

**Nos. 17-1450 & 17-2198**

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

**TSCHIGGFRIE PROPERTIES, LTD.**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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## **SUMMARY OF THE CASE**

This case involves the Company's unlawful discipline and discharge of employee Darryl Galle—a vocal proponent of unionization among the Company's workers—and the Company's subsequent questioning of one of Galle's colleagues about matters including Galle's statutorily protected union activity. The Company does not dispute the Board's findings that its discipline of Galle for expressing “union organizational viewpoints” overtly discriminated against Galle for his union activity and would reasonably tend to chill such activity, in plain violation of law.

Contrary to the Company's claims, moreover, substantial evidence supports the Board's finding that the discharge of Galle, like the discipline that preceded it, was motivated by hostility towards Galle's union activity. Indeed, by taking action based on a newly concocted policy, without investigation, and by relying on after-the-fact justifications and evidence, the Company only bolstered the Board's finding of discriminatory motive. Substantial evidence also supports the Board's finding that the Company coercively questioned one of Galle's co-workers in preparing for the hearing over Galle's discriminatory discipline and discharge.

The Board believes that this case involves application of well-settled principles to straightforward facts and that oral argument would not materially assist the Court. However, if the Court believes that argument is necessary, the Board requests to participate and suggests a time allocation of 10 minutes per side.

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**BRIEF FOR  
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**STATEMENT OF JURISDICTION**

This case is before the Court on a petition filed by Tschiggfrie Properties, Ltd. (“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. The Board’s Decision and Order issued on February 13, 2017, and is

reported at 365 NLRB No. 34. (A 15-30.)<sup>1</sup> In its decision, the Board found that the Company violated Section 8(a)(3) and (1) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 158(a)(3) and (1)) (“the Act”), by issuing a written warning to employee Darryl Galle because he engaged in statutorily protected union activities, and by later discharging him for those activities. The Board further found that the Company independently violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by including language in its warning to Galle that would reasonably tend to chill protected union activity, and by twice interviewing employee Bill Kane in preparation for the unfair-labor-practice hearing in this case, without affording Kane all of the legal protections owed to employees in such interviews.

The Board had subject matter jurisdiction under Section 10(a) of the Act (29 U.S.C. § 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)) and venue is proper because the unfair labor practices occurred in Dubuque, Iowa. The Board’s Order is final with respect to all parties.

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<sup>1</sup> Record references are to the Appendix (“A”) filed by the Company with its opening brief, and to the Separate Appendix (“SA”) filed by the Board with this brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” references are to the Company’s opening brief.

The Company filed its petition for review on March 1, 2017. The Board filed its cross-application for enforcement on May 31, 2017. Both filings were timely, as the Act places no time limit on the institution of proceedings to review or enforce Board orders.

### **STATEMENT OF THE ISSUES PRESENTED**

1. Whether the Board is entitled to summary enforcement of the uncontested portions of its Order corresponding to its findings that the Company's written warning to employee Darryl Galle violated the Act in several respects.

*NLRB v. Rockline Indus., Inc.*, 412 F.3d 962, 966 (8th Cir. 2005).

*NLRB v. Bolivar-Tees, Inc.*, 551 F.3d 722, 727 (8th Cir. 2008).

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

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

*NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764 (8th Cir. 2013).

3. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by coercively interrogating employee Bill Kane about matters that were the subject of this unfair labor practice proceeding.

*Johnnie's Poultry Co.*, 146 NLRB 770, 774-75 (1964), *enforcement denied*, 344 F.2d 617 (8th Cir. 1965).

*Standard-Coosa-Thatcher Carpet Yarn Div. v. NLRB*, 691 F.2d 1133 (4th Cir. 1982).

*Bill Scott Oldsmobile*, 282 NLRB 1073, 1075 (1987).

## **STATEMENT OF THE CASE**

Acting on an unfair-labor-practice charge filed by Teamsters Local 120, affiliated with International Brotherhood of Teamsters (“the Union”), the Board’s General Counsel issued a complaint alleging that the Company violated Section 8(a)(1) of the Act by instructing employees, in writing, that they were not to discuss the Union at work; and violated Section 8(a)(3) and (1) of the Act by disciplining and discharging employee Darryl Galle for his union activity.

An administrative law judge held a hearing on the unfair-labor-practice allegations. During the course of the hearing, the General Counsel moved to amend the complaint to further allege that the Company violated Section 8(a)(1) of the Act when it interviewed employee witnesses prior to the start of the hearing without providing required assurances. After considering the merits of the allegations, the judge concluded that amending the complaint to allege instances of unlawful interrogation was not warranted and denied the General Counsel’s motion. However, the judge found that the Company violated the Act in other respects as alleged in the complaint.

On February 13, 2017, the Board issued a Decision and Order affirming the judge’s unfair-labor-practice findings. In addition, upon cross-exceptions by the

General Counsel, the Board found that the Company's interviews of one employee during preparation for the hearing were, as alleged by the General Counsel and litigated at the hearing, coercive interrogations that violated Section 8(a)(1) of the Act. The Board's findings of facts, and its Conclusions and Order, are summarized below.

## **I. THE BOARD'S FINDINGS OF FACTS**

### **A. Background; the Company and Its Operations**

The Company is one of several related businesses operated by members of the Tschiggfrie family. (A 19; A 4, 13, SA 1-2, 5, 29-30, 46.) The Company is a subsidiary of Tschiggfrie Excavating, which, like the Company itself, is under the control of President Ed Tschiggfrie. (A 19; A 4, 13, SA 1.) Tschiggfrie's son, Rodney ("Rod") Tschiggfrie, serves as the General Manager of both entities. (A 19; A 4, 13, SA 2-3, 29-30, 66.) The Company's sole purpose is to repair and maintain Tschiggfrie Excavating's heavy equipment. (A 19; SA 1-2.)

To carry out this limited purpose, the Company employs between 5 and 8 employees, some of whom are mechanics. (A 19, 21, 23; SA 2-3.) The mechanics service equipment, replacing parts and repairing components as necessary. (A 21; SA 113.) For purposes of diagnosing and correcting equipment problems, the mechanics sometimes use computers and other devices provided by the Company,

or their own personal computers, as well as information available on the internet.<sup>2</sup>  
(A 21; SA 48-49, 114-17, 122-23.)

In 2015, when the events at issue unfolded, the Company permitted employees to use their personal computers at work, and to use the Company's wireless internet connection ("wi-fi") to access the internet on their personal computers. (A 21; SA 17, 49, 64-65, 69, 115.) The Company did not have any rules regulating the use of personal computers or company wi-fi. (A 15 n.1, 23; SA 17, 49, 64-65, 69, 101-02, 116-17.) The Company also did not have any rules regulating workplace discussions among employees, or preventing employees from talking to one another while working. (A 20; SA 17, 73-74, 118.)

**B. Employee Darryl Galle Initiates a Campaign To Organize the Company's Mechanics and Begins Discussing the Union with Fellow Employees**

For most of its 53-year existence, Tschiggfrie Excavating has been a union company and signatory to various collective-bargaining agreements negotiated on its behalf by the Heavy Highway Contractors Association, a multi-employer bargaining group. (SA 29, 31, 103-05.) By contrast, the Company, until 2015, had been a non-union business for most of its 30-year existence. (SA 61.)

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<sup>2</sup> The Company makes computers and other devices available to employees in certain areas of the facility; it does not issue computers or other devices to individual employees. (SA 48, 69, 76, 122.)

In early 2015, mechanic Darryl Galle contacted the Union and got information about what he could do to organize his fellow mechanics. (A 19, 22; SA 70, 78.) Galle thereafter began discussing the Union with other mechanics at work. (A 19-20; SA 70, 124-28.)

By mid-April 2015, the Union had received a sufficient showing of interest from the mechanics to formally petition to represent those employees for purposes of collective bargaining. The Union filed a representation petition with the Board on April 22, 2015. (A 19; A 31.) The Union also served a copy of the petition on the Company, but mistakenly listed Galle as the contact person for the Company and mailed the petition to him at the Company's address. (A 19; A 31-35, SA 6, 79.) When Galle received the petition, he called the Union and asked what he was supposed to do with the paperwork. (SA 70-71.) The Union informed him that the paperwork should have gone to the Company's office. (SA 71.) On the Union's instructions, Galle called General Manager Rodney Tschiggfrie, explained that the petition had been misdirected, and hand-delivered the petition to Tschiggfrie's office. (SA 70-71.) Tschiggfrie gathered, from this episode, that Galle had some involvement with the Union's petition. (A 22; SA 35.)

In addition, around the same time, Rodney Tschiggfrie heard from employees that Galle was talking about the Union at work. (SA 34-35, 37.) At least two of the employees told Tschiggfrie that they felt badgered by Galle's

constant talk, but Tschiggfrie chose not to address the issue with Galle at that time. (SA 37-38, 124-28, 131.)

