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

BIG RIDGE, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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

Nos. 15-1046 & 15-1103

BIG RIDGE, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

The jurisdictional statement of Big Ridge, Inc. (“BRI”) is not complete and correct. This case is before the Court on BRI’s petition to review, and the cross-application of the National Labor Relations Board (the “Board”) to enforce, the Board’s Order against BRI, finding that it violated Section 8(a)(3) and (1) of the National Labor Relations Act (29 U.S.C. § 151, 158(a)(3) and (1)) (“the Act”). The Board’s Order issued on December 16, 2014, and is reported at 361 NLRB

No. 149. (JA 1278-81.)¹ The Board had subject matter jurisdiction over the proceeding under Section 10(a) of the Act (29 U.S.C. § 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board's Order is final with respect to all parties.

BRI filed its petition for review on January 12, 2015, and the Board cross-applied for enforcement on January 16. Both filings were timely, as the Act places no time limitation on such filings. The Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), because the underlying unfair labor practices were committed in Illinois.

STATEMENT OF ISSUES

- I. Whether the Board properly considered this case anew and resolved the merits of the unfair-labor-practice allegations.
- II. Whether the Board is entitled to summary enforcement of the uncontested violations of Section 8(a)(1) of the Act, including several threats of job loss and mine closure, and a promise of benefits.
- III. Whether substantial evidence supports the Board's finding that BRI violated Section 8(a)(3) and (1) of the Act by discharging employee Wade Waller because of his union support.

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

STATEMENT OF THE CASE

The case before the Court is the Board's December 16, 2014 Decision and Order, which incorporates by reference, and as modified, the Board's 2012 Decision and Order.² (JA 1278-81, 1-30.) The Board found that the Company committed numerous unfair labor practices both during and after the United Mineworkers of America ("UMWA") successfully campaigned to become the exclusive bargaining representative of a unit of BRI's employees.

Before this Court, BRI contends that the Board lacked jurisdiction to issue its 2014 Decision and Order, and with regard to the unfair labor practices challenges only the Board's finding that the Company unlawfully discharged employee Wade Waller because of his union support. If the Court rejects BRI's challenge to the validity of the Board's Order, and upholds the Board's finding regarding Waller's discharge, the Order is entitled to enforcement in full.

I. THE BOARD'S FINDINGS OF FACT

A. Company Operations

BRI, a subsidiary of Peabody Energy, operates the Willow Lake coal mine in Equality, Illinois. It employs approximately 440 production and maintenance workers. (JA 2; 56-58, 1075.) Underground employees are assigned to crews;

² Because of this express incorporation by reference, the citations in this brief are to both the Board's 2014 Decision and Order and the Board's earlier 2012 Decision and Order.

each crew is divided into four units. (JA 12, 16, 19; 145-46, 275, 439, 645, 651.) A unit is supervised by a shift leader and production supervisor; the production supervisor reports to the mine manager overseeing the crew. (JA 12, 16, 19; 305, 398-99, 463, 465, 488, 651-52.)

Willow Lake is headed by Vice President of Underground Operations Tom Benner, Operations Manager John Schmidt, and Group Executive Charles Meintjes. (JA 20-21; 724.) Human Resources Manager Robert Gossman is responsible for issuing employee discipline upon Schmidt's approval and, in the case of termination, Benner's approval. (JA 23 & n.44; 140-41.)

B. BRI Tolerates Verbal Threats and Physical Confrontations

Heated arguments and threats of physical harm occur often at Willow Lake, and employees use profanity and vulgar language daily. (JA 25-26; 83-84, 89-90, 99-102, 112-13, 131, 265, 270, 367, 407, 419, 505-06, 633, 706-07.) Since Peabody Energy acquired Willow Lake, BRI never prohibited or discharged employees for such conduct absent any significant physical contact. (JA 25-26 & n.48; 74, 109-12, 125-30, 216, 270, 298, 349-56, 454-58, 497-500, 507, 667-68.)

For example:

- In 2005, employee Vaughan threatened other employees, stating he had a 9mm gun in his truck that he would get if necessary. BRI promoted him to production supervisor one month later. (JA 26 n.48; 408-10, 416-19.)

- Around February 2010, employee Horton told employee Lane to put on a reflective vest. When Lane refused and Horton insisted, Lane said he would shoot Horton if he had his gun. Lane admitted threatening to shoot Horton, but was never disciplined. (JA 25; 448, 452-62, 497-502.)
- In May 2011, employees Tadlock and Crissup got into a work-related argument. Tadlock called Crissup on an emergency phone to ask about coal tonnage; Crissup told him not to call on that phone and hung up. Tadlock phoned again and, following mutual cursing, Crissup called Tadlock a “fucking scab.” Forty-five minutes later, in front of a production supervisor, Tadlock threatened to “catch” Crissup off of company property and “beat [his] guts out.” No discipline issued. (JA 25 & n.46; 107-12, 115, 349-56, 365-66, 368-69, 371-72.)
- In July 2011, Maintenance Supervisor Hilliard threatened to fight Production Supervisor Stephenson. Hilliard yelled at Stephenson about a work-related issue in front of Mine Manager Hughes. Stephenson told Hughes that he did not “have to put up with this.” Hilliard approached them and said, “Don’t talk behind my Goddamn back. I’ll kick your fucking ass. I’m going to quit here one of these days, and when I do, I’m going to come and look you up, son.” Stephenson replied, “Well, I’m not fucking hard to find,” and told Hughes, “I have two witnesses that heard him threaten me.” Hilliard responded, “That’s not a threat; that’s a promise. If you want to walk around the corner, we can settle this now.” Neither was disciplined. (JA 25-26 & n.47; 125-30.)

Even when employees and supervisors engaged in physical confrontations, BRI either did not discipline them at all or merely issued three-day suspensions. In 2007, Manager Ward called Manager Francescon a “suck ass” and Francescon threw Ward to the floor; neither was disciplined. In March 2011, BRI suspended employee Bryan for grabbing another employee’s collar; in July 2011, it likewise

suspended employee Ashby for shoving another employee. (JA 26 & n.48; 75-76, 81-82, 207-14, 267-69, 880-81.)

C. UMWA Begins Organizing; BRI Conducts an Aggressive Antiunion Campaign

Around March 3, 2011,³ UMWA began organizing at Willow Lake to represent the production and maintenance employees. (JA 2; 60, 67-68.) Within a month, 93 percent of employees had signed authorization cards. (JA 2; 1075.) On April 7, UMWA officials met with Managers Schmidt and Gossman and requested voluntary recognition, which Gossman denied. The next day, UMWA petitioned the Board for an election, which was set for May 19-20. (JA 2; 57-58, 62, 218, 708, 716.)

In response, BRI began a vigorous antiunion campaign. (JA 2; 85, 138, 142, 151, 203-04, 220-21, 397, 483, 614, 661, 664, 679, 688, 692-705, 821, 885, 953, 1037.) It held captive audience meetings with employees, in which Vice President Benner and other company officials discussed the benefits of being union-free and presented films and slideshows indicating that nearby mines had closed following UMWA certification. (JA 2, 13, 14 n.24 & n.25; 220-26, 397, 605, 661-62, 664, 678-79, 689-90, 692-705, 953, SA6-7.) BRI distributed antiunion flyers, mailed letters and videotapes to employees' homes, and offered antiunion stickers. (JA 2;

³ All dates are in 2011, unless otherwise stated.

85, 203-04, 220-21, 605-15, 1037.) It conducted three straw polls to gauge employees' union support. (JA 2; 142-45, 841-42, 857, 869-70.) Manager Gossman gave managers lists with employee names and asked them to determine how each employee would likely vote; the managers, in turn, asked the production supervisors how employees might vote. (JA 2; 143-45, 151-55, 464-65, 466, 841-42, 857, 869-70.) Finally, BRI instructed supervisors to meet one-on-one with employees and encourage them to vote "NO." (JA 2, 12; 473-83, 495, 885.)

D. Supervisors Threaten Employees With Mine Closure and Job Loss If UMWA Wins the Election

Despite company-conducted meetings explaining permissible campaign conduct (JA 2; 473-74, 482, 885), supervisors threatened employees with mine closure and job loss if they chose union representation, and promised benefits if they opposed UMWA.

In mid-April, Production Supervisor Henderson threatened employee Gibby, an open union supporter: "If you vote the [UMWA] in, the mine will close. It will shut the mine down." Gibby replied that it was better to shut the mine down than to work as a "scab." (JA 12-13; 430-33, 437-38.)

Around late April, Production Supervisor Bowlin approached employee Frailey, whom BRI believed was a union supporter, and warned that BRI would close the mine if employees voted for UMWA. When Frailey questioned how he

knew that, Bowlin said he had seen it happen before and reiterated that if the Union won, the mine would shut down within a year. (JA 19; 440-42, 683.)

In early May, as Compliance Supervisor Clarida and employee Kirkman accompanied a Mine Safety and Health Administration inspector underground, Kirkman opined that the pro-union graffiti underground was unnecessary because UMWA was going to win. Clarida replied that if so, BRI would close the mine. (JA 19-20; 262-63.)

In mid-May, Production Supervisor Hendricks asked employee Gibbons, an open union advocate, if he planned to vote for UMWA. When Gibbons said yes, Hendricks replied, "Well, you know what they're saying . . . you might be voting your job away." Gibbons replied, "[He'd] as soon shut the damn doors on the place because [BRI had] been screwing [employees] ever since [they've] been there." (JA 20; 230-32, 235.)

