

Nos. 16-2066 & 16-2270

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

S. FREEDMAN & SONS, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

DRIVERS, CHAUFFEURS AND HELPERS LOCAL UNION NO. 639

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**

JILL A. GRIFFIN
Supervisory Attorney

DAVID A. SEID
Attorney

National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2949
(202) 273-2941

RICHARD F. GRIFFIN, JR.

General Counsel

JENNIFER ABRUZZO

Deputy General Counsel

JOHN H. FERGUSON

Associate General Counsel

LINDA DREEBEN

Deputy Associate General Counsel

National Labor Relations Board

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION
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THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

This case is before the Court on the petition of S. Freedman & Sons, Inc.
("the Company") to review and set aside, and the cross-application of the National

Labor Relations Board (“the Board”) to enforce, a Board Order issued against the Company. The Board found that the Company unlawfully discharged, suspended, and again discharged employee Richard Saxton. The Board had subject matter 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 issued on August 25, 2016, and is reported at 364 NLRB No. 82. (A. 857-77.)¹

The Court has jurisdiction over this case under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). The Board’s Order is final with respect to all parties. The Company filed its petition for review on September 19, 2016, and the Board filed its cross-application for enforcement on November 3, 2016. Those filings were timely because the Act imposes no time limits on proceedings for the review or enforcement of Board orders. The Drivers, Chauffeurs and Helpers Local Union No. 639 (“the Union”) has intervened on the Board’s behalf.

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the Board’s findings that the Company violated Section 8(a)(4) and (1) of the Act on two separate occasions by

¹ “A.” references are to the Joint Appendix. “SA.” references are to the Supplemental Appendix. References preceding a semicolon are to the Board’s

discharging employee Saxton on July 3, 2014, and by suspending him on July 23, 2014, for filing unfair labor charges against the Company with the Board or participating in unfair labor practice proceedings before the Board.

2. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by discharging employee Saxton on September 29, 2014, because he engaged in protected concerted activity by invoking his right under the collective-bargaining agreement to refuse overtime work.

STATEMENT OF THE CASE

Acting on charges filed by the Union, the Board's General Counsel issued a complaint alleging that the Company, as relevant here, discharged, suspended, and again later discharged employee Saxton. Following a hearing, an administrative law judge found that the Company had committed the alleged unfair labor practices. (A. 865-77.) On review, the Board affirmed the judge's rulings, findings, and conclusions, in part, reversed them in part, and adopted the recommended order as modified. (A. 857-64.) The facts supporting the Board's Order are summarized directly below, followed by a description of the Board's Conclusions and Order.

findings; those following are to the supporting evidence.

I. THE BOARD'S FINDINGS OF FACT

A. **Background; After a Truck Accident in November 2013, the Company Continues To Employ Saxton on the Condition That He Sign a Confidentiality Agreement; in April 2014, the Board Issues a Complaint and Schedules a Hearing for July 8 Regarding Company Actions Toward Saxton**

The Company delivers paper and restaurant products to hospitality providers from its facility in Landover, Maryland. The Company has approximately 135 employees, including about 28 truck drivers and 30 warehousemen. (A. 857, 865; 20-22, 25, 27-29, 60.) The Union has represented the Company's truck drivers and warehouseman for 50 years. The current collective-bargaining agreement is effective from January 1, 2013, to February 28, 2017. (A. 857, 866; 33-35, 848, 854, 879-904.)

Richard Saxton is the most senior truck driver and has worked for the Company for 26 years. Saxton, the senior union steward, has served as a steward for nearly 17 years. In the capacity as senior union steward, he has filed grievances and participated in grievance meetings and negotiations. Two other employees also serve as union stewards. (A. 857, 865-66; 39, 50, 62-68, 949-50.)

In November 2013, Saxton had an accident in his company truck that the Company deemed to have caused over \$8,900 in damages. The collective-bargaining agreement, in effect at that time, permitted termination for accidents that caused over \$2,000 in damage. (A. 857, 866 and nn.15-16; 70-71, 489, 534,

918.) During an unrelated grievance meeting on November 18, Vice President James Thompson notified Saxton, in his capacity as union steward, and Union Business Agent Wayne Settles, that he was inclined to discharge Saxton over the accident, but that he would forgo such action if the Union agreed to withdraw the grievances underlying several arbitrations involving other employees. Saxton and Settles rejected the offer. Thompson then terminated Saxton. (A. 866 and n.17; 21, 25, 31, 73-75, 88-90, 263-71, 488-91, 538-40, 562-64, 847, 853, 941-43.)

Thereafter, the Company met with Tommy Ratliff, the Union's president and business agent, and agreed to reinstate Saxton effective November 22. (A. 857, 866-67; 101-02, 494-95.) When Saxton reported for work, he refused Thompson's demand that he sign a "last chance agreement" before returning to work; Thompson told him that he was still terminated. After further discussions, the Union agreed to consider the Company's proposal to convert the termination into a suspension for time served if Saxton agreed not to discuss the terms of the settlement agreement. On November 25, without the Union's knowledge, the Company presented a settlement agreement directly to Saxton that converted the termination into a suspension and contained a confidentiality clause. Saxton signed the agreement. (A. 857-58, 867 and nn.20-25; 92, 102-110, 260-61, 847, 853, 919-21.)

On December 20, Supervisor Ellis Brown issued Saxton a verbal warning for failing to clock-out immediately at the end of work the previous day. (A. 867 and nn.26-28; 58, 110-13, 576-77, 665, 791, 847, 853, 921.) Saxton filed a grievance over the verbal warning. (A. 867 and n.29; 116-17, 922.) The parties were unable to resolve the grievance during a January 6, 2014 grievance meeting. (A. 867-68 and n.30; 117-18, 499-501.)

On January 24, 2014, the Union filed a charge with the Board's Regional Office alleging that the Company unlawfully disciplined Saxton on December 20, 2013, because of his union activities. Thereafter, the Union amended that charge to include allegations relating to the Company's refusal to rescind Saxton's termination unless the Union withdrew unrelated grievances and arbitrations, and its requirement that Saxton sign a confidentiality agreement.

The Board's Regional Office issued a complaint based on the aforementioned charges, and scheduled a hearing for July 8. The Board subpoenaed Jeff Freedman, the Company's owner, Meg Phillips, its Human Resources Director, and Vice President Thompson to testify. (A. 859 and n.11, 868 and nn.30-36; 19-20, 30, 32, 38-40, 319-23, 362, 572-73, 847, 853, GCX 1(a), 1(c), 1(e).)

B. On July 3, 2014, the Company Discharges Saxton for Driving With an Expired Driver's License Despite Proof that He Had a Valid License

On June 4, Saxton renewed his driver's license that was scheduled to expire on June 27. (A. 868; 124-25, 927, 975.) On June 30, when Saxton went to the Board's Regional Office to prepare for the scheduled July 8 hearing, he discovered that his license was missing. The next day, July 1, Saxton left a voice mail message on the Company line at 4:30 a.m. that he was taking off "to get a license." (A. 858, 868 and n.37; 126-33, 211.) The message was conveyed to Supervisor Brown, who informed Thompson that he had spoken to Saxton prior to his medical leave about renewing his driver's license before June 27.² Thompson began to investigate whether Saxton had driven with an expired license. (A. 858-59, 868 and n.38; 627, 667, 805-08, 820.) That same day, Saxton obtained a "duplicate" license—designated as type "D"—from the Maryland Department of Motor Vehicles. (A. 868 and n.39; 133-35, 923-24, 930, 975.)

When Saxton arrived at the facility on July 2, Thompson brought him into a meeting with Human Resources Director Phillips and union steward Antwoine Drayton. The Company accused Saxton of letting his license expire and driving a company truck on an expired license. Saxton denied the accusations. Saxton

² Saxton had been on medical leave from March 31 until June 9, 2014. (A. 123-24.)

explained that after he learned his license was lost on June 30, he immediately obtained a duplicate license the next day. Thompson repeatedly accused Saxton of lying, finally stating that Saxton should admit to having driven on an expired license. (A. 859, 868 and n.40; 63, 136-39, 147, 212-17, 222, 306, 395-99, 443-44.) A frustrated Saxton slammed his hands on the table, and stated that if Thompson insisted on the accusations, “then [they] must be true.” (A. 859, 868 and n.41, 870 n.55; 140, 227, 306-07, 399-400, 444, 446, 453-54.) Drayton then provided Thompson and Phillips with Saxton’s license and explained that the “D” designation on Saxton’s license stood for “duplicate.” Thompson and Philips refused to concede its validity as proof that Saxton’s license had not expired prior to July 1. (A. 859, 868; 141, 216, 224, 401.)

