

No. 15-60588

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

KATCH KAN USA, L.L.C.,

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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ORAL ARGUMENT STATEMENT

The Board believes that this case involves the straightforward application of well-settled law to the facts. However, to the extent the Court believes that oral argument would be helpful or grants the Company's request for oral argument, the Board requests the opportunity to participate.

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**BRIEF FOR
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JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Katch Kan USA, L.L.C. to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, the Board’s Order issued against Katch Kan in *Katch Kan USA, LLC*, 362 NLRB No. 162 (Aug. 4, 2015). The Board had jurisdiction over the unfair-labor-practice proceeding below under Section 10(a) of the National

Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”). The Board’s Order is final with respect to all parties.

Katch Kan petitioned for review on August 25, 2015; the Board cross-applied for enforcement on October 2, 2015. The filings were timely as the Act imposes no time limit on the initiation of review or enforcement proceedings. The Court has jurisdiction pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), because the underlying unfair labor practices occurred in Texas.

STATEMENT OF THE ISSUE

Whether substantial evidence supports the Board’s finding that Katch Kan violated Section 8(a)(1) of the Act by discharging Tanner Siems because he had engaged in concerted activity protected by the Act.

STATEMENT OF THE CASE

After investigation of an unfair-labor-practice charge filed by the United Steelworkers, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industry and Service Workers, International Union, AFL-CIO-CLC (“the Union”), the Board’s General Counsel issued a complaint against Katch Kan, alleging violations of Section 8(a)(1) of the Act. Specifically, the complaint alleged that employee Tanner Siems engaged in protected concerted activities when he participated in a work stoppage with other employees demanding that Katch Kan rescind a pay

decrease, and demanding the rescission in writing, and that Katch Kan fired Siems for those activities. Following a hearing, an administrative law judge issued a decision finding that violation. (D&O 1.) On review, the Board affirmed the judge's rulings, findings, and conclusions in a Decision and Order issued on August 4, 2015. (D&O 1.)

I. THE BOARD'S FINDINGS OF FACT

A. Katch Kan's Business Operations and Employees

Katch Kan is in the business of servicing oil rigs at several locations. (D&O 3; Tr. 13-14, 200.) Specifically, it services containment systems used to catch and recycle oil base during the drilling process. (D&O 3; Tr. 13-14.) As of July 2014, Katch Kan's South Texas location employed about ten regular employees, known as "installers," who worked on oil rigs servicing containment systems. (D&O 3; Tr. 15.) Katch Kan's United States' operation was headed by General Manager Nolan Todd, who started in that position in June 2014. (D&O 3; Tr. 180, 189.) Superintendent Stephen Ramsey was in charge of Katch Kan's South Texas facility. (D&O 3; Tr. 15, 40, 127.) He was assisted by two supervisors, John Canales and Jack McPherson. (D&O 3; Tr. 15, 40.)

B. Tanner Siems Is Asked if He Is Interested in a Voluntary Work Assignment in Saudi Arabia

Sometime in June 2014, General Manager Todd instructed Superintendent Ramsey to begin recruiting Katch Kan installers "willing to go" on a voluntary

work assignment to Saudi Arabia. (D&O 5; Tr. 49, 135.) Over the next several weeks, Ramsey would discuss the trip with at least five employees: Tanner Siems, John Barrows, Mike Salazar, David Salazar, and Gavin Wheeler. (D&O 4-6; Tr. 23-24, 119, 135.)

Siems, a lead installer who worked for Katch Kan for 2 years, was approached by Ramsey about the Saudi Arabia trip on July 11, 2014. (D&O 4; Tr. 48.) Siems initially expressed interest in the job, so long as “the terms were right” and he had time to think about it. (D&O 5; Tr. 49.) Ramsey responded that was all he needed to know. (D&O 5; Tr. 49.) Siems thereafter had several conversations in the coming weeks with Katch Kan representatives during which he expressed reservations about going on the trip. The first of these conversations was on July 14, when Siems asked Ramsey if he knew anything more about the job. (D&O 5; Tr. 49.) Ramsey said he did not know any further details, other than the trip was supposed to begin at the end of August. (D&O 5; Tr. 49-50.)

On July 16, Ramsey told Siems that he was one of the employees chosen for the assignment. (D&O 5; Tr. 50.) According to Ramsey, the trip remained voluntary. (D&O 5; Tr. 138.) Siems again asked if Ramsey had any more information regarding the terms of the trip. Ramsey said no. Siems replied that he still wanted to think about going before committing to the trip. Ramsey said that was fine. (D&O 5; Tr. 50.)

On July 21, Ramsey told Siems and the other employees being considered for the trip that they needed to get their passports in advance of the trip. Siems said that he would get his passport, but still wanted to know the terms and conditions of the trip prior to agreeing to go. Ramsey said that was fine. (D&O 5; Tr. 51.)

On July 22, Siems went to Todd to ask him for specifics on the trip. Todd replied that the anticipated schedule would require Siems to work 14 days straight, with 14 days off. (D&O 5; Tr. 51.) This was more consecutive working days than Siems' current work schedule of 7 days on, 7 days off. (D&O 3; Tr. 14, 100.) Todd expressed uncertainty about the pay, but stated it would likely be between \$250 and \$500 per day. (D&O 5; Tr. 51.) At the time, Siems made \$19 per hour as a lead installer in Texas, plus overtime, and worked any number of hours on a given day up to 24-hour shifts. (Tr.73.) Thus, based on the information Todd gave Siems at the time, compensation in Saudi Arabia would not necessarily have meant a pay increase, and may actually have been a pay decrease. (Tr. 73.) Todd did not know any further details about the trip, such as departure dates, length of the trip, or any anticipated safety precautions. Siems said he still wanted to think about it. (D&O 5; Tr. 51.)

