

Nos. 16-9514, 16-9526

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

DISH NETWORK, LLC

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR
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**STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION**

This case is before the Court on the petition of Dish Network, LLC (“the Company”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Board Order issued against the Company on

March 3, 2016, and reported at 363 NLRB No. 141. (R. 831-45.)¹ The Board had jurisdiction 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 Order is final with respect to all parties. The Company petitioned for review of the Board’s Order on March 18, 2016, and the Board cross-applied for enforcement on May 9, 2016. 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 Company transacts business in this Circuit and the unfair labor practices occurred in Littleton, Colorado.

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board’s finding that the Company violated Section 8(a)(1) of the Act by maintaining a work rule that unlawfully prohibits employees from engaging in solicitation in work areas during non-work time and requires management’s approval prior to engaging in solicitation.

¹ “R.” refers to the certified agency record, which is divided into Volumes I (Transcript), II (Exhibits) and III (Pleadings). References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

2. Whether substantial evidence supports the Board's findings that the Company violated Section 8(a)(1) of the Act by disciplining employee David Rabb, and later discharging him, because he engaged in protected concerted activities.

STATEMENT OF THE CASE

On the heels of employee David Rabb's vocal opposition to the Company's policy of reducing pay for employees who make even minor oversights at its call center, the Company became aware of Rabb's escalating efforts to challenge the policy. Specifically, after a complaint he filed with a state agency was denied, Rabb spoke with his coworkers about joining in his effort to mount a legal challenge to the Company's pay reductions. In response, the Company issued Rabb a final warning for solicitation in the workplace. Several weeks later, the Company discharged Rabb, allegedly for his improper use of mute or "silent hold" to use the restroom, despite the fact the Company knew Rabb and other employees routinely used the silent-hold function when stepping away from their work stations.

After investigation of an unfair-labor-practice charge filed by Rabb, the Board's General Counsel issued a complaint alleging the Company had violated Section 8(a)(1) of the Act by maintaining an unlawful solicitation policy, for disciplining Rabb pursuant to that policy, and later discharging him. (R. 831 n.1,

838.) An administrative law judge held a hearing and issued a decision and recommended order, finding the solicitation rule unlawful and holding that Rabb was unlawfully disciplined and later discharged for engaging in concerted activities protected by the Act. (R. 831 n.1, 838.) On review, the Board issued a Decision and Order, adopting the findings of the judge, with one modification to the recommended order to clarify the posting requirement. (R. 831n.1, 832 n.2.)

I. THE BOARD'S FINDINGS OF FACT

A. The Company's Operations and Littleton Call Center

The Company is a nationwide satellite media provider that operates a sales call center in Littleton, Colorado. (R. 838; 184, 488, 496.) The Littleton Call Center is open every day between 6:30 a.m. and 10:00 p.m., and handles about 2,500 calls per day. (R. 838; 291.) General Manager Emily Evans oversees the Littleton Call Center. (R. 838; 289, 488, 497.) David Gass, an inside sales manager, reports to Evans, and oversees multiple supervisors, including Barry Appelhans, who in turn oversee teams of call center employees. (R. 838-39; 488, 497.)

The Company maintains a "Solicitation in the Workplace" policy in its employee handbook which prohibits employees from "distribut[ing] literature . . . of a personal nature by any means, . . . or solicit[ing] for any other reason during work time or in work areas." (R. 839; 488, 497, 594.) It also states that all

solicitation requests must be “specifically authorized in advance by a vice president or higher.” (R. 839; 594.) The policy is in effect at the Littleton Call Center and multiple other company locations nationwide. (R. 839; 753.)

B. Inside Sales Associates’ Duties and Working Conditions

At its Littleton Call Center, the Company employs more than 1,000 inside sales associates (ISAs) who sell the Company’s television, internet, and telephone products over the phone to potential customers. (R. 838; 290-91, 295.) ISAs work shifts of 8 or 10 hours. Those who work 8-hour shifts receive 30-minute paid breaks, while those who work 10-hour shifts receive 35-minute paid breaks. (R. 838; 295-96.) In addition, all ISA receive a 1-hour unpaid meal break. (R. 838; 295.) The ISA position has a high-turnover rate, and the average ISA stays for only 12 months. (R. 838; 427.)

ISAs began their shifts by logging into the Company’s computer system that records their work time and designating their status as “READY” in order to automatically begin receiving customer calls. (R. 838; 34-35, 295.) ISAs frequently switch in and out of “READY” mode, in order to indicate their availability to receive calls. (R. 838; 34-36.) When on a paid break, ISAs turn their availability to “BREAK” mode, in order to alert the Company’s computer system they are not presently receiving calls. (R. 838; 34-36, 300.) Similarly, ISAs also place themselves in “COACHING” mode when receiving supervision,

and “TRAINING” mode when they are in trainings. (R. 838; 34-36, 381.) The computer system also allows ISAs to be in “HOLD” mode, which will temporarily play music for holding customers. (R. 838; 137, 353-54, 444.) The Company generates reports for all ISAs that track their time spent in each mode. (R. 838; 137, 444, 725.)

In addition to placing calls into specific modes, ISAs openly and routinely use a function called “silent hold,” where the ISA places a customer’s call on mute, but the customer hears silence rather than music, which is played when calls are placed on “HOLD.” (R. 841; 36, 99, 156, 214, 240-41.) Specifically, ISAs place customers on silent hold when there is a natural lull in the call, such as after completing a credit check. (R. 840; 45-46, 97-98, 100, 215, 240.) While the Company maintains a rule against “excessive” use of silent hold, it does not enforce the rule. (R. 841; 46, 100-101.)

Calls follow a general script, opening with a greeting and then asking the customer questions about what products and services the customer is looking for. (R. 36-37.) Calls that result in sales typically last 15 to 90 minutes. (R. 840; 37.) At the conclusion of a call, ISAs receive credit if they activate a new account. (R. 57, 78.)

