ORAL ARGUMENT NOT YET SCHEDULED

Nos. 14-1029 & 14-1057

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LUCKY CAB COMPANY

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of Lucky Cab Company ("the Company") to review, and on the cross-application of the National Labor Relations Board ("the Board") to enforce, a Board Order issued against the Company finding that it unlawfully discharged six employees and committed other unfair labor practices during a union organizing campaign. The Board had subject matter

jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"). The Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), which provides that petitions for review of Board orders may be filed in this Court.

The Board's Decision and Order issued on February 20, 2014, and is reported at 360 NLRB No. 43. (JA 102-25.)[1] The Board's Order is final with respect to all parties. The Company filed its petition for review on February 26, 2014. The Board filed its cross-application for enforcement on May 14, 2014. The petition and cross-application are timely because the Act imposes no time limit on such filings.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board is entitled to summary enforcement of its finding—uncontested by the Company before the Board or the Court—that the Company violated Section 8(a)(1) of the Act by prohibiting employee Almethay Geberselasa from discussing her discharge with other employees.

2. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by threatening employees with loss of

[1] "JA" references in this brief are to the Joint Appendix. "SA" references are to the Supplemental Appendix submitted with this brief. "Br." refers to the Company's brief. References preceding a semicolon are to the Board's findings; those following are to supporting evidence.

benefits and job security if they selected a union as their bargaining representative and threatening them that choosing union representation would be futile.

3. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by discharging employees Almethay Geberselasa, Elias Demeke, Endale Hailu, Melaku Tesema, Assefa Kindeya, and Mesfin Hambamo because of their union activity.

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions are set forth in the Company's brief.

STATEMENT OF THE CASE

Acting on charges filed by Industrial, Technical and Professional Employees, Local 4873, affiliated with Office and Professional Employees International Union, AFL-CIO ("the Union"), the Board's General Counsel issued a complaint alleging that the Company committed numerous unfair labor practices during a union election campaign at the Company's facility. (JA 111; 1-7, 15-17.) The Board's Regional Director issued an order consolidating those charges with objections the Union filed to a May 6, 2011 representation election, which the Union lost. (JA 102, 111; 8-10.) After a hearing, an administrative law judge found that the Company had committed many of the alleged violations and that several of those violations warranted setting aside the election. (JA 119-25.)

After considering exceptions to the judge's decision filed by the Company and the General Counsel, the Board issued a Decision, Order, and Direction of Second Election affirming the judge's findings that the Company violated the Act by threatening its employees and discharging six union activists, and reversing other findings of the judge. (JA 102-11.) The Board also considered an allegation the judge had not addressed, finding that the Company violated the Act by barring one of the activists from talking about her discharge with other employees. (JA 102, 108-10.)

I. THE BOARD'S FINDINGS OF FACT

A. The Union's Organizing Campaign

The Company operates a taxicab service in Las Vegas, Nevada, where it employs about 235 drivers. (JA 102; 183.) In November 2010, Almethay Geberselasa, Endale Hailu, Melaku Tesema, and Mesfin Hambamo were part of a group of drivers which contacted the Union to express their interest in organizing the Company. (JA 114; 357, 391-94, 450-51, 467-68.) They soon formed an organizing committee with driver Elias Demeke and about eight other employees. (JA 102, 114; 442-43.) Over the next several months the committee members recruited additional drivers, including Assefa Kindeya, to help campaign for the Union. (JA 114; 424-25.) On February 8, 2011, the Union provided authorization

cards which the organizing committee and other union supporters began to distribute. (JA 114; 362-63.)

The Company's facility soon became a hub of organizing activity. (JA 114-15; 393, 424, 441, 451.) Before each shift, the Company required drivers to arrive at least half an hour early and await their cab assignments at designated bleachers. (JA 112; 236.) While they waited, Demeke, Hailu, and Tesema campaigned for the Union, handing out authorization cards. (JA 114-15; 393, 414, 443-44, 451.) Geberselasa also solicited drivers and encouraged them to sign cards. (JA 114; 506-07.) Kindeya, meanwhile, distributed cards in other areas of the Company's premises, and Hambamo handed them out at the airport. (JA 115; 424-25, 363, 378.)

Immediately behind the bleachers were the Company's management offices. (JA 112; 200-02, 786.) Operations Manager Desiree Dante, who reported directly to the Company's owner, could see drivers milling around the bleachers through her ground-level tinted office window. (JA 106; 201-02, 735, SA 10.) Assistant Operations Manager Steve Gerace frequently left his office to smoke in the waiting area where drivers were soliciting for the Union. (JA 106; 186, 395-96, 506.)

B. The Company Learns of the Organizing Effort and Campaigns Against It, Threatening Employees with the Futility of Seeking Representation and With the Loss of Job Benefits if They Select the Union

Drivers approached Operations Manager Dante with questions about the union authorization cards shortly after the organizing committee started distributing them. (JA 106, 115 n.10, 121; 737.) Thereafter, on February 25, the Union officially notified the Company of its campaign by letter. (JA 102; 197, 883.) On March 30, the Union filed an election petition. (JA 102.)

The Company mounted its own campaign against the organizing effort. (JA 105, 115; 198.) On March 15, 16, and 17, Dante addressed the drivers at mandatory meetings. (JA 115; 217.) She told them that if they selected the Union, they would lose the sixty-day leave of absence the Company allowed drivers to take. (JA 115, 120; 161-62, 168, 365, 396-97.) About half of the Company's drivers were Ethiopian immigrants, many of whom relied on the Company's leave policy to return home for visits. (JA 113; 162, 183.) Dante also said that if drivers selected the Union, they would lose the gas bonus the Company provided to defray drivers' fuel costs, as well as the Company's open-door policy and its policies for scheduling shifts and vacations. (JA 114, 120; 162, 365, 396-97, SA 7.)

The Company also combated the Union's campaign by distributing flyers to the employees, including one which stated:

UNION REAL DEAL FACTS
LUCKY CAB INVITES YOU TO WALK ACROSS THE STREET TO ANY UNION COMPANY AND *VISIT THE TRUTH……*
THE UNION WILL **NOT** DELIVER TO THE DRIVERS:
** 60-DAY LEAVE OF ABSENCE
** CONVENIENCE LEAVE UPON REQUEST
** GAS CHECK
** OPEN DOOR DESIREE FOR MANAGEMENT ISSUES
** CERTAINTY CLEAN UPGRADED CARS
** JOB SECURITY
** FRIDAY BAR-B-QUE
THE ABOVE *ARE* SOME OF THE MANY LUCKY BENEFITS *EVERY DRIVER NOW ENJOYS!*
BUT… YOU ARE CERTAIN TO HAVE UNION DUES PAID BY YOU!!
BEWARE UNION CANNOT
** PROVIDE JOB SECURITY—FOR WRONGFUL & ILLEGAL ACTS
BUT… YOU SHALL PAY EXPENSIVE UNION DUES!!
VOTE NO ON UNION!

(JA 115; 884, SA 8.)

C. Nevada State Law and the Company's Disciplinary Policies

Nevada state law sets forth standards for taxicab driver conduct, which are enforced by the Nevada Taxicab Authority. (JA 112; 362, 1031-83.) The Taxicab Authority is empowered to fine drivers for infractions, such as smoking in their cabs, failing to maintain complete and accurate records of their work on daily trip sheets, or "long hauling" passengers by taking them on circuitous routes. (JA 112; 284-88, 1081-82.)

In addition, the Taxicab Authority issues the permit necessary for a driver to operate a taxicab. (JA 112; 288.) A driver must renew this permit annually by completing a one-hour driver safety refresher course, which the Taxicab Authority

offers one day a week. (JA 112; 288-90.) To prevent the permit from lapsing, a driver may attend the class during the last thirty days before expiration each year. (JA 112; 288-90.) If the driver signs up for the class but fails to attend, the permit is suspended until he or she reschedules. (JA 112; 289.) If the driver then misses the class a second time, the permit is suspended until completion of the course. (JA 112; 289.)

The Company also maintains its own rules for drivers' conduct on the job. (JA 112-13; 791-874.) When drivers violate these rules, the Company generally issues counselings, verbal warnings, written warnings, suspensions, and final warnings before resorting to discharge. (JA 113; 279, SA 1, 2.) During their initial 120-day probationary period, drivers may be discharged without receiving a final warning. (JA 587-88, 622.)

D. The Company Discharges Six Union Activists During the Final Months of the Union's Campaign

Between February 24 and April 20, the Company discharged six active union supporters, including five members of the Union's organizing committee. (JA 102, 114-15.) Each discharge is discussed below.