Immediately after the meeting, Thompson and Phillips obtained a copy of Saxton’s Maryland Vehicle Administration record from an outside investigatory service. The MVA document states: June 4, 2014, “NEW LIC/ID ISSUED-PREVIOUS LIC/ID RECEIVED AND DESTROYED”; July 1, 2014, “License Duplicate” issued designated as “License Type” “D.” (A. 859, 868; 339-42, 634, 975.) Later that day, Thompson dismissed Drayton’s renewed effort to explain that the “D” on Saxton’s license indicated that it was a duplicate. (A. 868 and n.44; 402-03, 450-51.)

When Saxton arrived at work on July 3, Thompson handed him a letter terminating his employment. (A. 859, 868-69; 142-45.) The letter stated, in part, “You admitted that, even though your license expired on June 27, and it was thereafter illegal for you to drive, you nevertheless ran your company route in your company truck on June 30, 2014, without a valid driver’s license [This] is your third major offense in a period of just over eight months.” (A. 859 and n. 9, 869 and n.45; 932.)

The Union immediately filed a grievance over Saxton’s discharge. The same day, the Union filed an unfair labor practice charge with the Board’s Regional Office alleging that the Company unlawfully discharged Saxton for engaging in protected concerted activity and participating in charges filed against the Company. That same day, the Board’s Regional Office rescheduled the hearing on various allegations—including the Company’s treatment of Saxton—from July 8 to October 6. (A. 859 and n.10, 869 and nn.48-51; 149, 162, 846, 933, GCX 1(h), 1(j).)

1. Thompson refuses to accept proof of Saxton’s license

During a grievance meeting on July 8, Union Business Agent Settles and Saxton met with Thompson and Phillips to discuss Saxton’s termination. Saxton provided copies of his MVA record, MVA “Driver Record Abbreviation Codes,” and an MVA receipt dated July 1. The material sets forth that Saxton received a

new license on June 4, that he received a duplicate license on July 1, and that “D” stands for duplicate license. Phillips and Thompson maintained that the Company discharged Saxton based on his July 2 statement that his license had expired.

Saxton explained that he discovered his license was lost while he was visiting the Board’s Regional Office, and was reluctant to divulge that activity. Thompson responded that he and Phillips had been misled, but Settles objected, referring to the documentary proof provided them prior to discharging Saxton. (A. 859, 869 and n.52; 150-53, 156-58, 232-36, 502-07, 526-28, 923-27, SA 1.) Phillips and Thompson refused to accept the records or reinstate Saxton. (A. 869 and n.52; 152, 157, 234, 507.)

2. The Company continues to refuse to accept proof of Saxton’s license

On July 16, Saxton along with Settles and union steward Drayton again met with Thompson and Phillips to discuss Saxton’s grievance over his termination. When Thompson again questioned Saxton about his license, Settles refused to let Saxton answer any questions. Settles reiterated that Saxton had not let his license expire or driven a company truck with an expired license. (A. 869; 159, 508-10.) Drayton also adamantly denied Thompson’s repeated accusations that Saxton had admitted that his license had expired during the July 2 meeting. The Union reiterated that the Company had ample evidence that Saxton’s commercial driver’s license was timely renewed on June 4. Thompson and Philips, however, continued

to challenge the validity of the information, suggesting that it was not entirely understandable, vague, or possibly falsified. (A. 869-70 and n.55; 159, 413, 510--14.)

The next day, Phillips responded to Saxton's claim for unemployment benefits with the Maryland Department of Labor by asserting that the Company terminated Saxton after "an investigation confirmed that he knowingly drove his [c]ompany truck without a valid driver's license." (A. 859 n.12, 870 n.56; 977.) In a follow-up statement dated July 18, Phillips again stated that Saxton had driven without a valid license, but concluded that the Company was bringing Saxton back to work on July 28 and converting the termination into an unpaid suspension, because the Company "could not prove that he had knowingly driven without a license." (A. 859 n.12, 870 and nn.57-58; 993.)

C. On July 23, the Company Suspends Saxton, Converting his July 3 Discharge into an Unpaid Suspension; a Board Hearing is Scheduled for October 6 on Saxton's Discharge and Suspension

On July 23, Thompson reinstated Saxton. In a July 23 letter to Settles, Thompson stated, in part, that the Company decided to reinstate Saxton and "treat his time off from work as an unpaid suspension and a major offense, for dishonesty." (A. 859, 870; 935.) The letter further stated that "[a]lthough it is now unclear to us whether [Saxton] drove without a license on June 30, it is clear to us

that [Saxton] was dishonest during the course of our investigation. . . .” (A. 859, 870; 935.) On July 24, the Union grieved the suspension. (A. 870 and n.60; 936.)

On September 10, the Board’s Regional Office served the Company with a consolidated complaint and a notice of hearing for October 6. In addition to the allegations contained in the previous complaint, the new complaint included allegations relating to the July 3 discharge and the July 23 suspension. (A. 859 n.11, 870 and n.61; 845, 846, GCX 1(l).) On September 16, the Board’s Regional Office again subpoenaed company officials Freedman, Thompson, and Phillips for the upcoming hearing. (A. 870 and n.62; 41, 362-63, 572-73.)

D. On September 29, 2014, the Company Discharges Saxton After He Exercises His Contractual Right To Refuse Overtime Work

The collective-bargaining agreement permits employees to decline overtime work. Specifically, Article 3-Seniority states, in pertinent part:

The Employer shall offer overtime to the most senior employee available at work, in accordance with classification seniority. The most senior employee available at work will be given the right to refuse to cover an assignment with the understanding that if the employer exhausts its seniority list and there still remains jobs to be covered, junior employees will be required to cover these assignments in order of reverse shift and classification seniority. Overtime is defined as work to be performed outside the normal scheduled work hours.

(A. 861 n.17; 883.)

On September 29, Saxton and three coworkers—Leroy Goodman, Harry Bowie, and Steve Williams—returned to the facility after completing their delivery

routes. (A. 861, 870, 871 and n. 64; 164-66, 415-16.) Saxton was the most senior among the four drivers. (A. 857, 866; 50, 949-50.) That day, Goodman had driven a truck that the Company knew had a problem with a window. (A. 468-70, 612-13.) Goodman was in front of Saxton at the transportation office as they prepared to turn in their manifests. (A. 871; 165-66.) After Saxton turned in his manifest, Supervisor Brown, at Thompson's direction, asked Saxton to take Goodman's truck for service to repair the window. Saxton refused on the basis that the terms of the collective-bargaining agreement permitted him to refuse overtime if a junior driver was available. He took out a copy of the agreement and urged Brown to read it. (A. 861, 871; 55-56, 59, 164-65, 167, 173, 273-75.)

As the conversation became louder, Thompson joined in and Thompson and Saxton began loudly arguing, with Thompson insisting that Saxton take the truck because no other drivers were available. Saxton again refused. Shortly thereafter, Warehouse Manager Joe Smith approached, and the three supervisors surrounded Saxton. Saxton maintained that, as the senior driver, he was entitled under the agreement to refuse overtime work. Thompson told Saxton to punch out and not return the next day. In response, Saxton said "goddam." He clocked out at 3:07 p.m. (A. 861, 871 and nn.69-71; 31, 168-69, 173-75, 275-79, 374-75, 615, 683-84, 754-55, 770, 781, 787, 847, 853.)

As he was leaving Saxton saw Dennis Wade, a junior driver, in the parking lot and he yelled into the warehouse that Wade was available to take the “fucking truck” for repair. Thompson then directed Wade to take the truck for repair. (A. 861, 871 and nn.70, 72; 174-75, 287, 307-08, 417-19, 474-77, 611, 615-16, 781, 794.)

Drayton saw a visibly upset Saxton in the parking lot and asked him what was wrong. Saxton said “this motherfucker fired me again.” (A. 871; 174, 288, 418.) Drayton went to Phillips office and insisted that Saxton’s discharge violated the collective-bargaining agreement’s overtime provisions. (A. 871; 425-26.) Settles told Saxton that he would speak to Thompson. About 30 minutes later, after the Union intervened, Business Agent Settles told Saxton to return to work the next day. (A. 861, 871; 175-79, 288-89, 424-28.) Around the same time, Thompson, Wade, and employee Davis Wallace provided Phillips with emails describing the incident. Thompson’s statement inaccurately said that Saxton refused to take the truck because overtime was not guaranteed. (A.871; 609-11, 962-63, 1006.)