On May 13, 2015, the Board held an election to determine whether the mechanics wanted to be represented by the Union. (A 19; SA 79.) Galle served as the Union's observer during the election. (A 19; SA 6, 72, 79-80.) The employees voted in favor of union representation. (A 19; SA 4, 80.) The Company thereafter recognized the Union as the employees' exclusive representative and began bargaining with the Union over an initial collective-bargaining agreement. (A 20; SA 43-44, 80.)

**C. The Company Begins Investigating Complaints about Galle, an Employee with No Prior Performance Issues**

At the time of the election, Galle had a clean record at the Company: he was a highly qualified mechanic who had never received any written discipline. (SA 61, 66-68, 72, 75.) Soon after the election, however, the Company decided to act on the complaints of a few employees that Galle was "bothering" them about the Union. (A 19-20; SA 8-12, 24-25, 37-38.) General Manager Rodney Tschiggfrie had a company attorney, Denis Reed, speak to Union Business Agent Kevin Saylor, so that Saylor, in turn, could ask Galle to "tone it down." (A 19-20; SA 8-10, 15-16, 38-40, 42-43, 77, 106-09.)

Reed, who was already dealing with Saylor to negotiate a collective-bargaining agreement, raised the issue in telephone calls to Saylor. (A 20; SA 10,

43, 81-83, 109.) He then raised the issue again in a May 20, 2015 email to Saylor about various bargaining matters, stating:

Please speak to Darryl Galle as he continues to harass other employees on company time. If he doesn't stop I will recommend that steps be taken.

(A 20; A 39.) Despite these efforts, Galle continued to discuss the Union with other employees at work; a few employees continued to complain about Galle's focus on the Union; and Rodney Tschiggfrie continued to discuss the complaints with Attorney Reed, so that Reed could relay them to Saylor and perhaps curb Galle's "aggressive" promotion of the Union at work.<sup>3</sup> (A 20; SA 43, 84, 110-12.)

**D. The Company Issues a Warning to Galle for Discussing His Views about the Union with Fellow Employees; the Company's Attorney Warns the Union that Galle Will Be Subject to Termination if He Does Not Stop**

In August 2015, General Manager Rodney Tschiggfrie informed his father, Company President Ed Tschiggfrie, that Galle persisted in talking about the Union at work, despite the instruction, conveyed through Attorney Reed to Union Business Agent Saylor, that Galle desist from such talk. (A 20; SA 13-14, 45-46.) After conferring with Rodney Tschiggfrie and Attorney Reed, Ed Tschiggfrie had his assistant prepare the following written warning:

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<sup>3</sup> It is not entirely clear whether Saylor relayed the Company's concerns to Galle. (A 20; SA 83-85.)

This is an official notice of written warning for discussing union organizational viewpoints with fellow employees during work. This matter will stop immediately.

(A 20; A 40, SA 15, 46.) Ed Tschiggfrie's assistant handed the warning to Galle on August 17, 2015. (A 20; SA 15, 72-73.)

The following day, at General Manager Rodney Tschiggfrie's request, Attorney Reed sent an email to Union Business Agent Saylor emphasizing the possible implications of Galle's continued talk about the Union at work. (A 24; SA 15-16, 85.) The email stated:

Rod has had other employees unhappy about [Galle's] constant diatribe. If he can't get it out of his system and stop bothering people at work I believe he will be subject to termination.

(A 24; A 41, SA 111-12.)

**E. The Company Summarily Discharges Galle After Observing a Nonwork-Related Website Open on His Personal Computer**

On October 1, 2015, about six weeks after the Company issued the above warning to Galle, General Manager Rodney Tschiggfrie observed two laptop computers open in Galle's work area. (A 21; SA 47.) Galle was on his break at the time. (A 21; SA 18.) Tschiggfrie approached the computers and surmised that one of them was Galle's personal laptop. (A 21; SA 47-48.) Looking at that laptop, he noticed that the screen displayed a web page from a site called QuickFunnels.com. (A 21; A 58, SA 49-50.) Tschiggfrie further noticed that the

web browser showed tabs for various other web pages: “GoGoDropShip.com,” “Thunderball Marketing, Inc.,” and “Traffic Authority E-mail prof.” (A 21; A 58, SA 50.) Tschiggfrie did not consider any of the websites to be work-related and took a photograph of the computer screen to memorialize what he had seen. (A 21; A 58, SA 50-52.)

Tschiggfrie then went in search of Galle, but quickly abandoned the search when he realized that it was Galle’s scheduled break time. (A 21; SA 18, 52.) Tschiggfrie waited until after the break and then returned to Galle’s work area with Office Manager Ty Malcom, whom Tschiggfrie had asked to accompany him as a witness. (A 21; SA 18, 23, 52-53.) For good measure, Tschiggfrie also engaged an audio recording device as he approached and confronted Galle. (A 21; SA 52-53.) The device recorded the following exchange:

TSCHIGGFRIE: Darryl, is this your laptop over here, or is this the Company’s?

GALLE: No, it’s mine.

TSCHIGGFRIE: Okay, were you on this before break?

GALLE: Off and on, yeah.

TSCHIGGFRIE: Okay.

GALLE: Just so you’re aware, I don’t take all of the pages down. I just put it to sleep.

TSCHIGGFRIE: I just walked into this room about ten minutes ago, Darryl, and this page was up. The computer wasn’t even sleeping,

and just so you know, I photographed this, and it appears, Darryl—and I'm recording this conversation, Darryl. It appears that you are doing something else, other than what you're getting paid for. Is that pretty accurate?

GALLE: No, it's not.

TSCHIGGFRIE: So, what were you doing on this computer, looking at this stuff here, when I am hired to pay you to work on a transmission?

GALLE: Getting the information because this transmission—because you don't have the manual for it.

TSCHIGGFRIE: Darryl, this is the page that is up, and let me read it out loud here. It was—I scrolled just a little bit. I am sorry about this.

'Part 2, the Automatic Authority Formula,' it says, 'The Automatic Authority Formula is the art of using a well-designed welcome e-mail sequence over the first five to seven days.'

It sounds like some kind of a business plan or something else, other than what we would want to have at Tschiggfrie Excavating.

I think your first response is pretty accurate, that you're on your computer here . . . prior to break time.

Do you have anything else to say?

GALLE: I was looking for information on that transmission.

TSCHIGGFRIE: There's another laptop right here. Who owns this laptop?

GALLE: That's yours.

TSCHIGGFRIE: Okay. Well, you know what? Darryl, as of this moment, you are terminated.

(A 21; A 63, SA 20-22, 52-53.)

After terminating Galle, Tschiggfrie precipitously announced that he was “going to take [Galle’s] computer.” (A 21; SA 22.) He claimed he had “a right” to do so—that the computer was his property, since Galle had used it on company time. (A 21; SA 22.) Galle, however, quickly took his computer in hand and told Tschiggfrie, “No, you’re not taking that computer.” (A 21; SA 22, 53-54.) Tschiggfrie then terminated Galle anew, this time “for not cooperating with what I’m asking you to do.” (A 21; SA 22.) Galle responded by stating he simply would not “leave [his] computer here for you to do whatever you want with.” (A 21; SA 22.) Tschiggfrie explained that he would let Galle stand next to the computer while a “computer forensic technician” checked “how much [Galle was] on that computer and that website.” (A 21; SA 22.) Galle refused to allow this, noting that Tschiggfrie had “already said [he] was terminated.” (A 21; SA 22.)

**F. The Company Gathers Evidence To Support Its Discharge Decision After the Fact**

After Galle left the facility, General Manager Rodney Tschiggfrie engaged the services of an information technology specialist to resolve whether Galle, notwithstanding his denials, had visited nonwork-related websites during the workday on October 1, 2015. (A 21-22; SA 56-59, 86-87, 100.) The information technology specialist, Victor Mowery, did not have the benefit of Galle’s personal laptop for purposes of his investigation, but he was able to review the logs associated with the Company’s wi-fi network. (A 21-22; SA 88-89, 100.) Based

on the data in the logs, Mowery concluded that a computer registered as “Darryls” had accessed several nonwork-related websites during work hours on October 1, including QuickFunnels.com. (A 22; SA 90-99.) The Company did not communicate Mowery’s conclusion to Galle, who was already terminated at that point.

**G. Before the Unfair-Labor-Practice Hearing, the Company Twice Interviews Employee Kane about Galle and the Union Campaign**

In preparation for the hearing in this case, Company Attorney Davin Curtiss and General Manager Rodney Tschiggfrie interviewed employee Bill Kane twice, both times in Tschiggfrie’s office at the facility where Kane works. (A 15; SA 139, 143.) The first interview was approximately a month before the hearing. (A 15; SA 139.) Kane was told the purpose of the meeting was to talk about some issues with Galle and his termination. The Company questioned Kane about the union campaign and Galle’s approaching Kane to talk about the Union as well as Galle’s alleged misconduct. (A 15; SA 140-41.) Kane testified that he could not “honestly say” whether the Company told him that the first interview was voluntary, but the Company did not tell Kane that it would not take any action against him as a result of the first interview. (A 16; SA 142.)

