

Nos. 18-1151, 18-1180

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

MURRAY AMERICAN ENERGY, INC., ET AL.

Petitioners/Cross-Respondents

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

MURRAY AMERICAN ENERGY, INC., ET AL)	
)	
Petitioner/Cross-Respondent)	Nos. 18-1151, 18-1180
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent/Cross-Petitioner)	06-CA-169736

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board (“the Board”) certify the following:

A. Parties and Amici

Murray American Energy, Inc., Harrison County Coal Company, Marion County Coal Company, Monongalia County Coal Company, and Marshall County Coal Company were the Respondents before the Board in the above-captioned case and are the Petitioners in this court proceeding. The Board’s General Counsel was a party before the Board. Michael S. Phillippi, Joshua Matthew Preston, United Mine Workers of America, International Union, United Mine Workers of America, District 31, United Mine Workers of America, Local 1501, and United Mine Workers of America, Local 9909 were the charging parties before the Board.

B. Rulings Under Review

The case under review is a Decision and Order of the Board, issued on May 7, 2018, and is reported at 366 NLRB No. 80.

C. Related Cases

This case has not previously been before this Court. The Board is not aware of any related cases either pending or about to be presented before this or any other court.

/s/ Linda Dreeben

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Dated at Washington, D.C.
this 5th day of November, 2018

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**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**

JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Murray American Energy, Inc., the Harrison County Coal Company, the Monongalia County Coal Company, the Marshall County Coal Company, and the Marion County Coal Company (collectively, “the Company”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, the Board’s Order issued against

the Company. The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the National Labor Relations Act (“the Act”), 29 U.S.C. §§ 151, 160(a), which empowers the Board to prevent unfair labor practices affecting commerce.

The Board’s Decision and Order issued on May 7, 2018, and is reported at 366 NLRB No. 80. (A. 116-51.)¹ The Order is final. The Company petitioned for review of the Order, and the Board cross-applied for enforcement. The Court has jurisdiction over the petition and cross-application pursuant to Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f), which provides that petitions for review of Board orders may be filed in this Court. Both filings were timely because the Act imposes no time limit on the initiation of review or enforcement proceedings.

STATEMENT OF THE ISSUES

1. Whether the Board is entitled to summary enforcement of the uncontested portions of its Order finding that the Company committed numerous violations of Section 8(a)(1), (3), and (5) of the Act.

2. Whether substantial evidence supports the Board’s finding that the Company committed numerous violations of Section 8(a)(1) of the Act.

¹ “A.” references are to the Joint Appendix. “Br.” refers to the Company’s opening brief. References preceding a semicolon are to the Board’s findings; those following, to the supporting evidence.

3. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(3), (4), and (1) of the Act by suspending Mark Moore because of his protected activity.

4. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by failing to timely respond to several information requests from the Union, and by unilaterally implementing a change to its grievance procedure.

RELEVANT STATUTES AND REGULATIONS

The relevant statutory provisions are set forth in the Company's brief.

STATEMENT OF THE CASE

Acting on charges filed by Michael Phillippi, Joshua Preston, the United Mine Workers of America ("the Union"), and various locals of the Union, the Board's General Counsel issued a consolidated complaint alleging that the Company committed numerous violations of Sections 8(a)(1), (3), (4), and (5) of the Act, 29 U.S.C. § 158(a)(1)-(5). (A. 120-21.) Following a hearing, an administrative law judge found merit to most of the unfair-labor-practice allegations. On May 7, 2018, after the Company filed exceptions, the Board issued its Decision and Order, affirming all of the judge's rulings, findings, and conclusions. (A. 116-51.)

I. THE BOARD'S FINDINGS OF FACT

A. Background; the Company's Operations and Labor Relations

The Company mines and sells coal. (A. 121.) It is a single employer composed of Ohio-based parent company Murray American Energy, Inc., and several wholly owned subsidiaries, including Marshall County Coal, Harrison County Coal, Monongalia County Coal, and Marion County Coal. Each of the subsidiary companies operates an underground coal mine in West Virginia. (A. 121-22, 122 n.3; 666-67.)

Each mine's hourly production-and-maintenance employees are represented by a local of the Union, and subject to the governing National Coal Bituminous Coal Wage Agreement, a collective-bargaining agreement between the Union and a multi-employer association. Pursuant to that agreement, the Company follows a four-step grievance procedure. (A. 122-23; 551-57.) The initial step involves an oral complaint by an employee to his immediate foreman, the second step is for the employee to make a written complaint, which is pursued by the Union's local committee with mine management, step three involves a meeting between company and union representatives, and the fourth step, if necessary, is arbitration. (A. 123; 385, 552-53.) Grievant-employees have a right to attend step-three meetings but are not required to do so. If they attend, they must do so off the clock. (A. 146, 556; 385-86.)

B. The Company Instructs Employees Not To Inform Government Agencies of Safety Concerns

On December 16, 2015, Marion County Coal employee Jamie Hayes attended a routine safety meeting for employees led by Shift Foreman Donald Jones. Assistant Shift Foreman Dave Chapman, Assistant Superintendent Chris England, and an inspector for the Mine Safety and Health Administration (“the MSHA”) were also present. At the meeting, Jones addressed a recent MSHA safety citation issued to the Company. (A. 126-27; 304-07.)

Jones began by telling employees that he was “old enough to retire, but most of you aren’t,” warning that if employees “keep notifying the authorities, they are going to shut this place down.” (A. 126; 311.) Jones then said, “[employees] don’t need to do that, [they] need to bring out concerns to the Company.” (A. 127; 305.) In response, Hayes, stood up, visibly irritated, and claimed that he and other employees had reported health and safety concerns to the Company that the Company had failed to fix, providing specific examples. (A. 127; 303-07.) When Chapman told Hayes to quiet down, Hayes left the meeting because he had “heard enough.” (A. 127; 306.)

The following day, Chapman instructed Hayes to go to Jones’ office to meet with Jones and England. (A. 127; 306.) When Hayes arrived, England stated that he and Jones wanted to discuss the prior day’s events. (A. 128; 307-08.) England accused Hayes of “being loud and belligerent” at the safety meeting and said that

he had to “pull [Hayes] off of Jones.” (A. 128; 308.) Hayes admitted to being loud but denied that he had to be physically restrained, explaining that all he had done was stand up from his seat. England then repeated Jones’ directive from the day before, explaining that employees “didn’t need to go to the authorities” for their safety concerns. (A. 128; 308, 318.) Jones concurred, repeating “[y]ou don’t need to notify the authorities, I’m telling you, you don’t need to notify the authorities.” (A. 318.) England then warned Hayes that “if this happens again, if [Hayes got] loud or anything,” they would discipline Hayes and England would “let the arbitrator rule on it.” (A. 128; 308, 317).

C. The Company Asks Joshua Peek To Withdraw a Grievance²

In January 2016, on a day several employees had called off work at the Harrison County Coal mine, supervisor George McCauley stepped in and did work contractually reserved to bargaining-unit employees. (A. 123; 370, 377, 400-03, 559.) Employee Joshua Peek, who had never initiated a grievance in his six years with the Company, informed McCauley that he planned to file one regarding McCauley’s performance of bargaining-unit work. (A. 123; 371-72.) McCauley told Peek he would deny the grievance. (A. 372.)

The following day, Superintendent Scott Martin approached Peek and asked why he had filed a grievance. (A. 123; 373-74.) Peek responded that the

² Peek is inadvertently referred to as “Peak” in the hearing transcript.

Company should have recalled laid-off bargaining-unit employees rather than have a manager do bargaining-unit work, and said that his grievance was meant to make that point. Martin asked Peek to withdraw his grievance, stating that Peek “was not one of those people to file grievances.” (A. 123; 374.) Acknowledging that Peek was trying to prove a point, Martin reminded Peek that he had “helped” him in the past. Martin then warned that if Peek “needed help in the future, that [Martin] would take into consideration whether or not [Peek] file[d] grievances.” (A. 123; 375.) Martin then reiterated his request that Peek withdraw the grievance. Peek did not pursue the grievance further. (A. 123; 375-76.)

D. The Company Threatens, Then Disciplines, Mike DeVault Because He Sought Union Representation

In February, Marion County Coal employee Mike DeVault accompanied a federal safety inspector, as the Union’s representative, while the inspector toured the mine. (A. 124; 213-17.) After DeVault finished his work for the day, foreman Tim Legg directed him to attend a meeting about equipment damage. DeVault explained that he was not present when the damage occurred, a fact Legg acknowledged before reiterating that DeVault must attend the meeting. (A. 124; 217, 219.)

When DeVault requested union representation, Legg explained that representation was unnecessary because the meeting was not for disciplinary purposes. Still concerned, DeVault contacted his local union president. The

president advised DeVault to attend the meeting but to inform management that if it could lead to discipline, DeVault wanted union representation. (A. 124; 219.)