Saxton worked on September 30 and October 1. At the end of his shift on October 1, Brown told Saxton that Thompson wanted to see him. Saxton replied that his shift was over and that he had been advised not to speak with Thompson without union representation. He clocked-out and left. (A. 861, 872; 179-80, 291-

92, 304, 309.) Upon leaving the warehouse, Saxton saw Drayton in the parking lot and told him that Thompson wanted to meet with him. Drayton stated that Thompson wanted to meet with him as well and asked Saxton to wait in the parking lot while he went to meet with Thompson. Drayton returned to the facility and searched for Thompson but could not locate him. He returned to the parking lot, informed Saxton that he did not find Thompson, and suggested they leave. (A. 861, 872; 181-85, 295-300.) Before leaving around 5:00 p.m., Saxton called Brown and asked if Thompson was around and whether he, Saxton, was scheduled to work the next day. Brown told Saxton that he had a route the next day, and to tell Drayton that Thompson did not need to see him anymore. During this conversation, Brown did not instruct Saxton to return to the facility to meet with Thompson. Saxton and Drayton then left. (A. 872 and n.74; 187-88, 195, 437-38.) In the meantime, Brown sent Thompson an e-mail around 4:45 p.m. telling him that he told Saxton that Thompson needed to talk to him, that Saxton was likely not going to wait, and telling Thompson that he might want to “come out now and catch him.” (A. 872 and n.75; 1010.) Thompson didn’t respond to the email for 35 minutes and when he did he asked Brown to email him “exactly what [Saxton] said to you.” (A. 872; 1010.)

When Saxton reported to work on October 2, Thompson informed Saxton he was discharged and handed him a termination letter dated October 1. (A. 861, 872

and n.76; 196-97, 872, 937-40.) The letter referenced Saxton's refusal to take the truck for repair on September 29, noting that he was "the only driver who was at the facility at the time," that in response, he "began screaming" that he "had seniority and did not have to take the truck," and that he was told "to punch out and leave." (A. 872; 937.) The letter also referenced an incident on September 30 where Saxton had allegedly refused a request to meet with company management at the conclusion of his shift. (A. 872; 937.)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Members Miscimarra, Hirozowa, and McFerran) found, in agreement with the administrative law judge but supplementing his rationale, that the Company violated Section 8(a)(4) and (1) of the Act (29 U.S.C. § 158(a)(4) and (1)) by discharging Saxton on July 3, just five days before a scheduled hearing on charges Saxton filed with the Board and by suspending him on July 23. (A. 859-62.) The Board further found, in agreement with the judge but again supplementing his rationale, that the Company violated the Act by discharging Saxton on September 29 for his protected concerted activity, but found this violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)), not Section 8(a)(4) and (3), as the judge had found. (A. 861-62.) Having found that Saxton was unlawfully discharged on September 29, the Board found it unnecessary to pass on the judge's finding that the Company's conduct on October

2 also constituted separate Section 8(a)(4) and (3) violations as such findings would not materially affect the remedy. (A. 862 n.19.)³

The Board's Order requires the Company to cease and desist from the unfair labor practices found and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act (29 U.S.C. § 157). (A. 862.) Affirmatively, the Order requires the Company to offer Saxton reinstatement, to make him whole for any loss of earnings or benefits he suffered from the Company's unfair labor practices, and to remove from its files any reference to the unlawful suspension and unlawful discharges. (A. 862.) The Order also requires the Company to post and distribute electronically copies of a remedial notice. (A. 863.)

³ The Board (Member McFerran, dissenting) also found, in disagreement with the judge, that the Company did not violate Section 8(a)(1) of the Act by requiring Saxton to sign a settlement agreement that contained a confidentiality clause. (A. 857-58, 863-64.) This issue is not before the Court.

SUMMARY OF ARGUMENT

1. Substantial credited and documentary evidence supports the Board's finding that the Company unlawfully discharged Richard Saxton on July 3, 2014, for assertedly driving on an expired license, despite having twice been presented with documentary evidence that supported Saxton's assertion that he had maintained a valid driver's license. The timing of Saxton's discharge only five days before a scheduled Board hearing on allegations that included claims that the Company had unlawfully disciplined Saxton, as well as the Company's steadfast refusal to accept the documentary evidence that proved its asserted reason for the discharge was false, amply demonstrates that the discharge was unlawfully motivated. Not only do the Company's pretextual, and wholly discredited, reasons for discharging Saxton on July 3 support the Board's finding of union animus, they also doom the Company's affirmative defense. Before the Court, the Company merely repeats its discredited version of the facts, but without meeting its heavy burden of demonstrating the requisite "exceptional circumstances" needed to overturn the Board's well-supported credibility determinations.

2. Substantial credited evidence also supports the Board's finding that the Company unlawfully suspended Saxton on July 23, 2014, for allegedly lying during its investigation of Saxton's license. The Board proceedings, Saxton's unlawful discharge, the timing of the suspension, and the Company's discredited

and shifting explanations for exactly how Saxton allegedly lied, provide ample support for the Board's finding that the suspension was unlawfully motivated. The Board further reasonably found that the Company failed to demonstrate that it would have suspended Saxton in the absence of his protected activity and his involvement in the Board proceedings. Once again, the Company relies on a discredited narrative to support its action, but has failed to show any basis, let alone "exceptional circumstances" to disturb the Board's finding.

3. Substantial credited evidence supports the Board's finding that the Company again unlawfully discharged Saxton on September 29, 2014, for engaging in the protected concerted activity of enforcing his contractual right to refuse overtime work. Significantly, the parties collective-bargaining agreement permitted Saxton—the most senior driver—to refuse overtime work, and request that an available less junior employee perform the requested work. Saxton's request was reasonable because other employees, all of whom were junior to him, were available at the time the request was made. In rejecting the Company's defense, the Board reasonably applied the factors of *Atlantic Steel Co.*, 245 NLRB 814 (1979), in finding that Saxton's raised voice and limited use of profanity when he declined to work overtime did not cause him to lose the Act's protection. Once again, the Company, without success, relies on its own discredited narrative to support its unlawful conduct.

STANDARD OF REVIEW

The Board's findings of fact are entitled to affirmance if supported by substantial evidence on the record as a whole. *See WXGI, Inc. v. NLRB*, 243 F.3d 833, 840 (4th Cir. 2001). On review, the 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 Corp. v. NLRB*, 340 U.S. 474, 488 (1951); accord *WXGI*, 243 F.3d at 840. In these circumstances, deference is particularly appropriate "[w]here the 'record is fraught with conflicting testimony and essential credibility determinations have been made.'" *Overnite Transp. Co. v. NLRB*, 240 F.3d 325, 338 (4th Cir. 2001) (quoting *NLRB v. Nueva Eng'g., Inc.*, 761 F.2d 961, 965 (4th Cir. 1985)). Indeed, "[i]t is well settled that absent exceptional circumstances, the [administrative law judge's] credibility findings, 'when adopted by the Board are to be accepted by the [reviewing court].'" *Evergreen America Corp. v. NLRB*, 531 F.3d 321, 330 (4th Cir. 2008) (quoting *NLRB v. Air Prod. & Chem., Inc.*, 717 F.2d 141, 145 (4th Cir. 1983)). The Board is also entitled to deference in its interpretation of the Act "if it is reasonably defensible." *WXGI*, 243 F.3d at 840.

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(4) AND (1) OF THE ACT BY DISCHARGING SAXTON ON JULY 3, 2014, AND SUSPENDING HIM ON JULY 23, 2014, FOR PARTICIPATING IN BOARD PROCEEDINGS

The Board's findings that the Company discharged Saxton on July 3 and suspended him on July 23 for false reasons because he participated in the filing unfair labor practice charges and proceedings before the Board are largely founded on the testimony of witnesses at the hearing that the administrative law judge credited over conflicting testimony. *See Overnite Transp. Co. v. NLRB*, 240 F.3d 325, 338 (4th Cir. 2001). In particular, the judge credited the testimony of Saxton-which was corroborated by documentary evidence and Drayton's and Settles' testimony, over Company witnesses, that Saxton did not drive on an expired license and did not lie about it to Thompson and Phillips. (A. 859-60, 869-70 and nn. 52, 54, 55, 56, 58, 874.) Moreover, in the face of the unassailable documentary evidence from the Maryland Department of Motor Vehicles that confirmed Saxton's repeated explanations that he had maintained a valid driver's license, Thompson continued to claim that Saxton drove a company truck on an expired license and lied to him about it. Phillips likewise publicly asserted that Saxton drove with an expired license even after being shown that documentary evidence. In these circumstances, the Board reasonably found that the "overwhelming evidence" establishes that the Company's reasons for discharging

Saxton were false and that the credited evidence supported the judge's finding that Saxton did not lie about driving on an expired license, which was the basis for his subsequent suspension. (A. 860-61, 870 and n.59.) As demonstrated below, the Company's arguments to the contrary are founded on an unsupported narrative that was expressly discredited by the judge and affirmed by the Board on review.