Approximately a week before the hearing, Curtiss and Tschiggfrie interviewed Kane again. (A 15; SA 139.) During the second interview, the

Company again questioned Kane about the union campaign. (A 16; SA 143.) The Company did not tell Kane that the interview was voluntary and Kane believed that he had to be there because he had been served with a subpoena for the hearing. (A 16; SA 143-44.) The Company did not assure Kane that it would not take action against him as a result of the interview. (A 16; SA 144.)

## **II. THE BOARD'S CONCLUSIONS AND ORDER**

On the foregoing credited facts, the Board (Acting Chairman Miscimarra and Members Pearce and McFerran) found that the Company's written warning to Galle "independently violated both Sec[ti]on 8(a)(1) and (3) of the Act." (A 15 n.1.) The Board found that the language of the warning reasonably tended to chill protected union activity, in violation of Section 8(a)(1) of the Act, by suggesting that employees would be subject to discipline for engaging in union discussions at work and would be prohibited from such conduct in the future. (A 20.) The Board further found that the warning "[o]n its face, . . . constitute[d] discrimination for engaging in protected activity," and thus violated Section 8(a)(3) of the Act. (A 20.)

The Board (Members Pearce and McFerran; Acting Chairman Miscimarra concurring) found that the Company additionally violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by discharging Galle about six weeks after issuing the above unlawful warning to him. (A 15 1 n.1.) In so finding, the

Board reasoned that the evidence presented by the General Counsel “established that Galle’s union activity, which included initiating the organizing campaign, serving as the Union’s election observer, and frequently discussing the Union with coworkers, was a motivating factor in the [Company’s] decision to discharge him.”<sup>4</sup> (A 15 n.1.) The Board further found that the Company had failed to rebut the General Counsel’s evidence of unlawful motivation by proving “that it would have discharged Galle even in the absence of his union activity.” (A 15 n.1.)

Finally, the Board (Members Pearce and McFerran; Acting Chairman Miscimarra concurring) found that the Company independently violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by twice coercively interrogating employee Bill Kane about the union campaign, and Galle’s activities in particular, in preparation for the unfair-labor-practice hearing in this case. (A 15-16.) The Board found that the interviews were coercive because the Company “failed to provide Kane with assurances against reprisals at both interviews and failed to

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<sup>4</sup> In concurring with this finding (A 15 n.1), Acting Chairman Miscimarra disagreed with the majority’s and the judge’s statement of the General Counsel’s burden in cases involving adverse employment actions allegedly motivated by anti-union animus. Acting Chairman Miscimarra would specifically require the General Counsel to “establish a link or nexus between the employee’s protected activity and the employer’s decision to take the employment action alleged to be unlawful.” (A 15 n.1.) *See also Nichols Aluminum, LLC v. NLRB*, 797 F.3d 548, 554-55 (8th Cir. 2015) (holding that “general hostility toward the union does not itself supply the element of unlawful motive”). Even under that standard, however, Acting Chairman Miscimarra found that the General Counsel had made the requisite showing of unlawful motivation in this case.

inform him that his participation in the second interview was voluntary,” as required under the Board’s rule in *Johnnie’s Poultry Co.*, 146 NLRB 770 (1964), *enforcement denied*, 344 F.2d 617 (8th Cir. 1965).<sup>5</sup> (A 16.)

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 their statutory rights. (A 17.) Affirmatively, the Board’s Order requires the Company to: rescind the written warning issued to Galle on August 17, 2015; offer Galle reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position; make Galle whole for any loss of earnings and other benefits suffered as a result of his unlawful discharge; compensate Galle for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Regional Director for Region 25 allocating Galle’s backpay to the appropriate calendar years; remove from its files any reference to the unlawful warning and discharge of

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<sup>5</sup> Acting Chairman Miscimarra concurred in the finding of this violation (A 16 n.5), evaluating the Company’s interviews of Kane under the totality-of-the-circumstances test set forth in *Rossmore House*, 269 NLRB 1176 (1984), *enforced sub nom. Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.3d 1006 (9th Cir. 1985).

Galle, and notify him in writing that this has been done and those actions will not be used against him in any way; and post a remedial notice.<sup>6</sup> (A 17-18.)

### **SUMMARY OF ARGUMENT**

The Board's order should be enforced in full. In its opening brief, the Company does not deny that it violated Section 8(a)(1) and (3) of the Act by issuing a coercive and discriminatory warning to employee Galle for "discussing union organizational viewpoints with fellow employees during work." (A 20.) Accordingly, under well-settled law, the Board is entitled to summary enforcement of the portions of its Order relating to the unlawful warning.

Moreover, substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by discharging Galle six weeks after issuing the above unlawful warning to him. Although the Company offered nondiscriminatory justifications for its discharge decision, the Board found, pursuant to the undisputedly applicable *Wright Line* framework for determining employer motivation, that the Company's discharge of Galle was unlawfully

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<sup>6</sup> In explaining the various elements of the remedy, the Board provided that the Company will be allowed "to establish in compliance that based on the after-acquired evidence produced by the [Company's] post-discharge investigation, Galle should not be reinstated and/or that backpay should be terminated as of the date the [Company] acquired knowledge" of misconduct by Galle that would have warranted the discharge of any employee. (A 16-17.) However, as further discussed below pp. 41-46, the Board declined to deny reinstatement and backpay to Galle outright based on any allegedly false testimony he may have given at the hearing. (A 17 n.8.)

motivated. In this regard, substantial evidence supports the Board's findings that: (1) there was sufficient evidence in the record to support an inference that the Company's discharge decision was unlawfully motivated by animus towards Galle's protected union activity; and (2) the Company failed to rebut the inference of unlawful motivation by showing that it would have taken the same action against Galle even in the absence of his protected activity. Although the Company now claims that, in making these findings, the Board failed to hold the General Counsel to the "correct" burden of proof, the Company made no such argument before the Board and therefore is foreclosed from securing consideration of that argument here. (Br. 23.)

In an effort to nevertheless escape liability for its unlawful discharge of Galle, the Company argues that Galle should be deprived of a remedy because he gave false testimony at the underlying hearing in this case. However, there was no finding by the judge who presided over the hearing that Galle lied under oath. Moreover, the Board reasonably found that, even assuming that Galle lied, his lies were not of such magnitude or significance as to warrant withholding a remedy from him.

Substantial evidence also supports the Board's finding that the Company violated Section 8(a)(1) of the Act by twice interviewing employee Bill Kane in preparation for the hearing in this case, about the union campaign and about

Galle’s union activities, without abiding by specific safeguards that the Board, for over 50 years, has required employers to comply with when interviewing employees about union activities in preparation for unfair labor practice proceedings. Specifically, the Company did not offer Kane any assurance against reprisal and failed to inform him that the second interview, held one week before the hearing, was voluntary. Because of the particular risks inherent in interviewing employees in preparation for litigation, the Board was not required to use the Company’s favored legal test, which applies to interrogations outside that context. Even so, the Board’s test takes into account considerations that are also relevant to evaluating whether any interrogation is coercive, such as assuring against reprisals—an assurance that the Company did not give Kane.

### **STANDARD OF REVIEW**

“This [C]ourt must enforce the NLRB’s order if the Board correctly applied the law, and if its findings of facts are supported by substantial evidence on the record considered as a whole.” *NLRB v. Vincent Brass & Aluminum Co.*, 731 F.2d 564, 566 (8th Cir. 1984) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951)); *see also* 29 U.S.C. § 160(e) (factual findings of the Board are “conclusive” if supported by substantial evidence). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *NLRB v. La-Z-Boy Midwest, a Div. of La-Z-Boy Inc.*, 390 F.3d 1054,

1058 (8th Cir. 2004) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Accordingly, the Court may not “displace the Board’s choice between two fairly conflicting views [of the evidence], even though the court would justifiably have made a different choice had the matter been before it *de novo*.” *Universal Camera*, 340 U.S. at 488. And “while this [C]ourt must take into account contradictory evidence in the record, the possibility that two inconsistent conclusions may be drawn from the evidence does not mean that the Board’s findings are unsupported by substantial evidence, considering the record as a whole.” *Vincent Brass & Aluminum*, 731 F.2d at 567.

## **ARGUMENT**

### **I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THE UNCONTESTED PORTIONS OF ITS ORDER**

In its opening brief, the Company does not challenge the Board’s finding that its August 17, 2015 warning to employee Darryl Galle “independently violated both Sec[ti]on 8(a)(1) and (3) of the Act.” (A 15 n.1.) Thus, the Company does not dispute that its warning interfered with employees’ statutory rights, in violation of Section 8(a)(1) of the Act, by suggesting that employees “would be subject to discipline” for “discussing union organizational viewpoints” at work, and that any such discussions would be prohibited in the future. (A 20.) *See Double Eagle Hotel & Casino v. NLRB*, 414 F.3d 1249, 1255-56 (10th Cir. 2005) (recognizing the well-settled principle that “an employer violates Section 8(a)(1) when . . .

employees are forbidden to discuss unionization while working, but are free to discuss other subjects unrelated to work”). Nor does the Company dispute that the warning, “[o]n its face, . . . constitute[d] discrimination for engaging in protected activity.” (A 20.) *See NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 785 (8th Cir. 2013) (“When the employer’s admitted motivation encompasses protected labor activity, the employer has in effect admitted an NLRA violation . . . .”); *Cintas Corp. v. NLRB*, 589 F.3d 905, 916-17 (8th Cir. 2009) (holding that employer violates Section 8(a)(3) and (1) by issuing verbal and written warnings to employees because of their union activity).

