Nos. 17-1158 & 17-1165

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CELLCO PARTNERSHIP,
D/B/A VERIZON WIRELESS

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

COMMUNICATIONS WORKERS OF AMERICA

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

USHA DHEENAN
Supervisory Attorney

JARED D. CANTOR
Attorney

National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2948
(202) 273-0016

PETER B. ROBB
General Counsel
JENNIFER A. ABRUZZO
Deputy General Counsel
LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Local Rule 28(a)(1) of the Rules of this Court, counsel for the National Labor Relations Board ("the Board") certifies the following:

A. Parties and Amici

Cellco Partnership d/b/a/ Verizon Wireless ("the Company"), was the Respondent before the Board and is Petitioner/Cross-Respondent before the Court. The Communications Workers of America AFL-CIO ("the Union"), was the charging party before the Board and has intervened on behalf of the Board. The Board is the Respondent/Cross-Petitioner before the Court; its General Counsel was a party before the Board. There were no intervenors or amici before the Board.

B. Ruling Under Review

The ruling under review is a Decision and Order of the Board in *Cellco Partnership d/b/a Verizon Wireless*, 365 NLRB No. 93 (June 9, 2017).

C. Related Cases

This case has not previously been before this or any other court. Board counsel is not aware of any related cases.

TABLE OF CONTENTS

Headings **Page(s)**

TABLE OF CONTENTS

Headings-Cont'd **Page(s)**

TABLE OF AUTHORITIES

Cases **Page(s)**

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases-Cont'd **Page(s)**

---

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases-Cont'd **Page(s)**

---

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases-Cont'd **Page(s)**

---

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases-Cont'd **Page(s)**

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Statutes: **Page(s)**

Regulations:

GLOSSARY

A.	The parties' joint appendix
Br.	The Company's opening brief
The Act	National Labor Relations Act, 29 U.S.C. § 151, et seq.
The Board	National Labor Relations Board
The Company	Cellco Partnership d/b/a Verizon Wireless
The Order	*Cellco Partnership d/b/a Verizon Wireless*, 365 NLRB No. 93 (June 9, 2017)
The Union	Communications Workers of America

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 17-1158 & 17-1165

CELLCO PARTNERSHIP,
D/B/A VERIZON WIRELESS

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

COMMUNICATIONS WORKERS OF AMERICA

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

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of Cellco Partnership, d/b/a Verizon Wireless ("the Company") for review, and the cross-application of the

National Labor Relations Board ("the Board") for enforcement, of a Board Decision and Order issued against the Company on June 9, 2017, and reported at 365 NLRB No. 93. (A. 206.)[1] Communications Workers of America ("the Union"), the charging party below, has intervened on behalf of the Board.

The Board had jurisdiction over the proceeding below under Section 10(a), 29 U.S.C. § 160(a), of the National Labor Relations Act, as amended ("the Act"), 29 U.S.C. § 151, et seq. The Court has jurisdiction over this proceeding under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f). The petition and cross-application were timely because the Act places no time limit on the initiation of review or enforcement proceedings.

STATEMENT OF THE ISSUE

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

RELEVANT STATUTORY PROVISIONS

Relevant sections of the Act and Board regulations are reproduced in the Addendum to this brief.

---

[1] "A." references are to the deferred appendix. "Br." references are to the Company's opening brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Following the investigation of a charge filed by the Union, the Board's General Counsel issued a complaint, subsequently amended, alleging that the Company had violated Section 8(a)(1) and (3) of the Act by discharging Bianca Cunningham for engaging in protected union and concerted activities. (A. 208; A. 1141-51.) After a hearing, an administrative law judge found that the Company had violated the Act as alleged. (A. 231.) On review, the Board affirmed the judge's rulings, findings, and conclusions, amended the remedy, and adopted the recommended Order, with modifications. (A. 206-08.)

II. THE BOARD'S FINDINGS OF FACT

A. Background: the Company's Operations; Bianca Cunningham and the Organizational Drive in Brooklyn; Victory Eshareturi's Working Relationship with Al Graves

The Company is a nationwide telecommunications service provider with retail stores throughout the country, including six wireless stores in Brooklyn, New York. (A. 209; A. 1126.) General managers directly supervise each store; they report to Ryan Broomes, the district manager for Brooklyn. (A. 209 n.8, 210 & n.15; A. 239-40, 606-07.) In turn, Broomes reports to Wendy Taccetta, the director of retail sales for a section of New York City, including Brooklyn. (A. 212 & n.26; A. 607, 742-44.) Brett Ulrich, the Company's director of labor

relations, is responsible for collective bargaining and participates in disciplinary matters involving represented employees. (A. 210; A. 860-62.)

In April 2012, Bianca Cunningham worked as a sales representative at the Company's store in Bensonhurst, Brooklyn. (A. 209; A. 289-90.) In late 2013, Cunningham contacted the Union about organizing. (A. 209; A. 296-301.) Concurrently, Cunningham reached out to trusted employees at the other Brooklyn stores about organizing. At the initial meeting with the union organizer, it was decided that Cunningham would use her contacts to build an organizing committee. Cunningham then reached out to every employee at all six stores, ultimately finding one person in each store to serve on the committee. (A. 209; A. 302-03.)

Cunningham also served as the liaison between the organizing committee and the Union and she wrote the committee's mission statement. On a day off from work, Cunningham and a union organizer visited each Brooklyn store, distributing the mission statement to employees and collecting signed authorization cards, which stated that the employees want union representation. On March 31, 2014, the Union filed an election petition seeking to represent employees at the Brooklyn stores. (A. 209; A. 304-05, 1129.) At the May 14 election, a majority of employees voted in favor of representation. The Board certified the Union on May 30. (A. 209; A. 305, 1127-28.)

In June, employees elected Cunningham to serve on the bargaining committee. The following month, contract negotiations began. Cunningham attended all but a handful of the approximately 39 bargaining sessions held over the following months. (A. 209; A. 306-07, 501.) When the Company's store in Everett, Massachusetts, voted to unionize in December 2014, Cunningham also attended some of those bargaining sessions. (A. 209; A. 360, 961-62.) The Company's six Brooklyn stores and the one in Everett are its only unionized wireless stores in the country. (A. 209 & n.10; A. 498, 934.)

After the election, employees elected stewards for each store. Although she was not a steward, employees would bring workplace concerns to Cunningham because of her prominence and participation on the bargaining committee. Depending on the employees' concern, Cunningham would raise it with the bargaining committee and, if warranted, they might discuss the issue at a bargaining session. Cunningham would refer other concerns to union staff representative Patrick O'Neil, the Union's chief negotiator, who would directly discuss them with Ulrich. (A. 210; A. 309-12.)

In addition to participating in collective bargaining, Cunningham spoke on behalf of the Union at public rallies, on national conference calls, and onstage during the Union's 2014 national convention. (A. 209; A. 307-09.) The Union

also featured Cunningham in two videos it posted on YouTube, one of which was a promotional video discussing the organizing drive in Brooklyn. (A. 210; A. 1528.)

Victory Eshareturi began working for the Company in February 2012. At some point that year, Eshareturi worked at a store where Al Graves was the general manager. From the beginning, Graves and Eshareturi had a troubled relationship: Eshareturi believed that Graves was mad at her for an unknown reason and directed customers—and thus sales and compensation—away from her and to other representatives. After several months, the Company transferred Eshareturi to another store. (A. 210 & n.13; A. 419-25.)

In late December 2014 or early January 2015, the Company decided to transfer Eshareturi to Bay Ridge, where Graves was now the general manager. (A. 210; A. 430-31.) Graves objected and repeatedly asked Broomes and company human resources to remove Eshareturi—to no avail. (A. 210; A. 271-72.) The relationship between Graves and Eshareturi remained troubled, with neither feeling comfortable with the other. (A. 210; A. 271, 434-35.) In March, Eshareturi protested Graves' random outbursts, including one when she asked to discuss a performance agreement. (A. 210; A. 1739-41.) In addition to raising her concerns with the Company, in early May Eshareturi contacted Cunningham—who she knew was involved with the Union—and sought advice on handling the situation with Graves. (A. 210; A. 316-18, 435-37.) Aware of the ongoing personnel

problem, Broomes met with Eshareturi on May 20 and asked if she was interested in transferring to another store. She declined, explaining that she earned a good income at that location. (A. 210-11; A. 438-39, 619-22.)

B. Eshareturi Has a Confrontation with Graves, Contacts Cunningham for Help, and Leaves Work Early on May 21

On May 21, 2015, when Eshareturi worked the closing shift with Graves, he took a sale from her and processed it himself. Graves was angry and aggressive toward Eshareturi and refused to discuss the incident when she asked. Eshareturi felt anxious because Graves was the only manger on duty and she did not know what he would do next. (A. 211 & n.19; A. 440-42.)

During her break, Eshareturi called Cunningham. (A. 211 & n.20; A. 442.) Eshareturi, who was crying hysterically and speaking very quickly, told Cunningham about the incident. She explained that she was scheduled to close the store with Graves but was uncomfortable because she did not know what would happen. (A. 211; A. 319, 443.) Cunningham told Eshareturi to "hang-tight" while she made some telephone calls. (A. 211; A. 320.) First, Cunningham called Roger Young, the Union's executive vice president, and left a voicemail summarizing the situation. (A. 211; A. 320, 322-23, 547.) Next, she texted O'Neil through an existing group chat conversation, which included other members of the Union's bargaining committee. (A. 211 & n.21; A. 323-23, 1134-35.) Cunningham stated that Eshareturi was "hysterically crying" and felt that Graves was "going to harm

her." (A. 211; A. 1135.) Cunningham indicated that she did not know how to proceed. (A. 211; A. 1135.)

