Nos. 15-3925, 15-3955

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner/Cross-Respondent

and

MID-SOUTH ORGANIZING COMMITTEE

Intervenor

v.

CHIPOTLE SERVICES, LLC

Respondent/Cross-Petitioner

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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ON APPLICATION FOR ENFORCEMENT AND
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THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the application of the National Labor Relations Board ("the Board") for enforcement, and the cross-petition of Chipotle

Services, LLC ("the Company") to review, a Board Order issued against the Company on November 4, 2015, and reported at 363 NLRB No. 37. (A. 1-17.)[1] The Mid-South Organizing Committee ("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. § 160(a)), which empowers the Board to prevent unfair labor practices affecting commerce.

The Board's Decision and Order is a final order with respect to all parties. The Board filed its application for enforcement on December 18, 2015, and the Company cross-petitioned for review on December 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 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)) because the unfair labor practices occurred in St. Louis, Missouri.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board is entitled to summary enforcement of its uncontested findings that the Company committed numerous violations of Section

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

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8(a)(1) of the Act by making statements that interfered with, restrained, or coerced employees in the exercise of their Section 7 rights.

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

NLRB v. Bolivar-Tees, Inc., 551 F.3d 722 (8th Cir. 2008)

2. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by discharging Patrick Leeper for engaging in union and protected concerted activity.

Wright Line, 251 NLRB 1083 (1980)

Hall v. NLRB, 941 F.2d 684 (8th Cir. 1991)

STATEMENT OF THE CASE

Acting on unfair labor practice charges filed by the Union, the Board's General Counsel issued a complaint alleging the Company had violated Section 8(a)(1) of the Act by making numerous coercive statements. The complaint further alleged the Company violated Section 8(a)(3) and (1) of the Act by discharging employee Patrick Leeper. An administrative law judge held a hearing and, on April 2, 2015, issued a decision and recommended order, finding merit to all of the allegations. (A. 15.) On November 4, 2015, the Board issued a Decision and Order, adopting all of the findings of the administrative law judge, with one modification to the judge's recommended order. (A. 1 n.3.)

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I. THE BOARD'S FINDINGS OF FACT

A. The Company's Operations and Delmar Location

The Company operates approximately 1700 quick service restaurants nationwide. (A. 2; 449-50.) Among other stores in Missouri, the Company operates St. Louis area stores in Delmar Loop, Clayton, Creve Coeur, and O'Fallon locations. (A. 3; 61-62.)

Timothy Healey has been the general manager of the Company's Delmar location since January 2009. (A. 3; 60-62.) Healey's direct supervisor is Team Leader Tim Wurdack. (A. 3; 62.)

The Delmar location has two or three service managers, who are responsible for overseeing everything related to customer orders, including the training of the food handlers and cashiers. (A. 3; 63, 409-10.) Thomas Brownlee, Desmond Goliday, and Alicia Johnson are service managers at the Delmar location. (A. 3; 63, 344.) Martay Love is the kitchen manager at the Delmar location.[2] (A. 3; 278-79, 296-97.)

[2] The Company stipulated that Wurdack, Healey, Brownlee, Johnson, and Love are all supervisors or agents of the Company within the meaning of Section 2(11) and (13) of the Act. (29 U.S.C. § 152(11), (13).) (A. 3; 39, 349.)

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B. Patrick Leeper's Employment with the Company

The Company hired Patrick Leeper in February 2011 at a wage of $8 per hour as a crewmember for its Delmar location. He worked there until May 6, 2014, when the Company terminated him allegedly for missing an all-store meeting and poor performance. (A. 3; 89, 276, 316.)

The Company considered Leeper to be a good employee who "showed a lot of constant effort and desire." (A. 4 n.7; 122-23.) In all of Leeper's evaluations, documented in what the Company calls employee "development journals," the Company rated Leeper as "meets expectations" or "above expectations." (A. 4; 784-801, 669-91.) There was, however, one entry in Leeper's development journal reflecting a "final warning" in February 2013 for "performance." (A. 3; 788.) Leeper was also once late to an all-store meeting in October 2013 but this was not documented in his employee journal. (A. 3; 304.)

C. The Company Learns of Leeper's Participation in Several Protests for the Union's "Show Me 15" Campaign; the Company Threatens to Fire Leeper for Participating in Protests

In May 2013, Leeper attended a meeting about the Union's "Show Me 15" campaign, which sought to raise the minimum wage in Missouri to $15 per hour. (A. 4; 175, 280, 314.) Shortly after attending his first "Show Me 15" meeting, Leeper participated in a protest on May 9, 2013, in St. Louis. (A. 4; 282, 285, 287.) During the protest, hundreds of demonstrators carried banners and signs, and

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wore t-shirts displaying messages aimed at raising the minimum wage as they marched to fast food locations in St. Louis, eventually ending up a block away from the Company's Delmar location. (A. 4; 282-84.)

Leeper sent Healey a letter to notify the Company of his participation because he would miss his scheduled shift. (A. 4; 73-74, 731.) Immediately after receiving the letter, Healey notified Wurdack. (A. 4; 74.) The following day, when Leeper returned to work, he was accompanied by a union delegation, who presented Healey with a letter explaining that Leeper had been exercising his legal right to protest. (A. 4; 314-15.) Upon his return, Wurdack told Leeper "you know you let your store down. You let Chipotle down. You let your coworkers down." (A. 4; 284-85.) Wurdack asked Leeper what would happen if he participated in another protest. (A. 4; 285.) When Leeper responded that he would be fired, Wurdack said "okay, great," and ended the meeting. (A. 4; 285.) Shortly after Wurdack warned Leeper about his participation in the protest, Healey told Leeper not to bring "this stuff" to the Company and to inform him the next time he planned on protesting. (A. 4; 286.) Several months later, Leeper participated in a similar protest but because he was not scheduled to work, he did not inform the Company of his participation. (A. 4; 283-84.)

On August 29, Leeper participated in a third protest. (A. 4; 291.) After the protest, two men, one of whom was later identified as Healey, visited Leeper's

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apartment looking for him. (A. 4; 50, 292.) Receiving no response when they banged on Leeper's front door and yelled out Leeper's name, the two men left. (A. 4; 50, 292.)

When Leeper returned to work, a union delegation accompanied him and gave the Company a letter stating that Leeper had exercised his legal right to protest. (A. 4; 285, 290, 863-64.) When they left, Healey pulled Leeper aside and asked him why "he had to make things so awkward." (A. 4; 293.) When Leeper asked Healey what he meant, Healey then asked Leeper to follow him into a private office, where he again asked Leeper why he was making things awkward. (A. 4; 293.) Healey told Leeper that he went to his apartment because he "just wanted to know what was going on." (A. 4; 293.) Healey went on to tell Leeper that he was "getting flack" from Wurdack and "corporate" because of Leeper's activity with the campaign. (A. 4; 293.)

