's accounts credible and supported by record evidence, and he justifiably discredited the Company's witnesses. The Company also argues that no evidence establishes how it learned about the plans for a work stoppage. But the Company's own statements to the three employees—as well as the Company's suspicious timing and reliance on clearly pretextual reasons for discharging

them—establish the Company’s knowledge of, and animus toward, their protected concerted activities. The Company’s refusal to reveal *how* it learned about those activities does not undermine the Board’s findings.

Having found that the Company violated the Act by discharging the three employees, the Board ordered the Company to make them whole. The Board acted within its broad remedial discretion in requiring the Company to compensate Zamora, Degante, and Salgado for any adverse tax impact of receiving their backpay awards as lump-sum payments and to provide reports to the Social Security Administration allocating their backpay to appropriate calendar quarters. The Court should enforce the Board’s Order in full.

STANDARD OF REVIEW

This Court’s review of the Board’s fact-finding is limited in scope. *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 779-80 (8th Cir. 2013). The Board’s findings of fact 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). In evaluating the weight of the evidence, the Court “afford[s] great deference to the Board’s affirmation of the ALJ’s findings.” *RELCO*, 734 F.3d at 780. Where the Board has chosen between conflicting views of the evidence, the Court will accept that choice “even though the court would justifiably have made a different choice had the matter been before it *de novo*.” *United Exposition Serv.*

Co. v. NLRB, 945 F.2d 1057, 1059 (8th Cir. 1991) (quoting *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 405 (1962) (internal quotation marks omitted)).

The Court's review is still more narrowly circumscribed where the Board's findings rest on determinations of credibility. *Id.* Those determinations, this Court has recognized, are "within the sound discretion of the trier of facts." *Porta-King Bldg. Sys. v. NLRB*, 14 F.3d 1258, 1262 (8th Cir. 1994) (quotation omitted). The Court will overturn them only if "extraordinary circumstances come into play." *Wilson Trophy Co. v. NLRB*, 989 F.2d 1502, 1509 (8th Cir. 1993). In other words, the Court "is bound by the Board's determinations of witness credibility and the weight to be given their testimony, unless the Board's determinations are shocking to the [C]ourt's conscience." *York Prods., Inc. v. NLRB*, 881 F.2d 542, 544 (8th Cir. 1989) (quotation and brackets omitted); *accord RELCO*, 734 F.3d at 787.

The Court "defer[s] to the Board's conclusions of law if they are based upon a reasonably defensible construction of the Act." *JCR Hotel, Inc. v. NLRB*, 342 F.3d 837, 841 (8th Cir. 2003). Because "the Board draws on a fund of knowledge and expertise all its own" in fashioning appropriate remedies for violations of the Act, its judgment in that regard is entitled to "special respect by reviewing courts." *United Exposition Serv. Co.*, 945 F.2d at 1061 (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969) (internal quotation marks omitted)).

ARGUMENT

I. **SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(A)(1) BY TERMINATING EMPLOYEES CARLOS ZAMORA, JORGE DEGANTE ENRIQUEZ, AND SUSANA SALGADO MARTINEZ FOR ENGAGING IN PROTECTED CONCERTED ACTIVITY**

A. Principles of Unlawful Discharge

Section 7 of the Act (29 U.S.C. § 157) guarantees employees the right to engage in concerted activity in the workplace for the purpose of mutual aid or protection. *See Wilson Trophy Co.*, 989 F.2d at 1508. Under Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)), it is unlawful to “interfere with, restrain, or coerce” employees in the exercise of their Section 7 rights. It is well established that an employer violates Section 8(a)(1) by “discharging a nonunion employee for organizing or implementing a collective [work stoppage] to protest working conditions.” *JCR Hotel*, 342 F.3d at 840. Such a discharge violates the Act even if no work stoppage ultimately takes place. *Id.*

To determine an employer’s motivation in an unlawful discharge case, the Board applies the framework set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981), and approved by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400-03 (1983). *RELCO*, 734 F.3d at 780. Under *Wright Line*, the General Counsel has the burden of establishing that an employee’s protected activity was a

motivating factor in the decision to discharge the employee. *Id.* The General Counsel may do so by showing that (1) the employee was engaged in protected activity; (2) the employer knew of the protected activity; and (3) the discharge was motivated by animus toward that activity. *Id.*

Once the General Counsel has met this burden, a violation of Section 8(a)(1) will be found unless the employer proves as an affirmative defense that it would have taken the same action in the absence of protected activity. *Id.* It is not enough for the employer to show that “good cause to fire” existed. *JCR Hotel*, 342 F.3d at 842. The employer’s proffered “rationale cannot only be a potential or partial reason for the termination, it must be *the* justification.” *RELCO*, 734 F.3d at 780 (quotation omitted). If the rationale is pretextual, the employer’s affirmative defense necessarily fails. *York Prods.*, 881 F.2d at 545-46. Its reliance on pretext provides additional support for the General Counsel’s case. *Id.* at 546.

