

No. 15-60257

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

DIRECTV HOLDINGS, LLC

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE 947, AFL-CIO**

Intervenor

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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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.

TABLE OF CONTENTS

Headings:	Page(s)
Statement of subject matter and appellate jurisdiction	2
Statement of the issue	3
Statement of the case.....	3
I. The Board’s findings of fact.....	5
A. Company operations	5
B. Installer Gregory Edmonds	7
C. Installers complain about Company policies impacting their pay	8
D. The Union campaigns to represent the Company’s installers at the nearby Ranch Dominguez facility; the Company opposes the Union, but the Union wins the election	9
E. Zambrano asks Edmonds to apply for a supervisory position	10
F. Riverside employees, including Edmonds, meet with union representatives to explore union representation at Riverside	10
G. At mandatory meetings of Riverside employees, including Zambrano and Edmonds, Vice-President Dimech tries to prevent unionization from spreading to Riverside; Edmonds forcefully voices support for a union.....	10
H. Zambrano threatens to “QC” Edmonds’ jobs	13
I. Edmonds expresses his frustration to Zambrano about the continuing problem of waiting in line for supplies.....	13
J. Zambrano suspends Edmonds but tells him he will not be discharged; Edmonds apologizes	14

TABLE OF CONTENTS

Headings-Cont'd:	Page(s)
K. On July 28, Zambrano discharges Edmonds	15
II. The Board's conclusion and order	16
Summary of argument.....	17
Argument.....	19
I. Substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by discharging Edmonds.....	19
A. Applicable principles and standard of review.....	20
B. The Board reasonably found that the Company discharged Edmonds because of his union activity.....	23
1. Edmonds' union activity was motivating factor in the Company's discharge decision.....	23
2. The Company would not have discharged Edmonds absent his union support	32
Conclusion	39

TABLE OF AUTHORITIES

Cases:	Page(s)
<i>Austal USA, LLC</i> , 356 NLRB No. 65, 2010 WL 5462282, at *1	25
<i>Cadbury Beverages, Inc. v. NLRB</i> , 160 F.3d 24 (D.C. Cir. 1998).....	33
<i>Clark & Wilkins Indus., Inc. v. NLRB</i> , 887 F.2d 308 (D.C. Cir. 1989).....	31
<i>Clear Pine Mouldings, Inc. v. NLRB</i> , 632 F.2d 721 (9th Cir. 1980)	23,32
<i>Davis Supermarkets v. NLRB</i> , 2 F.3d 1162 (D.C. Cir. 1993).....	22
<i>DirecTV U.S. DirecTV Holdings, LLC</i> , 357 NLRB No. 149 (2011)	10
<i>Dynasteel Corp. v. NLRB</i> , 476 F.3d 253 (5th Cir. 2007)	23,35,37
<i>Farmers Ins. Group</i> , 174 NLRB 1294 (1969)	30
<i>G.B. Elec., Inc.</i> , 319 NLRB 653 (1995)	29
<i>General Motors Corp.</i> , 243 NLRB 614 (1979)	30
<i>Healthcare Emps. Union v. NLRB</i> , 463 F.3d 909 (9th Cir. 2006)	22

TABLE OF AUTHORITIES

Cases-Cont'd:	Page(s)
<i>Intermet Stevensville,</i> 350 NLRB 1270, 1274 (2007)	21
<i>Jenkins Mfg. Co.,</i> 209 NLRB 439 (1974)	30
<i>Justak Bros. & Co. v. NLRB,</i> 664 F.2d 1074 (7th Cir. 1981)	21
<i>Klate Holt Co.,</i> 161 NLRB 1606 (1966)	30
<i>L.S.F. Transp. Inc. v. NLRB,</i> 282 F.3d 972 (7th Cir. 2001)	35
<i>Merchants Truck Line v. NLRB,</i> 577 F.2d 1011 (5th Cir. 1978)	21, 22
<i>Merle Lindsey Chevrolet, Inc.,</i> 231 NLRB 478 (1977)	30
<i>Metro. Edison Co. v. NLRB,</i> 460 U.S. 693 (1983).....	20
<i>NLRB v. Allied Aviation Fueling,</i> 490 F.3d 374 (5th Cir. 2007)	22
<i>NLRB v. Buitoni Food Corp.,</i> 298 F.2d 169 (3d Cir. 1962)	21
<i>NLRB v. Cal-Maine Farms, Inc.,</i> 998 F.2d 1336 (5th Cir. 1993)	23
<i>NLRB v. Central Power & Light,</i> 425 F.2d 1318 (5th Cir. 1970)	22, 32

TABLE OF AUTHORITIES

Cases-Cont'd:	Page(s)
<i>NLRB v. Link-Belt Co.</i> , 311 U.S. 584 (1941).....	21
<i>NLRB v. McClain of Georgia, Inc.</i> , 138 F.3d 1418 (11th Cir. 1998)	22
<i>NLRB v. Motorola, Inc.</i> , 991 F.2d 278 (5th Cir. 1993)	36
<i>NLRB v. Noel Canning</i> , 134 S. Ct. 2550 (2014).....	4
<i>NLRB v. Thermon Heat Tracing Servs., Inc.</i> , 143 F.3d 181 (5th Cir. 1988)	20,21
<i>NLRB v. Transp. Mgmt. Corp.</i> , 462 U.S. 393 (1983).....	20
<i>Parsippany Hotel Mgmt. Co. v. NLRB</i> , 99 F.3d 413 (D.C. Cir. 1996).....	37
<i>Proctor & Gamble Co. v. Amway Corp.</i> , 376 F.3d 496 (5th Cir. 2004)	27
<i>Shattuck Denn Mining Corp. v. NLRB</i> , 362 F.2d 466 (9th Cir. 1966)	33
<i>Sociedad Española de Auxilio Mutuo y Beneficiencia de P.R. v. NLRB</i> , 414 F.3d 158 (1st Cir. 2005).....	21
<i>Tasty Baking Co. v. NLRB</i> , 254 F.3d 114 (D.C. Cir. 2001).....	22
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951).....	22, 32

TABLE OF AUTHORITIES

Cases-Cont'd:	Page(s)
<i>Vermeer Mfg. Co.</i> , 187 NLRB 888 (1971)	30
<i>Vincent Indus. Plastics, Inc. v. NLRB</i> , 209 F.3d 727 (D.C. Cir. 2000).....	22, 23, 37
<i>Wright Line</i> , 251 NLRB 1083 (1980), <i>enforced on other grounds</i> , 662 F.2d 899 (1st Cir. 1981).....	17,20,21,33

Statutes:	Page(s)
National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 7 (29 U.S.C. § 157)	17,20
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	3,16,17,19,20,38
Section 8(a)(3) (29 U.S.C. § 158(a)(3))	3,16,17,19,20,38
Section 10(a) (29 U.S.C. § 160(a))	2
Section 10(e) (29 U.S.C. § 160(e))	3,22
Section 10(f) (29 U.S.C. § 160(f))	3

Rules:	
Fed. R. App. P. 28(a)(8)(A)	27

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**STATEMENT OF SUBJECT MATTER AND
APPELLATE JURISDICTION**

This case is before the Court on DirecTV Holdings, LLC's ("the Company's") petition to review, and the cross-application of the National Labor Relations Board ("the Board") to enforce, the Board's Order issued against the Company. The Board had jurisdiction over the unfair labor practice proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board's Decision and Order was issued on March 31, 2015, and is reported at 362 NLRB No. 48. (Vol. III, 2015 D&O 1-6.)¹ The Board's Order is final with respect to all parties.

