

Nos. 14-3001, 14-3202

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

NICHOLS ALUMINUM, LLC

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 Nichols Aluminum, LLC (“the Company”). In 2012, Bruce Bandy, a 34-year veteran employee, participated in a strike initiated by his union, Local 371 of the International Brotherhood of Teamsters (“the Union”). After the Union called an end to the strike, the Company recalled Bandy to work, as it was required to do. Within roughly two weeks of his return to work, however, the Company terminated Bandy on the basis of a “cut-throat” gesture directed toward a coworker. The Board found that the Company had unlawfully discharged Bandy because of his participation in the strike and ordered, among other things, that the Company reinstate Bandy and make him whole for any loss of benefits or wages he suffered.

Substantial evidence supports this finding, which the Board arrived at through applying the established *Wright Line* framework. The evidence demonstrates that the Company bore animus toward the strike as well as toward Bandy’s participation in the strike and that this animus was a motivating factor in his discharge. The Company, in turn, failed to prove its affirmative defense that it would have discharged Bandy even in the absence of his protected activities.

If the Court grants the Company’s request for oral argument, the Board requests that it be allowed to participate and be allotted an equal amount of time.

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**STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION**

The Board agrees with the Petitioner regarding the basis for the Court's subject matter jurisdiction over this proceeding.

STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence supports the Board's finding that the Company unlawfully discharged Employee Bruce Bandy because of his union activities, thereby violating Section 8(a)(3) and (1) of the National Labor Relations Act (the "Act").

Wright Line, a Division of Wright Line, Inc., 251 NLRB 1083 (1980), approved by *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 397-98, 400-03 (1983).

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

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

STATEMENT OF THE CASE

Acting on an unfair labor practice charge filed by Local 371 of the International Brotherhood of Teamsters ("the Union") (JA 195),¹ the Board's General Counsel issued a complaint alleging that Nichols Aluminum, LLC ("the Company") had violated the Act by discharging employee Bruce Bandy because of his protected activities. A hearing was held before an administrative law judge; and on April 8, 2013, the judge issued a decision and recommended order dismissing the complaint. (JA 248-56.) The General Counsel filed exceptions; the Company filed cross-exceptions; and on August 18, 2014, the Board issued a final

¹ "JA" refers to the Joint Appendix, and "Br." refers to the Company's Opening Brief. Where applicable, references preceding a semicolon are to the Board's decision; those following are to the supporting evidence.

Decision and Order. The Board adopted many of the findings and rulings of the judge, including the judge's witness credibility determinations, but the Board reversed the judge's ultimate conclusion, holding that the Company violated Section 8(a)(3) and (1) of the Act by discharging Bandy. (JA 322-34.)

I. THE BOARD'S FINDINGS OF FACT

A. Background

The Company operates two plants in Davenport, Iowa, employing roughly 235 workers. (JA 322; JA 10, 195.) At the Nichols Aluminum Casting (NAC) plant, the Company sorts, shreds, melts, and blends scrap metal in order to produce aluminum sheets; at the Nichols Aluminum Finishing (NAD) plant, the Company processes and finishes the aluminum sheets for use by the building industry. (JA 322; JA 10.) Since at least 1978, Teamsters Local Union No. 371 ("the Union") has served as the designated collective-bargaining representative of the employees at the two plants. (JA 322; JA 34-35.)

B. The Strike and the No-Strike Pledge

In November 2011, the collective-bargaining agreement between the Company and the Union expired. (JA 322; JA 244.) By January 20, 2012, the parties still had not reached a new agreement, and the Union initiated a strike. (JA 322; JA 22, 30, 126-27.) During the strike, the Union picketed both the NAC and NAD facilities. (JA 322; JA 35-36, 82, 104.) Twenty-one employees crossed the

picket line and continued to work for the Company during the strike; to make up for the remaining labor shortfall, the Company hired 100 permanent replacement employees. (JA 322; JA 22, 25-26, 139, 233.)

Although the parties still had yet to execute a successor collective-bargaining agreement, on April 6 the Union ended the strike by tendering to the Company an offer for its members to unconditionally return to work. (JA 322; JA 22, 184-85.) As it was legally required to do, the Company began recalling strikers to work as positions became available.² (JA 322, 324 & n.9; JA 22, 24, 36, 82, 104-05.) Since the Company had retained 100 replacement workers, however, only about 120 strikers were allowed to return to work. (JA 322; JA 22, 195.)

As strikers gradually returned to work, the Company conducted orientation sessions for them. (JA 322; JA 22-24, 36-38.) At the orientation sessions, the Company required that the strikers agree to a “no-strike pledge” as a condition of returning to work. (JA 322; JA 23-24.) The pledge required that they answer “yes” to two questions:

Are you here to return to work at Nichols? YES

Do you promise that you will not go out on strike again over the same dispute that caused the strike that just ended? YES

² See *NLRB v. Fleetwood Trailer*, 389 U.S. 375, 381 (1967); *Laidlaw Corp.*, 171 NLRB 1366, 1369-70 (1968).

You are now on notice that if you break that promise and go on strike again over the same dispute you will be subject to discipline up to and including the possibility of discharge.

(JA 322; JA 218.) Present at the sessions for NAC employees were Plant Manager Bill Hebert and Vice-President of Human Relations Mike Albee, who signed the pledges to indicate that they had witnessed the returning strikers agree. (JA 322; JA 218.) After learning that some employees were being required to agree to the pledge, the Union intervened and instructed those returning strikers who remained that they should refuse. (JA 322; JA 102.)

The Company additionally reviewed the Company's "Zero-Tolerance Violence in the Workplace" policy with the returning strikers who attended these orientation sessions. (JA 323; JA 83-84.) According to the terms of the policy, employees are subject to discharge for any of the following acts:

- [p]ossession of a firearm . . . while on Company property,"
- "[m]aking threatening remarks . . . that constitute a threat against another individual," and
- "[a]ggressive or hostile behavior that creates a reasonable fear of injury to another person or subjects another individual to emotional distress."