Almethay Geberselasa

Geberselasa was a committee leader who had driven for the Company for three years. (JA 114, 116; 469.) On February 24, she arrived at work with authorization cards that she had told other drivers she would help them sign that

day. (JA 114; 469, 493.) Before she could distribute any cards, she was called in for a meeting with Human Resources Manager Debbie Slack and Operations Manager Dante. (JA 116; 471.) Slack told Geberselasa she was being discharged for picking up passengers in restricted areas on February 17, in violation of company policy and state law, and gave her a personnel action form which described the alleged infractions. (JA 116; 471, 1084.)

Geberselasa tried to provide an explanation, but Dante did not want to hear it. (JA 116; 471.) Slack ordered Geberselasa to leave the Company's premises, and told Geberselasa that she didn't want her "to speak to anybody in the yard." (JA 116; 472.) Geberselasa said she knew she was being discharged for her union activities; Slack only responded, "Bye." (JA 116; 495.) Slack followed Geberselasa as she left the property. (JA 108; 496, 499-500.) The Company did not give Geberselasa a final warning prior to discharge. (JA 116; 1084.)

Elias Demeke

Next, on February 25, Slack and Gerace discharged Demeke, a "senior driver" who had been with the Company for six years. (JA 114, 117; 440-41, 1168.) They gave him a personnel action form, but did not explain it or allow him to respond. (JA 117; 446-47, 1168.) According to the Company, Demeke was discharged for failing to list his breaks on a trip sheet. (JA 107; 340.) He did not

receive a final discharge warning for that infraction, nor did the Company discuss any of Demeke's past discipline with him. (JA 107-08; 341-42.)

Endale Hailu

On March 8, Slack and Gerace called Hailu in for a meeting and told him he was discharged. (JA 117; 454.) When Hailu asked why, Slack gave him a personnel action form and said he could read it or have someone else read it for him. (JA 117; 455.) The form noted that he had recorded fare totals on March 4, 5, and 6 which did not match the Company's electronic trip log report. (JA 117; 1134.) That infraction was the sole reason for Hailu's discharge. (JA 117; 266, 610.) Although Hailu had been disciplined for various infractions over the course of his six-and-a-half years as a driver for the Company, his record included no prior references to inaccurate fare amounts. (JA 117; 450, 1092-94.)

Melaku Tesema

Tesema was discharged on April 8. (JA 117-18; 400, 428-29.) Slack called Tesema into her office and gave him a personnel action form, prepared two days earlier, which explained that discharge was warranted because he had "failed to log a ride" on April 3. (JA 108, 117; 402, 891.) On that day, according to the form, Tesema's cab had been parked for a thirty-five minute period that was not noted on his trip sheet. (JA 114, 117; 891.) Tesema had stopped for lunch at a fast-food restaurant during that time, using less than half of the hour-and-fifteen-minute

lunch break allotted by the Company. (JA 117 n.26; 403.) He had worked for the Company for over two-and-a-half years. (JA 114; 388.)[2]

Assefa Kindeya

Also on April 8, Slack discharged Kindeya and gave him a personnel action form, also prepared two days earlier, which noted that he had refueled his taxicab seven minutes early on April 4. (JA 117; 428-29, 1155.) Company policy required drivers to wait until the last thirty minutes of a shift to refuel their cabs, unless they run low on gas earlier. (JA 117; 572-73.) Kindeya had not received a final warning or any other prior discipline regarding that infraction. (JA 107; 430, 1101, SA 3-4.) Kindeya had worked for the Company for nearly four years. (JA 115; 1100.)

Mesfin Hambamo

On April 21, the Company discharged Hambamo, who had been a driver with the Company for nearly eight years. (JA 115; SA 5.) On April 13, he was scheduled to renew his permit for another year by attending the Taxicab Authority's refresher course. (JA 118; 370.) He missed the class that day but rescheduled to attend the next week. (JA 118; 370.) On April 20, he arrived for the class five minutes late and was denied admission. (JA 118; 371.) He

[2] The ALJ's incorrectly noted that Tesema was employed for three-and-a-half years. (JA 114.)

rescheduled again for April 27, the next available date, and informed Gerace that his permit would be suspended until then. (JA 118; 371-72.)

After Hambamo explained the situation, Gerace prepared a personnel action form stating that Hambamo was suspended for one shift because his Taxicab Authority permit had been revoked. (JA 118; 372-73, 1184.) Hambamo objected that his permit had not been revoked—it was only suspended. (JA 118; 372-73.) Gerace assured him that the form was "just a statement," and asked Hambamo to sign it. (JA 118; 373.) Hambamo complied, then went home. (JA 118; 373.)

Hambamo received a call a short time later from Human Resources Manager Slack, who told him that he was discharged. (JA 118; 373.) She instructed him to come in the next morning to complete paperwork. (JA 118; 373.) At that time, Slack gave him a new personnel action form which said that he was discharged for failure to attend his second scheduled class. (JA 118; 374, 1177.) Hambamo completed the class the following week and his Taxicab Authority permit was reinstated on April 27. (JA 118; 526, 1370, SA 6.)

E. The Union Loses the May 6 Representation Election

An election was held on May 6. (JA 102.) The Union lost by a vote of 105 to 93, with 3 nondeterminative challenged ballots. (JA 102.) The Union filed unfair labor practice charges and objections to the election, which were consolidated for hearing before an administrative law judge. (JA 111.)

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 administrative law judge, that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by discharging Geberselasa, Demeke, Hailu, Tesema, Kindeya, and Hambamo in response to their union organizing activity. (JA 108.) The Board also found, in agreement with the judge, that the Company violated Section 8(a)(1) by threatening employees with the loss of employment benefits and job security if they selected a union to represent them and by telling employees that seeking union representation was futile. (JA 102.) In addition, reaching an allegation unaddressed by the judge, the Board found that the Company violated Section 8(a)(1) by ordering Geberselasa not to talk to other employees about her discharge. (JA 108.)[3]

The Board's Order requires the Company to cease and desist from engaging in the unfair labor practices found, and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act (29 U.S.C. § 157). (JA 109.)

[3] The Board also reversed the judge's finding that the Company's road supervisors were supervisors within the meaning of Section 2(11) of the Act (29 U.S.C. § 152(11)), and accordingly also reversed her finding that one road supervisor's statements violated Section 8(a)(1). (JA 103-04.) The Board's dismissals of those complaint allegations are not before the Court.

Affirmatively, the Order requires the Company to make the six unlawfully discharged employees whole for any losses suffered as a result of its discrimination against them; compensate them for the adverse tax consequences, if any, of receiving a lump-sum backpay award and file a report with the Social Security Administration allocating the backpay award to appropriate calendar quarters; expunge from its records all references to the unlawful discharges of the six employees; and post a remedial notice. (JA 109.)[4]

SUMMARY OF ARGUMENT

1. The Board found that the Company violated Section 8(a)(1) of the Act by ordering Geberselasa not to discuss her discharge with other employees. The Board is entitled to summary enforcement of that finding because the Company failed to contest it before the Board.

2. Substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by coercively threatening employees. Three witnesses credibly testified that the Company's operations manager threatened drivers with a

[4] The Board set aside the May 6 election and remanded that portion of the case to the Regional Director for Region 28 to conduct a second election. (JA 109.) The Court lacks jurisdiction to consider the Company's argument (Br. 52-55) that the Board erred in doing so. *See Am. Fed'n of Labor v. NLRB*, 308 U.S. 401, 409-11 (1940) (representation proceedings excluded from appellate review afforded by Section 10 of the Act (29 U.S.C. § 160)). The Court has "repeatedly held that the Board's decision to hold another election is not a 'final order'" under Section 10(e) and (f) of the Act, and "[t]herefore, judicial review is not yet available." *Mid-Mountain Foods, Inc. v. NLRB*, 269 F.3d 1075, 1076 (D.C. Cir. 2001) (per curiam) (collecting cases).

loss of benefits and job security if they selected the Union and warned that union representation would be futile. The Company distributed flyers conveying the same message. Before the Court, the Company only disputes the Board's findings by presenting a discredited version of the facts, without citation to legal authority, and it has therefore waived the issue. Even if the Court were to reach the Company's factual arguments, they would fail because they are founded on discredited testimony.

3. Substantial evidence supports the Board's findings that the Company violated Section 8(a)(3) and (1) of the Act by discharging six union activists in response to their protected union activities. Applying its well-established *Wright Line* analysis, the Board first found that the six drivers—five of whom were members of the Union's organizing committee—engaged in protected activities by soliciting for the Union. The Board properly relied on a wealth of circumstantial evidence to find that the Company knew about those activities when it discharged them. For months, the six drivers had enthusiastically solicited for the Union, most of them doing so on the Company's property in plain sight of management. Starting in early February, most of them had also handed out authorization cards, and the discharges started only after drivers alerted the operations manager to the Union's card distribution.

The Board also relied on ample evidence of the Company's animus toward the organizing campaign. That evidence included the open hostility to the Union that the Company's threats conveyed, the deeply suspect timing of its elimination of six activists during the later stages of the Union's campaign, and its shifting, pretextual justifications for its actions. Because the drivers (1) engaged in protected activity, (2) the Company knew about that activity, and (3) the Company bore animus toward it, the Board properly found that the activists' organizing activities were a motivating factor in the Company's decision to discharge them.