As the Company has waived any challenge to the portions of the Board’s Order corresponding to the above findings, the Board is entitled to summary enforcement of those aspects of the Order. *See NLRB v. Bolivar-Tees, Inc.*, 551 F.3d 722, 727 (8th Cir. 2008) (finding the Board entitled to summary enforcement as to aspects of the Board order not challenged on appeal); *NLRB v. Rockline Indus., Inc.*, 412 F.3d 962, 966 (8th Cir. 2005) (same; employer had waived challenge to the Board’s finding of an unlawful warning).

Nevertheless, the uncontested violations do not disappear simply because they are not preserved for appellate review; rather, they remain in the case, “lending their aroma to the context in which the remaining issues are considered.” *NLRB v. Clark Manor Nursing Home*, 671 F.2d 657, 660 (1st Cir. 1982); *accord*

*NLRB v. Gen. Fabrications Corp.*, 222 F.3d 218, 232 (6th Cir. 2000). *See also* *Rockline Indus.*, 412 F.3d at 968 (uncontested violation considered as “important background information” in analyzing contested violation); *Radisson Plaza Minneapolis v. NLRB*, 987 F.2d 1376, 1382 (8th Cir. 1993) (findings that are summarily enforced “remain relevant” in resolving remaining issues).

**II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCHARGING EMPLOYEE DARRYL GALLE FOR HIS PROTECTED UNION ACTIVITY**

**A. An Employer Violates Section 8(a)(3) and (1) of the Act by Discharging an Employee for Protected Union Activity**

“While normally an employer is free to discharge an at-will employee for any or no reason, the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, provides protections for workers who seek to form a union or otherwise engage in concerted labor activities.” *RELCO Locomotives*, 734 F.3d at 780. Specifically, Section 7 of the Act protects employees in the exercise of their rights to “self-organization,” and “to form, join, or assist labor organizations,” and Section 8(a)(3) of the Act enforces this protection by making it an unfair labor practice for an employer to discriminate “in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization . . . .” 29 U.S.C. §§ 157, 158(a)(3).

It is well settled that an employer violates Section 8(a)(3) of the Act by discharging an employee for protected union activity.<sup>7</sup> *See Rockline Indus.*, 412 F.3d at 970 (upholding Board finding that employer violated Section 8(a)(3) by suspending and discharging employee because of his protected union activity on company premises); *see also Cintas Corp.*, 589 F.3d at 916-17 (upholding Board finding that employer violated Section 8(a)(3) by issuing verbal and written warnings to employees because they expressed support for union at work). Where, as here, an employer's discharge decision is not expressly based on union activity, the question becomes one of motivation: "whether the employee's termination was motivated by protected [union] activity." *RELCO Locomotives*, 734 F.3d at 780.

In *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Supreme Court approved the Board's *Wright Line*<sup>8</sup> test for determining motivation. 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

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<sup>7</sup> It is equally well settled that a violation of Section 8(a)(3) produces a derivative violation of Section 8(a)(1) (29 U.S.C. § 158(a)(1)), 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" of the Act. *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

<sup>8</sup> 251 NLRB 1083, 1089 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

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 NLRB v. MDI, Commer. Servs.*, 175 F.3d 621, 625 (8th Cir. 1999). 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.

Before the Board, the General Counsel must make a showing “sufficient to support the inference that protected conduct was a ‘motivating factor’ in the employer’s decision.” *Pace Indus., Inc. v. NLRB*, 118 F.3d 585, 590 (8th Cir. 1997) (internal quotation marks and citations omitted). “The elements commonly required to support a finding of discriminatory motivation are union activity by the employee, employer knowledge of that activity, and antiunion animus by the employer.” *Mesker Door, Inc.*, 357 NLRB 591, 592 (2011).

Where the General Counsel establishes these elements, the Board will find the employer’s action unlawfully motivated unless the employer can rebut the inference of unlawful motivation raised by the General Counsel’s evidence. *Transp. Mgmt. Corp.*, 462 U.S. at 395. As this Court has emphasized, however, an employer cannot escape liability by merely pointing to “the existence of a

nondiscriminatory rationale” for its action. *RELCO*, 734 F.3d at 780. “In order to satisfy [its] burden, the [employer’s] rationale cannot only be a potential or partial reason for the termination, it must be ‘*the justification.*’” *Id.* (quoting *Rockline Indus.*, 412 F.3d at 970); *see also DeQueen Gen’l Hosp. v. NLRB*, 744 F.2d 612, 615-16 (8th Cir. 1984) (employer must prove “by a preponderance of the evidence” that it would have discharged the employee in any event (internal quotation marks and citation omitted)).

If the employer fails to meet its burden under *Wright Line*, the Board is entitled to conclude that the General Counsel carried his overall burden of proving the violation—“that but for [the employee’s] union activities or membership, he would not have been discharged.” *Nichols Aluminum, LLC v. NLRB*, 797 F.3d 548, 554 (8th Cir. 2015); *see also NLRB v. Chipotle Servs., LLC*, 849 F.3d 1161, 1163 n.2 (8th Cir. 2017) (noting that if the General Counsel’s *initial* burden included the obligation to prove that protected activity was the “but for” cause of the employee’s discharge, nothing would be left for the employer to prove at the second stage of the *Wright Line* analysis).

Ultimately, whether an employer’s adverse employment action was unlawfully motivated is “a question of fact for the Board.” *GSX Corp. of Missouri v. NLRB*, 918 F.2d 1351, 1356 (8th Cir. 1990). The Board may find unlawful motivation based on circumstantial as well as direct evidence, and, indeed, “in

many cases [motivation] can be proved only by the use of circumstantial evidence.” *NLRB v. Senftner Volkswagen Corp.*, 681 F.2d 557, 559 (8th Cir. 1982).

“In analyzing the evidence, circumstantial or direct, the Board is free to draw any reasonable inference.” *Id.* Of particular relevance here, this Court has held that the Board may infer unlawful motivation from such factors as: admitted discriminatory conduct or prior uncontested violations;<sup>9</sup> implausible, false, or shifting employer justifications;<sup>10</sup> tolerance of the behavior for which the employee was allegedly fired;<sup>11</sup> failure to adequately investigate alleged misconduct before taking action;<sup>12</sup> after-the-fact investigation and justifications;<sup>13</sup> and disparate treatment of employees who engage in protected union activity.<sup>14</sup>

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<sup>9</sup> *Rockline Indus.*, 412 F.3d at 968 (citing cases).

<sup>10</sup> *RELCO Locomotives*, 734 F.3d at 782; *Rockline Indus.*, 412 F.3d at 968.

<sup>11</sup> *RELCO Locomotives*, 734 F.3d at 787.

<sup>12</sup> *Id.*; *Rockline Indus.*, 412 F.3d at 969.

<sup>13</sup> *RELCO Locomotives*, 734 F.3d at 787; *Milum Textile Servs. Co.*, 357 NLRB 2047, 2074 (2011).

<sup>14</sup> *Rockline Indus.*, 412 F.3d at 970.

**B. Substantial Evidence Supports the Board’s Finding that the Company’s Discharge of Galle Was Unlawfully Motivated**

**1. Galle’s union activity was “a motivating factor” in the Company’s decision to discharge him**

Substantial evidence supports the Board’s finding that Galle’s union activity was “a motivating factor” in the decision to discharge him on October 1, 2015. (A 15 n.1, 22.) As the Board found, the evidence presented by the General Counsel clearly established that Galle was a known union activist. (A 15 n.1.) Galle “started the union organizing campaign by contacting the Union,” and General Manager Rodney Tschiggfrie deduced that Galle was involved at an early stage, when he received the Union’s election petition erroneously listing Galle as a contact person for the Company. (A 22.) If Tschiggfrie thereafter had lingering doubts as to Galle’s active role in the union organizing campaign, those doubts were effectively removed when the Union designated Galle to serve as its observer at the May 13, 2015 election, and when employees reported to Tschiggfrie—in the spring of 2015, and consistently thereafter—that Galle was “frequently discussing the Union with coworkers.” (A 15 n.1.)

As the Board found, moreover, the General Counsel successfully showed that Galle’s discussions about the Union were not simply known to the Company; they provoked an almost immediate negative reaction from Company officials. Thus, General Manager Rodney Tschiggfrie had Company Attorney Reed contact

Union Business Agent Saylor several times, beginning in the spring of 2015, to try and stop Galle from “harass[ing]” other employees about the Union. (A 20.)

