Proof Brief Oral Argument Not Yet Scheduled

**No. 18-1222**

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

**UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO-CLC, AND ITS LOCAL 14300-12**

***Petitioner,***

**v.**

**NATIONAL LABOR RELATIONS BOARD**

***Respondent,***

**DURA-LINE CORPORATION**

***Intervenor.***

# BRIEF OF PETITIONER UNION

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**December 12, 2018**

## CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. Circuit Rule 26.1, Petitioner United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC, and its Local 14300-12 (collectively "Union") states that it is an unincorporated labor organization that has no parent corporation and no publicly held corporation owns 10% of more of its stock.

## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

### A. Parties

The following parties appeared in the administrative proceedings before the National Labor Relations Board (NLRB), Case Nos. 09-CA-163289, 09-CA-164263, 09-CA-165972, 09-CA-166481, and 09-CA-167265:

1. Charging Party United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC, and its Local 14300-12
2. Respondent Dura-Line Corporation
3. Counsel for the General Counsel, Region 9, NLRB

The parties in this case currently before the Court are:

1. Petitioner United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC, and its Local 14300-12
2. Respondent National Labor Relations Board
3. On October 2, 2018, this Court granted Dura-Line Corporation's Motion for Leave to Intervene in this matter.

### B. Rulings Under Review

Petitioner Union petitions the Court for review of the Board's Decision and Order in Case Nos. 09-CA-163289, 09-CA-164263, 09-CA-165972, 09-CA-166481, and 09-CA-167265, which was entered on July 12, 2018 and is reported at 366 NLRB No. 126.

### C. Related Cases

Petitioner Union is not aware of any related cases.

Respectfully submitted,

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## GLOSSARY OF ABBREVIATIONS

| Abbreviation | Definition |
|---|---|
| The Act or NLRA | National Labor Relations Act |
| ALJ | Administrative Law Judge Melissa M. Olivero |
| The Board or NLRB | National Labor Relations Board |
| The Board's Decision or D&O | Decision and Order of the Board under review |
| The Company or Dura-Line | Dura-Line Corporation |
| General Counsel | General Counsel of the NLRB and trial Counsel |
| Mexichem | Mexichem, S.A.B. de C.V., and parent company to Dura-line Corporation |
| The Union | United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC, and its Local 14300-12 |
| R. Ex. | Respondent, or Company, Exhibits submitted at hearing before ALJ |
| GC Ex. | General Counsel Exhibits submitted at hearing before ALJ |

## I. JURISDICTIONAL STATEMENT

The Board had subject matter jurisdiction over the NLRB case subject to this Petition for Review under Section 10(a) of the NLRA, 29 U.S.C. § 160(a). This Court has jurisdiction over the Union's Petition for Review under Section 10(f), 29 U.S.C. § 160(f).

## II. STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board's finding that, despite evidence of anti-union animus, the Company did not violate Sections 8(a)(3) and (1) of the NLRA because the Company established that it would have closed its unionized facility and relocated work to non-union facilities in the absence of the Union's protected concerted activity is supported by substantial evidence on the record considered as a whole, and did not depart from prior precedent without a reasoned explanation.

## III. STATUTES

### A. Sections 8(a)(1) and (3) of the NLRA, 29 U.S.C. § 158(a)(1) and (3)

§ 158. Unfair labor practices

(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 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

## IV. STATEMENT OF THE CASE

### A. Background

In December, 2015, Dura-Line closed its Middlesboro, Kentucky production facility ("Middlesboro facility"), which was its most profitable and productive facility, and also its only unionized workforce. The Company did not stop producing the products made in the Middlesboro facility, but instead moved that work to three other facilities with non-union workforces. This case involves a labor dispute over whether the Company's anti-union animus was a motivation for its decisions to close the Middlesboro facility and relocate its work to non-union facilities.

### B. Timeline Leading to the Closure of the Middlesboro Facility

Dura-Line opened the Middleboro facility in 1971, and operated it until December 2015. D&O 7, 12. In September 2014, Dura-Line was purchased by Mexichem, a global chemical company. *Id*. at 7. Dura-Line manufactured conduit at its Middlesboro facility by converting resin into pipes. *Ibid*. Approximately 15 to 20 percent of Middleboro's production was of MicroDuct or FuturePath. *Ibid*. MicroDuct is a small pipe, and FuturePath is a bundle of MicroDuct; both are used in the telecommunications industry. *Ibid*.

Since 1987, the Union represented a bargaining unit of production and maintenance employees at the Middleboro facility. *Ibid*. The parties' most recent

collective bargaining agreement was effective from April 18, 2013 through April 18, 2016. *Ibid*. Robert Hatfield served as Local Union president from 2011 until the facility closed. *Ibid*. Hatfield was an active union president, including filing more grievances than either of his predecessors. *Ibid*. The Middlesboro facility was the Company's only unionized facility. *Id*. at 8.