C. The Company's "Charge Back" Policy

ISAs earn a base salary and commissions. (R. 838; 41, 525-35.) They are expected to meet minimum metrics, which the Company evaluates based on their percentage of completed sales. (R. 838; 41-42, 525-35.) In addition, the Company maintains an "integrity" policy where the Company deducts money from ISA commissions as discipline for violating company protocols while speaking with customers. (R. 838; 40-42, 52, 219, 536-39, 565-66.) These violations, also known as "charge backs," are assigned to three tiers, whereby the most serious violations lead to possible termination and lesser offenses lead to warnings. (R. 838; 536-39, 565-66.) Tier 3 violations, which are the most serious, include data misuse, processing payment without consent, and profanity. (R. 838; 52, 742.) Lesser offenses, which are categorized as Tier 1 and 2 violations, include not offering internet services to a customer or delaying installation. (R. 838; 536-39.)

Charge back penalties can be significant. All Tier 3 violations result in a loss of all sales commissions for the week the violation occurred. (R. 838; 536-39, 565-66.) After a warning, Tier 1 and 2 violations result in a loss of between 1 and 30 completed sales. (R. 838; 536-39, 565-68.) As a result, charge back penalties can result in the ISA losing all commissions and making only their base salary for the week, which is a loss of up to \$1,600. (R. 526-29.)

In order to monitor ISAs and assess charge back penalties, the Company's supervisors listen to calls. (R. 838; 150.) In addition, the Company utilizes a Quality Assurance Team to review two calls per ISA per week and a Sales Integrity Team to investigate ISAs who have high cancellation rates with customers. (R. 838; 38, 41, 45.) When a violation is discovered, the ISA's supervisor receives an email alert that someone on their team has violated a rule. (R. 52-54.) ISAs are given the opportunity to listen to the alleged violation and discuss the violation with their supervisor, but no written documentation results from these violations. (R. 54, 57-58, 78, 220.)

D. Rabb's Complaints to the Company about the Fairness of the Charge Back Policy; Rabb Files a Complaint about the Policy with a State Agency

David Rabb worked at the Littleton Call Center as an ISA from 2012 until his discharge on March 7, 2014. During that time, his wages were sporadically reduced for tier violations under the charge back policy. (R. 839; 57-58.) For example, he was penalized once for telling a customer that their bill would be \$79.99, instead of the correct rate of \$81.99. (R. 548.) Another time, his wages were reduced because he mentioned a referral program to a customer without prompting. (R. 550.) Those and other pay reductions prompted him to make multiple workplace grievances about the fairness of the Company's charge back policy. (R. 839; 39, 52.)

Rabb often spoke with his coworkers about the Company's charge back policy, many of whom shared his concerns. (R. 839; 59, 61.) Finally, on August 21, 2013, Rabb wrote to Senior Vice President Joe Clayton to voice his concerns about the charge back policy and other working conditions. (R. 839; 59-60, 559.) In particular, Rabb noted that ISAs were "often penalized for issues we do not know [about] until some of our wages are taken." (R. 559.)

In about December 2013, unsatisfied with the Company's response to his concerns, Rabb filed a complaint with the Colorado Department of Labor (DOL). (R. 839; 61-62, 160.) He discussed his complaint with his coworkers, his supervisor, Barry Appelhans, and Sales Manager Gass. (R. 839; 59, 62-63, 222.) On January 6, 2014, the DOL denied his complaint because it fell outside of its jurisdiction. (R. 839; 62-64, 563.)

E. Rabb Seeks Legal Representation; the Company Disciplines Him for Discussing a Potential Lawsuit with His Coworkers

In early 2014, several weeks after the DOL had denied his complaint, Rabb and a coworker met with a private attorney regarding the Company's pay practices and discussed a potential lawsuit. (R. 839; 64, 111.) After this meeting, Rabb solicited approximately 15 coworkers to join the wage and hour lawsuit. (R. 839; 65-68.)

On February 18, Rabb's supervisor issued him a "final warning" for soliciting employees "during work time and in work areas." (R. 839; 69-70, 75.)

According to the warning, such behavior was a “clear violation” of the Company’s solicitation policy. (R. 839; 75, 594.) Rabb admitted to soliciting, but maintained he did so only during non-work time. (R. 839; 65-68.) General Manager Evans wanted to discharge Rabb for this offense but her supervisor and the Company’s human resources representatives decided instead to issue Rabb the warning. (R. 839-40; 371-72.)

F. The Company Discharges Rabb After He Places a Customer on “Silent Hold”

Next week, on February 28, Rabb returned from lunch, logged into his computer, placed himself in COACHING mode, and left his desk for three minutes to use the restroom. (R. 839; 99-100, 596, 723.) When he returned to his desk, Supervisor Appelhans told Rabb that he should have gone to the restroom on his lunch break. (R. 839; 119.)

On March 4, Rabb placed a customer on silent hold while the Company’s software system generated an account number. (R. 839; 99.) During this time, he completed paperwork for the call, and also used the restroom. (R. 839; 99, 155.) General Manager Evans, Sales Manager Gass, and Supervisor Appelhans—who were all nearby in a glass-walled conference room about 15 feet from Rabb’s work station—saw Rabb leave his desk. (R. 840; 100-01.) When Rabb returned from the restroom, Gass was waiting for him, was angry, and wanted to know why Rabb left his desk. (R. 840; 101, 172.) Rabb explained he had gone to the restroom, and

said that he frequently placed customers on hold for short periods of time. (R. 839; 99-100.) He then completed the sale. (R. 840; 99-101, 172.)

On March 7, the Company discharged Rabb based on the February 28 and March 4 incidents. (R. 839; 117-18, 596-97.) When Rabb received the termination notification, he informed the Company again that placing customers on silent hold was a routine practice that was known to all supervisors and ISAs. (R. 839; 118, 120, 597.)

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board (Chairman Pearce and Member Hirozawa; Member Miscimarra concurring) found, in agreement with the administrative law judge, that the Company violated Section 8(a)(1) of the Act, 29 U.S. C. § 158(a)(1), by maintaining an unlawful solicitation policy in its employee handbook that prohibited employees from soliciting in work areas during their non-work time and required prior approval. (R. 831 n.1.) The Board likewise agreed with the judge that the Company violated Section 8(a)(1) by disciplining and later discharging employee Rabb for engaging in concerted activities protected by Section 7 of the Act, 29 U.S. C. § 157. (R. 831 n.1.)

To remedy the unfair labor practices, the Board's Order requires the Company to cease and desist from engaging in the violations found and from, in any like or related manner, interfering with, restraining, or coercing employees in

the exercise of the rights guaranteed to them by Section 7. (R. 832.)