The Company failed to prove as an affirmative defense that it would have discharged the employees absent their union activity. The fragmented records that the Company proffered to support the discharges demonstrated at best inconsistent disciplinary practices, showing only that the Company *could* have discharged the drivers for various infractions, but not that it *would* have done so. Under settled law, that showing was insufficient to defeat the Board's finding of unlawful motivation.

STANDARD OF REVIEW

The Company mainly challenges the Board's factual findings and credibility determinations. It faces a heavy burden in doing so. 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, 488 (1951).

The Court does not disturb those factual findings even if it would have reached a different result reviewing the case de novo. *Universal Camera Corp.*, 340 U.S. at 488; *United Servs. Auto. Ass'n v. NLRB*, 387 F.3d 908, 913 (D.C. Cir. 2004). With respect to findings of motive, the Court's review is "even more deferential" because "[i]n most cases only circumstantial evidence of motive is likely to be available." *Laro Maint. Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1995); *accord Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 939 (D.C. Cir. 2011).

Because the Court "do[es] not retry the evidence," it is now "long past the time" for arguments that challenge credibility resolutions. *Vico Prods. Co., Inc. v. NLRB*, 333 F.3d 198, 209 (D.C. Cir. 2003). The Court will not reverse Board findings based on credibility determinations unless "those determinations are hopelessly incredible, self-contradictory, or patently unsupportable." *Federated Logistics & Operations v. NLRB*, 400 F.3d 920, 924 (D.C. Cir. 2005) (quotation omitted). The Board's interpretation of the Act will be upheld as long as it is "rational and consistent with the statute." *NLRB v. United Food & Comm. Workers Union Local 23*, 484 U.S. 112, 123 (1987).

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY PROHIBITING GEBERSELASA FROM SPEAKING WITH OTHER EMPLOYEES ABOUT HER DISCHARGE

The Board, ruling on a complaint allegation that the judge had not addressed, found that Human Resources Manager Slack violated Section 8(a)(1) of the Act (29 U.S. C. § 158(a)(1)) by instructing Geberselasa not to speak with any other drivers following her discharge. (JA 108; 472, 494-96.) The Company did not seek reconsideration of that finding before the Board. Accordingly, the Court lacks jurisdiction to review this portion of the Board's Order, which the Company does not even mention in its opening brief. *See* 29 U.S.C. § 160(e) ("No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure . . . to urge such objection shall be excused because of extraordinary circumstances."); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982) (stating Section 10(e) of the Act precludes court of appeals from reviewing claim not raised to the Board). The Board is therefore entitled to summary enforcement of its uncontested finding that the Company unlawfully prevented an employee from discussing disciplinary matters with coworkers. *See Flying Foods Group, Inc. v. NLRB*, 471 F.3d 178, 185 (D.C. Cir. 2006); *see also N.Y. Rehab. Care Mgmt. v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007)

(arguments not raised in employer's opening brief are waived); Fed. R. App. P. 28(a)(8)(A).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(1) BY COERCIVELY THREATENING EMPLOYEES IN AN EFFORT TO DISCOURAGE UNION SUPPORT DURING THE ORGANIZING CAMPAIGN

A. Applicable Principles

Section 7 of the Act (29 U.S.C. § 157) guarantees employees "the right to self-organization, to form, join, or assist labor organizations, . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) implements that guarantee by making it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [S]ection 7." The test for a Section 8(a)(1) violation is whether, considering the totality of the circumstances, the employer's conduct has a reasonable tendency to coerce or interfere with employee rights. *See Tasty Baking Co. v. NLRB*, 254 F.3d 114, 124 (D.C. Cir. 2001). It is well established that an employer violates Section 8(a)(1) by making statements that "reasonably would be understood by employees as threats that benefits w[ill] be lost" if they select a union, or "that selecting union representation w[ill] be futile." *Federated Logistics & Operations*, 400 F.3d at 924 (quotation omitted).

B. The Company Unlawfully Threatened Employees with the Futility of Seeking Union Representation and with the Loss of Benefits

Substantial evidence supports the Board's findings that the Company used mandatory meetings and flyers to unlawfully threaten employees as part of its effort to defeat the Union's campaign. As the Board found (JA 115), Dante, one of the Company's highest-ranking managers, addressed drivers at meetings they were required to attend on March 15 through 17. Dante told drivers that if they selected the Union, they would lose job benefits they then enjoyed, including the Company's sixty-day leave of absence, gas bonus, method of scheduling shifts, vacation policies, and open-door access to management. (JA 115, 120.)

The Company reinforced that message in flyers which encouraged the drivers to "VOTE NO ON UNION." (JA 884.) The flyers warned that "the Union will **not** deliver to the drivers" benefits such as sixty-day leaves of absence, "convenience leave upon request," a "gas check," an open door to bring issues to Dante, "clean upgraded cars," job security, and a Friday barbecue—"benefits that *every driver now enjoys*." (JA 884 (all capitalized in original)). As the Board found (JA 102, 120), in conjunction with Dante's statements, those words amounted to a threat that benefits and job security would be lost if drivers failed to "vote no"—and that union representation would be futile because the Union could not restore what drivers would lose.

In making those statements to employees, the Company did not explain the changes that might occur in the "give and take" of collective bargaining; it simply threatened that voting for unionization would bring a loss of benefits. (JA 120.) Settled law supports the Board's findings (JA 120) that those threats violated Section 8(a)(1) because they "would reasonably tend to interfere with the free exercise of protected employee rights." *See, e.g.*, *Conair Corp. v. NLRB*, 721 F.2d 1355, 1360-61, 1368 (D.C. Cir. 1983) (upholding Board finding that employer violated the Act when it warned employees that "direct access to management [through an 'open-door' policy] would be lost with unionization" and "recited current benefits, [then] cautioned that unionization would result in the loss of certain benefits"); *Sw. Reg'l Joint Bd. v. NLRB*, 441 F.2d 1027, 1031 (D.C. Cir. 1970) (employer unlawfully threatened that "if selected as bargaining agent the [u]nion would cause the loss of existing benefits relating to production quotas and would make it more difficult to obtain leaves of absence").

C. The Company Failed To Adequately Brief the Section 8(a)(1) Violations and Raises only Meritless Factual Arguments

The Company disputes the Board's findings and insists (Br. 33 & n.9, 35) that it made only "lawful factual" statements in the flyer and at the meetings. The Company offers only factual arguments, without citation to legal authority. But "merely discussing the factual basis for an argument is insufficient." *Williams v.*

Romarm, SA, 756 F.3d 777, 783 n.2 (D.C. Cir. 2014) (citing *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1001 (D.C. Cir. 2008)). The Court should therefore deem the issue waived. *See Dunkin' Donuts Mid-Atl. Distrib. Ctr., Inc. v. NLRB*, 363 F.3d 437, 441 (D.C. Cir. 2004) (under Federal Rules of Appellate Procedure, opening brief "'must contain'" citations to the authorities and record that support the party's arguments); *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Court will not address "an asserted but unanalyzed . . . claim").

Even if reached, the Company's arguments would nonetheless fail because they rely entirely on discredited testimony. With regard to Dante's statements, the Company merely recites as fact (Br. 33-35) Dante's discredited account of the meetings, which the judge rejected based on her "unconvincing manner" and the "general and uncorroborated" nature of her testimony. (JA 115.) Three witnesses—drivers Sisay Eba, Hambamo, and Tesema—testified consistently and credibly that Dante warned of a loss of benefits if the employees voted for the Union. (JA 115; 161-62, 174, 365, 396-97.) The Company has not even attempted to meet its difficult burden of showing that the judge's decision to credit those witnesses over Dante was "patently unsupportable." *Federated Logistics & Operations*, 400 F.3d at 924-25 (upholding Board's finding that an employer made unlawful threats, where issue "came down to a credibility determination between the testimony of the managers as against that of three employees at the meeting");

see also Monmouth Care Ctr. v. NLRB, 672 F.3d 1085, 1091-92 (D.C. Cir. 2012) (finding no basis for overturning judge's decision to credit one witness over another "based on a combination of testimonial demeanor and a lack of specificity and internal corroboration").