A. Applicable Principles

Section 8(a)(4) of the Act makes it an unfair labor practice for an employer to "discharge or otherwise discriminate against an employee because he has filed charges or given testimony under th[e] Act." 29 U.S.C. § 158(a)(4). In enacting Section 8(a)(4), Congress recognized that the Board cannot initiate its own processes, but is instead "dependent upon the initiative of individual persons who must . . . invoke its sanctions through filing an unfair labor practice charge." *Nash v. Florida Industrial Commission*, 389 U.S. 235, 235, 238 (1967). Because the Board cannot prevent and remedy unfair labor practices unless employees are willing to participate in its proceedings, "Congress has made it clear that it wishes all persons with information about [unfair labor] practices to be completely free from coercion against reporting them to the Board." *Id.* This "complete freedom is necessary . . . 'to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants.'" *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972) (quoting *John Hancock Mut. Life Ins. Co. v. NLRB*, 191

F.2d 483, 485 (D.C. Cir. 1951)). Accordingly, Section 8(a)(4) is broadly read to protect a wide array of employee participation in Board proceedings, and includes protection for employees on whose behalf charges have been filed. *See id.*; accord *Grand Rapids Die Casting Corp. v. NLRB*, 831 F.2d 112, 116 (6th Cir. 1987); *NLRB v. Overseas Motor, Inc.*, 721 F.2d 570 (6th Cir. 1983). As this Court had recognized, an employer violates Section 8(a)(4) of the Act by retaliating against an employee for participating in a Board proceeding. *See NLRB v. Leading Edge Aviation Servs., Inc.*, 212 F. App'x 193, 200 (4th Cir. 2007).

In Section 8(a)(4) cases, the Board applies the test for determining unlawful motivation that the Supreme Court approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), and the Board first articulated in *Wright Line*, 251 NLRB 1083, 1089 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981), *cert denied*, 455 U.S. 989 (1982). Under that test, if substantial evidence supports the Board's finding that an employee's protected activity was "a motivating factor" in an employer's decision to take adverse action against the employee, the adverse action is unlawful unless the record as a whole compelled the Board to accept the employer's affirmative defense that it would have taken the adverse action even in the absence of protected activity. *Transp. Mgmt. Corp.*, 62 U.S at 395, 397, 401-03; accord *WXGI*, 243 F.3d at 840; *RGC (USA) Mineral Sands, Inc. v. NLRB*, 281 F.3d 442, 448 (4th Cir. 2002). If the lawful reasons

advanced by the employer for its actions are a pretext – that is, if the reason either did not exist or was not in fact relied upon – the employer has not met its burden, and the inquiry is logically at an end. *Wright Line*, 251 NLRB at 1084; *accord USF Redstar Inc. v. NLRB*, 230 F.3d 102, 106 (4th Cir. 2001); *NLRB v. Grand Canyon Mining Co.*, 116 F.3d 1039, 1047 (4th Cir. 1997); *NLRB v. Nueva Engineering*, 761 F.2d at 968.

The Board may infer motive from circumstantial or direct evidence. *NLRB v. Link-Belt Co.*, 311 U.S. 584, 602 (1941); *WXGI*, 243 F.3d at 840. Factors supporting a finding of unlawful motivation include the employer's knowledge of the employee's union activities, the timing of the adverse action, and the implausibility of the employer's asserted reasons for its actions. *See Transp. Mgmt.*, 462 U.S. at 404-05; *Grand Canyon Mining*, 116 F.3d at 1048; *FPC Holdings v. NLRB*, 64 F.3d 935, 943 (4th Cir. 1995). Evidence of a cursory or inadequate investigation also provides evidence of unlawful motive. *Sociedad Espanola de Auxullo Mutuo y Beneficiencia de P.R. v. NLRB*, 414 F.3d 158, 161 (1st Cir. 2005); *Jet Star Inc. v. NLRB*, 209 F.2d 671, 677-78 (7th Cir. 2000); *American Thread Co. v. NLRB*, 631 F. 2d 316, 322 (4th Cir. 1980). In addition, the employer's reliance on a false motive also supports the finding that the real motive was an unlawful one. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). The question of an employer's motive is a factual one

““which the expertise of the Board is peculiarly suited to determine.”” *FPC*

Holdings, 64 F.3d at 942 (citation omitted).

B. The Board Reasonably Found that the Company Unlawfully Discharged Saxton on July 3

1. Ample credited evidence supports the Board’s finding that Saxton’s discharge was unlawfully motivated, and that the Company’s reason for discharging him was false

Ample credited evidence supports the Board’s finding (A. 859-60, 862) that the Company violated Section 8(a)(4) and (1) of the Act by discharging Saxton on July 3, 2014, for ostensibly driving on an expired license. In finding that the Company had an unlawful motive in terminating Saxton, the Board reasonably relied (A. 889) on Saxton’s participation in the Board process, the timing of the Company’s actions, and its ignoring ample credited and documentary evidence. including evidence from its own investigation, that proved Saxton did not have an expired license.

At the outset, the undisputed evidence establishes that Saxton was a longtime union steward who filed numerous grievances over the years, and that in December 2013 and March 2014, the Union filed unfair labor practice charges on Saxton’s behalf with the Board. The Company discharged Saxton just five days before a scheduled Board hearing to address complaint allegations that arose from those charges. Under settled principles, as the Board set forth (A. 859, 874), the

timing of a discharge in context with protected activity raises the inference of unlawful motivation. *See FPC Holdings*, 64 F.3d at 943.

The Company's reliance on a false reason for Saxton's discharge further supports the Board's finding of unlawful motivation. Saxton and Drayton credibly testified that they explained to the Company at the July 2 meeting that Saxton had timely renewed his license. Despite, on three separate occasions, being presented with documentary evidence that supported Saxton's explanation that he had consistently maintained a valid driver's license, the Company persisted in its assertion that he had driven its truck on an expired license. Specifically, on July 2, Thompson and Phillips were shown Saxton's July 1 license that plainly had the designation "D" for duplicate. Later that day, the Company obtained Saxton's driving record from the Maryland Department of Motor Vehicles from a third party vendor. That material again confirmed Saxton's explanation that he had timely renewed his license on June 4, and had later received a duplicate license on July 1, designated by the letter "D." As the Board explained (A. 868 n.39), the motor vehicle record "provides critical corroboration of Saxton's" explanation.⁴

⁴ The Board found that Thompson, "an experienced manager of a regulated interstate transportation" offered "explanations as to why or how he misinterpreted the information on Saxton's license status on July 2, [that] w[ere] simply not credible." (A. 868 n.43.) As the Board noted, "construing the 'duplicate' designation any other way does not make sense since it is incomprehensible that an

“Nevertheless, the [Company] terminated Saxton on July 3 for driving on an expired license, thereby evidencing its improper motive.” (A. 860.)⁵

Significantly, the Company held steadfast in its decision to terminate Saxton in the face of additional evidence demonstrating that its asserted reason for the termination was false. Thus, on July 8 Saxton provided the Company with a copy of his Maryland Department of Motor Vehicles record, a receipt for the record, and a list of the official code abbreviations that plainly demonstrated—beyond any possible doubt—that he had timely renewed his license on June 4 and obtained a duplicate license on July 1. In the face of this documentary proof, the Company declined to revisit its decision to terminate Saxton for purportedly driving with an expired license. Moreover, even after receiving proof that Saxton had maintained a valid license, the Company, in its July 17 and July 18 statements to the Maryland Department of Labor, continued to falsely claim that Saxton had knowingly driven a company truck “without a valid driver’s license.”⁶ In these circumstances, the

expired license would be duplicated as opposed to simply renewed.” (A. 868 n.39.)

⁵ Although evidence of a cursory or inadequate investigation can provide additional evidence of unlawful motive (*see Sociedad Espanola de Auxullo Mutuo y Beneficiencia de P.R. v. NLRB*, 414 F.3d 158, 161 (1st Cir. 2005), and cases cited at p. 161) here, in addition to the evidence provided by Saxton and Drayton, the Company ignored evidence uncovered during its own investigation that it received on July 2 that confirmed that Saxton had not let his license expire.

⁶ Tellingly, in its later submission, the Company claimed that it would retract Saxton’s discharge because Saxton “had prove[n]” that he had not driven on an

Company's continued reliance on a false reason for the termination amply supports the inference of unlawful motivation. *See Active Transp.*, 296 NLRB 431, 432 (1989), *enforced*, 924 F.2d 1057 (6th Cir. 1991).

Accordingly, the Board reasonably found that the "overwhelming evidence" establishes that the Company's claim that Saxton drove on an expired license "is false." (A. 860.) The Company's continued reliance on a demonstrably false reason for discharging Saxton establishes the Company's unlawful motivation. *See U-Haul Co. of California*, 347 NLRB 375, 388-89 (2006) (finding reason for discharge pretextual "not only dooms [employer's] defense but it buttresses the . . . affirmative evidence of discrimination" and supports an inference of unlawful motive), *enforced mem.*, 255 F. App'x 527 (D.C. Cir. 2007).