When those communications proved ineffective, Tschiggfrie took the matter to his father, Company President Ed Tschiggfrie, prompting the elder Tschiggfrie to issue a written warning to Galle, on August 17, 2015, “for discussing union organizational viewpoints with fellow employees during work.” (A 20.) The warning instructed Galle to desist from such conduct “immediately,” making the Company’s—and the Tschiggfries’—hostility towards Galle’s union activity entirely plain. (A 20.) *See RELCO Locomotives*, 734 F.3d at 782 (finding it “eminently reasonable” to impute animus of high-level manager to other senior managers (internal quotation marks and citation omitted)).

Indeed, the Company does not even challenge the Board’s findings that the disciplinary warning to Galle, “[o]n its face,” discriminated against union activity and would tend to chill protected expression of “union organizational viewpoints” in the workplace. (A 20.) *See Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491 (1978) (Section 7 “necessarily encompasses” the right of employees “effectively to communicate with one another regarding self-organization at the jobsite” (internal quotation marks and citation omitted)). As noted above, the Board is entitled to summary enforcement of the portions of its Order corresponding to these findings. There is accordingly ample circumstantial evidence to support the Board’s finding

that the warning of Galle alone “establishes animus.” (A 15 n.1.) *See Rockline Indus.*, 412 F.3d at 968 (finding of animus supported by employer’s prior undisputed discrimination in the form of a warning to employee for engaging in protected union activity).

However, as the Board further found, the Company did not stop at the warning. The very next day, Company Attorney Reed sent an email to Union Business Agent Saylor stating that he “believ[ed]” that Galle “will be subject to termination” if he could not get the need to talk about the Union “out of his system” and “stop bothering people at work.” (A 24.) True to Reed’s expressed belief, the Company terminated Galle’s employment about six weeks later, in the wake of Galle’s continued efforts to “discuss[] union organizational viewpoints with fellow employees during work.” (A 20.) In view of the progression of events described above, and the Company’s blatant hostility to Galle’s union activity, the Board found that the General Counsel met his *Wright Line* burden of proving that Galle’s union activity was “a motivating factor” in the ultimate decision to discharge him on October 1, 2015. *See Pace Indus., Inc. v. NLRB*, 118 F.3d 585, 590 (8th Cir. 1997) (describing the General Counsel’s burden as a “showing sufficient to support the inference that protected conduct was a ‘motivating factor’ in the employer’s decision” (citation omitted)).

**2. The Company failed to establish that it would have discharged Galle regardless of his protected union activity**

Given the Board's finding that union activity was a motivating factor in Galle's discharge, the Company was required to demonstrate, as an affirmative defense, that it would have taken the same action even in the absence of that activity. *Transp. Mgmt. Corp.*, 462 U.S. at 397, 401-03. Far from meeting this burden, however, the Company's attempts at justification only lent further support to the Board's finding of unlawful motivation.

At the time of the discharge, General Manager Rodney Tschiggfrie told Galle that he was discharging him because he had seen what appeared to be a nonwork-related website open on Galle's personal laptop, and Galle had admitted to using that laptop "off and on" during work time. (A 21.) The fundamental flaw in this rationale, as the Board found, is that "[t]he [Company] allows employees to use their personal computers for work and does not have a rule prohibiting employees from accessing nonwork-related websites." (A 15 n.1.) And although Tschiggfrie testified that the Company nevertheless regards accessing nonwork-related websites as "theft of company time," the Board found no evidence to support that bald assertion—essentially, an assertion that the Company has a zero-tolerance policy when it comes to viewing nonwork websites at work. (A 15 n.1.) In the absence of an express policy, the Board found that the Company also failed

to prove the next best thing: “that it has previously punished an employee for accessing a nonwork-related website during work time or for committing a comparable infraction.” (A 15 n.1.) *See also NLRB v. Melrose Processing Co.*, 351 F.2d 693, 696 (8th Cir. 1965) (when “an ambiguous situation is presented which may be resolved by evidence in the possession of the [employer],” its failure to produce such evidence “gives credence to” the finding against the employer).

As this Court has recognized, moreover, an employer’s enforcement of a previously non-existent policy to discharge a vocal union proponent is inherently suspect. *Rockline Indus.*, 412 F.3d at 970; *see also L.S.F. Transp., Inc. v. NLRB*, 282 F.3d 972, 983-84 (7th Cir. 2000) (reliance on non-existent Department of Transportation regulation to justify discharge supports finding of animus). Indeed, it reflects a form of disparate treatment. Where, as here, the employer suddenly deploys a novel policy against a leading union activist, with harsh first-time consequences, “the disparate treatment comes from being disciplined at all for something not covered by [the employer’s] employment policies.” *Rockline Indus.*, 412 F.3d at 970.

Compounding the novelty of the Company’s stated basis for taking action is the fact that the Company failed to conduct any kind of investigation into whether Galle had truly violated the Company’s newly concocted zero-tolerance policy. Thus, although Tschiggfrie confronted Galle, specifically telling him that “[i]t

appear[ed he was] doing something . . . other than what [he was] getting paid for,” Tschiggfrie did not investigate Galle’s response to that charge before discharging him. (A 21.)

Specifically, Tschiggfrie failed to conduct even the most cursory pre-discharge investigation into Galle’s claim that he had been on his laptop looking for an online manual to aid his work on a transmission, or his suggestion that the website Tschiggfrie had seen was from a previous web session outside of work. Instead of giving any consideration to these facially plausible explanations, Tschiggfrie “immediately discharged Galle and only subsequently investigated his use of the internet.” (A 15 n.1.) As the Board appropriately found, the Company’s rush to judgment without adequate investigation only serves to “raise [further] suspicion that some other factor affected the decision.”<sup>15</sup> (A 23-24.)

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<sup>15</sup> In its opening brief, the Company asserts that Tschiggfrie discharged Galle because “he knew Galle was using company time to work on his internet-based sales business.” (Br. 28.) But the record evidence fails to support the idea that Tschiggfrie held any such knowledge or conviction *before* he discharged Galle. Indeed, it is because Tschiggfrie did not “know” what Galle may have been doing on his computer that he attempted to seize the computer for further investigation after the discharge and, failing in that effort, engaged the services of a computer expert to try and reconstruct what Galle may have been doing on his computer. Although the Company now attempts to leverage (Br. 15-16) all of the knowledge it has gained through its belated investigative efforts, that after-acquired knowledge has no bearing on the issue at hand, which is simply: what motivated Tschiggfrie to discharge Galle *when he did?* (See A 24.)

This Court's precedent fully supports the Board's finding. Indeed, lack of investigation into alleged misconduct is a well-recognized indicium of unlawful motivation. See *RELCO Locomotives*, 734 F.3d at 787 (failure to adequately investigate alleged misconduct supports finding of unlawful motivation); *Rockline Indus.*, 412 F.3d at 969 (same); *Handicabs, Inc. v. NLRB*, 95 F.3d 681, 685 (8th Cir. 1996) (same); *Mississippi Transp., Inc. v. NLRB*, 33 F.3d 972, 979 (8th Cir. 1994) (same); *Berbiglia, Inc. v. NLRB*, 602 F.2d 839, 845 (8th Cir. 1979) (same).

At the hearing, Tschiggfrie attempted to prop up his discharge decision by stating that he had in mind, at the time of the October 1 discharge, not only the infraction that “appear[ed]” to have occurred on that date, but also Galle’s earlier sleeping on the job, which he similarly considered “theft of time.” (A 21, 23.) Critically, however, Tschiggfrie “failed to articulate th[is] reason[] to [Galle] at the time of his termination.” *Rockline Indus.*, 412 F.3d at 970; see also *NLRB v. Waco Insulation, Inc.*, 567 F.2d 596, 601 (4th Cir. 1977) (finding it “extremely unlikely that the reason for [the employee’s] discharge was due to the [proffered reason] since it was not articulated as a reason for his discharge at the time he was fired”). And, as this Court has recognized, “[t]he decision to add after the fact justifications to prior misconduct is itself a recognized ground for inferring animus.” *RELCO Locomotives*, 734 F.3d at 787.

Leaving aside the fact that an after-the-fact justification actually adds to the finding of animus, the Board was not persuaded on the merits of the Company's after-the-fact claim—that, in discharging Galle, Tschiggfrie was indeed actuated by concern over Galle's sleeping on the job. The Company "had known for months that Galle had been sleeping on the job, yet it never disciplined him for it." (A 15 n.1.)

By Tschiggfrie's own admission, he learned of and investigated complaints that Galle was sleeping on the job around June 2015. (A 23; SA 59-60.) When Tschiggfrie confronted Galle with his findings, Galle explained that some of his prescription medications made him drowsy, and he provided documentation from his doctor to prove this. (A 23; SA 60.) Tschiggfrie was not entirely satisfied with the documentation that Galle provided and accordingly requested additional documentation. (A 23; SA 60-61.)