Siems then went to get his passport, so that he would have it should he ultimately decide to accept the assignment. (D&O 5-6; Tr. 51-52.) On the way to

the passport office, Siems called Todd and told him he did not think it was a good idea for him to go to Saudi Arabia. Todd responded that was fine and they could talk about it later. Later that day, Siems went to Todd's office to again tell him he did not want to go on the trip. Todd was not in; Siems asked Todd's secretary to inform Todd that he did not want to go on the trip, and to call him. (D&O 6; Tr. 52.)

Around this same time, Katch Kan retracted initial trip offers made to Barrows and Wheeler. (D&O 6; Tr. 24, 109-10.) Ramsey told Barrows he was no longer one of the employees selected for the trip. (D&O 6; Tr. 24.) Ramsey similarly told Wheeler that Wheeler would not be going on the trip because Ramsey wanted to send Canales in his place. (D&O 6; Tr. 109-10.) Ramsey explained that Canales had a DWI conviction and, to keep him employed, Ramsey wanted to send him overseas because his driving record would not be an issue there. (D&O 6; Tr. 110.)

C. Siems and Other Employees Refuse to Work After Learning that their Wages Would be Reduced

Shortly after Todd became General Manager, Katch Kan decided to change its compensation structure. (D&O 3; Tr. 192.) Specifically, up until July 2014, employees worked a schedule of 7 days on followed by 7 days off, with a minimum of 40 hours pay for the 7 days off. (D&O 3; Tr. 14, 100.) Employees would often work overtime during the 7 days on. (D&O 3; Tr. 14, 45.) Katch Kan

management decided to implement a new schedule where employees would work 4 days followed by 4 days off, with no 40-hour minimum pay for days off. (D&O 3; Tr. 41, 100, 130.) This reduced the total number of hours paid, and also made it more difficult to earn overtime pay. (D&O 3; Tr. 45, 160.) The effect of the change was a dramatic pay reduction, resulting in as much as a 50 percent decrease in pay for employees. (D&O 3; Tr. 42, 101, 130.)

The change in pay was announced to the employees on July 28, 2014 at a regularly scheduled safety meeting attended by the ten installers, including Siems, in an office at the Texas facility. (D&O 3; Tr. 15, 40-41; R Ex. 8.) In addition to Ramsey, management was represented by Supervisor Canales, and Salesman Mike Cresetelli. (D&O 3; Tr. 15, 40-41; R Ex. 8.) At the end of the safety portion of the meeting, Ramsey stated that he had an announcement about changes in employees' schedules and pay and outlined the new 4-day schedule and pay structure. (D&O 3; Tr. 130.)

The employees were "in shock" over the news of such a drastic change in schedules and its attendant dramatic pay cut. (D&O 3; Tr. 131.) Several employees, including Siems, spoke up and complained that they had not been notified earlier. (D&O 3; Tr. 17-18, 42.) Ramsey walked out of the room. (D&O 3; Tr. 17.) The employees remained, discussing the changes and what they could do in response. (D&O 3; Tr. 18.) Ultimately, all the employees agreed to protest

the schedule and wage changes by refusing to go out on assignment that day.

(D&O 3-4; Tr. 18, 42, 101-02.)

Supervisor Canales approached the employees and asked for installers ready to go on the rig. All the employees, including Siems, refused to go, stating they would not return to work until the schedule changes were reversed. Ramsey returned and asked the employees why they were not working. (D&O 3; Tr. 20, 42-43.) The employees stated they were refusing to work and would not return to work until their schedule was renegotiated. (D&O 3-4; Tr. 42-45, 102-03.)

Ramsey wanted to immediately fire all those who refused to work. He called General Manager Todd and said he planned to discharge the workers. Todd told Ramsey not to fire anyone, and instead instructed Ramsey to negotiate with the employees over the schedule and wage change. (D&O 6; Tr. 132.) Ramsey approached the group with a compromise: the schedule would continue to be 7 days on, 7 days off, but without the 40-hour guarantee on the off week. (D&O 3-4; Tr. 20, 42-44, 132.) Siems, joined by others, asked for this in writing. (D&O 3-4, 7; Tr. 20, 45-46, 134.) Ramsey asked the employees to trust his word. (D&O 3, 7; Tr. 21, 46.) Siems replied, “[y]our word doesn’t mean shit.” (D&O 3-4, 6; Tr. 21, 46, 104.) Ramsey did not say anything to this, but his demeanor immediately changed. His face turned red and he looked angry. (D&O 3-4, 7; Tr. 21, 35, 46,

104.) He made more phone calls and Katch Kan agreed to put the compromise wage agreement in writing by day's end. (D&O 3-4; Tr. 46, 105.)

After Ramsey agreed to put the promised changes in writing, employees began to return to work. (D&O 3-4; Tr. 22, 47.) However, before Siems could leave the room, Ramsey pulled Siems aside and told him that he had been selected to go to Saudi Arabia. (D&O 6; Tr. 47-48, 53-54.) Ramsey stated that he selected Siems because of his work ethic and because he did not want Siems to lose any money. (D&O 6; Tr. 47-48, 53-54.) Siems replied that he still did not want to go. Ramsey looked angry and said "okay" before ending the conversation. (D&O 6; Tr. 54.)

D. After Engaging in the Work Stoppage, Siems Is Discharged for Refusing the Voluntary Work Assignment to Saudi Arabia

The following week, on August 4, Siems told Ramsey of his decision not to go to Saudi Arabia in an email, stating:

Steve, I appreciate the opportunity to work overseas and selecting me out of all employees. But I am sending this to inform you I will no longer be able to go because of personal family matters. Once again thank you for offer [sic] the chance to go and sorry for any inconvenience.
(GC Ex. 2; D&O at 6; Tr. 54.)