While escorting DeVault to the meeting, Legg said that initially DeVault “wasn’t going to be disciplined, but now that [he] asked for a rep, that [he] would be.” (A. 124; 220-21.) In response, DeVault recontacted the president, who arranged for a coworker to represent him. (A. 124-25; 220.)

At the meeting, Mine Foreman Clell Scarberry informed DeVault that while the meeting was originally to be about the damage, now DeVault would be disciplined for insubordination because he had not attended the meeting when first ordered to. (A. 220-21.) When challenged, Scarberry explained “that he didn’t want men at this mine that needed reps to speak with him.” (A. 221.) Scarberry then gave DeVault a written disciplinary notice stating that DeVault was being suspended for insubordination, due to his refusal to attend the meeting without representation. (A. 125; 220-21, 706.)

The following day, a human-resources supervisor for the mine contacted DeVault and explained that his discipline was inappropriate and had been rescinded and expunged from his file. (A. 125; 222-25.)

E. The Company Surveils Employees’ Union Activities

Also in February, Safety Supervisor Jeremy Devine attended a routine meeting with MSHA representatives at their office. (A. 129; 494.) Devine arrived

early and sat in a waiting area facing a conference room where several people were meeting. While Devine waited, he was able to identify three participants through the room's window: union official Mike Payton, employee and union-safety-committee chairman Rick Rinehart, and an MSHA investigator. (A. 130; 497-99.)

After a short time, an MSHA representative greeted Devine, and led him to a different conference room. At the conclusion of his meeting, Devine walked towards the exit. On his way, he passed the conference room where the meeting he had observed earlier was ongoing. When he got to the doors, Devine paused, pressed close to the window, and peered into the room. (A. 130; 276-77, 288-91, 300, 310.) Shortly thereafter, several meeting participants noticed Devine looking into the room, which disrupted their meeting, and the MSHA investigator left the room to usher Devine away. (A. 130; 276-77, 288-91, 300, 310.)

F. The Company Twice Suspends Mark Moore, Once Because He Filed a Grievance, and Once after an Unfair-Labor-Practice Charge Challenging That Suspension

In June, Marshall County Coal foreman Scott Meadow told employee Mark Moore that he intended to assign two supervisors to perform bargaining-unit work. (A. 131; 247-48.) After a brief discussion, Moore told Meadows he would grieve that assignment, and Meadows responded that the assignment was “above his head” and that he could not change it. (A. 131; 248.) Moore did not file a grievance. (A. 131; 248.)

Before starting his shift the following day, Moore was summoned to a meeting with Assistant Superintendent Jeff Crowe. (A. 131; 248-49.) Moore asked coworker Chris Drummond to attend the meeting with him. Two foremen also attended the meeting, which Moore recorded on his cell phone. (A. 131; 249-50, 708-09.) Crowe began the meeting by announcing that he had heard Moore had grieved the issue of supervisors performing bargaining-unit work. After speaking of the stress the mine was under, he questioned Moore, “why in the fuck would you file a grievance on a fucking foreman for fucking helping? You’re the only goddamn person here who’s fucking done it.” (A. 131-32; 708-09.) Crowe then accused Moore of being “the type of pe[rson] that will shut this fucking coalmine down,” asking, “Do you understand it? Now do you have an issue if fucking foremen are down there helping?” (A. 131-32; 708-09.) Finally, Crowe ordered: “Go home now.” (A. 131-32; 708-09.) As directed, Moore clocked out. His suspension lasted for one day. (A. 132; 251.)

Two months later, in August, the Union filed an unfair-labor-practice charge regarding Moore’s suspension. Three weeks after the charge was filed, Moore clocked in approximately 4 minutes before his scheduled start time of 4:00 p.m. (A. 132; 253-43.) Another employee, Colby Yarbrough, clocked in at the same time as Moore. After clocking in, Yarbrough and Moore donned their work gear, stopped to get water, and walked towards the elevator together, shortly after 4:00.

Some other members of their crew, including Moore's foreman, were still waiting for the elevator, which had not yet arrived. Two employees scheduled to be on an earlier elevator were also present. (A. 132; 253-55). Before Moore and Yarbrough reached the elevator, Shift Foreman John Brone, acting on Superintendent Eric Koontz's orders, told Moore to go home because he was not ready on time for his shift. No other employee was sent home that day or disciplined for tardiness. (A. 132; 254, 442.)

The next day, Moore met with Koontz, a human-resources representative, and a union representative. He received a written disciplinary summary of the incident, which stated that Moore had been suspended because he was not "dressed and ready to cage in at the start of his shift." (A. 132-33; 251.) Koontz also reviewed Moore's recent arrival times, admonishing Moore that he was "cut[ting] it way too close" before his shifts. (A. 133; 443.) When Moore asked why he was being disciplined when he was ready to get on his scheduled elevator, Koontz said, "from 4:00 on, I own you." (A. 133; 256.) Moore had never before received any documented warnings or other disciplinary action for being late. (A. 133; 256-57.)

G. The Company Tells Joshua Preston He Will Be Disciplined for Requesting a Union Representative

On September 13, 2016, Marshall County Coal employee Joshua Preston was missing equipment he needed to perform his scheduled work. Preston alerted

foreman John Kirk, who called Shift Supervisor Teddy Perkins, who said employees should have brought the equipment with them. (A. 135; 329-31.)

After Preston's shift, Perkins instructed him to meet with Assistant General Mine Foreman Ben Phillips. When Preston went to Phillips's office and found Phillips, Kirk, and two other managers, he announced that he wanted union representation. (A. 135; 331-32.) After asserting that the meeting was not a "write up" and that he could speak to Preston without a representative, Phillips offered, "if you want wrote up, I can find something to write you up with, and you can come back tomorrow at 4:00 with your union representation." (A. 135; 332-33.) Phillips then began angrily questioning Preston about the missing equipment, framing the questions as "direct orders" when Preston was reluctant to answer. Once Phillips determined that Kirk was responsible for the missing equipment, he instructed Preston to leave. (A. 135; 333-34.)

H. The Union Requests Information Regarding Contractor's Performance of Bargaining-Unit Work in September 2015; the Company Provides It in May 2016

On August 31, 2015, an arbitrator issued a decision in a class-action grievance filed by the Union, finding that the Monongalia County Mine improperly hired contractors to install "pumpable crib bags" used for roof support, which was bargaining-unit work. (A. 140; 717-21.) Based on that finding, on September 8, 2015, union representative Michael Phillippi requested information from the

Company about the “hours billed by any contractors performing work associated with pumpable crib bags” in order to discuss settlement of the grievance. (A. 140; 669-71.) The Company responded that the arbitration decision was limited to time spent hanging the bags, a small portion of the contractor’s work, and proposing to discuss details after the contractor itemized its work. Phillippi reminded the Company that it had already provided total contractor hours for work associated with the bags for an earlier time period, asserting that they could discuss later which hours were reimbursable. He then reiterated the Union’s request for the information. (A. 140; 669-71.)

On November 30, 2015, the arbitrator issued a supplemental decision liquidating employees’ backpay award for the Company’s improper use of contractors, without the benefit of the information the Union had sought. (A. 140; 722-26.) On May 26, 2016, almost nine months after the Union’s request, the Company provided the requested information. (A. 140; 672.)

I. The Union Requests Information Regarding Attendance Policies in December 2015; the Company Provides Some in January 2017

The Company acquired Monongalia County Coal in December 2013. At that time, the mine had an attendance policy called the Bradford Plan. The Company’s attendance plan is called the Chronic and Excessive Absentee (C&E) Plan. The Bradford Plan initially remained in effect, but the Company announced that the C&E Plan would replace it in March 2014. (A. 141-42; 164, 683.)

On December 22, 2015, in preparation for an upcoming arbitration concerning the C&E Plan, Phillippi requested a list of hourly employees governed by the Bradford Plan, a list of hourly employees governed by the C&E Plan, and copies of any other C&E Plan policies and changes since December 2013. (A. 141; 675-76.) The Company refused to furnish the information, asserting that its obligation to do so was before an arbitrator, a reference to the Union's subpoena request for similar information in arbitration. (A. 141; 677-78.) One year later, on January 23, 2017, the Company provided the Union with a list of employees on the Bradford plan. It never provided the remainder of the requested information. (A. 141; 167, 196-98, 679-82.)

J. The Union Requests Information Regarding Unit-Employees Certifications in December 2015; the Company Provides It in January 2017

To prepare for arbitration regarding the Company's use of contractors to perform belt-examination work for Marion County Coal, Phillippi requested on December 28, 2015, a list of all hourly employees with specific certifications. (A. 142; 674.) The Company offered to provide "what we have for the grievants that are listed on the grievance form." Phillippi replied, "I did not ask for information on specific individuals," explaining that the requested information "will be used to establish how many hourly employees are available to perform examinations." (A.

142; 674.) The arbitration was held in January 2016. (A. 142; 162.) The Company provided the information on January 23, 2017. (A. 143; 668.)