(JA 323; JA 241-43.) At the orientation session, the Company summarized its policy for the assembled employees, instructing them that "[h]arassing, disruptive,

threatening, and/or violent situations or behavior by anyone, regardless of status, will not be tolerated and [sic] subject to discharge for the first offense.” (JA 323; JA 170-72, 238.)

C. The April 25 Exchange Between Bandy and Braafhart; the Company Suspends and Terminates Bandy

Employee Bruce Bandy began working for the Company in 1978; throughout his employment, he was a member of the Union. (JA 322; JA 34.) Most recently, he worked at the NAC plant as a blending operator. (JA 322; JA 34.) His immediate supervisor was Vick Hansen; the manager of the NAC facility was Bill Hebert. (JA 323; JA 35.)

As a Union member, Bandy participated in the 2012 strike. Although he did not assume any leadership role, he regularly manned the picket line at the NAC and NAD facilities during the strike. (JA 322; JA 36.) The Company recalled Bandy for work on April 11, 2012. (JA 322; JA 24, 218.) At the orientation session held that day, the Company required that Bandy agree to the no-strike pledge as a condition of his returning to work. Bandy agreed. (JA 322; JA 218.)

Two weeks later, on April 25, as Bandy was leaving the melding break room with a bottle of milk and two paper plates in his hand, he saw coworker Keith Braafhart, a Company employee who had crossed the picket line. Braafhart was driving a forklift up the ramp that leads to one of the melder. (JA 322-23; JA 25-26, 48-49, 139.) The working relationship between Bandy and Braafhart was “not

good.” Braafhart, who is half a foot taller than Bandy and weighs a hundred pounds more, would always address Bandy, who is originally from Arkansas, as “peckerhead” or “peckerwood”; he would also refuse to perform work tasks when Bandy asked him to. (JA 322-23; JA 46-48, 58.)

Bandy stood beside the ramp, waiting for Braafhart’s forklift to pass. As Braafhart approached, he sounded the forklift’s horn. (JA 322-23; JA 139.) Braafhart was repeatedly “blaring his horn . . . , a little more than he probably should’ve” or more than was “necessary,” as observed by a nearby witness, Sam Harroun. (JA 323 & n.5; JA 139.) When Bandy recognized Braafhart in the forklift, he brought his hand across his neck with his thumb pointing upward. (JA 323, JA 139.) He then continued walking toward the blending office. (JA 323; JA 51.)

Braafhart stopped at the top of the ramp and exited the forklift, where Harroun was waiting for Braafhart. (JA 323; JA 139.) Braafhart asked whether Harroun had “see[n] [Bandy] do that?” Harroun chuckled and responded, “Yeah, I seen him.” (JA 323; JA 139.) Braafhart then called to Bandy, “I’m taking you upstairs.” (JA 323; JA 52, 72.) Bandy responded that he had just been scratching his throat, but Braafhart walked off in search of a supervisor. (JA 323; JA 52, 72.) Bandy then walked by Harroun, chuckling, and told Harroun “his throat itched and that was it.” (JA 323; JA 140.)

Fifteen minutes later, Supervisor Hansen found Bandy in the blending office eating his lunch. Hansen summoned Bandy to a conference room, where Plant Manager Bill Hebert, Human Resources Vice-President Mike Albee, and a union steward were present. (JA 323; JA 53, 67.) When asked, Bandy denied making any threat and again explained that he had been “itching his throat.” (JA 323; JA 153-54.) Albee told Bandy to punch out and said that the Company would be in touch. (JA 323; JA 55.) Unescorted, Bandy gathered his lunchbox, shut down his computer, and left the facility. (JA 323, 326; JA 57.)

That same day, the Company summoned Harroun into the conference room. (JA 323; JA 140.) Harroun told the managers that he believed that Bandy’s hand gesture was intended to signal to Braafhart that he should stop blaring the forklift’s horn. (JA 323 & n.5; JA 146.) Harroun testified: “I didn’t think it wasn’t [sic] any threat at all. I still don’t believe it was.” (JA 323 & n.5; JA 146.)

In consultation with other members of management, Hebert decided to terminate Bandy. (JA 323; JA 151, 155, 162.) On April 27, Human Resources Manager Kristy Riley called Bandy to inform him that he was terminated. (JA 323; JA 58.)

II. THE BOARD’S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Pearce and Member Hirozawa, Member Johnson dissenting) found, contrary to the administrative law judge, that

the Company had violated Section 8(a)(3) and (1) of the Act by discharging Bandy because of his union activities. In support of this conclusion, the Board noted that Bandy had been engaged in protected union activities when he participated in the strike and that the Company had been aware of these activities. (JA 324.) The Board further found that the Company bore union animus, as shown by the no-strike pledge that the Company demanded employees agree to, the suspicious timing of Bandy's discharge, and the Company's tolerance of more explicit threats by striker replacements. (JA 324-25.) The Board accordingly concluded that the General Counsel had carried its burden under *Wright Line*³ of proving that union animus played a motivating role in Bandy's discharge. (JA 325.) The Board also concluded that the Company failed to prove that it would have discharged Bandy regardless of his protected activity. (JA 325-26.)

To remedy the Company's unfair labor practice, the Board ordered the Company to cease and desist from discriminating against employees for supporting the Union and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act. Affirmatively, the Board ordered that the Company offer Bandy full reinstatement to his former position, make him whole for any loss of earnings or benefits suffered as a result of his wrongful termination, remove any reference to

³ *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), approved by *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 397-98, 400-03 (1983).

his unlawful termination from the Company's files and notify Bandy that it has done so, and post a remedial notice at the NAC facility. (JA 326-27.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that the Company discharged employee Bruce Bandy because of his union activities—specifically, his participation in the strike. In reaching this conclusion, the Board applied the long established *Wright Line* framework. The evidence showed that Bandy had engaged in protected union activities, that the Company knew of these activities, and that the Company harbored union animus. This animus was demonstrated most compellingly when the Company forced its employees, including Bandy, to sign a pledge that renounced their right to strike. The Company furthermore terminated Bandy sixteen days after recalling him to work and subjected him to disparate treatment under its “Zero-Tolerance” anti-violence policy—both accepted and probative bases for the Board's finding of union animus.