Days before the election, Group Executive Meintjes and Superintendent Hood met with employee Hooven, an outspoken union advocate who sought this meeting to talk about UMWA. Meintjes asked Hooven why he was pronion. Hooven said that if Meintjes had been treated the way Hooven had been, Meintjes would support it too. Meintjes explained that BRI needed more employees who could repair coal haulers. Hooven admitted that he did not go to maintenance school. Meintjes stated that if Willow Lake was not unionized, he could put

Hooven through school, but could not help him if UMWA won. (JA 16, 20-21; 373-76, 385, 387-93.)

Production Supervisor Henderson asked employee Shepherd why he thought UMWA would help employees. When Shepherd replied that it would create a happier workforce and safer mine, Henderson said that, based on everything he heard, if employees voted for UMWA, the mine would close. (JA 14-15; 488, 493-96.) Later that day, as Henderson's crew ate dinner, Henderson warned that, if UMWA won, "[T]his place is done, they're going to shut it down." (JA 15; 493-96.)

E. Employees Waller and Koerner Disagree Over Dumping Coal into the Feeder

Wade Waller, a 54-year-old coal miner with approximately 28 years of experience, worked as a ram car driver for BRI since 2004. He transported coal from a miner-machine, which strips coal from the walls, to the feeder, which dumps the coal onto a belt. (JA 3; 93, 146-47, 275-77, 303-04.) He was hard-working, dependable, well-liked, and usually worked on his days off. (JA 25; 132-33, 137, 157-59, 233, 275-76, 340, 404, 626, 654.) Waller openly supported UMWA, wearing union paraphernalia, including stickers on his hardhat, and singing an anti-"scab" song. (JA 3 & n.5, 24; 64-70, 120, 234, 265, 271, 276-81, 310-11, 339, 385-86, 406, 411, 415, 598, 821, 1074.)

Ronald Koerner began working for BRI in April 2011 and occasionally served as a feeder-watcher. (JA 3; 283-87, 537.) Feeder-watchers direct traffic when ram cars bring coal to the feeder. They use helmet lights, radios, and horns to “flag,” or communicate with, ram car drivers. Turning the helmet light sideways signals the driver to “stop” whatever he is doing; if someone is in the approach to the feeder, the feeder-watcher is supposed to sound an audible warning alarm, or horn. (JA 26 n.50; 103-04,134-35, 283-87, 517, 552, 935, 946.) Hooven had previously warned Koerner that some drivers would continue dumping coal even after they had been flagged. (JA 27; 283-85, 543-44.)

On May 20, Waller got into a disagreement with Koerner regarding coal-dumping at the feeder. (JA 23-27 & n.53, 28; 283-87, 318, 321.) Waller parked his ram car on one side of the feeder and began dumping coal; another car was already parked and dumping coal on the other side. Koerner stood at the front of the feeder, 20-40 feet away, safely out of the path of both cars. (JA 26-27; 136, 286-87, 541-42.) Koerner “flagged” Waller with his helmet light by turning his head sideways. Waller stopped dumping coal and asked Koerner, by radio, what he wanted. Koerner told Waller to stop dumping because he was worried the feeder would “gob out,” or stop running. According to Waller, he assured Koerner that the feeder was not going to “gob out” and that two cars could dump coal simultaneously. According to Koerner, Waller said that he would not stop no

matter how many times Koerner flagged him. (JA 26-27; 199-200, 517-18.)

Waller finished dumping his coal and returned to the miner-machine. (JA 23-27 & n.53; 95, 283-87, 318-23.) There were no witnesses to this exchange.

(JA 24 n.45.)

No one was in the approach to the feeder when Koerner flagged Waller. Koerner never blew his horn and he admitted that Waller's ram car was stopped and dumping coal. (JA 24 n.45, 26 n.50, 27 & n.53; 486, 541-48, 552-54, 593.)

Shortly after, Koerner complained to Shift Leader Davis, who supervised the unit that night; Davis reported it a few days later. (JA 26; 523, 634-42.)

F. UMWA Wins the Election; Supervisor Henderson Continues To Threaten Employees with Mine Closure and Job Loss

On May 20, the Union won the representation election, 219 to 206. (JA 2; 717.) After the votes were tallied, Production Supervisor Henderson posted on his Facebook page: "how can you bee [sic] so blind to vote the damn umwa in they shut every [mine] down that they represent and you think Peabody is going to stand for them . . . excuse me while I go vomit and [] start sending out resumes." (JA 15-16; 467-69, 882-84.) Employee Craig responded: "Ill puke arm in arm with ya." Employee Waller's wife saw these posts and commented: "IM THANKFUK N U CAN DELETE ME IF U WANT TO! IM PROUD OF THE MEN THAT VOTED N STRUTTED THEIR SHIRT!" (JA 16; 288, 883-84.)

Later, Supervisor Henderson approached employee Shepherd, who was trying on his UMWA hat, which he had kept hidden. Henderson yelled, “I hope you’re fucking happy that you just voted all these people out of their fucking jobs.” Believing Henderson wanted a fight, Shepherd walked away. (JA 16; 434-35, 489-91.)

The following day, Shift Leader Pezzoni asked employee Hooven if he had ever intimidated or been intimidated by anyone. Hooven said he had not, and that they should put the election behind them. Supervisor Henderson approached them, pointed at Hooven, and said, “I hope you’re happy, you just put us all on the G.D. unemployment line . . . That’s fine because Peabody knows. They’ve got a list.” Henderson told Hooven that BRI knew who supported the Union. (JA 16-17; 377-79, 385, 393-94.) Employee Wise overheard them arguing and intervened, asking Henderson why he was being such a sore loser. Henderson said, “We are all going to be unemployed.” (JA 17-18; 118-24, 378-79.)

G. Waller Confronts Craig About His Facebook Post

On May 21, Waller confronted Craig in the picnic area and told Craig he did not appreciate what Craig wrote about him on Facebook. Craig replied that the post was not about him. Waller asked Craig not to post any similar statements. They both said “fuck you”; Waller walked away. Moments later, Waller returned

and offered to “meet in the parking lot” if Craig wanted a “piece of this old man.” (JA 24, 27; 289-91,873,875.)

Later, Waller was instructed to report to Manager Lawrence. Lawrence asked him about his confrontation with Craig and whether Waller ever threatened to run over someone with a ram car. (JA 27; 69-73, 291-93, 579.) Waller admitted the argument with Craig, but denied he ever threatened to run over anyone or would ever do that. Lawrence told Waller to forget it and to leave Craig alone. Waller asked if he could work additional shifts; Lawrence agreed. (JA 26; 291-93, 575-80, 588-89.) Waller worked on May 22-24 and his scheduled days off, May 25-26. (JA 27; 69-73, 193-95, 293, 815.)

H. One Week After the Election, BRI Discharges Waller

On May 21, BRI began collecting employee and supervisor statements about alleged election-related misconduct during the campaign, preparing to file objections challenging UMWA’s victory. During that time, Manager Gossman also collected eight written statements alleging misconduct by Waller and anonymous threats and acts of vandalism. (JA 3, 23; 189, 716, 871-77, 879, 1038-43.)

On May 21, Koerner told Mine Manager Lawrence that someone scratched “scab” on his truck, that he received anonymous threatening phone calls, and discussed his disagreement with Waller. (JA 23, 26; 590, 872.) Lawrence wrote a

statement noting Koerner's complaints and left it in Gossman's mailbox for him to read on Monday. (JA 27; 575-80, 588-89, 872.) Koerner also prepared a statement recounting the threatening calls and scratched truck, but did not reference Waller. (JA 23; 879.) Craig and another employee wrote about Craig's confrontation with Waller; likewise, Manager Gossman wrote his own statement describing that incident, after hearing about it from Koerner, who witnessed it. (JA 23; 873, 875, 877.) Three statements alleged that Waller disliked "scabs," including employee Kirk's statement, which claimed that Waller indirectly threatened him by saying he would "pick something up and hit that scab motherfucker." (JA 23; 871, 874, 876.) Of those eight statements, only one sentence (in Manager Lawrence's statement) references the Waller-Koerner dispute: "Waller also told [Koerner] that he could flag him all he wants and he would not stop." (JA 26; 872.)

On May 26, Gossman reviewed the eight statements with Vice President Benner. Benner authorized Gossman to discharge Waller, instructing him first to interview Waller about those allegations. (JA 22-23 & n.44; 160, 162-67, 594-98, 600, 603, 616.) Prior to meeting with Waller, Gossman drafted a termination letter based on those statements. (JA 24; 164, 1023.)

On May 27, Waller reported to work and was escorted to Gossman's office. (JA 24; 294-98.) Gossman said he heard Waller threatened some employees, and

asked about Waller's altercation with Craig. Waller admitted the argument with Craig and explained the incident, and said he already met with Lawrence about it. (JA 24; 164-65, 294-96, 878.) Gossman asked if Waller threatened to run over an employee if the employee kept flagging him. Waller emphatically denied it, saying he would never do that. (JA 24 & n.45; 334-35, 878.) Waller also denied Gossman's claim that Waller yelled "fuck all you fucking scabs" in the bathhouse. (JA 24; 294-96.) Gossman told Waller there were many witnesses to these incidents and handed Waller the pre-written termination letter, which states, in relevant part:

There have been several reports of certain employees threatening or intimidating other employees in the last several weeks. As you are aware this type of behavior is prohibited by Company Policy. During our investigation of the allegations you were implicated in the type of behavior.

(JA 24 & n.45; 160, 163-64, 219, 294-98, 331-38, 684-87, 878, 1023.) Waller said he could not believe what was happening, retrieved his belongings, and left the premises. (JA 24; 294-98, 686, 878.)

Before his discharge, Waller had never been called into the office to discuss any misconduct or disciplined for any infraction. (JA 25; 157, 290, 345.)