K. The Union Requests Information Regarding the Monongalia County Mine's Use of Contractors in March 2016; the Company Never Provides It

On March 28, 2016, Phillippi emailed Monongalia County Coal human-resources employee Karen Mohan to request information about the mine's use of contractors. He asked for invoices, bills, bid forms, estimates, and other documentation describing the type and duration of work contractors had performed, or proposed to perform, at the mine since July 2015. (A. 143; 687-91.) Phillippi explained that his request was "to monitor compliance . . . and to determine whether or not to file or pursue any grievances" related to contractors performing bargaining-unit work. (A. 143; 687-91.) When the Company did not respond, Phillippi reiterated his request on March 31. Soon after, Mohan replied, stating that the request "is considered burdensome and it lacks any specifics." (A. 143; 687-91.)

In a follow-up communication, Phillippi reiterated that the Union needed the information to ensure compliance with the collective-bargaining agreement. He specifically named two contractors that were doing work unit employees were available to perform, and referred to an arbitration order instructing the Company to stop assigning unit work to contractors. (A. 143; 171, 687-91.) In reply, the

Company asked the Union to narrow its request “down to a specific date, grievant, contractor, project, etc.” (A. 143; 687-91.) The Company never provided the requested information. (A. 143; 171-72, 687-91.)

L. The Company Changes the Location of Step-Three Grievance Meetings at Marion County Coal

Marion County Coal employees are assigned to work at one of three portals: Marion, Metz, or Sugar Run. The portals are 20-30 minutes apart using main roads, or 15-20 minutes using back roads that require 4-wheel-drive vehicles. (A. 146; 175-78.) For over two years, step-three meetings were held at the employee-grievant’s assigned portal. (A. 146; 667.) In September 2016, when the Union requested step-three meetings at the Marion portal, the Company responded that it wanted to meet at the Metz portal. The Union agreed to make an exception to the regular location if the Company would allow grievants to attend on the clock. (A. 147; 412, 421, 692-704.) The Company rejected that suggestion and announced it would hold all future step-three meetings at the Metz portal. (A. 147; 486-88.)

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board (Members Pearce and McFerran; Member Emanuel, dissenting in part) issued its Decision and Order on May 7, 2018, adopting the judge's recommended decision and order with modifications. It found that the Company violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by: (1) threatening employees with discharge, discipline, or other reprisals if they filed grievances, requested union representation, or discussed safety issues;³ (2) discouraging employees from making safety complaints to government authorities; and (3) placing employees' union activities under surveillance. (A. 116, 148.) The Board further found that the Company violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1), by suspending employees because they filed grievances, requested union representation, or refused to promise not to file grievances, and violated Section 8(a)(3), (4), and (1), 29 U.S.C. § 158(a)(3), (4), and (1), by suspending an employee because he engaged in protected concerted activity and because he was the subject of an unfair-labor-practice charge. (A. 116, 148.) Finally, the Board found that the Company violated Section 8(a)(5) and (1), 29 U.S.C. § 158(a)(5) and (1) by: refusing to provide and unreasonably delaying provision of requested information relevant to the Union's

³ Member Emanuel dissented from the finding that the Company violated Section 8(a)(1) by threatening Preston with discipline for requesting representation.

representational duties; and (2) unilaterally changing the grievance process without first notifying the Union and giving it an opportunity to bargain. (A. 116, 148-49.)

To remedy those violations, the Board's Order requires the Company to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their Section 7 rights. Affirmatively, the Order requires the Company to make Moore whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, remove from its files any reference to the unlawful suspensions of Moore and DeVault, timely furnish the Union the information it requested on December 22, 2015, and on March 28 and 31, 2016, rescind its unilateral change to the grievance process, and post remedial notices. (A. 117-20.)

STANDARD OF REVIEW

The Court will affirm the findings of the Board unless they are “unsupported by substantial evidence in the record considered as a whole,” or unless the Board “acted arbitrarily or otherwise erred in applying established law to fact.” *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1282 (D.C. Cir. 1999). “Substantial evidence” consists of “such relevant evidence as a reasonable mind might accept to support a conclusion.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951).

SUMMARY OF ARGUMENT

The Board's Order should be enforced in full. As an initial matter, the Company does not challenge the Board's findings with respect to numerous violations of Section 8(a)(1), (3), and (5) of the Act. As such, the Board is entitled to enforcement of the portions of its Order remedying those uncontested violations.

Substantial evidence supports the Board's finding that the Company committed numerous additional violations of Section 8(a)(1) of the Act by engaging in conduct that coerced employees in the exercise of their statutory rights, such as surveillance of union activities, discouraging employees from making safety complaints to governmental agencies, and threatening employees with adverse action if they filed grievances or requested union representation. The Board's findings are factually and legally well supported. Most of the Company's challenges depend on the Court rejecting the Board's credibility findings, and the Company does not come close to meeting the high bar to warrant that result.

Substantial evidence also supports the Board's findings that the Company violated Section 8(a)(3), (4), and (1) by suspending Mark Moore because of his protected activity. It is undisputed that the Company unlawfully threatened and suspended Moore for his intention to file a grievance, and that the Union filed an unfair-labor-practice charge based on that unlawful conduct. The Board reasonably found that the Company further unlawfully suspended Moore based on

that earlier protected activity. While the Company insists that it acted pursuant to its attendance policy, the Board reasonably found that explanation pretextual, because of the suspicious timing of the discipline and disparate application of the policy.

Lastly, substantial evidence supports the Board's findings that the Company violated Section 8(a)(5) and (1) by failing to timely respond to several information requests from the Union and by changing its grievance process without providing the Union with notice or an opportunity to bargain. The Company repeatedly failed to timely respond—and in some instances, respond at all—to information requests from the Union. To the extent the Company now seeks to excuse its failures and delays, its explanations are unsubstantiated in the record and, importantly, were not contemporaneously provided to the Union as the law requires. As to the grievance process, the Company does not deny that it implemented a unilateral change, and its arguments that the inconvenience to employees was de minimis and that the change did not affect their terms of employment are factually and legally unsupported.

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDINGS

In its opening brief, and in most instances before the Board, the Company failed to challenge the findings that it: (1) violated Section 8(a)(1) by telling DeVault that he would be disciplined for requesting union representation, by impliedly threatening employees with discharge for requesting union representation, and by threatening that Marshall County Coal would close if employees filed grievances; (2) violated Section 8(a)(3) and (1) by suspending DeVault for requesting representation and suspending Moore on June 8, 2016, for planning to file a grievance; and (3) violated Section 8(a)(5) and (1) by failing to timely provide relevant, requested information concerning employee credentials at Marion County Coal and contractors' roof-support work at Monongalia County Coal.⁴

Because the Company does not dispute in its brief that it committed those violations, it has waived any challenge to them. *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 347 (D.C. Cir. 2011) (granting summary enforcement where employer waived challenge to violations on appeal); *see also* Fed. R. App. P. 28(a)(8)(A) (brief must contain party's contentions with citation to authorities and

⁴ The Company disputed before the Board that it unlawfully failed to timely provide this contractor information.

record). Moreover, this Court would be jurisdictionally barred from considering any arguments not first presented to the Board. 29 U.S.C. § 160(e); *accord Carpenters & Millwrights, Local Union 2471 v. NLRB*, 481 F.3d 804, 808 (D.C. Cir. 2007) (Section 10(e) precludes court from considering claims not raised to Board). The Board is therefore entitled to summary enforcement of the portion of its Order remedying the uncontested violations. *Flying Food Grp., Inc. v. NLRB*, 471 F.3d 178, 181 (D.C. Cir. 2006).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDINGS THAT THE COMPANY COMMITTED NUMEROUS VIOLATIONS OF SECTION 8(a)(1) OF THE ACT

A. An Employer Violates Section 8(a)(1) by Engaging in Activity That Would Reasonably Tend To Coerce Employees in the Exercise of Their Section 7 Rights

Section 7 of the Act guarantees employees “the right to self-organization, to form, join or assist labor organizations, . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection” 29 U.S.C. § 157. Section 8(a)(1) of the Act implements that guarantee by making it an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [S]ection 7.” 29 U.S.C. § 158(a)(1).

The test for a Section 8(a)(1) violation is whether, considering the totality of the circumstances, the employer’s conduct has a reasonable tendency to coerce or

interfere with employee rights. *See Tasty Baking Co. v. NLRB*, 254 F.3d 114, 124 (D.C. Cir. 2001); *Avecor, Inc. v. NLRB*, 931 F.2d 924, 931 (D.C. Cir. 1991). An employer’s statements are coercive if employees would “reasonably perceive” them as such. *Progressive Elec., Inc. v. NLRB*, 453 F.3d 538, 545 (D.C. Cir. 2006). The critical inquiry, then, is what an employee could reasonably have inferred from the employer’s statements or actions when viewed in context—proof of actual coercion is unnecessary. *Avecor, Inc.*, 931 F.2d at 924, 931. In applying that standard, moreover, the Board is cognizant that “the economic dependence of employees on their employer, and the necessary tendency of the former . . . to pick up the intended implications of the latter that might be more readily dismissed by a more disinterested ear.” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969); *see also Tasty Baking Co.*, 254 F.3d at 124-25 (statements that may appear ambiguous when viewed in isolation can have a more ominous meaning for employees when viewed in context).