D. The Company Tells Leeper Employees Are Not Permitted to Discuss Their Wages; the Company Threatens to Fire Leeper if he Continues to Discuss Pay Disparity with his Coworkers

In April 2014, Leeper was earning $8.80 per hour, up 80 cents since he started 3 years earlier. (A. 3; 276, 294.) On April 2, company supervisor Alicia Johnson asked Leeper how much he was earning; after he replied, she told Leeper "they have the nerve to be paying [a new employee] $11.00 per hour." (A. 5; 294.) Johnson told Leeper that at the Company's upcoming managers' meeting she

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would mention how little Leeper was being paid and how hard he worked. (A. 5; 294.) The following day, kitchen manager Love asked Leeper, "[C]an you believe [the new employee] makes $11.00 an hour?" (A. 5; 296.) Leeper also discussed the wage issue with coworker Thomas Schlumm during their shared commute. (A. 5; 332.) Service Manager Brownlee was aware that Leeper was discussing issues with wages with coworkers. (A. 5; 143.)

On April 4, Leeper participated in a union trip to Memphis. (A. 4; 169-70, 297.) While on the trip, Leeper discussed his concerns regarding the new hire's higher wages. (A. 4; 298.) In response, union organizer Celina Stien-della Croce suggested that Leeper discuss his concerns with his coworkers. (A. 4; 188, 298.)

After returning from Memphis, Leeper discussed his concerns about employee wages with coworker Ross Mandernach. (A. 5; 298-99.) When Mandernach learned how much the new hire was earning, he became upset. (A. 5; 300, 342.) At some point during their conversation, Service Manager Goliday appeared and repeatedly asked Mandernach how he knew about how much the new hire was earning. (A. 5; 300, 338-39.) While Mandernach did not respond, Leeper did and informed Goliday that he had told Mandernach the information. (A. 5; 300-01.) Goliday then told both employees that they could not talk about wages because, if they did, Goliday could "get in trouble." (A. 5; 301.) Goliday also stated that Healey said in a managers' meeting that managers need to notify Healey

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immediately if any of the employees are discussing wages. (A. 5; 301.) Goliday then instructed Leeper to go on break and called Healey to report the conversation. (A. 5; 81, 301.)

When Leeper returned from his break, Goliday informed him that Healey was on the phone and wanted to speak with him in the office. (A. 5; 301.) During the phone call, Healey asked Leeper what he had heard about wages. Leeper responded that it hurt to know that everyone else earned more than he did and that the new hire was making $11 per hour. (A. 5; 301-02.) When Healey asked Leeper how he knew how much money the new hire was making, Leeper responded that "a bunch of people" let him know. (A. 5; 301-02.) Healey then instructed Leeper not to discuss wages in the workplace because it "creates drama" and makes the workplace "awkward." Healey went on to warn Leeper that if he learned Leeper was discussing wages again, they would be "parting ways." (A. 5, 12 n.26; 301-02.) Healey twice asked if Leeper heard him, to which Leeper replied he did. (A. 5; 302.) Healey then asked, "so we have an understanding?" Leeper responded, "yes." (A. 302.)

Several days later, Mandernach and Love received performance reviews that referenced their wage discussions with Leeper. (A. 5; 1125-30.) In Mandernach's evaluation, Healey stated that Mandernach needed to improve in resolving issues with team members. (A. 5; 1076-79.) Healey explained that the low rating was

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"due to maybe a person coming to you with something and instead of you not getting involved you find yourself right in the middle of it all." (A. 5; 1076.) Healey similarly gave Love a low rating in the same area, explaining that Love needed to "do a much better job with . . . staying out of the drama or if you hear something make sure you quickly bring it to the attention of the management team." (A. 1068-71.)

E. Union Organizers Visit the Company's Delmar Location; Healey Advises Employee Roderick Warren Not to Speak With the Organizers

On April 25, three union organizers, including James Houston and Celina Stien-della Croce, visited the Delmar location. (A. 5; 200, 217.) While they ordered lunch, they told employees about the "Show Me 15" campaign. (A. 5; 201, 217, 440-41, 475.) While the organizers were eating, employee Roderick Warren came in to pick up his check. (A. 5; 202, 218, 475, 548.) When Warren left the restaurant, organizer Houston followed him to the parking lot to discuss the campaign. (A. 5; 202, 219, 475.)

Healey was at the Delmar location at the time and followed Warren and Houston to the parking lot under the guise of throwing away a box. (A. 5; 202, 219, 475.) While Houston and Warren were talking about wages by Warren's car, Healey approached them and told Warren he did not have to talk to Houston. (A. 6; 220.) Healey then told the men that the Company was taking care of Warren

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and that he did not need to be involved in the campaign or be on strike. (A. 5-6; 220.) When Healey next asked Warren if Houston was bothering him, Warren responded that he was okay. (A. 6; 220.) Healey then threw away the box, came back to Warren's car, and told Warren that he could make plenty of money with the Company, up to $30,000 to $40,000. (A. 6; 220.) Healey's comments made Warren noticeably uncomfortable so Houston ended the conversation and went back inside the restaurant. (A. 6; 220-21.)

F. Leeper Misses an All-Store Meeting; the Company Prepares Leeper's Evaluation

The Company holds all-store meetings at each of its locations every few months, usually on a Sunday morning. (A. 3; 452-53.) Employees are supposed to clock in for the meeting but payroll records reflect not all employees do so. (A. 3; 765-82.) The Company does not maintain a written policy regarding any consequences of missing an all-store meeting. (A. 3; 72-73.)

On May 4, the Company held a mandatory all-store meeting at 7:00 a.m. (A. 6; 304-05.) The night before, Leeper worked the closing shift and the following morning, he woke up early to drive his mother to a job that started at 5:00 a.m. and went back to sleep. (A. 305.) When Leeper woke up again at 7:40 a.m., he realized he was late for the all-store meeting and called a coworker, who gave the phone to Service Manager Brownlee. (A. 6; 305.) Leeper informed Brownlee that he had overslept and volunteered to come into the restaurant.

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Brownlee told him not to and that he would give Leeper a "recap" the next day. (A. 6; 305.)

The following day, Healey prepared a performance evaluation for Leeper. (A. 6; 1072-75.) The evaluation noted that Leeper "sometime[s] finds himself in the middle of drama that does not need to be there, and because of this he is not showing that he cares about the success of others." It did not mention that Leeper had been terminated. (A. 6; 1072.) Unlike in all of his previous evaluations, Healey rated Leeper as "needs improvement" in several areas, including the area of "creates a respectful workplace and communicates well with coworkers and customers," "cares about the success of others," and "resolves any issues with team members quickly." (A. 1072-75.) In the narrative portion of the evaluation, Healey added that it "seems like [Leeper] likes problems or drama." (A. 1072.)