II. THE PRIOR PROCEEDINGS

A. The Initial Board Proceeding

On April 8, 2011, the UMWA petitioned the Board for a secret-ballot election, which was held on May 19 and 20. On May 26, BRI filed objections,

seeking a rerun election. (JA 2 & n.1, 3; 709-12.) Acting on unfair-labor-practice charges filed by UMWA against BRI (JA 2; 713-15), the Board's Acting General Counsel issued a complaint, alleging, as relevant here, numerous violations of Section 8(a)(1) and (3) of the Act (29 U.S.C. § 158(a)(1) and (3)). (JA 2, 12, 19, 21-22; 427-30, 716-34, 738-40.) Thereafter, the Board's Regional Director consolidated the cases and directed a hearing.

Following a hearing, the administrative law judge issued a decision and recommended order. The judge first determined that BRI's election objections should be overruled and that UMWA should be certified as employees' exclusive bargaining representative. (JA 3-12, 29.) The judge further found that BRI violated Section 8(a)(1) by threatening employees with mine closure, job loss, and other unspecified reprisals because of their union support and by promising benefits to employees for opposing UMWA. (JA 12-21, 29.) He also found that BRI violated Section 8(a)(3) and (1) by discharging employee Waller because of his union support. (JA 22-29.) Absent exceptions to the Section 8(a)(1) violations, the Board adopted those findings. (JA 1 & n.2.) Upon exceptions filed by BRI and UMWA, the Board (Members Hayes, Griffin, and Block) issued a Decision,

Order, and Certification of Representative, affirming the judge's decision and adopting his recommended Order.⁴ (JA 1-2.)

B. The Prior Proceeding and the Supreme Court's *Noel Canning* Decision

Following the Board's 2012 Decision and Order, BRI petitioned for review and the Board cross-applied to this Court for enforcement of its Order. (Case Nos. 12-3120, 12-3258.) The parties submitted briefs and presented oral argument.

On June 26, 2014, the Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), which held three recess appointments to the Board in January 2012 invalid under the Recess Appointments Clause, including the appointments of Members Griffin and Block. Subsequently, on July 1, 2014, the Board moved this Court to vacate the Board's 2012 Decision and Order, remand the case to the Board for consideration by a properly constituted Board panel, and to expedite issuance of the mandate. *Big Ridge, Inc. v. NLRB*, Case Nos. 12-3120, 12-3258, ECF No. 69, Entry ID 6586839 (NLRB motion).

⁴ In a related action commenced before the Board's Order issued, the Regional Director filed for a preliminary injunction against BRI, under Section 10(j) of the Act (29 U.S.C. § 160(j)), in the Southern District of Illinois. The court granted the requested temporary relief, ordering BRI to cease and desist from its unlawful activity and to reinstate Waller. *Harrell ex rel. NLRB v. Big Ridge, Inc.*, 2012 WL 1553163, at *1, 10-11 (S.D. Ill. 2012). Such preliminary injunctive relief is effective from the date issued by the district court until the Board issues its remedial order. *See Ohr ex rel. NLRB v. Latino Exp., Inc.* 776 F.3d 469, 479-481 (7th Cir. 2015).

The next day, July 2, this Court denied enforcement and vacated the Board's Order. *Big Ridge, Inc. & FTS Int'l Proppants, LLC*, 561 F. App'x 563 (7th Cir. 2014). The Court's order made no reference to the Board's motion filed the day before. The sole basis of the Court's order denying enforcement was that, "in the absence of a lawfully appointed quorum, the Board cannot exercise its powers." *Id.* (quoting *Noel Canning*, 134 S.Ct. 2550, slip op. at 3) (citing *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 678-88 (2010) (holding that two-member quorum of a three-member panel delegated all of the Board's powers could not continue to exercise that delegated authority after the third Board member's appointment expired)). The Court also issued a "Final Judgment" granting the petition for review, vacating the Board's order, and denying the Board's cross-application for enforcement. *Big Ridge, Inc. v. NLRB*, Case Nos. 12-3120, 12-3258, ECF No. 72, Entry ID 6587293 (final judgment).

Also on July 2, the Company filed a one-sentence response to the Board's July 1 motion to vacate, remand, and for expedited mandate. The Company's response stated that it "does not object to the [Board's] request to vacate the Board's order but otherwise opposes the Board's motion." *Big Ridge, Inc. v. NLRB*, Case Nos. 12-3120, 12-3258, ECF No. 71, Entry ID 6598119 (response).

On August 14, 2014, the Court issued an order stating that "the motion to remand is denied." *Big Ridge, Inc. v. NLRB*, Case Nos. 12-3120, 12-3258, ECF

No. 73, Entry ID 6598119 (order). On September 10, 2014, the Court issued a certified copy of the July 2 Final Judgment with mandate. *Big Ridge, Inc. v. NLRB*, Case Nos. 12-3120, 12-3258, ECF No. 77, Entry ID 6604619 (certified copy of final order with mandate).

C. The Board’s Decision and Order after the Supreme Court’s *Noel Canning* Decision

In an October 27, 2014 letter, the Board’s Executive Secretary notified the parties that, in view of the determination that the Board panel that had previously decided the case was not properly constituted, the Board would “consider anew [BRI’s] exceptions, based on the full record, and will issue a decision and order resolving the allegations in the unfair labor practice complaint.” (JA 1274.)⁵ On October 31, BRI filed a letter objecting to any further action by the Board, arguing that the Board lacked jurisdiction over the case because the Court did not remand it. (JA 1275-76.)

On December 16, 2014, the Board (Members Hirozawa, Johnson, and Schiffer) issued its Decision and Order, which incorporates by reference the Board’s 2012 Decision and Order. (JA 1278-81.)

⁵ At that time, the Board was composed of five Senate-confirmed members, having regained a quorum in August 2013. See *The National Labor Relations Board Has Five Senate Confirmed Members*, NLRB Office of Public Affairs (Aug. 12, 2013), <http://www.nlr.gov/news-outreach/news-story/national-labor-relations-board-has-five-senate-confirmed-members>.

The Board first found that it could consider the case anew after the Court denied enforcement because “[t]he clear import of the [C]ourt’s denial of enforcement, along with the Supreme Court’s *Noel Canning* decision, is that no validly constituted Board has ruled on the exceptions to the administrative law judge’s decision, recommended order, and certification of representative.” (JA 1278.) Accordingly, the Board concluded (JA 1278) that the exceptions were “still pending before the Board, and the Board is free to address them.” In so finding, the Board noted (JA 1278-79) that consideration of the case anew was consistent with the treatment by the courts of appeals of other cases in which enforcement was denied for lack of a Board quorum at the time of the original decision.

The Board then considered de novo the judge’s decision and the record in light of the exceptions and briefs. The Board also considered the vacated 2012 Decision and Order and agreed with the rationale set forth therein. Accordingly, the Board affirmed the judge’s rulings, findings, and conclusions, and adopted the judge’s recommended Order to the extent and for the reasons stated in the 2012 Decision and Order, which the Board incorporated by reference. (JA 1279, 1, 29-30.) Additionally, the Board modified the judge’s order by requiring BRI to compensate Waller for any excess Federal and State income taxes he may owe as a

result of receiving a lump sum backpay award, and to submit appropriate documentation to the Social Security Administration. (JA 1279-80 & n.3, 1 n.4.)

The Board's Order requires BRI to cease and desist from its unlawful conduct. Affirmatively, it requires BRI, among other things, to offer Waller full reinstatement to his former job or, if it no longer exists, a substantially equivalent position; expunge Waller's personnel record; make Waller whole for any lost earnings or other benefits; and post a remedial notice. (JA 1279-80.)

SUMMARY OF ARGUMENT

1. The Board properly found that the Court's denial of enforcement of the August 2012 Decision and Order did not prevent the Board from deciding this case anew. In denying enforcement, the Court relied solely on the holding in *Noel Canning* that the Board's recess appointments were invalid and therefore the Board was improperly constituted when it issued the Decision and Order. Interpreting the Court's mandate as permitting further proceedings in these circumstances fully comports with the treatment by the courts of appeals in other cases in which enforcement was denied for lack of a Board quorum, and with principles governing the reasonable and equitable interpretation of mandates. The Board's view is also supported by the decisions of every court, including this one, that have permitted a properly constituted Board to address the merits of the unfair-labor-practice allegations in proceedings after *New Process* and *Noel Canning*. BRI's assertion

that the now properly constituted Board should be precluded from resolving the underlying unfair-labor-practice dispute relies on a litany of distinguishable cases and conflicts with both reasonable and equitable principles governing the interpretation of mandates. Accordingly, the Board properly interpreted the Court's mandate and decided this case anew.

2. Before the Board, BRI did not file exceptions to the Section 8(a)(1) violations found by the administrative law judge, including the findings that BRI threatened employees with mine closure and job loss and unlawfully promised employees benefits if they did not select UMWA as their bargaining representative. Thus, the Board is entitled to summary enforcement of the portions of its Order remedying those uncontested violations.

3. On the contested unfair labor practice, substantial evidence supports the Board's finding that BRI discharged Waller because of his union activities in violation of Section 8(a)(3) and (1) of the Act. As the record evidence amply shows, Waller openly supported UMWA, BRI knew of Waller's union support, it repeatedly demonstrated unlawful animus towards UMWA (as evidenced by the uncontested, unlawful threats made during and after the organizing campaign), and its animus spurred Waller's discharge. And, as the Board found, BRI's continuously shifting justifications for Waller's discharge further demonstrates BRI's unlawful animus. Moreover, BRI failed to prove that it would have

terminated Waller absent his protected activity because, as the credited evidence shows, it never believed Waller threatened to run over another employee. Rather, it seized upon a routine work-dispute, disingenuously characterizing it as a threat and a safety violation, to discharge a vocal union supporter and to bolster its election-objections case against UMWA.