Affirmatively, the Order requires the Company to reinstate Rabb to his former job, and to make him whole for any lost earnings and benefits. The Order further requires the Company to rescind its unlawful solicitation policy from its employee handbook and furnish employees with an updated or new policy. (R. 832.)

Relatedly, the Order requires the Company to post a remedial notice at its Littleton Call Center, and all other facilities where the unlawful solicitation policy is in effect, or has been in effect since December 18, 2013, the date Rabb filed his DOL complaint. (R. 832, 836-37.)

STANDARD OF REVIEW

The Board bears “primary responsibility for developing and applying national labor policy.” *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990). Thus, when the Board engages in the “difficult and delicate responsibility of reconciling conflicting interests of labor and management, the balance struck by the Board is subject to limited judicial review.” *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 267 (1975) (internal quotation marks omitted). Courts must “respect the judgment of the agency empowered to apply the law ‘to varying fact patterns,’ . . . even if the issue ‘with nearly equal reason [might] be resolved one way rather than another.’” *Holly Farms Corp. v. NLRB*, 517 U.S.

392, 399 (1996) (quoting *Bayside Enters., Inc. v. NLRB*, 429 U.S. 298, 302, 304 (1977)) (internal citation omitted).

The Board's findings are conclusive if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *NLRB v. Interstate Builders, Inc.*, 351 F.3d 1020, 1027 (10th Cir. 2003). "Substantial evidence" consists of "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Interstate Builders, Inc.*, 351 F.3d at 1027-28; *Universal Camera Corp.*, 340 U.S. at 477. In determining whether substantial evidence exists, a court may not displace the Board's choice between fairly conflicting views of the evidence, even if "an appellate panel may have decided the matter differently." *Interstate Builders*, 351 F.3d at 1028 (internal citation omitted); accord *Ready Mixed Concrete Co. v. NLRB*, 81 F.3d 1546, 1551 (10th Cir. 1996).

Finally, the Court's review of Board credibility determinations is even more limited because they are "particularly within the province" of the Board and the administrative law judge and are "generally entitled to affirmance on review." *NLRB v. Wilhow Corp.*, 666 F.2d 1294, 1299-1300 (10th Cir. 1981). Accord *Webco Indus. v. NLRB*, 217 F.3d 1306, 1311 (10th Cir. 2000). Thus, the credibility determinations made by the judge, which were adopted by the

Board, “will be upheld absent a showing of extraordinary circumstances.” *Meditate of New Mexico, Inc. v. NLRB*, 72 F.3d 780, 792 (10th Cir. 1995).

SUMMARY OF ARGUMENT

1. The Board reasonably found that the Company’s solicitation policy was unlawful on its face because its express terms are contrary to settled law on two bases: it contains a blanket ban on employees soliciting in work areas during non-work time, and requires management’s prior approval before employees are permitted to solicit. The Company’s maintenance of that unlawful work rule in its employee handbook therefore violated Section 8(a)(1) of the Act.

2. The Board reasonably found that the Company violated Section 8(a)(1) of the Act by disciplining Rabb because of his protected concerted activities. After Rabb had repeatedly complained to the Company about the unfairness of its charge back policy, openly discussed his concerns with coworkers, and had his state complaint regarding the policy denied, Rabb consulted with an attorney about bringing a wage and hour lawsuit. Thereafter, Rabb spoke with approximately 15 coworkers asking them to join in pursuing the lawsuit. When the Company learned of Rabb’s efforts to enlist his coworkers in filing suit, it promptly disciplined him for that solicitation by issuing him a final warning for violating the Company’s unlawful solicitation policy. On those facts, the Board

reasonably found that the Company unlawfully disciplined Rabb for engaging in protected concerted activities.

The Company does not contest the Board's finding that Rabb engaged in protected concerted activity. Rather, it contends it disciplined Rabb not for solicitation, but for distributing post-it notes. As the Board found, however, no credited record evidence supports that claim, and the Company's own written discipline form issued to Rabb states he was disciplined for violating the solicitation rule.

3. Similarly, the Board reasonably found that the Company unlawfully discharged Rabb for engaging in protected concerted activities. The Board, applying its well-established *Wright-Line* analysis for determining unlawful motivation, relied on the Company's uncontested and ample knowledge of Rabb's protected concerted activities and its animus towards Rabb's protected concerted activities, which was demonstrated by the Company's prior unlawful discipline of Rabb, General Manager Evan's effort to discharge Rabb because of those activities, and the close timing between Rabb's escalated protected activity, when he filed his complaint with the DOL and solicited about 15 of his coworkers to join him in pursuing a lawsuit against the Company's charge back policy, and his discharge.

Moreover, the Board properly concluded that the Company failed to show that it would have discharged Rabb absent his protected concerted activities for purportedly placing customers on silent hold to go use the restroom. Rather, the Board found the record evidence established that ISAs had a longstanding practice of using silent hold, which was known to and implicitly adopted by the Company's managers. Similarly, the Board emphasized that the Company failed to provide evidence of analogous discipline for placing callers on silent hold. To the contrary, employees continued to utilize silent hold, without instruction to do otherwise, even after Rabb's discharge. Further, the Board reasonably rejected the Company's defense because other sales employees routinely exceeded their break time without consequence, which contradicted the Company's contention it fired Rabb for avoiding calls. Finally, the Company's claim that the Board misapplied the *Wright Line* standard in finding Rabb's discharge unlawful misrepresents the Board's analysis and is otherwise meritless.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY MAINTAINING A PATENTLY UNLAWFUL WORK RULE

The Board reasonably found (R. 831 n.1, 842) that the Company violated Section 8(a)(1) of the Act by maintaining its solicitation policy for two reasons. First, the blanket prohibition is contrary to the well-established principle that

employers, absent special circumstances not applicable here, cannot ban employees from soliciting in work areas during non-work time. Second, the policy flies in the face of settled precedent that provides it is unlawful when an employer requires prior approval for employees engaging in activities protected by the Act. Thus, the rule is overly broad and otherwise unlawful on its express terms.

