

Nos. 15-1433, 15-1611

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

CATERPILLAR LOGISTICS, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND
AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW)**

Intervenor

**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**

JULIE B. BROIDO
Supervisor Attorney

VALERIE L. COLLINS
Attorney
National Labor Relations Board
1015 Half Street, SE
Washington, D.C. 20570
(202) 273-2996
(202) 273-1978

RICHARD F. GRIFFIN, JR
General Counsel
JENNIFER ABRUZZO
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

TABLE OF CONTENTS

Headings	Page(s)
Statement regarding oral argument.....	1
Statement of subject matter and appellate jurisdiction.....	2
Statement of the issues.....	3
Statement of the case.....	3
I. Procedural history.....	3
II. The Board’s findings of fact.....	5
A. The company’s operations and the union’s organizing campaign; the company interrogates two employees about their union sympathies and creates the impression of surveillance	5
B. A week before the election, the company announces a \$ 400 safety bonus for employees and the construction of smoking shelters	7
C. The union loses the election; the company discharges craft and delivers on its promises to pay safety bonuses and construct smoking shelters	8
III. The Board’s conclusions and order	11
Standard of review	11
Summary of argument.....	13
Argument.....	15
I. Substantial evidence supports the Board’s finding that the company violated Section 8(a)(1) of the Act by interrogating employees about their union sympathies, creating the impression of surveillance, and announcing and promising benefits in order to dissuade employees from supporting the union.....	15

TABLE OF CONTENTS

Headings – Cont’d	Page(s)
A. The company unlawfully interrogated employees and created the impression that their union activities were under surveillance.....	16
1. The Board reasonably found the company coercively interrogated employees Applin and Sponsler	16
a. Substantial evidence supports the findings that supervisor Butcher unlawfully interrogated Applin.....	17
b. Substantial evidence supports the finding that supervisor Ewry unlawfully interrogated Sponsler	21
2. The Board reasonably found that the company created the impression of surveillance by telling Sponsler it already knew which employees were involved in the organizing effort	23
B. The Company unlawfully announced and granted a new bonus, and promised new smoking shelters, in order to dissuade employees from supporting the union.....	27
1. The Board reasonably found that the company violated Section 8(a)(1) of the Act by announcing and granting an unprecedented \$400 safety bonus	29
2. The Board reasonably found that the company violated Section 8(a)(1) of the Act by announcing improved break areas for smokers	36
C. The court lacks jurisdiction to consider the company’s premature challenges to rulings on election objections made in the ongoing representation proceeding	39
II. Substantial evidence supports the Board’s finding that the company violated Section 8(a)(3) and (1) of the Act by discharging Craft because of his union activity.....	40

TABLE OF CONTENTS

Headings – Cont’d	Page(s)
A. An employer violates the Act by discharging an employee for engaging in union activity	41
B. Craft engaged in Section 7 activity by announcing his support for the union.....	42
C. Craft did not engage in conduct so egregious as to forfeit the Act’s protection	44
1. The Board reasonably determined that the place of discussion is neutral.....	45
2. The subject matter of Craft’s remarks indisputably favors protection	46
3. The nature of Craft’s remarks favors protection	47
4. The balance of the <i>Atlantic Steel</i> factors favors protection.....	53
Conclusion	55

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Abramson, LLC</i> , 345 NLRB 171 (2005)	20
<i>Adair Standish Corp. v. NLRB</i> , 912 F.2d 854 (6th Cir. 1990)	16
<i>Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. NLRB</i> , 253 F.3d 19 (D.C. Cir. 2001).....	40
<i>Aladdin Gaming</i> , 345 NLRB 585 (2005)	22
<i>Allegheny Ludlum Corp. v. NLRB</i> , 104 F.3d 1354 (D.C. Cir. 1997).....	18
<i>Am. Crane Corp. v. NLRB</i> , 203 F.3d 819, 2000 WL 51280 (4th Cir. 2000).....	19
<i>Am. Fed'n of Labor v. NLRB</i> , 308 U.S. 401 (1940).....	4,39
<i>Architectural Glass & Metal Co., Inc. v. NLRB</i> , 107 F.3d 426 (6th Cir. 1985)	17
<i>Arrow Electric Co.</i> , 323 NLRB 968 (1997)	44
<i>Atlantic Steel Co.</i> , 245 NLRB 814 (1979)	15,41,44,45,46,52,53
<i>Audubon Reg'l Med. Ctr.</i> , 331 NLRB 374 (2000)	33
<i>Boire v. Greyhound Corp.</i> , 376 U.S. 473 (1964).....	5,39

TABLE OF AUTHORITIES

Cases – Cont’d	Page(s)
<i>Beverly Health & Rehab. Serv.</i> , 346 NLRB 1319 (2006)	46,47
<i>Bourne Co.</i> , 144 NLRB 805 (1963), <i>enforced</i> , 332 F.2d 47 (2d Cir. 1964).....	17
<i>Camaco Lorain Mfg. Plant</i> , 356 NLRB No. 143, 2011 WL 1687418 (Apr. 29, 2011).....	19
<i>Cal. Gas Transp., Inc.</i> , 347 NLRB 1314 (2006), <i>enforced on other grounds</i> , 507 F.3d 847 (5th Cir. 2007)	19
<i>DaimlerChrysler Corp.</i> , 344 NLRB 1324 (2005)	44,46,51
<i>Dayton Newspapers, Inc. v. NLRB</i> , 402 F.3d 651 (6th Cir. 2005)	16
<i>Dayton Typographic Servs.</i> , 778 F.2d 118 (6th Cir. 1985).....	17
<i>Dealers Mfg. Co.</i> , 320 NLRB 947 (1996)	18
<i>Donaldson Bros. Ready Mix, Inc.</i> , 341 NLRB 958 (2004)	26
<i>Dupont Dow Elastomers, LLC v. NLRB</i> , 296 F.3d 495 (6th Cir. 2002)	12
<i>DynCorp, Inc. v. NLRB</i> , 233 F. App’x. 419 (6th Cir. 2007).....	28

TABLE OF AUTHORITIES

Cases – Cont’d	Page(s)
<i>Eastex, Inc. v. NLRB</i> , 437 U.S. 556	42
<i>Emery Worldwide</i> , 309 NLRB 185 (1992)	34
<i>Felix Indus., Inc.</i> , 339 NLRB 195, 196 (2003), <i>enforced mem.</i> , 2004 WL 1498151 (D.C. Cir. 2004)	46
<i>Flexsteel Indus., Inc.</i> , 311 NLRB 257 (1993)	24,27
<i>Garda CL Great Lakes, Inc.</i> , 359 NLRB No. 148 (2013)	38
<i>G.C. Murphy Co.</i> , 217 NLRB 34 (1975)	27
<i>Grapetree Shores, Inc.</i> , 356 NLRB No. 60, 2010 WL 5399101 (2010)	33
<i>Gold Coast Rest. v. NLRB</i> , 995 F.2d 257 (D.C. Cir. 1993)	39,40
<i>Holly Farms Corp. v. NLRB</i> , 517 U.S. 391 (1996)	12
<i>Hugh H. Wilson Corp. v. NLRB</i> , 414 F.2d 1345 (3d Cir. 1969)	41
<i>ITT Auto. v. NLRB</i> , 188 F.3d 375 (6th Cir. 1999)	16

TABLE OF AUTHORITIES

Cases – Cont’d	Page(s)
<i>Joseph Schlitz Co.</i> , 273 NLRB 1604 (1985)	51
<i>Kentucky May Coal Co., Inc.</i> , 317 NLRB 60 (1995)	19
<i>Kiewit Power Constructors Co. v. NLRB</i> , 355 NLRB 708 (2010), <i>enforced</i> , 652 F.3d 22 (D.C. Cir. 2011).....	49,50
<i>Kingsboro Medical Group</i> , 270 NLRB 962 (1984)	34
<i>Kusan Mfg. Co. v. NLRB</i> , 749 F.2d 362 (6th Cir. 1984)	12
<i>KOFY TV-20</i> , 332 NLRB 771 (2000)	30
<i>Leasco, Inc.</i> , 289 NLRB 549 (1988)	49
<i>Lee v. NLRB</i> , 325 F.3d 749 (6th Cir. 2003)	12
<i>Metro. Edison Co. v. NLRB</i> , 460 U.S. 693 (1983).....	41
<i>Munsingwear, Inc.</i> , 149 NLRB 839 (1964).	31
<i>NLRB v. Allied Mech. Servs., Inc.</i> , 734 F.3d 486 (6th Cir. 2013)	25

TABLE OF AUTHORITIES

Cases – Cont’d	Page(s)
<i>NLRB v. Arrow Elastic Corp.</i> , 573 F.2d 702 (1st Cir. 1978).....	34
<i>NLRB v. Bailey Co.</i> , 180 F.2d 278 (6th Cir. 1950)	27
<i>NLRB v. Crown Can Co.</i> , 138 F.2d 263 (8th Cir. 1943)	28
<i>NLRB v. City Disposal Sys.</i> , 465 U.S. 822 (1984).....	42,43
<i>NLRB v. E.I. Dupont De Nemours</i> , 750 F.2d 524 (6th Cir. 1984)	16
<i>NLRB v. Exch. Parts Co.</i> , 375 U.S. 405 (1964).....	27,28
<i>NLRB v. Garon</i> , 738 F.2d 140 (6th Cir. 1984)	20
<i>NLRB v. Gerbes Super Mkts., Inc.</i> , 436 F.2d 19 (8th Cir. 1971)	24
<i>NLRB v. Homemaker Shops, Inc.</i> , 724 F.2d 535 (6th Cir. 1984)	23
<i>NLRB v. Honda of Am. Mfg., Inc.</i> , 73 F. App’x 810 (6th Cir. 2003).....	41,42,47,52,54
<i>NLRB v. Los Angeles New Hosp.</i> , 640 F.2d 1017 (9th Cir. 1981)	20
<i>NLRB v. Main Street Terrace Care Ctr.</i> , 218 F.3d 531 (6th Cir. 2000)	44