On Friday, August 8, Ramsey called Siems and told him that he needed him to fly to Canada the following Monday for training in advance of the Saudi Arabia trip. Siems reiterated that he did not want to go. Ramsey responded that he would discuss the matter further with Todd, and get back to Siems. (D&O 6; Tr. 56.)

Later that morning Siems again emailed Ramsey saying, “Steve, I decided not to go over-seas because of filling [sic] unsafe and for personal [f]amily reasons.” (D&O 6; GC Ex. 3.) Siems then went to the company’s headquarters and met with Todd and Katch Kan’s attorney Peter Dawson. (D&O 6; Tr. 58.) He relayed the most recent conversation he had with Ramsey, noting that Ramsey still wanted him to go to Saudi Arabia, although he had told Ramsey he did not want to go. (D&O 6; Tr. 58.) Todd and Dawson said that by obtaining a passport Siems had consented to go on the trip. (D&O 6; Tr. 59.) Siems disagreed, and said that Katch Kan could take the cost of expediting the passport out of his pay. (D&O 6; Tr. 59.) Siems, a union supporter who had signed an authorization card, asked if Katch Kan was forcing Siems to Saudi Arabia because of his support for the Union. (D&O 6; Tr. 59-60.) Todd denied that it had anything to do with Siems’ union support, and said he would discuss the matter further with Ramsey. (D&O 6; Tr. 59.)

Siems left the office on August 8 and a few hours later received a call from Ramsey. Ramsey asked Siems if he was still unwilling to go to Saudi Arabia. Siems said yes. Ramsey replied that they could talk about it the following Monday at work. (D&O 6; Tr. 61.) However, the two spoke later that night by phone when Ramsey told Siems that he needed Siems to go on the trip. Siems responded that

he had already told both Ramsey and Todd that he did not want to go. Ramsey then discharged Siems. (D&O 6; Tr. 62.)

No Katch Kan employee went to Canada for training on August 11, the day Siems had been told he had to leave for Canada. (D&O 4; Tr. 139-40.) Indeed, on the date of Siems' termination, no plane tickets had been purchased for any employee to go to Canada or Saudi Arabia. (D&O 4, 7; R Ex. 14.) The employees who eventually agreed to the assignment were sent letters on August 20 and 25 thanking them for "volunteering to participate in the Saudi Aramco project in Saudi Arabia" and providing details on compensation. (D&O 5; R Ex. 12, 13.) Katch Kan did not purchase any tickets to Canada until August 25, and employees did not leave for Canada until September 14. (D&O 4, 7; R Ex. 14.) Of the four employees who would travel to Canada for training in September, none would travel to Saudi Arabia. (D&O 4, 7; R Ex. 14.) Only one Katch Kan employee, Jason Hughes, went to Saudi Arabia over six months later. (D&O 4; Tr. 213.) Hughes left for Saudi Arabia on February 25, 2015, the same day the unfair labor practices hearing began in this case. (Tr. 212; R Ex. 11.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On August 4, 2015, the Board (Chairman Pearce and Members Hirozawa and McFerran) issued its Decision and Order, finding, in agreement with the administrative law judge, that Katch Kan violated Section 8(a)(1) of the Act by

discharging Siems for his protected concerted activity. (D&O 1.) The judge found that Katch Kan used Siems' refusal to accept the voluntary work assignment to Saudi Arabia as pretext to discharge him for engaging in the July 28 work stoppage. (D&O 7.)

The Board's Order directed Katch Kan to cease and desist from discharging employees because they engage in protected concerted activities, and in any like or related manner, interfering with its employees' Section 7 rights. Affirmatively, the Board's Order directed Katch Kan to offer Siems full reinstatement to his former job, make him whole for any loss of earnings and other benefits, and post a remedial notice.

SUMMARY OF ARGUMENT

The Board reasonably concluded that Katch Kan violated the Act by discharging employee Tanner Siems because he engaged in the protected concerted activity of a work stoppage. Specifically, on the credited evidence, the Board found that soon after Siems challenged Superintendent Ramsey's word during that protected activity, by insisting that the promise must be reduced to writing before the employees would return to work, Ramsey demanded that Siems accept what had previously been a voluntary assignment to Saudi Arabia. When Siems refused, Ramsey discharged him. The Board, applying its well-established *Wright Line* analysis, determined that the General Counsel had shown that Siems engaged in

protected concerted activity, and Katch Kan was well aware of his activity. Katch Kan does not challenge these findings. Further, based on ample credited evidence, the Board found that Katch Kan's reasons for discharging Siems 11 days after the work stoppage were pretextual and Siems would not have been discharged in the absence of his protected conduct.

Overwhelming evidence supports the Board's view that Siems' refusal to go on the Saudi Arabia trip furnished the excuse rather than the reason for Siems' discharge. This finding of pretext is firmly rooted in the ample credited evidence that Katch Kan managers never told Siems that the trip was mandatory until the day of his discharge, that it did not send employees to training for the Saudi Arabia trip at the time it required Siems to leave for training, and ultimately sent only one employee to Saudi Arabia more than 6 months after Siems' discharge. There is no support for Katch Kan's claim that it reasonably believed Siems had agreed to the trip after he obtained a passport. There is ample record evidence that both before and after getting his passport, Siems made it clear to Katch Kan managers on multiple occasions that he was not sure he would agree to go. Indeed as found by the judge, "from the first request to the final request on August 8, Siems never said he would be willing to go." In these circumstances, the Board's rejection of Katch Kan's *Wright Line* defense is amply supported. Katch Kan's remaining contentions are founded primarily on an unsupported factual narrative that was

expressly discredited by the judge, and was rejected by the Board on review. Thus, Katch Kan has presented the Court with no basis to disturb the Board's well supported unfair-labor-practice finding.