Section 7 of the Act guarantees to employees not only the “right to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively,” but also the right to “engage in other concerted activities for the purpose of . . . mutual aid or protection” 29 U.S.C. § 157. In turn, Section 8(a)(1) of the Act implements those guarantees by making it an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7.” 29 U.S.C. § 158(a)(1). As the Supreme Court long ago recognized, “the broad protection of Section 7 applies with particular force to unorganized employees who, because they have no designated bargaining representative, must ‘speak for themselves as best they [can].’” *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 14 (1962). Accordingly, an employer’s conduct violates Section 8(a)(1) if it has a reasonable tendency to invade employees protected rights. *Lear Siegler Inc. v. NLRB*, 890 F.2d 1573, 1580 (10th Cir. 1989).

The Supreme Court also has “long accepted the Board’s view” that the rights guaranteed in Section 7 “necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite.” *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491 (1978) (citing *Cent. Hardware Co. v. NLRB*, 407 U.S. 539, 542-43 (1972)). The jobsite, after all, “is the one place where [employees] clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees.” *Eastex, Inc. v. NLRB*, 437 U.S. 556, 574 (1978) (internal quotation marks and citation omitted). *See also Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801 n.6 (1945) (the workplace is “uniquely appropriate” for exchange of views regarding organization).

With these principles in mind, the Board has long held that an employer’s work rule that prohibits all solicitation during non-work time or in non-work areas is presumptively invalid. *See Eastex*, 437 U.S. at 571-72 & n.21 (citing *Republic Aviation*, 324 U.S. at 793). *Accord Rest. Corp. of Am. v. NLRB*, 817 F.2d 799, 806 (D.C. Cir. 1987). Such a rule runs afoul of the Act because “time outside of working hours, whether before work or after work, or during luncheon or rest periods, is an employee’s time to use as he [or she] wishes without unreasonable restraint, although the employee is on company property.” *Republic Aviation*, 324 U.S. at 797-98, 803 n.10. The presumption of invalidity of such a rule is overcome

only on a showing that the rule is necessary to maintain discipline or production. *Id.*; *Our Way, Inc.*, 268 NLRB 394, 394-395 (1983).

As shown above (pp. 4-5), the Company's solicitation policy prohibits employees from "distribut[ing] literature . . . of a personal nature by any means, . . . or solicit[ing] for any other reason during work time or in work areas except as specifically authorized in advance by a vice president or higher." Fully in line with the above stated principles, as the Board observed, the policy is a "blanket prohibition of all work area solicitations, including those work area solicitations that occur during non-work time," and is accordingly unlawful. (R. 842.) *See, e.g., Food Servs. of Am., Inc.*, 360 NLRB No. 123, 2014 WL 2448456, at *7 (May 30, 2014) (applying the principle that employers may ban solicitation in working areas during working time but may not extend such bans to working areas during nonworking time); *UPS Supply Chain Solutions*, 357 NLRB 1295, 1296 (2011) (same).

The Company's solicitation policy is also unlawful because it requires the Company to pre-approve all solicitation. The Board has long held that rules requiring prior employer approval for solicitation and distribution activities are presumptively unlawful because they "establish a precondition to engaging in protected concerted activity." *Brunswick Corp.*, 282 NLRB 794, 795 (1987). *Accord Opryland Hotel*, 323 NLRB 723, 728 (1997); *Norris/O'Bannon*,

307 NLRB 1236, 1245 (1992); *Baldor Electric Co.*, 245 NLRB 614 (1979). In other words, rules that require prior employer authorization have the practical effect of “tend[ing] to cause employees to refrain from engaging in protected activities in areas where, and at times when, they have a right to do so under the Act,” out of “fear [of] management interference or retaliation.” *AMC Air Conditioning Co.*, 232 NLRB 283, 284 & n.6 (1977). This principle is fully applicable here. As such, the Board reasonably found the Company’s solicitation policy unlawful on this additional basis.

Contrary to the Company’s claim (Br. 19-22), the Board was not required to apply the special industry rules it has developed for retail establishments that permit more restrictive solicitation bans at retail stores in areas where employees and customers mingle to engage in selling transactions. As the Board held, as a factual matter, the Littleton Call Center “is not a retail establishment, nor is there a selling floor where customers are physically present.” (R. 831 n.1.) Thus, the Board was not required to apply the different line of precedent in the cases cited by the Company.

In certain industries, in order to strike an appropriate balance between an employer’s interest in maintaining discipline and production in operating its business and employees’ right to solicit and communicate with other employees regarding terms and conditions of employment, the Board—taking into account the

nature of the employer's business—has articulated special standards for assessing the legality of no-solicitation rules. With regards to retail stores and casinos, the Board allows an employer to institute a general ban on all employee solicitation on the selling floor, and its adjacent aisles and corridors, because active solicitation in a sales area may disrupt a retail store's business. *See, e.g., Marshall Field & Co.*, 98 NLRB 88, 92 (1952) (employer may prohibit solicitation in the selling area of a retail store, but may not prohibit all solicitation in non-selling areas). Here, as noted, the Board reasonably found that the call center is not a retail establishment. Moreover, the concerns present in industries, such as retail stores, casinos, or restaurants, where employee contact with customers is extensive and customers are physically present to engage in business transactions, are not implicated here. *See also JC Penny Co.*, 266 NLRB 1223, 1224 (1983) (retail establishments may prohibit solicitation in the selling areas of a retail store even when employees are on their own time); *Double Eagle Hotel & Casino v. NLRB*, 414 F.3d 1249, 1254 (10th Cir. 2005) (casinos may limit employees' discussions on the gaming floor).

As a result, the Company errs in relying on wholly inapposite cases (Br. 19-20) where the Board and courts, on very different facts and in different industries, have upheld specific solicitation prohibitions. Thus, in *St. John's Hosp. & School of Nursing v. NLRB*, 557 F.2d 1368 (10th Cir. 1977), a hospital's solicitation ban in patient areas was permitted. Under the circumstances in that case, the Court

concluded that additional restrictions on employee solicitation were valid “in order to maintain the tranquil atmosphere essential to the Hospital’s primary function of providing quality patient care.” *Id.* at 1371. *See Hughes Props. v. NLRB*, 758 F.2d 1320 (9th Cir. 1985) (the “guiding principle” the Board applies is whether the solicitation “comports with the normal use of the facility and is not disruptive”).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(1) BY DISCIPLINING EMPLOYEE RABB, AND LATER DISCHARGING HIM, BECAUSE OF HIS PROTECTED CONCERTED ACTIVITIES