TABLE OF AUTHORITIES

Cases – Cont’d	Page(s)
<i>NLRB v. Mead Corp.</i> , 73 F.3d 74 (6th Cir. 1996)	12
<i>NLRB v. Naum Bros., Inc.</i> , 637 F.2d 589 (6th Cir. 1981)	36
<i>NLRB v. Okun Bros. Shoe Store, Inc.</i> , 825 F.2d 102 (6th Cir. 1987)	12, 16, 22
<i>NLRB v. Promedica Health Sys., Inc.</i> , 206 F. App’x. 405 (6th Cir. 2006).....	23
<i>NLRB v. Thor Power Tool Co.</i> , 148 NLRB 1379, 1388 (1964), <i>enforced</i> , 351 F.2d 584 (7th Cir. 1965)	42,46,54
<i>NLRB v. Tri-County Mfg. & Assembly</i> , 76 F. App’x 1 (6th Cir. 2003).....	45
<i>NLRB v. V & S Shuler Eng’g, Inc.</i> , 309 F.3d 362 (6th Cir. 2002)	30
<i>N. Hills Office Servs.</i> , 346 NLRB 1099 (2006)	24
<i>Norton Audubon Hosp.</i> , 338 NLRB 320 (2002)	20
<i>Operating Eng’rs Local 470 v. NLRB</i> , 350 F.3d 105 (D.C. Cir. 2003).....	53
<i>Pactiv Corp.</i> , 337 NLRB 898 (2002)	52

TABLE OF AUTHORITIES

Cases – Cont’d	Page(s)
<i>Perdue Farms, Inc., Cookin’ Good Div. v. NLRB</i> , 144 F.3d 830 (D.C. Cir. 1998).....	28,31
<i>Peters v. NLRB</i> , 153 F.3d 289 (6th Cir. 1998)	12
<i>Pittsburgh Plate Glass Co. v. NLRB</i> , 313 U.S. 146 (1941).....	40
<i>Prescott Indus. Prods. Co.</i> , 205 NLRB 51 (1973)	47
<i>Reliance Electric Co.</i> , 191 NLRB 44 (1971), <i>enforced</i> , 457 F.2d 503 (6th Cir. 1972)	28
<i>RGC (USA) Mineral Sands, Inc. v. NLRB</i> , 281 F.3d 442 (4th Cir. 2002)	23
<i>Rockwell Int’l Corp. v. NLRB</i> , 814 F.2d 1530 (11th Cir. 1987)	44
<i>Rossmore House</i> , 269 NLRB 117 (1984), <i>enforced sub nom</i> , 760 F.2d 1006 (9th Cir. 1985)	17
<i>Sam’s Club</i> , 342 NLRB 620 (2004)	25
<i>Shamrock Foods Co. v. NLRB</i> , 346 F.3d 1130 (D.C. Cir. 2003).....	19
<i>SKD Jonesville Division, LP</i> , 340 NLRB 101 (2003)	26

TABLE OF AUTHORITIES

Cases – Cont’d	Page(s)
<i>S. Shore Hosp.</i> , 229 NLRB 363 (1997)	26
<i>Spartech Corp.</i> , 344 NLRB 576 (2005)	26
<i>Sproule Constr. Co.</i> , 350 NLRB 774 (2007)	20
<i>St. Francis Fed’n of Nurses & Health Prof’ls v. NLRB</i> , 729 F.2d 844 (D.C. Cir. 1984).....	31
<i>St. Margaret Mercy Healthcare Ctrs.</i> , 350 NLRB 203 (2007), <i>enforced</i> , 519 F.3d 373 (7th Cir. 2008)	48
<i>Stanadyne Auto. Corp.</i> , 345 NLRB 85 (2005)	34
<i>Stanford Hotel</i> , 344 NLRB 558 (2005)	41
<i>Starbucks Coffee Co.</i> , 354 NLRB 876 (2009)	46
<i>Teledyne Dental Products Corp.</i> , 210 NLRB 435 (1974)	37
<i>Tel Data Corp. v. NLRB</i> , 90 F.3d 1195 (6th Cir. 1996)	12
<i>Toma Metals, Inc.</i> , 342 NLRB 787 (2004)	21
<i>Torbitt & Castleman, Inc. v. NLRB</i> , 123 F.3d 899 (6th Cir. 1997)	23,35,37,38

TABLE OF AUTHORITIES

Cases – Cont’d	Page(s)
<i>Tres Estrellas de Oro</i> , 329 NLRB 50 (1999)	26
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951).....	12,25
<i>Verizon Wireless</i> , 349 NLRB 640 (2007)	47,52
<i>Vought Corp.</i> , 273 NLRB 1290, 1295 (1984), <i>enforced</i> , 788 F.2d 1378 (8th Cir. 1986)	49
<i>Waste Mgmt. of Ariz., Inc.</i> , 345 NLRB 1339 (2005)	52
<i>W.F. Bolin Co. v. NLRB</i> , 70 F.3d 863 (6th Cir. 1995)	25
<i>Wright Line, a Div. of Wright Line, Inc.</i> , 251 NLRB 1083 (1980), <i>enforced</i> , 662 F.2d 899 (1st Cir. 1981).....	45

TABLE OF AUTHORITIES

Statutes:	Page(s)
National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 7 (29 U.S.C. § 157)	11,15,16,18,40,42,43,44,47,49,53
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	3,4,11,13-16,23,24,27,29,36-41
Section 8(a)(3) (29 U.S.C. § 158(a)(3)).....	3,4,11,14,40,41
Section 8(a)(5) (29 U.S.C. § 158(5))	40
Section 10 (29 U.S.C. § 160)	5
Section 10(a) (29 U.S.C. § 160(a))	2
Section 10(e) (29 U.S.C. § 160(e))	3,11
Section 10(f) (29 U.S.C. § 160(f)).....	3,39
Regulations:	
29 C.F.R. § 102.69	39

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

No. 15-1433, 15-1611

CATERPILLAR LOGISTICS, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND
AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW)**

Intervenor

**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 REGARDING ORAL ARGUMENT

Although this case involves the application of settled principles of law to well-supported factual findings, the Court may find oral argument to be helpful in clarifying the issues in dispute. The National Labor Relations Board (“the Board”)

believes that 15 minutes per side would be sufficient for the parties to present their views.

**STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION**

This case is before the Court on the petition of Caterpillar Logistics, Inc. (“the Company”) for review, and the cross-application of the Board to enforce a Board Decision and Order issued against the Company on March 30, 2015, and reported at 362 NLRB No. 49. (A. 1-13).¹ The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (“the Union”) has intervened in support of the Board. The Board had subject matter jurisdiction over the proceeding below pursuant to Section 10(a) of the National Labor Relations Act (“the Act”) (29 U.S.C. §§ 151, 160(a)), which empowers the Board to prevent unfair labor practices affecting commerce.

The Board’s Decision and Order, insofar as it addresses the unfair labor practices, is a final order with respect to all parties. The Company filed its petition on April 14, 2015, and the Board cross-applied for enforcement on May 28, 2015. Both filings were timely because the Act imposes no time limit on the initiation of review or enforcement proceedings. The Court has jurisdiction pursuant to Section

¹ “A” references are to the joint appendix. “Br” references are to the Company’s brief. Where applicable, references preceding a semicolon are to the Board’s decision; those following are to the supporting evidence.

10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)) because the unfair labor practices occurred in Clayton, Ohio.

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by interrogating employees about their union sympathies, creating the impression of surveillance, and announcing and promising benefits in order to dissuade them from supporting the Union.

2. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by discharging Michael Craft because of his support for the Union.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

This case involves unfair labor practices committed by the Company during the period before a Board-conducted election among the Company's warehouse employees. After they voted against union representation, the Board's General Counsel issued a complaint based on unfair-labor-practice charges filed by the Union and a discharged employee, Michael Craft. (A. 2; 645-50.) The Union also filed objections to conduct affecting the election results, and the two cases were consolidated for hearing. (A. 645-50.)

On August 4, 2014, following the hearing, an administrative law judge issued a decision finding in relevant part that the Company committed several unfair labor practices. Specifically, the judge found that the Company violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by interrogating employees; and, to dissuade them from supporting the Union, by announcing and granting a \$400 safety bonus, and by promising to erect shelters in smoking break areas. (A. 5-13.) The judge also found that the Company violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1), by discharging Craft because of his union activity. (A. 11.)

After considering the parties' exceptions, the Board, with a partial dissent, affirmed the judge's unfair-labor-practice findings. (A. 1.) In addition, the Board found, contrary to the judge, that the Company unlawfully created the impression of surveillance by telling an employee it already knew who was involved in the union organizing campaign. (A. 1-2.)

The Board also affirmed the judge's finding that the Company engaged in objectionable conduct, and on that basis adopted his recommended order setting aside the election and directing a second one. (A. 3-4.) That ongoing representation proceeding has not yet resulted in a final order subject to judicial review. *See Am. Fed'n of Labor v. NLRB*, 308 U.S. 401, 409-11 (1940) (representation proceedings excluded from appellate review afforded by Section 10

of the Act (29 U.S.C. § 160)); accord *Boire v. Greyhound Corp.*, 376 U.S. 473, 476-77 (1964). Accordingly, that proceeding is not before the Court.

II. THE BOARD'S FINDINGS OF FACT

A. The Company's Operations and the Union's Organizing Campaign; the Company Interrogates Two Employees About Their Union Sympathies and Creates the Impression of Surveillance

The Company operates a logistics facility in Clayton, Ohio that receives, stores, and ships machinery and parts. (A. 5; 300, 314.) The facility, in operation since March 2011, sits on approximately 27 acres and employs about 500 employees. (A. 192, 313-14, 556-60.)

On August 16, 2013, the Union filed a petition seeking to represent a unit of the Company's warehouse employees. (A. 1, 5.) After learning of the petition, the Company's supervisors wore "Vote No" bracelets and provided employees with anti-union information. Additionally, the Company told supervisors to rate employees on a scale of 1 to 5 based on their likelihood of voting for union representation, and to explain those rankings in weekly reports prepared for its labor consultant. (A. 6; 336-37, 384-85, 401.) The Company also held mandatory anti-union meetings for employees. (A. 44, 197, 457.)

In late August, the Union held its first organizing meeting at a local hotel. (A. 2, 5; 48.) During the meeting, which was attended by 65-80 employees, John

Sponsler, a warehouse associate, participated in a presentation by taking notes on an easel in the front of the room. (A. 2; 48-49, 64.)

The following day, Supervisor Nick Ewry approached Sponsler while he was working alone and asked him what his feelings were about the Union. (A. 5; 49-50.) Sponsler responded that he was in favor of it, and gave his reasons why, but stated he was fearful of retaliation if the Union lost the election. (A. 5; 50.) Ewry replied that Sponsler “need not worry, because management already knew everyone who was involved in the organizing effort.” (A. 2, 5; 50, 65.)

Previously, Sponsler had not discussed his views on the Union with Ewry, nor had he engaged in any campaigning in the presence of management, or worn any pro-union clothing or paraphernalia. (A. 5; 51-52.)