By finding that the Company's asserted reason for Saxton's termination – driving on an expired license – was false, and therefore was not the real reason for his discharge, the Board (A. 860) reasonably concluded that the Company "failed to show that it would have taken the same action absent the protected conduct."

expired license but, then stated that because the Company could not prove that he had driven on an expired license it was returning him to work with a suspension for dishonesty "about his license being expired." (A. 993.) As the Board explained, "[t]hese statements are flatly contradictory and further undermine the assertion that Saxton was terminated for driving on an expired license." (A. 860.)

See NLRB v. Baltimore Luggage Co., 382 F.2d 350, 352 (4th Cir. 1967)

(employer's defense asserted to justify discharge fails when the Board made an "express finding that the claimed event never happened"); *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966) (when an employer'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] employer desires to conceal"). Thus, the Board was fully warranted in finding that Saxton's discharge on July 3 violated Section 8(a)(4) and (1) of the Act.

2. The Company's arguments are without merit

As an initial matter, the Company makes several arguments that are founded on an unsupported factual narrative that was expressly discredited by the administrative law judge. For example, the Company (Br. 18-19) mischaracterizes Saxton's discharge as a "dual motive" case, where even if Saxton's protected activity under Section 8(a)(4) were a reason for the Company's adverse action, an issue would remain as to whether the Company would have discharged Saxton even absent his protected activity. That is not the case here. As shown above, the Board found the asserted reason for the termination was false. As this Court has explained, in such a situation, "[i]t is not within the province of the court to say that the discharge happened because of [the reason set forth by the employer], and not for the reason found by the Board, when the finding is that in point of fact" the

reason set forth by the employer did not in fact occur. *Baltimore Luggage Co.*, 382 F.2d at 352. As set forth below, the Company's remaining challenges to the Board's findings have no merit.

a. The Board's finding of unlawful motivation is amply supported

The Company asserts (Br. 19-22) that the record contains no evidence of unlawful motivation. However, the Board's basis for finding unlawful motivation stands essentially unrefuted, and the factors the Company relies on do not require a different result. Specifically, the Company's claim (Br. 20) that the Board inferred unlawful motivation based on "sheer speculation" ignores the credited testimonial and documentary evidence. As shown at pp. 25-26, the Board reasonably inferred unlawful motivation based on the Company's undisputed knowledge of Saxton's filing of charges and its discharge of Saxton five days before the scheduled Board hearing; its cursory "investigation" into the status of Saxton's license and its blatant disregard of the unassailable documentary evidence contradicting its claim that Saxton drove on an expired license; and its continued false claim to a state agency that Saxton drove on an expired license, long after it had proof otherwise. These factors provide ample evidence establishing the Company's unlawful motivation.

The Company's contentions to the contrary are unfounded on this record or otherwise meritless (Br. 20, 22-23). For example, the Company asserts (Br. 22-23) a lack of proximity between the December 2013 Board charge and the July 2014 termination. That argument ignores that in the interim the Union filed additional charges on Saxton's behalf, that the Board issued complaints on those charges, and that the Company terminated Saxton less than a week before the scheduled Board hearing.⁷ Likewise, whether Saxton had previously maintained a positive relationship with Thompson (Br. 20) proves little where no evidence exists that the Board previously had issued a complaint alleging the Company's unlawful conduct toward Saxton, and scheduled a Board hearing over such conduct.⁸

Equally without merit, the Company's suggests (Br. 20-21) an absence of unlawful motivation because it previously provided Saxton with "preferential

⁷ The Company's reliance (Br. 22-23) on several cases construing Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e, et seq.) is misplaced because the obligations under *Wright Line* are different than a plaintiff's obligations under Title VII, where a plaintiff must establish causation for a prima facie case. In any event, those cases simply stand for the proposition that temporal evidence alone cannot establish a prima facie case of retaliation under Title VII unless very close proximity exists between the employer's knowledge of the protected activity and the adverse employment action. *See, e.g., Perry v. Kappos*, 489 F. App'x 637, 643 (4th Cir. 2012) (cited at Br. 22). Here, not only is there proximity between Saxton's termination and the scheduled Board hearing, but the Board also relied on other factors to infer animus.

⁸ Likewise the Company's suggestion that Saxton had maintained a good relationship with Supervisor Brown and owner Freedman (Br. 19-20) proves little

treatment” by ultimately retaining his employment after his truck accident. To begin, keeping Saxton employed after an accident that exceeded \$2,000 in damages did not constitute “preferential treatment,” particularly given that Saxton was its most senior driver and that there is no evidence of a significant disciplinary record prior to October 2013. The collective-bargaining agreement did not mandate termination for such an accident. Nor does the record contain any evidence of the Company terminating an employee for such an accident. To the contrary, the Company does not dispute that it continued to employ a supervisor after a truck accident that caused \$5,000 in damage, or that it later discharged that employee only after another accident and a failed drug test. (A. 866 and n.19; 583-84, 954-57.)

The Company asserts (Br. 21-23) that no causal connection or nexus exists between the Company’s unlawful motivation and Saxton’s discharge. As an initial matter, Board’s *Wright Line* test does not require such a nexus. Rather, as the Board set forth, that framework provides that unlawful motivation is established by record evidence demonstrating: (1) the employee was engaged in protected activity; (2) the employer had knowledge of the protected activity, and (3) evidence of animus. (A. 874, citing *Hawaiian Dredging Construction Co.*, 362

because it is clear that Thompson discharged Saxton on July 3 and there is no evidence that either Brown or Freedman played a role in that decision.

NLRB No. 10, 2015 WL 535027, at *3 (2015).) As the Board stated, the test “does not require an additional showing of particularized motivating animus towards the employee’s own protected activity or to further demonstrate some additional, ‘nexus’ between the employee’s protected activity and the adverse action.” (A. 874.) *See Michigan State Employees*, 364 NLRB No. 65, 2016 WL 4157599, at *5 (2016). Indeed, contrary to the Company’s suggestion, this Court’s decision in *TNT Logistics of North America, Inc. v. NLRB*, 413 F.3d 402, 406 (4th Cir. 2005), states that the Board need only show that the employee was engaged in protected activity, that the employer was aware of the activity, and that “the activity was a substantial or motivating reason for the employer’s action.”⁹

Moreover, the Company simply asserts that causal connection/nexus is a fourth factor, without making any argument that the Board erred in stating that its analysis does not contain such a requirement. Thus, the Company has not sufficiently raised such a challenge before the Court. *See Fed R. App. P. 28(a)(8)(A)* (an argument in a brief to the court must contain the party’s contention and the reasons for them, with citations to relevant authorities and to the record); *AMSC Subsidiary Corp. v. FCC*, 216 F.3d 1154, 1161 n.** (D.C. Cir. 2000) (contentions summarily

⁹ Here, Member Miscimarra, who takes the view that there needs to be a link or nexus between protected activity and the adverse action, agreed “based on the facts,” that the Company “discharged and suspended Saxton because of his participation in the Board’s process.” (A. 860 n.13.)

raised in an opening brief without any effort at argumentation are waived). Even if the Company's opening brief could be construed as disputing the appropriate test, the Court has no jurisdiction to consider that argument because the Company failed to argue to the Board that the judge applied the wrong test. *See* 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 unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” 29 U.S.C. § 160(e)); *see Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982) (a litigant's failure to raise an objection to the Board precludes appellate courts from subsequently asserting jurisdiction over that issue); *Parts Depot, Inc. v. NLRB*, 260 F. App'x 607, 611 (4th Cir. 2008) (same).

b. Credited evidence demonstrates that the Company's purported reasons for Saxton's discharge were false

The Company's arguments (Br. 23-27) that it had a legitimate reason for discharging Saxton are unsupported by the credited testimony and documentary evidence. Thus, the Company's repeated assertion, nearly 30 times in its brief, that Saxton "lied" in his meetings with Thompson—by either admitting during the investigation that his license had expired or by later changing his story to claim his license was lost at the NLRB and he simply obtained a duplicate—ignores the administrative law judge's credibility determinations upon which the Board's findings that Saxton did not lie, nor did Settles or Drayton admit that he had, are founded. The Company's narrative is unsupported by the credited evidence.