As demonstrated below, substantial evidence supports the Board’s findings that the Company repeatedly violated Section 8(a)(1) by threatening, surveilling, and otherwise coercing employees in the exercise of their Section 7 rights. While the Company raises a few legal challenges to those findings, most of its arguments rely on an alternative version of the facts that would require the Court to reject the Board’s credibility determinations. As this Court has noted, however, a party that

wishes to overturn credibility determinations must demonstrate that they “are hopelessly incredible, self-contradictory, or patently unsupportable.” *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1250 (D.C. Cir. 2012) (quotation omitted). In other words, the Company must show not only that the credited testimony “carries . . . its own death wound,” but also that the “discredited evidence . . . carries its own irrefutable truth.” *United Auto Workers v. NLRB*, 455 F.2d 1357, 1368 n.12 (D.C. Cir. 1971). At most, the Company’s arguments show that the record contains “conflicting testimony,” which is precisely the situation where “essential credibility determinations [must] be[] made,” *NLRB v. Nueva Eng’g, Inc.*, 761 F.2d 961, 965 (4th Cir. 1985), and where deference to the Board is most appropriate. What the Company seeks is to have the Court “retry the evidence,” which is “not for [a] court to do.” *See Vico Prods. Co. v. NLRB*, 333 F.3d 198, 209 (D.C. Cir. 2003).

B. The Company unlawfully directed employees not to file MSHA complaints

The Act protects employees when they bring safety concerns to the attention of governmental agencies. *See RGC (USA) Mineral Sands, Inc.*, 332 NLRB 1633, 1638 (2001) (complaints to MSHA protected), *enforced*, 281 F.3d 442 (4th Cir. 2002); *Walls Mfg. Co.*, 137 NLRB 1317, 1319 (1962) (complaints to government health department protected), *enforced*, 321 F.2d 753 (D.C. Cir. 1963). Thus,

when an employer interferes with employees' right to raise such concerns, it violates the Act.

Substantial credited evidence supports the Board's finding that, during a December 16, 2015 safety meeting called to discuss an MSHA citation, foreman Jones unlawfully discouraged employees from submitting safety complaints to government agencies. Specifically, Jones warned that if employees kept "notifying the authorities, they [would] shut this place down." Jones asserted that employees "don't need to" inform MSHA of safety concerns and could instead "bring . . . concerns to the company." As the Board explained, "such direction violates the Act" because employers cannot prohibit employees' concerted communications with governmental agencies regarding matters affecting their employment. (A. 128 (citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66 (1978)); *Trinity Protection Servs.*, 357 NLRB 1382, 1383 (2011)).

The Company does not contest the Board's legal analysis but argues (Br. 28-29), as a factual matter, that Jones did not make the unlawful statements and the underlying credibility determinations are "unwarranted." What the Company overlooks, however, is that the judge described the factors he considered in reaching those determinations. Specifically, he relied on Hayes' demeanor and other witnesses' corroboration of significant aspects of his testimony, as well as the logical consistency and plausibility of Hayes' account. Superintendent Pete

Ward’s testimony corroborated Hayes’ account that Jones discussed MSHA complaints and, as part of that discussion, talked about “the fact that [managers] would like for employees to . . . bring them to management’s attention and give us a chance to take care of them.” (A. 127.) As the Board found (A. 127), Hayes’ testimony that Jones discouraged employees from filing complaints with the government follows logically from that instruction—asking that employees give the Company “a chance” to deal with any complaints strongly implies that the complaints should be directed exclusively, or at least initially, to the Company instead of the government. The Board further noted that the Company’s other witness, Simpson, was not in the meeting and admittedly only overheard portions of Jones’ remarks. (A. 127.) Finally, the judge credited Hayes’s account of Jones’ coercive remarks because Jones and another manager repeated the same message in their meeting with Hayes the following day. The Company failed to produce any witness to contradict Hayes’ account of that second meeting. (A. 128.)

The Company argues that it is “not plausible” that Jones issued threats in the presence of an MSHA representative “because such conduct would likely violate the Mine Act.” (Br. 28.) In other words, the Company argues that this Court should disregard reasoned credibility determinations made by the judge, who observed the witnesses, and adopted by the Board, because it would not have so obviously violated the law. Besides the fact that its conduct in this case itself (*see*,

e.g., Part I) proves that it will openly violate federal law, the Company can point to nothing in the record to meet its burden of showing that the judge’s determinations must be rejected as hopelessly incredible or patently unsupportable.

C. The Company Unlawfully Threatened Peek Because He Filed a Grievance

An employer violates the Act when it threatens an employee for engaging in union activity. *Manor Care of Easton, PA., LLC v. NLRB*, 661 F.3d 1139, 1140 (D.C. Cir. 2011). To be unlawful, a threat need not predict that a specific action will be taken for engaging in protected activity; threats of unspecified reprisals also violate the Act. *Santa Fe Tortilla Co.*, 360 NLRB 1139, 1139 (2014); *see also Ozburn-Hessey Logistics, LLC v. NLRB*, 2015 WL 3369876, at *2 (D.C. Cir. May 1, 2015) (affirming violation based on threats of unspecified reprisals).

Substantial evidence supports the Board’s finding (A. 124) that Superintendent Martin unlawfully threatened Peek because Peek planned to file a grievance. As an initial matter, the Board noted, and the Company does not contest, that “‘the processing of a grievance’ under a collective bargaining agreement ‘is concerted activity within the meaning of [Section] 7.’” (A. 124 (citing *NLRB v. City Disposal Sys.*, 465 U.S. 822, 830, 36-37 (1984).) *Accord Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1252 (D.C. Cir. 2012). As the Board further found, “there is no question but that Martin’s statements to Peek constituted an unlawful threat of reprisal if he filed a grievance.” (A. 124.)

Briefly, the credited evidence establishes that, upon learning that Peek intended to file a grievance, Martin, the highest ranking official at the mine, pulled Peek aside to ask him to “withdraw” his grievance. Martin alluded to the fact that he had “helped [Peek] out in the past,” then pointedly noted that he takes whether an employee has filed grievances “into account” if and when they later need help. In other words, Martin “made clear that his future exercise of managerial discretion would be affected by whether Peek acceded to Martin’s request that Peek not pursue his grievance.” (A. 124.) That message violated the Act, “[w]hether viewed as a threat of unspecified reprisals for failing to withdraw the grievance or as a promise of continued favors for withdrawing the grievance.” (A. 124.)

Understandably, the Company does not dispute that the statements attributed to Martin are unlawful. Its sole challenge is its insistence (Br. 26-27) that Martin never uttered those unlawful threats—that the Board’s factual findings are incorrect because they are grounded in erroneous credibility determinations. Those determinations, however, are well-supported. The judge’s cited his assessment that Peek’s demeanor was “honest and straightforward,” while Martin came across as “fast-talking and overconfident.” (A. 123.) In addition, the judge emphasized the Board’s “well-established principle that a factor in determining credibility may be the recognition that the testimony of a current employee which contradicts statements of his or her supervisor is likely to be particularly reliable.” (A. 123 n.6

(citing *Portola Packaging*, 361 NLRB 1316, 1316 n.2 (2014); *Flexsteel Indus.*, 316 NLRB 745, 745 (1995), *enforced*, 83 F.3d 419 (5th Cir. 1996).) Far from “lack[ing] thoughtful and reasoned analysis and suggest[ing] bias,” (Br. 27) the credibility determinations are amply supported.⁵

D. The Company Unlawfully Threatened Hayes with Discipline for Engaging in Protected Activities

It is axiomatic that protected, concerted activity includes an employee’s discussion of work rules and other employment terms in front of other employees. *See, e.g., Kiewit Power Constr. Co. v. NLRB*, 652 F.3d 22, 26 (D.C. Cir. 2011) (employee’s safety complaints during staff meeting protected); *NLRB v. Talsol Corp.*, 155 F.3d 785, 797 (6th Cir. 1998) (same). And the Board had ample grounds for finding that Company violated Section 8(a)(1) by threatening to discipline Hayes for protesting, at the December 17 safety meeting, Jones’ unlawful directive that employees submit safety complaints directly to the Company.

When Jones unlawfully discouraged employees from reporting safety concerns to MHSa at the meeting, Hayes stood up and loudly offered examples of unresolved safety issues. When Hayes grew increasingly agitated, a foreman told

⁵ There is no merit in the Company’s argument that this credibility determination “differ[s] greatly from those upheld by the Court in other decisions” (Br. 27), as all credibility determinations are factually intensive and are considered in the context of each case.