ARGUMENT

I. THE BOARD PROPERLY CONSIDERED THIS CASE ANEW AND RESOLVED THE MERITS OF THE UNFAIR-LABOR-PRACTICE ALLEGATIONS

Taking account of this Court's orders after the Supreme Court's decision in *Noel Canning*, see pp. 17-20 above, the Board in the decision now under review determined that (JA 1278) "[t]he threshold issue is whether, in light of the denial of enforcement, the Board can consider this case anew." Under settled principles, the Board's task was to construe the Court's July 2 order and Final Judgment "in light of the principle that a mandate is to be interpreted reasonably and not in a manner to do injustice." *Bailey v. Henslee*, 309 F.2d 840, 844 (8th Cir. 1962) (per curiam) (quoting *Wilkinson v. Mass Bonding & Ins. Co.*, 16 F.2d 66, 67 (5th Cir. 1926)); accord *NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 225-28 (1947); *United States v. Bell Petroleum Services, Inc.*, 64 F.3d 202, 204 (5th Cir. 1995); *Phillips Petroleum Corp. v. FERC*, 902 F.2d 795, 798 (10th Cir. 1990); *Little v. United States*, 794 F.2d 484, 489 n.3 (9th Cir. 1986). In performing this task, the Board

was mindful of the instruction that “[i]nterpretation of an appellate mandate entails more than examining the language of the court’s judgment in a vacuum.” *Exxon Chem. Patents, Inc. v. Lubrizol Corp.*, 137 F.3d 1475, 1478 (Fed. Cir. 1998).

There is no merit to BRI’s argument (Br. 17-30) that the Court’s order denying enforcement deprived the Board of jurisdiction to decide this case with a properly constituted Board panel. As shown below, the Board properly construed the mandate as permitting it to resolve the unfair-labor-practice allegations. Specifically, it concluded (JA 1278-79) that this Court’s July 2 order and Final Judgment did not resolve the unfair-labor-practice allegations and therefore should not be interpreted as precluding a properly-constituted Board from deciding the unfair labor practice issues for the first time.

It is well established that an appellate mandate is reasonably construed to govern only what “was actually decided.” *Exxon Chem. Patents*, 137 F.3d at 1478. The Court’s July 2 order first states that BRI argued that the Board lacked a quorum at the time it issued its 2012 Decision and Order, and then sets forth the Supreme Court’s holding in *Noel Canning*. Significantly, it concludes:

“As ‘in the absence of a lawfully appointed quorum, the Board cannot exercise its powers,’ we GRANT the petitions for review and VACATE the Board’s orders in both cases. We also DENY the cross-petitions of the Board for enforcement of its orders.”

Big Ridge, Inc. & FTS Int’l Proppants, LLC, 561 F. App’x 563 (7th Cir. 2014)

(quoting *Noel Canning*, 134 S. Ct. 2550, slip op. at 3) (citing *New Process Steel*,

L.P. v. NLRB, 560 U.S. 674, 687-88 (2010)). Thus, the Court denied enforcement because the appointments of three of the Board members in January 2012 were invalid and, therefore, the Board lacked “a lawfully appointed quorum.” *Id.* As such, the Board properly found that “[t]he clear import” of the Court’s decision and the Supreme Court’s decision in *Noel Canning* is that “no validly constituted Board has ruled on the exceptions to the administrative law judge’s decision, recommended order, and certification of representative.” The Board, therefore, concluded that the exceptions are “still pending before the Board, and the Board is free to address them.” (JA 1278.)

Moreover, as the Board explained (JA 1279), neither the Court’s order nor its Final Judgment denying enforcement, was based upon the Court’s resolving the unfair-labor-practice issues raised in the General Counsel’s complaint and litigated in the unfair-labor-practice proceedings. The Court based its denial of enforcement on one ground—the Supreme Court’s *Noel Canning* decision. *Id.* Because the Court denied enforcement only on that ground, the Board reasonably concluded that the Court’s mandate was not intended to preclude further proceedings before the Board conducted by validly appointed members.

The Board’s conclusion is in accord with how other circuits construed similar mandates denying enforcement after *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 686-88 (2010), which set aside orders issued by a two-member Board on

the ground that the two members lacked authority to issue decisions after the term of the third member expired and the Board's membership fell below its quorum requirement. As the Board recognized (JA 1278-79), the decision of the Eighth Circuit in *NLRB v. Whitesell Corp.*, 638 F.3d 883 (2011), which issued during the post-*New Process* period, is the most instructive in calling attention to the difference between a court denying enforcement on the merits and denying enforcement because the panel that issued a decision lacked authority.

In *Whitesell*, the Eighth Circuit relied on the Supreme Court's decision in *New Process* to deny enforcement of an order issued by the improperly constituted two-member Board. 638 F.3d at 888. Subsequently, in reviewing the new final order issued by a validly constituted Board, the Eighth Circuit squarely held that its prior order denying enforcement did not prevent the properly constituted Board from considering the case. *Id.* Responding to virtually the same arguments as BRI makes here, the court explained that its prior denial was based only on the composition of the two-member Board, not the merits of the unfair-labor-practice issues, and that its order denying enforcement "without reference to remand" did "*not* preclude the Board, now properly constituted, from considering this matter anew and issuing its first valid decision." *Id.* at 889 (emphasis added).

Likewise, as the Board observed (JA 1278-79) and the *Whitesell* court discussed, the Second Circuit in *NLRB v. Domsey Trading Corp.*, 383 F. App'x 46,

47 (2d Cir. 2010), when it denied enforcement of a two-member Board order pursuant to *New Process*, “anticipated further proceedings before the Board and that a new petition for enforcement would be filed.” *Whitesell*, 638 F.3d at 889 (noting that after a validly constituted Board panel reconsidered the case, the Second Circuit reviewed the merits of the Board’s decision in *NLRB v. Domsey Trading Corp.*, 636 F.3d 33 (2d Cir. 2011)). In sum, as the Eighth Circuit has explained, where, as here, a court determines that no proper Board quorum has decided the merits, a remand need not be explicitly ordered for the Board to consider the case anew because the court’s mandate is reasonably construed to permit a properly constituted Board to decide the case. *Whitesell*, 638 F.3d at 889.

This Court’s unexplained denial of the Board’s motion to remand—a denial entered on August 14, following the Court’s July 2 issuance of its Final Judgment—does not undermine the Board’s interpretation of the mandate. The Board reasonably relied (JA 1279) on cases holding that no inferential weight should be ascribed to summary denials of post-judgment motions for rehearing or clarification. In this respect, as the Board noted (JA 1278-79), the Eighth Circuit’s decision in *Whitesell* is again instructive. Like this Court, the Eighth Circuit had previously issued a summary denial of a post-decisional motion by the Board for

remand or clarification, but nonetheless read its mandate to allow the Board to decide that case anew.⁶

In contending that the Board's conclusion was incorrect, BRI relies (Br. 23-28) on distinguishable cases. Specifically, it relies on cases in which the court, after considering and ruling on the merits, set aside or enforced a final order issued by a properly constituted Board. *See, e.g., Int'l Union of Mine, Mill & Smelter Workers, Local 15 v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 339-44 (1945) (absent proof of fraud or mistake, the Board is not entitled to have a court-enforced order vacated almost 2 years later so that it can enter a new remedial order that in retrospect it decides is more appropriate); *NLRB v. Lundy Packing Co.*, 81 F.3d 25, 26-27 (4th Cir. 1996) (Board not entitled to continue processing representation case after court explicitly denied enforcement on the merits); *W.L. Miller v. NLRB*, 988 F.2d 834, 837 (8th Cir. 1993) (once court enforces Board order on the merits, Board lacks authority to reopen proceeding to award additional relief); *Service Employees Int'l. Union Local 250 v. NLRB*, 640 F.2d 1042, 1045

⁶ The August 14 order denying the Board's motion to remand is most reasonably construed as the Court's administrative dispensing with an outstanding motion and response, which remained on the docket as the date for issuing the mandate approached but were no longer relevant in light of the July 2 order effectively disposing of the case. *See, e.g., United States v. Lee*, 504 F. App'x 505, 2013 WL 491515 (7th Cir. 2013) (after summarily affirming district court's order in favor of the government, court denied government's pending motion to dismiss the appeal as moot).

(9th Cir. 1981) (Board lacks jurisdiction to adjudicate claim, the merits of which were implicitly rejected by earlier court decision).

Here, by contrast, the Court denied enforcement because the order before the Court was issued by officials that the Court found were improperly appointed. That distinction makes all the difference. A judicial determination that an order had not been issued by a properly constituted tribunal means that the merits of the case have yet to be authoritatively decided. That is exactly how the Board construed the mandate here. And, as noted above, the Eighth Circuit in *Whitesell* agreed with the Board's construction of its similar mandate.⁷

Unable to square its position with *Whitesell*, BRI unconvincingly attacks (Br. 28-30) that decision. It first claims (Br. 28-29) that the *Whitesell* court did not distinguish or address relevant authority such as *Eagle-Picher*, or even Section

⁷ This view is supported by the common-law proposition that “dismissal on a ground not going to the merits was not ordinarily a bar to a subsequent action on the same claim.” *Costello v. United States*, 365 U.S. 265, 285 (1961); accord *Hughes v. United States*, 71 U.S. (4 Wall) 232, 237 (1866) (“In order that a judgment may constitute a bar to another suit, it must be . . . determined on its merits. If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit.”), quoted in *Costello*, 365 U.S. at 286; *Madden v. Perry*, 264 F.2d 169, 175 (7th Cir. 1959) (“At common law a dismissal on a ground other than the merits would not constitute res judicata in a later case.”); *FTC v. Food Town Stores, Inc.*, 547 F.2d 247, 249 (4th Cir. 1977) (“An order has no res judicata significance unless it is a final adjudication of the merits of an issue.”).