An employer’s motivation “is a question of fact that may be inferred from both direct and circumstantial evidence.” *RELCO*, 734 F.3d at 780 (quoting *Concepts & Designs, Inc. v. NLRB*, 101 F.3d 1243, 1244 (8th Cir. 1996) (internal quotation marks omitted)); *NLRB v. Wal-Mart Stores, Inc.*, 488 F.2d 114, 118 (8th Cir. 1973) (Board may properly rely on “inferences of probability drawn from the totality of other facts” (quotation omitted)). Indeed, this Court has long recognized that unlawful motivation “often may be proved *only* by circumstantial evidence.”

McGraw-Edison Co. v. NLRB, 419 F.2d 67, 75 (8th Cir. 1969) (emphasis added).

That evidence may include “suspicious timing,” *RELCO*, 734 F.3d at 787 (quotation omitted); “implausible explanations,” *Hall v. NLRB*, 941 F.2d 684, 688 (8th Cir. 1991); and other acts of unlawful coercion or intimidation, *id.* at 688-89; as well as “departures from past practice, [and] tolerance of behavior for which the employee was allegedly fired,” *RELCO*, 734 F.3d at 787 (quotation omitted).

B. Substantial Evidence Supports the Board’s Findings that the Company Discharged Zamora, Degante, and Salgado Because of Their Protected Concerted Activity and that the Reasons the Company Offered Were Pretextual

Applying *Wright Line*, the Board found that Zamora’s, Degante’s, and Salgado’s protected activity was a motivating factor in the Company’s decision to discharge them. (JA 41 & n.3, 50-51.) The Board also found that because the Company’s asserted reasons for the terminations were pretextual, it could not establish that it would have fired them in the absence of their protected activities. (JA 41 & n.3, 50-51.) Substantial evidence supports these findings.

1. Zamora, Degante, and Salgado engaged in protected concerted activity

As the Board found (JA 41 & n.3), Zamora, Degante, and Salgado engaged in “quintessential protected concerted activity” when they discussed a work stoppage to protest working conditions they had concertedly raised with the Company on numerous occasions. *See JCR Hotel*, 342 F.3d at 840. The

employees credibly testified that Degante took a lead role in organizing the work stoppage (JA 47; 138-42), Salgado joined his efforts (JA 48; 142, 173), and Zamora discussed the work stoppage with a coworker (JA 49-50; 211). Zamora had recently joined with other employees in a work stoppage protesting wage rates and the speed of the line (JA 42; 81, 201), and he discussed line speed with Manager Garcia again the week before he was fired (JA 46-47; 262-63). Degante and Salgado also protested the pace of their work to their supervisors. (JA 7 n.5, 48 n.7; 137, 171.) Indeed, Degante’s supervisor promised to talk with Plant Manager Correa about his concerns. (JA 46 n.5; 137.) For the three employees, a large work stoppage was the logical next step after their smaller-scale protests failed to get results. (JA 138-39.) In light of the foregoing evidence, the Company wisely does not contest the Board’s finding (JA 41 & n.3) that, under *Wright Line*, Zamora, Degante, and Salgado each engaged in protected concerted activity. *See RELCO*, 734 F.3d at 785 (protected concerted activity “can include that of individual employees if it ‘represents either a continuation of earlier concerted activities or a logical outgrowth of concerted activities’” (quoting *Mobil Explor. & Producing U.S., Inc. v. NLRB*, 200 F.3d 230, 238 (5th Cir.1999))).

2. The Company had knowledge of and was motivated by animus toward the Employees' protected concerted activity

On the morning of May 14, just before the planned work stoppage, the Company abruptly pulled Zamora, Degante, and Salgado from their workstations and fired them, one after another. Substantial evidence supports the Board's finding (JA 41 & n.3) that when the Company fired the three employees, it had knowledge of their protected concerted activity and harbored animus toward it.

First, the Company's statements to each of the employees on the day it discharged them provide strong evidence both that it knew they had engaged in protected activity and that the activity furnished the reason for their discharges. *See Wal-Mart Stores*, 488 F.2d at 118 (knowledge and animus may be proved by same evidence). Just before firing them, the Company's managers told Degante and Salgado "that [the Company] knew they were leaders of the planned work stoppage" (JA 41 n.3; 145, 176), and questioned Zamora, demanding to know what more he wanted (JA 41 n.3; 212).³ With these statements, the Company demonstrated its knowledge of the employees' protected activity and linked that activity to its decision to fire them. *Cf. York Prods.*, 881 F.2d at 545 (employer's

³ It is irrelevant, as a matter of law, whether the Company was mistaken as to the extent of Salgado or Zamora's actual involvement in organizing the work stoppage. *See JCR Hotel, Inc.*, 342 F.3d at 841 (firing an employee for engaging in protected activity is unlawful "even if the employer misjudged what the fired employee had done").

own statement to employee may “amount[] to an outright confession of unlawful motive, eliminating the need to resort to other evidence”). Contrary to the Company’s insinuations (Br. 21, 25), the Board was not required to uncover how the Company’s managers learned of the planned work stoppage. As this Court has recognized, the Board may find a violation of Section 8(a)(1) where, as here, substantial evidence establishes that the employer’s knowledge came from “some undisclosed source.” *Wal-Mart Stores*, 488 F.2d at 116.