The Company filed a petition for review of the Board's Order on April 10, 2015, and the Board filed a cross-application for enforcement on May 27, 2015; both were timely because the Act places no time limits on such filings. The International Association of Machinists and Aerospace Workers, District Lodge 947, AFL-CIO ("the Union"), the charging party before the Board, intervened on

¹ Record references are to the original record. Because the Board's March 31, 2015 Decision and Order incorporates by reference an earlier Board Decision and Order issued on January 25, 2013, reported at 359 NLRB No. 54, the citations in this brief are to both the Board's 2015 Decision and Order ("2015 D&O") and the Board's earlier 2013 Decision and Order ("2013 D&O"). References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

the side of the Board. The Court has jurisdiction under Sections 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), and venue is proper because the Company transacts business in this Circuit.

STATEMENT OF THE ISSUE

Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by discharging employee Gregory Edmonds because of his union activity.

STATEMENT OF THE CASE

Upon a charge filed by the Union, the Board's Acting General Counsel issued a complaint against the Company, alleging violations of Sections 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)). (Volume III, 2013 D&O 11.) Following a hearing, an administrative law judge issued a decision finding that the Company acted unlawfully by discharging Edmonds for engaging in union and other protected activities. Further, the judge found that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by maintaining and failing to repudiate four work rules that employees would reasonably construe to restrict their rights to discuss their terms and conditions of employment among themselves and with third parties, such as union representatives. The judge dismissed a fifth allegation regarding a work rule restricting employee use of company property.

After the parties each filed exceptions to the judge's decision, the Board (Chairman Pearce and Members Griffin and Block) issued a Decision and Order on January 25, 2013, affirming the judge's rulings, findings, and conclusions with slight modification. The Board found that the Company acted unlawfully by discharging Edmonds for his union activity. In addition, the Board agreed with the judge that the Company unlawfully maintained and failed to repudiate four work rules. *See* 359 NLRB No. 54 (Vol. III, 2013 D&O 1-22.) The Company and the Union petitioned the U.S. Court of Appeals for the Ninth Circuit for review of the 2013 Decision and Order, and the Board cross-applied for enforcement.

On June 26, 2014, the Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), which held that three recess appointments to the Board in January 2012, including those of Members Griffin and Block, were invalid under the Recess Appointments Clause. Subsequently, the Ninth Circuit vacated the Board's 2013 Decision and Order, and remanded the case to the Board for further proceedings. (Vol. III, 2015 D&O 1.)

On March 31, 2015, the Board (Chairman Pearce and Members Hirozawa and McFerran) issued the Decision and Order now before the Court. (Vol. III, 2015 D&O.) After considering de novo the judge's decision and the record, in light of the parties' exceptions and briefs, the Board agreed with the rationale set forth in its 2013 Decision and Order, as modified. Specifically, the Board

disagreed with the earlier panel's dismissal of the allegation regarding the company property rule, and instead remanded that allegation to the judge. (Vol. III, 2015 D&O at 1.)² Accordingly, the Board affirmed the judge's rulings, findings, and conclusions to the extent and for the reasons stated in the 2013 decision, which the Board incorporated by reference. The Board also adopted the judge's recommended Order, as modified. (Vol. III, D&O II at 1.)

I. THE BOARD'S FINDINGS OF FACT

A. Company Operations

The Company installs TV satellite dishes for consumers throughout the country. (Vol. III, 2013 D&O at 11-12.) At relevant times in 2010 and 2011, the Company maintained nationwide work rules placing constraints on its employees. These rules (1) restricted employees' contacts with the media; (2) required employees to contact company security before being interviewed by any law enforcement agency; (3) prohibited employees from discussing details about their job or releasing employee information; (4) restricted employee disclosures of company information on social media; and (5) restricted employee use of company

² In its opening brief, the Company notes (Br. 2 n.1) that it has not addressed the Board's findings that it unlawfully maintained and failed to repudiate the four work rules because the Company and the Board have been finalizing a settlement agreement that resolves these issues without the need for litigation. The parties expect that settlement will be finalized within the next few weeks. Should settlement fail, the parties will notify the court and may request supplemental briefing.

information systems, equipment, and resources. (Vol. III, 2015 D&O 1, 2013 D&O 1-4; Vol. II, GCX 1(g), pp. 3-4; 1(i), pp. 2-3; RX 1, at 19-20; 31-32; 41.) In May 2011, after the Acting General Counsel issued the complaint in this case, the Company sent employees a memorandum attempting to clarify the scope of these rules. (Vol. III, 2013 D&O 20; Vol. II, RX 4(a).)

The Company has several facilities in Southern California, including in Riverside and Rancho Dominguez. (Vol. III, 2013 D&O at 11-12; Vol. I, Tr. 339.) Site Manager Freddy Zambrano is in charge of the Riverside facility. (Vol. III, 2013 D&O 12; Vol. I, Tr. 337-39.) Zambrano reports to Scott Thomas, Regional Director of Operations for Southern California. In turn, Thomas reports to Adrian Dimech, Vice President of Operations for Southern California. (Vol. III, 2013 D&O at 14; Vol I., Tr. 288.)

There are approximately 50 installers working out of the Riverside facility. (Vol. III, 2013 D&O at 12; Vol. I, Tr. 439-40.) Installers are primarily paid on a piecework basis according to how many installations they complete during the workday. (Vol. III, 2013 D&O 12; Vol. I, Tr. 41-43.) However, if their piecework pay during the pay period is less than a guaranteed minimum base pay, they receive the guaranteed minimum amount in lieu of their piecework earnings. (Vol. III, 2013 D&O 12; Vol. I, Tr. 41-43.) There are three tiers of base pay (Grades 11, 12, and 13) for the installers, according to their expertise with certain

types of installations. (Vol. III, 2013 D&O 12; Vol. I, Tr. 41-43.)

B. Installer Gregory Edmonds

Gregory Edmonds was an installer at the Company's Riverside facility from November 2007 until his discharge on July 28, 2010.³ (Vol. III, 2013 D&O 12; Vol. I, Tr. 29.) Edmonds was one of five or six installers to whom the Company also assigned service technician work, which involved troubleshooting previously installed equipment pursuant to customer inquiries or complaints. (Vol. III, 2013 D&O 12; Tr. 112.) Approximately two weeks before his discharge, Edmonds attained the highest level of base pay. Zambrano recognized that Edmonds had become certified to install internet service, and that Edmonds had recently received a high rating for "hooking up the phone lines of the customer to [company] equipment." (Vol. III, 2013 D&O 12, 19 n.31; Tr. 112.)