Around the same time, Supervisor Cory Butcher approached employee Marquis Applin while he was alone in his work area following a mandatory anti-union meeting. (A. 6; 125-27.) While standing very close to Applin, Butcher asked him if he had made a decision as to how he would vote in the upcoming election. (A. 6; 127-28). Applin replied that he did not know. (A. 139.) Butcher then told Applin that if the Union won, Butcher would be unable to speak with him one-on-one. (A. 6; 128.) Prior to this conversation, Applin had not worn any pro-union clothing or paraphernalia. (A. 6; Tr. 131.)

B. A Week Before the Election, the Company Announces a \$400 Safety Bonus for Employees and the Construction of Smoking Shelters

The Company requires employees to attend quarterly meetings, which are conducted by shift and include presentations on safety, promotions, facility updates, and quarterly bonuses. (A. 45, 122.) On about September 18, during the last set of quarterly meetings before the election, the Company told employees for the first time that they would receive a one-time “safety bonus” of \$400, to be paid in December. (A. 6; 46, 79, 123-24, 148-50, 171-74, 201, 220-21.) Previously, employees had only participated in a “gain sharing” program, which made them eligible to receive quarterly payments based on the number of hours worked, discipline, safety, and other metrics. (A. 6; 45, 123, 145, 171.) The Company had never granted a one-time \$400 safety bonus, which represented nearly one week’s pay. (A. 6; 75, 175, 191, 198, 201.)

During the same all-employee meetings on September 18, General Manager Brian Purcell also informed employees for the first time that the Company would be constructing shelters in the outdoor break areas for smokers. (A. 8; 81-82, 205, 222-23.) At the end of each meeting, Purcell asked the smokers in the audience to remain so that he could tell them about the improvements. (A. 8; 86, 205-06.) Before the Union came on the scene, employees who wished to smoke could only do so in three designated outdoor areas that consisted of uncovered pavement

delineated by a painted square box. (A. 83, 204.) Smokers had complained to the Company for years about the lack of shelter. (A. 8; 83, 206-07, 224-25.)

C. The Union Loses the Election; the Company Discharges Craft and Delivers on Its Promises To Pay Safety Bonuses and Construct Smoking Shelters

The representation election was held on September 27, 2013, and the tally of ballots showed 188 votes for and 229 against representation by the Union. (A. 1, 5; 330.) On October 3, 2013, the Union filed objections to conduct affecting the election results. (A. 5.)

On November 14, while the Union's election objections were pending, Purcell conducted an all-employee meeting at which he announced that the Company would be constructing a guard shack. (A. 8; 245.) Previously, guards had patrolled the facility in vehicles. (A. 8.) Employee Michael Craft, who had opposed the Union during the campaign, asked Purcell what the shacks were for. (A. 8; 239, 245, 285.) Instead of answering Craft's question, Purcell responded that the guard shacks were "for guards," and the room "erupted in laughter." (A. 8; 245.) Purcell then quickly concluded the meeting. (A. 246-47, 287.) As Craft was leaving, he told his coworkers that he thought his question was valid, and he learned that other employees shared his concern. (A. 247-48, 286.)

The next day, Craft was working near coworkers Gary Cox and Kevin Harvey when he again voiced his frustration with Purcell's dismissive response to

his question about the guard shacks. (A. 8; 254-55.) Craft told Cox in a loud voice, “You guys [union supporters] just gained another supporter, I’m sick of the way they treat us here.” (A. 8; 562.) Craft then turned away from Cox and announced to Harvey, “I’m not putting up with it anymore. I’m sick of it, that motherfucker is going down, the gloves are fucking off now.” (A. 8; 255, 562.) Supervisor Jason Brown and Team Leader Angel Cuellar were within earshot of Craft’s statements, and Brown approached Craft to ask him why he was upset. (A. 8; 256, 259, 562.) Craft explained what had happened at the meeting, noting that Purcell had not provided a response to his question. Craft added that he was now a union supporter because Purcell was treating him and other employees like they were thugs. Craft assured Brown that he never meant to do physical harm or threaten Purcell; instead, he just wanted Purcell to be held accountable for his actions at the meeting. (A. 8; 259, 562.) Brown then asked Craft if he wanted to speak with Purcell about the incident, but Craft said he would wait until the following week. (A. 8; 261-62, 411, 562.)

After speaking with Brown, Craft returned to work until his lunch break. (A. 9; 262.) In the meantime, Brown told Assistant Steam Valve Manager John Gruet about the incident, and typed up a written report, which Gruet forwarded to Purcell and Human Relations Manager Jason Murphy. (A. 9; 413, 420-22, 562.) In his email, Gruet told Purcell and Murphy that he did not believe Craft was a

violent person, or that he intended physical harm. (A. 9; 563.) Gruet added that initially he contemplated dismissing Craft from his shift with pay, but decided Craft was “fit for work,” although that they needed to “discuss ramifications.” (A. 9; 563.)

As Craft was returning from his lunch break, Gruet told him he was being suspended pending an investigation. (A. 9; 264-65.) Gruet then escorted Craft from the facility and advised him that the Company would be in touch after it completed an investigation. (A. 9; 264.) Around this time, Purcell called Ron Hassinger, a corporate labor relations official, who advised Purcell to report the incident to the police. (A. 9; 482.) After obtaining a statement from Cox, Purcell, together with Murphy, and Gruet, met with a police officer, who took no action. (A. 9; 428-29.) Four days after the incident, the Company discharged Craft without talking to him or Brown and Cuellar about the incident. (A. 9; 485-86.)

Several weeks after Craft’s discharge, employees received the one-time \$400 safety bonus that the Company had promised them the week before the election. (A. 146, 171.) In March 2014, the Company completed its construction of the promised smoking shelters. (A. 8.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On March 30, 2015, the Board (Chairman Pearce and Member McFerran; Member Johnson dissenting in part) found, in agreement with the administrative law judge, that the Company violated Section 8(a)(1) of the Act by interrogating employees regarding their union sympathies, announcing and granting the \$400 safety bonus, and announcing the construction of smoking shelters. In addition, the Board found, in agreement with the judge, that the Company violated Sections 8(a)(3) and (1) of the Act by discharging Craft. Contrary to the judge, the Board also found that the Company violated Section 8(a)(1) of the Act by creating the impression that employees' union activities were under surveillance.

The Board's Order requires the Company to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act, 29 U.S.C. § 157. Affirmatively, the Order requires the Company to post a remedial notice, reinstate Craft to his former job, and make him whole for any lost earnings and benefits.

STANDARD OF REVIEW

This Court defers to the Board's factual determinations as long as they are supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e);

Universal Camera Corp. v. NLRB, 340 U.S. 474, 477, 488 (1951); *Peters v. NLRB*, 153 F.3d 289, 294 (6th Cir. 1998). As this Court has explained: “Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support the conclusion.” *Dupont Dow Elastomers, LLC v. NLRB*, 296 F.3d 495, 500 (6th Cir. 2002). Where substantial evidence supports the Board’s findings, this Court upholds the findings even if it might “justifiably have made a different choice had the matter been before the court de novo.” *Universal Camera*, 340 U.S. at 488; *NLRB v. Okun Bros. Shoe Store, Inc.*, 825 F.2d 102, 105 (6th Cir. 1987). Moreover, credibility determinations are only overturned in those rare instances where they “overstep the bounds of reason,” and are “inherently unreasonably or self-contradictory.” *Kusan Mfg. Co. v. NLRB*, 749 F.2d 362, 366 (6th Cir. 1984); *Tel Data Corp. v. NLRB*, 90 F.3d 1195, 1199 (6th Cir. 1996).

The Board’s application of law to facts is also reviewed under the substantial evidence standard. *Holly Farms Corp. v. NLRB*, 517 U.S. 391, 398-99 (1996); *NLRB v. Mead Corp.*, 73 F.3d 74, 78 (6th Cir. 1996). Further, as the Supreme Court has explained: “For the Board to prevail, it need not show that its construction is the best way to read the statute; rather, courts must respect the Board’s judgment so long as its reading is a reasonable one.” *Holly Farms*, 517 U.S. at 409; *see also Lee v. NLRB*, 325 F.3d 749, 754 (6th Cir. 2003).

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) when Supervisors Butcher and Ewry separately interrogated employees Applin and Sponsler about their union sympathies. In both encounters, immediate supervisors approached individuals who were not open union supporters while they were alone in their work areas, and asked them point blank for their union views. Moreover, both supervisors acted at the behest of upper management, which had instructed them to ascertain employees' positions about the Union so they could use the information in weekly reports to the Company's labor consultant. In these circumstances, the Board reasonably found that the interrogations were coercive and therefore unlawful.

Next, substantial evidence supports the Board's finding that during the same conversation where Ewry interrogated Sponsler about his union sympathies, he unlawfully created the impression that employees' union activities were under surveillance by telling Sponsler that the Company "already knew everyone who was involved in the organizing effort." Ewry failed to disclose the source of his information. Moreover, although Sponsler had not revealed his views to the Company, he had just participated in an off-site union meeting. In these circumstances, the Board reasonably found that Ewry's remarks created the impression that the Company was monitoring employees' union activities.

Substantial evidence also supports the Board's finding that the Company further violated Section 8(a)(1) of the Act by promising and granting benefits to employees in a manner calculated to influence their votes. Specifically, during a series of mandatory meetings held shortly before the election, the Company announced two new benefits: an unprecedented \$400 safety bonus, and the construction of new smoking shelters in outdoor break areas. Those announcements, and the post-election grant of the promised bonus, constituted an unlawful attempt to dissuade employees from supporting the Union.

Finally, substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by discharging employee Craft for engaging in union activity. Following an employee meeting where General Manager Purcell ridiculed Craft's legitimate inquiry about guard shacks, Craft told two coworkers that he supported the Union because he was "sick of the way they treat us here." Craft added some salty language to the effect that "the gloves are fucking off now." When a supervisor and team leader happened to overhear Craft, he explained that he was upset about the way Purcell was treating employees, and assured them he never meant to threaten Purcell or do physical harm. A high-ranking manager subsequently confirmed that view of the incident.