A. The Company Violated the Act by Disciplining Rabb Because of His Protected Concerted Activities

As established above (pp. 16-17), the right to engage in Section 7 concerted activities is protected by Section 8(a)(1) of the Act, which makes it an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise” of their Section 7 rights. 29 U.S.C. § 158(a)(1). Accordingly, it is well settled that an employer violates Section 8(a)(1) by disciplining, discharging, or taking other adverse action against an employee when the motive for the adverse action is the employee’s concerted activities. *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 397 (1983). Additionally, discipline issued pursuant to an unlawful rule is itself unlawful if the employee violated the rule by engaging in protected

conduct, including, as here, concerted discussions concerning terms and conditions of employment. *Continental Group, Inc.*, 357 NLRB 409, 412 (2011).²

The Company does not dispute that Rabb engaged in activity protected by Section 7 of the Act by speaking with his coworkers about the Company's charge back policy and by attempting to convince his coworkers to join a potential lawsuit concerning the policy, nor could it. An employee's conduct is statutorily protected where it is "concerted" in nature and has as its purpose the "mutual aid or protection of employees." *Citizens Inv. Servs. Corp. v. NLRB*, 430 F.3d 1195, 1197 (D.C. Cir. 2005) (quoting 29 U.S.C. § 157). In turn, an employee's action is "concerted" if it bears some relationship to initiating or preparing for group action or bringing truly group complaints to management. *See Meyers Indus., Inc.*, 281 NLRB 882, 887 (1986), *enforced sub nom., Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987). As a result, it is well-established that an employee's solicitation of coworkers to join a lawsuit concerning their employer's wage practices is protected concerted activity. *See, e.g., Host Int'l*, 290 NLRB 442, 443 (1988); *Brady v. Nat'l*

² With respect to discipline imposed under an unlawful work rule, the Board in previous decisions applied the standard set forth in *Double Eagle Hotel & Casino*, 341 NLRB 112, 112 n.3 (2004), *enforced*, 414 F.3d 1249 (10th Cir. 2005), which held that discipline imposed pursuant to an unlawfully overbroad work rule is, in itself, also unlawful. In *Continental Group*, however, the Board limited the application of *Double Eagle* and determined that discipline imposed pursuant to an unlawfully overbroad rule violates the Act when the employee has engaged in protected conduct or has engaged in conduct that otherwise implicates the concerns underlying Section 7 of the Act. *Continental Group*, 357 NLRB at 412.

Football League, 644 F.3d 661, 673 (8th Cir. 2011). *See generally Eastex*, 437 U.S. at 565-66 (the Act protects employees “when they seek to improve working conditions through resort to administrative and judicial forums”). Accordingly, and as shown above, because the Company disciplined Rabb based on his protected concerted activity, that discipline was unlawful.

The Company defends its discipline of Rabb by arguing that the Board should have found that it disciplined Rabb for “distributing post-it notes.” (Br. 23.) The Board, however, properly rejected (R. 831 n.1) this argument because the Company’s own written discipline form provides that Rabb was “soliciting his co-workers to seek the services of an attorney.” (R. 569.) Moreover, the discipline form states that “[s]oliciting employees to seek the services of an attorney during work time and in work areas is a clear violation of the expectation set regarding Solicitation in the Workplace on page 22 in the Employee Handbook.” (R. 569.) Thus, on this record, there can be no doubt that Rabb was disciplined for his solicitation, and not for distributing post-it notes.

Notably, none of the Company’s record citations (Br. 23 (citing R. 370-71, 569)) are remotely supportive of the proposition for which they are cited. Assuming the Company intended to cite General Manager’s Evans’ testimony, its claim still rings hollow. Evans testified that employees had complained that Rabb approached them, wanting to discuss his general complaints about the Company’s

charge back policy. (R. 364-65.) When Evans was further questioned about the incident, however, she admitted that she sent an e-mail that stated “Rabb was soliciting for people to call his attorney to join his case he is building against DISH about . . . the chargeback process.” (R. 615.) Moreover, the email explains that “the decision was made to place [Rabb] on a final warning *for violating the no solicitation policy in the employee handbook.*” (R. 615, emphasis added). Notably, Evans’ email makes no mention of a post-it, and her testimony, in fact, supports the Board’s finding.

In a last ditch effort to shield its unlawful behavior from liability, the Company contends (Br. 24, 26) that the Board should have applied the framework pursuant to *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964). That argument, however, is not properly before this Court because it was never presented to the Board, as required by Section 10(e) of the Act (29 U.S.C. § 160(e)) (“[n]o objection that has not been urged before the Board . . . shall be considered by the court”). *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 666 (1982) (“Court of Appeals lacks jurisdiction to review objections that were not urged before the Board . . .”). *Accord NLRB v. L&B Cooling, Inc.*, 757 F.2d 236, 240 (10th Cir. 1985). In any event, *Burnup & Sims* would nonetheless be inapplicable because it addresses the very different situation where, in the course of otherwise protected activity, an employee is discharged “on false charges,” but the employer

at the time had a good-faith belief that the employee had engaged in misconduct.

See Webco Indus., Inc. v. NLRB, 217 F.3d 1306, 1312 (10th Cir. 2000) (*Burnup & Sims* addresses situations where employees are discharged “on false charges”).

B. The Company Violated the Act by Discharging Rabb Because of His Protected Concerted Activities

The Board also reasonably found (R. 831 n.1, 842) that the Company unlawfully discharged employee Rabb for engaging in protected concerted activities. *See Washington Aluminum Co.*, 370 U.S. at 12-16, and cases cited at pp. 16-17, 22 above. The critical inquiry in such cases is whether the employer’s animus towards protected activity motivated the employer’s decision. *See MJ Metal Products, Inc. v. NLRB*, 267 F.3d 1059, 1065 (10th Cir. 2001). In *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Supreme Court approved the test for determining motivation in unlawful discrimination cases that was first articulated in *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 89 (1st Cir. 1981).

Under that test, where an employee’s protected activity is shown to be “a motivating factor” in an employer’s decision to take adverse action against the employee, the adverse action is unlawful unless the employer demonstrates, as an affirmative defense, that it would have taken the same action even in the absence of protected activity. *Transp. Mgmt. Corp.*, 462 U.S. at 397, 401-03.

Accord Ready Mixed Concrete, 81 F.3d at 1551. 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 Wright Line*, 251 NLRB at 1084.