Edmonds ranked well above average in customer satisfaction. For example, employees' performance is measured every pay period, both individually and as a facility, over 30-, 60-, and 90-day periods. As of March 8, Edmonds' customer satisfaction score for the previous 12 months was 100 percent, while the average site score for all of the Riverside installers was only 89.22 percent. As of June 29, Edmonds' customer satisfaction score was 98.67 percent for the previous 12 months, while the average site score for all of the Riverside installers was only

³ All dates are within 2010, unless otherwise specified.

89.56 percent. (Vol. III, 2013 D&O 17, 19 n.31; Vol. II, GCX 21 and 22.)

C. Installers Complain About Company Policies Impacting Their Pay

Throughout 2010, installers at the Riverside facility, including Edmonds, complained to each other about various inequities they perceived regarding the pay system, and related matters resulting from the daily routine of having to wait in line at the Company's facility each morning to obtain their installation equipment. For example, the longer employees had to wait in line for supplies before going out on installation calls, the less time they had to make those installation calls. This, in turn, caused them to complete fewer installations and lowered their piecework rate. As a result, the employees' frustration of simply having to wait in line—sometimes while other installers would let their buddies cut in front of them—was exacerbated by the impact it was having on their earnings. Zambrano and Supervisor Lamar Wilson told employees that they could not do anything about it, but that after the facility moved to a new location in Riverside in July, the Company would have lockers for each installer which would be stocked at night with their supplies, thus eliminating the need for lines each morning. (Vol. III, D&O 12, 15; Vol. I, Tr. 96-97, 210-11.)

Installers also complained about the lengthy commute time it took for some Riverside installers to drive to customers' locations in the San Diego area. They complained that they were not sufficiently paid for their approximately 2-hour

driving time to San Diego, especially if they could not complete the installation for some reason once they arrived. (Vol. III, D&O 12; Vol. II, Tr. 87, 93-94.)

D. The Union Campaigns To Represent the Company's Installers at the Nearby Rancho Dominguez Facility; the Company Opposes the Union, But the Union Wins the Election

On March 8, the Union filed a petition with the Board to represent installers and service technicians at the Company's Rancho Dominguez facility, which is approximately 50 miles west of Riverside. Soon after, the Company, including Dimech, held meetings with the Rancho Dominguez employees and supervisors to discuss the Company's opposition to the Union. (Vol. III, 2013 D&O 13 n. 5; Tr. 261.) Dimech also held a one-on-one, closed door meeting with Field Supervisor Noe Gallegos. Dimech promised Gallegos immunity from discharge if he would identify employees and supervisors who were supporting the Union. Dimech also told Gallegos that if the Union were to come in, the site could possibly be closed and the work given to contractors. (Vol. III, 2013 D&O 4, 13 n. 6; Tr. 262.)

On April 16, the Board held the election at Rancho Dominguez. The Union won with a tally of 85 votes for it, and 80 against it. (Vol. III, 2013 D&O 13 n.5; Vol. II GCX 2.) Shortly thereafter, the Company filed objections to the election, claiming that its field supervisors improperly solicited union cards.⁴

⁴ In July, the Region's Hearing Officer sustained the Company's election objections and recommended a new election. On appeal by the Union, however, the Board rejected the Hearing Officer's recommendation and certified the Union.

E. Zambrano Asks Edmonds To Apply for a Supervisory Position

In May, Zambrano suggested to Edmonds that he apply for an open field supervisor position. Edmonds filled out the application but decided not to apply. (Vol III, 2013 D&O 17; Vol. I, Tr. 112.)

F. Riverside Employees, Including Edmonds, Meet with Union Representatives to Explore Union Representation at Riverside

A few months after the Rancho Dominguez election, Edmonds and two of his fellow installers at Riverside, Matthew Webster and Brandon Ojeda, met with representatives of the Union at Ojeda's home. (Vol. III, 2013 D&O 12-13; Vol. I, Tr.181.) The three employees agreed to speak to their coworkers to see if they were interested in union representation. Edmonds spoke to about four coworkers about union representation. (Vol. III, D&O 12-13; Vol. I, Tr. 79, 181.)

G. At a Mandatory Meeting of Riverside Employees, Including Zambrano and Edmonds, Vice-President Dimech Tries to Prevent Unionization From Spreading to Riverside; Edmonds Forcefully Voices Support for a Union

On a Saturday sometime in May or June, the Company held a mandatory meeting with all of its employees, supervisors, and managers at the Riverside facility. Although the Company had previously held Saturday meetings to address issues that came up during the week, this one was unlike the others. The Company

posted a notice stating that all employees were required to attend. (Vol. III, 2013 D&O 13, 18 n. 28; Vol. I, Tr. 78, 80, 289, 349, 378.)

Zambrano began the meeting by introducing Vice President Dimech, and said that Dimech had some union matters to discuss. (Vol. III, 2013 D&O 13; Vol. I, Tr. 85.) Dimech told the gathered employees that the Rancho Dominguez facility had voted to have a union come in, and he was there to talk to the employees to try to keep unionization from spreading to other sites. (Vol. III, 2013 D&O 13; Vol. I, Tr. 85.) He conveyed that a union was bad for the employees and the Company would not allow it. (Vol. III, 2013 D&O 13-14 nn.7, 8, Vol. I, Tr. 184, 244.) Dimech indicated that nothing would come of efforts to unionize; the Company was “going to shut it down”; and essentially stated that unionization “ain’t gonna happen.” (Vol. III, 2013 D&O 4, 13 n. 8; Vol. I, Tr. 244.) Moreover, Dimech asked employees if there were issues that he could address so that a union would not be necessary. He expressed that he believed if management took care of the employees’ issues, then “there really wouldn’t be a need for a union in his mind.” (Vol. III, 2013 D&O 13; Vol. I, Tr. 85-86.)

In response to Dimech, Edmonds raised various issues that he and other installers had with the Company, including not being sufficiently paid for the time that it took them to drive from Riverside to San Diego and the desire for higher hourly pay. Dimech replied that changes in pay were not his decision to make,

decisions of that nature were “far over his head,” and all he could do was present this suggestion to the Company. (Vol. III, 2013 D&O 13; Vol. I, Tr. 87.)

Edmonds replied, “Okay. So you just said as an individual that you can’t do anything for us. But [what] I’m wondering is if we were a collective body if maybe the [C]ompany might hear us.” (Vol. III, 2013 D&O 13; Vol. I, Tr. 88.)