STANDARD OF REVIEW

The Board's findings of fact are "conclusive" if supported by substantial evidence on the record considered as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951). A reviewing court may not "displace the Board's choice between two fairly conflicting views, even though the court might have made a different choice had the matter been before it de novo." *Universal Camera*, 340 U.S. at 488; *Carey Salt Co. v. NLRB*, 736 F.3d 405, 409-10 (5th Cir. 2013). "Substantial evidence is that which is relevant and sufficient for a reasonable mind to accept as adequate to support a conclusion. It is more than a mere scintilla, and less than a preponderance." *Flex Frac Logistics, L.L.C. v. NLRB*, 746 F.3d 205, 207 (5th Cir. 2014) (quotations omitted). As the Court has observed, "[o]nly in the most rare and unusual cases will an appellate court conclude that a finding of fact made by the . . . Board is not supported by substantial evidence." *Merchants Truck Line v. NLRB*, 577 F.2d 1011, 1014 n.3 (5th Cir. 1978).

"In determining whether the Board's factual findings are supported by the record, [the Court does] not make credibility determinations or reweigh the

evidence.” *NLRB v. Allied Aviation Fueling*, 490 F.3d 374, 378 (5th Cir. 2007).

The Board’s adoption of the administrative law judge’s credibility determinations must be upheld absent a showing that they are “unreasonable,” “contradict[] other findings,” are “based upon inadequate reasons or no reason,” or are unjustified. *Dynasteel Corp. v. NLRB*, 476 F.3d 253, 257 (5th Cir. 2007). “Indeed, where a case turns on witness credibility, this [C]ourt will accord special deference to the [Board’s] credibility findings and will overturn them only in the most unusual of circumstances.” *NLRB v. Cal-Maine Farms, Inc.*, 998 F.2d 1336, 1339-40 (5th Cir. 1993) (internal citations omitted).

In particular, the Board’s finding of unlawful motive must be upheld if it is supported by substantial evidence. Courts are particularly “deferential when reviewing the Board’s conclusions regarding discriminatory motive.” *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 734 (D.C. Cir. 2000); accord *Clear Pine Mouldings, Inc. v. NLRB*, 632 F.2d 721, 726 (9th Cir. 1980) (the determination of motive is “particularly within the purview of the Board”).

ARGUMENT**SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT KATCH KAN VIOLATED SECTION 8(a)(1) WHEN IT DISCHARGED TANNER SIEMS BECAUSE HE ENGAGED IN PROTECTED CONCERTED ACTIVITY**

The Board's finding that Katch Kan discharged Siems because he engaged in protected concerted activity is largely founded on the testimony of witnesses at the hearing that the administrative law judge credited over conflicting testimony.

See NLRB v. Brookwood Furniture, 701 F.2d 452, 456 (5th Cir. 1983)

(“Particularly where, as here, the record is fraught with conflicting testimony, requiring essential credibility determinations to be made, the trier of fact's conclusions must be accorded particular deference.”) In particular, the judge credited the testimony of Siems, Barrows, and Wheeler that Siems actively participated in a protected work stoppage and openly challenged the value of Ramsey's word in front of other employees. (D&O 7.) Credited evidence establishes Ramsey's hostility to the employees' work stoppage, and Ramsey's displeasure at Siems' public challenge during this protected activity. Eleven days after Siems' conduct, Ramsey discharged Siems. The Board also found, based on credited evidence, that Katch Kan used Siems' refusal to go to Saudi Arabia—an assignment that had consistently been presented as voluntary—as a pretext for its unlawful conduct. In these circumstances the Board (D&O 7) reasonably determined that “Siems was discharged on August 8, not for his refusal to go to

Saudi Arabia, but for the protected concerted activities that he participated in on July 28.”

A. Applicable Principles

Section 7 of the Act guarantees employees the right to “to form, join, or assist labor organizations” and “to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection” 29 U.S.C. § 157. The section thus grants employees the fundamental right “to join together to seek better terms, tenure, or conditions of employment, and to protect those already obtained.” *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345, 1347-48 (3d Cir. 1969); *accord NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 12-15 (1962); *Mobil Expl. & Producing U.S., Inc. v. NLRB*, 200 F.3d 230, 238 (5th Cir. 1999). Section 8(a)(1) of the Act implements this guarantee by making it an unfair labor practice for an employer “to interfere with, restrain or coerce employees in the exercise of the rights guaranteed by [S]ection 7” 29 U.S.C. § 158(a)(1).

It is well settled that employees who engage in a work stoppage to improve their wages, benefits, or working conditions are engaged in protected Section 7 activity, and an employer violates Section 8(a)(1) of the Act by retaliating against employees who walk off the job in protest over such matters. *See Washington Aluminum*, 370 U.S. at 14-17; *NLRB v. McEver Eng’g, Inc.*, 784 F.2d 634, 639 (5th Cir. 1986).

Whether an adverse action violates the Act depends on the employer's motive. *See Wright Line*, 251 NLRB 1083, 1089 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981); *see also NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 401-03 (1983) (approving the *Wright Line* test). Under *Wright Line*, the Board's General Counsel bears the burden of showing that an employee's protected activity was "a motivating factor" in the employer's decision to take adverse action against that employee. *New Orleans Cold Storage & Warehouse Co. v. NLRB*, 201 F.3d 592, 600-01 (5th Cir. 2000). To carry this burden, the General Counsel must demonstrate that the employee engaged in protected activity, the employer had knowledge of that activity, and the employer had animus towards that activity. *Intermet Stevensville*, 350 NLRB 1270, 1274 (2007). Once the General Counsel satisfies this burden, the employer can only avoid liability by proving that it would have taken the same action even in the absence of the protected activity. *See Wright Line*, 251 NLRB at 1089; *accord Thermon Heat Tracing Servs., Inc.*, 143 F.3d 181, 187 (5th Cir. 1998).