Substantial evidence similarly supports the Board's finding that the Company failed to carry its burden of proving that it would have discharged Bandy even in the absence of his protected conduct. Even assuming Bandy's gesture was intended as a threat, his gesture was ambiguous, and no accompanying words or gestures indicated that the gesture was intended as an imminent threat of bodily harm. In this context, the Company's literalistic interpretation of Bandy's

gesture—as indicating an intention to slit Braafhart’s throat with a knife—is neither the only nor the most likely interpretation. Given the Company’s more lenient treatment of employees who had engaged in behavior as threatening or more so than Bandy’s, the Board therefore reasonably concluded that the Company would not have discharged Bandy had it been applying its anti-violence policy in a nondiscriminatory manner.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S CONCLUSION THAT THE COMPANY VIOLATED THE ACT BY DISCHARGING EMPLOYEE BRUCE BANDY

A. Applicable Principles and Standard of Review

The Act explicitly protects the right to strike.⁴ Under Section 8(a)(3) of the Act—which prohibits “discrimination in regard to hire or tenure of employment or any term or condition of employment . . . to discourage membership in any labor organization”—it is unlawful to discharge an employee because he participated in a strike.⁵ A Section 8(a)(3) violation derivatively violates Section 8(a)(1).⁶

⁴ See 29 U.S.C. § 163 (“Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.”).

⁵ 29 U.S.C. § 158(a)(3). See also *United Exposition Serv. Co. v. NLRB*, 945 F.2d 1057, 1059-60 (8th Cir. 1991) (finding that employer violated Section 8(a)(3) by discriminating against returning striker in the assignment of work); *Gibson Greetings, Inc. v. NLRB*, 53 F.3d 385, 393-94 (D.C. Cir. 1995) (finding that

In *Wright Line, a Division of Wright Line, Inc.*,⁷ the Board established a burden-shifting framework for discrimination cases in which the employer's motive for taking an adverse employment action is contested. First, the General Counsel must make an initial showing "that protected conduct was a 'motivating factor' in the employer's decision to discipline the employee."⁸ "The General Counsel's initial burden requires a showing that (1) the employee was engaged in union activity; (2) the employer had knowledge of that activity; and (3) the employer bore animus toward union activity."⁹

employer violated Section 8(a)(3) by disciplining striking workers more severely than nonstriking workers); *NLRB v. Plastilite Corp.*, 375 F.2d 343, 349 (8th Cir. 1967) (finding that employer violated Section 8(a)(3) by establishing discriminatory workrules for returning strikers).

⁶ See *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983). See also 29 U.S.C. § 158(a)(1) ("It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [of the Act].").

⁷ 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981), and approved by the Supreme Court, *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 397-98, 400-03 (1983). See also *United Exposition Serv.*, 945 F.2d at (approving *Wright Line*).

⁸ *NLRB v. Rockline Indus., Inc.*, 412 F.3d 962, 966 (8th Cir. 2005) (citations omitted). See also *Wright Line*, 251 NLRB at 1089.

⁹ *Fremont Medical Center and Rideout Memorial Hospital*, 357 NLRB No. 158 (2011), slip op. at 4. See also *Frankl v. HTH Corp.*, 693 F.3d 1051, 1062 (9th Cir. 2012); *Amglo Kemlite Laboratories*, 360 NLRB No. 51 (2014), slip op. at 7; *Austal USA, LLC*, 356 NLRB No. 65 (2010), slip op. at 1.

When making a finding of unlawful motivation, the Board can rely upon direct or circumstantial evidence¹⁰ and “is ‘permitted to draw reasonable inferences, and to choose between fairly conflicting views of the evidence.’”¹¹ The Board may infer union animus from such indicia as independent violations of the Act,¹² the suspicious timing of discipline,¹³ and an employer’s disparate treatment of union supporters.¹⁴

If the General Counsel “carries its burden of persuasion that an employee’s protected conduct was a substantial or motivating factor in [his] discharge,” the

¹⁰ See *Pace Indus., Inc. v. NLRB*, 118 F.3d 585, 590 (8th Cir. 1997).

¹¹ *Concepts & Designs, Inc. v. NLRB*, 101 F.3d 1243, 1245 (8th Cir. 1996).

¹² See also *Traction Wholesale Center Co. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000) (“Evidence that an employer has violated Section 8(a)(1) of the Act can support an inference of anti-union animus.”) (citation omitted); *NLRB v. Daniel Constr. Co.*, 731 F.2d 191, 197-98 (4th Cir. 1984) (holding that contemporaneous section 8(a)(1) violations provide evidence of an employer’s anti-union animus in the discharge of a particular employee).

¹³ See *NLRB v. Relco Locomotives, Inc.*, 734 F.3d 764, 782 (8th Cir. 2013) (one month after employee challenged employer’s antiunion speech); *Concepts & Design*, 101 F.3d at 1245 (13 days prior to union election); *TLC Lines, Inc. v. NLRB*, 717 F.2d 461, 464 (8th Cir. 1983) (two weeks prior to union election); *McGraw-Edison Co. v. NLRB*, 419 F.2d 67, 75 (8th Cir. 1969) (10 days after union filed representation petition).