Edmonds further stated that the employees should not listen to Dimech, that “the union is a good thing,” and that, “if we all stand together, it’s not just one voice. It’s all of us. That’s what a union is.” (Vol. III, 2013 D&O 14 n. 8; Vol. I, Tr. 245.) Ojeda and Webster also spoke up, with Ojeda backing up Edwards by saying that the Company might hear us better “if we were a collective body [rather] than just a bunch of individuals.” (Vol. III, 2013 D&O 13; Vol. I, Tr. 88.)

After the meeting, which lasted about an hour, employees complimented Edmonds for speaking up. Some employees told Edmonds that he was their “hero” and that Edmonds had said things that they had wanted to say but could not. (Vol. III, 2013 D&O 14; Vol. I, Tr. 248.) Edmonds gathered his supplies and proceeded to his van to prepare his installation calls for the day. (Vol. III, 2013 D&O 14; Vol. I, Tr. 90-92.)

Dimech followed Edmonds to his van and asked Edmonds what he could do about the issues that employees raised in the meeting. (Vol. III, 2013 D&O 14; Vol. I, 91-92.) After some discussion, Dimech said he would address the issues

and see if he could get them taken care of. While Edmonds replied, “that would be great,” he “remained unconvinced” and he continued to profess the need for union representation, stating that the Company was “not taking care of it.” Dimech gave Edmonds his business card and said, “if there was anything [Dimech] could do for [Edmonds] to give him a call.” (Vol. III, 2013 D&O 14, 18; Vol. I, Tr. 92.)

Shortly after that Saturday meeting, the Company raised the pay for San Diego jobs for all installers. Dimech personally called Edmonds to tell him. Edmonds, who had never before received a call from Dimech, simply thanked him. (Vol. III, 2013 D&O 14-15; Vol. I, Tr. 91-94.)

H. Zambrano Threatens to “QC” Edmonds’ Jobs

On the first or second workday after the Dimech meeting, Zambrano warned Edmonds that he was going to “QC” (perform a quality control inspection) all of Edmonds’ jobs that day. (Vol. III, 2013 D&O 4, 14, 14 n.10; Vol. I, Tr. 93, 248-49, 251.) Employees understood that statement as tantamount to saying that Edmonds would be kept under surveillance. (Vol. III, 2013 D&O 14 n.10; Vol. I, Tr. 92, 248-49, 251.)

I. Edmonds Expresses His Frustration to Zambrano About the Continuing Problem of Waiting in Line for Supplies

In early July, the Riverside facility moved to a new location. Despite lockers being in place, they were not being utilized as Zambrano promised. Thus,

the installers still had to wait in line for a long time each morning to get their installation supplies. (Vol. III, 2013 D&O 15; Vol. I, Tr. 97-98.)

On the morning of July 21, Edmonds went to the warehouse to obtain supplies for the day. (Vol. III, 2013 D&O 15; Vol. I, Tr. 100.) Faced with a disorganized gathering of about 40 to 60 installers waiting for supplies, Edmonds became increasingly frustrated. After standing there for “quite some time,” Edmonds saw Zambrano enter the warehouse. Edmonds called out to Zambrano, “Hey Freddy, can’t you do something about this fucking line? I stand in this fucking line ten hours a day.” (Vol. III, 2013 D&O 15, Tr. 100-01.) Zambrano walked over, put his arms out as if to block others from getting in front of Edmonds, and said, “Oh, Greg. Nobody cut in front of Greg, Okay?” Edmonds was humiliated. The exchange lasted a matter of seconds. Edmonds eventually got his supplies and went to work. (Vol. III, 2013 D&O 15, Tr. 100-01.)

J. Zambrano Suspends Edmonds But Tells Him He Will Not Be Discharged; Edmonds Apologizes

The next morning, Zambrano summoned Edmonds to his office. Assistant Manager Roy Cienfuegos was also present. Zambrano told Edmonds he was being suspended for his outburst the day before. (Vol. III, 2013 D&O 15; Vol. I, Tr. 102.) Zambrano handed Edmonds an Employee Consultation Form (“ECF”) that was dated July 21 and gave Zambrano’s version of the incident. The “Corrective

Action” listed on the form was defined as a “suspension” with an end date of July 28. (Vol. III, 2013 D&O 15; Vol. II, GCX 19.)

Edmonds signed the form as requested and apologized. Edmonds asked Zambrano, “[y]ou’re not going to fire me, are you?” Zambrano replied, “No. When you get back from your suspension, you’ll go back to work.” (Vol. III, 2013 D&O 15; Vol. I, Tr. 106.)

Assistant Manager Cienfuegos drove Edmonds home that day. During the drive home, Edmonds apologized and told him “he was sorry for what had happened and that he wished he could take it back.” (Vol. III, 2013 D&O 15, Vol. I, Tr. 331.)

K. On July 28, Zambrano Discharges Edmonds

On July 28, the date the suspension period ended, Edmonds called his direct supervisor, Lamar Wilson, about returning to work. Wilson told Edmonds he would be notified, and later that day, the office secretary called Edmonds and instructed him to meet with Zambrano. (Vol. III, 2013 D&O 15; Vol. I, Tr. 107.) That afternoon, Edmonds came to the office and met with Zambrano. In the meeting, Zambrano abruptly changed course from his previous promise that Edmonds would be returning to work after the suspension. Zambrano said nothing about Edmond’s disciplinary history or any previous warnings. (Vol. III, 2013 D&O 18). Zambrano told Edmonds that after talking “with Scott Thomas and the

HR department,” Edmonds’ employment “was being terminated.” (Vol. III, 2013 D&O 15; Vol. I, Tr. 107-108.) Zambrano gave Edmonds another ECF, which was dated July 28 and was identical to the July 21 ECF, except that the “Corrective Action” listed on the form was defined as “Termination of Employment.” (Vol. III, 2013 D&O 15; Vol. II, GCX 20.)

II. THE BOARD’S CONCLUSION AND ORDER

On the foregoing facts, the Board (Chairman Pearce and Members Hirozawa and McFerran) found, in agreement with the administrative law judge and incorporating the 2013 Decision and Order, that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by discharging Edmonds for his union activity. (Vol. III, 2015 D&O 1, 2013 D&O 1.)⁵ The Board found that Edmonds’ union activity was a motivating factor for his discharge. Further, the Board found that, although the Company may have lawfully suspended Edmonds, the Company failed to prove it would have discharged Edmonds even in the absence of his union activity. That was true, the Board found, particularly because Zambrano initially only suspended Edmonds, but immediately upon Edmonds’ return to work, abruptly discharged him without any credible explanation. (Vol. III, 2013 D&O 4-5, 18-19.)

⁵ As noted above, p. 5 n. 2, the Board also found that four of the Company’s work rules were unlawful and that the Company failed to lawfully repudiate them. Those rules are not before the Court at this time.