Hayes to quiet down, at which point Hayes left the meeting and returned to work because he had “heard enough.” (A. 127; 306.) The following day, Jones summoned Hayes to his office, where he reiterated—in the presence of Assistant Superintendent England—that employees were to report safety concerns to the Company. Jones also scolded Hayes for his interruption of the meeting the day before, which England characterized as “loud and belligerent.” Both managers reiterated that Hayes “didn’t need to go to the authorities” with safety complaints. (A. 128; 308, 318.) England then explicitly threatened Hayes that “if this happens again, if [Hayes got] loud or anything, that they will—[Hayes] will be disciplined and [England] will let the arbitrator rule on it.” (A. 129; 308, 317.)

The Company does not dispute that Hayes was engaged in protected, concerted activity when he challenged the Company’s unlawful directive discouraging MSHA complaints. Nor does it deny that it disciplined Hayes for his actions at the meeting. Its sole defense is that Hayes lost the protection of the Act because his conduct at the meeting was so outrageous. As the Board stated in rejecting that argument, however, the question of whether Hayes forfeited the protection of the Act “is not a close case.” (A. 129)

An employee engaged in protected activity can lose the Act’s protection if his conduct is “so egregious as to be indefensible.” *Stephens Media*, 677 F.3d at 1253. It is well established that an employee’s right to engage in Section 7 activity

“may permit some leeway for impulsive behavior, which must be balanced against the employer’s right to maintain order and respect.” *Kiewit Power*, 652 F.3d at 22, 26. Thus, for example, “intemperate remarks” will not, standing alone, cause an employee to forfeit the Act’s protection. *Id.* at 28. To determine whether an employee’s conduct is sufficiently egregious to forfeit protection, the Board weighs the following factors: (1) the place of the discussion, (2) the subject matter of the discussion, (3) the nature of the employee’s outburst, and (4) whether the outburst was provoked in any way by an employer’s unfair labor practice. *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979); accord *Stephens Media*, 677 F.3d at 1253.

Ample evidence supports the Board’s determination (A. 129 n.19) that all four *Atlantic Steel* factors weigh in favor of protection. The Board reasonably concluded that the place of the discussion favors protection. Hayes’ disputed conduct took place at a meeting called by the Company to discuss safety complaints, the very subject of Hayes’ comments. An employer who chooses, as the Company did, to broach a topic in a particular location, cannot claim that an employee’s related protests should lose protection based on the setting. *See, e.g., Cibao Meat Prods.*, 338 NLRB 934, 934 (2003) (where employer chose to announce policy during meeting, location of employee’s protest, in front of other employees, did not weigh against protection), *enforced*, 84 F. App’x 155 (2d Cir. 2004); *NLRB v. Sw. Bell Tel. Co.*, 694 F.2d 974, 978 (5th Cir. 1982) (having

chosen location of its announcement, employer “can hardly be heard to complain about the public nature of the . . . discussion”).

Thus, contrary to the Company’s suggestion (Br. 31), the first factor is not simply an inquiry into whether other employees witnessed the incident. As a result, its reliance (Br. 31) on cases addressing situations in which an employee’s outburst disrupted other, working employees is misplaced. *See DaimlerChrysler Corp.*, 344 NLRB 1324, 1328-29 (2005) (location weighed against protection when employee’s profane outburst in open cubicle, overheard by other employees working nearby); *Piper Realty Co.*, 313 NLRB 1289, 1289 (1994) (location weighed against protection when employee cursed at supervisor in supervisor’s office, overheard by other employees who were working). Here, by contrast, Hayes’ conduct took place at a safety meeting, away from any work area and, as the Board explained, “did not entail a risk of disruption of production as the employees who could hear were assembled at the meeting.” (A. 129 n.19.) *See Datwyler Rubber & Plastics, Inc.*, 350 NLRB 669, 669-70 (2007) (employee’s outburst took place at staff meeting attended by nearly 70 employees; Board highlighted that meeting was in location that would not disturb work process, i.e., non-participating employees).

The subject matter of Hayes’s remarks—the assertion that the Company had failed to address numerous safety concerns raised by employees—also

undoubtedly favors protection. Discussing workplace safety is protected, and that weighs strongly in favor of protection in the *Atlantic Steel* analysis. See *Felix Indus., Inc.*, 339 NLRB 195, 196 (2003) (finding it “very significant” in favor of protection that subject of disputed outburst was protected assertion of contractual rights), *enforced mem.*, 2004 WL 1498151 (D.C. Cir. 2004). As this Court has recognized, disputes regarding working conditions, such as safety measures, are among those “most likely to engender ill feelings and strong responses.” *Kiewit Power*, 653 F.3d at 26.

And while the Board acknowledged that Hayes was “out of line” to be loud, rude, and storm out of the safety meeting, it reasonably concluded that the nature of Hayes’s comments fell “far short of the type of ‘opprobrious conduct’ that would weigh against continued protection.” (A. 129 (quoting *Atlantic Steel*, 245 NLRB at 816.)) Notably, Hayes used no profanity, made no threats, and engaged in no physically menacing conduct. Indeed, this Court has found that far more confrontational—even pugilistic—conduct did not forfeit the Act’s protection. See *Kiewit Power*, 652 F.3d at 25-29 (employee did not forfeit Act’s protection by telling supervisor things were “going to get ugly” and he had “better bring his boxing gloves”).⁶

⁶ The Company is correct (Br. 32) that this Court has rejected any rule that employees engaged in protected activity “could not be dismissed unless they were

The fourth *Atlantic Steel* factor also weighs strongly in favor of protection. Hayes's remarks, and the frustration that led him to make them in such a forceful manner, were provoked by, and directly responsive to, an unfair labor practice, i.e., Jones' unlawful directive that employees not file official safety complaints. *See Stanford Hotel*, 344 NLRB 558, 559 (2005) (employer may not provoke employee with unlawful conduct and rely on resulting insubordination to discipline the employee).⁷

In sum, the Board reasonably determined that Hayes retained the Act's protection even though he disrupted the safety meeting and, thus, that his discipline was unlawful.

E. The Company Unlawfully Surveilled Employees' Union Activities

An employer violates Section 8(a)(1) by monitoring or "surveilling" its employees' union activities, unless the employer establishes a "proper justification" for its actions. *Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 420 (D.C. Cir. 1996). This Court, recognizing the coercive effect of surveillance,

involved in flagrant, violent, or extreme behavior," but the Board did not rely on any such rule. Rather, it thoughtfully addressed each *Atlantic Steel* factor.

⁷ While the Company's complains that the Board's *Atlantic Steel* analysis was "limited and neglectful" because it was in a footnote (Br. 31), it cites no case for the proposition that legal analysis in a footnote is inherently inadequate. As the Board found, the loss-of-protection determination in this case was not difficult; its footnote concisely outlined the legal and factual bases for the Board's conclusion.

has explained: “[w]hen an employer watches off duty employees because he believes they are engaged in union activities, the employees may reasonably fear that participation in union activities will result in their identification by the employer as union supporters” and “may thereafter feel reluctant to participate in union activities.” *Nueva Eng’g, Inc.*, 761 F.2d at 967. Although employer observation of protected activity in the course of the employer’s regular routine does not necessarily violate the Act, the employer “may not do something ‘out of the ordinary’” to further its observation. *Sprain Brook Manor Nursing Home, LLC*, 351 NLRB 1190, 1191 (2007) (citation omitted).

The Board reasonably found (A. 130) that Devine, at the conclusion of his MSHA meeting, purposefully peered into the window of the conference room to see what else he could learn about the union meeting, instead of simply walking past the conference room. Devine’s gawking was so noticeable that participants temporarily halted their meeting until an MSHA investigator ushered him away. As the Board found, the moment Devine stopped to observe the meeting, he became the “curious supervisor who took steps out of the ordinary to investigate the previously overseen union activity in an effort to learn more about it”—his conduct was “classic unlawful surveillance.” (A. 131.) *See Control Bldg. Servs.*, 337 NLRB 844, 845 (2002) (supervisors unlawfully surveilled employees by staring through glass window of restaurant as employees met union organizers inside).

The Company challenges both the factual findings and the legal analysis supporting this violation. With respect to the facts, the Company disputes the underlying credibility determinations, arguing (Br. 35) the judge incorrectly credited Peyton's account that Devine pressed close to peer into the conference room. Notably, all three witnesses either personally observed, or noticed other meeting participants reacting to, Devine looking through the windows. While the Company is correct that the details of their accounts varied, that is typical in the "honest recollection of three people independently recalling a surprise and sudden event." (A. 130.) Thus, while Rinehart saw Devine near the window and Peyton saw Devine pressed against it, the Board reasonably determined that their stories were not contradictory. Rather, it is consistent with both accounts that Payton saw Devine at the window and alerted the room to his presence, at which point Rinehart looked up and saw Devine, who had stepped back a few feet, perhaps in reaction to being seen. (A. 130.) Significantly, the testimony that Devine peered into the meeting is un rebutted; Devine himself had no specific memory of leaving the MSHA office. (A. 130.) Thus, contrary to the Company's argument (Br. 36), the testimony "as a whole" supports the Board's factual findings and does not support, much less compel, an inference that Devine's lack of recall means nothing unusual happened.