10(e) itself. Although *Whitesell* did not explicitly address *Eagle-Picher* and related cases, it was not required to, given that those cases were distinguishable. In addition, those cases were fully presented and briefed to the court (*see NLRB v. Whitesell*, Eighth Cir. Case No. 10-2934, ECF Entry ID 3712382 at *36-38 (employer brief filed 10/12/2010); ECF Entry ID 3723703 at *43-45 (Board brief filed 11/12/2010)) and thus “are to be taken as covered by the court’s decision though not mentioned in the opinion.” *Com. of Pa. v. Brown*, 373 F.2d 771, 777 (3d Cir. 1967) (citing *Bingham v. United States*, 296 U.S. 211, 218-19 (1935)).

Moreover, BRI is factually incorrect in claiming (Br. 29) that the Eighth Circuit omitted to consider Section 10(e) of the Act in its *Whitesell* decision. As the Board noted (JA 1278), *Whitesell* specifically relies on Section 10(e):

In the prior action, the only question presented was whether to enforce the NLRB’s order. Relying on the *New Process* decision, we denied the application for enforcement because the prior NLRB decision, reached while there were only two members of the Board, was invalid. On that issue, our decision is final. *See* 29 U.S.C. Section 160(e).

Whitesell, 638 F.3d at 889.

BRI’s remaining challenge (Br. 29) to *Whitesell* is that it is inconsistent with the Eighth Circuit’s prior panel decision in *W.L. Miller*, 988 F.2d 834 (8th Cir. 1993), and therefore not binding precedent even in the Eighth Circuit. However, *W.L. Miller* is readily distinguishable from *Whitesell* (and the instant case), because it involved a Board order enforced on its merits. *See* above pp. 28-29.

Accordingly, *Whitesell* is inescapably on all fours with this case and stands as precedent in the Eighth Circuit and persuasive authority for this Court.⁸

BRI's primary remaining argument against the Board's authority to decide the case anew (Br. 18-22) is that the so-called "plain text" of Section 10(e) undermines the Board's interpretation of the Court's mandate. BRI's assertion, however, rests on a distinction between denying enforcement and remanding that lacks any basis in the text of Section 10(e). After a court has completed its review of the merits, the plain language of Section 10(e) allows the court to "enter a decree enforcing, modifying and enforcing as so modified or setting aside in whole or in part the order of the Board." 29 U.S.C. § 160(e). In other words, the plain language of the statute makes no provision for a final decree remanding the case to the Board. *See Ford Motor Co. v. NLRB*, 305 U.S. 364, 373 (1939) (explaining that an order to remand is an exercise of a court's equity powers). Thus, a court that strictly adhered to the limited options given by the statute's literal language would never use the word "remand" but instead, would explain that its setting aside of the Board's order was without prejudice to the Board's resuming

⁸ BRI implies (Br. 29-30) that the Second Circuit's *Domsey* decision, cited by the *Whitesell* court and the Board here, is inapposite because it contained language in addition to its denial of enforcement that could be viewed as authorizing future Board proceedings. However, the relevant similarity shared by *Domsey*, *Whitesell*, and this case is that in each initial court decision, the court's denial of enforcement without explicitly providing for a remand did not preclude further action by the Board.

consideration of the case with a properly constituted panel. That, in essence, is what the Eighth Circuit held to be the meaning of its *Whitesell* decree. The same is true here.⁹

Nor is there merit to BRI's argument (Br. 17-20) that the Board's actions are inconsistent with the language of Section 10(e) that "[u]pon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final" 29 U.S.C. § 160(e). Here, as discussed above, pp. 27-28, with respect to *Whitesell*, there is no question that the Court's prior judgment was final with respect to the issue that it decided—that the Board was improperly constituted when it issued the order before the Court. BRI mistakenly construes (Br. 18, 26-28) the Board's interpretation of the Court's mandate as improperly creating an "implied remand" in any decision "not based on the merits of the unfair labor practice findings." But here, the Board reasonably construed the Court's

⁹ BRI also contends (Br. 19-21) that the Board's interpretation of the Court's mandate is "all but eviscerate[d]" by Section 10(e)'s language providing additional evidence to be taken before the Board "if either party applies to the court for leave to adduce additional evidence" (*see* 29 U.S.C. Section 10(e)). But BRI's formalistic argument, which maintains that Congress provided for remand in that one instance and that one instance only, flies in the face of *Ford Motor*. As discussed above, the Supreme Court in that case recognized that a court possesses equitable remand authority apart from any explicit statutory authorization. Thus, the statute's provision for parties to request the taking of additional evidence does not indicate that Congress intended to limit the court's inherent remand authority in other circumstances. Indeed, courts routinely remand to administrative agencies absent a party's request, and for reasons other than the need for adducing additional evidence.

“judgment and decree” itself as contemplating further Board action under the circumstances. In this context, the Court’s “judgment and decree” enabled the Board to continue processing the case after the Court’s mandate relinquished its exclusive jurisdiction.¹⁰ Nothing about the Board’s interpretation is inconsistent with the plain language of Section 10(e) cited above.

The Court should also reject BRI’s construction of the mandate as precluding further Board proceedings because it would result in injustice. *See Bailey v. Henslee*, 309 F.2d at 844 (mandate is to be interpreted reasonably and not to do injustice). Under BRI’s view, the parties—through no fault of their own and unlike every party to have previously come before the Board—would not be entitled to a decision by a properly constituted Board. The Board’s interpretation of the Court’s mandate avoids injustice to the parties and to the employees whose rights are at issue. *See Laclede Gas Co. v. NLRB*, 421 F.2d 610, 617 (8th Cir. 1970) (“[t]he interest of the . . . employees in having the issue resolved on an appropriate theory of law is an important one”); *Cf. NLRB v. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263-66 (1969) (consequences of Board’s internal delay should not fall on victims of unfair labor practices). As this Court recognized under comparable circumstances, “[t]he parties are entitled to a decision on the merits of

¹⁰ In contrast, in *Ford Motor*, 305 U.S. at 371, the Court held that the Board could not resume processing of a case while exclusive jurisdiction remained in the court of appeals.

their case by a properly constituted panel of the NLRB prior to appellate review.”

New Process Steel, L.P. v. NLRB, 08-3517, 2010 WL 4137308, at *1 (7th Cir. Aug. 3, 2010) (remanding *New Process* following the Supreme Court’s decision).

The Court’s citation to *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010), in its decision denying enforcement (561 F. App’x 563) strongly suggests that this Court contemplated for this case to be treated similarly to the cases that were denied enforcement following *New Process*. All the *New Process* decisions of this Court, as well as numerous decisions of other circuit courts, disposed of those cases in a manner that permitted a properly constituted Board to decide anew the unfair-labor-practice cases that were pending in court when *New Process* issued, including cases that had been argued and even decided.¹¹ That result—

¹¹ See, e.g., *Allied Mech. Servs. v. NLRB*, Case Nos. 08-1213, 08-1240 (D.C. Cir. Sept. 20, 2010), on remand 356 NLRB No. 1 (2010), *enforced*, 668 F.3d 758 (D.C. Cir. 2012); *Northeastern Land Servs., Ltd. v. NLRB*, Case No. 08-1878 (1st Cir. July 30, 2010), on remand 355 NLRB 1154 (2010), *enforced*, 645 F.3d 475 (1st Cir. 2011); *County Waste of Ulster, LLC v. NLRB*, Case Nos. 09-1038, 09-1646 (2d Cir. July 1, 2010), on remand 355 NLRB 413 (2010), *enforced*, 665 F.3d 48 (2d Cir. 2012); *J.S. Carambola v. NLRB*, Case Nos. 08-4729, 09-1035 (3d Cir. July 1, 2010), on remand 356 NLRB No. 23 (2010), *enforced*, 457 F. App’x 145 (3d Cir. 2012); *Diversified Enters., Inc. v. NLRB*, Case Nos. 09-1464, 09-1537 (4th Cir. July 23, 2010), ECF No. 66, on remand 355 NLRB 492 (2010), *enforced*, 438 F. App’x 244 (4th Cir. 2011); *Bentonite Performance Mineral, LLC v. NLRB*, Case No. 09-60034 (5th Cir. June 22, 2010), on remand 355 NLRB 582 (2010), *enforced*, 456 F. App’x 2 (D.C. Cir. 2012); *Galicks, Inc. v. NLRB*, Case Nos. 09-1972, 09-2141 (6th Cir., June 24, 2010), ECF No. 80, on remand 355 NLRB 366 (2010), *enforced*, 671 F.3d 602 (6th Cir. 2012); *NLRB v. Spurlino Materials, LLC*, Case Nos. 09-2426, 09-2468 (7th Cir. July 8, 2010), ECF No. 28, on remand 355 NLRB 409, *enforced*, 645 F.3d 870 (7th Cir. 2011); *Leiferman Enters., LLC v.*

unlike the result BRI seeks here—is consistent with the general rule that an appellate court’s finding of legal error does not “foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge.” *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 145 (1940); accord *S. Prairie Constr. Co. v. Local No. 627, Int’l Union of Operating Eng’rs*, 425 U.S. 800, 803-06 (1976); *ICC v. Clyde S.S. Co.*, 181 U.S. 29, 32-33 (1901).