In addition to the Company’s own words, the suspicious timing of the Company’s actions provides “strong evidence” of its unlawful motive. *RELCO*, 734 F.3d at 775. As the Board noted (JA 41 n.3), Zamora, Degante, and Salgado were discharged at the same time, just before the planned work stoppage. Such close “[c]oincidence between the employee[s’] protected activities and the discharge[s] . . . strongly supports an inference of illegal motive.” *Hall*, 941 F.2d at 689. The Company’s timing is still more suspect because the three employees were fired within minutes of one another, supposedly for independent reasons. (JA 41 n.3, 50.) The Company’s decision to fire them all at once indicates that their shared involvement in protected activity was its real reason. *See Abbey’s Transp. Servs., Inc. v. NLRB*, 837 F.2d 575, 580 (2d Cir. 1988) (firing of two union

supporters within thirty minutes of each other, purportedly for different reasons, suggested employer “viewed a nexus between them”).⁴

As further support for finding knowledge and animus, the Board relied on the pretextual reasons the Company’s witnesses offered for firing Zamora, Degante, and Salgado. (JA 41 & n.1, 50.) The Company claims that it called each of them in on the same morning for counseling on unrelated, minor infractions, but then fired them because they each became insubordinate. (Br. 26.) Ample record evidence refutes this claim. First, the Company’s account is belied by the credited evidence showing that the Company had already called a security guard to the supervisors’ office “for a termination escort” (JA 367) before Zamora, the first of the three employees, even arrived. (JA 50.) Moreover, the judge expressly credited Zamora’s testimony that the Company fired him without attempting to counsel him. (JA 49.)⁵

Next, as the Board noted (JA 50), the conduct for which the Company claims it counseled Degante and Salgado on May 14 was nothing new. Garcia testified that tardiness had been “a practice for Mr. Degante” for at least four and a half years (JA 122), and Salgado’s supervisor said she left her workstation without

⁴ For this reason, there is no merit to the Company’s suggestion that it would not have unlawfully fired Degante, Zamora, and Salgado because they were working in different areas and “d[id] not have any relationship to one another.” (Br. 25.)

⁵ In addition, as the Board found (JA 41 n.3), the credited testimony does not support the Company’s claim (Br. 10) that Zamora threatened anyone.

permission “[e]very day” (JA 284). The Board had every reason to find it “extremely implausible” that the Company would have suddenly chosen to address these long-running issues with both employees on the same morning for reasons unrelated to their common involvement in protected activity. (JA 50.) And in light of their long years of service, it is “particularly implausible” that Zamora, Degante, and Salgado all would have had the same response to routine counseling that morning: an obstinate refusal to admit wrongdoing. (JA 50.) *Cf. Lemon Drop Inn, Inc. v. NLRB*, 752 F.2d 323, 325 (8th Cir. 1985) (pretext finding supported by evidence that “discharge was abrupt and unexpected, particularly in light of [employee’s] previously satisfactory work record”).

Furthermore, as the Board found (JA 51), the Company’s own exit-interview documents underscore the pretextual nature of its proffered reasons. Although the Company asserts that Zamora, Degante, and Salgado were fired for “insubordination and conduct during their counseling meetings” (Br. 26), their forms did not reflect “Insubordination” or “Refusal to Follow Instructions.” (JA 364-66.) Instead, all three forms indicated the same vague reason for discharge: “Conduct – Behavior and/or Language.” (JA 364-66.) In addition, all three forms lacked any narrative description of the three employees’ supposed misconduct, in sharp contrast to the exit-interview documents for other employees introduced by the Company at the hearing. (JA 373-77.) The Company’s unexplained departure

from its usual practice in preparing documents for Zamora, Degante, and Salgado reinforces the Board's finding of pretext. *RELCO*, 734 F.3d at 787. *See also McGraw-Edison Co.*, 419 F.2d at 75 (“variance from the employer’s normal employment routine” evidences unlawful motive (quotation omitted)).

In sum, the Company’s own statements, as well as its suspicious timing and pretextual reasons, demonstrate that it knew the employees “had engaged in protected activity” and “terminated them because it perceived they would continue to do so.” (JA 41 n.3.)

3. The Company failed to show it would have fired Zamora, Degante, and Salgado absent their protected concerted activity

Because the Company provided only pretextual reasons for discharging the three employees, the Board rightly found (JA 41 & n.3) that the Company failed to carry its burden under *Wright Line* of demonstrating it would have taken the same action in the absence of their protected activity. *See RELCO*, 734 F.3d at 782 (“The Board’s conclusion that [the employer’s] stated motives were pretextual provides substantial reason to reject its affirmative defense.”). As a result, the Company’s pretextual reasons only buttress the Board’s finding of unlawful motive. *York Prods.*, 881 F.2d at 545-46.