Proof of animus does not require overt direct evidence, but may be established by circumstantial evidence. *Valmont Indus., Inc. v. NLRB*, 244 F.3d 454, 465 (5th Cir. 2001.) This may include, for example, the employer's knowledge of and hostility toward the protected conduct, *NLRB v. Central Power & Light*, 425 F.2d 1318, 1322 (5th Cir. 1970), *Vincent Indus. Plastics, Inc. v.*

NLRB, 209 F.3d 727, 735 (D.C. Cir. 2000); the timing of the discipline in relation to the protected activity, *Electronic Data Systems. Corp. v. NLRB*, 985 F.2d 801, 805 (5th Cir. 1993); disparate treatment or discipline that deviates from the employer's past practice, *NLRB v. ADCO Elec. Inc.*, 6 F.3d 1110, 1119 (5th Cir. 1993); the employer's reliance on pretextual justifications, *Van Vlerah Mech., Inc. v. NLRB*, 130 F.3d 1258, 1264 (7th Cir. 1997); the implausibility of the employer's explanation of its action, *Yesterday's Children, Inc. v. NLRB*, 115 F.3d 36, 49 (1st Cir. 1997); and inconsistencies between the employer's proffered reason for the action and other actions of that employer, *Healthcare Employees Union v. NLRB*, 463 F.3d 909, 922 (9th Cir. 2006). The Court defers to the Board's findings on unlawful purpose, including the Board's logical inferences that an employer's adverse employment decisions were discriminatorily motivated. *Texas World Serv. Co. v. NLRB*, 928 F.2d 1426, 1435 (5th Cir. 1991).

If the General Counsel meets the initial *Wright Line* burden, the burden then shifts to the employer to demonstrate it would have taken the adverse action in the absence of animus toward the protected activity. *Red Ball Motor Freight, Inc. v. NLRB.*, 660 F.2d 626, 627 (5th Cir. 1981). This requires establishing a valid business justification for the employment action that is not pretextual. The employer must prove that the protected activity was not the motivating factor behind the discharge, and that the employer would have discharged the employee

even absent the protected activity. *Marathon LeTourneau Co., Longview Div. v. NLRB*, 699 F.2d 248, 252 (5th Cir. 1983); *NLRB v. Int’l Ass’n of Bridge Structural & Ornamental Iron Workers*, 864 F.2d 1225, 1233 n.4 (5th Cir. 1989). Thus, the employer must prove that it would have taken the same actions had the employee not exercised his rights under the Act. The Board need not accept at face value even a “seemingly plausible explanation” if the evidence and the reasonable inferences drawn from it indicate that union animus motivated the decision. *Sociedad Española de Auxilio Mutuo y Beneficiencia de P.R. v. NLRB*, 414 F.3d 158, 161 (1st Cir. 2005) (citation omitted); *accord Justak Bros. & Co. v. NLRB*, 664 F.2d 1074, 1077 (7th Cir. 1981); *NLRB v. Buitoni Food Corp.*, 298 F.2d 169, 174 (3d Cir. 1962).

B. Siems Was Discharged for his Protected Concerted Activity

1. Siems’ discharge was unlawfully motivated by his protected conduct

Before this Court, as before the Board (D&O 6), Katch Kan does not challenge that the employees’ work stoppage was protected concerted activity and that it was aware of the activity. Specifically, Siems engaged in concerted activity protected by the Act when he and his fellow employees all refused to work in immediate response to Katch Kan’s decision to dramatically change the employees’ schedules and reduce their wages. *See McEver*, 784 F.2d at 639 (holding that a brief one-time strike regarding working conditions “is

presumptively protected activity”); *NLRB v. Gulf-Wandes Corp.*, 595 F.2d 1074, 1078 (5th Cir. 1979) (single strike over working hours protected if aimed at changing employer’s policies.) The credited evidence demonstrates that Siems was an active and vocal participant in this protected activity. (D&O 3, 7; Tr. 17-18, 20, 42.) In particular, Siems was the one who spoke up for the group of employees and directly rejected Ramsey’s offer to take his word about a compromise, telling Ramsey in front of all the employees that Ramsey’s word was untrustworthy and insisting that management commit its promise of a compromise to writing before the employees would return to work. (D&O 3-4, 7; Tr. 20, 45-46, 134.) Katch Kan was well aware of this conduct because it occurred during the July 28 meeting in front of Ramsey, and Ramsey reported the events to Todd as he sought to get the employees to return to work. (D&O 6; Tr. 132.)

Moreover, Ramsey’s animus towards the employees’ protected activity and to Siems in particular, is well supported by both credited and circumstantial evidence. Ramsey sought permission to discharge the employees for refusing to work, which Todd denied. (D&O 6; Tr. 166-67.) When Todd subsequently agreed to a compromise wage and schedule policy, and Ramsey asked the employees to take him at his word that the changes would be made, it was Siems—and Siems alone—who challenged Ramsey, telling him in front of other employees that his word “doesn’t mean shit,” and insisting, successfully, that the compromise be put

in writing. (D&O 6-7; Tr. 21, 46, 104.) Ramsey was particularly upset with Siems because of these comments. (D&O 7; Tr. 21, 46, 104.) Based on this evidence, the Board reasonably concluded that Ramsey was angered by the incident, and held animus towards Siems because of his protected activity.

The timing of Ramsey's discharge of Siems just 11 days after his protected conduct lends significant support to the Board's finding that animus motivated Siem's discharge. *See Valmont* 244 F.3d at 465 (close proximity between protected activity and discipline may provide basis for inferring unlawful motive.)