Similarly, after *Noel Canning*, all of the circuit courts have found it appropriate for a properly constituted Board to resolve cases that were pending in court when *Noel Canning* issued.¹² For example, in *Contemporary Cars, Inc. v. NLRB*, Case

NLRB, Case Nos. 09-3721, 09-3905 (8th Cir. July 8, 2010), on remand 355 NLRB 364 (2010), *enforced*, 649 F.3d 873 (8th Cir. 2011); *NLRB v. Legacy Health Sys.*, Case No. 09-73383 (9th Cir., July 9, 2010), ECF No. 19, on remand 355 NLRB 408 (2010), *enforced*, 662 F.3d 1124 (9th Cir. 2011); *Teamsters Local Union No. 523 v. NLRB*, 624 F.3d 1321 (10th Cir. 2010), on remand 357 NLRB No. 4 (2011), *enforced*, 488 F. App’x 280 (10th Cir. 2012); *CSS Healthcare Servs., Inc. v. NLRB*, Case Nos. 10-10568, 10-10914 (11th Cir. July 16, 2010), on remand 355 NLRB 472 (2010), *enforced*, 419 F. App’x 963 (11th Cir. 2011).

¹² See, e.g., *Oak Harbor Freight Lines Inc. v. NLRB*, Case Nos. 12-1226, 12-1358, 12-1360 (D.C. Cir. August 1, 2014); *NLRB v. Instituto Socio Economico Comunitario, Inc.*, Case No. 13-1688 (1st Cir. October 3, 2014); *NLRB v. Dover Hospitality Servs., Inc.*, Case No. 13-2307 (2d Cir. July 2, 2014); *NLRB v. Salem Hosp.*, Case No. 12-3632 (3d Cir. July 3, 2014); *NLRB v. Nestle Dreyer’s Ice Cream Co.*, Case No. 12-1783 (4th Cir. July 29, 2014); *Dresser-Rand Co. v. NLRB*, Case No. 12-60638 (5th Cir. July 23, 2014); *Little River Band of Ottawa v. NLRB*, Case Nos. 13-1464, 13-1583 (6th Cir. Aug. 13, 2014); *Contemporary Cars, Inc. v. NLRB*, Case Nos. 12-3764, 13-1066 (7th Cir. Oct. 3, 2014); *Relco Locomotives, Inc. v. NLRB*, Case No. 13-2722 (8th Cir. July 1, 2014); *DirectTV Holdings, LLC v. NLRB*, Case Nos. 12-72526, 12-72639 (9th Cir. July 2, 2014); *Int’l Union of Operating Eng’rs, Local 627 v. NLRB*, Case Nos. 13-9547, 13-9564

Nos. 12-3764, 13-1066 (7th Cir. Oct. 3, 2014), another panel of this Court vacated the underlying decision in light of *Noel Canning* and remanded to Board for further proceedings. BRI's construction of the Court's mandate would unjustly deny to the parties in this case a ruling on the merits comparable to that afforded to similarly-situated parties in other cases impacted by *Noel Canning*. BRI's construction also unjustifiably attributes to the Court an intent to depart from the normal and usual course of judicial proceedings in circumstances where the decision below was rendered by an improperly constituted panel.¹³ It seems particularly unlikely that this Court intended that result given the many Section 8(a)(1) violations that the Company did not contest before the Board or this Court.

In sum, interpreting the Court's mandate as permitting further proceedings before the Board fully comports with principles governing the reasonable and equitable interpretation of mandates. In contrast, BRI's cribbed reading relies on readily distinguishable cases and conflicts with both legal and equitable principles. Therefore, the Board properly considered this case anew.

(10th Cir. July 2, 2014); *NLRB v. Gaylord Chem. Co.*, Case Nos. 12-15404, 12-15690 (11th Cir. Aug. 13, 2014).

¹³ See *Nguyen v. United States*, 539 U.S. 69, 83 (2003) (remanding case to court of appeals where panel was improperly constituted; "it is appropriate to return these cases to the Ninth Circuit for fresh consideration . . . by a properly constituted panel"); *Flav-O-Rich, Inc. v. NLRB*, 531 F.2d 358, 364 (6th Cir. 1976) (remanding case for "complete consideration by a duly constituted panel of the Board"); *KFC Nat'l Mgmt. Corp. v. NLRB*, 497 F.2d 298, 307 (2d Cir. 1974).

II. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THE UNCHALLENGED PORTIONS OF ITS ORDER FINDING THAT BRI UNLAWFULLY THREATENED MINE CLOSURE AND JOB LOSS AND PROMISED BENEFITS TO EMPLOYEES

BRI did not file exceptions to the administrative law judge's findings of several Section 8(a)(1) violations, including threats of mine closure and job loss and a promise of benefits in exchange for abandoning support for UMWA. (JA1 n.2, 12-21,29-30.) *See* 29 U.S.C. § 160(c) (providing that if no exceptions are filed, the judge's recommended order becomes the order of the Board); 29 C.F.R. § 102.48(a) (stating that if no exceptions are filed, the judge's findings "automatically become the decision and order of the Board and become its findings, conclusions, and order, and all objections and exceptions thereto shall be deemed waived for all purposes"). Section 10(e) of the Act states: "No objection that has not been urged before the Board . . . may be considered by the court. . . ." 29 U.S.C. § 160(e). Thus, because BRI failed to challenge the Board's findings of Section 8(a)(1) violations, the Board is entitled to summary enforcement of the related portions of its Order. *See NLRB v. Somerville Constr. Co.*, 206 F.3d 752, 756 (7th Cir. 2000).

Nevertheless, the "unchallenged violations do not disappear," but "remain, lending their aroma to the context in which the contested issues are considered." *Ryder Truck Rental v. NLRB*, 401 F.3d 815, 818-19 (7th Cir. 2005) (citations omitted). Here, BRI threatened employees with mine closure and job loss if

UMWA were elected, and, one week after the election, BRI discharged a vocal union advocate. That discharge must be considered against the backdrop of the unchallenged Section 8(a)(1) violations.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT BRI VIOLATED SECTION 8(A)(3) AND (1) OF THE ACT BY DISCHARGING EMPLOYEE WADE WALLER BECAUSE OF HIS UNION ACTIVITY

BRI discharged union activist and experienced miner Waller within days of its employees' selection of union representation. At the time of his discharge, BRI purported to rely on reports implicating Waller in unspecified threatening or intimidating behavior. However, throughout the course of litigation before the Board, BRI abandoned all claims of any misconduct other than a verbal disagreement between Waller and co-worker Koerner about dumping coal. Specifically, BRI "deliberately twisted" (JA 28) Waller's statement, "No matter how many times you flag me, I'm not going to stop," to claim that he threatened to "kill" Koerner and created a safety violation (JA 26-27; 215). The Board reasonably found (JA 27-28), based on the credited evidence, that BRI did not have a "reasonable belief" that Waller made such a threat. Instead, BRI's shifting reasons for discharging Waller, its contemporaneous Section 8(a)(1) violations, its prior tolerance of threats and physical altercations, and its reliance on discredited testimony amply support the Board's finding that BRI terminated Waller because of his union activity, not its professed concerns about safety.

A. Applicable Principles and Standard of Review

Section 7 of the Act guarantees employees the right to “form, join, or assist labor organizations . . . for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. § 157. Section 8(a)(3) of the Act safeguards that right by prohibiting “discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization.”¹⁴ 29 U.S.C. § 158(a)(3). Thus, an employer violates Section 8(a)(3) and (1) by discharging an employee because of his union activity. *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 400-03 (1983); *FedEx Freight East, Inc. v. NLRB*, 431 F.3d 1019, 1025 (7th Cir. 2005).

In *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397 (1983), the Supreme Court approved the Board’s test for determining motivation in unlawful discrimination cases, articulated in *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981). Under this test, if substantial evidence supports the Board’s finding that an employee’s union activity was a “motivating factor” in the adverse employment action, the Court must affirm that conclusion unless the record as a whole should have

¹⁴ A violation of Section 8(a)(3) results in a “derivative” violation of Section 8(a)(1) of the Act, *Rochelle Waste Disposal LLC v. NLRB*, 673 F.3d 587, 597 (7th Cir. 2012), which makes it unlawful for employers “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.” 29 U.S.C. § 158(a)(1).

compelled the Board to accept the employer's affirmative defense that it would have taken the same action even absent the protected activity. *See Transp. Mgmt. Corp.*, 462 U.S. at 397, 401-03; *FedEx Freight East, Inc.*, 431 F.3d at 1025. Questions of motive are usually resolved by inferences drawn from the record as a whole. *NLRB v. O'Hare-Midway Limousine Serv.*, 924 F.2d 692, 695-96 (7th Cir. 1991). The "Board is free to rely on circumstantial as well as direct evidence." *NLRB v. So-White Freight Lines, Inc.*, 969 F.2d 401, 408 (7th Cir. 1992) (citations omitted). Circumstantial evidence includes the timing of the discharge, the employer's reliance on pretextual justifications, and the employer's other contemporaneous violations of the Act. *Van Vlerah Mech., Inc. v. NLRB*, 130 F.3d 1258, 1264 (7th Cir. 1997); *accord Jet Star, Inc. v. NLRB*, 209 F.3d 671, 676-77 (7th Cir. 2000). Also, shifting explanations for the adverse action "may, in and of themselves, provide evidence of unlawful motivation." *NLRB v. Henry Colder Co., Inc.*, 907 F.2d 765, 769 (7th Cir. 1990); *accord NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984).

To establish the affirmative defense that it would have taken the same action even absent the union activity, the employer must show it had a reasonable belief that the employee engaged in misconduct, and acted on that belief when it discharged him. *McKesson Drug Co.*, 337 NLRB 935, 937 (2002). The Board need not accept an employer's asserted explanation "if there is a reasonable basis

for believing it ‘furnished the excuse rather than the reason for [its] retaliatory action.’” *Justak Bros. & Co. v. NLRB*, 664 F.2d 1074, 1077 (7th Cir. 1981) (citation omitted).