¹⁴ See *Rockline Indus., Inc.*, 412 F.3d at 968-70 (employer treated employees disparately by permitting antiunion employee to criticize union during working hours but disciplining pro-union employee for discussing union during working hours); *Berbiglia, Inc. v. NLRB*, 602 F.2d 839, 844 (8th Cir. 1979) (employer treated employees disparately by promoting antiunion employee who padded his commissions and firing pro-union employee who padded his commissions).

burden then “shifts to the employer to prove the ‘affirmative defense’ that it would have discharged the employee even absent that protected conduct.”¹⁵ This affirmative defense—which the Board adopted in *Wright Line*¹⁶—recognizes the fact that “[e]ngaging in protected activity does not shield employees from legitimate disciplinary action by their employer. Employers still control their workforce even if their employees are (or seek to be) represented by a union.”¹⁷ At the same time, “employers cannot single out employees who engage in such activities for adverse or disparate treatment.”¹⁸ “Having disciplined an employee who has engaged in protected activity, it is not enough that an employer put forth a nondiscriminatory justification for discipline. It must be *the* justification.”¹⁹ Thus, when an employer claims to have terminated a union supporter pursuant to a

¹⁵ *TLC Lines*, 717 F.2d at 463. *See also Transp. Mgmt. Corp.*, 462 U.S. at 395, 402–03 (“[T]he Board’s construction of the statute permits an employer to avoid being adjudicated a violator by showing that what his actions would have been regardless of his forbidden motivation. It extends to the employer what the Board considers to be an affirmative defense.”).

¹⁶ *See Wright Line*, 251 NLRB at 1086-89 (discussing and adopting affirmative defense established in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977)).

¹⁷ *Rockline Indus., Inc.*, 412 F.3d at 970 (emphasis in original) (citation omitted).

¹⁸ *Id.*

¹⁹ *Id.* (emphasis in original).

workrule, the employer's affirmative defense requires that it show that the uniform and evenhanded application of its workrule justified the employee's discharge.²⁰

In a review proceeding, “[a]n order of the Board cannot be set aside unless ‘the record before a Court of Appeals clearly precludes the Board’s decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both.’”²¹ This Court reviews the Board’s findings under *Wright Line* for substantial evidence—*viz.*, that the Company harbored union animus,²² that the General Counsel carried its initial burden,²³ and that the Company failed to prove its affirmative defense.²⁴ A finding by the Board is supported by substantial evidence if “on this record it

²⁰ See *Republic Die & Tool Co. v. NLRB*, 680 F.2d 463, 465 (6th Cir. 1982) (“[T]he Company has the right to require that [an employee] comply with shop rules that apply to others in [the employee’s] position, the Act is not a shield for employee misconduct. Just as clearly, the Company may not enforce rules against an employee solely because that employee has exercised rights guaranteed by the Act.”) (citations omitted).

²¹ *Berbiglia*, 602 F.2d at 842 (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490 (1951)).

²² See, e.g., *Relco Locomotives*, 734 F.3d at 781 (reviewing finding of union animus for substantial evidence).

²³ See, e.g., *TLC Lines*, 717 F.2d at 464 (reviewing for substantial evidence Board’s finding that General Counsel had carried its initial burden).

²⁴ See, e.g., *Relco Locomotives*, 734 F.3d at 782 (reviewing Board’s rejection of employer’s affirmative defense for substantial evidence).

would have been possible for a reasonable jury to reach the Board's conclusion.”²⁵

In conducting substantial evidence review, “[a] reviewing court may not displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.”²⁶

B. The Company Does Not Dispute that Bandy’s Participation in the Strike Constituted Protected Activity and that the Company Was Aware of this Activity

Under *Wright Line*, the General Counsel’s initial showing includes demonstrating that (1) the employee had engaged in protected union activity and (2) the employer had knowledge of that protected union activity. The Board found, and the Company does not contest, that the General Counsel carried its burden with respect to both of these elements. Section 13 of the Act forcefully expresses the legally protected right to strike,²⁷ and Bandy’s participation in the 2012 strike clearly constituted protected union activity. Moreover, the Company was aware of Bandy’s participation in the strike: Bandy assumed a visible role in the strike by

²⁵ *Allentown Mack Sales & Serv. v. NLRB*, 522 U.S. 359, 366-67 (1998).

²⁶ *United Exposition Serv. Co.*, 945 F.2d at 1059 (quoting *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 405 (1962)) (internal quotation marks omitted).

²⁷ *See* 29 U.S.C. § 163 (“Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.”).

manning the picket line (JA 35-36), and the Company kept track of those who participated in the strike by maintaining a list of names (JA 26, 233).

C. Substantial Evidence Supports the Board’s Finding that the Company Harbored Union Animus

The Board based its finding of union animus upon three subsidiary findings: (1) the Company’s requirement that Bandy sign the no-strike pledge in order to return to work, (2) the suspicious timing of Bandy’s discharge, sixteen days after recalling him to work, and (3) the Company’s disparate, more lenient treatment of striker replacements under its “Zero-Tolerance” policy. As explained below, these subsidiary findings—each of which is backed by substantial evidence—provide ample support for the Board’s overall conclusion that the Company harbored union animus.

1. The No-Strike Pledge

The Board first considered the no-strike pledge, which the Board found to be “compelling” evidence of union animus. (JA 324.) As a condition for their returning to work, the Company forced returning strikers—including Bandy—to fore swear their right to strike again “over the same dispute” and specified that violation of this pledge would result in discipline, including discharge. Although not charged as a violation of the Act, the Board stated that it would have found this pledge to be unlawful and violative of the Act if it had been charged. (JA 324 n.10.) The Board reasoned that the Company did not explain the nature or scope of

the “dispute” referenced in the pledge; employees therefore “could reasonably interpret the [pledge] to encompass all issues related to the ongoing bargaining.” (JA 324.) Conditioning employment upon a renunciation of rights protected by the Act is unlawful. (JA 324 n.10.)²⁸ Thus, by forcing its employees to sign a document that appeared to broadly renounce their statutorily protected right to strike,²⁹ the Company had engaged in behavior that demonstrated significant animus toward its employees’ rights under the Act. This reasoning is sound and supported by substantial evidence in the record.