G. Union Organizers Come to the Delmar Location; the Company Discharges Leeper

On May 6, Stien-della Croce and another union organizer visited the Company's Delmar location to meet with Healey. (A. 6; 85, 197, 431.) Stien-della Croce recorded the conversation on her cell phone. (A. 6; 199, 859-61.) Stien-della Croce introduced herself to Healey and told him that she had been informed that Healey had made several "veiled threats" to employees for participating in protected, concerted activity, in violation of Federal law. (A. 6; 859.) When Healey asked what the threats were about, Stien-della Croce said "participating in

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union activity." (A. 6; 859.) She went on to tell Healey that she knew about the interaction between Warren and Houston a few days earlier, and that she had heard from other employees that Healey threatened employees they may lose their jobs or other negative things would happen if they participated in concerted activity. (A. 6; 859.) Healey responded that whatever Stien-della Croce heard was false because as far as he knew, only Leeper had "done anything like that" and Leeper was "still employed" with the Company. (A. 859-60.) Healey explained that he had told Leeper "if you want to move up in your career this is what I need you to do." (A. 6; 860.) Healey repeated that Leeper had been involved in "union stuff" and was still employed with the Company. (A. 6; 860.) In response to Healey's claim that he never made any threats, Stien-della Croce said she heard otherwise but there would be no issue as long as it ended. (A 7; 860.)

When Leeper arrived for his shift hours after the union representatives left, he met with Brownlee to learn what had been discussed in the May 4 all-store meeting. (A. 307.) Two hours into his shift, Healey approached Leeper and asked him if he was aware that he missed the all-store meeting two days earlier. (A. 7; 307.) After Leeper responded that he was aware, Healey fired him, saying we are "parting ways." (A. 7, 12 n.26; 307.) At the time, Healey had a page from Leeper's development journal that indicated he was being discharged for failing to come to the May 4 all-store meeting and because he was not a "top performer."

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The Company had never discharged an established employee for missing an all-store meeting. (A. 7; 617-63, 68-69.) The Company had never disciplined established employees with more than a warning, if at all, for missing or being late to all-store meetings. (A. 7; 84-85, 102-03, 110-13.)

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board (Chairman Pearce and Members Hirozawa and McFerran) found, in agreement with the administrative law judge, that the Company violated Section 8(a)(1) of the Act by interrogating employees, telling employees they could not talk about their wages, threatening employees with unspecified reprisals if they talked about their wages or other terms and conditions of employment, threatening employees with discharge if they talked about their wages, telling employees that managers were instructed to report employee discussions about wages, telling an employee to refrain from talking to union representatives, telling an employee to refrain from engaging in protected concerted activity, and impliedly promising an employee increased wages in order to discourage him from engaging in protected concerted activities. (A. 1, 15.) The Board likewise agreed with the judge that the Company violated Section 8(a)(3) and (1) of the Act by discharging Leeper. (A. 1, 15.)

To remedy the Company's unfair labor practices, the Board ordered the Company to cease and desist from engaging in the violations found and from, in

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any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act. (A. 1-2, 15-17.) Affirmatively, the Order requires the Company to reinstate Leeper to his former job, make him whole for any lost earnings and benefits, and post a remedial notice. (A. 16-17.)

SUMMARY OF THE ARGUMENT

The Board's Order should be enforced in full. The Company does not deny it violated the Act by making numerous unlawful statements. As such, well-settled law makes clear that the Court should summarily enforce those portions of the Board's Order remedying findings the Company opted not to challenge in its opening brief to the Court.

Substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by discharging Patrick Leeper because of his protected activities. Leeper was undisputedly involved in both union and protected concerted activity, all of which the Company was aware. For instance, when Leeper participated in the Union's "Show Me 15" protest in May 2013, he immediately notified the Company and was instructed to report future participation. Similarly, the Company admitted that it was aware that Leeper discussed wages with his coworkers. Moreover, the Company repeatedly demonstrated that its animus against Leeper's protected conduct motivated its

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decision to discharge him. For example, after Leeper participated in the May 2013 protest, the Company warned him that the next time he "let the store down," he would be fired. Similarly, when Leeper discussed wages with his coworkers in April 2014, Healey informed him that if he continued to do so, he and the Company would be "parting ways." Combined with additional evidence of animus, including other statements that demonstrated the Company's hostility towards Leeper's protected activities, its failure to call Wurdack as a witness, the pretextual nature of its proffered reasons for discharging Leeper, its statements to Stien-della Croce, and the timing of Leeper's discharge, the record evidence amply supports the Board's finding that the Company made good on its prior threats and discharged Leeper because of his union and protected concerted activities. The Company's numerous violations of Section 8(a)(1) underlie the Board's finding that animus towards Leeper's union and protected activity was a motivating factor in his discharge.

In its opening brief, the Company makes no attempt to show that the factual findings underlying the Board's determinations were unsupported by record evidence. Instead, the Company, for the first time, raises challenges to the validity of the Board's standard for determining motivation. Because the Company never raised this challenge before the Board, the Court lacks jurisdiction to consider it.

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In any event, the Company's challenge is unpersuasive because but for Leeper's protected activities, he would not have been discharged.

STANDARD OF REVIEW

The Board's findings of fact are "conclusive" when 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, 493 (1951); *accord Laborers Dist. Council of Minn. & N.D. v. NLRB*, 688 F.3d 374, 381 (8th Cir. 2012). Therefore, "'[t]his court must enforce the Board's order if the Board has correctly applied the law and if its findings rest upon substantial evidence.'" *Cedar Valley Corp. v. NLRB*, 977 F.2d 1211, 1215 (8th Cir. 1992) (quoting *GSX Corp. of Missouri v. NLRB*, 918 F.2d 1351 (8th Cir. 1990)). The Court "defer[s] to the Board's conclusions of law if they are based upon a reasonably defensible construction of the Act." *JCR Hotel, Inc. v. NLRB*, 342 F.3d 837, 841 (8th Cir. 2003). In other words, the Board's findings must be upheld if "it would have been possible for a reasonable jury to reach the Board's conclusion." (A. 71, 727-28.) *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 366-67 (1998).