This Court owes “significant deference” to the Board’s findings. *FedEx Freight East, Inc. v. NLRB*, 431 F.3d 1019, 1025 (7th Cir. 2005). The Board’s factual findings, and its application of the law to particular facts, must be upheld if they are supported by substantial evidence on the record as a whole. *See* 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951); *NLRB v. So-White Freight Lines, Inc.*, 969 F.2d 401, 405 (7th Cir. 1992). The Court will affirm the Board’s legal conclusions if they have “a reasonable basis in law.” *Rochelle Waste Disposal LLC v. NLRB*, 673 F.3d 587, 592 (7th Cir. 2012). The substantial evidence test “requires not the degree of evidence which satisfies the *court* that the requisite fact exists, but merely the degree that *could* satisfy the reasonable fact finder.” *ATC Vancom of Cal. v. NLRB*, 370 F.3d 692, 695 (7th Cir. 2004) (emphasis in original). Since “[d]iscerning an employer’s motivation is a question of fact,” “the Board’s determination is conclusive if supported by substantial evidence, either direct or circumstantial.” *Rochelle Waste Disposal*, 673 F.3d at 597 (internal quotation marks omitted). Finally, the Court will not disturb the judge’s credibility resolutions, as adopted by the Board, absent “extraordinary circumstances.” *Ryder Truck Rental v. NLRB*, 401 F.3d 815, 825

(7th Cir. 2005); *see also Beverly Cal. Corp. v. NLRB*, 227 F.3d 817, 829 (7th Cir. 2000) (attacks on credibility findings “almost never worth making”).

B. BRI Discharged Waller Because of His Union Activity

1. Waller’s discharge was motivated by union animus

The record amply demonstrates, as the Board found, that union animus was a motivating factor in Waller’s discharge. It is undisputed that Waller was “one of the strongest and most outspoken UMWA supporters at the mine” and company management was aware of his support. (JA 25; 69, 382.) Waller openly wore and distributed union paraphernalia. (JA 3 & n.5, 24; 64-70, 120, 234, 265, 271, 276-81, 385-86, 406, 411, 415, 598, 821, 1074.) Senior Human Resources Manager Gossman and Vice President Benner knew of Waller’s strong union support before terminating him. (JA 2, 23-25.) The straw polls, which Gossman kept, identified Waller as pro-union. After UMWA’s victory, Gossman collected and reviewed with Benner several statements regarding union conduct. Benner admitted that he was aware of Waller’s union support. (JA 23, 25; 143-45, 598, 821-23, 833, 871-77, 879.)

Moreover, BRI’s union animus is well-established. The Board found and BRI does not contest (JA 1 n.2, 29-30) that, during the course of an aggressive antiunion campaign, BRI committed numerous Section 8(a)(1) violations. In doing so, BRI employed a carrot-and-stick approach, threatening job loss and mine

closure if employees selected union representation, while promising benefits to diminish union support. In discharging Waller, BRI made good on its threats. Applying this Court's "commonsense" view, "a company that does not dispute its responsibility for multiple prohibited practices is more likely to have engaged in an additional one than a company which has not been found to have engaged in any other prohibited practice." *Uniroyal Tech. Corp. v. NLRB*, 151 F.3d 666, 668-69 (7th Cir. 1998); *see, e.g., Van Vlerah Mech., Inc.*, 130 F.3d at 1264 (contemporaneous violations of Act support inference of union animus); *N. Wire Corp. v. NLRB*, 887 F.2d 1313, 1318-19 (7th Cir. 1989) ("comments made by company officials demonstrating a 'manifest hostility' toward union activity are relevant to determining discriminatory motive").

BRI's animus is further supported by circumstantial evidence. It discharged Waller for an alleged threat of physical injury, despite evidence that he was "hard-working, experienced, dependable, well-liked and willing to fill in on his days off" and was never disciplined during his seven years at the mine. (JA 25.) *See, e.g., Uniroyal Tech. Corp.*, 151 F.3d at 668-69 (union activist's glowing performance reviews and willingness to work days off suggested unlawfully motivated discharge); *Henry Colder Co.*, 907 F.2d at 769 (evidence that discriminatee was "good employee" supported finding that union activity was motivating factor in discharge).

As the Board found, BRI's consistent failure to punish more serious misconduct further supports the Board's finding that BRI discharged Waller because of its union animus. (JA 3 n.5, 25-26; 83-84, 89-90, 99-102, 112-13, 131, 265, 270, 367, 407, 419, 505-06, 633, 706-07.) BRI did not discipline two employees who threatened to shoot other co-workers, an employee who threatened to "beat" another employee's "guts out," or two supervisors who threatened to fight each other. (JA25 n.46, 26 & n.47; 74, 107-12, 115, 125-30, 208, 216-17, 270, 298, 349-56, 365-66, 368-69, 371-72, 448, 452-62, 497-500, 667-68.) Even when two employees grabbed and shoved co-workers in what BRI deemed "serious" incidents (Br. 45-46), it suspended them for only three days. (JA 26; 76, 81, 207-14, 880-81.) And it failed to discipline two managers who actually fought each other. (JA 26 n.48; 267-69.) Indeed, since BRI took over the mine, it "had *never* prohibited or discharged any other employee for [threats of physical injury] in the absence of any significant physical contact." (JA 25, emphasis in original.)

Yet, in highly disparate treatment, BRI purportedly discharged Waller for threatening to run over Koerner, notwithstanding Waller's denial and the lack of any witnesses. (JA 25-27; 132-33, 137, 157-59, 233, 276, 290, 296-97, 340-45, 404, 626, 654.) Under this Court's precedent, such disparate treatment strongly supports an inference of unlawful motive. *See, e.g., Great Lakes Warehouse Corp. v. NLRB*, 239 F.3d 886, 891 (7th Cir. 2001) (disparate discipline of union advocate

supports animus finding); *SCA Tissue North America LLC v. NLRB*, 371 F.3d 983, 991-92 (7th Cir. 2004) (employer’s “past willingness to give second and third chances to poor employees with a myriad of performance problems, but not to [the discriminatee], smacks of disparate treatment”).

BRI’s multiple arguments opposing the Board’s finding of unlawful animus lack merit. First, contrary to BRI’s claim (Br. 39), in finding union animus, the Board did not rely on its lawful campaign against UMWA, but on the now-undisputed unlawful threats and promise of benefits “several supervisors and managers at various levels” made during the campaign. (JA 25.) BRI’s effort (Br. 40) to dismiss these uncontested violations as “isolated comments” is baseless. The Board explained (JA 14) that, although there was no overt evidence that BRI intentionally adopted a strategy of threats, it instructed supervisors to urge employees to vote “NO” and “did not specifically caution that their opinions should be carefully expressed on the basis of objective facts beyond [BRI’s] control.” *Cf. Garvey Marine, Inc. v. NLRB*, 245 F.3d 819, 824 (D.C. Cir. 2001) (though employer forbade threats and promises, campaign statements unlawful where employer instructed supervisors to convince employees to vote against the union and employees could reasonably believe employer’s “public statements were primarily for show” while “[supervisors’] private warnings reflected management’s actual position.”).

Second, BRI argues (Br. 40-41), for the first time, that the union animus of supervisors who committed unfair labor practices cannot be imputed to Senior Human Resources Manager Gossman and Vice President Benner. However, under Section 10(e) of the Act (29 U.S.C. § 160(e)), the Court may not consider that argument because BRI failed to raise it to the Board (JA1160-1220). 29 C.F.R. § 102.46(b)(2) (“Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived.”).

In any event, the Board did not impute animus to Gossman and Benner. Rather, the Board found that their undisputed knowledge of Waller’s union activity, coupled with their disparately harsh treatment of Waller and BRI’s efforts to twist the Waller-Koerner exchange into an implausible threat to “kill” Koerner to justify his termination, amply demonstrates that the decision to discharge Waller was unlawfully motivated. Moreover, BRI cannot ignore that the discharge occurred within a week of the election and at a time when there were uncontroverted and pervasive threats of mine closure and job loss by managers at “various levels” that engendered “rampant” rumors and were “a primary concern” for employees. (JA7.) *Cf. Fleming Companies, Inc. v. NLRB*, 349 F.3d 968, 973 (7th Cir. 2003) (threats of mine closure against employees for engaging in union

activity are unlawful “because these acts reasonably tend to coerce employees in the exercise of their rights, regardless of whether they do, in fact, coerce”).¹⁵

Third, BRI’s attempts to distinguish (Br. 44-47) other threats that resulted in no punishment by asserting that two employees did not “follow[] through on their threats” to injure one another, or that the threat to shoot another employee was well-received because the threatened employee “was joking” when he reported it to a mine manager, do not withstand scrutiny. Nor does its suggestion that Waller “repeatedly” committed safety infractions, when the record establishes that he had never been disciplined for any infraction. (JA 25; 157, 345.) Though BRI avers (Br. 45) that other employees’ confrontations were merely isolated verbal threats, there is no credited evidence that Waller’s statement to Koerner was even a threat. Yet BRI blatantly mischaracterizes the Waller-Koerner exchange as Waller’s “refusal to stop his ram car” endangering Koerner. Even assuming Waller said he would not stop if Koerner kept flagging him, the record demonstrates that the comment referenced dumping coal—which Waller was doing at the time—because

¹⁵ Contrary to BRI’s contention (Br. 47-49), the fact that Waller’s discharge occurred after the UMWA’s election victory does not undermine the Board’s finding of unlawful motivation. Indeed, BRI continued to threaten to close the mine even after the election, discharged Waller one day after filing its election objections, and “had begun collecting statements from employees to support the [election] objections several days earlier,” including alleged additional incidents involving Waller. (JA 23.) Thus, the credited record evidence shows that the timing of Waller’s discharge was connected to the election and BRI’s attempt to seek a rerun election.