In these circumstances, the Board reasonably found that the Company discharged Craft for protected union activity, and that the Company had failed to

meet its burden of showing his conduct was so egregious as to forfeit the Act's protection. Analyzing the situation under *Atlantic Steel*, 245 NLRB 814, 816 (1979), the Board found that the place of the discussion was neutral because although Craft made his remarks on the warehouse floor, he was speaking to two coworkers when a supervisor and team leader overheard their conversation. Importantly, the discussion's subject matter related directly to Craft's union support and employees' working conditions. Moreover, the nature of his outburst was brief, spontaneous, and understandable given how upset he was about the way in which Purcell had belittled his legitimate question addressing a condition of employment.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY INTERROGATING EMPLOYEES ABOUT THEIR UNION SYMPATHIES, CREATING THE IMPRESSION OF SURVEILLANCE, AND ANNOUNCING AND PROMISING BENEFITS IN ORDER TO DISSAUDE EMPLOYEES FROM SUPPORTING THE UNION

Section 7 of the Act (29 U.S.C. § 157) guarantees employees "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." Those rights are implemented through Section 8(a)(1) of the Act (29

U.S.C. § 158(a)(1)), which makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise” of their Section 7 rights. The test for a Section 8(a)(1) violation is whether the employer’s conduct has a reasonable tendency to coerce; proof of actual coercion is not necessary. *See, e.g., Dayton Newspapers, Inc. v. NLRB*, 402 F.3d 651, 659 (6th Cir. 2005); *ITT Automotive v. NLRB*, 188 F.3d 375, 384 (6th Cir. 1999). In making this determination, the Board considers the total context in which the challenged statement was made, and is justified in viewing the issue from the standpoint of its impact on employees. *Okun Bros. Shoe Store*, 825 F.2d at 105.

The Board found that the Company violated Section 8(a)(1) by interrogating employees about their union sympathies, creating the impression of surveillance, and announcing and promising benefits in order to dissuade them from supporting the Union. As shown below, substantial evidence supports those findings.

A. The Company Unlawfully Interrogated Employees and Created the Impression that Their Union Activities Were Under Surveillance

1. The Board reasonably found the Company coercively interrogated employees Applin and Sponsler

It is well settled that an employer violates Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by coercively interrogating employees about their union support and activities. *Adair Standish Corp. v. NLRB*, 912 F.2d 854, 861 (6th Cir. 1990); *NLRB v. E.I. Dupont De Nemours*, 750 F.2d 524, 527 (6th Cir. 1984). The

test for evaluating the legality of an interrogation is “whether under all of the circumstances the interrogation reasonably tends to restrain, coerce or interfere with rights guarantees by the Act.” *Dayton Typographic Servs. v. NLRB*, 778 F.2d 118, 1194 (6th Cir. 1985).

In determining the coercive tendency of an interrogation, the Board considers several factors including: (1) the nature of the information sought; (2) the questioner’s identity and authority within the employer’s organization; (3) the place and method of interrogation; and (4) the employer’s prior hostility to unionization. *Architectural Glass & Metal Co., Inc. v. NLRB*, 107 F.3d 426, 434 (6th Cir. 1985); *Dayton Typographic Servs.*, 778 F.2d at 1194. Those criteria are known as the *Bourne* factors, after *Bourne Co.*, 144 NLRB 805 (1963), *enforced*, 332 F.2d 47, 48 (2d Cir. 1964). *See Rossmore House*, 269 NLRB 1176, 1178 & n.20 (1984), *enforced sub nom., Hotel Employees & Rest. Employees Union, Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

a. Substantial evidence supports the finding that Supervisor Butcher unlawfully interrogated Applin

As shown above (p. 6), Supervisor Butcher approached Applin while he was alone in his work area following one of the Company’s mandatory anti-union meetings. (A. 6; 125-27.) While standing “shoulder to shoulder” with Applin, Butcher—acting at upper management’s behest—asked for his views about the Union. (A. 6; 132.) Applin, who had not worn any pro-union paraphernalia or

attire, responded that he was unsure. Butcher then said that if the Union won the election, he would be unable to speak with Applin one-on-one. (A. 6; 128, 131.)

The Board reasonably determined (A. 10-11) that, given the totality of the circumstances, Butcher's questioning of Applin was unlawful. As to the nature of the information sought, Butcher squarely asked an employee who was not an open union supporter about his union sympathies. Such questioning is inherently coercive. *Dealers Mfg. Co.*, 320 NLRB 947, 948 (1996). "[A]ny attempt by an employer to ascertain employees' views and sympathies regarding unionization generally tends to cause fear of reprisal in the mind of the employee if he replies in favor of unionism and, therefore, tends to impinge upon his Section 7 rights." *Allegheny Ludlum Corp. v. NLRB*, 104 F.3d 1354, 1359 (D.C. Cir. 1997). This is particularly so where, as the Company admittedly did here, the employer has instructed supervisors to ascertain employees' views about the Union, so that they can use the information in preparing reports for its labor consultant. (A. 401-02.) Indeed, the Company even went so far as to direct its supervisors, including Butcher, to rank employees on a scale of 1 to 5, and to explain the rankings in their weekly reports. (A. 401-02.) Thus, as the Board reasonably inferred (A. 10), Butcher questioned Applin so that he could "assess which way Applin was leaning" and use that information in those reports.

Butcher's status as Applin's immediate supervisor further supports the Board's finding that the questioning was coercive. *See, e.g., Cal. Gas Transp., Inc.*, 347 NLRB 1314, 1314, 1345 (2006) (employee's immediate supervisor coercively interrogated employee by asking him his thoughts about the union), *enforced on other grounds*, 507 F.3d 847 (5th Cir. 2007). As a direct supervisor, Butcher had the authority to discipline Applin. (A. 6; 125, 393.) "It hardly strains credulity to posit . . . that employees would be particularly anxious not to incur the wrath of the one person who, day in and day out, twirls the key to their job security." *Am. Crane Corp. v. NLRB*, 203 F.3d 819, 2000 WL 51280, at *3 (4th Cir. 2000) (unpublished) (interrogation coercive where questioner directly supervised employee and was substantially involved in disciplining him).

The interrogation took place while Applin alone in his work area, which is further evidence of coercion. *See, e.g., Shamrock Foods Co. v. NLRB*, 346 F.3d 1130, 1137 (D.C. Cir. 2003) (questioning that took place while employee was alone supports finding of coercion); *Kentucky May Coal Co., Inc.*, 317 NLRB 60, 62 (1995) (same). Moreover, Butcher's inquiry understandably made Applin "nervous" and reluctant to answer the question. (A. 128, 139). *See, e.g., Camaco Lorain Mfg. Plant*, 356 NLRB No. 143, 2011 WL 1687418, at *1-2 (Apr. 29, 2011) (silence or untruthfulness in responding to question about union support

indicated an attempt to conceal and weighed in favor of interrogation finding); *Sproule Constr. Co.*, 350 NLRB 774, 774 n.2 (2007) (same).

Furthermore, Butcher offered no justification for his questioning, nor did he assure Applin against reprisals. Those failures add to the coerciveness of the interrogation. *NLRB v. Garon*, 738 F.2d 140, 143 (6th Cir. 1984); *Norton Audubon Hosp.*, 338 NLRB 320, 321 (2002).

Moreover, the interrogation occurred against the backdrop of the Company's commission of other violations. *See, e.g., NLRB v. Los Angeles New Hosp.*, 640 F.2d 1017, 1019-20 (9th Cir. 1981) (interrogation was part of a "pattern of coercive conduct tending to inhibit the exercise of Section 7 rights"). Further, as the Board emphasized (A. 11), the questioning came "on the heels of a meeting in which [the Company] made it clear that it opposed unionization." As shown above p. 5, upon learning of the Union's petition, the Company mounted a vigorous anti-union campaign that included mandatory meetings where the Company made plain its opposition to the Union. (A. 43-44, 126, 196.) As the election neared, the Company increased the frequency of those meetings. (A. 197, 457.)

Faced with this strong evidence of coercion, the Company (Br. 44) does little more than assert that the Board ignored existing precedent, but the cases it cites are plainly distinguishable. Thus, in *Abramson, LLC*, 345 NLRB 171, 172-73 (2005), unlike the instant case, the employee initiated the conversation, and in

Toma Metals, Inc., 342 NLRB 787, 789-90 (2004), the questioner, a relative and friend, did not focus on specific employees' union sympathies.

**b. Substantial evidence supports the finding that
Supervisor Ewry unlawfully interrogated Sponsler**

Ewry's interrogation of Sponsler followed the same pattern as Butcher's questioning of Applin. As shown above (p. 6), shortly before the election, Ewry—Sponsler's direct supervisor—approached Sponsler while he was alone in his work area, and asked him point blank what his feelings were about the Union. This inquiry was particularly coercive because Sponsler had not previously discussed his views about the Union with Ewry, or made any showing of union support in the presence of management. (A. 5; 51-52.) Moreover, Sponsler responded to Ewry's question about his union views by expressing his fear of retaliation, thereby making it plain that the interrogation had fulfilled its unlawful objective. Ewry then exacerbated the coercive effect of his inquiry by telling Sponsler not to worry because the Company already knew everyone who was involved in the organizing effort. (A. 5; 50, 65.)

Additionally, as shown above (p. 18), the record firmly establishes the Company's hostility to the union campaign. And like Supervisor Butcher, Ewry had a "tremendous incentive, if not pressure," to ascertain his employees' union sympathies. (A. 6, 10.) As a result, the Board reasonably inferred (A. 10) that Ewry made the inquiry so that he could assess which way Sponsler was leaning in

his weekly reports to company officials about employees' union sentiments. In these circumstances, the Board reasonably found (A.10-11) that Ewry's interrogation of Sponsler was unlawful.

Contrary to the Company's claim (Br. 42-43), *Aladdin Gaming*, 345 NLRB 585 (2005), is factually distinguishable and therefore inapplicable here. In that case, unlike the instant one, the employee was an open union supporter and wore a union "committed leader" button when her supervisor asked her why she wanted a union. In those very different circumstances, the Board noted that it will allow "a range of supervisory inquiries that flow from the observation of a union button." *Id.* at 600.

Similarly misplaced is the Company's reliance on *NLRB v. Okun Bros. Shoe Store*, 825 F.2d 102 (6th Cir. 1987), another plainly distinguishable case. There, the Court found that an assistant manager's question about how many employees might have joined the union was not coercive because he "himself was uncertain whether he should sign up for the union." *Id.* at 108. As the Court noted: "That he was indisputably a part of the management and yet considering membership in the union is indicative of his ambivalence and of the harmless nature of his question." *Ibid.* By contrast, in the instant case Ewry was hardly questioning Sponsler out of idle curiosity or to help Ewry resolve his own feelings about the Union. To the contrary, Ewry was acting at upper management's behest to assess

employees' union sympathies so that he could report the information to the Company's labor consultant for use in its anti-union campaign.

Finally, contrary to the Company (Br. 43), the Board does not consider whether the questioned employee subjectively feels or actually is coerced. *See* cases cited above pp. 15-16 and *Torbitt & Castleman, Inc. v. NLRB*, 123 F.3d 899, 906 (6th Cir. 1997) (same with respect to threats of reprisal). And although, as the Company notes (Br. 43), Ewry told Sponsler he did not need to worry about retaliation, this purported assurance was nothing more than the predicate for Ewry's warning that "management already knew everyone who was involved in the organizing effort." (A. 5.) As shown below (pp. 23-27), the warning unlawfully created an impression that the Company was keeping track of employees' union views.