In its opening brief, although the Company mentions credibility in its issue statement (Br. 1), it fails to present any basis, let alone requisite extraordinary circumstances, to overturn the judge's credibility determinations, which the Board adopted on review. Therefore, the Company has waived any challenge to the Board's credibility findings by failing to make any such argument to the Court. *See Estate of Armstrong v. Village of Pinehurst*, 810 F.3d 892, 898 n.6 (4th Cir. 2016) (failure to present argument in opening brief constitutes waiver of issue)

Moreover, the Board on review thoroughly explained its reasoning for adopting the judge's crediting of certain testimony and witnesses over others

regarding Saxton's license that the Company had challenged. Thus, the Board recognized "some minor inconsistencies in Saxton's testimony," but reasonably concluded that they did not "undercut the judge's finding, corroborated by documentary evidence, that Saxton repeatedly asserted that he did not drive on an expired license."¹⁰ (A. 860 n.14. *See also*, A. 868 nn.41-42 (any conflicting statements made by Saxton came out of that "did not detract from the fact that he produced solid proof at that meeting that his license had not expired.)) Indeed, as the Board explained, the testimony of Thompson (A. 623-24) and Phillips (A. 343-44) confirmed testimony by Saxton (A. 139, 213) and Drayton (A. 397-99) that on July 2 Saxton "initially maintained that his license never expired." (A. 868 n.40.) In addition, as the Board further explained, "[n]either Thompson, who provided inconsistent testimony . . . nor Phillips, who was evasive and nonresponsive in many of her responses, disputed testimony by Saxton and Drayton that Saxton produced a duplicate license on July 2." (A. 868 n.42.) Further, Thompson

¹⁰ As the judge found, Saxton admitted in his testimony that in the July 1 meeting he rambled on about an employee's right to a 7-day grace period to obtain a license, and slammed the table in response to Thompson's accusations, stating that if he insisted his license expired, it must be so. (A. 859, 868 and n.41, 870 n.55.) As the judge further found, Saxton made the statement "out of frustration and feeling insulted," and "deferred to Drayton for the rest of the meeting." (A. 868 n. 42.)

admitted that the information contained in the July 8 copy of Saxton's driving record was the same as the information it obtained on July 2. (A. 869 nn.52-53.)¹¹

Before the Court, the Company now claims that Saxton was a "bad employee with a poor employment record." (Br. 27.) The Court, however, has no jurisdiction to consider that argument as it was never made to the Board. *See* Section 10(e) of the Act, 29 U.S.C. § 160(e), and cases cited at p. 34. Moreover, Saxton was the Company's most senior driver, and there is no evidence of any significant work-related issues prior to his accident that led to the initial charges. *cf NLRB v. Instrument Corp.*, 714 F.2d 324, 330 (4th Cir. 1983) (discharge of employee who "had long been a problem employee"). In these circumstances, the Company's claim that Saxton was a "bad employee" is further evidence of the Company's unlawful motive for taking action against Saxton. The Company's reliance (Br. 27-28) on *TNT Logistics of North America, Inc. v. NLRB*, 413 F.3d 402, 408-09 (4th Cir. 2005) does not support its position. In that case, there was no dispute that evidence existed to support a finding that the employee had engaged in the activity that was the proffered reason for the discharge and the sole issue before the Court was whether the employer had established that it would have

¹¹ Likewise, given Phillips' testimony and the documentary proof provided to her, the Board reasonably found that "Phillips' assertion that Saxton drove a company vehicle on an expired license was a fabrication." (A. 870 n.56.)

discharged the employee for that proffered reason absent its animus. The Court, in disagreement with Board, found that the employer had made such a showing because the employee, who already had a poor work record, was discharged only after he had a “rash” of mishaps that displayed an “emerging pattern of recklessness.” *Id.* at 408-09.¹² Here, by contrast, the evidence establishes that the Company terminated Saxton for a reason that simply did not exist.

C. The Board Reasonably Found that the Company Unlawfully Suspended Saxton on July 23

The credited evidence also supports the Board’s finding (A. 860) that the Company’s suspension of Saxton on July 23 for allegedly lying during its investigation about the status of his license was unlawfully motivated. As shown above, undisputed evidence establishes that the Union filed charges with the Board on Saxton’s behalf, and that the Company had knowledge of those charges. Similar to the timing of the discharge, the timing of the July 23 suspension—only 2 weeks after the first scheduling of the Board hearing—demonstrates the Company’s unlawful motivation.

In addition, the Company’s shifting and inconsistent explanation for Saxton’s alleged dishonesty provides additional evidence of animus. As the Board

¹² Similarly, in *NLRB v. Instrument Corp.*, 714 F.2d 324, 326, 329-30 (4th Cir. 1983) (cited at Br. 28), no dispute existed that the proffered reason for the discharge had in fact occurred.

explained (A. 860), the Company relied at various times on three different versions of Saxton's "dishonesty" which it repeats before the Court: (1) lying about the fact that he drove with an expired license; (2) lying by admitting to driving with an expired license; and (3) lying about the circumstances surrounding the loss of his license. Not only were these claims unproven, but the shifting reasons demonstrate their pretextual nature. *See Approved Elec. Corp.*, 356 NLRB 238, 239 (2010) (shifting rationales provides evidence that an employer's preferred reasons for its actions are pretextual); *GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997) ("Where . . . an employer provides inconsistent or shifting reasons for its actions, a reasonable inference can be drawn that the reasons proffered are mere pretexts designed to mask an unlawful motive."), *enforced*, 160 F.3d 353 (7th Cir. 1998).

The Board reasonably found (A. 860) that the Company relied on that false reason to suspend Saxton. Thus, the credited evidence establishes that Saxton did not, as the Company asserts, lie about driving on an expired license. *See FedEx Freight East, Inc.*, 344 NLRB 205, 205–206 (2005) (rejecting employer's assertion that employee was discharged for lying where credited evidence showed employee did not lie), *enforced*, 431 F.3d 1019 (7th Cir. 2005). Accordingly, the Board concluded that the Company failed to show that it would have suspended Saxton absent the protected conduct, and that the Company's suspension of Saxton for "dishonesty" violated Section 8(a)(4) and (1) of the Act.

Before the Court, the Company does not seriously dispute the Board's finding of unlawful motivation with regard to the suspension, or that it offered shifting and inconsistent arguments as to how Saxton allegedly lied. Instead, it repeats (Br. 28) its discredited reasons that Saxton's suspension was justified because he lied. These arguments, discussed above, warrant little response. As shown, Saxton was understandably hesitant to inform the Company that he discovered his lost license while at a meeting at the Board's Regional office, and provided documentary proof that he maintained a valid driver's license.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY DISCHARGING SAXTON ON SEPTEMBER 29, 2014, FOR ENGAGING IN PROTECTED CONCERTED ACTIVITY

A. The Act Prohibits an Employer from Discharging an Employee in Retaliation for Engaging in Protected Concerted Activity, Including an Employee's Invocation of Rights under a Collective-Bargaining Agreement

Section 7 of the Act guarantees the right of employees to engage in "concerted activities for the purpose of . . . mutual aid or protection" 29 U.S.C. § 157. The right to engage in 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 the rights guaranteed in [S]ection 7" 29 U.S.C. § 158(a)(1). Accordingly, an employer violates Section 8(a)(1) of the Act by terminating employees for

engaging in concerted activities protected by the Act. *NLRB v. Air Contact Transport, Inc.*, 403 F.3d 206, 208, 213 (4th Cir. 2005).

The Supreme Court has indicated that Section 7's "mutual aid or protection" clause should be liberally construed to protect concerted activities directed at a broad range of employee concerns. *See Eastex, Inc. v. NLRB*, 437 U.S. 556, 563-68, 567 n.17 (1978). As the Supreme Court has explained, "an individual employee may be engaged in concerted activity when he acts alone." *NLRB v. City Disposal Sys.*, 465 U.S. 822, 831 (1984). Such circumstances include an employee's "assertion of a right grounded in a collective-bargaining agreement." *Id.* at 829. That action is protected because an employee's invocation of a collectively bargained right is "unquestionably an integral part of the process that gave rise to the agreement," and affects the rights of all employees covered by the agreement. *Id.* at 831-32. As the Supreme Court further explained, such employee conduct falls within Section 7 where "the employee's statement or action is based on a reasonable and honest belief that he is being . . . asked to perform a task that he is not required to perform under his collective-bargaining agreement, and the statement or action is reasonably directed toward the enforcement of a collectively bargained right." *Id.* at 837. Accordingly, "an honest and reasonable invocation of a collectively bargained right constitutes concerted activity, regardless of whether the employee turns out to have been correct in his belief that his right was

violated.” *Id.* at 840; *accord U.S. Postal Serv.*, 332 NLRB 340, 343–44 (2000), *enforced*, 25 F. App’x 41 (2d Cir. 2001); *Monongahela Power Co.*, 314 NLRB 65, 69-71 (1994), *enforced*, 62 F.3d 1415 (4th Cir. 1995) (table); *NLRB v. P*I*E* Nationwide, Inc.*, 923 F.2d 506, 515 (7th Cir. 1991); *NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495, 500 (2d Cir.1967).

When employees are engaged in protected activity, the Board and courts have interpreted the Act to allow them a certain degree of latitude, even when they express themselves with intemperate comments. *See, e.g., NLRB v. Caval Tool Div.*, 262 F.3d 184, 191-92 (2d Cir. 2001); *Mobil Exploration and Producing U.S., Inc. v. NLRB*, 200 F.3d 230, 242-43 (5th Cir. 1999); *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965). *See* further discussion at pp. 46-47, below.