Before O'Neil responded, Cunningham received a text from Eshareturi asking whether she should call Broomes and ask for permission to leave work. (A. 211; A. 327, 1131.) Cunningham replied "Yes" and wrote that she was "speaking to hr right now so that will speed it up." (A. 211; A. 1131.) Eshareturi called Broomes, told him that she did not feel comfortable at work with Graves, and asked about leaving. (A. 212; A. 445-48, 622-23.) After inquiring why she felt uncomfortable, Broomes said he needed to check the schedule and that he would call her back. (A. 212; A. 448, 1139.)

While Eshareturi was on the phone with Broomes, O'Neil texted Cunningham and said that "[i]f [she] really feels threatened about her safety she should leave the store." (A. 211; A. 1135.) Cunningham replied that Eshareturi was leaving; O'Neil said, "Good," and asked for follow-up. (A. 211; A. 1135-36.) Cunningham then texted Eshareturi and asked her to email a summary of the incident. Cunningham also wrote, "[d]on't worry about Ryan." (A. 211; A. 1131.) Eshareturi promised to send the email and indicated that she was waiting to hear from Broomes. (A. 212; A. 1132.) Shortly afterward, Broomes called Eshareturi and repeatedly asked whether she wanted to transfer; although she again declined a transfer and attempted to explain why she wanted to leave that day, Broomes kept

returning to the transfer issue. Making no progress about leaving early, Eshareturi told Broomes that she had to return to work and ended the call. (A. 212; A. 448, 624.)

Eshareturi next texted Cunningham, explaining that Broomes had called and kept talking about a transfer, making it seem as if Eshareturi was reversing her position that she did not want a transfer. Cunningham responded that "[y]ou don't want to be transferred. Stick to your guns .. you can leave just make sure you email me." Eshareturi thanked Cunningham and then clocked out, leaving after working just under six hours. (A. 212; A. 471-73, 1132-33.) Shortly afterward, Broomes called Graves, who reported that Eshareturi had left without notice. Broomes shared that information with Taccetta and officials in human resources. (A. 212; A. 625.) That evening, Eshareturi sent an email summarizing the incident with Graves to Cunningham, who forwarded it to O'Neil. (A. 212; A. 328, 535-37, 1138, 1178.)

On May 22, Broomes called Eshareturi about her leaving work early. After repeating that she had felt uncomfortable around Graves, she said she had not known what to do so she had called Cunningham. Broomes understood Eshareturi to say that Cunningham had told Eshareturi that she had spoken with human resources and they had approved Eshareturi leaving work; he stated that he did not believe that because, had Cunningham done so, human resources would have

contacted him. He also informed Eshareturi that she would be transferred effective June 1. (A. 213; A. 627, 1364.) That same day, Ulrich and O'Neil spoke several times about the incident, with O'Neil describing Eshareturi as crying and having felt unsafe. Ulrich said that the Company was placing Eshareturi on paid leave until it could determine what had caused her to feel uncomfortable. (A. 213; A. 510-13, 946-47.)

C. The Company Interviews Eshareturi and Cunningham on May 27

On May 27, two officials from company human resources interviewed Eshareturi in the presence of Young, her union representative, in the basement of the Bensonhurst store. (A. 213; A. 449-50, 550, 555-57, 563-64, 927-28, 932-33, 1193-221, 1509-19, 1572-77, 1687-91.) As with all of the investigatory interviews, Eshareturi's interview began with a review of the Company's code of conduct, requiring employees to be truthful and forthright during investigations. (A. 213; A. 550, 1213, 1538.)

Eshareturi was asked about her conversation with Cunningham. (A. 213; A. 550-52, 1217-20, 1509-10, 1575-76, 1689-90.) Eshareturi explained that she called Cunningham because she thought Graves was "going to do something crazy" and told Cunningham she felt threatened. She added that Cunningham had said that if Eshareturi felt threatened, then it was okay for her to leave. (A. 213; A. 1217-18, 1509-10, 1575-76, 1689-90.) Eshareturi was also asked whether she told

Broomes on May 22 that Cunningham had spoken with "HR" and had approval from "HR" for her to leave. (A. 213; A. 553-54, 1219, 1510, 1575-76, 1690.) Eshareturi did not remember saying that, although at one point she stated that she thought Cunningham had mentioned that she might reach out to "HR." (A. 213; A. 553-54, 1219-20, 1510, 1575, 1689-90.) Eshareturi also did not believe that Cunningham explicitly had said that "HR" said she could go home; rather, Cunningham had indicated that if Eshareturi felt threatened, she could leave work. (A. 213; A. 553-54, 1220.) When asked whether her conversation with Cunningham was through texts or calls, Eshareturi could not definitively remember but thought it was all by text. (A. 213; A. 554, 1220, 1576, 1689-90.)

After the interview, one of the human resources officials told Young that the Company also wanted to interview Cunningham. (A. 213; A. 559, 563-64, 1222-33.) Although the Company previously had drafted questions for both Eshareturi and Cunningham (A. 214; A. 927), it had not informed Cunningham or Young ahead of time that it would interview Cunningham, who was working upstairs. (A. 213; A. 344-45, 549, 559.)

When asked, Cunningham narrated the events of May 21, including that, after Eshareturi said she felt unsafe, she told Eshareturi to contact Broomes. (A. 214; A. 560, 1230, 1690.) Cunningham also said she had told Eshareturi that she would make a telephone call because the Union had a direct relationship with

Ulrich. (A. 214; A. 1230, 1690.) When asked with whom she spoke that evening, Cunningham said O'Neil, the Union's "connect" with Ulrich. (A. 214; A. 1231, 1691.) One of the human resources officials mentioned that Eshareturi had said Cunningham had approval from "HR" for Eshareturi to leave. (A. 214; A. 346-47, 562, 1231.) Cunningham said that was probably Eshareturi misunderstanding her when she said that she was going to make a telephone call, which Eshareturi must have assumed was to "HR" but actually was Cunningham reaching out to Ulrich through O'Neil. (A. 214; A. 347, 351, 562, 1231, 1691.)

When asked, Cunningham initially denied telling Eshareturi to go home. (A. 214; A. 391, 1230, 1691.) Later, Cunningham said that when Eshareturi had asked for her personal opinion, she replied that she would go home if she were in the same situation and felt threatened, but it was merely her opinion and not a direction. (A. 214; A. 395, 1232, 1690-91.) Cunningham also confirmed that she had directed Eshareturi to reach out to Broomes. (A. 214; A. 1232, 1691.) Asked how they had communicated, Cunningham said over the telephone and that any texts may have been akin to "I'll call you in a second." (A. 214; A. 351, 561, 1231-32, 1691.) Cunningham had not reviewed her texts from May 21 before the interview and she did not have her telephone with her during it. (A. 214; A. 351-52, 354.)

D. The Company Interviews Eshareturi and Cunningham on June 1

On June 1, Broomes and one of the human resources officials who met with Eshareturi on May 27 interviewed Eshareturi again. Young was also present. (A. 214; A. 452, 565, 568, 1234, 1701.) Broomes indicated that they wanted to clarify her prior responses. (A. 214; A. 566, 1234, 1701.) The nearly two-hour interview covered a range of topics, including the Company's request that Eshareturi grant it access to her texts so that it could determine whether her conversation with Cunningham primarily was through texts or included calls. (A. 214-15; A. 452, 569, 1235-41, 1701-02.) Eshareturi said she could not remember when she had spoken with Cunningham and when they had exchanged texts, but that both had occurred. (A. 214; A. 1236-37, 1701.)

The human resources official noted that in the prior interview Eshareturi said that the conversation was entirely through texts and that she could not remember whether she spoke with Cunningham on the telephone. (A. 214; A. 1237, 1701.) The official also explained that the Company wanted the texts because Cunningham said the conversation was generally over the telephone with only quick texts, contrary to Eshareturi. (A. 214; A. 1239-40, 1701.) Eshareturi repeated that she remembered communicating through both means, but not how much of the conversation was through one or the other. (A. 214; A. 1240-41.) Eshareturi elected not to provide her texts, explaining that she was uncomfortable

turning over her personal telephone. (A. 214-15; A. 452, 1251-52.) Broomes said, "that's entirely OK." (A. 214; A. 1238.)

Broomes next inquired about Eshareturi's statement to him on May 22 that Cunningham had spoken with someone from "HR." Eshareturi responded that she was not certain when she had said that and only thought that Cunningham was speaking with someone who had something to do with "HR," an uncertainty she had expressed to him at the time. Broomes maintained that Eshareturi had not been uncertain; Eshareturi disagreed and repeatedly said she was not sure. In the end, Eshareturi said that Cunningham may have mentioned "HR" at some point, but she was not certain, and she could not remember if it arose in a text or call. (A. 214; A. 1241-43, 1280, 1702.) Broomes also asked what directions Cunningham had given to her. Eshareturi explained that Cunningham had said that if she were in a similar situation, she would leave and had suggested that Eshareturi call Broomes for permission to leave, which Eshareturi did. (A. 214-15; A. 1244-45, 1701.) The rest of the interview was to clarify the timeline of Eshareturi's communications with Cunningham and Broomes and why she felt uncomfortable with Graves. (A. 214-15; A. 1250-51, 1255-57, 1265-66, 1701-06.)