2. The Board reasonably found that the Company created the impression of surveillance by telling Sponsler it already knew which employees were involved in the organizing effort

An employer violates Section 8(a)(1) of the Act by creating the impression that employees' union activities are subject to surveillance. *See, e.g., NLRB v. Promedica Health Sys., Inc.*, 206 F. App'x. 405, 411-12 (6th Cir. 2006); *NLRB v. Homemaker Shops, Inc.*, 724 F.2d 535, 550 (6th Cir. 1984); *RGC (USA) Mineral Sands, Inc. v. NLRB*, 281 F.3d 442, 452 (4th Cir. 2002). The rationale for finding such a violation is that "employees should be free to participate in union

campaigns without the fear that members of management are peering over their shoulders, taking notes of who is involved in Union activities, and in what particular ways.” *Flexsteel Indus., Inc.*, 311 NLRB 257, 257 (1993).

Substantial evidence supports the Board’s finding (A. 1-2) that the Company violated Section 8(a)(1) of the Act by creating the impression that employees’ union activities were under surveillance. Sponsler’s testimony, which the administrative law judge reasonably credited (A. 6), establishes that just one day after a union meeting at a local hotel, Supervisor Ewry told him that upper management already knew everyone who was involved in the organizing campaign. (A. 2, 5; 50.) Ewry did not disclose the source of his information, but Sponsler, who had not yet openly supported the Union, had just participated in a presentation at an off-site union meeting that coworkers also attended.

When an employer advises employees that it knows who is involved with the union, but fails to disclose the source of its knowledge, it conveys the message that it obtained the information by stealth, and thus creates the impression of surveillance. *See, e.g., NLRB v. Gerbes Super Mkts., Inc.*, 436 F.2d 19, 21 (8th Cir. 1971) (when an employer informs employees that it knows about their protected activity, but does not reveal the source of that knowledge, employees may reasonably fear that the employer obtained its information through unlawful monitoring); *N. Hills Office Servs.*, 346 NLRB 1099, 1103 (2006) (employer’s

failure to identify source of information was the “gravamen” of an impression of surveillance violation); *Sam’s Club*, 342 NLRB 620, 620-21 (2004) (manager created impression of surveillance when, without revealing the source of the information, he told an employee that he had heard the employee was circulating a petition about wages). This principle is fully applicable here. As such, the Board reasonably found that “Sponsler would reasonably have assumed that the [Company] was monitoring the employees’ union activities.” (A. 2.)

The Company errs in suggesting (Br. 48, 50) that the Board’s finding of unlawful surveillance is suspect because the Board rejected the administrative law judge’s contrary conclusion. (A. 2, 10.) Where, as here, the Board disagrees with the judge’s inferences, and draws a different conclusion from the record, the substantial evidence standard is unchanged. *W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 870 (6th Cir. 1995) (citing *Universal Camera*, 340 U.S. at 496); *see also NLRB v. Allied Mech. Servs., Inc.*, 734 F.3d 486, 491 (6th Cir. 2013) (“court deference is to the Board rather than the ALJ when the two come to different factual conclusions”).

The Company also misses the mark in speculating (Br. 48-50) that Ewry was entitled to make the remark because he may have learned which employees were involved in the organizing effort through legitimate means. To establish a violation, the Board “does not require that the employer acquire[] its knowledge of

the employee[s'] activities by unlawful means.” *Tres Estrellas de Oro*, 329 NLRB 50, 51 (1999). Instead, as the Board explained, “the critical inquiry is whether ‘the employees would reasonably assume from the employer’s statements or conduct that their union activities had been placed under surveillance.’” (A. 2 (quoting *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 963 (2004))). Here, Ewry’s remark gave the impression that the Company was keeping track of who supported the Union, “and thus the remark would reasonably tend to discourage participation in union activities.” *Spartech Corp.*, 344 NLRB 576, 576-77 (2005).

The Company further errs in relying on distinguishable cases (Br. 48-49) where the Board, on very different facts, dismissed complaint allegations of unlawful surveillance. Thus, in *SKD Jonesville Division, LP*, 340 NLRB 101 (2003), the employer told an employee that it had heard the workers wanted him to organize a union. But in the circumstances of that case, the Board could infer that someone opposed to the Union had voluntarily informed the manager about the employee’s union activities. *Id.* at 105. And in *S. Shore Hosp.*, 229 NLRB 363 (1997), another distinguishable case on which the Company relies, the Board dismissed a complaint allegation that was based on a supervisor’s statement to an employee that “talk . . . [of] having a union was all over the hospital.” In so ruling, the Board pointed out that an employer does not create an impression of surveillance merely by noting its awareness of such talk, absent evidence that the

employer could only have learned of the rumor through surveillance. *Id.* at 363 (citing *G.C. Murphy Co.*, 217 NLRB 34, 36 (1975)). In contrast with those cases, Ewry did not allude to a “rumor,” nor did he say he had “heard” Sponsler was supporting the Union. Rather, Ewry made it crystal clear that upper management “knew everybody” who was involved in the union campaign.

Finally, the Company misses the mark in contending (Br. 49-50) that Sponsler did not personally interpret Ewry’s comment as indicating the Company had spied on the union meeting. As shown above (p. 23-24), actual surveillance is not the issue, and the Board does not examine employees’ subjective reactions. Instead, the issue is whether the statement created the impression that employees’ union activities were under surveillance. *Flexsteel Indus. Inc.*, 311 NLRB 257, 257 (1993). The Board reasonably found that it did.

B. The Company Unlawfully Announced and Granted a New Bonus, and Promised New Smoking Shelters, in Order To Dissuade Employees From Supporting the Union

An employer violates Section 8(a)(1) of the Act by promising or granting benefits to employees in circumstances where such conduct might reasonably tend to discourage them from supporting the Union. *NLRB v. Exch. Parts Co.*, 375 U.S. 405, 409 (1964). Such promises and conferrals of benefits are unlawful because they link improved working conditions with defeat of the union. *See NLRB v. Bailey Co.*, 180 F.2d 278, 279 (6th Cir. 1950) (“Interference is no less interference

because it is accomplished through allurements rather than coercion.”) (quoting *NLRB v. Crown Can Co.*, 138 F.2d 263, 267 (8th Cir. 1943)). *Accord Reliance Electric Co.*, 191 NLRB 44, 46 (1971), *enforced*, 457 F.2d 503 (6th Cir. 1972). In other words, “[t]he danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.” *Exch. Parts Co.*, 375 U.S. at 409.

Thus, an employer’s promise and conferral of benefits during a union campaign is presumed to influence employees unless the employer establishes a legitimate business reason for the timing of its announcement and grant. *DynCorp, Inc. v. NLRB*, 233 F. App’x. 419, 430 (6th Cir. 2007). To pass muster, both the timing of the announcement and the decision to confer benefits must be made “in the normal course of business.” *Perdue Farms, Inc., Cookin’ Good Div. v. NLRB*, 144 F.3d 830, 836 (D.C. Cir. 1998).

Here, just a week before the election, General Manager Purcell conducted a series of mandatory meetings that gave him a platform for reiterating the Company’s anti-union message and announcing two new benefits: a \$400 safety bonus that would be paid to all warehouse employees after the election, and the construction of new smoking shelters in outdoor break areas. As shown below,

substantial evidence supports the Board's finding that those announcements, and the post-election grant of the promised bonus, constituted an unlawful attempt to dissuade employees from supporting the Union.

1. The Board reasonably found that the Company violated Section 8(a)(1) of the Act by announcing and granting an unprecedented \$400 safety bonus

Substantial evidence supports the Board's finding (A. 1, 9-10) that the Company violated Section 8(a)(1) of the Act by announcing, about a week before the election, an unprecedented \$400 safety bonus to be granted post-election, and by making good on the promise after employees voted against unionization. As the Board concluded, the Company's announcement and implementation of the bonus, which affected every employee eligible to vote in the election, was calculated to influence their freedom of choice, so as to favor the Company and undermine the Union. (A. 9-10.)

The safety bonus was highly unusual. Employees had never before received such a lump sum bonus. (A. 201.) In past years, they had only received quarterly gain-sharing awards that the Company based on facility-wide benchmarks and the number of hours they worked during the quarter. (A. 45, 101, 123, 171, 183, 300-02.) Safety was merely one factor that affected those awards. Moreover, the Company reduced or withheld gain-sharing awards from employees with disciplinary records, unlike the safety bonus, which the Company promised to all

warehouse employees regardless of whether they had been disciplined during the past year. (A. 46, 101, 172, 175.)

In addition, the \$400 bonus was substantial, amounting to between 75 and 100 percent of a week's pay for employees eligible to vote in the election. (A. 75, 142, 175.) As they uniformly testified, the bonus represented a significant and important sum of money for them. (A. 191, 236-37.) By contrast, the amount of quarterly gainsharing awards varied considerably, as it turned on a variety of performance metrics. (A. 7; 332-33, 363-64, 366, 368, 370.)

Moreover, in 2014, the year after the Union lost the election, the Company did not announce or grant any further safety bonuses. This abrupt change in practice further supports the Board's finding that the Company promised a safety bonus only once, right before the election, to influence its outcome. (A. 9; 379-80, 499.) *See, e.g., KOFY TV-20*, 332 NLRB 771, 773 (2000) (pre-election announcement of new break policy was unlawful in part because employer reverted to old policy several months later).

Contrary to the Company's argument (Br. 24-29), the timing of its decision to announce the bonus "on the doorstep of the election" strongly supports the Board's finding that it acted to thwart employee support for the Union. *NLRB v. V & S Shuler Eng'g, Inc.*, 309 F.3d 362, 372 (6th Cir. 2002). The same is true for the Company's further decision to follow through with the grant after employees

rejected unionization. *Id.* (timing of benefits “supports the Board’s finding that the Company improperly interfered with employees’ free choice”); *accord St. Francis Fed’n of Nurses & Health Prof’ls v. NLRB*, 729 F.2d 844, 850 (D.C. Cir. 1984) (timing of benefit raises “strong presumption” of intent to interfere with employee rights). As the Board reasonably found (A. 9-10), the Company failed to provide a legitimate explanation for deciding to announce, just a week before the election, a bonus that was not to be granted for several months, and for making good on its promise after employees voted against representation. *See Perdue Farms*, 144 F.3d at 836 (employer bears burden of showing that the timing was “in the normal course of business”). Given this failure of proof, the Board could reasonably infer that announcing the bonus right before the election, and then granting it after the Union lost, “was no mere coincidence,” and therefore that it showed the Company “intended to wean the employees from the Union.” *Munsingwear, Inc.*, 149 NLRB 839, 844 (1964).