The Company also contends (Br. 37-39) that, even accepting the Board’s factual findings, the Board’s legal analysis is contrary to precedent. That argument evinces the Company’s misunderstanding of the Board’s rationale. The Board specifically acknowledged that Devine’s presence at the MHSA office was legitimate and that any observations he made while waiting for his meeting to begin were “incidental to his own work.” (A. 131.) Devine’s conduct crossed the line only after his meeting, when he chose to pause outside the conference room—where he knew a meeting involving union representatives and employees was taking place—to observe more closely. Thus, the Company’s discussion (Br. 37) of *Astro Shapes*, 317 NLRB 1132 (1995), a case in which a supervisor intentionally drove to a location with the specific purpose of monitoring a meeting, does not advance its position because while Devine’s presence at the MHSA office was legitimate, his conduct became unlawful when he intentionally stopped at the conference-room door. *See also Dadco Fashions*, 243 NLRB 1193, 1198-99 (1979) (unlawful surveillance where supervisor drove by union meeting because she was curious). Likewise, the Company’s attempt (Br. 38) to liken Devine’s conduct to the supervisor’s lawful conduct in *Valmont Indus.*, 328 NLRB 309, 318 (1999), is unavailing. There, the supervisor’s presence at the same hotel as a union meeting was coincidental, and the supervisor did nothing out of the ordinary to observe the meeting. Here, Devine’s presence was fortuitous, but his conduct

became unlawful when, after concluding his business, he went out of his way to stop and actively try to observe the union meeting more closely.

F. The Company Unlawfully Threatened Preston for Seeking Union Representation

Substantial credited evidence supports the Board's determination (A. 136) that the Company unlawfully threatened Preston because he requested union representation. Preston was directed to Assistant General Foreman Phillips' office, where both Phillips and foreman Kirk were waiting, along with two other supervisors. Upon seeing them, Preston declined to participate in the meeting without union representation. In response, Phillips contested Preston's need for representation, then stated: "if you want wrote up, I can find something to write you up with, and you can come back tomorrow at 4:00 with your union representation." (A. 332-33.) The Board reasonably found that Phillips' statement unlawfully threatened retaliation against Preston for union activity, i.e., requesting representation. The threat was explicit—that insistence on union representation would lead to retaliatory discipline.

While the Company complains (Br. 39-41) that the Board's finding relied on "flawed" credibility assessments, the judge's determinations, adopted by the Board, are well supported. Specifically, the judge relied on Preston's direct and straightforward demeanor, whereas he observed that both Kirk and Phillips "answered questions in a rushed way that did not inspire confidence." (A. 136.)

The judge also cited the fact that the Company's witnesses directly contradicted each other. Notably, while Phillips asserted (A. 432) that he did not mention discipline at all, Kirk testified (A. 427) that Phillips denied he was disciplining Preston. And the managers again contradicted each other with respect to Preston's request for representation. Phillips testified that Preston never mentioned "union representation" during the meeting (A. 432); Kirk testified that Phillips said, "if you need representation, you can get it." (A. 428.) Finally, the Board noted that Preston provided unrebutted testimony that Shift Supervisor Perkins (who did not testify) directed him to Phillips's office, and dismissed as implausible the managers' story that Preston came to the office uninvited to ask a favor. Even according to Phillips and Kirk, Preston never asked for any type of favor.

With respect to the Board's legal analysis, and contrary to the Company's argument (Br. 41-42), the Board's characterization of Phillips' statement as "smart-aleck" does not contradict its determination that the comment was objectively coercive. As the Board observed, the statement was a "naked" and "unmistakable threat," reasonably understood to promise retaliation for requesting representation, and issued in response to such a request. Given the explicit nature of the threat, and the two high-level managers present, the Board reasonably found lighthearted phrasing insufficient to counter Phillips' coercive message. *See Chinese Daily News*, 346 NLRB 906, 906, 931-32 (2006) (statement intended as

joke unlawful when considered from employees' perspective), *enforced*, 224 F. App'x 6 (D.C. Cir. 2007).

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY'S SUSPENSION OF MOORE VIOLATED SECTION 8(a)(3), (4), AND (1) OF THE ACT

A. An Employer Violates Sections 8(a)(3), (4), and (1) by Disciplining an Employee for Participation in Union Activity and Board Processes

Section 8(a)(3) of the Act prohibits employer "discrimination in regard to hire or tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). Accordingly, an employer violates Section 8(a)(3) by disciplining employees for engaging in union activities. *Tasty Baking Co.*, 254 F.3d at 125. Similarly, Section 8(a)(4) of the Act, 29 U.S.C. § 158(a)(4), makes it unlawful for an employer to take adverse actions against employees for participating in Board processes. *NLRB v. Scrivener*, 405 U.S.117, 121 (1972).⁸ The legality of an employer's adverse actions thus depends on its motivation. Where protected conduct is a "motivating factor," the action is unlawful unless the record as a whole compels acceptance of the employer's affirmative defense that it would have taken the same action in the absence of protected conduct. *NLRB v. Transp. Mgmt.*

⁸ Violations of Section 8(a)(3) and 8(a)(4) produce a "derivative" violation of Section 8(a)(1). See *Chinese Daily News*, 346 NLRB 906, 934 (2006), *enforced*, 224 F. App'x. 6 (D.C. Cir. 2007).

Corp., 462 U.S. 393, 401-03 (1983); *Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981).

Because direct evidence is often impossible to obtain, the Board may rely on circumstantial evidence and inferences from the totality of the evidence to determine an employer's motives. *See Waterbury Hotel Mgmt., LLC v. NLRB*, 314 F.3d 645, 651 (D.C. Cir. 2003). For example, evidence that an employee engaged in union or protected activity of which the employer was aware, and that the employer harbored animus towards that activity, suffices to show an unlawful motivating factor. *Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994), *clarifying Transp. Mgmt.*, 462 U.S. at 395, 403 n.7. Moreover, contemporaneous unfair labor practices evidence unlawful motivation, *see Vincent Indus. Plastics v. NLRB*, 209 F.3d 727, 735 (D.C. Cir. 2000); *Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 423 (D.C. Cir. 1996), as does proximate timing of the adverse action to protected activity, *Inova Health Sys. v. NLRB*, 795 F.3d 68, 80, 82 (D.C. Cir. 2015); *Reno Hilton Resorts*, 196 F.3d at 1283.

Both disparate treatment—treating an employee who engaged in protected activity more harshly than other similarly situated employees—and departure from the employer's typical practice tend to show pretext, which also indicates animus. *See Laro Maint. Corp. v. NLRB*, 56 F.3d 224, 230 (D.C. Cir. 1995) (false reason

evidences animus); *Gold Coast Rest. Corp. v. NLRB*, 995 F.2d 257, 264-65 (D.C. Cir. 1993) (disparate treatment evidences animus). Moreover, where the Board finds pretext, “the employer fails as a matter of law” to establish its affirmative defense. *Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 219 (D.C. Cir. 2016).

B. Moore’s Protected Activity Was a Motivating Factor for His September Suspension

Substantial evidence supports the Board’s finding (A. 133-35) that employee Moore’s protected activity—stating his intent to file a grievance and the unfair-labor-practice charge filed on his behalf—was a motivating factor in the Company’s decision to suspend him. The Company’s unlawful motivation is evident in the events leading to the suspension as well as the surrounding circumstances, and its purported reason for the suspension is plainly pretextual.

First, as explained above (p.21), it is undisputed that the Company unlawfully threatened and suspended Moore on June 8 because he planned to file a grievance. At that time, Superintendent Crowe displayed significant animus—asking, among other things, “why in the fuck would [Moore] file a grievance on a fucking foreman for fucking helping?” (A. 708-09). On August 29, the Union filed a Board charge regarding Moore’s suspension. On September 19, two months after the unlawful threat and suspension, and three weeks after the charge, Moore was suspended again, this time for violating an attendance policy. That

day, Moore went to work and clocked in shortly before his scheduled shift, too late to be ready on time. He and another employee on his shift walked together to their scheduled elevator, where they met others still waiting for it, as well as two employees who had been scheduled for an earlier elevator. A foreman, acting upon direction from Superintendent Koontz, suspended Moore for not being ready on time, but no other employee present was sent home or disciplined for tardiness.

As the Board detailed (A. 134), Moore's protected activities were a motivating factor for his September suspension. To start, it is undisputed that Moore's intent to file a grievance and the related Board charge were protected, and that the Company knew of both. Moreover, the judge reasonably concluded (A. 134) that the multiple other unfair labor practices—particularly those targeting Moore—support a finding of animus.