The Company argues (Br. 22-24) that the pledge merely sought assurance that employees would not engage in an illegal intermittent strike by striking again over the exact same issue.³⁰ However, as the Board pointed out (JA 324), the Company elicited no testimony supporting this assertion, and there is no evidence that the Company offered this explanation to employees when it required that they

²⁸ Citing *Pratt Towers, Inc.*, 338 NLRB 61, 64 (2002); *Penn Tank Lines*, 336 NLRB 1066, 1068 (2001); *Eddyleon Chocolate Co.*, 301 NLRB 887, 887 (1991).

²⁹ See 29 U.S.C. § 163. See also *id.* § 157.

³⁰ Intermittent striking is not protected under the Act. See *Westpac Elec.*, 321 NLRB 1322, 1360 (1996) (defining intermittent strikes as being “intentionally planned and coordinated so as to effectively reap the benefit of a continuous strike action without assuming the economic risks associated with a continuous forthright strike, i.e., loss of wages and possible replacement”). See also *United States Serv. Indus.*, 315 NLRB 285, 285 (1994) (“‘[H]it and run’ strikes engaged in as part of a planned strategy intended to ‘harass the company into a state of confusion’ are not protected activity.”), *enforced*, 72 F.3d 920 (D.C. Cir. 1995).

make the pledge. There is not even evidence that any company official understood the pledge as prohibiting intermittent striking. And this is not surprising. Since intermittent strikes are already unprotected under the Act, any no-strike pledge prohibiting intermittent strikes would have been unnecessary. The Company could have lawfully disciplined or discharged any employee who engaged in intermittent strikes, regardless whether they had signed a no-strike pledge or not.

Contrary to the Company's objections (Br. 24-26), the General Counsel introduced sufficient evidence into the record to demonstrate the pledge's unlawfulness. Like any other document, the text of the pledge is sufficient evidence as to its meaning where that meaning is plain; and there is no dispute that the pledge's import is plain save for the phrase "over the same dispute." As regards this phrase, the Board noted that the Union called the strike in the midst of negotiations for a successor collective-bargaining agreement. Relying upon its expertise and experience in labor relations, the Board determined that employees would thus reasonably understand "the same dispute" as including any and all issues relating to those negotiations. (JA 324.) This is a more than reasonable inference, given union members' general lack of familiarity with technical legal concepts like "intermittent strikes," as well as the incomplete information that rank-and-file union members usually possess with regard to on-going contract negotiations. It is also in keeping with the Board's established practice of

interpreting employer statements and workrules from the perspective of the employees to whom they are directed.³¹ Indeed, the record shows that employee Robert Schalk understood the pledge as broadly renouncing employees' right to strike. (JA 84.)³²

Finally, settled Board law disposes of the Company's complaint (Br. 24 n.16) that the no-strike pledge cannot serve as evidence of animus because it was not alleged in the General Counsel's complaint as a separate violation of the Act. Proving animus through evidence that is not separately alleged as a violation raises no legal concerns, whether rooted in due process or otherwise,³³ as the federal circuit courts and the Board have repeatedly acknowledged.³⁴

³¹ See, e.g., *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004) (in considering whether workrule violates Section 8(a)(1) of the Act, the Board considers whether "employees would reasonably construe the language to prohibit [protected] activity").

³² See JA 84 (testimony of Robert Schalk) ("Q: Were you asked to make a promise or a pledge of any sort? A: Yes. Q: What were you asked? A: To sign a paper saying that we wouldn't return to the strike.").

The Company's reliance (Br. 24) on the testimony of Bandy, that he understood the pledge to prohibit "striking again on the same issue" (JA 38), does not suggest otherwise. His testimony simply parrots the proscription contained in the pledge, which the Board reasonably found was overbroad and could encompass all issues related to the parties' bargaining of a successor contract. Bandy's testimony thus does not suggest that he understood the pledge as being narrowly tailored to forbid intermittent strikes.

³³ Furthermore, in this particular case, the Union succeeded in persuading the Company to cease requiring that employees agree to the pledge (JA 102); thus, by

2. Timing

The Board additionally noted that the timing of the Company's decision to discipline Bandy further supported a finding of animus. (JA 325.) Bandy had worked for the Company for 34 years, and the record does not show that he had any previous disciplinary history or problems. Sixteen days after Bandy had returned to work from the strike, however, the Company terminated him. Both this Court and the Board have repeatedly found it to be highly indicative of union animus when an employer disciplines an employee shortly after the employee's protected activity.³⁵ This temporal proximity to Bandy's strike activity lends further support to the inference that Bandy's discharge was likely triggered by hostility toward his participation in the strike.

the time charges were filed with the Board, the pledge no longer represented an ongoing violation of employees' rights under the Act, and the General Counsel reasonably exercised his discretion in not including this allegation in the Complaint.

³⁴ See, e.g., *Alpo Petfoods, Inc. v. NLRB*, 126 F.3d 246, 253 (4th Cir. 1997) (“[A]lthough the surveillance was not timely alleged as a violation, it remains forceful evidence of unlawful motive.”); *Hendrix MFG, Co. v. NLRB*, 321 F.2d 100, 103-04 (5th Cir. 1963) (similar); *Overnite Transp. Co.*, 335 NLRB 372, 375 n.15 (2001) (similar); *Wilmington Fabricators, Inc.*, 332 NLRB 57, 58 n.6 (2000) (similar).

³⁵ See, e.g., *NLRB v. Relco Locomotives, Inc.*, 734 F.3d 764, 782 (8th Cir. 2013) (one month); *Concepts & Designs, Inc. v. NLRB*, 101 F.3d 1243, 1245 (8th Cir. 1996) (thirteen days); *TLC Lines, Inc. v. NLRB*, 717 F.2d 461, 464 (8th Cir. 1983) (two weeks).

Such temporal proximity also sent a message to the rest of the workforce that strike activity will likely be punished in the future, reinforcing the overbroad language of the no-strike pledge. In this particular case, sixteen days was certainly not enough time to dissipate the memory of a strike that lasted nearly three months. After the strike ended unsuccessfully, the strikers returned to a workplace where there now worked a roughly equal number of workers who had either crossed the picket line or permanently replaced union members. (JA 22, 195, 233.) This created a naturally tense atmosphere,³⁶ in which no employee would be oblivious to the significance of the Company firing Bandy a little more than two weeks after rehiring him, especially for the alleged offense of threatening an employee who had crossed the picket line.