The Company asserts (Br. 24-25) that it made and announced a definite decision to grant the safety bonus in March or July 2013, before it learned about the union campaign, but the evidence it cites undermines its claim. Indeed, the cited evidence actually supports the Board’s finding (A. 1 n.4) that the Company’s pre-campaign statements about the possibility of a safety bonus were “full of contingencies.” For example, the Company relies on a March 2013 PowerPoint

slide that is riddled with precatory language and hardly shows the safety bonus was a done deal. (A. 515.) At most, the slide suggests only that in March, it told employees they *might* receive a safety bonus *if* the facility was in a position to submit for a Chairman’s Safety Award, the event that would trigger a safety bonus. Thus, the slide states that the Company would apply for the award “IF AND ONLY IF we are positioned to submit a viable safety program.” (A. 515-16.) Moreover, the slide does not establish the Company’s timeframe for making such a submission or paying the bonus. (A. 515.) The Company’s reliance on the slide is doubly deficient, because it bases its claim that then-Plant Manager Slocum actually presented the slide to employees on the discredited testimony of Valve Stream Manager Pahlas, whose claim could not be squared with the testimony of 12 employee witnesses that they did not recall such a presentation.²

The Company gains no more ground in relying (Br. 25-26) on the testimony of Safety Manager Rivera, which shows only that in July 2013 he told employees the Company “would be submitting, or we thought we would be submitting for that award.” (A. 355.) Contrary to the Company (Br. 25), this testimony hardly establishes that a firm decision had been made at that time. Indeed, undermining

² For similar reasons, the Company does not help itself by relying (Br. 28) on Pahlas’ further testimony, also discredited, that in July 2013, the Company announced that a submission would be made, and that the Company “was going to submit” for a Chairman’s Safety Award. (A. 7; 334.) As the judge emphasized, even if she had made such a statement, it would not have shown that a decision had actually been made to submit a proposal for the award. (A.7.)

its own position, the Company admits that “Rivera testified he reminded associates in July that the safety payment was ‘contingent’ on the facility submitting for an award” (Br. 25.) Thus, Rivera’s July statement did not constitute an announcement that employees would in fact receive a safety bonus, nor did it explain why the Company decided to grant the bonus months later, after the Union’s defeat.

The Company’s argument (Br. 26) that Rivera started to prepare the submission in July and August is beside the point. Taking preliminary behind-the-scenes steps cannot be equated with making an actual decision to grant benefits and announcing that decision to employees. *See, e.g., Audubon Reg’l Med. Cr.*, 331 NLRB 374, 374 fn. 5 (2000) (pre-election announcement of new benefits unlawful where plan was “still in its formative stages,” critical details had not been resolved, and benefits were conditioned on employer’s future actions); *Grapetree Shores, Inc.*, 356 NLRB No. 60, 2010 WL 5399101, *1 (2010) (promise of benefit was unlawful where employer had taken some preliminary steps but future implementation remained uncertain), *enforced*, 451 F. App’x 143 (3d Cir. 2011). Moreover, even if, as Rivera asserted (A. 360, 363, 366), September 30 was the deadline to submit a proposal for the award, that would not explain why the Company announced the submission and grant of the bonus shortly before the September 27 election, instead of waiting until it was over. As the Board found

(A. 7), the Company offered no explanation, let alone a legitimate business reason, for timing the announcements to occur right before the election. *See, e.g., NLRB v. Arrow Elastic Corp.*, 573 F.2d 702, 706 (1st Cir. 1978) (employer violated Act by announcing, days before the election, a new benefit that it was not bound to provide until several months later).

The Company further errs in relying (Br. 28) on the testimony of employees Cuellar, Pinkston, and Gambral. Thus, Cuellar’s testimony—that in March 2013, employees were told they would receive a safety bonus *only if* the facility won a safety award (A. 7; 348)—does not aid the Company because, like Rivera’s, it is phrased in the conditional. Similarly, although Pinkston claimed that the Company presented the PowerPoint slide quoted above p. 32, as shown, the slide itself is filled with contingencies. (A. 10; 515.)

In these circumstances, the Company errs in relying on a series of plainly distinguishable cases (Br. 29-32) where employers announced improved benefits that they had already begun to implement before the union began its campaign. Thus, in *Emery Worldwide*, 309 NLRB 185, 185 (1992), unlike the instant case, the “bonus program had been previously announced to all employees” before the union began its campaign, and in *Kingsboro Medical Group*, 270 NLRB 962, 963 (1984), the employer “merely was announcing additional aspects of the . . . plan it had already begun to implement.” *Stanadyne Auto. Corp.*, 345 NLRB 85, 90-91

(2005), is also distinguishable, because there the employer demonstrated that it had followed its usual procedures with regard to both the decision to grant a pension benefit increase and the timing of its announcement. By contrast, the Company failed to establish a business justification for waiting until the week before the election to announce its submission of a proposal for the Chairman's Safety Award, the action that triggered a new and previously unavailable bonus.³

In sum, given the deficiencies in the evidence cited by the Company, it cannot prove its claim that well before the union campaign started, it had already decided to grant the safety bonus, and had announced a firm decision to do so. Instead, the record shows the Company waited until September 18, right before the election, to announce that employees would receive safety bonuses after voting. Nor could the Company explain the timing of its announcement and the post-election grant. On this record, the Board reasonably inferred that the Company acted when it did in order to influence voter choice.

³ The Company also errs in relying (Br. 31-32) on *Torbitt & Castleman, Inc. v. NLRB*, 123 F.3d 899, 907-08 (6th Cir. 1997), where the Court found that the employer's solicitation of employee suggestions was not unlawful because its practice predated the organizing campaign. The instant case does not involve the solicitation of grievances.

2. The Board reasonably found that the Company violated Section 8(a)(1) of the Act by announcing improved break areas for smokers

Substantial evidence supports the Board's finding (A. 10) that the Company violated Section 8(a)(1) of the Act by announcing, right before the election, its plan to build outdoor smoking shelters. As shown above (pp. 6-7), after each of the September 18 employee meetings, Plant Manager Purcell told employees who were smokers that the Company would be constructing three new shelters for them. Purcell added that the Company had heard their complaints and was going to show compassion by building the shelters so they would not be exposed to the elements when they went outside to smoke. (A. 98-99, 203, 463.)

As with the safety bonus, the timing of the Company's announcement of new smoking shelters strongly supports the Board's finding (A. 10) that it acted to thwart employee support for the Union. *See NLRB v. Naum Bros., Inc.*, 637 F.2d 589, 591 (6th Cir. 1981) (timing of promises to make improvements "support the conclusion that they were instituted by the Company to discourage union activity"). The Company's rush to promise the smoking shelters is particularly suspect because it made the announcement before it had even secured funding for the improvements. The only estimate that the Company obtained for the shelters was dated October 15, 2013, after the election. (A. 8; 204-05, 503-04.)

Contrary to the Company's contention (Br. 36-37), the Board reasonably found that the erection of sheltered break areas constituted a benefit. As the Board noted (A. 10), "it is hard to fathom" that this significant improvement would not be viewed as beneficial by employees who smoked. They had been complaining to management about the smoking areas since shortly after the facility opened (A. 83, 206-07, 224-25), and Purcell acknowledged that smokers had been forced to take smoking breaks in unpleasant conditions. (A. 215, 462.) In those circumstances, the Board aptly concluded that "the unit employees would deem it quite beneficial to smoke in a sheltered area in bad weather, and in the case of the [one] area, not to walk down a potentially hazardous slope to reach the smoke break area." (A. 10.)

And contrary to the Company's suggestion (Br. 36-37), the benefit was still a benefit even if (unlike the safety bonus) it did not involve remuneration, and not all employees would make use of it. *See, e.g., Torbitt & Castleman*, 123 F.3d at 908 (employer's implementation of new parking lot policy was unlawful because "although the benefit appears relatively small, it was something that had bothered many . . . employees, the same employees seeking union representation"); *Teledyne Dental Products Corp.*, 210 NLRB 435 (1974) (employer's implementation of a new coffee break policy was an unlawful benefit).

The Company contends (Br. 38-39) that its promise to improve outdoor smoking areas was based on safety concerns, and therefore that it had a legitimate

business reason for announcing the improvement on September 18, right before the election. However, as the Board noted (A. 10), the safety concerns cited by company witnesses could have been addressed long before the pre-election meetings. In addition, employees were permitted to continue smoking in the allegedly unsafe conditions throughout the winter, for nearly six months, until the shelters became operational in March 2014. (A. 205, 476, 495, 497.) Further, Purcell admitted that the alleged safety concerns with one of the smoking areas could have been remedied by simply relocating it. (A. 501.) Under these circumstances, the Company failed to establish that safety concerns compelled it to announce, just a week before the election, its plan to build new shelters. *See Garda CL Great Lakes, Inc.*, 359 NLRB No. 148 (2013) (employer violated Section 8(a)(1) by making improvements to facility where it was aware of allegedly unsafe conditions prior to the representation petition but did not address employee concerns until after petition was filed). Viewed through the prism of an employees' economic dependence on the employer, *see Torbitt & Castleman*, 123 F.3d at 906, the Board correctly found that the Company, by announcing right before the election a promise to construct outdoor shelters for employees who smoked, violated Section 8(a)(1) of the Act. (A. 10.)

**C. The Court Lacks Jurisdiction To Consider the Company's
Premature Challenges to Rulings on Election Objections Made in
the Ongoing Representation Proceeding**

In addition to challenging the Section 8(a)(1) violations found by the Board, the Company contends (Br. 17-18, 29, 37-38, 40, 45-48) that the Board erred in finding it engaged in objectionable conduct that warranted setting aside the election results and directing a second election. (A. 3-4.) As noted above p. 4, however, the rulings in that ongoing representation proceeding, although addressed in the Board's Decision and Order, have not yet resulted in a "final order" subject to judicial review under Section 10(e) and (f) of the Act. *Am. Fed'n of Labor v. NLRB*, 308 U.S. 401, 409-11 (1940); *Boire v. Greyhound Corp.*, 376 U.S. 473, 476-77 (1964); *Gold Coast Rest. v. NLRB*, 995 F.2d 257, 267 (D.C. Cir. 1993). Accordingly, the Company's challenges to the Board's rulings on election objections are premature, and the Court lacks jurisdiction to consider them at this time.