The Court's review of Board credibility determinations is even more limited. As this Court has stated, "[t]he question of credibility of witnesses is primarily one for determination by the trier of facts." *Fruin-Colnon Corp. v. NLRB*, 571 F.2d 1017, 1022 (8th Cir. 1978). Thus, this Court accords "great deference to the

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[administrative law judge's] credibility determinations," *JHP & Assocs., LLC v. NLRB*, 360 F.3d 904, 910-11 (8th Cir. 2004), and "'afford[s] great deference to the Board's affirmation of the [judge's] findings," *NLRB v. RELCO*, 734 F.3d 764, 779 (8th Cir. 2013) (quoting *Town & Country Elec., Inc. v. NLRB*, 106 F.3d 816, 819 (8th Cir. 1997)).

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THE PORTIONS OF ITS ORDER CORRESPONDING TO THE COMPANY'S UNCONTESTED SECTION 8(a)(1) VIOLATIONS

Section 7 of the Act (29 U.S.C. § 157) guarantees employees, whether or not represented by a union, the right to "assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of rights guaranteed by Section 7."

Before the Board, the Company did not contest many of the findings made by the administrative law judge. Specifically, the Company did not file exceptions with the Board to the judge's findings that it violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by interrogating Leeper about his wage discussions with coworkers, telling employees they could not talk about their wages, threatening employees with unspecified reprisals if they talked about their wages or other

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terms and conditions of employment, threatening employees with discharge if they talked about their wages, and telling employees that managers were instructed to report employee discussions about wages.[3] *See generally* BSA 1-20. Because the Company did not except to those findings, the Company is now jurisdictionally barred from obtaining appellate review of them. *See* Section 10(e) of the Act (29 U.S.C. § 160(e)); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *NLRB v. Cornerstone Builders, Inc.*, 963 F.2d 1075, 1077 (8th Cir. 1992). For that reason, the Board is entitled to summary affirmance of the findings and summary enforcement of the corresponding portions of its remedial order. *See NLRB v. Vought Corp.-MLRS Sys. Div.*, 788 F.2d 1378, 1380 n.1 (8th Cir. 1986); *NLRB v. Bolivar-Tees, Inc.*, 551 F.3d 722, 727 (8th Cir. 2008) ("The Board is entitled to summary enforcement of the uncontested portions of its order.").

Moreover, in its opening brief to the Court, the Company failed to contest any of its Section 8(a)(1) statements, even those to which it had excepted to before the Board. Accordingly, the Board is entitled to summary enforcement of those violations on that additional ground. *See Bolivar-Tees, Inc.*, 551 F.3d at 727

[3] The Company excepted to the judge's finding that (1) Healey's statements to Warren violated the Act, and (2) "Goliday interrogated Warren and Leeper on April 7, 2014." The judge, however, found that the Company violated the Act by interrogating Leeper and *Mandernach* on April 7, 2014, not Warren. (A. 11.) In any event, as discussed below, because none of the 8(a)(1) violations were contested in its brief to the Court, the Board is entitled to summary enforcement of those portions of its Order.

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(finding Board entitled to summary enforcement as to aspects of Board order not challenged on appeal); *NLRB v. Rockline Indus., Inc.*, 412 F.3d 962, 966 (8th Cir. 2005) (same).

The uncontested violations, however, do not disappear from the case simply because the Company has not challenged them. Rather, they "remain, lending their aroma to the context in which the [contested] issues are considered." *NLRB v. Clark Manor Nursing Home Corp.*, 671 F.2d 657, 660 (1st Cir. 1982); *see Radisson Plaza Minneapolis v. NLRB*, 987 F.2d 1376, 1382 (8th Cir. 1993) (findings that are summarily enforced "remain relevant" in resolving remaining issues).

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II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCHARGING PATRICK LEEPER FOR HIS UNION AND OTHER PROTECTED ACTIVITIES

A. Principles of Unlawful Discharges

Under Section 8(a)(3) of the Act—which prohibits "discrimination in regard to hire or tenure of employment or any term or condition of employment . . . to discourage membership in any labor organization"—it is unlawful to discharge an employee because of his union activities.[4] 29 U.S.C. § 158(a)(3); *see also Hall v. NLRB*, 941 F.2d 684, 688 (8th Cir. 1991). An employer violates Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by discharging an employee for engaging in concerted activity that is protected by Section 7. *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 17 (1962); *Sutherland v. NLRB*, 646 F.2d 1273, 1274 (8th Cir. 1981). As shown below, the Board reasonably found that, in addition to the host of admitted unlawful acts committed against employee Leeper described above, the Company unlawfully discharged Leeper in violation of Section 8(a)(3) and (1) of the Act because of his union and protected, concerted activity. Because the Company's sole defense is not properly before the Court and is otherwise meritless, the Court should enforce this aspect of the Board's Order.

[4] A Section 8(a)(3) violation derivatively violates Section 8(a)(1). *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

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In *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Supreme Court approved the Board's test for determining motivation in unlawful discrimination cases first articulated in *Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981). Before the Board, and in accordance with *Wright Line*, in order to establish unlawful discharge, the General Counsel must show that animus against protected activity was a substantial or motivating factor for the employer's action by demonstrating that: the employee engaged in protected activity; the employer had knowledge of that activity; and the employer harbored animus toward protected activity. *Intermet Stevensville*, 350 NLRB 1270, 1274 (2007). If the General Counsel meets that showing, the burden then shifts to the employer to show that it would have taken the same action even in the absence of the employee's protected activity. *Id.*

Courts will enforce the Board's finding of an unlawful discharge if substantial evidence supports the Board's finding that an employee's protected activity was "a motivating factor" in the employer's decision to discharge the employee, unless the record as a whole compelled the Board to accept the employer's affirmative defense that the adverse action would have been taken even in the absence of protected activity. *Transp. Mgmt. Corp.*, 462 U.S. at 395; *see also Rockline Indus., Inc.*, 412 F.3d at 968-70; *RELCO*, 734 F.3d at 780 (critical question is "whether the employee's termination was motivated by the protected

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activity"). If the lawful reasons advanced by the employer for its actions were a pretext—that is, if the reasons either did not exist or were not in fact relied upon—the employer's burden has not been met, and the inquiry is logically at an end. *Limestone Apparel Corp*., 255 NLRB 722 (1981), *enforced mem*., 705 F.2d 799 (6th Cir. 1982); *see also Lemon Drop Inn, Inc. v. NLRB*, 752 F.2d 323, 325 (8th Cir. 1985).