The timing of, and explanation for, the September suspension is also suspect, as it occurred just three weeks after the Board charge but—according to the Company itself—for tardiness on a level Moore had allegedly been engaging in for some time. Specifically, Koontz testified that he had been aware Moore was regularly late, but also testified that he had never formally disciplined Moore. Essentially, Koontz tolerated Moore's alleged tardiness until Koontz became aware

of the unfair-labor-practice charge contesting an earlier unlawful discipline.⁹ Moreover, when he did decide to suspend Moore, he failed to discipline, or even counsel, any other tardy employee, including the employee who walked alongside Moore. As the Board observed, the Company’s “implausible” explanation for Moore’s suspension “is what pretext looks like.” (A. 134.) *See Southwire Co. v. NLRB*, 820 F.2d 453, 460, 464 (D.C. Cir. 1987) (pretext where employer tolerated alleged shortcomings until employee engaged in union activity, then discharged employee for infraction for which other employees only reprimanded).¹⁰

The Company complains (Br. 44-45) that the Board improperly attributed animus to Koontz specifically, noting that he played no role in the earlier suspension and asserting that he had “very little” knowledge of the unfair-labor-practice charge. But Koontz clearly admitted that he was aware of Moore’s earlier unlawful discipline and the charge. (A. 452-53.) Moreover, that Koontz’s stated reason for suspending Moore was pretextual further supports a finding that his true

⁹ The Company criticizes the Board (Br. 45-46) for crediting Moore that he was never verbally counseled for tardiness. In fact, the Board questioned company witnesses’ “wholly undocumented” claim that Moore was repeatedly tardy and found, assuming it was true, that Moore had not received “even a single documented (written) verbal warning.” (A. 134.)

¹⁰ The Company argues (Br. 45) that the Board “ignored Moore’s admission [that] he knew he needed to be dressed and ready at 4:00 p.m.,” and was not, in finding pretext. But the Board did not rely on a finding that Moore was not tardy, but on a finding that tardiness was not the actual reason for his suspension.

motive was unlawful. *See Laro Maint.*, 56 F.3d at 230; *Gold Coast Rest.*, 995 F.2d at 264-65.

C. The Company Failed To Establish Its Affirmative Defense

As demonstrated, substantial evidence supports the Board's finding that Moore's protected activity was a motivating factor in the Company's decision to discipline him. Considered as a whole, the record further supports the Board's finding (A. 134) that the Company failed to prove it would have suspended Moore in the absence of that activity. Indeed, as the Board explained (A. 134-35), its pretext finding obviated the need to examine that defense. *See Ozburn-Hessey*, 833 F.3d at 219. Nonetheless, far from "inexplicably discount[ing]" comparator evidence, as the Company claims (Br. 46), the Board rejected as inapposite the Company's one "comparator" employee, who was disciplined for clocking in 48 minutes late, while Moore clocked in 3-5 minutes early. Notably, the comparator received a verbal warning, not a suspension.

IV. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDINGS THAT THE COMPANY REPEATEDLY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT

A. The Company Unreasonably Delayed and Failed To Provide Relevant, Requested Information to the Union in Violation of Its Statutory Duty To Bargain

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer to refuse to “bargain collectively.” 29 U.S.C. § 158(a)(5). The statutory duty to bargain includes an obligation to timely provide relevant information, i.e., “information that is needed by the bargaining representative for the proper performance of its duties,” upon request. *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967); *accord N.Y. & Presbyterian Hosp. v. NLRB*, 649 F.3d 723, 729 (D.C. Cir. 2011). Information is relevant if, for example, it relates to the evaluation and processing of grievances. *Acme*, 385 U.S. at 437. An employer thus violates Section 8(a)(5) and (1) if it fails to provide, or unreasonably delays in providing, its employees’ representative with relevant, requested information, *see Brewers & Maltsters Local 6 v. NLRB*, 414 F.3d 36, 45-46 (D.C. Cir. 2005) (6-month delay unlawful), or if it fails adequately to explain its noncompliance with the request to the union within a reasonable time, *Columbia Univ.*, 298 NLRB 941, 945 (1990); *Goodyear Atomic Corp.*, 266 NLRB 890, 896 (1983).¹¹

¹¹ A violation of Section 8(a)(5) results in a derivative violation of 8(a)(1) by interfering with employees’ collective bargaining rights. *See, e.g., NLRB v. Curtin Matheson Sci., Inc.*, 494 U.S. 775, 778 (1990).

Certain information is “presumptively relevant” because it is “central to the core of the employer-employee relationship.” *Oil, Chem. & Atomic Workers Local 6-418 v. NLRB*, 711 F.2d 348, 359 (D.C. Cir. 1983) (internal citation omitted). That includes “[i]nformation related to the wages, benefits, hours, [and] working conditions . . . of represented employees.” *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1191 (D.C. Cir. 2000). When requesting information that is not presumptively relevant, a union must explain the relevance. *N.Y. & Presbyterian*, 649 F.3d at 730. But an employer must also provide information if the “relevance of the information should have been apparent under the circumstances.” *See Disneyland Park*, 350 NLRB 1256, 1258 (2007); *accord Public Serv. Co. of New Mexico*, 360 NLRB 573, 598 (2014), *enforced*, 843 F.3d 999 (D.C. Cir. 2016).

When assessing whether a union has adequately explained the relevance, the Court applies a liberal “discovery-type standard,” *Acme*, 385 U.S. at 437 n.6, under which “[t]he fact that the information is of probable or potential relevance is sufficient to give rise to an obligation . . . to provide it,” *N.Y. & Presbyterian*, 649 F.3d at 730 (quotations omitted). Whether information is relevant “is, in the first instance, a matter for the NLRB, and the Board’s conclusions are given great weight by the courts.” *Oil, Chem. & Atomic Workers*, 711 F.2d at 360.

1. The Company unlawfully delayed providing, and failed to provide, requested attendance-policy information

Ample record evidence supports the Board's finding (A. 139-46) that the Company unlawfully delayed providing, and outright failed to provide, relevant, requested attendance-policy information. In December 2015, the Union requested: (1) a list of employees covered by the Bradford Plan; (2) a list of employees covered by the C&E Plan; and (3) a copy of all C&E Plan policies and changes. It is undisputed that the requested information, which concerns represented employees, is presumptively relevant. More than one year after the original request, the Company provided a list of employees on the Bradford Plan. It never provided information responsive to the other two requests.

To defend its delay in providing the Bradford Plan list, the Company argues (Br. 52-54), essentially, that it was not sure it had that information. The Board, however, reasonably found (A. 141) that the Company's 13-month delay in responding, without explanation or justification, was unlawful. *Dover Hospitality Servs.*, 361 NLRB 906, 906 (2014) (13-month delay, without explanation, unlawful). When an employer does not have responsive information, it has an obligation to notify the union of that fact. But the Company does not even argue that it ever told the Union that it could not find responsive information.

Moreover, as the Board found, the record establishes as “untrue” the Company’s initial defense before the Board that “*no responsive information existed.*” (A. 142 (quoting Company Brief to administrative law judge).) As the Board noted, the Company itself stipulated that it eventually provided “responsive” materials, “squarely contradicting” that assertion. And even now, the Company provides no explanation, much less one substantiated by record evidence, for why it could not locate that responsive information for over a year or how it eventually did. It simply asks the Court to accept that its initial search was reasonably diligent. *See Goodyear*, 266 NLRB at 896 (employer must make “reasonable effort to secure the requested information”).

Further, even absent the stipulation that information was provided, the Board properly rejected the Company’s reliance on testimony that the Bradford Plan was not “administered” after October 2013. Far from being “incredible” (Br. 53), the Board’s determination that the testimony did not establish that the Bradford Plan was not in effect after 2013 is supported by a company memorandum issued in 2014 that stated, “Effective March 1, 2014, the Chronic and Excessive Absenteeism Disciplinary Program (the “Program”) will no longer calculate absences and occurrences based upon the ‘Bradford Factor’ However, . . . employees currently in the Program, as calculated using the Bradford Factor, *will continue to be counseled, or discipline, if necessary, in accordance with the terms*

of that Program.” (A. 683) (emphasis added). As the judge found, “the compelling implication is that up to March 1, 2014, the [Bradford Plan] remained in effect.” (A 142).

The Board also reasonably rejected the Company’s defense regarding its failure to provide any information at all in response to the C&E Plan requests: that the Union already had the information. Specifically, the Company asserts (Br. 54-55) that the Union had copies of letters amending the plan or placing employees, and that similar information had been orally conveyed to union representatives. As the Board observed (A. 142), however, it has repeatedly rejected the proposition that an employer need not provide information a union could assemble from another source, including its own records, representatives, or members. *See, e.g., Lansing Automakers Fed. Credit Union*, 355 NLRB 1345, 1352 (2010) (absent special circumstances, “an employer may not refuse to furnish relevant information on the grounds that the union has an alternative source or method of obtaining the information”).¹² But even if the alternative-source argument had any merit, it

¹² Contrary to the Company’s suggestion (Br. 55), *King Soopers* does not establish that only unusual circumstances trigger an employer’s duty to provide information a union could obtain elsewhere; it reiterates “that a union’s ability to obtain requested information elsewhere does not excuse an employer’s obligation to provide the requested information.” 344 NLRB 842, 845 (2005); *see also* A. 142 (citing cases).

would not excuse the Company's failure to explain its position to the Union within a reasonable time.