The Board's Order requires the Company to cease and desist from the unfair labor practices found and, in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act. (Vol. III, 2015 D&O 1-3.) Affirmatively, the Board's Order requires the Company to rescind the unlawful discharge of Edmonds and to pay him backpay with interest. (Vol. III, 2015 D&O 1-3.) The Board's Order also requires the Company to compensate Edmonds for any adverse income tax consequences of receiving a lump sum backpay award and to file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. (Vol. III, 2015 D&O 1 n.1.) Finally, the Board ordered the Company to post a remedial notice.

SUMMARY OF ARGUMENT

The Board reasonably concluded that the Company violated Section (8)(a)(3) and (1) of the Act by discharging Edmonds because he engaged in union activity. The Board, applying its well-established *Wright Line* analysis, determined that Edmonds engaged in protected union activity of which the Company was aware when he challenged Vice President Dimech's opposition to union representation during a mandatory meeting of all employees. Shortly after voicing his support for a union at the meeting, Edmonds' boss, Site Manager Zambrano, who reported to Dimech, demonstrated union animus when he

threatened Edmonds with quality control inspections of his jobs in retaliation for Edmonds' prounion statements. Only a month or two later, Zambrano decided to suspend Edmonds for an outburst toward Zambrano. Despite Zambrano's promise to Edmonds that he would return to work after serving his suspension, and would not be discharged, Zambrano abruptly changed course and inexplicably discharged Edmonds when he returned to work. Thus, the Board's finding that Zambrano's decision to discharge Edmonds was unlawfully motivated by animosity toward Edmonds' protected union conduct is well supported by the credited record evidence.

The Company's brief glaringly omits reference to the Board's crucial finding that Zambrano's threat of retaliation to Edmonds was sufficient on its own to establish animus. The Company has thereby waived any challenge to this finding. The Company's other arguments are generally grounded in attacks on the judge's well-founded credibility determinations that the Board adopted. Moreover, the fact that Zambrano did not discharge Edmonds for two other prounion statements is a red herring given that Edmonds clearly did not engage in misconduct in either instance.

The Board properly rejected the Company's defense that it would have discharged Edmonds in the absence of his union activity because, it claims, Zambrano changed his mind after reviewing Edmonds' disciplinary record. The

credited evidence fails to support this argument. Zambrano did not tell that Edmonds that this was the reason for his discharge. Indeed, Edmonds recent record included high consumer satisfaction ratings. Moreover, there was no credible explanation for why Zambrano changed Edmonds' suspension into a discharge after calling the Zambrano's boss—and Dimech's subordinate—Thomas, and the Human Resources department. In the face of the Company's failure to explain the abrupt change in treatment of Edmonds, the Board found that the Company had failed to prove that it would have discharged Edmonds even in the absence of his union activity. Accordingly, the Board's Order regarding Edmonds's unlawful discharge should be enforced.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCHARGING EDMONDS

The Board reasonably found that the Company discharged Edmonds for his protected union activity. (2015 D&O 1, 2013 D&O 4). Here, the Company lawfully suspended Edmonds for an outburst towards his supervisor. After he fully served out that suspension, he was immediately discharged upon his return to work without any credible reasons given. In these circumstances, the Board reasonably determined that his discharge was motivated by unlawful reasons.

A. Applicable Principles and Standard of Review

Section 7 of the Act guarantees employees the right “to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection” 29 U.S.C. § 157. In turn, Section 8(a)(1) of the Act makes it unlawful for an employer to “interfere with, restrain, or coerce employees in the exercise of [those] rights.” 29 U.S.C. § 158(a)(1).

Section 8(a)(3) of the Act bans “discrimination in regard to hire or tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization.” 29 U.S.C. § 158(a)(3). An employer violates Section 8(a)(3) and (1) by taking adverse employment actions against employees for engaging in protected union activity. *See NLRB v. Thermon Heat Tracing Servs., Inc.*, 143 F.3d 181, 186 (5th Cir. 1988). Although the protections of Section 8(a)(3) and Section 8(a)(1) “are not coterminous, a violation of [the former] constitutes a derivative violation of [the latter].” *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

Whether 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 *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. "The elements commonly required to support such a showing are union or protected activity by the employee, employer knowledge of that activity, and union animus on the part of the employer." *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*, 143 F.3d at 187. 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).

The Board may rely on direct evidence to establish unlawful motive, and, because an employer will rarely admit an unlawful motive, the Board may also infer discriminatory motivation from circumstantial evidence. *See NLRB v. Link-Belt Co.*, 311 U.S. 584, 597, 602 (1941); *Merchants Truck Line*, 577 F.2d at 1014.

Such evidence includes the employer's knowledge of and hostility toward 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 adverse action, *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 126 (D.C. Cir. 2001), *Davis Supermarkets v. NLRB*, 2 F.3d 1162, 1168 (D.C. Cir. 1993); and the employer's reliance on shifting explanations for the adverse action. *Healthcare Emps. Union v. NLRB*, 463 F.3d 909, 920-22 (9th Cir. 2006); *NLRB v. McClain of Georgia, Inc.*, 138 F.3d 1418, 1424 (11th Cir. 1998).

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). As this 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). Further, a reviewing court may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." *Universal Camera*, 340 U.S. at 488.

"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,” “based upon inadequate reasons or no reason,” or “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”).

B. The Board Reasonably Found that the Company Discharged Edmonds Because of His Union Activity

1. Edmonds’ union activity was a motivating factor in the Company’s discharge decision

The Board’s findings that Edmonds engaged in union activity and that the Company had knowledge of his union activity are amply supported by the credited

evidence. (Vol. III, 2013 D&O 4-5.) It is undisputed that Edmonds “spoke up forcefully in favor of unions at a mandatory employee meeting” at which both Zambrano and Dimech were present, and which Dimech had called in order to keep union activity from spreading from Rancho Dominguez to Riverside. At the meeting, Edmonds “let Dimech, Zambrano, and everyone else know, in no uncertain terms, that he did not believe any significant concerns of the employees could be resolved absent representation by a union.” (Vol. III, 2013 D&O 18.) Not only did Edmonds’ pronoun statements “directly challenge[]” Dimech’s antiunion statements, but Edmonds’ fellow employees hailed him as their “hero.” (Vol. III, 2013 D&O 14, 18; Vol. I, Tr. 248.) Dimech even followed Edmonds outside after the meeting to ask what more could be done to prevent the Union from coming to Riverside; Edmonds remained unconvinced that the Company would address the issues and “continued to profess the need for union representation.” (Vol. III, 2013 D&O 18.) Dimech called Edmonds personally to tell him that the Company had raised the pay for San Diego jobs, one of the primary concerns that Edmonds had raised. (Vol. III, 2013 D&O 14; Vol. I, Tr. 87.) Accordingly, the record amply demonstrates that both Zambrano and Dimech were well-aware of Edmonds’ unyielding and highly vocal union activity.