Motive is a question of fact, and the Board may rely on direct and circumstantial evidence to find an improper motive has been established. *Concepts & Designs, Inc. v. NLRB*, 101 F.3d 1243, 1244 (8th Cir. 1996); *NLRB v. Wal-Mart Stores, Inc.*, 488 F.2d 114, 118 (8th Cir. 1973) (Board may properly rely on inferences of probability drawn from totality of other facts) (quotation omitted)). Indeed, this Court has long recognized that unlawful motivation "often may be proved *only* by circumstantial evidence." *McGraw-Edison Co. v. NLRB*, 419 F.2d 67, 75 (8th Cir. 1969) (emphasis added). That evidence may include "suspicious timing," *RELCO*, 734 F.3d at 787 (quotation omitted)), "implausible explanations," *Hall*, 941 F.2d at 688, other acts of unlawful coercion or intimidation, *id*. at 688-89, as well as "departures from past practice, [and] tolerance of behavior for which the employee was allegedly fired," *RELCO*, 734 F.3d at 787 (quotation omitted); *see also Rockline Indus.*, 412 F.3d at 970 (pretext supports an inference of unlawful motive).

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B. Substantial Evidence Supports the Board's Finding that the Company Unlawfully Discharged Leeper Because of Its Animus Towards His Protected Conduct

Substantial evidence supports the Board's finding that Leeper's termination—purportedly for missing an all-store meeting and poor performance—was in fact motivated by the Company's animus against Leeper for engaging in union and protected concerted activities.[5] As the Board found (A. 13-14), the Company's decision to discharge Leeper was motivated by its hostility to Leeper's protected activities as established by: (1) the Company's numerous threats and other coercive statements regarding Leeper's protected activities, including Goliday and Healey's threats that he stop discussing wages with his coworkers or be fired; (2) the Company's failure to call Wurdack as a witness, which warranted an adverse inference; (3) the Company's retaliatory and negative performance reviews for Mandernach and Love after they discussed wages with Leeper; (4) Healey's statements to Stien-della Croce on the day he discharged Leeper; (5) the timing of the discharge, which occurred just several hours after the Union

[5] The Company does not, nor could it, dispute the Board's finding that Leeper was engaged in protected activity of which it was aware. As to his union activities, Leeper was an active participant in the Union's "Show Me 15" campaign and the Company admittedly knew of his activities from at least May 2013. (A. 13.) Leeper's protected, concerted activity included discussing wages with Mandernach and other coworkers. *See Automatic Screw Prods. Co.*, 306 NLRB 1072, 1072 (1992) (wages are "vital term and condition of employment," and discussions concerning wages are "inherently" protected and concerted), *enforced mem.*, 977 F.2d 582 (6th Cir. 1992). As the Board found (A. 13), "it is . . . undisputed that Healey, Brownlee, and Goliday were aware of this activity."

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confronted the Company about its prior unlawful statements; and (6) the Company's implausible reason for discharging Leeper, which demonstrate its pretext and therefore unlawful motivation.

The Company began displaying hostility towards Leeper right after it learned of his union activity. Prior to his participation in the May 9 "Show Me 15" protest, Leeper sent Healey a letter to notify the Company of his intent to participate in the protest. (A. 4; 73-74, 731.) Healey immediately notified Wurdack of the letter. (A. 4; 74.) Armed with the knowledge Leeper participated in the protest, and upon Leeper's return to work the following day, Wurdack informed Leeper that he had let the store down, the Company down, and his coworkers down by participating in the protest. (A. 4; 284-85.) Wurdack went on to ask Leeper "what would happen to him [Leeper] if he did this [protested] again." (A. 4; 284-85.) When Leeper responded that the Company would fire him, Wurdack confirmed that and told Leeper to return to work. Shortly after that confrontation, Healey told Leeper not to "bring this stuff" to the Company and announced that Leeper should notify the Company before participating in other protests. (A. 4; 286.)

The Company continued to demonstrate its hostility towards Leeper's protected activities when, several months later, Leeper participated in the August

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protest.[6] After the Company learned of Leeper's participation in that protest, Healey went so far as to show up at Leeper's apartment because he wanted to "know what was going on." (A. 4; 50-52, 292.) When Leeper returned to work following the protest, Healey asked Leeper why he was "making things so awkward," and complained that, because of Leeper's activity, he was "getting flack" from Wurdack and the corporate office.[7] (A. 4; 293.)

Related to those threats, the Board reasonably concluded (A. 13) that the Company's failure to call Wurdack as a witness further supported the Company's unlawful motivation. Applying established principles, the Board reasoned that "when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge." (A. 13 (citing

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[6] Leeper rearranged his schedule to keep the Company from finding out he was involved in the protest on July 29. (A. 286.)

[7] The Company's reference to the 2013 statements as "outside the Section 10(b) [statute of limitations] period" (Br. 14) is irrelevant. Threats outside of the Act's 6-month statute of limitations may demonstrate animus even if it is too late to allege that they are separate unfair labor practices. *Microimage Display Div. of Xidex Corp. v. NLRB*, 924 F.2d 245, 251 n.2 (D.C. Cir. 1991) (Board properly relied on conversations outside Section 10(b) period "as evidence of the intent motivating the employer to take the actions charged as unfair labor practices"). Moreover, as shown below, the Company's unlawful statements including threats of discharge continued until just before it discharged Leeper.

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Int'l Automated Mach., 285 NLRB 1122, 1123 (1987), *enforced*, 861 F.2d 720 (6th Cir. 1988)). *See JHP & Assoc.*, 360 F.3d at 909 (Board can draw adverse inference against party when it fails to call witness whose testimony would be relevant and significant). This adverse inference is especially appropriate when the witness is the employer's agent. *See Roosevelt Memorial Med. Ctr.*, 348 NLRB 1016, 1022 (2006); *NLRB v. Laredo Coca-Cola*, 613 F.2d 1338, 1341 (5th Cir. 1980) (where party fails to produce crucial witness, "appropriate to infer that testimony of [witness] would have been adverse to [party's] position"). In applying these established principles, the Board inferred that had the Company called Wurdack to testify, his testimony would have been contrary to the Company's position that Healey and Wurdack did not threaten Leeper because of his union activity. (A. 13.)

The Board also found (A. 13) evidence of the Company's discriminatory motivation to discharge Leeper in Healey's unlawful threats to fire him because he discussed employee wages with his coworkers, which foreshadowed his discharge. Specifically, in April 2014, when Leeper discussed his concerns about wages with his coworkers, manager Goliday warned him not to discuss wages and that Healey had instructed managers to report any employee discussions concerning wages. (A. 4; 300-01.) After Goliday reported the conversation to Healey, Healey threatened to fire Leeper if he continued to discuss wages with his coworkers. (A.

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4; 302.) Less than one month later, Healey made good on this threat when he discharged Leeper. All of the Company's threats and admonishments, including Healey and Wurdack's warnings in May 2013, support the Board's finding that the Company was unlawfully motivated when it discharged Leeper. *See Golden Eagle Spotting Co v. Brewery Drivers & Helpers, Local Union 133*, 93 F.3d 468, 471 (8th Cir. 1996) (employer's uncontested violations of Act support Board's other findings).