As for its flyer, the Company merely proposes (Br. 33 n.9) a reading which differs from the Board's, again with no legal support. That is no basis for overturning the Board's reasonable interpretation, even if the Company's reading were "equally plausible." *Tasty Baking Co.*, 254 F.3d at 124-25. The Board construed the flyer consistently with Dante's unambiguous spoken threat, finding that drivers would reasonably understand that benefits and job security they enjoyed would be lost if they chose union representation. Its reasonable finding should be upheld. *Id.*

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY DISCHARGED ALMETHAY GEBERSELASA, ELIAS DEMEKE, ENDALE HAILU, MELAKU TESEMA, ASSEFA KINDEYA, AND MESFIN HAMBAMO BECAUSE OF THEIR UNION ACTIVITY IN VIOLATION OF SECTION 8(a)(1) AND (3)

A. Applicable Principles

Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage

membership in any labor organization." An employer, therefore, violates Section 8(a)(3) and (1) by discharging an employee for engaging in union activities.[5]

In cases where the employer's motivation for the discharge is disputed, the Board applies the test articulated in *Wright Line*, 251 NLRB 1083, 1089 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981), *approved by NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 397, 401-03 (1983). Under this framework, the Board first determines whether the General Counsel has met his initial burden of demonstrating that the employee's union activity was a "motivating factor" underlying the employer's decision. Once the General Counsel meets this initial burden, the employer can avoid liability by proving that it would have taken the same action even in the absence of the union activity. *Wright Line*, 251 NLRB at 1089; *Bally's Park Place*, 646 F.3d at 935.

Because direct evidence of unlawful motive is seldom available, the Board may, as it did here, properly rely exclusively on circumstantial evidence to infer unlawful motivation. *Southwire Co. v. NLRB*, 820 F.2d 453, 460 (D.C. Cir. 1987). Factors supporting an inference of unlawful motivation—all of which are found in this case—include the employer's knowledge of the employee's union activities,[6]

[5] A violation of Section 8(a)(3) of the Act produces a "derivative" violation of Section 8(a)(1). *See, e.g.*, *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

[6] *Tasty Baking Co.*, 254 F.3d at 126.

the employer's hostility toward union activities as revealed by the commission of other unfair labor practices,[7] the timing of the adverse action,[8] the employer's failure to fully and fairly investigate the conduct that it asserts as grounds for the discipline,[9] its disparate treatment of employees or departure from prior practice to impose the discipline,[10] and its reliance on pretextual, implausible, or shifting explanations for the discipline.[11]

Once the General Counsel's initial burden has been met, the employer "cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *W.F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), *enforced*, 99 F.3d 1139 (6th Cir. 1996); *accord Laro Maint. Corp.*, 56 F.3d at 228. Indeed, the Board need not accept at face value even a "seemingly plausible explanation" if the evidence and the reasonable inferences drawn from it indicate that union animus motivated the decision. *Sociedad Española de Auxilio Mutuo y Beneficiencia de P.R. v. NLRB*, 414 F.3d 158, 161 (1st Cir. 2005)

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[7] *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 735 (D.C. Cir. 2000).

[8] *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1168 (D.C. Cir. 1993).

[9] *Valmont Indus., Inc. v. NLRB*, 244 F.3d 454, 466 (5th Cir. 2001).

[10] *Waterbury Hotel Mgmt., LLC v. NLRB*, 314 F.3d 645, 652-53 (D.C. Cir. 2003).

[11] *Passaic Daily News v. NLRB*, 736 F.2d 1543, 1553-55 (D.C. Cir. 1984).

(quotation omitted); *accord Justak Bros. & Co. v. NLRB*, 664 F.2d 1074, 1077 (7th Cir. 1981); *NLRB v. Buitoni Food Corp.*, 298 F.2d 169, 174 (3d Cir. 1962).

B. The Company Unlawfully Discharged the Six Drivers Because of Their Union Activity

The Company eliminated six of the Union's strongest supporters over the final months of its organizing campaign. Applying *Wright Line*, the Board found (JA 104-08, 120-22) that those drivers were discharged because of their protected conduct. First, the Board found (JA 105-07, 121-22) that the drivers' union activity was a motivating factor in the Company's discharge decision. Each of the six employees participated in the organizing campaign (JA 105, 121), the Company knew of that activity (JA 106, 121), and the Company bore animus toward the campaign (JA 105-06, 121-22). Second, the Board found (JA 107-08, 121-22) that the Company failed to show that it would have discharged any of the six drivers in the absence of their union activity. Substantial evidence supports each of the Board's findings.

1. Each of the six drivers actively participated in the Union's campaign and the Company knew about their activity

As the Board found (JA 105, 121), it is beyond dispute that each of the six discharged drivers engaged in union activity. Indeed, Geberselasa, Hailu, Tesema, and Hambamo were among the first drivers who went to the Union in November 2010 to start the organizing campaign. (JA 102, 114; 357, 391-94, 450-51, 467-

68.) Demeke soon joined them in the committee which led the campaign, and Kindeya became part of the effort as well. (JA 102, 114; 424-25, 442-43.)

Based on ample circumstantial evidence, the Board reasonably found that the Company knew about the drivers' union activities when it fired them. (JA 106.) The Company received official notice of the Union's campaign on February 25. (Br. 23, JA 883.) But even before that date, as the Board found (JA 106, 115, 121), the Company had learned of the Union's campaign from drivers who approached Dante with questions about the authorization cards they had received. The Board appropriately discredited Dante's "expedient" and "inherently unlikely" claim that the questioning occurred only after February 25. (JA 106, 115 & n.10.) Union supporters began distributing authorization cards on February 8, and the drivers, not understanding what the cards meant, questioned Dante about them. (JA 726-28.) They certainly had no reason to wait to approach her until after the Union had sent its letter. (JA 121.)

Once it knew about the campaign, the Company had abundant opportunities to learn of each driver's involvement. Starting well before the Union delivered its letter, five of the six drivers had been campaigning on the Company's premises. (JA 105-06.) Indeed, Geberselasa, Demeke, Hailu, and Tesema solicited employees just outside Dante's office, in an area where Gerace frequently smoked, "in plain sight of both of them." (JA 106.) Such close proximity provides strong

evidence that the Company knew what the drivers were doing.[12] *See Holsum De P.R., Inc. v. NLRB*, 456 F.3d 265, 270 (1st Cir. 2006) (Board could infer knowledge of employee's union activities where employee openly solicited in employer's parking lot, "in plain view of those entering or leaving"); *cf. Schaeff Inc. v. NLRB*, 113 F.3d 264, 268 (D.C. Cir. 1997) (noting general manager's "practice of mingling with the employees in the plant" in upholding Board's finding that he knew about union meeting). Accordingly, this case is quite unlike *Dallas & Mavis Specialized Carrier Co.*, 346 NLRB 253, 255 (2006), upon which the Company relies (Br. 27). There, by contrast, there was "little opportunity" for the employer to view drivers' union insignia and "all other union activity took place away from the [employer's] premises." *Id*.

It is no surprise that the first drivers to be discharged were Geberselasa, Demeke, Hailu, and Tesema—the four who solicited at the bleachers directly in front of management offices—while Hambamo, the only driver who solicited exclusively off the Company's premises, was discharged last. (JA 114-15.) Regardless of where they solicited, however, numerous additional factors demonstrate that the Company knew each of the six drivers was engaged in protected activities. *See Martech MDI*, 331 NLRB 487, 488 (2000) (noting that

[12] The Company speculatively suggests (Br. 26) that Gerace would not have realized the drivers were campaigning because their native language was an Ethiopian dialect. There is no reason to believe their solicitation was limited to that language, given that half of the drivers were not Ethiopian. (JA 183.)

Board precedent does not require a showing "that the employer had specific knowledge of an employee's union interest and activities, where other circumstances support an inference that the employer had suspicions or probable information on the identity of union supporters"), *enforced*, 6 F. App'x 14 (D.C. Cir. 2001). As shown below (pp. 31-44), the Company was plainly hostile to the Union's campaign, and the timing and pretextual circumstances of the drivers' discharges demonstrate that the Company got rid of them because it knew they were part of it. (JA 106.) *See Abbey's Transp. Servs., Inc. v. NLRB*, 837 F.2d 575, 580 (2d Cir. 1988) (upholding Board's inference of both knowledge and unlawful motive from the same circumstantial evidence, including "the timing of the discharges" of "two prime movers of the union drive" and "the employer's manifestation of hostility as adduced from [Section] 8(a)(1) violations").

The Company's challenges to the Board's reasonable inferences regarding knowledge are baseless. The Company makes much of the Union's initial desire to keep its organizing campaign secret—an approach it jettisoned with its February 25 letter, once the Company began discharging Union activists. (JA 883.) But many of the Company's assertions in this regard are misleading or wrong. For instance, the Company asserts that "[t]he ALJ concluded that ***one*** of the drivers, Tesema, engaged in Union activities at [its] facility." (Br. 26) (bold and italics in original). The Board did find (JA 114; 414) that "Tesema encouraged other drivers

to complete union authorization cards while waiting for shift start in the bleacher area," but the judge and the Board also found that Geberselasa, Demeke, Hailu, and Kindeya all engaged in union activity on the Company's premises. (JA 114-15.)