Moreover, the Company’s union animus is well-established. Just one or two days after Edmonds spoke out strongly in favor of a union to help the employees

with their concerns, the credited testimony established that Zambrano threatened Edmonds that all of Edmonds' jobs would be subject to quality control surveillance. Given the timing of Zambrano's statement, and the lack of any other "apparent reason or motivation" for it, the Board reasonably found that Zambrano made that statement "in direct response to Edmonds' pronoun remarks at the Dimech meeting." (Vol. III, 2013 D&O 4, 14, 18.) Thus, the Board correctly viewed Zambrano's statement as a "threat of retaliation" sufficient to establish animus. *See Austal USA, LLC*, 356 NLRB No. 65, 2010 WL 5462282, at *1 (unlawful motivation found where human resources director interrogated and threatened union activist, and supervisors told activist that management was "after her" because of her union activities).

Moreover, the credited record evidence amply demonstrates, as the Board found, that when Zambrano made his quality control threat to Edmonds, Zambrano was well aware that his boss, Dimech, opposed the union campaign at Rancho Dominguez and wanted to keep unionization from spreading to Riverside. (Vol. III, 2013 D&O 4.) For example, Dimech stated in front of Zambrano, and all of the other employees at the mandatory Saturday meeting, that the union was "bad" for the employees, the Company would "not allow it," and that the Company would "shut [the union] down." (Vol. III, 2013 D&O 4.) Indeed, Dimech's public statements were consistent with his attempts to defeat the union campaign at

Rancho Dominguez, where the Board further recognized that Dimech had interrogated supervisor Gallegos and asked him which employees were supporting the Union. (Vol. III, 2013 D&O 4.)

In addition to the above evidence of Zambrano's reaction to Dimech's statements against the Union, the Board also noted that the Company discharged Edmonds just a month or so after the Saturday mandatory meeting that Dimech called in response to the employees' union activities and Zambrano's almost immediate threat thereafter that Edmonds' work would be subject to quality control scrutiny after he publicly made prounion remarks. (Vol. III, 2013 D&O 18-19.) Under these circumstances, the Board reasonably found (Vol. III, 2013 D&O 4) that union animus was a motivating factor in the Company's discharge of Edmonds.

Critically, the Company fails to challenge the Board's finding, based on credited evidence, that Zambrano's quality control statement was a threat of retaliation "in direct response to Edmonds' prounion remarks at the Dimech meeting" and that threat was "sufficient on its own to establish animus." (Vol. III, 2013 D&O 4, 14, 18.) Instead, the Company misrepresents (Br. 16-17) the record by stating that there is no evidence of anyone in management making "any negative comments regarding Edmonds or the comments that he made during the [Saturday meeting]." By failing to acknowledge—let alone contest—the Board's

finding in this regard, the Company has waived any challenge to these findings.

See Proctor & Gamble Co. v. Amway Corp., 376 F.3d 496, 499 n. 1 (5th Cir. 2004)

(argument not raised in opening brief is waived); Fed. R. App. P. 28(a)(8)(A)

(argument in brief before the Court must contain party's contention with citations to authorities and record.

Instead of addressing the Board's crucial finding regarding Zambrano's quality control threat, the Company raises multiple other arguments that lack merit.

To begin, the Company ignores the credited evidence in arguing (Br. 17-19) that Dimech did not say what the Board found that he said in his Saturday meeting, and that Dimech did not interrogate Gallegos about employee support for the Union during the union campaign at Rancho Dominguez. The credited evidence demonstrates that Ojeda, who said that Dimech stated in the meeting that "the union was bad for us and [the Company] would not allow it," confirmed his earlier affidavit statements in his testimony at the hearing. (*See* Vol. I, Tr. 184.)

Although the Company challenges his affidavit as having been given under the influence of alcohol (Br. 18), it has provided no grounds to impugn his hearing testimony confirming what he declared in the affidavit. Also contrary to the Company's claim (Br. 19), the credited evidence demonstrates that Gallegos testified that Dimech did, indeed, ask him to identify employees, and not just supervisors, involved in the union organizing at Rancho Dominguez. (*See* Vol. I,

Tr. 269-273.) The Company has provided no basis to disturb any of this credited evidence.

The Company further argues (Br. 24-25) that the Board cannot solely rely on Dimech's statements to show animus, but, of course, that is not what the Board did. As discussed above, the Board found that Zambrano's uncontested threat to subject all of Edmonds' jobs to quality control surveillance was in direct response to Edmonds' vocal support for the Union at the Saturday mandatory meeting, and constituted sufficient evidence to establish animus. (Vol. III, 2013 D&O 4-5.) Thus, the Board did not rely on Dimech's statements to establish animus, but on Zambrano's reaction to Dimech's statements in his quality control threat to Edmonds. All of the Board's findings in this regard are consistent with, and explain, Zambrano's and Dimech's actions.

The Company also challenges the Board's finding of animus on the basis of misguided arguments (Br. 20-25, 27-29) about the timing of Edmonds' discharge. The Company claims (Br. 28) that the Board should have resolved the parties' dispute over whether the Saturday mandatory meeting took place in May or June and found it took place in May, two months prior to Edmonds' discharge. However, as the Board found, it was unnecessary to resolve the dispute.⁶ (Vol. III,

⁶ The Company's assertions regarding its evidence that the meeting took place on May 22 ignore the Acting General Counsel's challenges to this evidence and the

2013 D&O 18 n. 28.) Even assuming that Edmonds was discharged two months after his union activity, all the General Counsel need show is “a reasonable proximity in time between the adverse action in question and the employer’s knowledge of, and hostility toward, the employee’s protected activity.” *G.B. Elec., Inc.*, 319 NLRB 653, 658 (1995). The difference between one or two months timing does not impugn the Board’s animus finding under the circumstances.

The Company additionally claims (Br. 20-25) that Zambrano’s failure to discharge Edmonds for two incidents that occurred after the Saturday meeting and before Edmonds’ July 28 discharge undercuts the Board’s animus finding.

However, as the Board observed, the Company did not have any “supportable rationale” for imposing discipline on Edmonds for those two incidents. (Vol. III, 2013 D&O 19 n. 30). Rather, objective evidence demonstrated that Edmonds did not engage in misconduct in either incident. Thus Zambrano was precluded from relying on “subjective considerations” as he did when he inexplicably changed the suspension that Edmonds had just served into a discharge. Indeed, the “OOP” incident cited by the Company (Br. 7-8, 22-23) where a customer claimed that Edmonds did not call him when he was supposed to, was disproved after Zambrano reviewed Edmonds’ phone records and concluded that Edmonds did, in fact, call the customer. (Vol. III, 2013 D&O 19 n.30; Vol. II, GCX 16(d); Vol. I,

Board’s finding that “the date of the meeting is unclear.” (Vol. III, 2013 D&O 18 n.28.)