For the Board's rulings in the ongoing representation proceeding to culminate in a judicially reviewable final order, the following chain of events would need to take place. First, the Union would have to prevail in a second election, and be certified by the Board as the employees' exclusive collective-bargaining representative. *See* 29 C.F.R. § 102.69 (explaining this procedure). Next, the Company would have to precipitate an unfair labor practice charge by

refusing to recognize and bargain with the Union. *See, e.g., Gold Coast Rest.*, 995 F.2d at 267 (describing this process). At that point, the charge could then initiate what is known as a “technical” refusal-to-bargain proceeding—a separate case where the issue would be whether the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union, in order to challenge its certification. *See Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 158-62 (1941) (explaining this procedure); *Gold Coast Rest.*, 995 F.2d at 267 (same). But unless and until those events transpire, there is no final order with regard to the election objections, even though they were consolidated for hearing with the instant unfair-labor-practice case and addressed in the same Board Decision and Order. *Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. NLRB*, 253 F.3d 19, 24-25 (D.C. Cir. 2001). In short, with respect to the election objections, the Company will have its day in court, but not until the contingencies noted above have been resolved.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCHARGING CRAFT BECAUSE OF HIS UNION ACTIVITY

As demonstrated below, Craft’s statements to his coworkers that he supported the Union because he was “sick of the way [the Company] treats us here” constituted union activity under Section 7 of the Act. Moreover, as the Board reasonably found, Craft’s further comments, that General Manager Purcell

was “going down, the gloves are fucking off now,” were not so egregious as to deny him the Act’s protection. Accordingly, the Company violated Section 8(a)(3) and (1) of the Act by admittedly discharging him for supporting the Union.

A. An Employer Violates the Act by Discharging an Employee for Engaging in Union Activity

Section 8(a)(3) of the Act prohibits “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.”⁴ 29 U.S.C. § 158(a)(3). Thus, unless an employee’s conduct loses the protection of the Act, an employer violates Section 8(a)(3) and (1) by taking action against him for participating in that activity. *NLRB v. Honda of Am. Mfg., Inc.*, 73 F. App’x 810, 815 (6th Cir. 2003); *Gold Coast Rest. Corp.*, 995 F.2d at 263-64; *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345, 1347 (3d Cir. 1969); *Stanford Hotel*, 344 NLRB 558, 558-59 (2005).

An employee engaged in union activity can lose the Act’s protection if, during the course of that activity, he engages in sufficiently “opprobrious conduct.” *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979). Yet, it is well established that an employee’s right to engage in such activity “may permit some leeway for impulsive behavior, which must be balanced against the employer’s right to

⁴ A violation of Section 8(a)(3) results in a derivative violation of Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), which makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the[ir statutory] rights” See *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

maintain order and respect.” *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965). The Board’s determination of whether an employee enjoys the Act’s protection ought not to be disturbed unless it is illogical, unreasonable, or arbitrary. *Honda of Am. Mfg.*, 73 F. App’x. at 813 ; *see also NLRB v. City Disposal Sys.*, 465 U.S. 822, 829 (1984) (“[T]he task of defining the scope of [protected activity] ‘is for the Board to perform in the first instance as it considers the wide variety of cases that come before it,’ and, on an issue that implicates its expertise in labor relations, a reasonable construction by the Board is entitled to considerable deference.”) (quoting *Eastex*, 437 U.S. at 568 (1978)).

B. Craft Engaged in Section 7 Activity by Announcing His Support for the Union

As the Board found, there is no question that Craft engaged in Section 7 protected activity by telling his coworkers he supported the Union because he was frustrated with the Company’s disrespectful treatment of employees. (A. 11.) Moreover, it is undisputed that the Company discharged him for making those statements.

Specifically, as shown above (p. 8), the day before his discharge, during an all-employee meeting, Craft asked General Manager Purcell why the Company planned to construct guard shacks. (A. 8; 245.) Craft’s coworkers shared his concerns, and wanted to know “what the purpose of the guard shack was for, other than just prohibiting us from coming and going at will.” (A. 249.) When Purcell

dismissed Craft's question by replying sarcastically that the guard shacks were "for guards," it solidified Craft's belief that the Company was increasingly hostile and disrespectful towards its employees. (A. 248-49.) Accordingly, after the meeting, Craft voiced his displeasure with Purcell's response to his coworkers. (A. 249.)

The following day, Craft continued to express his dissatisfaction, telling two coworkers that they had "just gained another [union] supporter," that he was "sick of the way they treat us here," and "that motherfucker is going down, the gloves are fucking off now." (A. 8.) During the discussion, both of Craft's coworkers continued to work. (A. 258, 288-90). Team Leader Cuellar and Supervisor Brown, who were conversing nearby, happened to overhear Craft's remarks. (A. 8; 256, 259, 562.)

Thus, Craft's announcement of his support for the Union is plainly protected by Section 7 of the Act, which expressly recognizes the right of employees "to form, join, or assist labor organizations." 29 U.S.C. § 157. And he just as plainly engaged in concerted activity by pledging his allegiance to the union cause. *Id.*; accord *City Disposal Sys., Inc.*, 465 U.S. at 830 (Section 7 "itself defines both joining and assisting labor organizations . . . as concerted activities.").

Accordingly, the Company misses the mark entirely in asserting (Br. 52-54) that

the complaints Craft voiced at the employee meeting and the next day were merely personal gripes designed solely to serve his self-interest.⁵

C. Craft Did Not Engage in Conduct so Egregious as To Forfeit the Act's Protection

As noted above (pp. 41-42), in determining whether an employee's conduct is so egregious that it forfeits the Act's protection, the Board balances two competing policy concerns: allowing employees some latitude for impulsive conduct in the course of protected activity, and respecting employers' need to maintain order in the workplace. *DaimlerChrysler Corp.*, 344 NLRB 1324, 1329 (2005). Accordingly, in striking an appropriate balance, the Board weighs the following factors: the place of discussion; its subject matter; the nature of the employee's outburst; and whether it was provoked by an employer's unfair labor practice. *Atlantic Steel*, 245 NLRB at 816. In so doing, the Board examines the conversation within its appropriate context, and considers all of the surrounding

⁵ In any event, contrary to the Company's suggestion (Br. 52-54), the type of complaints lodged by Craft, about an employer's disrespectful treatment of employees, are protected under Section 7. *See, e.g., NLRB v. Main Street Terrace Care Ctr.*, 218 F.3d 531, 540 (6th Cir. 2000) (employee's statement that "[i]f we had a union they would not treat any of us this way" was protected); *Arrow Electric Co.*, 323 NLRB 968, 970 (1997) (work stoppage protesting supervisor's rude and condescending behavior was protected), *enforced*, 155 F.3d 762 (6th Cir. 1998). And expressing such complaints to coworkers constitutes concerted activity, contrary to the Company's further claim (Br. 52-54). *See, e.g., Rockwell Int'l Corp. v. NLRB*, 814 F.2d 1530 (11th Cir. 1987) (employee engaged in concerted activity by objecting at a meeting to management's discussion of workplace policy addressing the volume of employee headsets, a group concern).

circumstances. *Id.* As demonstrated below, ample evidence supports the Board's determination (A. 11) that, on balance, Craft's conduct did not forfeit the Act's protection, and therefore that the Company violated the Act by admittedly discharging him for it.⁶

1. The Board reasonably determined that the place of discussion is neutral

As the Board found (A. 11), the place of the discussion "cuts both ways." On one hand, Craft made his remarks to two coworkers who were working on the warehouse floor. Although Brown pulled Craft away from his work area to discuss his remarks, after a brief conversation, he returned to work. Thus, any interruption in work lasted only for a "very brief period of time." (A. 11.) At no point did Brown or Cuellar have to ask any employee to return to work. (A. 416-17.)

On the other hand, as the Board noted (A. 11), the venue carries less significance here because Craft did not direct his remarks at any company representatives, although a supervisor and team leader happened to overhear him. Indeed, Purcell was not even present in the facility at the time. (A. 479.) Thus,

⁶ Contrary to the Company's assertion (Br. 51, 60-61), the Board properly analyzed Craft's discharge under *Atlantic Steel* rather than *Wright Line, a Div. of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981). "*Wright Line* applies to 'dual-motive' cases, in which an employee has engaged in protected activity, but the employer asserts that the discharge was caused by unrelated job performance." *NLRB v. Tri-County Mfg. & Assembly*, 76 F. App'x 1, 4 (6th Cir. 2003). By contrast, here it is undisputed that the Company discharged Craft for "the very same conduct that the Board determined to be protected activity. Accordingly, *Wright Line* is not instructive." *Id.*

Craft's remarks occurred during what otherwise would have been a brief discussion with two coworkers. *See, e.g., Thor Power & Tool Co.*, 148 NLRB 1379, 1388 (1964), *enforced*, 351 F.2d 584 (7th Cir. 1965) (employee did not lose the Act's protection by telling a coworker, as they were leaving a grievance meeting, that a company official was a "horse's ass"). The situation is therefore distinguishable from the typical *Atlantic Steel* case, where the Board is called upon to analyze the impact of an outburst that occurs during a confrontation with management. *Compare Starbucks Coffee Co.*, 354 NLRB 876, 878 (2009) (employee lost protection when she followed, taunted, and intimidated a manager after a union rally outside employer's coffee shop), and *DaimlerChrysler Corp.*, 344 NLRB at 1329 (loud ad hominem attack directed towards a supervisor that other workers overheard resulted in loss of protection), *with Beverly Health & Rehab. Serv.*, 346 NLRB 1319, 1322 n.20 (2006) (location of the remark did not weigh for or against protection where employee's comments were not directed toward a supervisor).

2. The subject matter of Craft's remarks indisputably favors protection

When an employee's statements occur during otherwise protected activity, the subject matter of the discussion weighs heavily in favor of protection. *Felix Indus., Inc.*, 339 NLRB 195, 196 (2003) (finding it "very significant," in favor of protection, that employee was engaging in protected activity when he made the

disputed remarks), *enforced mem.*, 2004 WL 1498151 (D.C. Cir. 2004). As shown above, the Board reasonably found that Craft engaged in protected activity when he announced his support for the Union while expressing his frustration with Purcell for rudely dismissing his inquiry about the guard shacks. “While there may be gentler ways of expressing the [Company’s] alleged inadequacies,” *Honda of Am. Mfg.*, 73 F. App’x. at 816 n.3, central to Craft’s message was his belief that Purcell failed to treat employees with respect. Given the fact that the subject matter of Craft’s remarks concerned employees’ working conditions and his support for the Union, this factor weighs strongly in favor of the Board’s finding that Craft’s remarks did not lose the Act’s protection. *See Verizon Wireless*, 349 NLRB 640, 642 (2007) (finding subject matter favored protection because employee’s remarks occurred while exercising his Section 7 rights); *Beverly Health & Rehab. Serv.*, 346 NLRB at 1322 (same).