The Company also erroneously insists that it "could not have been aware of Demeke's clandestine efforts" in support of the Union (Br. 31 (bold and italics omitted)), ignoring Demeke's credited testimony that he solicited for the Union and had drivers sign authorization cards in front of the Company's offices (JA 114; 441, 448). The Company similarly disregards (Br. 26) credited testimony regarding Geberselasa. Although Geberselasa did not distribute cards before she was discharged, she frequently "ask[ed] drivers if they were willing to sign union authorization cards," and did so "in plain sight" of Dante and Gerace. (JA 114; 469.) Indeed, the Board specifically found that both Demeke and Geberselasa were part of the initial "core group" of committee members who "openly solicited" employees. (JA 114.)

The Company is correct (Br. 24, 26) that Hambamo did not solicit for the Union on company property, as the Board recognized (JA 115). But the Company fails to acknowledge the overwhelming circumstantial evidence showing its awareness of Hambamo's activity. That evidence, as described more fully below (pp. 33, 37-38, 41-43), includes the timing of his discharge so close to the election,

the blatant disparate treatment he received, the Company's inexplicable disciplinary change from suspension to discharge, and its fabrication of evidence to support that discharge. *See Masterform Tool Co.*, 327 NLRB 1071, 1072 (1999) (inferring knowledge based on employer's general awareness of union campaign; its suspicious timing in laying off entire organizing committee, which had openly met with union organizers "just outside the doors of the plant" shortly before the layoff; and the pretextual reasons for the layoff).

2. Numerous factors demonstrate the Company's animus toward the Union's campaign

Ample evidence supports the Board's finding (JA 105-06, 121-22) of company animus toward the campaign it knew the six drivers were spearheading. This evidence includes the Company's contemporaneous violations of Section 8(a)(1), the suspicious timing of the discharges, and the pretextual explanations the Company provided for them.

a. Contemporaneous Violations of Section 8(a)(1)

As the Board found (JA 105, 121), the Company demonstrated anti-union animus by the unlawful threats it made at mandatory meetings and in anti-union flyers. *See Vincent Indus. Plastics*, 209 F.3d at 735 ("Evidence that an employer has violated § 8(a)(1) of the Act can support an inference of anti-union animus."); *Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 423 (D.C. Cir. 1996) ("The ALJ thus properly relied on [employer]'s anti-union speech as evidence of [its]

anti-union animus."). As set forth above (pp. 19-23), the Company's arguments to the contrary are refuted by settled law and the credited evidence.

b. Timing

As the Board emphasized (JA 105, 121), the timing of the six discharges—which eviscerated the Union's organizing committee during the final months of its campaign—provides powerful evidence of the Company's unlawful motivation. *Phelps Dodge Min. Co. v. NLRB*, 22 F.3d 1493, 1502 (10th Cir. 1994) (timing alone may suggest that anti-union animus motivated employer's conduct) (citing *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984)); *NLRB v. Am. Geri-Care, Inc.*, 697 F.2d 56, 60 (2d Cir. 1982) ("An inference of anti-union animus is proper when the timing of the employer's actions is stunningly obvious." (quotation omitted)). The Company's contention (Br. 28, 37) that there is "no temporal connection" between the drivers' union activities and their discharges ignores established law and the overwhelming record evidence showing otherwise.

The Company discharged Geberselasa approximately two weeks after the organizing committee began distributing authorization cards, on the very day she had promised coworkers she would bring cards for them to sign. (JA 105 & n.10, 114; 493.) Similarly, the Company discharged Demeke on the same day that it received official notice of the Union's campaign. (JA 114.) Then, on the heels of those two terminations, the Company discharged Hailu about a week before the

meetings in which it threatened drivers. (JA 114.) The Company discharged Tesema and Kindeya only about a week after the Union filed its petition for a representation election, and it discharged Hambamo just a few weeks before the election. (JA 105, 114-15.) This timing reveals the Company's unlawful motive. *See Ark Las Vegas Rest. Corp. v. NLRB*, 334 F.3d 99, 105 (D.C. Cir. 2003) (discharge of employees "just weeks" after wearing pro-union buttons supports animus); *Parsippany Hotel*, 99 F.3d at 424 (finding of unlawful motivation supported by "the proximity in time between [employee]'s last concerted activity (i.e., voting in the representation election on April 22) and the disciplinary action taken against him (i.e., warnings on May 6 and June 15; discharge on June 18)").

The Board properly found the Company's timing even more suspect in light of the "unusually high number of discharges in a relatively short period before the election." (JA 121.) The Company only underscores that point by asserting (Br. 38) that it had sometimes discharged two employees per month in the past: the record shows that in less than two months—from Geberselasa's discharge on February 24 to Hambamo's on April 20—the Company discharged a total of nine drivers.[13] *See Power, Inc. v. NLRB*, 40 F.3d 409, 418 (D.C. Cir. 1994) (timing of a layoff disproportionately affecting union supporters two weeks before union

[13] In addition to the six drivers whose discharges are at issue in this case, the Company discharged drivers on March 9, 2011 (JA 1182), March 29, 2011 (JA 2168) and April 14, 2011 (JA 2192-93).

election demonstrates animus); *Vincent Indus. Plastics*, 209 F.3d at 735-36 (employee's discipline close in time to employer's other unlawful actions is strong evidence of unlawful motive).

c. Pretext

In addition to its coercive threats and suspicious timing, the Company's resort to pretextual reasons to justify the drivers' discharges indicates animus. It is well established that "an employer's proffering of a false explanation for its actions justifies an inference that its real motive for a discharge was unlawful." *L.S.F. Transp., Inc. v. NLRB*, 282 F.3d 972, 984 (7th Cir. 2002). Here, as the Board found (JA 105-06), a variety of factors demonstrate pretext, including the Company's (1) disparate treatment of the six drivers, (2) shifting reasons for discharging them, (3) refusal to let the drivers respond to allegations, (4) abrupt change of Hambamo's discipline from suspension to discharge, (5) fabrication of evidence, and (6) improbable explanations.

i. Disparate Treatment

The Company's disparate treatment of the six drivers supports the Board's finding of pretext. (JA 105, 121.) As the Board found (JA 105), "[p]ersonnel action forms . . . show that other drivers were not discharged for the same or similar infractions as those committed by the six discriminatees." The fact that the Company treated prominent union supporters more severely than some other

similarly situated drivers indicates that its proffered reasons were a pretext to conceal its real motivation: anti-union animus. *See Southwire Co.*, 820 F.2d at 460 (employer unlawfully discharged union organizer for infraction, where other employees had merely received reprimand); *Gold Coast Rest. Corp. v. NLRB*, 995 F.2d 257, 265 (D.C. Cir. 1993) ("Enforcement of . . . valid work rule[s] against union supporters in a disparately harsh manner violates the Act.").

First, the Company asserted that it discharged Geberselasa "for picking up passengers on two occasions on February 17 in a geographically restricted area." (JA 107; 260, 609.) But another driver also engaged in a pickup outside his authorized region (JA 490-91, 1425), and was not so much as warned for doing so.

The Company discharged Demeke next, purportedly for failing to list his lunch breaks. (JA 1168.) Yet many other drivers had done the same and only received a warning. (JA 1476 (Bereket Eyob), 1596 (Michael Berichon), 1724 (Alazar Woldemariam), 1738 (Yihenew Mekonnen), 1771 (Lutz Bloching), 1845 (James DeVita Jr.), 2052 (Robel Begashaw).) Indeed, the Company's records revealed that driver Rohn Greear had received a warning for much more egregious conduct—taking a six-and-a-half hour unlisted break and falsifying rides to conceal it. (JA 1666.)

The Company asserts (Br. 16-18) that Hailu was discharged for falsification after he recorded fare totals on March 4, 5, and 6 which did not match the

Company's trip logs. Numerous other drivers, however, engaged in falsification and were not discharged for the offense. They instead received final warnings (JA 1305 (Walter Allen), 1596 (Michael Berichon), 1738 (Yihenew Mekonnen), 1845 (James DeVita Jr.)), or a suspension (JA 580, 1217 (Kelifa Abdo)). As the Board found (JA 107), the Company's records pertaining to Hailu contain no final warning for falsification.

Next, the Company claims (Br. 12-13) that it discharged Tesema for failing to record one of his breaks after having received a final warning for the same conduct. That argument ignores the Board's specific finding (JA 108) that the stated reason for Tesema's discharge was "fail[ure] to log a ride." (JA 891.) The Company's Global Positioning System (GPS) records proved that accusation false, as Gerace "could have easily ascertained." (JA 108.)