After Eshareturi's interview, the Company asked to re-interview Cunningham. (A. 214; A. 355, 569, 572-73, 1281-85.) As before, it gave no advance notice to Young or Cunningham. (A. 214; A. 569-70.) In response to a

timeline question, Cunningham confirmed that she had instructed Eshareturi to contact Broomes and Eshareturi said she would; Cunningham did not know more than that. (A. 215; A. 356, 571, 1284, 1704-05.) When Broomes asked whether Cunningham would share her texts, she replied that they were just quick ones like "I'll call you back" or "give me a few minutes" and lacked detail. (A. 215; A. 356-57, 1284, 1705.) Cunningham declined to provide her texts to the Company because it was her personal telephone. (A. 215; A. 357, 571, 1284, 1705.) As of her June 1 interview, Cunningham had not reviewed her May 21 texts. (A. 215 n.29; A. 357.)

E. The Company Decides To Terminate Eshareturi; Cunningham Reviews the May 21 Texts; the Parties Discuss Eshareturi's Termination on August 6

As of June 8, the Company decided to terminate Eshareturi for violating the code of conduct by walking off the job and being dishonest during the investigation. (A. 215; A. 1520-25.) On June 10, that decision was codified in the Company's formal documentation used for terminations, the "Business Request for Termination of Employment Review." (A. 215; A. 667, 671-72, 1569.) Although it intended to terminate Eshareturi within several days of June 12, the Company delayed. It informed the Union, via voicemail, of its decision on July 21. (A. 215-16; A. 516, 672, 958, 1486.)

On July 22, during a break at a bargaining session in Connecticut, Ulrich informed O'Neil that the Company planned to terminate Eshareturi for dishonesty during the interviews. He cited Eshareturi's claims that Cunningham contacted human resources and received permission for Eshareturi to leave, and that they had communicated through texts. (A. 216; A. 360-61, 516-17, 519-22, 958-60.) The parties agreed to meet in two weeks to discuss Eshareturi's termination. (A. 216 & n.30; A. 362, 522, 961.) During the car ride back to New York, Cunningham and O'Neil discussed the Company's decision to terminate Eshareturi. For the first time, Cunningham reviewed the May 21 texts, exclaiming to O'Neil that she had mentioned "HR" in one of them. (A. 216 & n.31; A. 362-63, 523-24.)

The parties met on August 6 to discuss Eshareturi's termination. The Union claimed that the situation ultimately came down to a misunderstanding of the events of May 21 and that Eshareturi was not trying to be dishonest during the investigation. (A. 216; A. 363-65, 529-30, 964-66, 1811.) The Union described Eshareturi's emotional state that day, how Cunningham had told Eshareturi that she would reach out to the Company (Ulrich), that her way of doing so was through the Union (O'Neil), and that was how Eshareturi was told "HR" would be contacted. O'Neil also explained that he had told Cunningham to tell Eshareturi that if she felt threatened, she should leave. (A. 216; A. 365, 1811-12.) Cunningham then told Ulrich that she had found the relevant texts, which she read

to him and allowed him to read for himself. Ulrich asked for a copy of the texts, and the Union agreed to provide them. Ulrich said he would review the new information and get back to the Union. (A. 216; A. 365-66, 530-32, 966-68, 1812-13.)

F. The Company Turns Its Investigation to Cunningham and Interviews Her on August 11

On August 10, the Company informed the Union that it had identified a discrepancy between Cunningham's interview statements and the texts that called into question her honesty during the investigation. Therefore, in addition to investigating Eshareturi, the Company would now investigate Cunningham. (A. 216; A. 545-46, 976-77.)

On August 11, the Company conducted its third investigatory interview of Cunningham, with Young present. It had not told Cunningham ahead of time the purpose of the meeting. (A. 216-17; A. 367, 405-07, 418, 578-79, 585-86, 1286-325, 1651.) Broomes stated that there were discrepancies between Cunningham's statements and the evidence that the Company needed to resolve before making a final decision regarding Eshareturi's employment. (A. 217; A. 1314-15, 1651.) Among other questions, including ones about emails between Eshareturi and Cunningham and whether Eshareturi really felt unsafe, Broomes asked Cunningham to explain the discrepancy between her prior statements that she had never mentioned "HR" to Eshareturi and the text that said she was speaking with

"HR." Cunningham replied that she had not re-read the texts, had not remembered the text conversation with Eshareturi, and had answered the prior interview questions to the best of her memory. She also explained that, to her, Ulrich is "HR," so when she wrote "HR" she meant that she was speaking to O'Neil, who was speaking with Ulrich. (A. 217; A. 409, 1322-23, 1655-56.)

Broomes also asked Cunningham to explain the discrepancy between her prior denials that she told Eshareturi she could go home and the text telling Eshareturi that she could leave. Cunningham said that Eshareturi had asked for her personal opinion, she had spoken with O'Neil who told her that Eshareturi should leave if she felt threatened, and she gave Eshareturi her personal opinion. Cunningham also explained that O'Neil and she were worried about Eshareturi's safety and did not think Eshareturi could handle customers in a hysterical state. (A. 217; A. 412-13, 1323-24, 1656.)

G. The Company Interviews Eshareturi on August 14 and Cunningham on August 17

On August 14, the Company conducted its third investigatory interview of Eshareturi, with Young present. (A. 216-17; A. 587, 591, 1326, 1658.) Numerous times during the interview, the Company asked Eshareturi to sign a consent form granting it access to her personal telephone records or to produce them, explaining they would help assess her initial statements that Cunningham had talked to "HR" and it was okay for her to leave. (A. 217-18; A. 457, 589, 1331-35, 1339, 1350,

1659-61, 1664.) Eshareturi declined each time, expressing unease with providing private records to the Company. (A. 217-18; A. 458, 476, 589-90, 1334-36, 1339, 1350-51, 1660-61, 1664-65.)

During the interview, among other questions, Broomes asked whether she was referring to Cunningham's text when she had told him on May 22 that Cunningham said that she had spoken with "HR" and "HR" had approved Eshareturi leaving work. Eshareturi remembered something was said about "HR" but she was not sure if she remembered correctly because she had not reviewed her texts. (A. 218; A. 1345-46, 1663, 1665.) Until shown Cunningham's text during the interview, Eshareturi said she had not remembered whether "HR" arose during the telephone call or in a text and was not aware of the texts' content during the prior interviews. (A. 218; A. 1346-48, 1352, 1664-65.)

During a conference call with Cunningham on August 17, Broomes asked whether she would provide her telephone call and text records for a block of time on May 21 to clarify her communications with Eshareturi. Cunningham was uncomfortable with the request and asked for time to consider it. On August 19, the Union informed the Company that Cunningham would not provide the records. (A. 218; A. 375-78, 595-97, 695, 1356-61.)

H. The Company's Termination Process; the Company Discharges Cunningham; Eshareturi Receives a Final Warning

Generally, following the initial decision to review an employee's conduct for possible termination and after sufficient due diligence, Taccetta or the relevant district manager decides to initiate a Business Request for Termination of Employment Review. Once that decision is made, a store manager, district manager, or human resources official drafts the actual request. The draft is then circulated for review; if there are no outstanding questions, the completed document goes to either Taccetta or a district manager for final approval. (A. 218 & n.33, 219; A. 749-58.)

Sometime after August 14, Broomes began composing a Business Request for Termination for Cunningham in collaboration with Marielena McDonald, a human resources manager, who compiled various types of information from the investigation and typed the document. (A. 219; A. 685-88, 703, 1009-11.) Subsequently, the termination request for Cunningham, dated August 18 and addressed from Broomes to Taccetta, was created. It recommended discharging Cunningham for lying during the investigative interviews and for engaging in misconduct by improperly giving Eshareturi permission to leave work. The cited lies included Cunningham's denials that she told Eshareturi she could leave and that she was in contact with "HR" and her claims that the exchange with Eshareturi was over the telephone, except for some quick texts. (A. 218-19; A. 1367-68.)

On August 21, O'Neil emailed a letter to Ulrich clarifying the events of May 21 and claiming that there was never an intent to mislead the Company. As he had at the August 6 meeting, O'Neil again informed the Company that he had told Cunningham that Eshareturi should leave and that he would contact "HR." (A. 219; A. 1187-90.)

On the morning of Sunday, August 23, McDonald emailed Broomes, Taccetta, and Eileen Lambert, the senior manager for human resources, stating that she and Broomes recommended terminating Cunningham. Attached to her email was an exhibit packet containing some of the witness statements included in the August 18 Business Request for Termination. (A. 219; A. 1613.) The 63-page exhibit packet was nearly twice as long as the 34-page Business Request for Termination dated August 18 and, unlike the earlier document, the August 23 email and exhibit packet were not on the usual form template used by the Company for terminations. (A. 220 & n.41; A. 1367-400, 1612-76.) The August 23 packet also removed as a basis for termination Cunningham giving Eshareturi permission to leave work; it recommended termination solely for dishonesty during the investigation. That same evening, Taccetta replied and approved Cunningham's termination; other recipients subsequently replied that they concurred. (A. 220; A. 1612-13.)