C. The Company's Contrary Arguments Are Meritless

The Company's various attempts to undermine the judge's credibility determinations are without merit. First, the Company claims that the Employees' testimony regarding the planned work stoppage does not make sense because the work stoppage never happened. (Br. 23.) The Board, however, reasonably inferred (JA 50) that no work stoppage occurred precisely because the Company's unlawful discharges had their desired effect. It is well established that the "[d]ischarge of 'a single dissident may have—and may be intended to have—an in terrorem effect on others.'" *Handicabs, Inc.*, 318 NLRB 890, 898 (1995) (quoting *Rust Eng'g Co. v. NLRB*, 445 F.2d 172, 174 (6th Cir. 1971)), *enforced*, 95 F.3d 681 (8th Cir. 1996). The Company ignores the obvious when it suggests (Br. 24) that other workers would not have noticed Degante, Zamora, and Salgado's absence because employees were "routinely" pulled from the production line. Rather, as the Board noted (JA 50), the Company's simultaneous removal of these three employees just before a planned work stoppage would not have appeared routine to anyone.

Just as other employees had looked to Degante, in particular, for leadership in organizing the work stoppage (JA 140), they would have looked to him as the time to walk out approached (JA 50). By then, the Company had pulled him from the line—along with Zamora, a vocal advocate for improved working conditions

who had participated in the previous month's work stoppage, and Salgado, another supporter of the work stoppage. This fact "likely dissuaded other employees from walking off the job." (JA 50; 165.) In any event, however, the Company's discharge of the Zamora, Degante, and Salgado for planning a work stoppage was unlawful, regardless of whether their plans would have succeeded. *See, e.g., RELCO*, 734 F.3d at 790 (discharges intended to quash "incipient concerted action" are unlawful even if that action ultimately would have "dissipated" or "never materialized"); *Brandeis Mach. & Supply Co. v. NLRB*, 412 F.3d 822, 833 (7th Cir. 2005) ("[T]he test for a violation of § 8(a)(1) is not whether the employer actually interfered with its employees' rights under the NLRA, but whether the employer's actions had a *tendency to interfere* with those rights.").

The Company misses the mark as well when it attacks the three employees' testimony as "self-serving." (Br. 27-28.) The Company fails to acknowledge that the judge in this case had *only* the testimony of interested parties before him—from Zamora, Degante, and Salgado on one side and from the Company's managers and security personnel on the other. This Court has long held that "[w]hen the Board is faced with conflicting testimony, it is the sole prerogative of the ALJ to make credibility findings." *DeQueen Gen. Hosp. v. NLRB*, 744 F.2d 612, 617 (8th Cir. 1984); *see, e.g., JCR Hotel*, 342 F.3d at 841 (if credible and unrebutted, employee's testimony that employer said she was being fired for planning a

walkout “would support a finding that [she] was terminated, at least in part, for this reason”); *Mississippi Transp., Inc. v. NLRB*, 33 F.3d 972, 979 (8th Cir. 1994) (upholding, in the absence of extraordinary circumstances, Board’s decision to credit an employee’s account of a conversation over a supervisor’s conflicting testimony). Moreover, the three employees’ accounts corroborated and reinforced each other on important points, especially regarding the timing and purpose of the planned work stoppage. (JA 138-42, 172-73, 211.)⁶ And as explained above, they were supported by strong circumstantial evidence. Accordingly, the cases cited by the Company—in which courts found that a single charging party’s testimony was heavily outweighed by the record evidence as a whole—are inapposite. (Br. 27-28.)

There is also no merit to the Company’s attempt (Br. 21-23) to rely on its asserted record of compliance with the Act. Regardless of the Company’s history, substantial evidence supports the Board’s finding that it violated the law here. In

⁶ In its statement of the case, the Company argues (Br. 14) that Salgado testified inconsistently as to when she was called to the supervisors’ office. The judge, however, reasonably found (JA 48 n.8) that Salgado, who testified through an interpreter, was summoned from the production floor before 10:00 a.m., but had to wait in the cafeteria for some time before she was called to the office. (JA 174-75, 184-85, 191-95.) Any “minor discrepancies” in Salgado’s statements as to when she was removed from the floor and when she was fired are clearly “overcome by the balance of the testimony and consideration of the language problem.” *NLRB v. Del Rey Tortilleria, Inc.*, 787 F.2d 1118, 1122 (7th Cir. 1986); *see also NLRB v. Chem Fab Corp.*, 691 F.2d 1252, 1258-59 (8th Cir. 1982) (upholding Board’s crediting of witness despite prior contradictory statement).

any event, the Company's suggestion (Br. 23) that its business circumstances had not changed since 2008 is puzzling, given that its own managers testified to the significant immigration-related turnover it was facing in April and May 2012. (JA 79, 111.) And the Company does not help its case by emphasizing (Br. 22) that Zamora participated in a protected work stoppage the month before it fired him. *RELCO*, 734 F.3d at 782 (an employee's termination "a mere one month" after engaging in protected activity was evidence of unlawful motive).