Tr. 357.) Moreover, contrary to the Company's hyperbole regarding the fender-bender (Br. 21-22), the other party admitted to Edmonds that she was at fault and Edmonds included that admission in his incident report; Zambrano believed Edmonds after reviewing Edmonds' incident report. (Vol. I, Tr. 362, Vol. II, GCX 17.)⁷

Accordingly, all of the cases the Company cites (Br. 23) for the proposition that an "employer's failure to take advantage of an earlier opportunity to obtain the same result weakens the basis for the Board's attributing an anti-union motive to the discharge" are inapposite. These cases involve situations where the employer could have obtained the same result by taking advantage of an earlier opportunity to discipline the employee for undisputed misconduct.⁸ Here, however, the Company could not have obtained the same result by disciplining Edmonds for the two incidents because Edmonds did not engage in misconduct. Zambrano would have had to discount Edmonds' credible defenses, backed up by evidence outside Zambrano's control (the phone logs and the car accident report), to plausibly discipline Edmonds for those incidents. In contrast, after Edmonds returned from

⁷ Contrary to the Company's suggestion (Br. 21-22), it is not surprising that the other party's insurer denied liability.

⁸ See *General Motors Corp.*, 243 NLRB 614, 618 (1979); *Merle Lindsey Chevrolet, Inc.*, 231 NLRB 478, 485 (1977); *Jenkins Mfg. Co.*, 209 NLRB 439, 443 (1974); *Vermeer Mfg. Co.*, 187 NLRB 888, 892 (1971); *Farmers Ins. Group*, 174 NLRB 1294, 1300 (1969); *Klate Holt Co.*, 161 NLRB 1606, 1661 (1966).

serving his suspension for his profane outburst, Zambrano seized on the incident to convert the suspension to a discharge without any credible explanation. Thus, Zambrano's failure to discipline Edmonds for either the OOP incident or fender-bender does not undercut the Board's finding of union animus.

Contrary to the Company's additional claim (Br. 33), the fact that other employees in the Saturday meeting spoke in favor of union representation and were not disciplined does not disprove the Company's animus. Edmonds—who assertively challenged Dimech at the meeting and was hailed by his co-workers as a hero—was the most vocal union proponent in the meeting. In any event, it is well established that “an employer's discriminatory motive is not disproved by evidence showing that it did not weed out all union adherents.” *See, e.g., Clark & Wilkins Indus., Inc. v. NLRB*, 887 F.2d 308, 316 (D.C. Cir. 1989).

Finally, the Company makes a series of assertions (Br. 29-33) about other factors the Board, at times, uses to evaluate circumstantial evidence of an employer's motive, such as whether there was an investigation of the conduct alleged to be the basis for discipline, if disparate treatment was present, if the reasons for the discipline were implausible or inconsistent, and the seriousness of the alleged violation. Again, however, in making those assertions, the Company ignores the Board's finding that Zambrano decided that a suspension for Edmonds' outburst was appropriate and promised him that he would not be discharged but

would return to work, but upon Edmonds return, without a credible explanation or additional misconduct by Edmonds, converted Edmonds' suspension into a discharge. As this Court has held, the employee at issue may not be "a model employee," but when the evidence demonstrates open hostility by the employer to the union and discharge of an employee shortly after the employer learns of his union activity," it "may give rise to an inference that the discharge was discriminatory." *Central Power & Light Co.*, 425 F.2d at 1322.⁹ Accordingly, the Board's finding that union animus was a motivating factor in Edmonds' discharge, which is a matter "particularly within the Board's purview," is entitled to deference by this Court. *See Clear Pine Mouldings, Inc.*, 632 F.2d at 726; *Universal Camera*, 340 U.S. at 488.

2. The Company would not have discharged Edmonds absent his union support

The Board found that the Company failed to meet its rebuttal burden of demonstrating that it would have taken the same action—discharging, not just

⁹ The Company incorrectly (Br. 30) asserts that "the record is void of any other evidence of unfair labor practices by [the Company] at the Riverside Facility," and concludes that "[u]nder the adverse inference rule this Court can conclude that no such evidence exists." To the contrary, as discussed above at p. 5 n.2, the Board found that the Company violated the Act by maintaining and failing to repudiate four unlawful work rules, all of which could reasonably be viewed as restricting employee discussions about working conditions, talking to union or Board Regional Office representatives, and other employees. The parties may be resolving those violations short of litigation before this Court, but they have not disappeared from the record.

suspending, Edmonds— in the absence of Edmonds’ protected activity. (Vol. III, 2013 D&O 5, 18-19.) As discussed below, the Company failed to present any credible explanation for why Zambrano changed Edmonds’ suspension to a discharge when Edmonds returned to work. The only explanation he gave Edmonds was that he did so after calling Zambrano’s boss—and Dimech’s subordinate—Thomas, and the Human Resources Department. Therefore, the Board reasonably concluded that “someone intervened between July 22 and 28 to cause Zambrano to change his mind and convert the suspension to a termination.” (Vol. III, 2013 D&O 19.) In these circumstances, the Board reasonably determined that the Company failed to affirmatively demonstrate that “Edmonds’ discharge was not motivated by unlawful considerations.” (Vol. III, 2013 D&O 19.) *See Fluor Daniel, Inc.*, 304 NLRB 970, 970 (1991), citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966) (“It is . . . well settled . . . that when a respondent’s stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal.”).

As an initial matter, the Company misconstrues its *Wright Line* burden by claiming (Br. 41-42) that the Board “improperly speculated” that “someone intervened” to change the suspension to a discharge. It the Company’s “overall burden to prove, as an affirmative defense,” that despite any union animus, the

Company would have fired Edmonds anyway. *Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 31-32 (D.C. Cir. 1998). Once the Acting General Counsel demonstrated that union animus was a motivating factor in the Company's decision to discharge Edmonds, it was for the Company, and no one else, to establish a lawful motive for its discharge of Edmonds. It failed to do so.

On this record, the Company's highly suspicious reversal of its decision to only suspend Edmonds is insufficient to establish that it would have taken the draconian step of discharging him absent his union activity. As the Board found, after Edmonds forthrightly apologized to Zambrano and asked Zambrano whether he would be terminated, Zambrano "pointedly replied that [Edmonds] would not be terminated, and would be returned to work at the end of his suspension." (Vol. III, 2013 D&O 19; Vol. I, Tr.106.) Indeed, as the Board noted, Zambrano's statement comported with the July 21 ECF form that he gave to Edmonds, which gave a date certain for the end of his suspension, and did not state that Edmonds was "suspended pending investigation." (Vol. III, 2013 D&O 19; Vol. II, GCX 20.) However, after Edmonds fully served out his suspension and returned to work, Zambrano immediately discharged him. The only explanation that Zambrano gave was that he was discharging Edmonds after speaking to Thomas and the Human Resources Department. (Vol. III, 2013 D&O 19, Vol. I, Tr. 107-108.) Zambrano never explained to Edmonds why the additional, and ultimate,

penalty of discharge—in the absence of additional misconduct—was warranted.