2. The Company unlawfully failed to provide requested subcontractor information

Substantial evidence also supports the Board's finding that the Company unlawfully failed to provide relevant, requested information about its use of contractors at Monongalia County Coal. Specifically, on March 28, 2016, the Union requested, among other items, "[c]opies of all invoices, bills, and any other document submitted by ANY contractor describing . . . any work performed by a contractor," and "of all Bid Forms, Estimates, Offers or any other document describing . . . work to be done submitted by a contractor," from July 2015 forward. (A. 143; 782.) The Union explained that it sought the information to monitor compliance with the collective-bargaining agreement and to evaluate grievances. The Company responded that the Union's first request was burdensome and non-specific and refused to respond to the second request because it did "not maintain records as described." (A. 782.) The Union then reiterated its request, explaining that it needed the information "urgent[ly] since contractors . . . are on the property while we have employees available and/or on layoff who can perform the work apparently being done by the contractors." (A. 784.) The Company never provided any responsive information. (A. 171-72.)

Based on those facts, and on the circumstances surrounding the Union’s request, the Board reasonably found (A. 144) that the Union adequately explained the requested information’s relevance which should, in any event, have been “apparent” to the Company. *Disneyland*, 350 NLRB at 1258. As the Board detailed, the record establishes that contractors’ alleged performance of bargaining-unit work was an ongoing source of dispute between the parties, and the subject of multiple grievances and arbitrations. Indeed, as the Board further noted, it had been the subject of many information requests to which the Company had responded and—notably—the Company never disputed relevance when it received those requests, including the request at issue. While the Company now argues that the information the Union sought in March 2016 was different from those earlier requests because it encompassed estimates and offers “regardless of whether . . . work was ever performed” (Br. 48), it never argued to the Union that such documents were irrelevant. And even if it had, that would not explain its failure to provide the types of documents it had previously provided.¹³

¹³ The Company’s continued reliance (Br. 48-49) on *NLRB v. Wachter Construction, Inc.*, 23 F.3d 1378 (8th Cir. 1994), is misplaced. Rather than “disregard[]” the Company’s citation to the case, the Board explained (A. 146 n.39) that *Wachter* is inapposite because, there, the court found that the union’s request was made in bad faith, citing affirmative evidence that it was intended to coerce employers to do business only with union firms.

Having found the requested information relevant, the Board also reasonably found the Company's response to the request—that it was burdensome and that some of the information was unavailable—insufficient. As noted, the Company was obliged to make a reasonable effort to locate the information and, if it could not, to explain why. *See Goodyear*, 266 NLRB at 896. It was also the Company's burden, if it thought the request unreasonable, to propose an accommodation. *U.S. Testing Co. v. NLRB*, 160 F.3d 14, 21 (D.C. Cir. 1998). As the Board found (A. 145), however, the Company did not fulfill either requirement.

First, the Company admitted that it did not make even the most perfunctory attempt to comply with the request. (A. 538-39.) Specifically, the Company official responsible testified that she failed to search for responsive documents at all because she “highly doubted” that the Company maintained the information in question. And while she was aware that some of the responsive information, such as contractor payments, was handled through a specific division, she failed to ask anyone from that division about it. Instead of making any effort to obtain information, she asked her direct boss how to respond to the request, and he told her to tell the Union it was burdensome. (A. 542).

Second, the Company did not support its assertion that the request was too burdensome, or propose an accommodation. Even after the Union cited specific contractors working in violation of the contract and reiterated its request for

information, the Company refused to respond, stating that if the Union “narrow[ed its] requests . . . down to a specific date, grievant, contractor, project, etc., [the Company] may be able to provide more information.”¹⁴ (A. 689.) But, as this Court has recognized, the burden is on an employer to propose an alternative method of disclosing information “because it is in the better position to propose how best it can respond.” *Oil, Chem. & Atomic Workers*, 711 F.2d at 362-63. In other words, “the union need not propose the precise alternative to providing the information unedited.” *Id.*; *see also U.S. Testing Co. v. NLRB*, 160 F.3d 14, 21-22 (D.C. Cir. 1998) (employer who “made no effort to accommodate the Union’s request” failed to fulfill its duty to bargain). As the Board noted, had the Company made an effort to supply even some of the requested information, this “might be a different case,” but here the Company “essentially dismissed the request, demanding instead that [the Union] provide exactly the information [it] did not have, and was seeking through the request.” (A. 145.)

B. The Company Unilaterally Changed a Term of Employment in Violation of Its Statutory Duty To Bargain

An employer violates its statutory bargaining obligation if, without having giving the Union an opportunity to bargain, it makes unilateral changes to terms

¹⁴ Contrary to the Company’s claim that Mohan “tried to engage [Phillippi] in an interactive dialogue to focus his request and enable her to provide a meaningful response,” (Br. 51) Mohan not only demanded more details, but failed to commit to complying even if she got them.

and conditions of employment that are mandatory subjects of bargaining. *Litton Fin. Printing Div. NLRB*, 501 U.S. 190, 198 (1991). Such action “is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal.” *NLRB v. Katz*, 369 U.S. 736, 743 (1962); accord *Honeywell Int’l, Inc. v. NLRB*, 253 F.3d 125, 131 (D.C. Cir. 2001). However, not every minor unilateral change in working conditions constitutes an unfair labor practice. “To violate section 8(a)(5), the change in working conditions must be ‘material, substantial and significant.’” *Microimage Display Div. of Xidex Corp. v. NLRB*, 924 F.2d 245, 253 (D.C. Cir. 1991) (citations omitted). The application of that test is context-sensitive, and “[a] change is measured by the extent to which it departs from the existing terms and conditions affecting employees.” *S. California Edison Co.*, 284 NLRB 1205, 1205 n.1 (1987), *enforced*, 852 F.2d 572 (9th Cir. 1988).

Here, it is undisputed, and the record evidence shows, that the Company maintained an established term of employment whereby step-three grievance meetings at Marion County Coal were held at the mine portal where the grievant-employee worked, with very limited exceptions. It is similarly undisputed that the Company unilaterally changed that term without first notifying or bargaining with the Union, and began to hold all step-three meetings at the Metz Portal. The Company’s sole defense is that the change was not significant enough to be

unlawful because it would result only a bit of extra driving for affected employees. The Board reasonably rejected that defense. (A. 148.)

As the Board specifically found—contrary to the Company’s assertion (Br. 57) that the Board “failed to address” the character of the change—a “20-30 minute drive, unpaid (or 15-20 minutes on inhospitable back roads), and likely a return trip, is hardly a de minimis change, compared to the convenience of attending a meeting where one works.” (A. 148.)¹⁵ There is no merit to the Company’s contention (Br. 57) that requiring employees to drive up to 40 minutes without pay in order to participate in their own grievance proceedings is comparable to requiring employees to walk a few minutes further from their parking spaces to their work, which the Board has characterized as de minimis. Indeed, the Company itself complains that travelling to other portals for the meetings placed an “extraordinary burden” (Br. 58) on its managers.¹⁶

The Company’s argument (Br. 57) that a change affecting the grievance procedure did not “involve[] a change to wages, benefits, bases for discipline, schedules, or other traditional terms of employment” is similarly specious. Aside

¹⁵ The Company no longer argues, as it did before the Board, that the number of employees affected was insufficient to violate the Act. In any event, as the Board explained, the number of employees affected is immaterial. (A. 148, quoting *Ivy Steel & Wire*, 346 NLRB 404, 419 (2007).)

¹⁶ As the Board pointed out, “it is precisely those concerns that should have been raised with the Union during good faith negotiations over the subject.” (A. 148.)

from the obvious point that any or all of those core terms of employment may be at issue in a grievance proceeding, grievance procedures themselves are mandatory subjects of bargaining, as the Board explained. (A. 147, citing *Bethlehem Steel Co.*, 136 NLRB 1500 (1962), *enforced in relevant part*, 320 F.2d 615 (3d Cir. 1963).) And, finally, the Company cites no authority for its suggestion (Br. 56-57) that proof of a “concerted strategy to weaken and discredit the Union” is a required element of this violation. That said, the Company implemented the unilateral change in grievance procedures at a time when it was committing a number of other violations, many uncontested here, and some involving statements by high-level company officials criticizing employees’ right to union representation at disciplinary meetings.

CONCLUSION

The Board respectfully requests that the Court deny the Company's petition for review, grant the Board's cross-application for enforcement, and enter a judgment enforcing the Board's Order in full.

Respectfully submitted,

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November 2018

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

MURRAY AMERICAN ENERGY, INC., ET AL)	
)	
Petitioner/Cross-Respondent)	Nos. 18-1151, 18-1180
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent/Cross-Petitioner)	06-CA-169736

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 12,862 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

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Dated at Washington, DC
this 5th day of November 2018

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CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2018, I electronically filed the foregoing 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 certify the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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