Significantly, Katch Kan's animus is further demonstrated by the pretextual reason offered by Ramsey for discharging Siems: his refusal to accept an assignment to Saudi Arabia. The credited evidence amply demonstrates that from the initial offering of this assignment until the day of Siems' discharge, the Saudi Arabia trip was presented to the employees as a voluntary, not mandatory, assignment. (D&O 5, 7; Tr. 50-52, 138.) Indeed, Ramsey and Todd both confirmed that the trip was voluntary. (Tr. 138, 232.) When Todd first asked Ramsey to put together a team, he asked for employees "willing to go" overseas. (D&O 5; Tr. 135.) When Ramsey approached the employees, he asked them if they would be willing to go. (D&O 5; Tr. 49.) And in response to concerns expressed by Siems, prior to the protected work stoppage, neither Ramsey nor Todd ever indicated that the trip was mandatory. (D&O 7; Tr. 138.) Indeed, until

the day of his discharge, Siems was never told that his participation in the trip was mandatory or that Katch Kan committed him to it.

Likewise, as the Board found, “from the first request to the final request on August 8, Siems never said he would be willing to go” to Saudi Arabia. (D&O 5, 7; Tr. 58.) Siems had numerous conversations with Ramsey and Todd about going on the trip, repeatedly expressed his reservations, and consistently remained noncommittal each time he was asked about the trip. (D&O 5, 7; Tr. 49-52.) In particular, he asked about the work involved and the pay structure, telling management that he needed this information before committing to the trip. (D&O 5-6, 7; Tr. 49-52, 136.) Ramsey and Todd were unable to provide these details, other than generalities on expected terms and conditions. (D&O 5; Tr. 50-51.)¹ Even before Siems went to get his passport, he told Ramsey directly that he was unsure that he wanted to go on the trip. On his way to the passport office, Siems called Todd and told him that he did not think it was a good idea to go on the trip; Todd responded that was fine and they could discuss it further. Siems went to Todd’s office and left a message with Todd’s secretary that he did not want to go on the Saudi Arabia trip. (D&O 6; Tr. 52.) Siems also noted his concerns

¹ Actual scheduling and compensation information was not available until August 20, after the original departure date had passed and Siems had been discharged. (Tr. 221; R Ex. 12.)

regarding safety and personal family issues as reasons for declining the trip. (GC Ex. 3.)

However, immediately following the protected work stoppage, Ramsey pulled Siems aside and told him he was selected for the Saudi Arabia trip. (D&O 6; Tr. 47-48, 53-54.) When Siems said he still did not want to go, Ramsey looked at Siems angrily and said “okay.” (D&O 6; Tr. 54.) The following week, Siems emailed Ramsey that he was unable to go on the trip. (D&O 6; Tr. 54, GC Ex. 2.) Ramsey ignored Siems’ repeated statements and his August 4 email; instead, on August 8, Ramsey instructed Siems to fly to Canada the following Monday for training for the Saudi Arabia trip. (D&O 6; 56.) Siems refused and reiterated in another email to Ramsey that he did not want to go on the trip based on both security concerns and personal family reasons. (D&O 6; Tr. 58-59, GC Ex. 3.) That same day, Siems met with Todd and repeated that he did not want to go to Saudi Arabia. For the first time, Todd told him that by obtaining his passport, Siems had agreed to go on the trip. Siems disagreed and offered to pay back the cost of expediting the passport.² Although both Ramsey and Todd told Siems they would think about it and get back to him, Ramsey discharged Siems in a telephone conversation later that evening. In the face of the overwhelming credited evidence

² It is worth noting that Siems paid the passport fee himself, while Katch Kan paid a fee to expedite the passport. Ramsey was unaware of this fact, or even the cost of expediting the passport, underscoring that money spent on the passport was not an issue for Katch Kan. (Tr. 138, 163.)

that the trip to Saudi Arabia had been voluntary until after Siems participated in the work stoppage, the Board reasonably found Siems' discharge 11 days later for refusing the trip amply demonstrates that Katch Kan was unlawfully motivated when it discharged Siems. (D&O 6; Tr. 62.)

Katch Kan makes several arguments (Br. 16-19) that are largely founded on an unsupported factual narrative that was expressly discredited by the judge. For example, Katch Kan objects (Br. 16-17) to the judge crediting the testimony of Siems, Barrows, and Wheeler that Siems told Ramsey his word "doesn't mean shit" and that Ramsey was visibly angered by the comment. However, the judge, who saw Ramsey testify and heard his explanation, discredited Ramsey's testimony that he did not remember these comments and that he was not upset about being asked to put his promise in writing.³ See D&O 7 ("I do not believe his testimony that he could not recollect [Siems' statement] and that he was not upset that he was asked to put his promise in writing."). As noted, the Court largely defers to the credibility findings of administrative law judges in Board proceedings, absent a showing that they are unreasonable, contradict other

³ Likewise, Katch Kan's argument (Br. 18) that Ramsey no longer worked for the company and was therefore credible was specifically rejected by the judge (D&O 7) who noted that it was Ramsey's word that was being impugned and his actions being called into question. Further, to the extent the Court places any weight on witnesses' current employer, Wheeler and Barrows no longer worked for Katch Kan at the time of the hearing. Moreover, no evidence was presented to suggest Wheeler and Barrows were biased in Siems' favor.

findings, are based upon inadequate reasons or no reason, or are otherwise unjustified. *See New Orleans Cold Storage & Warehouse Co. v. NLRB*, 201 F.3d 592, 599 (5th Cir. 2000), and cases cited at p. 14-15. No such showing has been made here.

Thus, Katch Kan's claims (Br. 11, 22) that the General Counsel failed to meet his burden that Siems' discharge was unlawfully motivated lack merit. As discussed above, the credited evidence amply demonstrates that 11 days after Siems engaged in undisputedly protected concerted activity, Ramsey discharged him for failing to accept what had, until after the protected conduct, been a voluntary assignment. As demonstrated above, there is ample credited evidence that Ramsey held animus towards the employees engaged in the protected activity, especially Siems, following the work stoppage, and seized on what had previously been a voluntary trip as the reason to discharge Siems.