On August 24, the Company informed Cunningham that she had violated the code of conduct and it intended to discharge her. It then placed her on paid leave until it finalized the decision. (A. 220; A. 378-79, 1177.) The parties met on August 31 to discuss the Company's decision. The Union argued the case was one of miscommunication and not lying; the Company disagreed. It officially terminated Cunningham on September 14. (A. 220; A. 1191, 1600.) On September 26, in lieu of discharge, the Company issued Eshareturi a final written warning for leaving work early without permission and ignoring Broomes' telephone calls. (A. 209, 231 n.94; A. 1139-40.)

I. Cunningham's Texts with Graves

Sometime in August, Graves asked an employee to give Cunningham his personal cell phone number. (A. 220; A. 268-70, 277.) Starting on August 12, they exchanged sporadic texts discussing the Company's investigation into Cunningham and Eshareturi, work issues, and mundane matters. During their exchange, Graves wrote that the Company had a "hit list," Broomes also had a "list" and would not deviate from it, Cunningham was on the prior district manager's "list," and Lambert and her "crew" wanted Cunningham. (A. 220-22; A. 1038, 1040, 1042, 1059.) He also wrote that the Company viewed the store where Cunningham had worked as a "strong hold" or a "base." (A. 221; A. 1041.)

III. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Chairman Miscimarra and Members Pearce and McFerran)[2] found that the Company had violated Section 8(a)(1) and (3) of the Act by discharging Cunningham for engaging in union and protected concerted activities. (A. 206.) 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. (A. 206-07.)

Affirmatively, the Order requires the Company to offer full reinstatement to Cunningham, make her whole for any loss of earnings or benefits suffered as a result of the Company discriminating against her, remove any reference to her unlawful discharge from its files, and notify her in writing of that expungement and that the discharge will not be used against her. Finally, the Company must post a remedial notice at its stores in Brooklyn, New York, and distribute it electronically. (A. 207.)

---

[2] Chairman Miscimarra disagreed with a portion of the remedial Order that is not contested. (A. 206 n.3.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that the Company unlawfully discharged Cunningham. Under the governing *Wright Line* test, the Board found that Cunningham's union and protected activity was a motivating factor in the Company's decision to fire her. This finding is fully supported by evidence that Cunningham engaged in protected union and concerted activity, the Company knew of it, and had animus toward it.

Her protected activity and the Company's knowledge of it are largely undisputed. Cunningham was an instrumental force behind the successful campaign to organize the Company's Brooklyn stores, its first unionized locations. Afterward, Cunningham attended numerous bargaining sessions for the Union and served as a de facto steward, addressing coworkers' complaints or relaying them to union officials. In that capacity Cunningham fielded a frantic telephone call from a coworker about her altercation with a supervisor. After consulting union officials for guidance, Cunningham relayed to the coworker that if she felt unsafe at work, she should leave.

Ample evidence likewise shows that the Company harbored animus towards that activity. Most significantly, the Company disparately treated Cunningham. Other employees who allegedly lied were not terminated, negating the Company's claim that it consistently terminates employees for lying. Further, the Company

meted out lesser punishment for even more egregious misconduct than lying. Additional evidence of unlawful motive included the length and breadth of the Company's investigation and a supervisor's statements revealing company animus toward Cunningham and unionization.

The Board reasonably found that the Company failed to meet its burden of demonstrating that it would have taken the same action in the absence of Cunningham's protected activity. The Company's proffered evidence was unavailing because, unlike here, its comparator employees not only lied but engaged in other terminable misconduct. Likewise, Eshareturi's case did not show company consistency: although she misstated what Cunningham had told her, the Company did not discharge her. Additionally, the Company's defense failed because its investigation pried into protected activity and, in any event, its professed concern with dishonesty during investigations was pretextual, which served as additional evidence of animus.

The Company's myriad challenges to the Board's decision lack merit. The Board properly applied its established *Wright Line* test in finding that the General Counsel carried his burden and the Company did not. The Company's claims attacking the Board's finding that its decision to discharge Cunningham was unlawfully motivated all fail given the substantial evidence establishing its animus. Its evidentiary arguments regarding two exhibits are also baseless: it failed to

establish that one was privileged and the Board expressly declined to rely on the second in light of other record evidence.

STANDARD OF REVIEW

This Court's "role in reviewing an NLRB decision is limited." *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 348 (D.C. Cir. 2011). When supported by substantial evidence, the Board's findings of fact are "conclusive." 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Kiewit Power Constr. Co. v. NLRB*, 652 F.3d 22, 25 (D.C. Cir. 2011). The Court also applies that test to the Board's "application of law to the facts, and accords due deference to the reasonable inferences that the Board draws from the evidence, regardless of whether the court might have reached a different conclusion *de novo*." *United States Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998) (internal citations omitted). Accordingly, "a decision of the NLRB will be overturned only if the Board's factual findings are not supported by substantial evidence, or the Board acted arbitrarily or otherwise erred in applying established law to the facts of the case." *Pirlott v. NLRB*, 522 F.3d 423, 432 (D.C. Cir. 2008) (internal quotation marks omitted). Finally, the Board's assessment of witness credibility is given great deference and must be upheld unless it is "hopelessly incredible, self-contradictory, or patently unsupportable." *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1250 (D.C. Cir. 2012) (quotation omitted).

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) AND (3) OF THE ACT BY DISCHARGING BIANCA CUNNINGHAM FOR ENGAGING IN PROTECTED UNION AND CONCERTED ACTIVITIES

A. An Employer Violates the Act by Discharging an Employee Because of Her Protected Union or Concerted Activity

Section 7 of the Act guarantees employees "the right to self-organization, to form, join, or assist labor organizations" and the right to "engage in other concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. § 157. In turn, Section 8(a)(1) of the Act 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). Section 8(a)(3) of the Act makes it an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). Accordingly, an employer violates Section 8(a)(1) by discharging an employee for engaging in protected concerted activity, *Inova Health Sys. v. NLRB*, 795 F.3d 68, 80 (D.C. Cir. 2015), and separately violates Section 8(a)(3) by discharging an employee for engaging in union activity, *Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 217 (D.C. Cir. 2016).

In *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Supreme Court approved the Board's test for determining motivation in unlawful discrimination cases first articulated in *Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981). Under that test, courts will enforce the Board's finding of an unlawful discharge if substantial evidence supports the Board's finding that an employee's protected activity was "a motivating factor" in the employer's decision to discharge the employee, unless the record as a whole compelled the Board to accept the employer's affirmative defense that the adverse action would have been taken even in the absence of protected activity. *Transp. Mgmt. Corp.*, 462 U.S. at 395; *see also Ozburn-Hessey*, 833 F.3d at 217-20 (applying *Wright Line* to union-activity discharge); *Inova Health*, 795 F.3d at 80-85 (applying *Wright Line* to concerted-activity discharge). 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, 722 (1981), *enforced mem.*, 705 F.2d 799 (6th Cir. 1982); *accord Ozburn-Hessey*, 833 F.3d at 219.

Because direct evidence of motivation is often impossible to obtain, the Board may instead rely on circumstantial evidence. *Power, Inc. v. NLRB*, 40 F.3d 409, 418 (D.C. Cir. 1994). The Board, with approval from this Court, has found

that an employer's disparate disciplinary treatment of an employee serves as evidence of its unlawful motivation. *See, e.g.*, *Fort Dearborn Co. v. NLRB*, 827 F.3d 1067, 1075 (D.C. Cir. 2016). Such disparate treatment also undermines an employer's defense of employee misconduct. *See, e.g.*, *Traction Wholesale Ctr. Co., Inc. v. NLRB*, 216 F.3d 92, 100 (D.C. Cir. 2000); *Alstyle Apparel*, 351 NLRB 1287, 1288 (2007). Further, a finding of pretext serves as additional evidence of unlawful motivation. *Fort Dearborn*, 827 F.3d at 1075. In addition, the Board has relied on the length and breadth of an investigation as evidence of unlawful motivation. *See Tubular Corp. of Am.*, 337 NLRB 99, 99 (2001). The Court's "review of the Board's conclusions as to discriminatory motive is even more deferential [than the substantial-evidence standard], because most evidence of motive is circumstantial." *Fort Dearborn*, 827 F.3d at 1072 (internal quotation marks omitted).

B. The Company Unlawfully Discharged Cunningham Because of Her Protected Union and Concerted Activity

Substantial evidence supports the Board's finding (A. 206, 226-31) that the Company's discharge of Cunningham was unlawfully motivated. Cunningham's well-known protected union and concerted activity and the Company's animus toward that activity support that finding. In addition, the Company failed to establish that it would have discharged her absent her protected activity.

1. Cunningham's protected activity was a motivating factor in the Company's decision to discharge her

a. Cunningham engaged in protected activity, and the Company was aware of it

Abundant record evidence supports the Board's finding (A. 227 & n.74) that Cunningham engaged in protected union and concerted activity, including on May 21. The Company does not dispute (Br. 21-22, 24, 45) her efforts to assist Eshareturi or her prior significant union activity. Thus, as detailed above (pp. 7-10), Eshareturi reached out to Cunningham, a coworker and member of the bargaining committee, about the incident with Graves, her fear of closing the store with him, and her resulting desire to leave work early. Cunningham assisted Eshareturi and served as a conduit between Eshareturi and Union representatives Young and O'Neil, consistent with her history of relaying employee concerns to the bargaining committee. (A. 310-12, 316-28, 435-37, 440-43, 535-37, 547, 1130-38, 1178.) Prior to May 21, Cunningham had an extensive history of union activity both leading to, and following from, her singular effort to successfully organize the Company's six Brooklyn stores. (A. 302-09, 360, 501, 961-62, 1528.)