Nonetheless, even if Tesema had been discharged for failing to log a break, the record reveals that other drivers were treated less harshly than he was for the same conduct. Tesema was discharged on April 6, 2011, and he had received a final warning for failure to log a break more than eight months earlier, on August 4, 2010. (JA 896.) Driver Fidel Luna-Banuelos, however, received two final warnings on May 26, 2010, for his repeated failures to list breaks that month (JA 1449, 1460), and when he failed to list his break again about nine months later, he received a *third* final warning instead of being discharged (JA 1391). The

Company issued this third final warning to Luna-Banuelos on March 11, 2011, but then denied Tesema the same leniency when it discharged him a month later. That disparity indicates that Tesema's union activity was the real reason for his discharge. *See United Food & Comm. Workers Local 204 v. NLRB*, 447 F.3d 821, 826 (D.C. Cir. 2006) (per curiam) (discharge was unlawful even though employee missed work after receiving a final warning for attendance, where another employee had received a "final final warning" instead of discharge for the same infraction).

The Company likewise treated Kindeya worse than other drivers who, like him, refueled their cabs early contrary to the Company's rules. While the Company fired Kindeya for that infraction, other drivers—Bereket Eyob (JA 1473), Michael Berichon (JA 1596), Lutz Bloching (JA 1762), and Frank Buettgenbach (JA 1955, 1961)—received only a final warning.

Finally, the Company claims (Br. 14-15, 42) that it discharged Hambamo because his Taxicab Authority permit was suspended pending completion of the required class. The Company's treatment of three other drivers with suspended permits proves that it did not consider this to be cause for discharging a nonprobationary driver. (JA 118.) Drivers Abraham Worke, Metekya Absu, and Demeke all had their permits indefinitely suspended by the Taxicab Authority

when, like Hambamo, they missed their second class.[14] (JA 118; 1179, 1180, 1181.) None of those three drivers was discharged due to his permit status. (JA 118; 345-47.) The Company's more lenient treatment of those drivers for precisely the same offense makes the case against it "airtight." *Southwire Co.*, 820 F.2d at 460.

ii. Shifting Reasons

The shifting nature of the Company's explanations for discharging certain drivers further supports the Board's pretext finding. (JA 105-06, 121.) Initially, the Company listed a variety of infractions on the personnel action forms it gave the six drivers. (JA 1084 (Geberselasa), 1168 (Demeke), 1134 (Hailu), 891 (Tesema), 1155 (Kindeya), 1177, 1184 (Hambamo).) Then, at hearing, Gerace offered new, previously undocumented justifications for his decisions to discharge three of them. He claimed that Geberselasa and Kindeya "were very combative," Geberselasa was "very aggressive," Kindeya "did not want to take advice," and Hailu lied about passenger pick-up information. (JA 116-18; 609-10.) Yet ultimately, the Company retreated to a single reason for discharging each driver. (JA 107.) The Company's abandonment of reasons it initially proffered and its production of new reasons after the fact indicate that its true motivation was an unlawful one. *See Ark Las Vegas Rest. Corp.*, 334 F.3d at 105 (Board reasonably

[14] Demeke's permit was suspended in 2009, before he engaged in the union activity that led to his discharge. (JA 118; 1178.)

disbelieved employer's explanation for an employee's discharge which differed from an earlier explanation the employer abandoned); *U.S. Coachworks, Inc.*, 334 NLRB 955, 957 (2001) (shifting explanations suggested pretext where, at hearing, employer added two new reasons for discharging employee), *enforced*, 53 F. App'x 171 (2d Cir. 2002).

iii. Failure to Allow the Six Drivers to Respond

In addition to the Company's shifting explanations and disparate treatment, the Board properly relied on (JA 105,121) the Company's brusque discharges of the six drivers, without offering them an opportunity to respond to the allegations against them, as evidence of pretext. The Board and courts of appeals are rightly suspicious when an employer spurns explanation and investigation in its haste to get rid of union supporters, as the Company did. *See, e.g.*, *Sociedad Española*, 414 F.3d at 163 (pretext finding supported where employer "did not even ask [employee] for her position on the allegations"); *Bantek West, Inc.*, 344 NLRB 886, 895 (2005) (employer's "failure to conduct a meaningful investigation or to give the employee . . . an opportunity to explain are clear indicia of discriminatory intent" (quotation omitted)). The Company perfunctorily disputes as "not supported" (Br. 37) the Board's finding that the six drivers did not have a full opportunity to respond. But the credited testimony of each of the drivers supports the Board's finding that when the Company met with each of them, it was not

amenable to discussion or reconsideration. (JA 105, 116 & n.19, 121; 471 (Geberselasa); 446-47 (Demeke); 455 (Hailu); 402-03 (Tesema) 429 (Kindeya) 373-74 (Hambamo).)

Moreover, an inference of pretext is particularly appropriate where, as in this case, the employer's unwillingness to hear out a long-standing employee is contrary to its past practice or policy.[15] *See Tel Data Corp. v. NLRB*, 90 F.3d 1195, 1198 (6th Cir. 1996) (upholding finding of unlawful discharge where a long-term employee who had engaged in protected conduct "was given no opportunity to explain his actions before his termination"). Here, Slack admitted that the Company's usual practice was to solicit an employee's position during the final meeting, and to sometimes alter the discipline based on any mitigating circumstances. (JA 277-78.) The different approach the Company took with the six drivers indicates that it "was looking for any infraction . . . that might ostensibly justify discharging these employees." *U.S. Rubber Co. v. NLRB*, 384 F.2d 660, 663 (5th Cir. 1968); *Dash v. NLRB*, 793 F.2d 1062, 1069 (9th Cir. 1986) (ignoring employee's version of incident establishes that employer's "interest was in finding a plausible pretext for the discharge, and not in ascertaining what

[15] The Company quibbles (Br. 37-38 & n.12) with the Board's finding that the six drivers were "long-term employees." (JA 121.) In his opening statement to the judge, however, Company counsel argued that "[a]ll of these drivers were veterans with years of experience." (SA 9.) Nothing in the record suggests that the Company ever took a different view.

actually occurred"); *see also Tasty Baking Co.*, 254 F.3d at 126-27 (alleged insubordination was pretext where employer failed to give employee "a chance to explain before imposing the warning and suspension, as was required by company policy").

iv. Additional evidence of pretext: abrupt discipline change, false documentation, and "improbable" explanations

The Board also found (JA 105-06, 121) that particular circumstances surrounding several of the discharges provide additional strong evidence of pretext. Those circumstances include an abrupt and unexplained change in Hambamo's discipline, the Company's reliance on falsified documentation, and its "improbable" explanations. (JA 105-06, 121.)

The Company's reversal of its initial decision to suspend Hambamo is highly suspect. When Hambamo forthrightly notified Gerace that his permit would be suspended for one week until he completed his already-rescheduled class, Gerace initially suspended him. (JA 105, 118.) Later that day, Slack informed Hambamo that he was discharged. (JA 105, 118.) The Company has never explained—to Hambamo, to the Board, or to the Court—why it suddenly decided that discharge, rather than the lesser discipline it initially imposed, was warranted. As the Board recognized (JA 106), that mysterious about-face gives rise to an inference that the real reason for Hambamo's discharge was not his temporary

inability to work. *See L.S.F. Transp.*, 282 F.3d at 984 (upholding Board's finding that employer's explanation was "less than truthful" where manager "never did explain why in the first instance he assured [a pro-union driver] that he could return to work once he regained his license and three weeks later terminated him").

The Company's subsequent efforts to justify Hambamo's discharge—including with a "spurious" document—only further undermine its case. The Company produced a two-page document purporting to show another employee's discharge for a suspended permit. (JA 105-06, 118, 121; 2139-40.) The first page, dated October 22, 2009, indicated that the driver in question had "failed probation." (JA 2139 (all capitalized in original).) The second page, which noted the driver's "failure to keep a valid [Taxicab Authority] card," was dated September 14, 2011—shortly before the hearing in this case. (JA 2140.) The Company could not explain that discrepancy in dates, except to acknowledge that the second date would have been computer generated. (JA 118; 622.) The Board reasonably found (JA 106, 118, 121) that the Company had in fact altered the document to bolster its case against Hambamo, further demonstrating pretext. *See Cherry Hill Convalescent Ctr.*, 309 NLRB 518, 534 (1992) ("[T]he Board does not view with favor defenses based on documents that have been 'doctored' or 'tampered with' . . . ."); *Caruso Elec. Corp.*, 332 NLRB 519, 519 n.2, 523 (2000) (anti-union animus demonstrated by employer's alteration of dates on employee

applications to manipulate statistics on its hiring of union and nonunion applicants).

The untrustworthy testimony of the Company's managers regarding the discharges, upon which the Company continues to rely, lends further support to the Board's findings. In particular, Gerace offered "vague" and "inherently implausible" testimony to explain his decision to investigate Geberselasa's GPS trip log for February 17, the day she assertedly picked up passengers outside her designated area. (JA 106, 116 & n.16.) The Board reasonably discredited his claim that he relied on a tip from an anonymous informant whose gender he could not recall, whose name and phone number he did not obtain, on a date he did not recollect, which he claimed to have documented on a piece of paper he threw away. (JA 106, 116; 326, 352.)