The Company's remaining attacks on the Board's reasoning are equally meritless. There is no basis for the Company's suggestion (Br. 26-27) that the Board's findings were based on mere "displeasure" with the reasons it gave for terminating Zamora, Degante, and Salgado. The judge and the Board rejected the Company's proffered reasons because they were false and pretextual (JA 41 n.3, 49-51), not because they were disagreeable. Nor did the Board find a violation based on the "mere coincidence" of the three employees' protected activity and their discharges, as the Company implies. (Br. 26.) Rather, the Board properly considered the highly suspect timing of the Company's actions, among other indicia of unlawful motive. *See Hall*, 941 F.2d at 688 ("The timing of an adverse employment decision is given great weight in unlawful discharge cases as an indication of [the employer's] motive."). Finally, contrary to the Company's assertions (Br. 20, 27), the Board's decision was not based on suspicion or

speculation. As explained above, the judge’s credibility determinations and the Board’s factual findings were grounded in substantial evidence on the record as a whole. (JA 49-51.) The Company’s arguments are, at best, a request for the Court to “preempt the Board’s choice between two fairly conflicting views of th[e] evidence.” *JHP & Assocs., LLC v. NLRB*, 360 F.3d 904, 911 (8th Cir. 2004) (quotations omitted). As such, they must be rejected.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S REASONABLE FINDING THAT THE COMPANY’S STATEMENTS TO CARLOS ZAMORA JUST BEFORE HIS DISCHARGE COERCIVELY CONVEYED THE COMPANY’S DISPLEASURE WITH HIS PROTECTED CONCERTED ACTIVITY IN VIOLATION OF SECTION 8(A)(1)

A. Principles of Unlawful Coercion

An employer violates Section 8(a)(1) of the Act by making statements which “interfere with, restrain, or coerce employees” in the exercise of their right to engage in protected concerted activity. The Board applies an objective standard to evaluate whether a statement “reasonably tends to . . . coerce employees.” *NLRB v. Intertherm, Inc.*, 596 F.2d 267, 271 (8th Cir. 1979). In carrying out this inquiry, the Board considers “the entire factual context” in which the statement was made. *Mississippi Transp.*, 33 F.3d at 977 (quotation omitted).

The Board and this Court have long recognized that an employer’s statement of frustration or displeasure with an employee’s protected activities may be coercive, even in the absence of an explicit threat. *See Intertherm*, 596 F.2d at 275

(statement that “if [employee] were unhappy with the company, he should look for another job” was unlawful); *Concepts & Designs, Inc.*, 318 NLRB 948, 954-55 (1995) (finding statements to be implied threats, in context), *enforced*, 101 F.3d 1243 (8th Cir. 1996). Other Courts are in agreement. *United Food & Commercial Workers Union Local 204 v. NLRB*, 447 F.3d 821, 825 (D.C. Cir. 2006) (per curiam) (“Why do you all guys want a Union, the Union can’t do anything for you but cause trouble between the workers and the Company,” found to be coercive); *NLRB v. D.C. Mason Builders, Inc.*, 133 F.3d 916 (4th Cir. 1997) (per curiam) (employer’s suggestion to steward “that if [he] didn't want to be on [the employer’s] job, to get the [expletive] off,” was unlawful because it “had a reasonable tendency to intimidate”).

Courts reviewing the Board’s findings regarding coerciveness “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.” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 620 (1969).

B. The Board Reasonably Found that the Statements the Company Made to Zamora Before Firing Him Were Coercive

On the morning of May 14, just before the planned work stoppage, the Company called Zamora to the supervisors’ office, where he was confronted by two managers. (JA 42; 85, 115, 211-12.) Plant Manager Correa told Zamora he already had a good job, good insurance, and good overtime, and asked what more

he wanted. (JA 42; 212.) When Zamora responded that he wanted an increase, Correa immediately fired him. (JA 42; 212.) A security guard waiting outside the office for a “termination escort” led Zamora from the premises. (JA 50; 213.)

As the Board recognized (JA 42), Correa’s comments, made at a meeting in the supervisors’ office where Zamora faced two Company managers, coercively conveyed the Company’s displeasure with his protected conduct. The timing of the comments—minutes before a planned work stoppage—clearly tied the Company’s frustration to Zamora’s protected activity, and the comments were immediately followed by Zamora’s abrupt termination. (JA 42.) In light of “the immediate [and] the broader context in which the remarks were made,” the Board reasonably found Correa’s words coercive. *Aldworth Co., Inc.*, 338 NLRB 137, 141 (2002) (in context, employer’s statements were a warning that associating with union proponents could cost them their jobs), *enforced sub nom. Dunkin’ Donuts Mid-Atl. Distrib. Ctr., Inc. v. NLRB*, 363 F.3d 437 (D.C. Cir. 2004); *see also NLRB v. Crystal Tire Co.*, 410 F.2d 916, 918 (8th Cir. 1969) (“The effect of the employer statements must be judged in the light of circumstances in which words innocent in and of themselves may be understood as threats.”).

The Company's brief does not dispute that Correa made the statements at issue.⁷ Instead, the Company asserts only that "Correa's statement to Zamora was not generally coercive." (Br. 28.) But none of the cases it cites for that proposition dealt with circumstances even remotely similar to what Zamora experienced. Reversing the Board, the Court in *NLRB v. Douglas Division* found that any possible coercion was neutralized by the "casual" nature and "joking atmosphere" of the employer's questions. 570 F.2d 742, 746 (8th Cir. 1978); *see also Federal-Mogul Corp. v. NLRB*, 566 F.2d 1245, 1250 (5th Cir. 1978) (finding, contrary to the Board, that employer's "questions were more in the nature of casual remarks among friends"). There was nothing casual or joking in the atmosphere of the supervisors' office when Zamora was confronted there, alone, by two managers who proceeded to berate and then fire him.⁸ Nor was Zamora summoned to the supervisors' office in a legitimate attempt to learn his grievances, which he had already made clear to both Correa and Garcia in the preceding weeks. *See Burger King Corp. v. NLRB*, 725 F.2d 1053, 1055 (6th Cir. 1984) (finding, contrary to the

⁷ Any such argument is therefore waived. *Ahlberg v. Chrysler Corp.*, 481 F.3d 630, 634 (8th Cir. 2007) (points not meaningfully argued in opening brief are deemed waived); *accord NLRB v. Carmichael Const. Co.*, 728 F.2d 1137, 1140 n.1 (8th Cir. 1984).