Likewise, substantial evidence supports the Board's undisputed (Br. 45) finding (A. 227 & nn.74-75) this activity was well known to the Company. The Company (through officials including Taccetta, Broomes, and Ulrich) knew of Cunningham's protected activity in general (A. 617-18, 797-98, 867), and her

specific protected activity on May 21 (A. 637-38, 640, 699, 714, 721, 723-24, 789-90, 838-39, 894-96, 949-53, 987-88, 995, 997, 1130-37, 1187-90, 1230-33, 1284-85, 1314-25, 1612, 1812).

b. The Company had animus toward Cunningham's protected activity

The ample evidence of the Company's animus toward Cunningham's protected activity further supports the Board's finding of unlawful motivation. The "most compelling evidence" of the Company's animus, the Board found (A. 228), is its disparate disciplinary treatment of Cunningham in discharging her. Even assuming that Cunningham lied rather than simply being mistaken, imposing this ultimate punishment stands in stark contrast to the Company's treatment of other employees who ostensibly lied during investigations into alleged misconduct and yet were only warned, not discharged. That disparity negates the Company's position that it consistently terminates employees under such circumstances.

The Board relied (A. 228-29) on several comparable cases showing lesser discipline for lying during an investigation. For example, an assistant store manager purposely changed 9 employees' timesheets and deleted 104 hours of overtime and then emailed store manager Francis to explain; Francis replied that they would discuss the matter in more detail the next day. (A. 1412.) During the ensuing investigation, Francis told her district manager that she had no knowledge of the assistant manager's email. (A. 1406, 1408-09.) Moreover, when Francis

forwarded the assistant manager's email to her district manager, she omitted her reply to the assistant manager, thus removing evidence of her knowledge. (A. 1411, 1414.) In that same email, Francis also falsely indicated that she had "never revisited" the relevant email chain, which started with her emailing the assistant manager about overtime. (A. 1414.) The Company uncovered Francis' omission (A. 1411) and specifically noted in its disciplinary documentation that she had told her district manager during the investigation that she "had no knowledge of the email . . . however, records indicate that you replied to her, which indicates that you acknowledged its receipt." (A. 1406.) The Company, however, issued Francis only a final written warning. (A. 1405.) The Company's claim (Br. 43) that Francis' situation is different because it "believed" her and not Cunningham simply begs the crucial question here. It provides no cogent explanation of why it believed Francis, whom it found misrepresented emails to bolster her lies, while not accepting Cunningham's plausible explanation that she simply forgot about texts with Eshareturi.

Furthermore, when five employees at the Company's store in Cross County, New York, lied during an investigation into the abuse of company gift cards, the Company issued them only final written warnings.[3] (A. 228; A. 1466, 1473-78.)

[3] Although managers may have "led astray" the employees (Br. 42) regarding the underlying misconduct, there is no evidence or claim that they similarly told employees to lie.

Likewise, when five management employees at its store in Hazlett, New Jersey, lied during an investigation into similar gift card misconduct, the Company gave them mere documented counselings. (A. 229; A. 1492-93.) Moreover, when an employee lost track of a store demonstration tablet that he took home to use on vacation, the Company issued him only a written warning despite his first untrue claim to store management that he left the device in his car, which he then sold, and his initial denial of any knowledge of the missing tablet during the investigatory interview. (A. 229; A. 1503-08.) The Company's disparately harsh treatment of Cunningham as compared to the foregoing cases is strong evidence of its unlawful motivation. *See, e.g.*, *Fort Dearborn*, 827 F.3d at 1075 (discriminatee discharged for bringing unauthorized person into plant but others with same conduct received one-day suspensions); *Gold Coast Rest. Corp. v. NLRB*, 995 F.2d 257, 264-65 (D.C. Cir. 1993) (discriminatee suspended for smoking and later suspended for pooling tips, but no action against other employees for same conduct); *Southwire Co. v. NLRB*, 820 F.2d 453, 460 (D.C. Cir. 1987) (discriminatee discharged for leaving work early but oral reprimand issued for prior incident by another employee).

As further evidence of the Company's disparate treatment of Cunningham, the Board found (A. 229) relevant numerous instances (outlined below) where employees "engaged in conduct far more egregious than Cunningham's, yet were

not fired." Consistent with precedent, the Board may properly rely on such evidence, notwithstanding the Company's claim (Br. 41-42) that only same-or-similar-offense evidence, such as that discussed above, is relevant. *See*, *e.g.*, *St. Francis Reg'l Med. Ctr.*, 363 NLRB No. 69, slip op. at 20 (Dec. 16, 2015) (other employees treated less harshly for more egregious violations of privacy policy); *Puerto Rican Family Inst.*, 311 NLRB 929, 937 (1993) (no discharge of employees with similar or more egregious alleged misconduct); *cf. Rest. Corp. of Am. v. NLRB*, 827 F.2d 799, 808 (D.C. Cir. 1987) (while the "essence of discrimination in violation of [S]ection 8(a)(3) is treating like cases differently . . . . It follows that condoning greater violations while punishing lesser violations also constitutes disparate treatment") (citation and quotation marks omitted).

The following chart demonstrates that employees engaged in conduct more egregious than Cunningham's ostensible lying, such as fraud, insulting language, and profanity within earshot of customers, and yet were not terminated.

Conduct (*see* A. 229)	**Discipline**
Fabricated time record	Documented counseling (A. 1430-34)
Money consistently missing from register	Written warning (A. 1435-36)
Used foul language, including "you can all kiss my A**"	Final written warning (A. 1438)
Used profanity and told coworker "I'll slap you back to Trinidad" and "who the f*ck do you think you're talking to?"; outburst heard on sales floor	Final written warning (A. 1437, 1526-27)
Manager improperly commented on employee's pregnancy, kicked wall in front of employees, and failed to attend mandatory meetings	Final written warning (A. 799-804, 1449)

Used fraudulent coupons at least twice	Written warning (A. 1502)

Supplementing that disparate treatment evidence, the Board found two additional pieces of evidence established the Company's animus: the length and breadth of its investigation into the events of May 21, and Graves' texts to Cunningham. With regard to the former, the Board found (A. 229) that, unlike the protracted investigation into Eshareturi's walkout, employees at non-unionized stores who left work early received written warnings in a "seemingly routine fashion." Thus, for example, one employee left work nearly three hours early without permission and, after an investigation that consisted of simple "conversations," received a documented counseling within five days. (A. 791-96, 1416-17.) Similarly, an employee who left work without authorization to run a personal errand received a documented counseling within 16 days. (A. 1497.) In comparison, as the Board observed (A. 229), the Company's investigation into the events of May 21 "involved multiple investigatory interviews, with high-level participants, detailed planning with pre-arranged questions, and spanned many months." In ascertaining motive, the Board properly considers evidence that an employer's investigation was atypical. *See*, *e.g.*, *Tubular*, 337 NLRB at 99 ("unprecedented scope" of investigation evidence of unlawful motive); *see also Inova Health*, 795 F.3d at 84 (in rejecting affirmative defense as pretextual—and

thus evidence of unlawful motive—Board properly found "telling" the "abrupt and abnormal" end to "skewed investigation").

Graves' text messages shed further light on the Company's motivation. They state that the Company, Broomes, and the prior district manager had a "hit list" or "list," and that Cunningham was on the "list," and that Lambert, the Company's senior manager for human resources, and her "crew" wanted Cunningham. The texts also said that the Company viewed Cunningham's store as a "strong hold" or "base," meaning a stronghold or base of union supporters. (A. 261-67, 1038-40, 1042, 1059.) As the Board explained (A. 228), prior decisions have found such statements evidence of animus. *See, e.g.*, *R&S Truck Body Co.*, 333 NLRB 330, 336, 338 (2001) (animus shown in statement that one department was "wellspring" of union campaign); *H.B. Zachry Co.*, 319 NLRB 967, 978 (1995) (animus from statement that pro-union employee on employer's "hit list").

2. The Company failed to meet its burden of showing that it would have discharged Cunningham absent her protected activity

Having found that the Company's decision to discharge Cunningham was unlawfully motivated, the Board found (A. 229) that the Company failed to meet its burden. Specifically, the Board reasonably found (A. 229-30) that the Company failed to demonstrate that it would have discharged Cunningham, even in the absence of her protected activity, because it consistently terminates employees for

lying during an investigation. Additionally, the Company's affirmative defense failed because its investigation pried into protected conduct and the defense is mere pretext.

The Company cited (Br. 41) a number of discharges ostensibly demonstrating that it consistently terminates employees for lying during an investigation. The Board reasonably rejected (A. 229) that comparator evidence because "a review of these discharges show that the employees in question did not just lie during an investigation, but also engaged in other misconduct." Specifically, as outlined below, the purported similarly situated employees are not comparable, having engaged in terminable misconduct *and* lied during an investigation whereas the Company's defense is solely that Cunningham lied. The Board thus properly found (A. 229) that "[n]one of these examples help" to establish the Company's defense, rejecting (A. 229 n.91) as "speculative [and] self-serving" the Company's "conjecture" that if they had not lied, the comparator employees would not have been terminated (*i.e.*, lying was the catalyst for termination). *See, e.g.*, *Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 32 (D.C. Cir. 1998) (to carry burden, employer must show "similar treatment of . . . employees who have acted similarly").