Motive is a question of fact, and the Board may rely on direct and circumstantial evidence to find an improper motive. *Intermountain Rural Elec. Ass’n*, 732 F.2d 754, 759 (10th Cir. 1984). Evidence of unlawful motivation includes the employer’s knowledge of protected activity, *Intermountain Rural Elec. Ass’n*, 732 F.2d at 759, hostility toward protected conduct, including by the commission of other unfair labor practices, *Ready Mix Concrete*, 81 F.3d at 1552, *MJ Metal Prods*, 267 F.3d at 1065, *Intermountain Rural Elec. Ass’n*, 732 F.2d at 759, the timing of the adverse action, *MJ Metal Prods*, 267 F.3d at 1065, *Ready Mix Concrete*, 81 F.3d at 1550-51, disparate treatment of employees, *NLRB v. U.S. Postal Serv.*, 906 F.2d 482, 488 (10th Cir. 1990), and the pretextual nature of the employer’s justification, *MJ Metal Prods*, 267 F.3d at 1065, *Ready Mix Concrete*, 81 F.3d at 1551.

In assessing the employer’s affirmative defense, the Board need not accept at face value the employer’s explanation for a discharge if the evidence and the reasonable inferences drawn from it indicate that animus motivated the discharge.

Justak Bros. and Co. v. NLRB, 664 F.2d 1074, 1077 (7th Cir. 1981). As this Court has stated, the issue is not whether the employer “‘could have discharged [the employee], but whether it would have done so regardless of [his protected] activities.’” *Ready Mix Concrete*, 81 F.3d at 1553 (quoting *Presbyterian/St. Luke Med. Ctr.*, 723 F.2d 1468, 1479 (10th Cir. 1983)). See also *Roure Bertrand Dupont, Inc.*, 271 NLRB 443, 443-44 (1984) (“[A]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.”).

1. Rabb’s protected concerted activities were a motivating factor in his discharge, and the Company’s reasons for discharging him were pretextual

The Board reasonably found Rabb’s discharge—purportedly for placing a customer on silent hold—was in fact motivated by the Company’s animus against Rabb for engaging in protected concerted activities.³ As the Board found (R. 831

³ As previously shown (pp. 22-23), the Company does not, nor could it, dispute the Board’s finding that Rabb was engaged in protected concerted activity of which it was aware. Rabb’s protected, concerted activity included discussing the Company’s charge back policy with his coworkers and his attempt to find additional coworkers to join a lawsuit contesting that policy. 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)); *Altex Ready Mixed Concrete Corp. v. NLRB*, 542 F.2d 295, 297 (5th Cir. 1976) (labor related civil actions by employees constitutes protected activity under Section 7); *Host. Int’l, Inc.*, 290 NLRB at 442-43, 445 (concerted lawsuit against employer protected

n.1, 843), the Company's unlawful motive is established by: (1) General Manager Evans' attempt to fire Rabb after learning he was soliciting his coworkers to join a lawsuit challenging the Company's charge back pay deductions; (2) the Company's unlawful discipline of Rabb for his protected concerted activities; (3) and "the close timing between Rabb's escalated protected activity (i.e., filing a DOL complaint and soliciting workers to join his lawsuit) and his firing, which all occurred within 3 months." (R. 843.) Finally, the Company's implausible reason for discharging Rabb, which demonstrates pretext, is additional evidence of unlawful motivation.

The Company displayed its hostility towards Rabb's protected concerted activities in the weeks prior to his discharge when General Manager Evans first learned Rabb was pursuing court action to challenge the Company's charge back policy. As the Board found (R. 831 n.1, 843), Evans bore animus against such activity when she sought to fire him for breaching the solicitation policy. (R. 839, 843; 372, 615.) Similarly, Evans sought to discharge Rabb for asking a supervisor for the telephone numbers of current and former employees because Evans viewed the requests as a problem "[b]ecause the intent was to continue to solicit in the workplace." (R. 371-72, 615.) *See Ready Mixed Concrete*, 81 F.3d at 1552

activity). Moreover, as the Board found (R. 843), the Company "was admittedly aware of" Rabb's protected activities.

(supervisor's statements expressing hostility toward discharged employee's protected activity "alone sufficiently indicate" animus).

In addition, the Board found (R. 831 n.1) strong evidence of the Company's unlawful motivation in its unlawful discipline of Rabb for engaging in protected concerted activities. *Presbyterian/St. Luke's Med. Ctr.*, 723 F.2d at 1479 (other unfair labor practices *alone* demonstrated unlawful motivation). Moreover, as demonstrated above (pp. 22-25), the Company disciplined Rabb pursuant to its unlawful ban on employee solicitation. *See Interstate Builders*, 351 F.3d at 1034 (contemporaneous unfair labor practices support unlawful motivation finding); *MJ Metals*, 267 F.3d at 1065 ("the employer's commission of other unfair labor practices" supports unlawful motivation finding); *Austal USA, LLC*, 356 NLRB 363, 363-64 (2010) (employer's unlawful motivation shown by other 8(a)(1) violations found in the case, such as unlawful restrictions on solicitation).

Furthermore, the Company's increasingly obvious hostility towards Rabb's protected concerted activities corresponded in time with the intensifying nature of his complaints. (R. 831 n.1, 843.) While Rabb initially complained about the Company's charge back policy internally, when Rabb took his complaints public by filing a DOL complaint and soliciting coworkers to join a potential lawsuit, the Company's animus increased. *See MJ Metal Prods.*, 267 F.3d at 1066 (unlawful motivation may be proven by the timing of the employer's

action); *McLane/Western v. NLRB*, 723 F.2d 1454, 1460 n.5 (10th Cir. 1983) (timing of discharge supports unfair labor practice charge); *Traction Wholesale Ctr. Co. v. NLRB*, 216 F.3d 92, 99-100 (D.C. Cir. 2000) (same).