⁸ *Douglas Division* must also be distinguished because the Court, in disagreement with the Board, found there that any unlawful questioning by the employer "was rescinded and expressly disavowed" in a timely manner. 570 F.2d at 746. The Company in this case has never attempted to disavow its managers' statements.

Board, that employer’s inquiries were innocuous where they were part of genuine effort to determine what had caused an earlier confrontation). Rather, Correa’s statements served as a preface for Zamora’s unlawful discharge.

The Board reasonably took all of these circumstances into consideration in finding the Company’s statements coercive. *See Nat’l By-Prods., Inc. v. NLRB*, 931 F.2d 445, 452 (7th Cir. 1991) (statements may be coercive “either [because] the words themselves or the context in which they are used . . . suggest an element of coercion” (quotation omitted)); *NLRB v. Elias Bros. Big Boy, Inc.*, 325 F.2d 360, 364 (6th Cir. 1963) (“In view of the subsequent unfair labor practices . . . following so closely after the interrogations in question, we cannot say that the Board was in error in holding that the interrogations had a relation to coercion . . .”).⁹

⁹ There is no merit to the Company’s perfunctory argument that the violation found by the Board lacked a close connection to the allegations raised in the complaint. (Br. 28.) Relying on settled authority, the Board concluded that the issue of the statements’ coerciveness was “closely connected to the subject matter of the complaint and ha[d] been fully litigated.” (JA 42 (quoting *Pergament United Sales*, 296 NLRB 333, 334 (1989), *enforced*, 920 F.2d 130 (2d Cir. 1990)).) The alleged violation and the violation found by the Board both arose from the same facts and turned on the same ultimate question: whether Correa’s statements, under the circumstances, were coercive. *Compare, e.g., Midland Transp. Co. v. NLRB*, 962 F.2d 1323, 1325, 1329 (8th Cir. 1992) (considering surrounding circumstances to evaluate whether employer “coercively interrogat[ed] employees”) *with Medallion Kitchens, Inc. v. NLRB*, 806 F.2d 185, 191 (8th Cir. 1986) (analyzing surrounding circumstances and content of statements to determine whether they were coercive). The Company recognized as much in its briefing before the Board.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S REASONABLE FINDING THAT THE COMPANY CREATED AN IMPRESSION OF SURVEILLANCE IN VIOLATION OF SECTION 8(A)(1) WHEN IT TOLD JORGE DEGANTE ENRIQUEZ AND SUSANA SALGADO MARTINEZ THAT IT KNEW ABOUT THEIR INVOLVEMENT IN ORGANIZING A WORK STOPPAGE BUT REFUSED TO REVEAL HOW IT HAD OBTAINED THAT INFORMATION

A. Principles of Unlawful Impressions of Surveillance

An employer violates Section 8(a)(1) of the Act when it either engages in surveillance of employees’ protected activities or creates the impression that it is doing so. *Mississippi Transp.*, 33 F.3d at 978. Statements that lead employees to believe their employer is monitoring their protected activities are unlawful because they tend to “inhibit the employees’ right to pursue [those] activities untrammelled by fear of possible employer retaliation.” *Id.* (quoting *NLRB v. Chem Fab Corp.*, 691 F.2d 1252, 1258 (8th Cir.1982) (internal quotation marks omitted)).

To determine whether an employer has created an unlawful impression of surveillance, the Board considers “whether under the circumstances, the employee reasonably could conclude from the statement in question that his [or her] protected activities are being monitored.” *Sam’s Club*, 342 NLRB 620, 620 (2004). It is firmly established that when an employer informs employees that it knows about their protected activity, but does not reveal the source of that

(JA 32 (arguing there was no unlawful interrogation because “[t]here is no evidence of coercion in this matter”).)

knowledge, the employees may reasonably fear that the employer obtained its information through unlawful monitoring. *NLRB v. Gerbes Super Mkts., Inc.*, 436 F.2d 19, 21 (8th Cir. 1971); *Mountaineer Steel, Inc.*, 326 NLRB 787, 787 (1998), *enforced*, 8 F. App'x 180 (4th Cir. 2001) (per curiam). By contrast, an employer does not violate the law if it “clearly indicate[s] that another employee”—and not employer surveillance—“was the source of [its] information.” *N. Hills Office Servs., Inc.*, 346 NLRB 1099, 1104 (2006); *accord Park 'N Fly, Inc.*, 349 NLRB 132, 133 (2007).