However, when Galle did not provide the requested additional documentation, Tschiggfrie did not pursue the matter further. (A 23; SA 60-61.) Thus, Tschiggfrie never issued a written warning or other discipline to Galle for sleeping on the job in the summer of 2015. (A 23-24; SA 61.) And there is no reference to any alleged sleeping problem in the August 17, 2015 warning issued to Galle, or in the August 18, 2015 email from Company Attorney Reed to Union

Business Agent Saylor purporting to relay employee complaints about Galle. (A 15 n.1, 23-24; A 40-41.)

The Board reasonably inferred (A 15 n.1, 23) from the above evidence, and particularly Tschiggfrie's inaction, that he did not consider Galle's sleeping on the job a matter of serious or ongoing concern, much less a matter warranting discharge, as of October 1, 2015. *See RELCO Locomotives*, 734 F.3d at 787 (tolerance of the behavior for which the employee was allegedly fired is circumstantial evidence of animus).

In sum, the record amply supports the Board's finding (A 15 n.1) that the Company failed to carry its burden of persuading, by a preponderance of the evidence, that it would have discharged Galle even in the absence of his protected union activity. Indeed, as shown above, the Company's attempts at justification only tend to further support the Board's inference that the Company acted based on animus towards Galle's protected union activity. Accordingly, substantial evidence supports the Board's finding that the Company's discharge of Galle was unlawfully motivated and violated Section 8(a)(3) and (1) of the Act.

### **C. The Company's Challenges to the Finding of Unlawful Discharge and Corresponding Remedial Order**

In its opening brief, the Company, for the first time, challenges the Board's articulation of the General Counsel's burden under *Wright Line* and argues that the Board failed to hold the General Counsel to the "correct" burden of proof. (Br. 21-

24.) The Company further argues that Galle should be denied the remedies of reinstatement and backpay because Galle purportedly gave false testimony at the hearing. (Br. 29-31.) For the reasons explained below, both of the Company's arguments should be rejected.

**1. The Company's remaining challenges to the Board's *Wright Line* analysis are barred by Section 10(e) of the Act**

Under Section 10(e) of the Act, “[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). This provision is “a jurisdictional bar, designed to allow the [Board] the first opportunity to consider objections and to ensure that reviewing courts receive the full benefit of the [Board’s] expertise.” *Cast North Am. (Trucking) Ltd. v. NLRB*, 207 F.3d 994, 1000 (7th Cir. 2000); *see also Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (Section 10(e) bars the courts from considering issues not raised before the Board).

Before the Board, the Company never raised any asserted error in the administrative law judge’s formulation of the General Counsel’s burden under *Wright Line*. (See SA 151-58.) *See also* 29 C.F.R. § 102.46(b) (exceptions not specifically urged are waived); 29 C.F.R. § 102.46(g) (matters not included in exceptions or cross-exceptions may not be urged “before the Board, or in any

further proceeding”). In particular, the Company did not argue on exceptions to the judge’s decision, as it does here (Br. 21-24), that the judge should have held the General Counsel to a more stringent burden of proof or should have required the General Counsel to show that “but for [Galle’s] union activities or membership, he would not have been discharged.” (Br. 22, citing *Nichols Aluminum, LLC v. NLRB*, 797 F.3d 548, 554 (8th Cir. 2015).) As the Company failed to raise those arguments in objections before the Board, the Court is “jurisdictionally barred from considering” them, absent a showing of “extraordinary circumstances” excusing the failure or neglect to have timely raised them before the Board. *NLRB v. Chipotle Servs., LLC*, 849 F.3d 1161, 1163 (8th Cir. 2017).

In its opening brief, the Company does not suggest, let alone show, any such “extraordinary circumstances.” Accordingly, any such challenge is beyond the bounds of what this Court may properly consider. *See Chipotle Servs.*, 849 F.3d at 1164; *see also NLRB v. Monson Trucking, Inc.*, 204 F.3d 822, 826-27 (8th Cir. 2000) (explaining that “mere discussion of an issue by the Board does not necessarily prove compliance with [S]ection 10(e)”); *HTH Corp. v. NLRB*, 823 F.3d 668, 673 (D.C. Cir. 2016) (explaining that “a party may not rely on arguments raised in a dissent or on a discussion of the relevant issues by the majority to overcome the [Section] 10(e) bar; the Act requires the party to raise its challenges itself”).

In any event, the Company is simply mistaken in its claim that *Wright Line* requires a showing that the employee would not have been discharged “but for his union activities or membership.” (Br. 21-22.) The imposition of such a burden on the General Counsel at the outset would effectively eliminate the need for any rebuttal from the employer, and would thus alter the basic framework set forth in *Wright Line*. Although the Company relies on language from this Court’s decision in *Nichols Aluminum* to support its view, this Court has not endorsed the Company’s sweeping interpretation of the language in that case. *See Chipotle Servs.*, 849 F.3d at 1162 n.2 (finding a similar employer argument jurisdictionally barred, but noting that “[i]t is not clear what [the employer] thinks is left for the second step of the *Wright Line* analysis, given this understanding of the first step”).

Nor is there any merit to the Company’s broader suggestion (Br. 22-24) that the General Counsel, in this case, failed to show *any* causal relationship between the Company’s anti-union animus and Galle’s discharge. The General Counsel presented direct evidence of the Company’s animus towards Galle’s union activities, in the form of a disciplinary warning telling Galle to “stop” discussing “union organizational viewpoints with fellow employees during work,” even though employees were ordinarily free to discuss anything they wanted at work. *See Rockline Indus.*, 412 F.3d at 970 (finding unlawful motivation based, in part, on employer’s creation of policies specific to one employee whom employer had

noted as a union activist). Alongside this undisputedly unlawful warning, the Company's attorney told the Union's business agent that he believed that Galle would "be subject to termination" if he did not "stop" as instructed. This evidence was more than sufficient to satisfy the General Counsel's burden of supporting the inference that Galle's protected activity was "a motivating factor" in his discharge six weeks after he was disciplined for discussing union organizational viewpoints at work.

Contrary to the Company's claims, moreover, the General Counsel's evidence did not merely establish "general hostility" towards the Union or union activity, leaving a question as to why the Company would target Galle, in particular, for adverse treatment. (Br. 23.) Just the opposite: the General Counsel's evidence established *specific* animus towards *Galle's* protected union activity, making it all but obvious why the Company would single out Galle for discharge based on a thinly supported claim of misconduct. *Cf. Nichols Aluminum*, 797 F.3d at 552, 554-55 (the Court finds insufficient basis for inference that discharge was unlawfully motivated where General Counsel's evidence suggested no specific hostility towards employee's protected activity, and his role in that activity was "unremarkable"). Thus, the principle that general hostility towards a union does not itself establish unlawful motive has little relevance in this case. The facts, instead, implicate the different but equally important principle that

“[p]rotected activity is just that . . . —protected—and employers cannot single out employees who engage in such activities for adverse or disparate treatment.”

*Rockline Indus.*, 412 F.3d at 970.<sup>16</sup>

## **2. The Board properly ordered its standard remedy for Galle’s unlawful discharge**

In a final effort to escape liability for its unlawfully motivated discharge of Galle, the Company argues that Galle cannot be entitled to reinstatement and backpay for any unfair labor practice committed by the Company because he “provided false testimony at the hearing in this matter.” (Br. 29.) The Company is once again mistaken.

As an initial matter, the mere fact that the Company believes (Br. 20-31) Galle testified falsely does not make it so. Here, the administrative law judge who presided over the hearing made no finding that Galle lied in his testimony. Rather, he simply found that Galle’s denial that he accessed nonwork websites during work time on October 1, 2015, was less trustworthy than the contrary testimony of a computer expert (Victor Mowery) presented by the Company. (A 22, 27-28.) In

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<sup>16</sup> If the Court has any doubt that the result in this case would be the same if the Company had preserved its contention that application of *Nichols Aluminum* would produce a different result, the Board requests a remand to apply *Nichols Aluminum* in the first instance. See *Beverly Enters.-Minn. v. NLRB*, 266 F.3d 785, 789 (8th Cir. 2001) (finding that “in view of the Board’s request that [the Court] do so,” remand was appropriate “to afford the Board the opportunity to reconsider its decision”); see also *Nichols Aluminum*, 797 F.3d at 555 (J. Melloy, concurring) (remand permitted where Board offers alternative theory or requests remand).

so finding, the judge noted that “a competing expert might have pointed out flaws in Mowery’s analysis of the [Company’s] firewall logs,” but as no competing expert testified, the judge found no basis to disbelieve Mowery’s testimony. (A 22.) Accordingly, the judge credited Mowery’s testimony over Galle’s, and determined that “where Galle’s testimony conflict[ed] with other evidence,” he would “not credit it.” (A 22.)