The Board also reasonably relied (R. 831 n.1, 843) on the ample evidence that the Company's proffered reasons for discharging Rabb were pretextual, which further demonstrates the Company was unlawfully motivated when it discharged him. *See Intermountain Rural Elec. Ass'n.*, 732 F.2d at 759-60 (pretextual explanation for discipline and discharge supported the Board's finding of unlawful motivation). When the Company discharged Rabb, his termination notification stated he was discharged because he placed customers on silent hold while using the restroom. (R. 839.) However, as the Board found (R. 831 n.1, 843), the evidence established that other employees routinely placed customers on silent hold for short periods of time without consequence. Ann Tallman, for example, credibly testified that she used silent hold "exclusively" to place customers on hold. (R. 840; 214-15.) *See Ready Mixed Concrete*, 81 F.3d at 1550 (employer explanation is pretextual where other employees receive no discipline for similar infractions). Moreover, the Company was aware of the practice and Rabb had never before been disciplined for using silent hold. (R. 840; 101, 186-90, 214-15, 236, 241, 243.) In fact, supervisors had specifically instructed ISAs to use silent

hold for customers because the formal HOLD mode would reflect poorly on their evaluations. (R. 840; 186-90, 217, 241.)

As the Board concluded, the Company's "seizure upon this long-term practice as disciplinary fodder, only after he engaged in protected activity, deeply undercuts any claim of evenhanded intent." (R. 843.) Finally, the Company's claim that the use of silent hold was unacceptable is further undermined by its failure to address the fact that ISAs continued to use silent hold, without any instructions to the contrary, even after the Company fired Rabb. (R. 843 n.33; 242, 255.) *See Interstate Builders*, 351 F.3d at 1034 ("flimsy or unsupported explanation may affirmatively suggest that the employer has seized upon a pretext to mask an [unlawful] motivation") (quoting *NLRB v. Dillon Stores*, 643 F.2d 687, 693 (10th Cir. 1981).)

Additionally, the Board reasonably rejected (R. 841, 843) the Company's claims that employees had previously been discharged for their use of silent hold. As the Board noted (R. 843 n.34), although there were two former employees who had been discharged for misconduct that included their use of silent hold, their discharges were not based solely on that reason. For example, one employee was discharged after the Company observed him placing multiple customers on silent hold, amounting to more than 65 minutes in 8 calls. (R. 841; 365, 368.) Moreover, the Company discharged that employee because he willfully provided

customers with wrong information on four occasions and because he created a false account. *Id.* Similarly, the Company discharged the second employee for “logging in and logging out” of his phone system and for “miss[ing] 108 minutes of his scheduled time [during one day] and 103 minutes [during another day.]” (R. 662.) Moreover, that individual engaged in insubordination when he “repeatedly and hostilely [told] a supervisor while pointing a finger that he didn’t have to listen to him.” (R. 841; 662.) Finally, when asked to leave, the employee refused. (R. 662.) As a result, the Board properly concluded that Rabb’s discharge was not factually similar to the Company’s discharge of these two employees.⁴

The Company distorts the record (Br. 31-32) with its claim that “many employees engaged in call avoidance for durations similar” to Rabb’s use of silent hold. As an initial matter, none of the three individuals the Company relies on used silent hold. Further, all three stayed on calls after the customer had hung up. (R. 841; 638-701.) Finally, far from being “similar” to the duration of time Rabb was away from his desk, all three employees had no customer on the phone for double the amount of time Rabb was away from his desk. (R. 841; 647-51, 674-

⁴ To the extent the Company suggests (Br. 32) it discharged Rabb for “insubordination” because he “state[d] rudely that he ‘went to take a piss,’” that argument is not properly before the Court because the Company failed to argue before the Board that it discharged Rabb for insubordination. *See* 29 U.S.C. § 160(e), and cases cited at p. 25 above.

79, 693-96.)⁵ Finally, the Board reasonably rejected the remaining comparators offered by the Company because those employees were not discharged for similar reasons. (R. 841; 95-96, 128-29, 218, 251, 304-05.) As such, the Company's reliance on employees who "engaged in call avoidance, and lied to customers or were rude to management" (Br. 31), is unavailing.

Similarly, the Board reasonably dispensed (R. 843) with the Company's claim that it was concerned about Rabb avoiding customer calls in general. The Board found that argument contrary to the record evidence that established that many ISAs routinely exceeded their allotted break time without consequence. For example, at the time Appelkans supervised Rabb, 21 of 48 ISAs on Appelkans's team exceeded their BREAK mode time without any discipline.⁶ (R. 842, 842-43 n.26; 95-96, 128-29, 218, 251, 302-05, 349, 382-84.) Indeed, the evidence demonstrates that the Company knew about the overuse of BREAK time and the use of silent hold, yet failed to address either as an actual problem. As the Board found, if the Company was truly concerned with ISAs avoiding customer calls, it would also respond to the multitude of ISAs who exceed their BREAK time allotment. (R. 843.)

See Presbyterian/St.Luke's Med. Cir. v. NLRB, 723 F.2d at 1478 (employee's

⁵ The Company and the administrative law judge mistakenly list (R. 841; Br. 31-32) K. Baasch as a discharged employee. The employee's correct name is M. Marcum. (R. 647-51.)

⁶ The Company views the use of BREAK and silent hold as similar. (R. 378.)

discharge for minor reason – speaking to employees in other areas of workplace for a few minutes while on break – supported finding of animus); *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).

The Board's amply supported finding of pretext also demonstrates that the Company failed to prove its affirmative defense that it would have discharged Rabb absent his protected activities. While the Company claims (Br. 30) that it decided to discharge Rabb based on his "repeated misconduct," the Board properly rejected this claim. As discussed above, the Company had a longstanding practice of placing customers on silent hold, lacked any analogous discipline examples, was unbothered by other ISAs exceeding their break time usage, misrepresented its intentions about trying to help Rabb when in fact, Evans and Gass took steps to catch Rabb in order to excuse his discharge, and responded drastically to an employee simply using silent hold to go to the restroom. *See U.S. Postal Serv.*, 906 F.2d at 488 (disparate handling of complaints about employees supports pretext finding).