3. The nature of Craft’s remarks favors protection

In examining whether statements made during the course of Section 7 activity remain protected, the Board draws the line between situations where an employee “exceeds the bounds of lawful conduct in a moment of animal exuberance or in a manner not motivated by improper motives and those flagrant cases in which the misconduct is so violent or of such a character as to render the employee unfit for further service.” *Prescott Indus. Prods. Co.*, 205 NLRB 51, 51-

52 (1973). Ample evidence supports the Board's determination (A. 11) that Craft's statements, while blunt, remained protected because they were not "so violent or of such serious character as to render . . . [him] unfit for further service." *St. Margaret Mercy Healthcare Ctrs.*, 350 NLRB 203, 204-05 (2007), *enforced*, 519 F.3d 373 (7th Cir. 2008).

As the Board explained (A. 11), Craft's remarks, when viewed in context, did not constitute a threat of violence. In addressing his coworkers, the first thing he did was to declare his support for the Union and complain about "the way they treat us here." (A. 8.) Against this backdrop, the Board reasonably inferred that in his follow-up remarks ("the motherfucker is going down, the gloves are fucking off now"), Craft "was threatening consequences, such as future unionization, rather than physical harm." (A. 11; 562.) As the Board noted (A. 11), and contrary to the Company's claim (Br. 54), it would make no sense to read Craft's statement differently, as proclaiming that because he supports the Union, he intends to assault his boss.

Moreover, Craft made his remarks at a time when the representation proceeding was ongoing and the ultimate fate of his coworkers' organizing efforts was uncertain. As a result, Craft's colloquial references to "going down" and "gloves" coming off are more accurately viewed as figures of speech invoked to protest the Company's treatment of employees, rather than as a literal invitation to

engage in a fist fight. *See, e.g., Leasco, Inc.*, 289 NLRB 549, 552 (1988) (employee's statement to supervisor that he was going to "kick [his] ass" made in the course of Section 7 activity was "a colloquialism that standing alone does not convey a threat of actual physical harm"); *Vought Corp.*, 273 NLRB 1290, 1295 (1984) (employee's statement to supervisor that "I'll have your ass" was no more than a threat to file a grievance or a Board charge or to report the supervisor to higher management), *enforced*, 788 F.2d 1378 (8th Cir. 1986).

In this regard, *Kiewit Power Constructors Co.*, 355 NLRB 708 (2010), *enforced*, 652 F.3d 22 (D.C. Cir. 2011), strongly supports the Board's analysis here. There, the Board found that employees who told their supervisor "it's going to get ugly and you better bring your boxing gloves" were not making a physical threat. *Id.* at 710. As the Board noted, the statements, "[a]lthough intemperate, were not unambiguous or 'outright' . . . threats of physical violence. To the contrary, the employees' predictions that things could 'get ugly' reasonably could mean nothing more than that the [employer's behavior] would engender grievances or a labor dispute." 355 NLRB at 710. As the Board also inferred, the reference to "boxing gloves" was "more likely to have been a figure of speech . . . rather than a literal invitation to engage in physical combat," particularly given the lack of any accompanying physical gestures. *Ibid.* The District of Columbia Circuit, in enforcing the Board's order, stated what it thought was "obvious:" no one thought

that the employees “were literally challenging their supervisor to a boxing match.” *Kiewit Power Constructors Co. v. NLRB*, 652 F.3d at 28. The court then pointed out that once it was acknowledged the employees were speaking in metaphor, the meaning of their language was a matter of context. *Id.* at 28-29. The Board conducted the same type of contextual analysis here.

Moreover, if there was any doubt as to whether Craft was literally inviting Purcell to engage in bare-knuckled physical combat, that doubt was eradicated when Craft clarified his statements. As he immediately told Supervisor Brown, “he never meant that he wanted to do physical harm to Brian Purcell[,] he just meant that he wanted [Purcell] to be held accountable for his actions” (A. 9; 562.)

Further, as the Board noted (A. 11), the reactions of company officials support its finding that Craft’s statements did not constitute a threat. Thus, instead of calling security to the scene, Brown suggested that Craft speak directly with Purcell. It is axiomatic that if Brown thought Craft were threatening Purcell with physical harm, he would not have tried to facilitate a face-to-face meeting between the two men. Moreover, in his email to Purcell about the incident, Value Stream Manager Gruet conceded that he “d[id]n’t believe Mike intended physical harm with his words,” and that he believed Craft “was fit for work and would not harm any associates.” (A. 9; 563.) Accordingly, the Company’s assertion that Craft

meant to do violence (Br. 54) cannot be squared with management's contemporaneous assessment that Craft harbored no such intention.

In addition, based on Gruet's belief that Craft had not threatened Purcell, the Company let him return to his job, and he continued to work for two hours before taking his regularly scheduled lunch break. When the Company later decided to eject Craft from the facility – on the advice of the labor consultant it hired to spearhead its antiunion campaign – the Company did not call security guards to escort him from the facility. To the contrary, the Company permitted Craft to keep his badge, and to return to the facility the following Monday.

The forgoing facts completely undermine the Company's claim that Craft meant to do physical harm. In the circumstances, the Company errs by invoking (Br. 54-55) two factually distinguishable cases, *DaimlerChrysler Corp.*, 344 NLRB 1324 (2005), and *Joseph Schlitz Co.*, 273 NLRB 1604 (1985). In *DaimlerChrysler Corp.*, 344 NLRB at 1329-30, the employee approached his supervisor in an "intimidating" manner and used "sustained profanity" during a "loud ad hominem attack on a supervisor." And in *Joseph Schlitz Co.*, 273 NLRB at 1605, the employee threw his safety glasses and "advanced toward [the supervisor] in a belligerent manner with clenched fists." By contrast, Craft was simply discussing his union support and the Company's disrespectful treatment of

employees with two coworkers when a supervisor happened to overhear him. In addition, Craft did not engage in any physically intimidating conduct.

There is no more merit to the Company's exaggerated claim (Br. 57-58) that the Board is seeking to impose rules that shield any insubordination as long as the subject matter of the employee's statements involves a union. As this Court recognizes, the Board considers "context in determining whether the language used was opprobrious, profane, defamatory, or malicious." *Honda of Am. Mfg.*, 73 F. App'x at 815. Indeed, precedent belies the Company's contention that the Board has a per se rule protecting pledges of union support. *See, e.g., Verizon Wireless*, 349 NLRB 640, 643 (2007) (employee lost the Act's protection while soliciting coworkers to support union); *Waste Mgmt. of Ariz., Inc.*, 345 NLRB 1339, 1340 (2005) (employee lost protection of the Act while claiming he was being targeted because of his union support). Instead, the Board conducts a reasoned review, taking into account the context of the incident through analysis of the *Atlantic Steel* factors.

Likewise, the Board reasonably rejected the Company's claims, repeated to this Court (Br. 58-59), that it was entitled to discharge Craft because it has a zero-tolerance policy against workplace violence. To be sure, the Board recognizes an employer's legitimate need to guard against workplace violence. *See, e.g., Pactiv Corp.*, 337 NLRB 898, 898 (2002) (employer did not violate Act by calling sheriff

in response to employee's unusual and threatening behavior), *review denied sub nom. Operating Eng'rs Local 470 v. NLRB*, 350 F.3d 105 (D.C. Cir. 2003). As shown above, however, Craft's remarks, when viewed in context, did not constitute a threat of physical violence, as company officials recognized.

4. The balance of the *Atlantic Steel* factors favors protection

In conclusion, substantial evidence supports the Board's determination that, on balance, Craft's statements to his coworkers concerning his support for the Union, while expressing his dissatisfaction with the way Purcell was treating him and other employees, did not lose the protection of the Act. First, the place of the discussion is neutral because although Craft made his remarks on the warehouse floor, he was merely speaking with two coworkers when a supervisor and team leader overheard the conversation. Moreover, Purcell was not even present. Second, the subject matter of the discussion – Craft's support for the Union because of the disrespectful manner in which Purcell had treated him and his coworkers – is protected under Section 7 of the Act. This factor strongly favors protection. Third, the nature of the outburst – profane, to be sure, but ambiguous, and understandable given how upset Craft was about the way his legitimate inquiry was rudely dismissed – favors protection. The fourth factor, that the outburst was not provoked by an unfair labor practice, is the only one absent here. (A. 11.)

Viewing the foregoing factors in context, the Board carefully weighed them to strike an appropriate balance between an employee's right to engage in protected activity and an employer's right to maintain order and respect. *Thor Power Tool Co.*, 351 F.2d at 587. Because the line drawn by the Board between those countervailing rights in this case is not illogical, arbitrary, or unreasonable, this Court should not disturb it. *Honda of Am. Mfg.*, 73 F. App'x. at 813.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

Respectfully submitted,

/s/ Julie B. Broido

JULIE B. BROIDO

Supervisory Attorney

/s/ Valerie L. Collins

VALERIE L. COLLINS

Attorney

National Labor Relations Board

1015 Half Street SE

Washington, DC 20570

(202) 273-2996

(202) 273-1978

RICHARD F. GRIFFIN, JR.

General Counsel

JENNIFER ABRUZZO

Deputy General Counsel

JOHN H. FERGUSON

Associate General Counsel

LINDA DREEBEN

Deputy Associate General Counsel

National Labor Relations Board

November 2015

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

CATERPILLAR LOGISTICS, INC	*	
	*	
Petitioner/Cross-Respondent	*	Nos. 15-1433
	*	15-1611
v.	*	
	*	Board Case No.
NATIONAL LABOR RELATIONS BOARD	*	9-CA-110687
	*	
Respondent/Cross-Petitioner	*	
	*	
and	*	
	*	
INTERNATION UNION, UNITED AUTOMOBILE, AREOSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW)	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 12,752 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

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

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

CATERPILLAR LOGISTICS, INC	*
	*
Petitioner/Cross-Respondent	* Nos. 15-1433
	* 15-1611
v.	*
	* Board Case No.
NATIONAL LABOR RELATIONS BOARD	* 9-CA-110687
	*
Respondent/Cross-Petitioner	*
	*
and	*
	*
INTERNATION UNION, UNITED AUTOMOBILE, AREOSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW)	* * *

CERTIFICATE OF SERVICE

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

I certify foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

Joseph J. Torres
Derek G. Barella
Heather Lehman
Winston & Strawn
35 W. Wacker Drive
Chicago, IL 60601

Mary Monica Lenahan
Winston & Strawn
1700 K Street, N.W.
Washington, DC 20006

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

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