This kind of measured credibility determination is a far cry from a determination that the discriminatee deliberately lied under oath. And, as the Board has emphasized, there is a distinction of substance “between the discrediting of a witness and a finding that [the] witness has deliberately lied.” *Precoat Metals*, 341 NLRB 1137, 1140 (2004). The possibility of denying a remedy to a witness arises where the witness is not only discredited but is found to have deliberately lied under oath. *See, e.g., id.* at 1138 (considering whether to grant reinstatement and backpay where judge found that employee lied in affidavit given to Board investigator and at hearing); *Toll Mfg. Co.*, 341 NLRB 832, 833-36 (2004) (considering tolling of backpay where judge found that employee repeatedly lied over the course of two hearings). Significantly, in the present case, the judge specifically declined to make a finding that Galle lied under oath. (A 28.)

Moreover, even assuming that Galle lied, the Board reasonably found that “the allegedly false testimony does not warrant denying Galle reinstatement and

full backpay.” (A 17 n.8.) Under Section 10(c) of the Act, the Board is expressly authorized “to take such affirmative action including reinstatement of employees with or without backpay” as will effectuate the policies of the Act, so long as the employee involved was not “suspended or discharged for cause.” 29 U.S.C. § 160(c). Thus, the Board has “broad discretion” to order reinstatement with backpay to remedy an unlawful discharge, and the Board is not “obligated to adopt a rigid rule that would foreclose relief” where the employee involved has given false testimony. *ABF Freight Sys., Inc. v. NLRB*, 510 U.S. 317, 324-25 (1994).

In determining whether denial of relief is warranted in a particular case, the Board balances “the two equally important interests of protecting the Board’s adjudication processes and remedying unfair labor practices.” *Toll Mfg.*, 341 NLRB at 836. In particular, the Board weighs “the seriousness and significance of the offense to the outcome of the case, the overall veracity of the discriminatee, and the impact of the offense on the integrity of Board processes.” *Precoat Metals*, 341 NLRB at 1139.

Weighing those factors here, the Board reasonably found that Galle’s denial that he visited nonwork websites during work, if false at all, constituted “an ‘insignificant trespass on the truth.’” (A 28, quoting *Lincoln Hills Nursing Home*, 288 NLRB 510, 512 (1988).) As the Board found, “[e]vidence other than Galle’s testimony established all elements the government needed to make its initial

showing [of unlawful motivation], which the [Company's] defense did not surmount.” (A 28.) And although the Company now takes issue with this finding, maintaining that Galle's testimony went to “the very reason he was terminated,” the fact remains that his testimony, false or not, could not have resolved the central question before the Board in regard to Galle's discharge: what was *the Company's motivation* was for discharging him when it did. (Br. 31.) Whether Galle was engaged in conduct that could have provided the Company with a neutral reason for discharging him was, at all times, peripheral to the point.

As the Board further found, even if Galle “gave false testimony on this one point about what websites he visited while at work,” the judge did not find him dishonest or untrustworthy in the rest of his testimony. (A 28.) *Cf. Precoat Metals*, 341 NLRB at 1139 (employee forfeited remedy where he was found a “generally untrustworthy witness” who “gave testimony totally lacking in effort to be candid” (internal quotation marks omitted)). Thus, Galle did not hinder the truth-seeking function of the hearing or otherwise cause obstruction of the Board's process. *See Toll Mfg.*, 341 NLRB at 835-36. Nor was his allegedly false testimony so extreme as to “cause the Board to waste resources.” (A 17 n.8 (citing cases).)

In view of these considerations, the Board acted well within its broad remedial discretion in ordering reinstatement and backpay to remedy the

Company's unlawful discharge of Galle. Accordingly, the Court should reject the Company's suggestion (Br. 31) to set aside the Board's Order based on Galle's testimony. *See Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943) (holding that a Board remedial order is entitled to enforcement, unless "it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act").

Moreover, to the extent that the Company's concern is not simply Galle's testimony at odds with Mowery's findings, but also the underlying misconduct that Mowery may have uncovered, the Board has already taken the Company's concerns into account in fashioning an appropriate remedy in this case. (A 16-17.) Indeed, the Board has specifically provided that the Company will be allowed "to establish in compliance that based on the after-acquired evidence produced by the [Company's] post discharge investigation, Galle should not be reinstated and/or backpay should be terminated as of the date the [Company] acquired knowledge of Galle's misconduct." (A 16-17, citing *Berkshire Farm Center*, 333 NLRB 367, 367 (2001)).

Thus, even though the evidence obtained through Mowery's post-discharge investigation "neither can rebut the inference" that the Company was unlawfully motivated in discharging Galle, "nor establish that the [Company] would have fired [him] anyway," that after-acquired evidence remains relevant to the precise

remedy that Galle will receive in the compliance phase of this case, where the Board's determination will be separately judicially reviewable. (A 19.) The import of the Board's Order at this stage is simply, and appropriately, that Galle is not automatically *disentitled* to a remedy based on his testimony at the hearing. (A 16-17 & n.8.)

### **III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY COERCIVELY INTERROGATING EMPLOYEE BILL KANE ABOUT MATTERS THAT WERE THE SUBJECT OF THE UNFAIR-LABOR-PRACTICE PROCEEDING**

#### **A. Principles Governing Employer Interviews in Preparation for Unfair-Labor-Practice Proceedings**

The Board has long interpreted the language of Section 7 of the Act to protect employees "in seeking vindication" of their rights through Board proceedings. *Johnnie's Poultry Co.*, 146 NLRB 770, 775 (1964), *enforcement denied*, 344 F.2d 617 (8th Cir. 1965). *See Eastex, Inc. v. NLRB*, 437 U.S. 556, 566 (1978) (Section 7 protects "resort to administrative and judicial forums"). Under Section 8(a)(1) of the Act, it is an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [S]ection 7 . . . ." 29 U.S.C. § 158(a)(1).

For over 50 years, the Board has required employers to comply with "specific safeguards" when interviewing employees about union activities in preparation for unfair-labor-practice proceedings. *IUA-UAW v. NLRB*, 392 F.2d

801, 809 (D.C. Cir. 1967) (quoting *Johnnie's Poultry*, 146 NLRB at 775). *Accord WXGI, Inc.*, 330 NLRB 695, 712-13 (2000) (collecting cases), *enforced*, 243 F.3d 833 (4th Cir. 2001). When an employer interviews an employee about protected activity in preparation for an unfair labor practice hearing, three criteria must be met to avoid unlawful coercion: “the employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis.” *Johnnie's Poultry*, 146 NLRB at 775. The Board requires that all three of these warnings be presented to the employee, and the failure to provide any one of the warnings is a violation of Section 8(a)(1) of the Act. *Id. Accord Bill Scott Oldsmobile*, 282 NLRB 1073, 1075 (1987); *Standard-Coosa-Thatcher Carpet Yarn Div.*, 257 NLRB 304, 304 (1981), *enforced*, 691 F.2d 1133 (4th Cir. 1982). Further, the “questioning must occur in a context free from employer hostility to union organization.” *Johnnie's Poultry*, 146 NLRB at 775.

The Board's approach strikes a balance between the competing notions that pretrial preparation serves a legitimate purpose, but that such interviews have the potential for discouraging employees from cooperating in Board investigations or freely testifying in Board proceedings, as well as inhibiting the exercise of Section 7 rights generally. *Id.* (“When an employer transgresses the boundaries of these safeguards, he loses the benefits of the privilege.”). Thus, “[c]ompliance

with *Johnnie's Poultry* safeguards is the minimum required to dispel the potential for coercion in circumstances where an employee is interrogated concerning his intended testimony before the Board.” *Standard-Coosa-Thatcher*, 257 NLRB at 304.

**B. The Board Reasonably Found that the Company Coercively Interrogated Employee Kane in Two Prehearing Interviews by Not Giving the Required Assurances**

The Board found substantial evidence in the record, based on Kane’s uncontested testimony, that the Company failed to provide Kane with assurances against reprisals at both prehearing interviews and failed to inform him that his participation in the second interview was voluntary. (A 16.) During both interviews, the Company questioned Kane about protected activity and the union campaign. (A 16.) By questioning Kane at the prehearing interviews without giving the warnings in *Johnnie’s Poultry*, the Company violated Section 8(a)(1) of the Act.

There is no dispute that the Company summoned employee Kane to its General Manager’s office to meet with Tschiggfrie and company counsel to prepare for its defense at the unfair-labor-practice hearing. A significant part of this defense was Galle’s alleged harassment of coworkers during the union campaign. The Company then questioned Kane about that subject. When the Company was thus interrogating Kane in preparation for litigation, the Company

failed to provide the “specific safeguards” the Board requires. *Johnnie’s Poultry*, 146 NLRB at 775.

Substantial evidence in the record, specifically Kane’s un rebutted testimony, supports the Board’s finding that the Company did not give Kane the *Johnnie’s Poultry* warnings. For the first interview, Kane agreed that “nothing was brought up” about there being no reprisals for what he said during the interview. (A 16; SA 142, 149.) Kane was never advised that he faced no reprisals for participating in the second interview either. For that second interview, held the week before the hearing, when Kane was asked if he was informed by either Tschiggfrie or Curtiss that his participation was voluntary, he answered that he had received a subpoena so he thought he had to attend the interview.<sup>17</sup> (A 16; SA 143-44, 149.)