B. The Board Reasonably Found that the Company Unlawfully Created an Impression of Surveillance in Its Meetings with Degante and Salgado

Ample evidence supports the Board’s findings that the Company created an unlawful impression of surveillance during its meetings with Degante and Salgado on May 14. (JA 43.) Garcia accused Degante of agitating his coworkers (JA 43; 144), and then specifically stated that he had been told Degante was the leader of the work stoppage (JA 43, 50 n.12; 145). When Degante asked Correa and Garcia to prove that he was the leader, they refused. (JA 43; 145.) Shortly thereafter, Correa accused Salgado of being one of the organizers of the planned work stoppage. (JA 43, 48; 176.) The Company also refused Salgado’s request to know who had identified her. (JA 43; 176.) Because the Company told Degante and Salgado that it knew about their protected activities without saying *how* it knew,

the Board found that the two employees would have reasonably believed the Company was monitoring their protected activity. (JA 43.)

Contrary to the Company's claims (Br. 29-30), established law supports the Board's findings. The courts have agreed with the Board time and again that statements just like Correa and Garcia's unlawfully create an impression of surveillance. *See, e.g., Gerbes Super Mkts.*, 436 F.2d at 21 (manager's statement to an employee "that the company knew [the employee] had met with union representatives" was unlawful); *Conley v. NLRB*, 520 F.3d 629, 642 (6th Cir. 2008) (employer "improperly 'created the impression of surveillance of employees' union activities'" by telling employee that it knew the employees "'were trying to get a union in here'"); *NLRB v. McCullough Envtl. Servs., Inc.*, 5 F.3d 923, 929 (5th Cir. 1993) (manager's statement that he believed employee was organizing a union campaign "created the impression that [he] was engaged in the surveillance of the employees' union activity"); *Hanlon & Wilson Co. v. NLRB*, 738 F.2d 606, 613 (3d Cir. 1984) (employer's statement, "we hear you are trying to get the [union] in here" violated Section 8(a)(1)); *Mountaineer Steel*, 326 NLRB at 787 (employer created impression of surveillance by stating, "I thought you was [sic] a union radical and now I know you are").

This case is particularly similar to *Mississippi Transport*, where this Court upheld the Board's finding that an employer violated Section 8(a)(1) by telling an

employee “there was word going around” about his protected union activity. 33 F.3d at 978. The Court agreed that “the comments could reasonably create the impression that [the employer] was monitoring” that activity. *Id.* In addition, the Court observed that the statements were not made “in casual conversation, but rather in a formal meeting” in a manager’s office, shortly after another employee had been discharged. *Id.* at 978-79. Likewise, here, the Company informed Degante and Salgado that it had heard about their protected activities from sources it declined to name. It made these statements during formal meetings in which it discharged the two employees, clearly “exploiting the timing to make a point.” *Id.* at 979. Here, as in *Mississippi Transport*, the statements at issue would reasonably tend make a listener suspect he or she was being watched. *Id.* at 978.

The Company’s only rejoinder—that an employer does not violate the Act by merely reporting information voluntarily provided by employees—is entirely beside the point. (Br. 29-30.)¹⁰ The Company never told Degante or Salgado that their coworkers had provided the information. To the contrary, the Company refused to identify its sources when they inquired. (JA 145, 176.) Nor did the

¹⁰ Nevertheless, the Company’s position that it was merely reporting what it had learned from other employees about Degante and Salgado’s participation in planning the work stoppage (Br. 29) is significant because it definitively refutes the Company’s claim that it had no knowledge of that activity (Br. 21). As above, the Company has waived any argument that its managers did not make the statements at issue. (Br. 29-30 (arguing only that the statements did not create an impression of surveillance)); *Carmichael Const. Co.*, 728 F.2d at 1140 n.1.

Company even hint that other employees had provided information voluntarily. Under these circumstances, the Board cases on which the Company relies are inapplicable. (Br. 29-30 (citing *Bridgestone Firestone S. Carolina*, 350 NLRB at 527 (no violation where employer told employees “only that certain coworkers had voluntarily provided information” and “there was no evidence or implication that management had previously solicited or coerced that information from employees”); *N. Hills Office Servs., Inc.*, 346 NLRB at 1103-04 (same)).) The Board reasonably found that Degante and Salgado were “left to speculate as to how the [Company] obtained the information, causing them reasonably to conclude that the information was obtained through *employer* monitoring.” (JA 43 (quotation omitted).)

IV. THE COURT SHOULD ENFORCE THE BOARD’S REMEDIAL ORDER IN FULL

A. Principles of Board Remedies

Section 10(c) of the Act (29 U.S.C. § 160(c)) empowers the Board to order a violator to cease and desist from violations of the Act and to take affirmative action to “effectuate the policies” of the Act. This provision “vest[s] in the [Board] the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act, subject only to limited judicial review.” *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984). “The Board’s remedies are reviewed for an

abuse of its broad discretion in its field of specialization.” *NLRB v. Beverly Health & Rehab. Servs., Inc.*, 187 F.3d 769, 772 (8th Cir. 1999) (quotation omitted).