Determining whether employee activity is concerted and protected within the meaning of Section 7 is a task that “implicates [the Board’s] expertise in labor relations.” *City Disposal*, 465 U.S. at 829. Accordingly, the Board’s determination that an employee has engaged in protected concerted activity is entitled to considerable deference if it is reasonable. *Id.*

B. The Board Reasonably Found that the Company Unlawfully Discharged Saxton on September 29 for Engaging in Protected Concerted Activities

The Board found that the Company violated Section 8(a)(1) of the Act by

discharging Saxton after he invoked the collective-bargaining agreement to refuse an overtime work assignment. The Board found, initially, that Saxton's refusal to work overtime based on a provision in the agreement constituted activity that was both protected and concerted. Then, rejecting the Company's claim, the Board found that Saxton's raised voice and use of profanity during a heated exchange with Thompson and other supervisors did not remove him from the Act's protection. As we now show, substantial evidence and applicable precedent fully support the Board's findings.

1. Saxton's conduct was both protected and concerted

The Board has found, with Court approval, that employees who invoke their collective-bargaining rights to refuse overtime are engaged in protected concerted activity. *See U.S. Postal Serv.*, 332 NLRB 340, 343–44 (2000), *enforced*, 25 F. App'x 41 (2d Cir. 2001), and cases cited at p. 41. Here, the credited evidence fully supports the Board's finding (A. 861, 875) that Saxton invoked his collective bargaining right on September 29.

It is undisputed that the Company asked Saxton to work overtime on September 29. Saxton had returned to the facility, along with three drivers who were junior to him, after he completed a full day of work when Brown, at Thompson's urging, asked Saxton to take a truck for repair. Saxton, as the most senior driver invoked his right to refuse the overtime. As the Board found, the

terms of the collective-bargaining agreement permitted Saxton to decline the overtime request. Thus, the agreement specifies that “the most senior driver at work” has “the right to refuse to cover an assignment with the understanding that if the employer exhausts its seniority list and there still remains jobs to be covered, junior employees will be required to cover these assignments in order of reverse shift and classification seniority.” (A. 861 n.17; 883.) Here, Saxton invoked that right by declining to work overtime, telling company management to read the agreement when it insisted otherwise, and asking it to assign the task to a junior driver.

As the Board reasonably found, Saxton’s request was reasonable because “there were at least three junior drivers available to perform the work.” (A. 861.) Indeed, Saxton returned to the facility with three coworkers (Leroy Goodman, Harry Bowie, and Steve Williams) and all three were turning in their manifests to Brown at about the same time that Brown sought to assign the overtime to Saxton. Despite their presence, the Company continued to insist that Saxton take the truck for repair well after Brown allowed the three junior drivers to clock out. Moreover, as the Company concedes (A. 612-13), Goodman drove the truck that needed repair that day and if instructed, Goodman could have taken the truck for repair at any point. Following Thompson’s directive that Saxton “punch out and not return the next day,” Saxton noticed that another junior driver, Wade, was

available, called that to the Company's attention, and the Company ultimately directed Wade to take the truck for repair.

In these circumstances, the Board reasonably found that "Saxton's invocation of the contract demonstrated a reasonable and honest refusal to perform the requested task and was thus a concerted activity." (A. 875.) *See White Elec. Constr.*, 345 NLRB 1095, 1095 (2005); *Tillford Contractors*, 317 NLRB 68, 68–69 (1995). Thus, the Board concluded that the Company's reason for discharging Saxton was "contrived" because it knew there were junior drivers available at the time Thompson and Brown directed Saxton to take the truck for repairs. (A. 874.)

2. Saxton's conduct was insufficient to remove him from the Act's protection

The Board and this Court have consistently construed the Act to permit employees engaged in protected activity "some leeway for impulsive behavior," so that not every impropriety that occurs in the context of such activity "necessarily places the employee beyond the protection of the statute." *J. P. Stevens & Co. v. NLRB*, 547 F.2d 792, 794 (4th Cir. 1976); *accord Union Carbide Corp.*, 331 NLRB 356, 356, 360 (2000), *enforced*, 25 F. App'x 87 (4th Cir. 2001); *Fairfax Hosp.*, 310 NLRB 299, 300 and n.7, *enforced mem.*, 14 F.3d 594 (4th Cir. 1993). Thus, as this Court has emphasized, even "imprudent" employee conduct will remain protected unless it is "unlawful, violent, in breach of contract, or

indefensible” (*NLRB v. Waco Insulation, Inc.*, 567 F.2d 596, 599 (4th Cir. 1977) (citing *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962)), or where employee conduct is “so egregious . . . or of such character as to render the employee unfit for further service” (*Anheuser-Busch, Inc. v. NLRB*, 338 F.3d 267, 280 (4th Cir. 2003) (quoting *Consumers Power Co.*, 282 NLRB 130, 132 (1986)); accord *NLRB v. Air Contact Transport, Inc.*, 403 F.3d 206, 211 (4th Cir. 2005)).

Determining whether an employee’s activity retains the protection of the Act requires the Board to balance the competing interests of the employer and the employee, and to assess the entire context in which the allegedly flagrant conduct took place. *See U.S. Postal Serv. v. NLRB*, 652 F.2d 409, 412 (5th Cir. 1981). Specifically, the Board looks to the four factors laid out in *Atlantic Steel Co.*, 245 NLRB 814 (1979): “(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee’s outburst; and (4) whether the outburst was, in any way, provoked by an employer’s unfair labor practice.” *Id.* at 816. The Board bears primary responsibility for striking the balance between the *Atlantic Steel* factors, “and its determination, unless arbitrary or unreasonable, ought not be disturbed.” *Mobil Exploration & Producing U.S., Inc. v. NLRB*, 200 F.3d 230, 243 (5th Cir. 1999); *cf. Eastern Omni Constructors, Inc. v. NLRB*, 170 F.3d 418, 423 (4th Cir. 1999) (striking the proper balance between the employee’s

protected rights and the employer's interests is a matter that falls "squarely within the specialized expertise of the Board").

Applying the four-part *Atlantic Steel* test here, the Board reasonably found, on balance, that Saxton did not lose the Act's protection by raising his voice and engaging in limited profane language when Thompson refused to honor his seniority. As an initial matter, the Board (A. 875) recognized that the location of the incident "counsels against protection" because it occurred both inside and outside the transportation office, and within hearing distance of other employees. However, the Board reasonably concluded that "this factor carries less weight given that the Company selected the setting of the confrontation." (A. 875.) *See Brunswick Food & Drug*, 284 NLRB 663, 665 (1987), *enforced mem.*, 859 F.2d 927 (11th Cir. 1988). Regarding the second prong, the Board reasonably found (A. 875) that the subject matter supports a finding that Saxton did not lose the Act's protection because it involved Saxton's interpretation of, and reliance upon, a contractual right to decline overtime work.

As to the nature of Saxton's conduct, the Board reasonably found (A. 861, 874) that Saxton's raised voice and profanity during his "shouting match with Thompson" did not render his concerted activity unprotected. Indeed, the Court has recognized that an employee does not lose the Act's protection simply because he becomes loud and boisterous. *See Waco Insulation*, 567 F.2d at 599; *Air*

Contact Transport, 403 F.3d at 211. Moreover, the Company does not dispute, as the Board found (A. 874 n.19; 62, 370-72, 393-94), that Saxton uttered his comments “in a loud warehouse where vulgar language was not uncommon.” (A. 861 n.19.) *See Corrections Corp. of America*, 347 NLRB 632, 636 (2006) (finding no loss of protection based on employee’s profanity where similar language was common among employees and supervisors alike). In addition, as the Board found, the comments occurred “at the end of the day with few employees present, and in response to being deprived of his contractual rights.” (A. 861 n.19.)

Finally, the Board (A. 874) reasonably declined to place too much emphasis on the fourth factor, whether the outburst was provoked. On the one hand, Thompsons’s directive was not, in and of itself unlawful. However, Saxton reasonably believed that Thompson’s order contravened his interpretation of the collective-bargaining agreement, and as discussed, was made at a time when three other junior drivers were available. Moreover, Saxton reacted to the “display of overt hostility” he faced as he was surrounded by three supervisors. (A. 876.)

In sum, the Board reasonably found (A. 874) that, under the circumstances, Saxton’s impulsive use of language did not cause him to lose the Act’s protection. Accordingly, the Board concluded (A. 861, 874-75), that the Company acted unlawfully when it discharged Saxton for invoking his contractual right to refuse overtime. *See U.S. Postal Serv.*, 332 NLRB at 343–344; *see also Interboro*

Contractors, 388 F.2d at 498-500 (employer unlawfully discharged employees who raised complaints about alleged violations of collective-bargaining agreement); *NLRB v. P*I*E* Nationwide*, 923 F.2d at 510, 514-16 (employer unlawfully discharged employee for refusing work where he asserted right pursuant to oral agreement between union and employer, and where employer previously had not disciplined employees for same conduct).