The Board requires particular warnings because they are “reasonably calculated to limit th[e] risk [of coerciveness] and do not unreasonably restrict an employer’s interest in gathering information for use in Board hearings.” *Standard-Coosa-Thatcher*, 691 F.2d at 1141. The Company failed to provide Kane with the necessary assurances against reprisals for his answers or his failure to answer and,

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<sup>17</sup> The Board did not rely on any finding as to whether Kane was told the first interview was voluntary. (A 16.) Kane initially said he “believed” that he was told that the first interview was voluntary. (A 26; SA 142). But when he was asked who told him that the interview was voluntary, he admitted that “I guess I can’t honestly say if they told me if it was voluntary or not.” (A 15; SA 142.)

in the case of the second interview, did not tell him that his participation was voluntary. The Board reasonably found therefore that the Company did not take the required steps to reasonably limit the coerciveness of Kane's interviews and therefore violated Section 8(a)(1) of the Act. *See id.* (affirming Section 8(a)(1) violation where employer's attorney failed to give *Johnnie's Poultry* warning in one of 70 interviews conducted with employees in preparation for hearing); *Bill Scott*, 282 NLRB at 1075 (finding interrogations unlawful where employer attorney failed in pretrial interviews to instruct employees on purpose of his questioning or inform them that cooperation was voluntary).

**C. The Company's Attempt To Retry the Evidence Fails as Does Its Challenge to the Board's Application of the Established Test Specifically Tailored to the Conditions of Prehearing Interviews**

The Company asserts that Kane "received all of his *Johnnie's Poultry* assurances, even if he doesn't remember receiving them." (Br. 35.) While the Company denies (Br. 34) that it failed to give the warnings, the Board's factual findings, based on unrebutted testimony, are entitled to deference. *NLRB v. Vincent Brass & Aluminum Co.*, 731 F.2d 564, 566 (8th Cir. 1984) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951)). At the hearing, the General Counsel made a motion to amend the complaint to allege a Section 8(a)(1) violation for the Company's failure to provide Kane with the requisite assurances during his interviews. After the motion to amend was made, the Company recalled

Tschiggfrie, who was present at both interviews, to testify yet presented no evidence to rebut the allegations or demonstrate that Kane was given the *Johnnie's Poultry* assurances.<sup>18</sup>

In support of its assertion that Kane knew he could refuse to give information, the Company cites his testimony that he had “nothing to lie about,” which falls short of demonstrating Kane was told he could refuse to provide information. The Company erroneously states that the Board relied on Kane’s inability to recall, regarding the first interview, whether he had been told it was voluntary “as **proof** that he wasn’t given the warning.” (Br. 35 (emphasis in original).) To the contrary, the Board did not rely on any finding as to whether Kane was told the first interview was voluntary, stating only that the Company “failed to inform him that his participation in the *second* interview was voluntary.” (A 16 (emphasis added).)

The Company further contends (Br. 35-36) that Kane’s statements at the hearing that he was not testifying under duress and that he had no fear he would be

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<sup>18</sup> Although the General Counsel’s motion to amend the complaint to include this alleged violation was denied, the Company does not contend, nor could it, that the Board was prohibited from reaching the merits of this allegation in light of the fact that the issue was fully and fairly litigated. *See NLRB v. Monson Trucking, Inc.*, 204 F.3d 822, 827 (8th Cir. 2000); *Medallion Kitchens, Inc. v. NLRB*, 806 F.2d 185, 188-89 (8th Cir. 1986). *See also In re Wholesale Grocery Prods. Antitrust Litigation*, 849 F.3d 761, 767 (8th Cir. 2017) (issue not raised in opening brief waived).

disciplined if he did not testify a certain way establish that he was “aware” of the *Johnnie’s Poultry* assurances. (Br. 36.) However, the Company can cite no authority indicating that because an employee happens not to fear reprisal, he does not have to be given a warning that no reprisals will result from his participation in a prehearing interview with his employer.<sup>19</sup> *See Standard-Coosa-Thatcher*, 691 F.2d at 1141 (rejecting argument that employee not given assurance against reprisals likely already knew so there was no violation because “it is the tendency of an employers’ words and conduct, rather than their actual impact, which is controlling”).

The Company states (Br. 36) that Kane freely volunteered information without any prompting from the Company and that is how the Company became aware of it. Kane testified at the hearing that he came forward voluntarily with information in the summer of 2015. (SA 150.) He confirmed that he was not referring to his prehearing interviews in the spring of 2016 when he responded affirmatively to a question about whether he volunteered information to management the first time. (SA 148, 150.)

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<sup>19</sup> Similarly, the Company erroneously relies repeatedly on its assessment that Kane had a “lack of fear” about participating in the interviews or testifying at the hearing. (Br. 37.) *See, e.g., Torbitt & Castleman, Inc. v. NLRB*, 123 F.3d 899, 906 (6th Cir. 1997) (“[i]t is unnecessary to show that any employee was in fact intimidated or coerced” by an unlawful interrogation).

The Company asserts that the information it sought from Kane was “primarily” about Galle’s laptop use and whether Galle slept on the job. (Br. 37.) The Company further relies on Kane not describing “any specific question” about the Union. (Br. 37.) However, Kane testified that, in the first interview, the Company asked at least a “few” questions about the “union campaign” and that they asked about Galle approaching Kane and talking to him about the Union. (A 15, 12; SA 141.) Kane also confirmed that the Company asked questions about the union campaign in the second interview. (A 16; SA 143.) Overall, the Company’s repeated attempts to retry the evidence before this Court do nothing to change the conclusiveness of the Board’s factual findings where, as here, they are supported by substantial and, in this case unrebutted, evidence in the record.

Next, the Company states (Br. 33) that this Court “impliedly rejected” the Board’s approach to determining coercion in prehearing interviews when the Court denied enforcement in *Johnnie’s Poultry*. In that case, the Court determined that the Board’s finding of coercion was not supported by substantial evidence but did not specifically question the Board’s required assurances for a lawful prehearing interview. *Johnnie’s Poultry*, 344 F.2d at 619. *See also Montgomery Ward & Co. v. NLRB*, 377 F.2d 452, 456 (6th Cir. 1967) (“reversal of this case by the Eighth Circuit . . . has not been regarded as a rejection of [its] principles”); *Neuhoff Bros. Packers v. NLRB*, 375 F.2d 372, 378 & n.11 (5th Cir. 1967) (same).

Finally, the Board reasonably found that a totality of the circumstances test governing alleged employer interrogations in other contexts was not the correct test to apply here.<sup>20</sup> (A 16 n.4.) Contrary to the Company’s contention (Br. 33-34), the Board’s decision is not undermined by cases that have applied such a test to interrogations arising in other contexts. *See, e.g., Midland Transp. Co. v. NLRB*, 962 F.2d 1323, 1329 (8th Cir. 1992); *NLRB v. Mark I Tune-Up Ctrs, Inc.*, 691 F.2d 415, 417 (8th Cir. 1982). Rather, the Board’s consistent use of its rule in the specific context of prehearing investigations comports with the teaching that the Board should address such “recurrent problem[s]” by establishing “clear standard[s] to guide employers.” *Allegheny Ludlum Corp. v. NLRB*, 104 F.3d 1354, 1356, 1364-65 (D.C. Cir. 1997). *Accord Int’l Union of Operating Eng’rs v. NLRB*, 353 F.2d 852, 854-56 (D.C. Cir. 1965). Indeed, “the longstanding exception in *Johnnie’s Poultry* to the Board’s standard treatment of interrogations reflects the difference between the nature and circumstances of an employer’s interviewing of employees in preparation for litigation and other interrogations generally.” *Bill Scott*, 282 NLRB at 1075. In any event, this Court has examined, in reviewing the lawfulness of employer interrogations, whether an employer has a valid purpose for obtaining the information sought and if that purpose is

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<sup>20</sup> Nonetheless, Chairman Miscimarra noted that, applying the totality of the circumstances standard, he would reach the same result and agree that the Company’s interviews of Kane violated Section 8(a)(1) of the Act. (A 16 n.5.)

communicated to the employee as well as whether the employee received assurances that no reprisals will be taken—considerations that are wholly encompassed by the Board’s decision here. *See, e.g., Midland Transp.*, 962 F.2d at 1329 (citing *NLRB v. Intertherm, Inc.*, 596 F.2d 267, 274 n.2 (8th Cir. 1979)).

## CONCLUSION

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

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National Labor Relations Board

July 2017

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

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	)	
Petitioner/Cross-Respondent	)	
	)	Nos. 17-1450 & 17-2198
v.	)	
	)	Board Case No.
NATIONAL LABOR RELATIONS BOARD	)	25-CA-161304
	)	
Respondent/Cross-Petitioner	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 12,916 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010, and the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

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Dated at Washington, D.C.  
this 3rd day of July 2017

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 3, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. I further 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 3rd day of July 2017