The following chart demonstrates that the Company's ostensibly similarly situated employees are not comparable to Cunningham. Those employees both

lied and engaged in terminable misconduct, such as fraud, threatening and insulting behavior toward coworkers, or inappropriate relationships with subordinates.

Misconduct in Addition to Lying (A. 229)	**Terminated Comparator**
Using store demonstration telephone, manager sent threatening text to employee that "[t]hey are coming after you. You better get your people ready."	Sarkiso (A. 1762-67)
Manager used derogatory, homophobic slur toward employee	Alexander (A. 1847-49)
Employee engaged in fraud (sequential barcode use) when processing coupons	Webb (A. 1839-46)
Employee processed artificially inflated trade-in transactions	Augusto (A. 1850-53)
Employee accessed customer's account without authorization	Adlah (A. 1815-27)
Employee gave customer the middle finger	Thomas (A. 1828-34)
Employee added two tablets to customer's account without authorization, resulting in unauthorized purchases	Gordon (A. 1835-38)
Two managers instructed employees to fraudulently inflate trade-in values of devices	Mansour (A. 1854-57); Soheb (A. 1858-61)
Manager used employee's login to process a certified-like-new-replacement for a family member, giving them a better tablet	Pepe (A. 1803-06)
Supervisor at call center had improper sexual relationship with subordinate	Thompson (A. 1877-81)

Moreover, "even if these employees were fired only for lying during an investigation," the Board found (A. 230) that would not establish the Company's affirmative defense. Under established Board precedent, an employer does not establish its *Wright Line* affirmative defense "simply by showing that examples of consistent past treatment outnumber the General Counsel's examples of disparate

treatment." *Avondale Indus., Inc.*, 329 NLRB 1064, 1066 (1999); *see also Starbucks Coffee Co.*, 360 NLRB 1168, 1170 & n.14 (2014) (same); *KOFY, Operator of KOFY TV-20*, 332 NLRB 771, 772 (2000) (same). Rather, an employer "must prove that the instances of disparate treatment shown by the General Counsel were so few as to be an anomalous or insignificant departure from a general consistent past practice." *Avondale*, 329 NLRB at 1066.

The Company failed to do so here, the Board found, because even "[a]ssuming some of the comparators were fired for lying during an investigation, other employees were not. Therefore, 'the record of disciplinary action is mixed . . . [and] the General Counsel's case has not been rebutted.'" (A. 230 (quoting *id.* at 1067).) That determination follows from the established principle that "[o]nce the burden has shifted, [an employer] must show not just that it *could have* taken the challenged disciplinary action but that it *would have* done so even in the absence of" the protected activity. *Avondale*, 329 NLRB at 1066; *accord Bruce Packing Co. v. NLRB*, 795 F.3d 18, 23 (D.C. Cir. 2015) (the question "is not just whether the employer's action also served some legitimate business purpose, but whether the legitimate business motive would have moved the employer to take the challenged action absent the protected conduct") (citation omitted). It also follows from the fact that the "value of . . . disparate treatment evidence lies principally in its tendency to rebut the employer's own attempt to carry its now-shifted burden

under *Wright Line* of demonstrating that it would have taken the same action . . . ." *Avondale*, 329 NLRB at 1066.

The Board further found (A. 229) that the Company's asserted closest comparator (Br. 40)—Eshareturi, because it planned to fire her for dishonesty but later determined she had not lied—likewise fails to support its defense. As the Board reasoned (A. 229-30), according to the Company, Eshareturi told Broomes on May 22 that Cunningham had said that "HR" approved Eshareturi leaving work early. (A. 1364.) The texts, however, disproved her statement: Cunningham never wrote that "HR" had approved Eshareturi leaving. (A. 1131-33.) Yet, despite a claimed unwavering practice of terminating employees for "lying," the Company did not discharge Eshareturi for her misstatement. That misstatement "is not even mentioned in Eshareturi's ultimate written discipline, whereas Cunningham was fired, in part, for allegedly misrepresenting facts by denying that she used the word 'HR' in her texts." (A. 230; A. 1139-40.) The Board therefore fully explained its sound rationale for rejecting Eshareturi as a comparator, notwithstanding the Company's claim (Br. 41) that the reasoning is "inexplicable."

In addition, the Board found (A. 230) that the Company's affirmative defense separately fails because its investigatory questions pried into protected conduct and the proffered defense is pretext. With regard to the former, court-approved Board law provides that "[a]n employer may not discharge an employee

for lying in response" to questions that pry into or otherwise seek to uncover protected activity. *Paragon Sys., Inc.*, 362 NLRB No. 182, 2015 WL 5047766, at *7 (Aug. 26, 2015); *accord United Servs. Auto. Ass'n v. NLRB*, 387 F.3d 908, 917 (D.C. Cir. 2004) (employee's "dishonesty about her protected concerted activity did not constitute a lawful reason to discharge her"). Here, the evidence establishes that Eshareturi felt unsafe at work and reached out to Cunningham, a coworker she understood was affiliated with the Union. (A. 316-19, 435-37, 441-43, 1131-33.) Concerned for Eshareturi's safety, Cunningham contacted O'Neil who, likewise concerned, instructed Cunningham that Eshareturi should leave the store if she felt unsafe. (A. 1134-37.) Cunningham then conveyed that instruction to Eshareturi in the text that "you can leave," notwithstanding her answers during the investigation. (A. 391, 395, 1133, 1230, 1232, 1690-91.) The Board reasonably found (A. 230) that as "Cunningham's alleged lying occurred while [the Company] was prying into Cunningham's protected conversations with both Eshareturi and O'Neil, she was under no obligation to disclose the protected nature of those discussions," and consequently the Company could not rely on her "lies" as justification for her discharge.

In making that finding, the Board reasonably rejected (A. 230) the Company's contention (Br. 50-51) that Eshareturi's walkout, and therefore

Cunningham's advice, were unprotected.[4] As the Board reasoned, it is well established that employees have the right to walk off the job where their safety is at issue. *See NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 13-18 (1962). Furthermore, as to Cunningham's role in advising Eshareturi and serving as the conduit with O'Neil, the record amply supports the Board's (A. 230) finding that such conduct "is, by its very nature, concerted activity, for the purpose of mutual aid or protections."[5] *See generally Fresh & Easy Neighborhood Mkt., Inc.*, 361 NLRB No. 12, 2014 WL 3919910, at *6-*9 (Aug. 11, 2014) (discussing mutual aid or

---

[4] The Company argues (Br. 50-51) that Cunningham lost the Act's protection because she effectively directed Eshareturi to ignore Broomes' legitimate directive. Cunningham relayed O'Neil's message that Eshareturi could go home, but also told her to talk to Broomes, which she did. He, however, never directed her to stay or even answered her question about leaving, choosing instead to redirect the conversation toward a transfer. Indeed, even after her discussions with Cunningham, Eshareturi still answered Broomes' telephone call and spoke with him about the Graves situation. (A. 448, 624, 1132.)

[5] The Company strains credulity by arguing (Br. 47) there is no evidence that it knew Cunningham communicated instructions from the Union (O'Neil) to Eshareturi when it discharged her on August 24. The record shows that it was informed on August 11 and 21. (A. 365, 1187-90, 1811-12.) Likewise, the record disproves its claim (Br. 47-48) that there is no evidence it knew Eshareturi felt unsafe or threatened, or that Cunningham advised her to leave if she felt threatened. At her May 27 interview, Eshareturi said she had felt "threatened" by Graves, who she worried was "going to do something crazy" and that Cunningham advised her to leave if she "felt . . . really threatened." (A. 1216-20.) Cunningham confirmed that during her May 27 interview. (A. 1230-32.) During the June 1 interview, Eshareturi repeated her concern that Graves "was going to do something" and an interviewer acknowledged that she had described feeling "threatened" in the prior interview. (A. 1255, 1258.)

protection caselaw and finding that employee protected even though employee—who asked coworkers to sign document memorializing incident—was sole target of harassment). Additionally, Board law "has long held that employee discussions in which advice about future action is sought or offered constitute concerted activity." *Unique Pers. Consultants, Inc.*, 364 NLRB No. 112, 2016 WL 4582493, at *4 (Aug. 26, 2016).

The Board also reasonably rejected (A. 230) as misplaced the Company's reliance (Br. 51-52) on *Fresenius USA Mfg., Inc.*, 362 NLRB No. 130, 2015 WL 3932160 (June 24, 2015), to support its contention that Cunningham's conduct was unprotected. In *Fresenius*, the discriminatee anonymously wrote pro-union statements on union literature, which female employees viewed as offensive and threatening. 2015 WL 3932160, at *1. During the subsequent investigation, the discriminatee lied about authoring the statements and, after inadvertently confessing, tried to hide his identity as the confessor. *Id.* On those facts, the Board found the case implicated an employer's legitimate business interest "to question an employee about facially valid claims of harassment and threats, even if that conduct took place during the employee's exercise of Section 7 rights." *Id.* at *2. It further found that the discriminatee's "lies did not implicate a legitimate interest in shielding his Section 7 activity from employer inquiry" because he had no reasonable basis to believe his employer was trying to pry into protected

activity or that he would suffer reprisal for his activity because of its pro-union content. *Id.*

The Board here reasonably found (A. 230) *Fresenius* "clearly distinguishable" because Cunningham never made any threatening or offensive statements and the Company's questioning of Cunningham indubitably pried into her protected union and concerted activity, namely, her discussions with Eshareturi and O'Neil. While Graves' conduct set the events in motion, the Company's investigation quickly targeted Eshareturi and Cunningham's protected communication. The Board additionally (A. 230) distinguished *Fresenius* because there was no evidence of disparate treatment, *see id.* at *2, whereas here numerous other employees lied or were dishonest during investigations and were not terminated.