Further, as the Board noted, late in the hearing Gerace invented a disciplinary policy that was "uncorroborated and inconsistent" (JA 106, 119) and admittedly unwritten (JA 616) in an attempt to justify the Company's erratic approach to disciplining repeat offenders.[16] The Board properly deemed his testimony regarding the alleged policy "incredible" and gave it "no weight

[16] As the Board recognized (JA 106, 108 n.19, 119), the Company referenced infractions on some of the six drivers' personnel action forms which were more than six months old and thus should have been expunged under Gerace's "safety period" rule, if it existed. (JA 1134, 1155, 1168 (referencing discipline from more than six months earlier), 891 (relying on seven-month old final warning).)

whatsoever." (JA 106.) Dante, too, was thoroughly discredited as a witness. (JA 115 & n.10.) The dissembling of both managers only cements the Board's finding of pretext. *See Alpo Petfoods, Inc. v. NLRB*, 126 F.3d 246, 253 (4th Cir. 1997) (Board properly inferred unlawful motivation where employer witness's testimony was "patently untrue," "pure nonsense," and "a deliberate attempt to mislead" the Board (quotations omitted)). This additional evidence, taken together with evidence of disparate treatment, shifting explanations, and the failure to allow the drivers to respond to allegations, demonstrates that the Company's reasons for discharge were mere pretext.

d. The Company's arguments contesting animus are contrary to precedent

The Company's challenges to the Board's animus finding are unavailing. Throughout its brief the Company's emphatic but erroneous refrain is that "no evidence" supports the Board's findings of both knowledge and animus. (*See, e.g.*, Br. 22 (bold and italics omitted).) The Company is "perhaps referring to the want of direct evidence." *Southwire Co.*, 820 F.2d at 460. "But circumstantial evidence alone may establish unlawful motivation in a Section 8(a)(3) case." *Id.* As set forth above (pp. 26-44), the Board's findings in this case rest on a "wealth of circumstantial evidence." (JA 106.)

The Company particularly misses the mark when it contends (Br. 22) that its retention of some union supporters "destroys" the Board's finding of animus. As

the Board recognized (JA 106), it is well established that "an employer's discriminatory motive is not disproved by evidence showing that 'it did not weed out all union adherents.'" *Clark & Wilkins Indus., Inc. v. NLRB*, 887 F.2d 308, 316 n.19 (D.C. Cir. 1989) (quoting *Nachman Corp. v. NLRB*, 337 F.2d 421, 424 (7th Cir.1964)). Nor can the Company exonerate itself by pointing out (Br. 36) that it did not discharge "the most prominent [u]nion advocate in [its] workforce." "To the contrary, it is entirely rational that the [Company] would prefer to be more subtle, at least to the extent of not picking the most visible symbol of union organizing, if it wanted to send an anti-union message to employees and still claim that there was no anti-union bias." *NLRB v. Hosp. San Pablo, Inc.*, 207 F.3d 67, 74-75 (1st Cir. 2000).

In sum, substantial evidence shows that the six drivers indisputably engaged in protected union activities, the Company knew of that activity, and it possessed strong anti-union animus. Accordingly, under *Wright Line*, the Board properly found (JA 105) that the drivers' protected conduct was a motivating factor in the Company's decision to discharge them.

C. The Company Failed to Show That It Would Have Discharged the Drivers Absent Their Union Activity

The Company argues (Br. 39-50) that even if union activity was a factor in its decision to discharge the six drivers, the discharges were lawful because it would have taken the same action absent that activity. At the outset, the Company

misunderstands its burden in this regard when it asserts (Br. 21) that the General Counsel must "demonstrate the absence of a legitimate, nondiscriminatory reason for the discharge[s]" of the six drivers. On the contrary, it was the Company's burden to establish, as an affirmative defense, not only that legitimate reasons for the discharges existed, but also that it was actually motivated by those reasons. *See Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 31 (D.C. Cir. 1998) (explaining that an employer must prove as an affirmative defense that it "*would* have fired" the employee for a nondiscriminatory reason—not merely "that it *could* have done so" (emphasis in original)); *see also Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 278 (1994) (reaffirming that the *Wright Line* test "place[s] the burden of persuasion on the employer as to its affirmative defense").

The Company failed to meet that burden. As shown above (pp. 34-44), the infractions the Company cited to justify its actions were pretextual—they "furnished the excuse rather than the reason" for the six drivers' discharges. *Justak Bros. & Co.*, 664 F.2d at 1077. The Board's finding of pretext necessarily "defeats [the Company's] attempt to meet its rebuttal burden." (JA 107.) *See Bally's Park Place*, 646 F.3d at 937 n.6 (noting that a showing of pretext serves as a "'conclusive rejection'" of the employer's affirmative defense (quoting *Cadbury Beverages*, 160 F.3d at 32)); *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981) ("[A] finding of pretext necessarily means that the reasons advanced by the

employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive . . . ."), *enforced*, 705 F.2d 799 (6th Cir. 1982); *see also Southwire Co.*, 820 F.2d at 459 ("[W]ork rule violations may not be used as pretexts for firing unwelcome union activists.").

Nonetheless, the Company (Br. 40-50), relying on the fragmented personnel records it introduced at trial, contends that it had a consistent policy of discharging employees for engaging in misconduct similar to that of the six discharged drivers. The Board properly deemed that argument "unsuccessful[]" and unsupported. (JA 107-08, 122.) At the very most, the Company demonstrates that its policies were inconsistently applied—that it *could* have discharged the drivers, but not that it *would* have done so regardless of their union activities. Under settled law, that is not enough. *See Southwire Co.*, 820 F.2d at 461 (employer's memo did not require that employee be discharged because it did not make the penalty of discharge mandatory); *Frazier Indus. Co., Inc. v. NLRB*, 213 F.3d 750, 760 (D.C. Cir. 2000) (employer's form stating that misconduct "may" result in discharge does not satisfy employer's burden because it indicates that dismissal is only a potential option).

Almethay Geberselasa

First, the Company fails to show that it would have discharged Geberselasa for the reason it ultimately relied on—picking up passengers outside her designated

area. (JA 107; 260, 609.) The Company points to one driver it assertedly discharged for the same infraction. (Br. 43.) But as noted above (p. 35), another driver was not discharged for a restricted pickup. (JA 490-91, 1425.) The Company's inconsistent practice cannot establish its *Wright Line* defense. *See Tasty Baking Co.*, 254 F.3d at 130 (policy which employer "had not consistently applied" did not satisfy its burden). Moreover, as the Board noted (JA 107), the Company knew that Geberselasa had previously strayed into restricted areas to find passengers, since she had openly documented the practice on trip sheets that the Company reviewed.[17] Yet the Company only took action after she began campaigning for the Union. Accordingly, it cannot show that it would have discharged her absent her protected activity. *See NLRB v. Aquatech, Inc.*, 926 F.2d 538, 546-47 (6th Cir. 1991) (discharge unlawful where pro-union employee with history of attendance problems was discharged for absenteeism only after engaging in union activity); *George P. Bailey & Sons, Inc.*, 341 NLRB 751, 756-58 (2004) (employer's prior toleration of multiple policy infractions prior to employee's union activity undermines the assertion that those infractions justified discharge).

[17] For example, Geberselasa noted only two pickups on July 17, 2010, one of which was in violation of her restricted medallion. (JA 476, 480-81, 1383.) The Company indisputably reviewed this trip sheet, as it noticed the absence of a clock-out stamp and counseled her accordingly. (JA 1383-85, 476-77.)

Elias Demeke, Endale Hailu, and Assefa Kindeya

The Company asserts it discharged Demeke for failure to record breaks, Hailu for fare falsification, and Kindeya for early refueling. Substantial evidence supports the Board's findings (JA 107-08) that with regard to these three drivers, the Company failed to show that it adhered to its own ordinary practice. To the extent the Company had any consistent approach to these drivers' infractions, it was to issue at least one final, written warning for each different type of violation before resorting to discharge. (*See* pp. 35-37.)[18] Yet the Company was unable to produce final warnings for these three drivers. (JA 107-08.)[19]

The Company does not make up for that deficiency by cataloguing drivers (Br. 10-11, 40-42) who were discharged after receiving a final warning, or under circumstances where the Company's own failure to introduce complete records makes it impossible to tell whether a warning was given. (*See, e.g.*, JA 601.) Nor does the Company meet its burden by insisting that the refueling rule Kindeya violated is "strongly" enforced (Br. 49), or that Demeke's failure to record

[18] Indeed, the Company cites numerous examples of this practice in its brief. (Br. 45 n.15-16.) But providing examples of final warnings given to other drivers falls far short of proving final warnings were given to Demeke, Hailu, and Kindeya.