For the first time before the Court, Katch Kan argues (Br. 18-19) that Ramsey would not have been offended by Siems' statement because such language was typical at the workplace. But Katch Kan presented no evidence to that effect before the Board, nor does it in its brief to the Court. Nor did Katch Kan even argue to the judge, or the Board, that Ramsey would not have been angry by such a statement because it was common in the workplace. Indeed, the credited evidence was to the contrary—Ramsey was upset by Siems' statement questioning his word.

(D&O 7; Tr. 104.) According to Wheeler’s credited testimony, Ramsey “was clearly mad. His face turned beet red, and his whole demeanor changed.” (Tr. 104.) In contrast, the administrative law judge specifically discredited Ramsey’s testimony that he did not recall these comments by Siems, which he based on testimony of witnesses confirming Siems’ statement, Ramsey’s reaction to it, as well as the unlikelihood that Ramsey would forget such a tense interaction with a subordinate. (D&O 7.)

Moreover, Katch Kan’s new contention that the interaction between Siems and Ramsey was benign because it was common in the workplace only further highlights Katch Kan’s continued shifting explanations for Siems’ discharge, and lends additional support to the Board’s finding that its stated reasons for discharging Siems were pretextual. *See NLRB v. Henry Colder Co., Inc.*, 907 F.2d 765, 769 (7th Cir. 1990) (shifting explanations for adverse action “may, in and of themselves, provide evidence of unlawful motivation”); *Am. Ambulette Corp.*, 312 NLRB 1166, 1169 (1993) (“The Board has consistently held that shifting reasons or defenses for an employee’s termination of an employee establish a pretextual reason and under such circumstances an employer fails to meet its *Wright Line* burden.”)

Katch Kan’s argument (Br. 15-16, 23) that if it harbored animus over the work stoppage, it would have discharged Barrows over Siems, because it perceived

Barrows was a leader in the work stoppage, does not advance its position. The credited evidence is that all the employees agreed not to work, that there was no formal leader, and that Siems was the only employee who publically challenged Ramsey. (D&O 3-4; Tr. 18, 20-21, 42-45, 102-04.) More significantly, the fact that an employer does not discipline every employee who engages in protected activity does not immunize the employer when it discriminates against one employee. *NLRB v. Nabors*, 196 F.2d 272, 276 (5th Cir. 1952); *Fresh & Green's of Washington, D.C., LLC*, 361 NLRB No. 35, 2014 WL 4302561, *1 n.1 (Aug. 29, 2014).

In sum, prior to the work stoppage on July 28, Siems' consistently expressed reluctance to go to Saudi Arabia were met with casual responses and understanding from Katch Kan management. After the work stoppage, when it became clear that Siems did not want to go to Saudi Arabia, Katch Kan made his participation mandatory, giving him an ultimatum to either agree to the trip or be discharged. Substantial credited evidence supports the Board's finding that Siems' participation in the work stoppage caused Katch Kan to reverse course about the voluntary nature of the assignment and demand that Siems go to Saudi Arabia at a time it knew he did not want to go. (D&O 7.)

2. Katch Kan would not have discharged Siems absent his protected conduct

In the face of evidence demonstrating unlawful motive, Katch Kan bears the burden of proving that it had an otherwise lawful reason for discharging Siems. *New Orleans Cold Storage & Warehouse Co. v. NLRB*, 201 F.3d 592, 601 (5th Cir. 2000). Katch Kan must not only establish that a legitimate business justification existed for the action, but that it would have discharged Siems regardless of his protected activity. *Marathon LeTourneau Co., Longview Div. v. NLRB*, 699 F.2d 248, 252 (5th Cir. 1983.) Katch Kan has failed to meet its burden.

Katch Kan's proffered reason (Br. 20) for discharging Siems' was his refusal to go to Saudi Arabia. As fully discussed above at pp. 22-24, substantial evidence supports the Board's conclusion that this proffered reason was pretextual and thus cannot satisfy its burden. Further, in asserting that Siems was "part of the Saudi team" (Br. 20), Katch Kan utterly ignores that the trip was voluntary and prior to the day of his discharge, "neither Ramsey nor Todd said that [Siems] had to go." (D&O 7.) Likewise, Katch Kan's claim that Ramsey reasonably believed that Siems agreed to go because he obtained a passport and apologized in the August 4 email, is unsupported by the evidence. As demonstrated above, Siems repeatedly told Ramsey that he was unsure about going on the trip. Ramsey never received a verbal commitment from Siems regarding the trip. Instead, Ramsey merely "felt" that Siems getting his passport meant he had decided to go. (Tr. 137.) However, the credited evidence puts a lie to this claim because Siems told Ramsey the day

that he went to get his passport that he still wanted to think about going and Ramsey replied that was fine. (D&O 7; Tr. 51.) Moreover, after obtaining the passport, Siems called Todd and told him that he did not think it was a good idea to go on the trip and he did not think he would do it; Todd replied that was fine and that they could discuss it. (D&O 7; 52.) Thereafter, in discussion and emails with both Todd and Ramsey, Siems repeated that he did not want to participate in the trip. (GC Ex. 2; D&O at 6; Tr. 54, 57-59.) In the face of this credited evidence, there is no merit to Katch Kan's claim (Br. 11-12) that it reasonably believed that Siems had committed to go to Saudi Arabia by obtaining his passport.

Likewise, although Katch Kan fixates on Siems' use of the phrase "I will no longer be able to go," in his August 4 email to Ramsey, in context the wording makes perfect sense. Siems had been considering the trip for weeks at that point, while forthrightly telling Ramsey and Todd that he was unsure that he wanted to go and needed more time to think it over. The August 4 email signaled that Siems had decided that he would not be going on the trip. Siems had no reason to believe that Katch Kan would have any issue with his decision, because he was told repeatedly that the trip was voluntary.