3. The Company's arguments are without merit

As an initial matter, the Company asserts (Br. 31-34) that the Board erred in finding that Saxton was reasonably trying to enforce a right under collective-bargaining agreement because, it claims, the record does not support the Board's finding that junior drivers were available to work overtime on September 29. Specifically, the Company claims (Br. 31) that the Board identified only employee Goodman as being available, but that Drayton's testimony established that Goodman had punched out and left by the time Brown went to look for someone else to take the truck. The Company's argument fails for several reasons. First, it ignores that the Board also identified employees Bowie and Williams as available to handle the request. Drayton's testimony, which Supervisor Brown did not dispute, establishes that Saxton, Goodman, and Bowie all arrived back at the facility at around the same time and went into the warehouse. Significantly, it is further undisputed that Brown would have seen them because he had to dismiss the

drivers. (A. 871 n.64; 414-16, 608-09.) Finally, consistent with Drayton's testimony and the Board's finding, the documentary evidence establishes that Bowie clocked out at 2:36 p.m., Goodman at 2:59 p.m., and Williams at 3:00 p.m. Saxton clocked out at 3:07 p.m., but only after he had discussed management's request that he work overtime and Thompson ordered him to punch out and not return. (A. 951, 954.) In these circumstances, credited evidence clearly supports the Board's finding that drivers more junior to Saxton, including Goodman, were available to work overtime at the time of the request.

Next, the Company argues (Br. 34-36) that regardless of whether Saxton had a reasonable belief that other drivers were available, the collective-bargaining agreement required Saxton instead to perform the requested overtime, notify the Union, and file a grievance. That argument fails because, as shown at p. 44, the agreement expressly grants an employee the right to refuse an overtime request and establishes a procedure for the Company to obtain another employee to perform the work. Nor does the Company advance its position by relying on Article 8, Section B of the agreement (Br. 35, A. 889), because that provision, as the Board found (A. 861), instead pertains to unprotected work stoppages. Thus, the provision states that a "Shop Steward shall not have the power to cause any cessation of work," but "in the event of a disagreement, he shall report it to the Union, meanwhile carrying out and instructing other members to carry out the orders of the Employer and the

Union.” (A. 889.) Here, Saxton did not question the Company’s right to request overtime work, or direct other employees to refrain from such work. Rather Saxton simply attempted to enforce his contractual right to decline an overtime request. And, as the Board found, “but for the [Company’s] refusal to assign the overtime to one of them, the work would have continued uninterrupted.” (A. 861.) Moreover, when Saxton told shop steward Drayton that Thompson “fired him again,” Drayton tried to talk with Thompson, and Brown then assigned the work to Wade. Therefore, the Board reasonably concluded that “Saxton’s refusal to accept the overtime assignment did not remotely fall within the contract’s prohibition of an unprotected work stoppage.” (A. 861.)¹³

The Company’s challenges (Br. 37-41) to the Board’s finding that Saxton’s conduct did not lose the Act’s protection also have no merit. Thus, contrary to the Company’s claim (Br. 37-38) that no one other than Saxton had a raised voice, the credited testimony of Saxton (A. 871 n.69; 172-73, 273), corroborated by the testimony of Kem Singh (A. 871; 374-75), establishes that both Saxton and Thompson raised their voices. Moreover, the Board is not, as the Company claims (Br. 38-39), blaming the Company for the location of the incident, but simply

¹³ Because Saxton was reasonably enforcing a contractual right, the cases the Company relies on (Br. 26 n.4), where employees were not trying to enforce such a right, have no bearing here. *See, e.g., John S. Swift Co.*, 124 NLRB 394, 397

recognizing that it occurred in an open noisy area of the warehouse. That said, as three supervisors joined the discussion and surrounded Saxton, the Company did not ask Saxton to continue the discussion in a more private area. (A. 811-12.)

This Court's decision in *Media General Operations, Inc. v. NLRB*, 394 F.3d 207 (4th Cir. 2005) (cited by Br. 40), does not advance the Company's position. In that case, the employee's outburst toward a supervisor was "devoid of substantive content" (*id.* At 211), and "merely a manifestation of the [employee's] personal sentiments towards his supervisor" (*id.* At 212). Here, by contrast, Saxton engaged in limited profanity while attempting to enforce a contractual right, and the language did not personally impugn any manager.¹⁴ In addition, the Company's expressed outrage over Saxton's limited profanity (Br. 39) is belied by Thompson's acknowledgment (A. 713) that the language played no role in his termination, and that the profanity was not directed at him (A. 611.)

(1959) (employees engaged in unprotected activity when they refused to work overtime under pain of discharge).

¹⁴ Other cases cited by the Company (Br. 40-41) are similarly distinguishable. *See, e.g., Am. Steel Erectors, Inc.*, 339 NLRB 1315, 1316-17 (2003) (employer did not violate Act when it refused to hire an applicant because the applicant lost the Act's protection when, absent a labor dispute, he used deliberate and outrageous exaggerations in a public setting to accuse the employer of unsafe practices); *The Mead Corp.*, 275 NLRB 323, 323-24 and n.2 (1985) (employee was informed that he would be disciplined if he refused to stay at work, but, nevertheless, left work despite having no contractual basis to refuse work assignment).

Finally, the Company's contention (Br. 48-49) that it did not discharge Saxton on September 29 has no merit. Thus, the Company does not dispute that after Saxton declined to work overtime on September 29, Thompson told Saxton to "punch out and not return the next day." Moreover, although Saxton reported to work on September 30 after discussions between the Union and the Company, the Board, in agreement with the judge, reasonably found "that this was only a temporary reprieve." (A. 861, 874.) Indeed, as the Board explained, "Thompson did not retract his statement." (A. 861.) Moreover, the Company's preparation in the interim of termination documents that included collecting statements about the September 29 incident, and the October 1 discharge letter, which relies on the events of September 29, undermines the Company's claim that it did not discharge Saxton effective that date.

In these circumstances, the Board was warranted to find that a "reasonable employee, when instructed to leave and not return would construe that instruction to be a termination." (A. 861-62.) *See FiveCAP, Inc.*, 331 NLRB 1165, 1201 (2000) (employer's statement to employee that if he left, he should not come back, coupled with subsequent instructions to leave, are sufficient to lead a prudent person to believe that the employer had fired him), *enforced*, 294 F.3d 768 (6th Cir. 2002); *Romar Refuse Removal, Inc.*, 314 NLRB 658, 670 (1994) (employer's statement to employee to "get out of here, . . . we don't need you anymore,"

coupled with its refusal to assign the employee work that day, was “more than sufficient to lead a prudent person to believe” that “he had had been terminated”). And, as the Board further explained, that view is “especially true in light of the fact that the [Company] had twice previously attempted to terminate Saxton.” (A. 862.)¹⁵ Accordingly, the Company has presented no basis to disturb the Board’s findings.

¹⁵ Because the Board found that the Company fired Saxton on September 29, the Board reasonably found it unnecessary to pass on the judge’s finding that the Company’s conduct on October 2—when it gave Saxton the discharge letter dated October 1—also constituted a separate violation of Section 8(a)(4) and (3) of the Act. In any event, the Company has not argued to the Board or the Court that Saxton’s alleged conduct on September 30, referenced in the letter, would have independently justified his discharge.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the Company's petition for review and enforcing the Board's Order in full.

Respectfully submitted,

/s/ Jill A. Griffin

JILL A. GRIFFIN

Supervisory Attorney

/s/ David A. Seid

DAVID A. SEID

Attorney

National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001
(202) 273-2949
(202) 273-2941

RICHARD F. GRIFFIN, JR.

General Counsel

JENNIFER ABRUZZO

Deputy General Counsel

JOHN H. FERGUSON

Associate General Counsel

LINDA DREEBEN

Deputy Associate General Counsel

January 2017

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FOR THE FOURTH CIRCUIT**

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)	
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v.)	
)	Board Case Nos.
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)	05-CA-132227
Respondent/Cross-Petitioner)	05-CA-138025
)	
and)	
)	
DRIVERS, CHAUFFEURS AND HELPERS)	
LOCAL UNION NO. 639)	
)	
Intervenor)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its final brief contains 12,720 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

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

Dated at Washington, DC
this 12th day of January, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fourth 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:

Scott V. Kamins
Offit Kurman, PA
8171 Maple Lawn Boulevard, Suite 200
Maple Lawn, MD 20759

Lauren Powell McDermott, Esq.
John Robert Mooney
Mooney, Green, Saindon, Murphy & Welch, PC
1920 L Street, NW, Suite 400
Washington, DC 20036

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
this 12th day of January, 2017