In addition, the Company's proffered reasons for Rabb's discharge were rejected by the Board (R. 831 n.1, 841, 843) because they relied almost entirely on the discredited testimony of Evans and Gass. In particular, the Company was

unable to substantiate its claim that the reason Gass was waiting for Rabb to return to his desk was in order to assist him. To the contrary, the evidence indicated the Company had grown tired of Rabb's vocal criticism concerning the Company's charge back policy, placed Rabb under close scrutiny, and "seized upon his longstanding restroom practices, as a mechanism to jettison a perceived malcontent." (R. 841.) *See generally MJ Metals Prods.*, 267 F.3d at 1066 ("judge acted within his discretion in believing . . . two employees rather than [the employer's] witnesses); *NLRB v. Blue Hills Cemetery*, 567 F.2d 529, 530 (1st Cir. 1997) (while there may be evidence pointing both ways, it is not the court's "function to retry this case on a cold record"). Further, the judge discredited Evans and Gass because it was implausible that management would spontaneously exit a meeting to assist an employee who was obviously not seeking assistance. (R. 841, 843.) Finally, the Board reasonably rejected any purported good faith by Evans based on the fact that she failed to even ask Rabb's supervisor whether his silent hold usage was routine and accepted, as he claimed both before and after his discharge. (R. 842; 358.) *See Intermountain Rural Elec. Ass'n*, 732 F.2d at 760 (employer's failure to investigate employee's explanation supported pretext finding); *Presbyterian/St. Luke's Med. Ctr.*, 723 F.2d at 1481 (same); *Serv. Tech. Corp.*, 196 NLRB 1036, 1043 (1972), *enforced mem.*, 480 F.2d 923 (5th Cir. 1973) (same).

In sum, substantial evidence supports the Board’s findings that Rabb’s protected concerted activities were “a motivating factor” in the Company’s decision to discharge him, and that the Company failed to prove its affirmative defense because its purported reasons for the discharge were either pretextual or contrary to the credited evidence. As a result, his discharge was unlawful.

2. The Company’s challenges to the Board’s application of *Wright Line* lack merit

To challenge the Board’s thorough and well-reasoned finding that Rabb was unlawfully discharged, the Company spills a great deal of ink (Br. 24-36) presenting a variety of circular arguments about how the Board “botched” its application of *Wright Line*. Its claims appear to boil down to three, all of which are mistaken: (1) that the General Counsel failed to show unlawful motivation; (2) that the Board improperly relied on “generalized” animus; and (3) that the Board was required to accept the Company’s “business judgment” for firing Rabb. Nothing the Company puts forth warrants setting aside the Board’s finding.

To begin, the Company mischaracterizes (Br. 26) the Board’s analysis. According to the Company, the Board used its “own ‘undefined’ standard” to find unlawful motivation. To the contrary, as shown in detail (pp. 28-36), the Board adhered to the well-settled *Wright Line* standard in finding an unlawful motive. Inasmuch as the Company may be complaining about the Board’s application of certain factors in its finding, as this Court has explained, the Board “need not

follow a rote formula,” and that this Court and other “circuits have approved many combinations of factors in concluding the General Counsel carried its burden.” *Ready Mixed Concrete*, 81 F.3d at 1551. Accordingly, the Company’s claim (Br. 26) that the Board’s analysis is in any way lacking is baseless.

Contrary to the Company’s claim (Br. 27), the Board relied on “the close timing between Rabb’s escalated protected activity (i.e., filing a DOL complaint and soliciting workers to join is lawsuit) and his firing, which all occurred within 3 months.” (R. 843.) *See Phelps Dodge Min. Co., Tyrone Branch v. NLRB*, 22 F.3d 1493, 1502 (10th Cir. 1994) (timing alone may suggest that animus motivated employer’s conduct) (citing *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984)). *Accord NLRB v. Am. Geri-Care, Inc.*, 697 F.2d 56, 60 (2d Cir. 1982) (“An inference of . . . animus is proper when the timing of the employer’s actions is ‘stunningly obvious.’”) (citation omitted).

The Company additionally criticizes (Br. 29) the Board’s application of *Wright Line* in this case because, in the Company’s view, the Board “double counted” pretext in its analysis. That claim disregards the settled law, shown at pp. 27, 30-32, that evidence of pretext may support a finding of unlawful motivation, as well as support a finding that an employer failed to prove its affirmative defense. Further, in this case, there is ample evidence of pretext, and in assessing the Company’s defense the Board properly found that its proffered reasons of

Rabb's discharge either did not exist or were not in fact relied upon. Accordingly, here, the Board found that the evidence presented by the Company "did not overcome the inference of discriminatory intent." (R. 831 n.1.)

Moreover, the Board explained that *Wright Line* does not require some additional showing of "particularized animus towards the employee's own protected activity," or "some additional, undefined 'nexus' between the employee's protected activity and the adverse action." (R. 831 n.1.) *See Libertyville Toyota*, 360 NLRB No. 141, 2014 WL 3367701, at *4 n.10 (July 9, 2014), *enforced sub nom., AutoNation, Inc. v. NLRB*, 801 F.3d 767 (7th Cir. 2015). As the Seventh Circuit explained in rejecting a nearly identical argument, there is "no need to prove additional animus beyond whatever animus lay behind the contested action." *AutoNation*, 801 F.3d at 775. Thus, by way of example, the court explained that if an employer "took the position that it would fire all union organizers, and then it fired Union Organizer A, there would be no need to show that it had an extra grudge against A related to union activity." *Id.* In that example, the court explained, "there is a clear nexus between the employer's anti-union animus and the particular action it took." *Id.* The Court should reject the Company's invitation to impose such additional requirements.

Finally, the Company's contentions that the Board somehow improperly relied on "generalized animus" in finding unlawful motivation, and that the Board

was required to accept the Company's purported business judgments—are similarly without merit. As previously shown at pp. 28-32, the Company's animus towards Rabb was blaringly obvious and in fact, the Board, on this record, relied exclusively on animus that was specifically directed towards Rabb's protected activities. Equally flawed, the Company's "business judgment" argument must be rejected because, at base, it is little more than an assertion that the Board was required to accept its explanation for discharging Rabb without question. Accordingly, the Company has presented the Court with no basis to disturb the Board's well-reasoned and amply supported findings, and the Board is entitled to enforcement of its Order.

CONCLUSION

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

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NATIONAL LABOR RELATIONS BOARD

July 2016

STATEMENT REGARDING ORAL ARGUMENT

Although this case involves the application of settled principles to well-supported factual findings, the Court may find oral argument to be helpful in clarifying the issues in dispute.

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

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	*
Petitioner/Cross-Respondent	*
	* Nos. 16-9514,
v.	* 16-9526
	*
NATIONAL LABOR RELATIONS BOARD	* Board Case No.
	* 27-CA-131084
Respondent/Cross-Petitioner	*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 8,898 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

Dated at Washington, DC
this 25th day of July, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Tenth 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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Dated at Washington, DC
this 25th day of July, 2016