Moreover, after the Company unlawfully warned and threatened Leeper regarding his protected concerted activity by discussing his concerns about wages, the Company gave low ratings to Mandernach and Love in their performance reviews shortly after they spoke with Leeper about employee wages. (A. 4; 1125-30.) In addition, Manderach's evaluation contained a "veiled reference" to his discussion with Leeper where Healey explained that Manderach's low rating was "due to maybe a person coming to you with something and instead of you not getting involved you find yourself right in the middle of it all." Those reviews further demonstrate the Company's hostility towards Leeper's wage discussions with his coworkers.[8] (A. 5, 13; 1076.)

[8] The Board also noted that Leeper's own May 5 performance review reflected the Company's disapproval of his "being in the middle of drama that does not need to be there . . . and not showing that he cares about the success of others." In addition, for the first time, the Company included "needs improvement" ratings for him. (A. 6; 1072)

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The Company further displayed its animus towards Leeper's union activity on the day he was fired. After Leeper asked Stien-della Croce to speak with Healey about the Company's unlawful behavior, she visited the Delmar location. During her conversation with Healey, he told Stien-della Croce that he had told Leeper "if you want to move up in your career this is what I need you to do." (A. 7, 13; 199, 859.) As the Board concluded, "Healey's statement, which implied that Leeper would have to choose between his union activities and advancement at the Company, confirmed its animus toward Leeper's union activities. (A. 7, 13; 199, 859.)

Furthermore, the Company discharged Leeper just several hours after Stien-della Croce visited the Delmar location on his behalf. (A. 13-14; 194-95, 303.) Accordingly, as the Board found, the Union's visit to the Delmar location was the proverbial "straw that broke the camel's back" and "provides powerful evidence that the true motive for the discharge was unlawful."[9] (A. 14-15.) *See Wilson*

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[9] The Company's suggestion that it tolerated Leeper's protected conduct for about a year (Br. 15-16) is unavailing. A discriminatory discharge need not be implemented at the first opportunity to be unlawful. Courts have affirmed unlawful discharges even with a long hiatus in protected activity. *See Jet Star, Inc. v. NLRB*, 209 F.3d 671, 676-77 (7th Cir. 2000) (discharged employee active in prior campaign and intended to renew organizing); *Am. Thread Co. v. NLRB*, 631 F.2d 316, 318, 322-23 (4th Cir. 1980) (discharge unlawful where last election was 5 years earlier and last union activity occurred about 8 months before discharge). Here, Leeper ramped up his conversations with coworkers regarding employee wages in the month before his discharge. The Board reasonably found that the timing of the discharge only hours after the Union's visit to ensure Leeper's ability

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Trophy Co. v. NLRB, 989 F.2d 1502, 1509 (8th Cir. 1993) (suspicious timing of employee's discharge relative to union activity aids in establishing unlawful motivation); *Abbey's Transp. Servs., Inc. v. NLRB*, 837 F.2d 575, 582 (2d Cir. 1988) (agreeing with conclusion that employer seized on minor infraction to discharge employee for protected activity); *see also NLRB v. Ark.-La. Gas Co.*, 333 F.2d 790, 796 (8th Cir. 1964).

Substantial evidence also supports the Board's finding (A. 13-14) that the Company's proffered reasons for discharging Leeper were pretextual, which further demonstrates that the Company was unlawfully motivated when it discharged him. *See York Prods., Inc. v. NLRB*, 881 F.2d 542, 545 (8th Cir. 1989), *cited with approval in Hall v. NLRB*, 941 F.2d 684, 688 (8th Cir. 1991); *Pace Indus., Inc. v. NLRB*, 118 F.3d 585, 591 (8th Cir. 1997). When Healey discharged Leeper, he made a notation in Leeper's development journal that Leeper had failed to attend an all-store meeting on May 4 and was a poor performer due to "lack of desire." (A. 7; 783.) However, as the Board found (A. 14), the Company's records demonstrate that other established employees like Leeper were not discharged for missing all-store meetings. (A. 7; 68-69, 617-63.) For example, when employee Caleb Dalton, an employee with a negative performance reviews, missed an all-

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to continue his efforts demonstrated unlawful motivation. The Company's claims that the Union's visit had nothing to do with Leeper and no suspicious timing exists are unfounded.

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store meeting, the Company only gave him a written warning. (A. 7; 1207-25.) Another employee, Gabriela Hernandez, only had a notation in her performance journal that she had been "informed" of the fact she missed an all-store meeting. (A. 7; 1236.) Moreover, the three employees who had been discharged for missing a meeting were all employees who had been with the Company for less than 90 days, unlike Leeper, who was the longest serving non-management employee at the Delmar location when the Company terminated him. (A. 7; 68-69.) As a result, the Board reasonably found that the Company failed to demonstrate that it has consistently and nondiscriminatorily applied its disciplinary rules." (A. 14.) *See Rockline Indus., Inc.*, 412 F.3d at 970 ("Having disciplined an employee who has engaged in protected activity, it is not enough that an employer put forth *a* nondiscriminatory justification for discipline. It must be *the* justification." (citation omitted) (emphasis in original).

Moreover, the Board further found that the Company's noncompliance with the subpoenas issued by the General Counsel warranted an adverse inference. Specifically, the Board found that had the Company conducted an appropriate search, it would have uncovered records showing that other employees had missed all-store meetings and were not terminated. (A. 1 n.1, 7-8.)[10] That finding further

[10] The Company's bare "disagree[ment]" (Br. 16) with this adverse inference is not sufficient to preserve the issue on appeal. *See Bolivar-Tees, Inc.*, 551 F.3d at 727 (finding Board entitled to summary enforcement as to aspects of Board order not

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supports the Board's finding of pretext and therefore the Company's unlawful motivation.

The Board's pretext finding also demonstrates that the Company failed to prove its defense that it would have discharged Leeper absent his protected activities. While the Company claimed it made the decision to discharge Leeper on the day he missed the all-store meeting, no record evidence supports that contention. (A. 6.) To the contrary, on May 5, the day after the meeting, Healey went through the effort of completing a performance evaluation for Leeper. That evaluation makes no mention that the Company had terminated Leeper or was about to do so. Healey also offered no explanation as to why he would take the time to do an evaluation for an employee he had already decided to fire. Moreover, the following day just prior to Leeper's discharge, Healey told union representative Stien-della Croce that Leeper was "still employed" by the Company after she informed Healey she had learned Healey was threatening employees for engaging in protected activity. (A. 859.) As the Board noted, had Healey already decided to fire Leeper, as the Company claims, his statements to the union representative were "misleading, at best." (A. 7.)