The Company begs the question by arguing (Br. 27) that the decision to terminate Bandy is not suspicious because it “merely coincides with Mr. Bandy’s decision” to make the gesture that he did. This objection might have some force if the Company had consistently enforced its “Zero-Tolerance” policy. But, as we

³⁶ See JA 159 (“Because of the situation and the circumstances, it’s a highly emotional rollercoaster for everyone. The returning strikers, the people that are there working, management, it’s an emotional time for everyone.”) (testimony of Plant Manager Bill Hebert). This heightened atmosphere is also likely illustrated by the spontaneous altercation between striker Schalk and replacement worker Saltzburger. (JA 84-88.) See also pp. 24-25, *infra*.

now show,³⁷ not only did the Company not demonstrate uniformity of enforcement, its enforcement actually showed favoritism toward striker replacements, further confirming the union animus found by the Board.

3. Disparate Treatment

Despite exhibiting behavior far more explicit and threatening than Bandy's, three striker replacements were permitted to continue to work for the Company. The Board relied on this disparate treatment as the third basis for finding Bandy's discharge was motivated by union animus. (JA 323-25.)

a. On December 20, 2011, employee Mike McGlothen brought a handgun with him to the NAC facility. (JA 323-24; JA 30.)³⁸ Electrician Mark Cook discovered McGlothen cleaning the gun in one of the breakrooms and, after McGlothen had finished his cleaning, saw McGlothen load the weapon with a clip full of bullets. (JA 323-24; JA 220.) The loaded weapon made Cook "very nervous," and he reported the incident to his supervisor, who in turn reported the incident to management. (JA 323-24; JA 220.) The Company eventually fired McGlothen on January 13, 2012, but rehired him shortly after the strike commenced. (JA 323-24; JA 30.)

³⁷ See pp. 23-28, *infra*.

³⁸ See also JA 222 (picture of handgun).

b. On May 4, 2012, one week after Bandy's termination, replacement worker Craig Saltzburger approached returning striker Robert Schalk, who was talking with coworker Darren Schnowski, and began screaming, "What the fuck are you looking at? You got a fucking problem?" while grabbing his crotch. (JA 323; JA 85-86.) Schalk walked away from Saltzburger and left the facility, where he found Saltzburger waiting for him. (JA 323; JA 86-87.) Saltzburger stepped in front of Schalk and asked Schalk whether he thought Saltzburger was "pretty" and "what [Schalk's] fucking problem was[?]" (JA 323; JA 87.) Schalk told Saltzburger to get away from him and he walked toward his car, but again Saltzburger blocked Schalk's way and demanded "You got a fucking problem? What the fuck are you looking at?" (JA 323; JA 87.) Schalk at this point told Saltzburger that they should go upstairs and talk to management. (JA 323; JA 87.)

Schalk and Saltzburger reentered the facility and, accompanied by Schnowski, found supervisor Phil McBroom. (JA 323; JA 87.) Schnowski told McBroom that he had witnessed the dispute, but McBroom had no interest in Schnowski's input and directed him to leave. (JA 323; JA 87.) McBroom then asked Schalk "[w]hat the fuck do you want me to do[?]" McBroom told Schalk to "fucking grow up" and that, if Schalk wanted him to do something about it, McBroom "would fire . . . both [Schalk and Saltzburger]." (JA 323; JA 88.) Throughout the conversation with McBroom, Saltzburger continued to demand

whether Schalk had “a fucking problem” and what “the fuck [Schalk was] looking at.” (JA 323; JA 88.)

Later, Schalk contacted Human Resources Manager Kristy Riley about the incident, but she did not return his call. Schalk persisted and contacted Plant Manager Bill Hebert, at which point the Company finally agreed to investigate. Riley met with Schalk, who described the confrontation with Saltzburger to her. Riley told Schalk that “when there is more than one person involved, you never get the full story,” and the meeting ended shortly thereafter. (JA 323; JA 89-91.) Schalk never heard back from management about the Company’s investigation. (JA 323; JA 91.) Eventually, Schalk learned through coworkers that Saltzburger had been given a written warning. (JA 323; JA 91.) In October, Schalk resigned owing to what he considered a “hostile work environment.” (JA 323; JA 99.)

c. Supervisor Everett Orey called a staff meeting on October 12, in order to discuss and clarify the different responsibilities of the melding and casting departments. (JA 323; JA 105-06.) Sam Harroun—the same replacement worker who had witnessed the April 25 incident involving Bandy and Braafhart—began to argue with John Dinkman, also a replacement worker, over which department was responsible for maintaining an appropriate temperature in the “holder.” (JA 323; JA 109-10.) After Dinkman contradicted Harroun, Harroun turned to him and threatened “I’m going to take you out back and beat your ass.” (JA 323; JA 110.)

Supervisor Orey intervened by saying, “Hey, that’s enough.” Harroun was never disciplined for his outburst. (JA 323; JA 110.)

* * *

In its own way, each of these three incidents represents a severe threat to the safety of the Company’s employees. By bringing a loaded weapon to work with him, McGlothen caused his fellow employees to fear for their lives, as evinced by the employee who reported his encounter with McGlothen. (JA 220.) Saltzburger subjected Schalk to an extended bout of menacing, repeatedly uttering threatening words while pursuing Schalk and blocking his attempts to escape. And in the heat of an argument, Harroun—who is a physically imposing man³⁹—made a direct physical threat to his coworker, telling him that he would take him outside and “beat [his] ass.” The common thread among these incidents is that they all represent severe violations of the Company’s anti-violence policy, they were all committed by replacement workers, and each of these replacement workers was allowed to continue working for the Company.⁴⁰

The Board correctly found that Bandy’s conduct “was similar to, or even less severe than” the conduct of these three replacement workers. (JA 326.)