Finally, the Board found (A. 230) that the Company's professed concern with dishonesty during its investigation into Eshareturi leaving work early was mere pretext for its true motive: an unwillingness to tolerate the Union (through Cunningham) in a recently organized store advising Eshareturi to walk off the job.[6]

---

[6] The Company splits hairs (Br. 48-49) by arguing that it never determined it was misconduct for Eshareturi to walk off the job; rather, the issue was doing so without notice or approval. (A. 1569.) Walking off, however, reasonably presupposes no approval. It also mischaracterizes (Br. 49-50) General Counsel Exhibit 33, which unambiguously states that Cunningham's protected activity (informing Eshareturi she could leave) formed the basis of its misconduct determination. (A. 1368.)

The Board observed that Eshareturi's June 10 Business Request for Termination summarizes Broomes' May 22 telephone discussion with her. It states that he told her she was being placed on leave to permit time to address the Graves issue and investigate questions regarding the truthfulness of her explanations. (A. 1571.) However, the Board noted (A. 231), dishonesty was not mentioned in either Broomes' contemporaneous May 23 email to company officials or his May 22 telephone call with Young. (A. 512-13, 946-47, 1364-65.) In his email and telephone call, Broomes only indicated that Eshareturi was being placed on leave pending resolution of her conflict with Graves.

Thus, the June 10 Business Request for Termination "makes it appear that, as of May 23, Broomes immediately had concerns about Eshareturi's truthfulness—thereby substantiating further investigation and her termination." (A. 231.) However, the evidence indicates that the concern over alleged untruthfulness "was added into Broomes' [telephone call summary] sometime in the intervening 3 weeks, to support the [Company's] decision to fire Eshareturi." (A. 231.) When Cunningham's texts came to light and terminating Eshareturi for lying may no longer have been practicable, the Company "pivoted" to Cunningham to use "the same excuse of 'truthfulness' to fire Cunningham." (A. 231.) In other words, "somebody was going to be fired for the walk-out in Brooklyn"—if not Eshareturi, then Cunningham. (A. 231.) In addition to negating

its defense, the foregoing finding of pretext is evidence of unlawful motivation. *Fort Dearborn*, 827 F.3d at 1075.

3. The Company's challenges to the Board's application of *Wright Line* lack merit

In its brief, the Company raises various challenges to both the Board's application of *Wright Line* and its underlying factual findings, none of which have merit. Contrary to the Company's assertion (Br. 34), the Board properly stated that extant Board law does not require a showing of a "particularized motivating animus" or an "undefined 'nexus' between the employee's protected activity and the adverse action." (A. 226 n.72 (quoting *Libertyville Toyota*, 360 NLRB 1298, 1301 n.10 (2014), *enforced*, 801 F.3d 767 (7th Cir. 2015)).) The Court's recent decisions enforcing Board orders have recited the *Wright Line* standard without that additional showing.[7] *See Ozburn-Hessey*, 833 F.3d at 218; *Inova Health*, 795 F.3d at 80.

The Company next attempts to dress up its factual dispute as a Board legal error in claiming that the Board misapplied or misassigned (Br. 40, 48) the burden

[7] *Chevron Mining* (Br. 34) is not to the contrary. There, the parties stipulated that the employer amended a bonus program in response to employees' exercise of contractual work stoppages; thus, motivation was not in dispute. *Chevron Mining, Inc. v. NLRB*, 684 F.3d 1318, 1327 (D.C. Cir. 2012). In that context, the court unremarkably observed that motivation involves finding a "link, or nexus" between protected activity and employer action—in other words, the causation analysis inherent in *Wright Line*. *Id.* at 1328.

of proof in requiring the Company to prove similarities between Cunningham and other employees instead of requiring the Board's General Counsel to prove dissimilarities. The Company confuses the burdens of *Wright Line*. Before the Board, it was the Board's General Counsel burden to show that the Company's discharge of Cunningham was unlawfully motivated. The General Counsel did so, in part, by presenting evidence of disparate treatment—several employees found to have lied during investigations merely received warnings. When the burden shifted to the Company, it elected to advance examples of terminated employees as comparators to show that it would have discharged Cunningham even absent her protected activity. Thus, the burden fell on it to establish that those incidents were comparable, which, as shown (pp. 37-39), the Board reasonably found that it failed to do. The Company's cited cases (Br. 40) do not show that the Board reversed the burdens. *MECO Corp. v. NLRB*, 986 F.2d 1434, 1438 (D.C. Cir. 1993) (similar-treatment evidence may weigh against animus evidence under first step of *Wright Line*, but employer entitled to offer it under second step); *NLRB v. Lampi, LLC*, 240 F.3d 931, 937 (11th Cir. 2001) (Board's animus finding not supported by substantial evidence; then noting in dicta that Board's rejection of employer defense also not supported by substantial evidence where, inter alia, similarly situated employees also discharged and cited disparate treatment evidence was not comparable, undermining finding of pretext).

Next, citing *Sutter East Bay Hospitals v. NLRB*, 687 F.3d 424 (D.C. Cir. 2012), the Company argues (Br. 45, 46) that the Board erred in applying *Wright Line* because it never addressed whether, as part of the Company's affirmative defense, it "reasonably believed" Cunningham lied. To the extent the Company even made that factual claim before the Board, it failed to raise the legal theory that a good-faith belief of misconduct establishes an employer's *Wright Line* defense. (*See* A. 52-72.) Because it failed to raise that legal challenge before the Board, the Court lacks jurisdiction to consider it. 29 U.S.C. § 160(e) ("No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court"); *KLB Indus., Inc. v. NLRB*, 700 F.3d 551, 560 (D.C. Cir. 2012) (same). In any event, its argument is unavailing because the good-faith belief defense the Court articulated in *Sutter East Bay* is inapplicable where the employer's affirmative defense is pretextual or where it disparately treated the employee. *See Ozburn-Hessey*, 833 F.3d at 221; *Fort Dearborn*, 827 F.3d at 1070.

The Company's factual challenges to the Board's animus finding are equally meritless. Its claim (Br. 43) that the Board improperly "depart[ed] from precedent" without explanation by finding disparate treatment based on "a speck" of evidence is negated by the ample evidence set forth above (pp. 32-35). Furthermore, attempting to downplay the evidence, the Company cannot credibly

blame (Br. 39) Cunningham for the length and breadth of its investigation. Rather, the evidence shows that the Company, in a departure from practice, held multiple interviews and escalated its normal response of a written warning for lying in investigations (or even for early departures) into a discharge, thus by its own act triggering the need for "*Alan Ritchey*" meetings. An instance of "lying" became a major brouhaha, complete with an outsized investigation. Given the disparate treatment here, the Board has not created a "catch-22" where both a "thorough investigation and . . . a cursory investigation" (Br. 39) are evidence of animus.

In addition, although the Company makes factual arguments (Br. 36-38) to mitigate the weight of Graves' texts, it presents no legal argument that those statements by an undisputed supervisor/agent are not attributable to the Company. Its statement (Br. 36) that Graves had no role in the discharge decision is immaterial; the Board did not rely on his texts as evidence of *his* animus but as a management official's insight into *the Company's* motivation to discharge Cunningham. Its accusation (Br. 36) that Cunningham "baited" Graves is speculative and undermined by the actual texts, which, for instance, show Graves mentioning the "hit list" before the cited message from Cunningham about "the klan." (A. 1038-39.)

Further, the Board stated that it was "unnecessary to rely" on another unfair-labor-practice case against the Company "to find animus" (A. 206 & n.2), thus

making it plain that it found the remaining evidence of animus sufficient. The Company's claim (Br. 35, 44) that it failed to so find and its reliance on a distinguishable out-of-circuit case is misplaced. *See Good Samaritan Med. Ctr. v. NLRB*, 858 F.3d 617, 632, 643 (1st Cir. 2017) (*sua sponte* applying *Wright Line*, court determined Board's decision—directed toward another test—failed to specify what facts supported finding of employer's animus). The Court has rejected such an assertion under similar circumstances. *See Fort Dearborn*, 827 F.3d at 1075 (Board affirmed that General Counsel met his burden; it did not eliminate judge's other findings of animus when it deemed other animus evidence unnecessary).

The Company's remaining challenges that the Board failed to explain, or erred in making, certain findings are resolved by a reasonable reading of the decision. Thus, although it claims (Br. 45) that the Board failed to "explain for what protected conduct [it] fired Cunningham," the decision (*see* A. 206, 209, 226, 227, 230, 231) plainly shows that the Board found the Company unlawfully discharged Cunningham for her protected union and concerted activity on May 21. That same reading shows, contrary to the Company's repeated assertions (Br. 45-

47), that the judge did not concoct his own theory of the case.[8] Specifically, the complaint alleged that the Company unlawfully discharged Cunningham because: she engaged in protected concerted activity on May 21 by discussing Eshareturi's conflict with Graves; and she assisted the Union by acting as a de facto shop steward and engaging in concerted activities. (A. 1142 ¶¶3-6.) Those allegations plainly encompass the unfair-labor-practice findings. The Board's conclusions of law state that the Company violated Section 8(a)(3) by discharging Cunningham for her union activity and Section 8(a)(1) for her protected concerted activity. (*See* A. 206, 227-31.) In any event, the Board (or judge) is not limited to the complaint's theory. *See Noel Canning, a Div. of the Noel Corp.*, 364 NLRB No. 45, 2016 WL 3853832, at *1 (July 14, 2016), *enforced mem.*, No. 17-71893 (9th Cir. July 20, 2017); *see also Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1169 (D.C. Cir. 1993) (although not alleged by General Counsel in complaint, Board properly found unfair-labor-practice violation based on mass-discharge theory).