B. The Board Acted Well Within Its Remedial Discretion in Ordering the Remedies In This Case

The Board’s Order requires the Company to make Zamora, Degante, and Salgado whole for any loss of earnings and benefits suffered as a result of the Company’s unlawful actions. (JA 44.) In doing so, the Company must reimburse the employees “an amount equal to the difference in taxes owed upon receipt of a lump-sum backpay payment and taxes that would have been owed had there been no discrimination against them.” (JA 44.) The Company must also “[s]ubmit the appropriate documentation to the Social Security Administration so that when backpay is paid to [the employees], it will be allocated to the appropriate periods.” (JA 44.)

These remedies, the Board determined here, were “necessary to effectuate the purposes of the Act.” (JA 44.) The Company does not contest that determination. Rather, the Company asserts only (Br. 32) that the Board was “without authority” to order these specific make-whole remedies here because the case in which they were first announced, *Latino Express, Inc.*, 359 NLRB No. 44 (Dec. 18, 2012), was issued by an improperly constituted panel of the Board. The Board acknowledges that the panel in *Latino Express* included members whose recess appointments were invalid under the Supreme Court’s decision in *NLRB v.*

Noel Canning, 134 S. Ct. 2550, 2578 (June 26, 2014).¹¹ However, contrary to the Company’s argument, that circumstance does not deprive the current Board, which has a full complement of five Senate-confirmed members, of its “broad discretion” under Section 10(c) of the Act “to fashion appropriate remedies.” *NLRB v. J.S. Alberici Const. Co., Inc.*, 591 F.2d 463, 468 (8th Cir. 1979).¹²

In this case, as the Company notes (Br. 31), the judge did not order these specific remedies. But the Board has long reserved to itself the determination of the appropriate remedy, even if no party has filed exceptions.¹³ In any event, the General Counsel did file exceptions urging the Board to grant the additional relief of requiring that the employees be made whole for any excess taxes resulting from

¹¹ In *Noel Canning*, the Supreme Court held that three Board members who received recess appointments in January 2012 were not validly appointed. 134 S. Ct. at 2578. Two of those appointees participated on the panel which decided *Latino Express*.

¹² The Board regained a quorum in August 2013, following the confirmation of five presidentially appointed Board members. *The National Labor Relations Board Has Five Senate Confirmed Members*, NLRB Office of Public Affairs (Aug. 12, 2013), <http://www.nlr.gov/news-outreach/news-story/national-labor-relations-board-has-five-senate-confirmed-members>.

¹³ See, e.g., *Cleveland Cinemas Mgmt. Co., Ltd.*, 346 NLRB 785, 786 (2006) (“Matters of remedy are traditionally within the Board’s province, and may be addressed by the Board sua sponte.” (quotation and brackets omitted)). See also *NLRB v. Americare-New Lexington Health Care Ctr.*, 124 F.3d 753, 760 (6th Cir. 1997) (“The Board . . . may impose sua sponte a remedy different than that suggested by an ALJ because parties may move the Board to reconsider such rulings.”); accord *U.S. Marine Corp. v. NLRB*, 944 F.2d 1305, 1324 n.24 (7th Cir. 1991) (en banc).

their receiving backpay in a lump sum and that the Company also be required to submit appropriate documentation to the Social Security Administration so that employees would receive proper credit.

In granting the General Counsel’s request in this case, the current Board exercised its Section 10(c) remedial authority in the same manner that it has in other cases—both before and after the Supreme Court’s *Noel Canning* decision—where in its judgment such remedial relief effectuated the Act’s policies.¹⁴ This course of decision-making confirms that the granting of the additional relief in this case represents the independent determination of the current Board that such relief is appropriate.

The Company does not dispute that these additional remedies “vindicate the public policy of the [Act] by making the employees whole for losses suffered on account of an unfair labor practice.” *NLRB v. J.H. Rutter-Rex Mfg.Co.*, 396 U.S. 258, 263 (1969). Accordingly, the Board’s order should be enforced in full. *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943) (Board’s remedy “should stand unless it can be shown that the order is a patent attempt to achieve

¹⁴ See, e.g., *Key Handling Sys., Inc.*, 361 NLRB No. 2, slip op. at 3 (July 15, 2014) *Libertyville Toyota*, 360 NLRB No. 141, slip op. at 7 (July 9, 2014); *Illinois Consol. Tel. Co.*, 360 No. 140, slip op. at 14 (July 3, 2014); *Plaza Auto Ctr., Inc.*, 360 NLRB No. 117, slip op. at 4 (May 28, 2014); *Salem Hosp. Corp.*, 360 NLRB No. 95, slip op. at 11 (Apr. 30, 2014); *Woodcrest Health Care Ctr.*, 360 NLRB No. 58, slip op. at 3 (Feb. 27, 2014).

ends other than those which can fairly be said to effectuate the policies of the Act”).

CONCLUSION

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

Respectfully submitted,

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AUGUST 2014

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

GREATER OMAHA PACKING CO., INC.	*
	*
Petitioner/Cross-Respondent	* Nos. 14-1651
	* 14-1934
v.	*
	* Board Case No.
NATIONAL LABOR RELATIONS BOARD	* 17-CA-85735
	*
Respondent/Cross-Petitioner	*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 10,176 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.

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Dated at Washington, DC
this 8th day of August, 2014

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	*
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CERTIFICATE OF SERVICE

I hereby certify that on August 8, 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.

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