³⁹ See JA 130 (“[Sam’s] a pretty big boy, he’ll fill up the whole [forklift] door.”) (testimony of Keith Braafhart).

⁴⁰ Some qualification of this statement is necessary in respect of McGlothen, who was terminated but then rehired shortly thereafter during the strike.

Attention must be paid to context in order to determine the severity of that threat, as the Company itself allows (Br. 41),⁴¹ and that context undermines the Company's depiction of Bandy making a cold-blooded death threat. Although the Board found that Bandy made a so-called "cut-throat gesture," it is unlikely that he literally meant he was "going to cut [Braafhart's] throat."⁴² Bandy's gesture obviously expressed hostility toward Braafhart but did not necessarily communicate a threat of physical violence: Bandy uttered no words indicating that he intended to cause Braafhart physical harm, nor was Bandy holding a knife or any other cutting implement in his hands but, rather, a bottle of milk and some paper plates. In this regard, Harroun—who, like Braafhart, had worked during the strike and was the only disinterested witness to Bandy's gesture—insisted that Bandy's gesture "wasn't any threat at all," (JA 146) by which Harroun presumably meant that Bandy never intended to physically confront Braafhart, who stood six inches taller than Bandy and outweighed him by 100 pounds. Moreover, Bandy essentially retracted his gesture immediately after making it, disclaiming any ill intention and making no move to carry out any threat. Instead, Bandy went to the

⁴¹ See *Wilkie Metal Products*, 333 NLRB 603, 617-18 (2001), *enforced*, 55 Fed. App'x 324 (6th Cir. 2003) (finding union picket sign with "R.I.P." and manager's initials to be a suggestion that "the Company's labor relations are threatening 'the very existence' of the Company and the positions of its managers," rather than a death threat).

⁴² See pp. 31-32, *infra*.

blending office to eat his lunch, where his supervisor eventually found him. (JA 53.)

Against the background of the Company's disciplinary history, the Board reasonably found that the Company had subjected Bandy, a returning striker, to disparate treatment. The Company's disciplinary history indicates that it has continued to employ replacement workers who have made direct physical threats (Harroun), persistently harassed and menaced their coworkers (Saltzburger), and even brought a loaded weapon to work (McGlothen). Bandy did none of these things. When the Company nonetheless discharged him, on the basis of an ambiguous gesture, it was applying its workrules more strictly to him than to replacement workers. This kind of disparate treatment vis-à-vis replacement workers justifiably supported the Board's finding that the Company's discharge of Bandy was motivated by union animus.⁴³

* * *

On the basis of these three findings—the no-strike pledge, the suspicious timing of Bandy's discharge, and the disparate application of the Company's disciplinary policy—the Board reasonably concluded that the General Counsel had successfully carried its burden of showing that the Company harbored animus

⁴³ See *Rockline Indus., Inc.*, 412 F.3d 962, 968-70 (8th Cir. 2005) (holding that disparate treatment of pro- and antiunion employees supports Board's finding of animus); *Berbiglia, Inc. v. NLRB*, 602 F.2d 839, 844 (8th Cir. 1979) (similar).

toward its employees' strike activities and that this animus had played a substantial or motivating role in its decision to discharge Bandy. (JA 324-25.)

D. Substantial Evidence Supports the Board's Finding that the Company Failed To Carry Its Burden of Demonstrating that It Would Have Discharged Bandy Even If It Had Not Harbored Union Animus

After having found that the General Counsel had made his initial showing that Bandy's union activities were a motivating factor in his discharge, the Board proceeded to consider whether the Company had proven its affirmative defense under *Wright Line*. In support of that defense, the Company contended that it would have discharged Bandy pursuant to its "Zero-Tolerance" policy regardless of his union activities.

Substantial evidence supports the Board's rejection of that defense. (JA 325-26.) The Company claims that Bandy's conduct warranted discharge because it resembled the conduct of two other employees who were terminated under its anti-violence policy. First, Ed Fountain told Human Resources Manager Kristy Riley that he would come to her office and beat her with a baseball bat. (JA 164.) Second, Roosevelt Smith told his supervisor that he would shoot him in the gut with a weapon he had in his car so "that [the supervisor] would have to shit in a bag for the rest of his life." (JA 162-63.)

The Company's attempt (Br. 42) to treat Bandy's gesture as an imminent mortal threat, on par with the threats made by Fountain and Smith, is implausible.

The threats made by Fountain and Smith are so vivid and immediate that they jump off the page. By contrast, Bandy made an ambiguous gesture with his thumb. The Board was able to readily conclude that Bandy's conduct was not like that of Fountain or Smith, and that the Company had not carried its burden of showing that Bandy's gesture would have resulted in his immediate termination had the Company applied its disciplinary policy in an even-handed manner.⁴⁴

The claimed seriousness of Bandy's threat (Br. 35-37, 42) is belied by the reactions of all the participants in the events of April 25. Eyewitness Sam Harroun—the one disinterested witness present—believed Bandy's gesture was not “any threat at all” and chuckled after observing the interaction between Bandy and Braafhart. (JA 139, 146.) And after the Company suspended Bandy, it allowed Bandy to collect his things and exit the facility unescorted (JA 57), thereby

⁴⁴ The Company incorrectly accuses (Br. 33) the Board of “dismiss[ing] the ALJ's credibility findings and reasoning.” In fact, the Board accepted all of the judge's credibility determinations. When the Board reversed the judge, it reversed his legal conclusion that the Company had reasonably construed Bandy's gesture as the kind of threat that warranted immediate discharge under the Company's uniformly enforced “Zero-Tolerance” policy. Reversing the judge in this manner—with respect to an issue lying within the Board's special expertise, *viz.* evaluating the consistency with which the Company applied its putatively uniform workrules—is precisely something the Act empowers the Board to do. *See Local 702, IBEW v. NLRB*, 215 F.3d 11, 15 (D.C. Cir. 2000) (“[S]ince the Board is the agency entrusted by Congress with the responsibility for making findings under the statute, it is not precluded from reaching a result contrary to that of the [judge] when there is substantial evidence in support of each result, and is free to substitute its judgment for the [judge's].”) (internal quotation marks omitted).

demonstrating that it also did not consider Bandy to be a serious threat to Braafhart.⁴⁵ Not even Braafhart seemed to believe that Bandy's gesture veritably threatened physical violence: the record is devoid of any evidence that Braafhart feared Bandy or believed Bandy would actually assault him.