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challenged on appeal); *United States v. Kirk*, 528 F.3d 1102, 1104 n.2 (8th Cir. 2008) ("[U]ndeveloped issues perfunctorily adverted to in an appellate brief are waived" (citation omitted)); Fed. R. App. P. 28(a)(8)(A) (argument must contain reasons for claims with supporting authority and record references).

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In addition, the Company's proffered reasons for Leeper's discharge were rejected by the Board because they relied entirely on the discredited testimony of Healey and Brownlee. (A. 6 n.21, 14.) In particular, the Company was unable to substantiate its claim that it discharged Leeper for poor performance. The judge discredited the Company's characterizations of Leeper's work performance because he was the longest-serving non-management employee at the Delmar location, had never received a negative performance evaluation in his three years, and was considered a good employee by Service Manager Goliday.[11] (A. 4 & n.7; 71, 727-28.) *See Tidewater Constr. Corp.*, 341 NLRB 456, 458 (2004) ("an employer's proffer of a lawful, but false, reason for an alleged act of Section 8(a)(3) discrimination" permits the Board to infer "that the employer was shielding an illicit motive.")

In sum, substantial evidence supports the Board's findings that the General Counsel demonstrated that Leeper's protected activity was "a motivating factor" in the Company's decision to discharge him. The record as a whole did not compel Board to accept the Company's defense that Leeper would have been fired even in the absence of his protected activity. *Transp. Mgmt. Corp.*, 462 U.S. at 395.

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[11] The Board found no basis to reject any of the judge's credibility determinations. (A. 1 n.2.) In any event, because the Company does not challenge those credibility determinations on appeal, they are not before the Court. *See Bolivar-Tees*, 551 F.3d at 727. Accordingly, the discredited testimony (*See* Br. 5, 14-16) cannot support the Company's position.

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C. The Company's Challenges to the Board's Application of *Wright Line* Are Not Properly Before the Court and, In Any Event, Lack Merit

In its opening brief, the Company argues (Br. 10-17), for the first time, that the Board applied the incorrect legal standard of proof to determine motivation by improperly relieving the General Counsel of his initial burden to prove causation. As shown below, the Company's failure to make any such argument before the Board precludes the Court from considering it. *NLRB v. Monson Trucking*, 204 F.3d 822, 825 (8th Cir. 2000). In any event, as further shown below, the Company's arguments do not provide any basis for overturning the Board's finding the Company unlawfully discharged Leeper.

1. The Company failed to present any *Wright Line* challenges to the Board

As explained above (pp. 19-20), Section 10(e) of the Act (29 U.S.C. § 160(e)) makes clear that a party's failure to file exceptions with the Board to specific findings found by the administrative law judge leaves the reviewing court without jurisdiction to review those findings. In addition, where a party *does* file exceptions to a finding and does so on specific grounds, the Court has no jurisdiction to consider other grounds not asserted before the Board and raised by that party for the first time on appeal. *NLRB v. FES*, 301 F.3d 83, 88-89 (3d Cir. 2002) (holding that court lacked jurisdiction to consider employer legal challenge where employer failed to make basis for challenge clear before Board).

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This established principle recognizes that "Section 10(e) embodies the 'general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.'" *Monson Trucking*, 204 F.3d at 825 (quoting *U.S. v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)). Thus, "[i]n order for this Court to consider a party's objection, the party must have apprised the Board 'that it intended to press the question now presented' to us." *Monson*, 204 F.3d at 825 (quoting *Marshall Field & Co. v. NLRB*, 318 U.S. 253, 255 (1943)).

In addition, the Board's rules provide: "No matter not included in exceptions or cross-exceptions may thereafter be urged before the Board, or in any further proceeding." 29 C.F.R. § 102.46(g). The Board's rules further provide that exceptions "shall set forth specifically the question of procedure, fact, law, or policy to which exceptions are taken" and that "[a]ny exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived." 29 C.F.R. § 102.46(b). Accordingly, "the critical question in satisfying Section 10(e) is whether the Board received adequate notice of the basis for the objection." *Monson*, 204 F.3d at 826 (quotation omitted); *see also Highlands Hosp. Corp. Inc. v. NLRB*, 508 F.3d 28, 32-33 (D.C. Cir. 2007) (employer's single reference to issue is "insufficient to satisfy [S]ection 10(e)

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because it failed to give the Board adequate notice of the argument it seeks to advance on review") (quotations and citation omitted).

Here, the Company failed to give the Board notice of any objection to the Board's *Wright Line* standard or application. Indeed, the Company does not address the *Wright Line* standard at all in its 20-page Consolidated Exceptions and Supporting Brief to the Administrative Law Judge's Decision. (BSA 1-20.) As a result, the Company failed to identify, much less develop, any dispute with the *Wright Line* standard applied by the judge. *See Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 417 (D.C. Cir. 1996) (basis for employer's objection must be evident if not explicit). Thus, far from giving the Board notice of the specific arguments it had regarding the Board's application of *Wright Line*, the Company gave the Board no indication that it intended to later challenge that portion of the judge's analysis on court review.

Moreover, in its opening brief, the Company does not suggest, let alone show, any "extraordinary circumstances" that would excuse its failure to raise its contentions before the Board. *See* 29 U.S.C. § 160(e). Accordingly, the Company's challenges to the *Wright Line* standard are beyond the bounds of what this Court may properly consider. *See Singer Co. v. NLRB*, 429 F.2d 172, 180-82 (8th Cir. 1970) (employee's general objection to Board's remedy was "too vague" to preserve employer's specific argument that Board's order was improper).

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Although this Court's decision in *Nichols Aluminum, LLC v. NLRB*, 797 F.3d 548 (8th Cir. 2015), issued after the Company submitted its exceptions to the Board, the Company still was obliged to notify the Board that it planned to challenge the *Wright Line* standard based on that decision. The Company could have submitted a letter calling attention to pertinent and significant authorities, like this Court's *Nichols Aluminum* decision, that had come to the Company's attention after filing its brief with the Board and therefore apprised the Board of its corresponding challenge to the *Wright Line* standard. *See Reliant Energy*, 339 NLRB 66 (2003) (permitting submission of such letters and modeling Board procedure after Federal Rule of Appellate Procedure 28(j) (citation of supplemental authorities)). The Company failed to do so. Following the Board's decision, the Company should have filed a motion for reconsideration with the Board to address *Nichols Aluminum* and its objection to the Board's *Wright Line* test. It is settled that the Company's failure to move for reconsideration further precludes judicial review of its argument. *See Woelke*, 456 U.S. at 666 (appellate court lacked jurisdiction to hear challenge to Board decision on issue not expressly presented by motion for reconsideration); *Garment Workers Union v. Quality Mfg.*, 420 U.S. 276, 281 n.3 (1975) (Section 10(e) of Act precluded judicial consideration of party's contention that Board denied it due process by basing order on theory neither charged nor

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litigated, because party failed to urge due process objection to Board in postdecision motion for reconsideration).