Moreover, Katch Kan's disparate treatment of other employees who decided not to go on the trip sharply demonstrates its discriminatory treatment of Siems. One example is Wheeler, who was also selected to go on the Saudi Arabia trip.

(D&O 6; Tr. 108.) Ramsey testified that Wheeler backed out of the trip. (D&O 5; Tr. 162-63.) Yet, assuming the truth of Ramsey's testimony, Katch Kan took no adverse action against Wheeler. (Tr. 163.) According to Wheeler, his offer to participate in the Saudi Arabia trip was withdrawn when Ramsey decided to send Canales instead because of Canales' DWI conviction that would not matter overseas. (D&O 5; Tr. 110.) A second example was Barrows, who was also told he had been selected to go to Saudi Arabia. (Tr. 23.) However, at the end of July, Ramsey told Barrows he was no longer one of the employees selected for the trip. (D&O 6; Tr. 24.) Nor did Katch Kan ask Barrows or Wheeler to take Siems' place on the team after it became clear that Siems was not interested in going on the trip.

Katch Kan's contrived false deadline for Siems to agree to the trip provides further evidence that Siems' refusal to go to Saudi Arabia was mere pretext for his discharge. On August 8, Katch Kan told Siems that he had to be ready to leave for Canada on August 11 for training for the Saudi Arabia assignment. (D&O 4, Tr. 139-40.) However, at that time, no plane tickets had been purchased and no definitive work or travel plans had been made. (D&O 4; R Ex. 14.) Yet, on August 8, when Siems refused to go on the trip, he was discharged.

Moreover, no Katch Kan employee traveled to Canada on August 11. (D&O 4; Tr. 140, 231.) Katch Kan did not purchase tickets to Canada until August 25. (D&O 4; R Ex. 14.) No Katch Kan employee went to Saudi Arabia in August.

(D&O 4.) The trip was delayed several months until February 28, the same day the unfair labor practice hearing began in this case. (D&O 4; R Ex. 11.) Ultimately, only one Katch Kan employee was assigned to the trip, not a team as had originally been planned. (D&O 4; Tr. 213.) The employee sent by Katch Kan in February, Jason Hughes, was not one of the original individuals approached by Ramsey. (D&O 4-6; Tr. 23-24, 119, 212; R Ex. 11.)

Additionally, the Board expressly noted that Katch Kan was not prejudiced or affected in any way by Siems' refusal to go on the trip. (D&O 7.) Katch Kan was easily able to recruit another employee willing to go to Saudi Arabia. Ramsey testified that he had no difficulty in filling Siems' spot on the crew after he discharged Siems, a replacement was found within a few days. (Tr. 150.)⁴ Katch Kan offers no explanation for why it did not attempt to fill the spot prior to discharging Siems. Moreover, Katch Kan's suggestion (Br. 8, 12) that it hired other workers to replace Siems in Texas is flawed. Ramsey acknowledged that Katch Kan still had plenty of work for Siems in Texas on the date of his discharge. (Tr. 149.) The fact that it instead fired Siems rather than allowing him to continue his present work further demonstrates its unlawful motive.

Katch Kan's suggestion (Br. 21) that it wanted Siems to travel to Saudi Arabia because of his experience is undercut by the evidence. One of the original

⁴ Jacob Lemm was selected as Siems replacement but would ultimately not travel to Saudi Arabia. (Tr. 91; R Ex. 14.)

installers Ramsey had selected for the trip, David Salazar, was fairly new and had little experience. (Tr. 119.) Further, Ramsey attempted to send Canales on the Saudi Arabia trip solely because Canales was in danger of being fired due to a DWI conviction that would hinder his employment here, but not overseas. (D&O 5; Tr. 110.) In sum, Katch Kan did not have strict criteria as to whom it was sending to Saudi Arabia and no evidence suggests Siems was an indispensable member of the Saudi Arabia crew.

Finally, Katch Kan asserts (Br. 21) that it “could legitimately demand Siems go [to Saudi Arabia], for the benefit of the company, or forfeit his job.” Perhaps this is true as a general matter. But this again ignores the fact that Katch Kan never treated the trip as mandatory until shortly after Siems engaged in the protected work stoppage. A central tenant of the *Wright Line* analysis is that an employer may not reference otherwise legitimate business goals as pretext for firing an employee for engaging in protected concerted activity. *See Thermon Heat*, 143 F.3d at 187 (unlawful to single out union supporters for discharge for violating otherwise legitimate safety restrictions). Thus, even if Katch Kan could have otherwise made travel to Saudi Arabia a work requirement, it may not do so as punishment for engaging in the work stoppage. The record reveals that Katch Kan would not have discharged Siems in the ordinary course for refusing to go to

Saudi Arabia, based on the voluntary nature of the trip, Katch Kan's treatment of other workers, and the fact that it still had work for Siems in Texas.

Accordingly, the Board reasonably found that Katch Kan failed to meet its *Wright Line* burden of establishing that it would have otherwise discharged Siems absent his protected activity. Given that Katch Kan has provided the Court with no basis to disturb the Board's well supported unfair-labor-practice finding, the Board's Order should be enforced.

CONCLUSION

The Board respectfully requests that the Court deny Katch Kan's petition for review and enforce the Board's Order in full.

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February 2016

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

KATCH KAN USA, L.L.C.	:
	:
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	:
v.	:
	: Board Case No.
NATIONAL LABOR RELATIONS BOARD	: 16-CA-134743
	:
Respondent/Cross-Petitioner	:

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 8,328 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010, and the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.2015 and is virus-free according to that program.

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Dated at Washington, DC
this 29th day of February, 2016

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	:
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CERTIFICATE OF SERVICE

I hereby certify that on February 29, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth 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:

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Dated at Washington, DC
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