Waller's car was parked and Koerner had not blown a horn or indicated that Waller was in danger of hitting anyone with the car. In light of the credited evidence concerning that incident, and the "weekly, if not daily" tolerated threats of physical violence, BRI's claim that it has "zero tolerance" (Br. 46) for the supposed safety concerns raised by Waller's statement is not credible.

Critically, as the Board noted (JA 26), throughout the litigation process, BRI's reasons for discharging Waller shifted in the face of contradictory evidence, particularly that it tolerated threats and physical fights without discharge, let alone discipline.¹⁶ Those shifting justifications "seriously undermine [BRI's] attempts to portray its discharge decision as based upon anything other than [Waller's] protected behavior." *NLRB v. Henry Colder Co., Inc.*, 907 F.2d 765, 769 (7th Cir. 1990). At the hearing, Gossman testified that all the allegations in the written statements justified Waller's discharge. In its posthearing briefs, after overwhelming evidence of BRI's failure to punish profanity and fighting, BRI relied only on the unpersuasive "flagging" incident as its justification for Waller's discharge. (JA 26; 1185-96.)

¹⁶ Despite BRI's repeated suggestion (Br. 5, 33, 48) that Waller's vulgar "scab" song somehow legitimizes his discharge, BRI does "not contend that the song justifies either overturning the election or terminating Waller." (JA 3 n.5.) See *Letter Carriers Branch v. Austin*, 418 U.S. 264, 283 (1974) ("scab" is "common parlance in labor disputes" and "entitled to the protection of [Section] 7 of the [Act]") (citation omitted).

Now, before this Court, BRI argues (Br. 33-35, 38-39, 44-45) that Waller's "pattern of escalating threatening behavior" motivated his discharge, relying on discredited testimony and unsubstantiated statements. However, the evidence shows no pattern. For example, the Waller-Craig confrontation over Craig's Facebook post was not unusual, and Gossman admitted that cursing would not warrant discharging an employee. (JA 26; 216.) BRI also never claimed that Waller was responsible for the anonymous phone calls or damage to Koerner's truck (JA 26). Moreover, the judge discredited Kirk's claim at the hearing that Waller threatened him during a midnight shift one week before the May 19-20 election. As the judge found, payroll records indicate that Waller worked the midnight shift only once on May 5 and was on vacation from May 6 to May 17, and the "witness" to the threat credibly denied it happened. (JA 4-5, 26; JA173-74, 815, SA 1-4, 10, 15-17.)

Furthermore, BRI's attempt to show (Br. 51-53) that Koerner "in fact felt threatened" by Waller rests on unsubstantiated claims that other employees warned Koerner to "watch out for Waller" and on recasting the evidence to present a different story. But the judge who heard the testimony of all the participants discredited the claim that Koerner felt threatened at the time of the "flagging" incident, given that Waller was undisputedly parked and Koerner admittedly told Waller to stop dumping coal because the feeder was overloaded. (JA 541-42.) In

contrast, the judge described Waller as a “credible witness overall,” who testified in “an earnest and even manner . . . was not overly defensive or evasive” and readily admitted actions, even unflattering ones. (JA 4, 24 n.45, 25; 331-33, 878.)

Waller, an experienced miner, consistently denied that he threatened to hit Koerner with his ram car or that he would ever do such a thing. (JA 292-93, 295-97.)

While BRI may be technically correct that employees may not “ignore feeder signals,” BRI’s workplace reality belies any suggestion that doing so is a basis for discharge. Indeed, Koerner testified that another employee warned him that miners would disregard his signals and continue dumping coal.

Thus, BRI’s asserted justifications rely on discredited testimony and conduct that was acceptable in the mine.¹⁷ These shifting and implausible reasons—a nonexistent pattern of behavior; an admitted, minor verbal confrontation; a mischaracterized disagreement; and a discredited alleged threat—along with BRI’s other admittedly coercive behavior and disparate treatment of Waller, support the Board’s finding that BRI discriminatorily discharged Waller.

¹⁷ In attacking the judge’s credibility determinations, which were adopted by the Board, BRI incorrectly asserts (Br. 32) that the judge “faulted” Lawrence, Koerner, Pezzoni, and Davis for “consulting with counsel prior to their testimony.” Rather, the judge reasonably found their testimony warranted “close scrutiny” because they “went over their testimony together as a group with Gossman and [BRI’s] counsel prior to testifying” despite the judge’s sequestration order. (JA 3 n.6, 27 n.53.)

2. BRI would not have discharged Waller absent his union support

Based on overwhelming record evidence, the Board properly concluded (JA 27-28) that BRI did not reasonably believe that Waller threatened to kill Koerner, nor did it act on that so-called belief in discharging Waller. To begin, when BRI summoned Waller into the office for his discharge, it did so based on eight statements Gossman collected describing anonymous phone calls and vehicular damage, a profanity-laced confrontation between Craig and Waller, a subsequently-disproven confrontation with Kirk, and the Waller-Koerner exchange. (JA 4-5, 23-24; 163-64, 815, 871-77, 879, SA 1-4, 15-17.) Gossman prepared the termination letter before even speaking to Waller and, despite Waller's denials, discharged him. *See Jet Star, Inc. v. NLRB*, 209 F.3d 671, 677 (7th Cir. 2000) (discharging employee without formally warning him about potential consequences of misconduct and "without even cursory investigation" supports finding of unlawful motive).

Moreover, the letter states only that Waller was "implicated" in threatening, intimidating behavior, points to no specific conduct, and fails to mention any safety issues that BRI relies on now. (JA 24; 295-98, 335, 1023.) Therefore, as the record demonstrates and the Board found, Gossman and Benner "chose to spin" the Waller-Koerner conflict over coal-dumping into a threat to "kill" Koerner

because “they knew that the other alleged incidents alone were insufficient to justify discharging Waller.” (JA 27.)

Indeed, the evidence dispels any realistic assertion that BRI reasonably believed Waller threatened to harm Koerner or create a safety issue. First, and most importantly, Koerner admitted that Waller’s ram car was stopped and that he told Waller to stop dumping coal because the feeder was overloaded. (JA 542-50.) Gossman admitted that Koerner never explained why he flagged Waller at the feeder, nor did Gossman bother to ask Koerner; Gossman did not even know where Koerner was standing. (JA 26-27; JA 196-201, SA 5.) Second, neither Gossman’s nor Koerner’s statement even mention the “flagging incident,” and only one of the other statements on which Gossman and Benner relied reference it, albeit obliquely. (JA 26-27 & n.53; 510, 877, 879.) Third, BRI repeatedly cites Shift Leader Davis’s supposed interest in Koerner’s well-being to show that BRI took the “threat” seriously (Br. 42-44), but its reliance is misplaced. The judge discredited Davis’s inconsistent testimony that he did not carry a radio on May 20 (and could not have heard the argument) but that Koerner “called [him] up” to tell him about the incident. Moreover, Davis did not immediately report the dispute or submit a written statement about it (JA 26, 27 n.53; 634-37), although he allegedly “continuously checked on Koerner to make sure he was okay.” (Br. 42.) Lastly, after Koerner told Manager Lawrence about the disagreement, Lawrence did not

reprimand Waller but allowed him to work extra shifts. (JA 26; 69-73, 293, 575-80, 588-89, 815.) *See Jet Star, Inc.*, 209 F.3d at 677 (rejecting stated reason for employee's discharge and finding discharge motivated by union animus where supervisors allowed employee to continue working after observing employee abusing company truck).

Thus, the Waller-Koerner incident "furnished the excuse rather than the reason" for Waller's discharge, *SCA Tissue North America LLC v. NLRB*, 371 F.3d 983, 991-92 (7th Cir. 2004), and the other alleged incidents on which BRI relies either never occurred or could not plausibly justify Waller's discharge.

Accordingly, substantial evidence supports the Board's finding that BRI violated Section 8(a)(3) and (1) of the Act by discriminatorily discharging Waller because of his union support and activities.

CONCLUSION

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

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NATIONAL LABOR RELATIONS BOARD

May 2015

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

BIG RIDGE, INC.)	
)	
Petitioner/Cross-Respondent)	Nos. 15-1046
)	15-1103
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	
)	Board Case No.
Respondent/Cross-Petitioner)	14-CA-30379
)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,052 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 20th day of May, 2015

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)	
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CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2015, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system.

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Dated at Washington, DC
this 20th day of May, 2015

ADDENDUM OF STATUTES, RULES, AND REGULATIONS

Relevant provisions of the National Labor Relations Act (29 U.S.C. § 151, et seq.) are as follows:

Sec. 7. [29 U.S.C. § 157]

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 8. [29 U.S.C. § 158]

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

....

(3) 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

....

Sec. 10 [29 U.S.C. § 160]

(c) In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

....

(e) The Board shall have power to petition any court of appeals of the United States . . . wherein the unfair labor practice in question occurred or wherein

such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding Upon the filing of such petition, the Court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

. . . .

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court,

within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

Relevant provisions of the Board's Rules and Regulations are as follows:

Sec. 102.46 [29 C.F.R. § 102.46]

(b)(2) Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived. . . .

Sec. 102.48 [29 C.F.R. § 102.48]

(a) In the event no timely or proper exceptions are filed as herein provided, the findings, conclusions, and recommendations of the administrative law judge as contained in his decision shall, pursuant to section 10(c) of the Act, automatically become the decision and order of the Board and become its findings, conclusions, and order, and all objections and exceptions thereto shall be deemed waived for all purposes.