Finally, the Company cites (Br. 13) *Carleton College v. NLRB*, 230 F.3d 1075 (8th Cir. 2000), *GSX Corp. of Missouri v. NLRB*, 918 F.2d 1351 (8th Cir. 1990), and *Calloway v. Miller*, 247 F.3d 778 (8th Cir. 1998), for its contention that the Board applied the incorrect legal standard. However, the Company failed to cite any of those cases in its exceptions to the Board. Nor did it cite any other case or even suggest that the judge's application of *Wright Line* was an error. Accordingly, the Court cannot deny enforcement on the basis of arguments that were never presented to the Board in exceptions or in a motion for reconsideration.

2. The Board's finding of unlawful motivation was consistent with this Court's precedent

In any event, even if before the Court, the Company's challenges to the Board's application of *Wright Line* would fail on the merits. The Company's claim (Br. 13-16) that the General Counsel failed to demonstrate that Leeper's protected activities were the "cause in fact" for his discharge is baseless because the causal relationship the Board inferred between the Company's hostility towards Leeper's protected activities and his discharge is both obvious and reasonable. The Board found (A. 13) the Company "harbored antiunion animus *and* animus toward Leeper's *other* protected concerted activity." (A. 13) (emphasis added).

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As demonstrated above (pp. 24-33), an abundance of record evidence supports the Board's finding that the Company's decision to discharge Leeper was motivated by animus towards his union and protected, concerted activities. For example, after Leeper participated in the Union's "Show Me 15" protest in May 2013, Healey and Wurdack were waiting for Leeper when he arrived at work the following day. Wurdack told Leeper that he had let his team down, and threatened to fire Leeper if Leeper did "this" again. (A. 285.) That threat, from a high-level manager, shows the Company harbored animus towards Leeper's union activities and was prepared to fire him for his participation. Similarly, Healey warned Leeper after the same protest that Leeper should not bring "this stuff" to the Company and instructed Leeper to let him know before the next protest, if Leeper planned on participating. (A. 13; 286.)

The Company's union animus continued when it learned Leeper participated in another protest in August 2013. After that protest, Healey showed up at Healey's apartment, banged on the door, and shouted his name in the hallway in order to find out "what was going on." (A. 4; 293.) When Leeper went to work the following day, Healey told Leeper that he was getting "flack" from corporate and again told Leeper he needed to inform the Company before he participated in Union activities. (A. 4; 293). Healey later chastised Leeper for "making things awkward." (A. 4; 293.)

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The Company similarly demonstrated animus – again, to the point of threatening discharge – towards Leeper's protected, concerted activities regarding wages at the Delmar location the month before he was fired. When Leeper tried to talk with coworkers about concerns he had with employee wages, Goliday interrupted the conversation and told Leeper he was not permitted to talk about wages. After Goliday reported Leeper's wage discussions, Healey reemphasized to Leeper that the Company would not allow employees to discuss wages. (A. 5; 300-301.) Tellingly, Healey then stated that the "next time I hear you speaking about wages in workplace, we will be parting ways." (A. 5; 302.) These persistent threats and unlawful statements, which are undisputed before the Court, support the Board's conclusion that the Company continued to harbor animus toward Leeper's protected activity.

The Company's animus continued until the day it fired Leeper. When a union representative informed Healey that the Union learned Healey was threatening employees for engaging in protected activities, Healey brought up Leeper's union activities. Several hours later, Healey fired Leeper. (A. 7; 307.) On this record, the Board reasonably concluded the Union's visit to protect Leeper's right to continue his protected activities was the last straw that led the Company to carry out its threats of discharge. (A. 14.)

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Thus, the Company's animus was clearly directed at Leeper's union and protected, concerted activities. In contrast, in *Nichols Aluminum*, the Court found that the evidence demonstrated only "simple animus towards the union." *Nichols Aluminum*, 797 F.3d at 554-55. In other words, none of the evidence relied upon to support an unlawful motivation in that case was specific to the discharged employee. *Id.* Moreover, because the Board in *Nichols Aluminum* rejected the administrative law judge's recommendation, the Court in those circumstances departed from the typical standard of review and evaluated the Board's findings "more critically," requiring "the Board's evidence [to] be stronger." *Id.* Here, the Board agreed with the administrative law judge. Moreover, the Board relied on a wealth of evidence – including multiple (uncontested) threats to discharge Leeper – demonstrating the Company's animus specifically towards Leeper's protected union and concerted activities rather than just general hostility to such conduct found by the Court in *Nichols Aluminum*.

Accordingly, the Company is wrong in its assertion (Br. 15) that the Board's "only specific finding with regard to causation was the timing between Healey's interaction with . . . Stien-della Croce and Leeper's ultimate termination." As previously demonstrated (pp. 24-33), and as summarized above, ample record evidence supports the Board's finding that the Company would not have

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discharged Leeper, but for his protected activities. As such, the Court should enforce this aspect of the Board's Order.[12]

[12] If the Court rejects the Board's arguments that the Court lacks jurisdiction under Section 10(e) to consider the Company's belated challenge to the Board's *Wright Line* test and that, in any event, the evidence meets the Court's causation standard, the Board requests a remand to consider those issues in the first instance. *See Beverly Enters.-Minn. v. NLRB*, 266 F.3d 785, 789 (8th Cir. 2001) ("in view of the Board's request that [the Court] do so," remand was appropriate "to afford the Board the opportunity to reconsider its decision"). Accordingly, because the factual determination of unlawful motive could be evaluated pursuant to this Court's decision in *Nichols Aluminum*, remand for the limited purpose of applying that legal standard is consistent with this Court's precedent. *See Nichols Aluminum*, 797 F.3d at 555 (J. Melloy, concurring) (remand permitted where Board offers alternative theory or requests remand).

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CONCLUSION

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

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May 2016

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD	*	
	*	
Petitioner/Cross-Respondent	*	Nos. 15-3925 &
	*	15-3955
and	*	
	*	Board Case No.
MID-SOUTH ORGANIZING COMMITTEE	*	14-CA-128253
	*	
Intervenor	*	
	*	
v.	*	
	*	
CHIPOTLE SERVICES, LLC	*	
	*	
Respondent/Cross-Petitioner	*	
	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 9,895 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 12.1.6 and is virus-free according to that program.

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Dated at Washington, DC
this 6th day of May, 2016

UNITED STATES COURT OF APPEALS
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Intervenor	*	
	*	
v.	*	
	*	
CHIPOTLE SERVICES, LLC	*	
	*	
Respondent/Cross-Petitioner	*	
	*	

CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

I certify that the 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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