[19] The Company (Br. 16-17 (citing JA 1134-54)) claims that Hailu received a final warning on February 5. But the pages upon which the Company relies do not contain any such warning. (JA 1134-54.) There is thus no support for the statement on Hailu's personnel action form that he was counseled on February 5 for "Trip Sheet violations" and informed that "any other violations would result in termination." (JA 1134.)

authorized breaks and Hailu's inexact fare notations were "extremely serious" (Br. 10). Regardless of the infractions' severity, the Company failed to show that it would have punished the employees with immediate discharge in the absence of union activity. *See NLRB v. O'Hare-Midway Limousine Serv., Inc.*, 924 F.2d 692, 697-98 (7th Cir. 1991) (although drunk driving is a serious offense, record did not show that employer would have fired driver absent his union activity).

Melaku Tesema

The Company claims (Br. 12-13) that it properly discharged Tesema for failing to log a break on April 3 because he had received a final warning for that violation. It attempts to show (Br. 40-42) that it consistently discharged other drivers under comparable circumstances. The Company, however, wholly ignores the Board's finding that Tesema was discharged for failure to "log a ride"—an allegation the Company's GPS records soundly disproved. (JA 108; 891.) Because he did not commit the infraction for which he was discharged, the Board properly found (JA 108) that "the question of consistent disciplinary treatment has no application with respect to Tesema." The Company's discussion of other discharges (Br. 40-42) is therefore beside the point.

Even assuming that the Company meant to discharge Tesema for failing to log a break, the evidence still does not support the Company's assertion that it would have discharged him for that offense absent his union activity. Again, the

Company does not respond to the Board's finding (JA 108 n.19) that under the Company's own asserted policies, Tesema's July 26, 2010 warning should have been expunged well before his discharge in April 2011. Indeed, the record shows that the Company allowed other drivers' stale final warnings for identical or comparable conduct to expire on multiple occasions. As noted above (pp. 36-37), final warnings that another driver received for failing to list his breaks in May 2010 (JA 1449, 1460) were not held against him when he accrued an identical final warning after ten months had passed (JA 1391). Yet another driver received a final warning on November 23, 2010, for dropping an incorrect amount at the end of his shift (JA 2019), which was apparently forgotten seven months later when he received another final warning for the same offense (JA 1993). And likewise, a third driver was allowed to accrue final warnings for the same infraction on November 30, 2010 (JA 1356) and August 12, 2011 (JA 1332). Accordingly, the Board properly rejected the Company's attempt to rely on Tesema's eight-month-old infraction. *See Manor Care of Easton, PA., LLC v. NLRB*, 661 F.3d 1139, 1140 (D.C. Cir. 2011) (employer failed to establish *Wright Line* defense where it "premised its discipline, at least in part, on [employee]'s expired disciplinary history, an impermissible consideration under company rules").

Mesfin Hambamo

Finally, the inadequacy of the Company's evidence is perhaps most stark with regard to Hambamo, who was discharged following suspension of his permit. As explained above (pp. 37-38), there is absolutely no record support for the Company's claim that it had a practice of discharging drivers with suspended permits like Hambamo. (JA 107.)[20] The only document the Company points to in its defense (Br. 42) is a page from a probationary employee's file which the Board found to have been improperly altered (JA 2140). In any event, even if the Company had not tampered with this record, it would have little probative value: Gerace admitted that the Company would treat a probationary employee differently from an experienced driver, because a new driver "has no track record with the [C]ompany." (JA 587.) The Company's comparison between a probationary driver and Hambamo—who was with the Company for nearly eight years—is plainly inapt and does not demonstrate that the Company would have discharged Hambamo absent his union activity.

The Company falls flat in its attempt (Br. 46) to explain its failure to discharge the other three drivers (Worke, Absu, and Demeke) who had suspended permits. The Company claims that Gerace may have simply overlooked Demeke's

[20] Indeed, the relevant portion of the Company's "Policies, Procedures & Regulations" states that "[r]evocation" of an employee's permit may result in discharge. (JA 113; 822.) As Hambamo attempted to explain to Gerace, his permit was only suspended, not revoked. (JA 118; 372-73.)

suspended permit, and that Absu was on leave when his permit was suspended. (Br. 46 n.17.) Those assertions, however, fail to explain why the Company let Absu remain on leave with a suspended permit, yet felt an urgent need to discharge Hambamo rather than offer him the same option. *See Vincent Indus. Plastics*, 209 F.3d at 736 (discharge unlawful where employer failed to explain refusal to accommodate long-term, skilled employee's request to participate in work release program after his drunk-driving arrest). Nor does the Company even attempt to justify its failure to enforce its purported policy against Worke. (JA 107.)

Overall, with regard to all six discharged drivers, the Company at best showed that it had an inconsistent practice of discharging drivers in similar circumstances—not that it would have discharged them absent their union activity. *See NLRB v. Bliss & Laughlin Steel Co., Inc.*, 754 F.2d 229, 234, 236 (7th Cir. 1985) (employer failed to show that it would have fired employee for violating its policy even absent his union activity because there was "extensive evidence of discretion in the application and laxity in the administration of [its] 'no fault' policy"). The Company's inconsistently enforced policies and hit or miss disciplinary practices do not rebut the Board's finding that the Company's justifications for discharge were pretextual. Thus, the Board properly found that the Company failed to satisfy its burden of demonstrating that it would have discharged the employees absent their union activity. (JA 108.)

D. The Company's Section 10(c) Argument is Without Merit

Because the Company unlawfully discharged the six drivers for their union activities, the Board ordered it to offer them reinstatement and make them whole. (JA 109.) That remedy was appropriate and well within the Board's broad remedial discretion. *See Petrochem Insulation v. NLRB*, 240 F.3d 26, 34 (D.C. Cir. 2001) (noting Board's broad discretionary powers, which are subject to "limited review"). Indeed, "[s]uch a remedy was imposed in the Board's first published decision and, since that time, has become the traditional means by which the Board seeks to neutralize employer discrimination." *Taracorp Inc.*, 273 NLRB 221, 222 (1984) (citing *Pa. Greyhound Lines*, 1 NLRB 1, 51 (1935) and *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941)). It is no less appropriate where, as here, an employer can point to past infractions committed by the employees it discharged for unlawful reasons. *See, e.g., Garvey Marine, Inc. v. NLRB*, 245 F.3d 819, 825 (D.C. Cir. 2001) (upholding Board order to reinstate employee who engaged in "intentional and repeated tardiness [which constituted] 'provocative misconduct' worthy of discipline," since his discharge "was due not to his lateness but to his activity on behalf of the Union").

The Company contends (Br. 51-52) that it need not reinstate the drivers, citing Section 10(c) of the Act (29 U.S.C. § 160(c)). That makeweight argument ignores the Board's findings and disregards settled law. Section 10(c) renders

employees discharged for cause ineligible for reinstatement and backpay. However, contrary to the Company's claim (Br. 51-52) that it discharged the drivers "for cause," the Board found (JA 107-08) that the Company's "proffered reasons for discharging the [drivers] [we]re pretextual" and that it in fact discharged the drivers "in response to their organizing activities." It is well established that "[a] termination of employment that is motivated by protected activity . . . is not 'for cause.' The termination is unlawful, and the Board can order reinstatement and backpay." *Anheuser-Busch, Inc.*, 351 NLRB 644, 648 (2007), *pet. for review denied sub nom. Brewers & Maltsters, Local Union No. 6 v. NLRB*, 303 F. App'x 899 (D.C. Cir. 2008).[21]

The one case the Company cites on this issue (Br. 51-52) is completely irrelevant. In *Vilter Mfg. Corp.*—a decision which does not reference Section 10(c)—the employer took adverse action against an employee by refusing to comply with an arbitrator's order to rehire him. 271 NLRB 1544, 1544 (1984). The Board found that action lawful, as it was based on the employee's acts of fraud and the employer "established that it would have refused reinstatement to [him] even in the absence of his protected activities." *Id.* at 1547. Here, by contrast, the Company took adverse action against the six drivers because of their union

[21] The Company also suggests that it cannot be ordered to reinstate Hambamo because he lacks "the credentials necessary to perform [his] work." (Br. 51.) The record flatly contradicts that assertion. Hambamo's permit was reinstated one week after the Company discharged him. (JA 118; SA 6.)

activities, and it failed to establish that it would have taken the same action in the absence of those activities. (JA 108.) The Board's remedy is fully consistent with Section 10(c) and should be enforced.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court deny the Company's petition for review and enforce the Board's Order in full.

Respectfully submitted,

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DECEMBER 2014

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LUCKY CAB COMPANY	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 14-1029, 14-1057
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case No.
Respondent/Cross-Petitioner	)	28-CA-023508
	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 12,924 words of proportionally spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

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Dated at Washington, DC
this 19th day of December, 2014

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	)	

CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that all counsel of record are registered CM/ECF users and were served through the CM/ECF system.

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Dated at Washington, DC
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