In addition, the decision plainly shows that the Board did not "dodge [the] central issue" of whether Cunningham lied (Br. 45, 46). To the contrary, the Board's express findings and credibility determinations demonstrate that it found she was not "lying"—*i.e.*, purposely misleading—during the interviews, as

[8] The Company (Br. 47) argues the judge created a "walk-out" theory, but it consistently referred to Eshareturi's actions using variations of the phrase "walk off," as the decision notes. (A. 209 n.6 (citing evidence).)

opposed to misremembering. (A. 208 n.3, 214, 215 & n.29, 216 & n.31, 217.) That point is likewise apparent as the Board repeatedly couches any mention of lying only as "alleged" (*e.g.*, A. 228, 230). It also assumed (A. 230), for the sake of argument, that she lied but found such conduct non-dischargeable under the facts because any "lying" related to protected activity, not to mention the disparate treatment for that offense.

4. The Company's evidentiary challenges are without merit

The Company's evidentiary arguments (Br. 27-28, 32-33) with respect to two exhibits, claimed to be privileged, are without merit. To begin, "[i]t is settled law that the party claiming the privilege bears the burden of proving that the communications are protected." *In re Lindsey*, 158 F.3d 1263, 1270 (D.C. Cir. 1998). To do so, that party must prove that the recipient of the communication was a lawyer and was acting in that capacity with respect to the communication, and the communication was made for purposes of securing a legal opinion or services or assistance with a proceeding. *Id.* Ambiguities are construed against the privilege. *F.T.C. v. TRW, Inc.*, 628 F.2d 207, 213 (D.C. Cir. 1980) (given ambiguity of record, privilege not apply). Generally, the Court does not overturn

the Board's evidentiary rulings absent an abuse of discretion. *Veritas Health Servs., Inc. v. NLRB*, 671 F.3d 1267, 1274 (D.C. Cir. 2012).[9]

First, regarding General Counsel Exhibit 33 (Cunningham's Business Request for Termination), the Board had several bases for rejecting (A. 223-24) the Company's claim that it was a draft document created to secure advice from counsel. It expressly credited Broomes' testimony that Exhibit 33 was the final termination paperwork, not a draft, to determine if termination was warranted. (A. 223, 219 n.36; A. 687-88.) Indeed, the Company introduced termination requests for nine other employees and none were claimed to be privileged; there is no indication that Exhibit 33 was different. (A. 223 n.56.) The Board, moreover, specifically declined to credit (A. 223) McDonald's testimony that Exhibit 33 was created to secure legal advice. (A. 1019-21.) As the Board noted (A. 224), despite claims that the Company possessed a cover email from McDonald to counsel regarding Exhibit 33, it was never introduced into evidence nor offered for in-camera review. (A. 705-07.) The Board found (A. 223-24) that neither Taccetta nor Broomes indicated that the Company's Business Requests for Termination are created for a purpose covered by the privilege. Additionally, the exhibit was not marked as privileged nor as a draft; the Company concedes (Br. 28) that it was not

[9] Although the Company asserts (Br. 27-28) no deference for the Board's privilege analysis, it does not claim that the Board's underlying findings of fact or credibility determinations have lost their normal deference.

"readily apparent as privileged." (A. 224.) Thus, as the Board aptly observed (A. 224), Exhibit 33 "appears [to be] a routine business document created whenever [the Company] decides to terminate an employee." As the Supreme Court has stated, "'since the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose.'" *U.S. v. Zolin*, 491 U.S. 554, 562 (1989) (citation omitted).

The Company has not demonstrated that necessity. Indeed, the Company's argument (Br. 32-33) that Exhibit 33 should not have been admitted rests on challenging the Board's discrediting of McDonald; yet it does not overcome the stringent standard of review for such Board determinations (p. 27) and waives challenges to the Board's other bases for rejecting the privilege claim.[10] *Corson & Gruman Co. v. NLRB*, 899 F.2d 47, 50 (D.C. Cir. 1990) (arguments not raised in opening briefs waived).

Second, with respect to General Counsel 49 (emails between Ulrich and in-house counsel disclosed by the Company pursuant to subpoena), the Board expressly declined (A. 206 n.2) to rely on that exhibit in light of other supporting

[10] The Company contends (Br. 32) that in finding Exhibit 33 not privileged, the judge improperly characterized McDonald's testimony as "self-serving" by relying on contested Exhibit 49. That contention is baseless. Exhibit 49 is not mentioned, explicitly or implicitly, in the portion of the decision related to Exhibit 33 (A. 223-24). Its absence is understandable given that the judge first addressed the admissibility of Exhibit 33 and only then proceeded to assess the admissibility of Exhibit 49.

evidence and thus found "it unnecessary to pass on" the judge's bases for admitting it.[11] The Company claims (Br. 30, 33) the Board erred in not ruling on the exhibit because it was essential to credibility determinations. The Court, however, lacks jurisdiction to consider that challenge because it was not raised in a motion for reconsideration with the Board. *See* 29 U.S.C. § 160(e); 29 C.F.R. § 102.48(c)(1); *W&M Properties of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1345 (D.C. Cir. 2008) (where party failed to file motion for reconsideration challenging remedy, court lacked jurisdiction to consider it).

In any event, the Company's claims that Exhibit 49 "tainted" (Br. 30, 31, 33) the entire decision is incorrect. Specifically, the judge admitted Exhibit 49 because it indicated which specific company officials made the termination decision and the Company's concern about Cunningham's possible post-discharge employment as a union representative, which would further indicate her union activity playing a role in her termination. (A. 226.) No element of the Board's *Wright Line* analysis hinges on Exhibit 49; as described above, all findings are supported by substantial evidence even without that exhibit. The rejection of the Company's defense as pretextual likewise does not depend on Exhibit 49, particularly given its disparate treatment of Cunningham. Ultimately, the Board was correct in determining that it

[11] The judge likewise found (A. 226 n.71) the evidence sufficient to support the violations, even if Exhibit 49 was inadmissible.

simply need not rely on Exhibit 49, a result that does not undermine any other finding.

CONCLUSION

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

/s/ Usha Dheenan
USHA DHEENAN
Supervisory Attorney

/s/ Jared D. Cantor
JARED D. CANTOR
Attorney
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2948
(202) 273-0016

PETER B. ROBB
General Counsel

JENNIFER A. ABRUZZO
Deputy General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

December 2017

STATUTORY AND REGULATORY ADDENDUM
TABLE OF CONTENTS

Relevant provisions of the National Labor Relations Act, 29 U.S.C. §§ 151-69:

Sec. 7 [Sec. 157] Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

***

Sec. 8(a) [Sec. 158(a)] [Unfair labor practices by employer] It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];

***

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

***

Sec. 10 [Sec. 160]

(a) [Powers of Board generally] The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding

provision of this Act [subchapter] or has received a construction inconsistent therewith.

***

(e) [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) [Review of final order of Board on petition to court] Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Relevant provisions of the National Labor Relations Board's Rules and Regulations 29 C.F.R. §§ 101-103

§ 102.48. No exceptions filed; exceptions filed; motions for reconsideration, rehearing, or reopening the record.

***

(c) [Motions for reconsideration, rehearing, or reopening the record.] A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order.

> **(1)** A motion for reconsideration must state with particularity the material error claimed and with respect to any finding of material fact, must specify the page of the record relied on. A motion for rehearing must specify the error alleged to require a hearing de novo and the prejudice to the movant from the error. A motion to reopen the record must state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become

available only since the close of the hearing, or evidence which the Board believes may have been taken at the hearing will be taken at any further hearing.

***

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CELLCO PARTNERSHIP, D/B/A VERIZON WIRELESS	)	
Petitioner/Cross-Respondent	)	
v.	)	
	)	Nos. 17-1158 & 17-1165
NATIONAL LABOR RELATIONS BOARD,	)	
Respondent/Cross-Petitioner	)	Board Case No. 29-CA-158754
and	)	
COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO	)	
Intervenor	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 12,623 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 29th day of December, 2017

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CELLCO PARTNERSHIP, D/B/A VERIZON WIRELESS	)	
Petitioner/Cross-Respondent	)	
v.	)	
	)	Nos. 17-1158 & 17-1165
NATIONAL LABOR RELATIONS BOARD,	)	
Respondent/Cross-Petitioner	)	Board Case No. 29-CA-158754
and	)	
COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO	)	
Intervenor	)	

CERTIFICATE OF SERVICE

I hereby certify that on December 29, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia 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:

Arthur G. Telegen, Esq.
Robert A. Fisher, Esq.
Nicholas Skelly Harper
Seyfarth Shaw LLP
Two Seaport Lane
World Trade Center East, Suite 300
Boston, MA 02210-2028

Katherine A. Roe
Communications Workers of America
501 Third Street, NW, Suite 800
Washington, DC 20001-2797

/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 29th day of December, 2017