The Company unconvincingly argues (Br. 35-37) that Bandy's cut-throat gesture necessarily meant that he was "going to cut [Braafhart's] throat." (JA 132.) Although under rare circumstances that gesture can communicate an intention to literally cut someone's throat with a knife, in the modern workplace a cut-throat gesture is most commonly used in a metaphorical manner and signifies a non-physical threat. This was the case in *Bohemia, Inc.*, in which an employee interpreted a throat-slashing gesture "as indicating that he was close to being fired,"⁴⁶ as well as in *Joseph Victori Wines*, a case cited (Br. 36) by the Company: when a supervisor interrogated employees to determine who had signed authorization cards, he used a throat-cutting gesture to threaten them with termination; there was no suggestion in that decision that the supervisor intended

⁴⁵ By contrast, when handling the threat made by Roosevelt Smith toward his supervisor, the Company posted security guards outside the home of the supervisor, to ensure his safety and that of his family. (JA 185-86.)

⁴⁶ *Bohemia, Inc.*, 266 NLRB 761, 765 (1983).

to slit his employees' throats.⁴⁷ In short, in neither of these cases did the Board find that the “cut-throat” gesture literally communicated a physical threat, much less a specific intent to slash someone’s throat. By contrast, additional aggravating circumstances were present in *General Electric Co.*, *SNE Enterprises*, and *Acme Die Casting* that made a real threat of physical violence plausible: in *General Electric*, the throat-slashing gestures were made by members of an angry mob wielding clubs and chasing after their supervisors⁴⁸; in *SNE Enterprises*, the employee made the throat-slashing gesture with a razor in his hand while telling his female coworker he “could do [her] in like this”⁴⁹; and in *Acme Die Casting*, the employee flashed a Latin gang sign, told his supervisor “I am going to make a move on you,” and later confirmed to his manager that he had intended to threaten his supervisor.⁵⁰

The Board reasonably concluded that Bandy’s gesture bore little resemblance to the vivid, mortal threats made by Fountain and Smith.

⁴⁷ See *Joseph Victori Wines, Inc.*, 294 NLRB 469, 473 (1989). See also *id.* at 473-75 (supervisor followed through on throat-slashing threat by laying employees off).

⁴⁸ 183 NLRB 1225, 1227-28 (1970).

⁴⁹ 1997 WL 34979545 (Dichter, 1997), at *2.

⁵⁰ *Acme Die Casting*, 309 NLRB 1085, 1113-16 (1992). See also *id.* at 1114 (in response to question whether employee had threatened his supervisor, “[a]ll three witnesses—including [the employee]—agree that [the employee] answered ‘Yes’”).

Accordingly, substantial evidence supports the Board’s finding that the Company failed to prove that it would have discharged Bandy regardless of his protected union activities.

E. In its Analysis, the Board’s Correctly Applied the *Wright Line* Framework

The *Wright Line* framework, which has been approved by the Supreme Court as well as this Court, requires that the General Counsel initially show that an employee’s protected activity was a motivating factor in the employer’s adverse employment decision.⁵¹ As the Board observed in its Decision (JA 324 n.7), there is no requirement in *Wright Line* that “the General Counsel further demonstrate some additional, undefined ‘nexus’ between the employee’s protected activity and the adverse action.”⁵² No mention of such a “nexus” is to be found in the *Wright Line* decision or in the Supreme Court’s decision approving the *Wright Line* framework.

In any event, the Company’s objection (Br. 29-32) is misplaced. As the Board noted (JA 325 n.11), the Company demonstrated particularized animus toward Bandy’s participation in the strike when it required him to sign the no-

⁵¹ *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), approved by *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 397-98, 400-03 (1983). See also *United Exposition Serv. Co. v. NLRB*, 945 F.2d 1057, 1059-60 (8th Cir. 1991) (approving *Wright Line*).

⁵² Citing *Libertyville Toyota*, 360 NLRB No. 141 (2014), slip op. at 4 n.10.

strike pledge in order to return to work (JA 218). Thus, even if the Company’s “nexus” requirement had some foundation in the *Wright Line* decision, the no-strike pledge would furnish that “nexus” and the Board’s finding of a Section 8(a)(3) violation would still be supported by substantial evidence in the record.⁵³

⁵³ See, e.g., *Concepts & Designs, Inc. v. NLRB*, 101 F.3d 1243, 1245 (8th Cir. 1996) (affirming Board order because, despite incorrect statement of law, *Wright Line* had been properly applied).

CONCLUSION

The Court respectfully requests that the Court enter a judgment denying the Company's petition for review and enforcing the Board's order in full.

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December 2014
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**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

NICHOLS ALUMINUM, LLC,)	
)	
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)	Nos. 14-3001,
v.)	14-3202
)	
NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent/Cross-Petitioner)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 8,058 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

COMPLIANCE WITH VIRUS SCAN REQUIREMENTS

Board counsel certifies that the foregoing document has been scanned for viruses and is virus-free.

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Dated at Washington, DC
this 10th day of December 2014

**UNITED STATES COURT OF APPEALS
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CERTIFICATE OF SERVICE

I certify that on December 10, 2014, I electronically filed the foregoing document 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 also certify that the foregoing document was served on all parties or their counsel of record through the CM/ECF system, as all counsel are registered users.

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Dated at Washington, D.C.
this 10th day of December 2014