As the Board recognized, that mysterious about-face gives rise to an inference that the real reason for Edmonds' discharge was unlawful. (Vol. III, 2013 D&O 19).

See L.S.F. Transp. Inc. v. NLRB, 282 F.3d 972, 984 (7th Cir. 2001) (upholding Board's finding that employer's explanation was "less than truthful" where manager "never did explain why in the first instance he assured [a pro-union driver] that he could return to work once he regained his license and three weeks later terminated him").

The Company's primary challenge to the Board's finding (Br. 37-44) rests on the discredited testimony of Zambrano that he initially only suspended Edmonds pending discharge, and later decided that Edmonds' disciplinary record warranted his discharge. However, the Court will not overturn credibility findings by an administrative law judge that the Board has adopted unless they are unreasonable, self-contradictory, based upon inadequate reasons or no reason, or unjustified. *See, e.g., Dynasteel Corp.*, 476 F.3d at 257.

Here, the credibility determinations are well supported. The judge expressly explained that Zambrano, generally, did not impress him as a credible witness and "frequently gave succinct responses to leading questions in a manner that he believed would be most beneficial to the [Company's] position regardless of their

accuracy.” (Vol. III, D&O 16 n. 17.)¹⁰ The Court should affirm the Board’s credibility-based rejection of Zambrano’s testimony “to the extent it suggests or implies that he did not have his mind made up not to discharge Edmonds when he issued the July 21 counseling form, or that his review of Edmonds’ personnel file was the determinative factor in making his decision to discharge Edmonds.” (Vol. III, 2013 D&O 19.) Moreover, as the Board recognized, if Zambrano really had changed his mind based on reviewing Edmonds’ record, he “did not explain what motivated him to ignore or discount” the positive parts of Edmonds’ recent work history, particularly his perfect score in customer satisfaction, his recent ascension to the highest pay level, and Zambrano’s own suggestion that Edmonds apply for an open supervisory position.¹¹ (Vol. III, 2013 D&O 19 n.31.)

The Company (Br. 42-45) is left to argue only its own view of the evidence, which was rejected by the Board and is insufficient to overturn credibility findings. For example, the Company asserts (Br. 39-41) that the judge should have believed

¹⁰ Indeed, the case the Company cites (Br. 45, 47) to assert that the Board’s credibility determination should be overturned actually supports the Board’s determination. *See NLRB v. Motorola, Inc.*, 991 F.2d 278, 284 (5th Cir. 1993) (upholding credibility finding where judge gave a brief, but clear explanation of his reason for the finding).

¹¹ Although the Company asserts (Br. 45-46) that Zambrano did not ever suggest Edmonds apply, the Board credited Edmonds’ testimony that, in fact, Zambrano encouraged him to apply. (Vol. III, 2013 D&O 17 n.23.) The Company has not demonstrated any reason to overturn this finding.

Zambrano because “in this day and age” the “normal protocol” is for an employer to suspend employees pending investigation. However, the Company’s argument ignores the objective evidence that Zambrano gave Edmonds an EFC form documenting a suspension with a date certain which gave no indication that the discipline was pending further investigation. Moreover, Zambrano did not deny that he told Edmonds that Edmonds would return to work at the end of the suspension.¹² (Vol. III, 2013 D&O 16.) The Company’s claim (Br. 41) that Zambrano waited to discharge Edmonds until he could obtain Edmonds’ final check is predicated on discredited testimony. *See Vincent Indus. Plastics*, 209 F.3d at 736 (refusing to “second guess” the Board’s finding that an employer’s proffered explanations were not credible).

The Company’s remaining arguments (Br. 35-37) related to Edmonds’ disciplinary history and those of other employees, fails to meet its burden of proving it would have discharged Edmonds absent his union activity. As the Board found, most of the incidents for which Edmonds had been disciplined

¹² The Company also misses the mark (Br. 43) in its attempt to cast Edmonds as an unbelievable witness. Although there were some inconsistencies between his testimony and that of other witnesses, the Company points to nothing “unreasonable, self-contradictory, inadequate, or unjustified” about the judge’s decision to credit Edmonds. *Dynasteel Corp.*, 476 F.3d at 257; *see, e.g. Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 426 (D.C. Cir. 1996) (“The mere fact that conflicting evidence exists is insufficient to render a credibility determination ‘patently insupportable,’ since such a conflict is present in every instance in which a credibility determination is required.”).

involved technical performance-related matters in the field, and none of them involved insubordination toward management. (Vol. III, 2013 D&O 16-17, 16 n.20; Vol. II, GCX 8-15; Vol. I, Tr. 51.) In addition, although some of the discipline Edmonds received indicated that he was being placed on “final” warning, these “final” warnings were followed by additional warnings or suspensions, and there was no showing that final warnings generally were followed by discharges. (Vol. III, 2013 D&O 16, n. 20; Vol. II, GCX 8, 9, 13, 14.)

Finally, the Company’s claim (Br. 36-37) that other employees were terminated for using profanity disregards that only one of those incidents involved an employee at the Riverside facility where Zambrano was site manager. Zambrano discharged that employee, John Barrios, after Barrios not only swore at his supervisor, but also for physically snatching a gas card from his supervisor’s hand and refusing to leave the premises when ordered to do so.¹³ As the Board found, Barrios’ discharge “is unlike and readily distinguishable from the facts in the instant matter.” (Vol. III, 2013 D&O 17.) Accordingly, the Company has not demonstrated that it would have discharged Edmonds had it not been for his union activity, and the Board’s finding that the Company violated Section 8(a)(3) and (1) of the Act by discharging him should be upheld.

¹³ The Company’s assertion (Br. 37) that the Board should not have relied on discipline at the Riverside facility involving Zambrano, but also at other facilities by other managers, is unavailing given that it is Zambrano’s discretion that is at issue.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter judgment denying the Company's petition for review and enforcing the relevant portions of the Board's Order.

Respectfully submitted,

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November 2015

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

DIRECTV HOLDINGS, LLC	:
	:
Petitioner/Cross-Respondent	:
	: Case No. 15-60257
v.	:
	: Board Case No.
NATIONAL LABOR RELATIONS BOARD	: 21-CA-39546
	:
Respondent/Cross-Petitioner	:
	:
and	:
	:
INTERNATION ASSOCIATION OF	:
MACHINISTS AND AEROSPACE WORKERS,	:
DISTRICT LODGE 947, AFL-CIO	:
	:
Intervenor	:

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 9,161 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

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Board counsel certifies that the contents of the accompanying CD-ROM, which contains a copy of the Board’s brief, is identical to the hard copy of the Board’s brief filed with the Court and served on the petitioner/cross-respondent. The Board counsel further certifies that the CD-ROM has been scanned for viruses

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Dated at Washington, DC
this 25th day of November, 2015

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	:
Intervenor	:

CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2015, 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 that the foregoing document was served on all 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, D.C.
this 25th day November, 2015