In December 2015, the Company ended manufacturing at its Middlesboro facility. *Id*. at 7. Up to that point, the facility had been the Company's most productive and profitable. *Id*. at 22. The Company shifted the MicroDuct and FuturePath production to a new facility it constructed in Clinton, Tennessee. *Id*. at 12. The Middlesboro facility's remaining work, which consisted of the manufacturing of standard conduit, was transferred to two other existing Company facilities in Ohio and Georgia. *Ibid*.

Local Management's Statements Regarding Union Activity Leading up to the Closure of the Middlesboro facility and Transfer of its Work

In the months leading up to the announced closure of the plant, the Company's management at the Middlesboro facility repeatedly made negative statements regarding the Union's activities, including threats of plant closure over vigorous enforcement of its collective bargaining agreement. These statements include the following:

- In April 2015, Patsy Wilhoit, human resources manager at the Middlesboro facility, wrote an email to Tamera Fraley, corporate human resources director, stating that she could not recommend Hatfield for a transfer to the

Company's facility in Texas for fear that he might attempt to organize that plant. D&O 12, GC Ex. 10.

- Also in April 2015, after Hatfield exercised his right to bereavement leave under the parties' collective bargaining agreement, Wilhoit told Hatfield, "This is the type of shit that's going to get you guys out of a job and get the facility shut down." D&O 13.

- Wilhoit told bargaining unit member and former local union president Elmer Evans that Hatfield was filing too many grievances; that every time Hatfield filed a grievance, it cost the Company $50 to have an attorney review it; and that "if something's not done with [Hatfield]… we've got new owners… Mexichem and they're not liking this company already because it's union, and if something's not done with [Hatfield] and if [Hatfield] doesn't stop filing grievances as much as he does, we're going to shut it down and move." *Ibid*.

- Wilhoit told bargaining unit member and former local union president Freddie Chumley that every time a grievance was filed, she had to log it, these grievances were seen by corporate managers, and they did not like it. *Ibid*. Wilhoit further made Fraley aware of any grievances that may go to arbitration. *Ibid*.

- In April 2013, just after the signing of the parties' last collective bargaining agreement, Evans had a conversation with Mike Roark, a manager who served as production manager beginning in 2014 and interim plant manager beginning in 2015, and Shift Supervisor Jeff Hatfield. *Ibid*. After Evans expressed relief that they had at least three more years, due to the contract, J. Hatfield replied, "You better enjoy it because it's your last contract here." *Ibid*. Roark added, "I guarantee it'll be your last contract." *Ibid*.

- In September 2015, just prior to the announced closing of the Middlesboro facility, Roark became animated after Hatfield filed a grievance, and said that "those grievances was (sic) the type of things that was going to get the doors closed on the facility. We were all going to be out of jobs[.]" *Ibid*.

- In September 2015, Bruce Wasson, maintenance manager, told Hatfield, after a meeting over the Company's discipline of two employees, that "[y]ou

guys are going to get what you want, they're going to shut the doors, and you guys are going to be out of a job." *Ibid*.

- Wasson told Chumley that Mexichem would not tolerate grievances and Dura-Line (meaning the Middlesboro facility) would be shut down. *Ibid*. In discussing grievances, Wasson said to Chumley, "What do they think they are doing? They're going to get this plant shut down." *Ibid*. Wasson told Chumley the Union's International Representative had already gotten on plant shut down in town, and that Dura-Line was next. *Ibid*. After the plant closing was announced, Wasson said to Chumley, "I told you it was coming." *Ibid*.

- Wasson told bargaining unit member Matthew Craig that one of the reasons the Company was closing the Middlesboro facility was because the Company cannot run it the way they want to run it, and that the large pile of grievances, along with reinstatement and backpay for two employees, were among the reasons for the closure. *Id*. at 14.

- Wasson told Evans, "If [Hatfield] does not quit doing what he was doing… Mexichem… don't like the Union and it's the only union plant they got, so you all figure it out." *Ibid*. Wasson continued that if the grievances continued and cost the Company money, they would shut down the facility. *Ibid*.

- Several supervisors and managers told bargaining unit members after the announced closing that the reason for the closing was the Union and its aggressive grievance filing. *Ibid* (David Jackson told Hatfield that Hatfield and the Union caused the closing; Jeff Hatfield said the plant was closing "basically because [of] all the grievances"; Clifton West told employees that he told Hatfield that his grievances were going to get the facility shut down; William Calhoun told employees that the Union and the grievances were the main reason for the closure).

<u>Corporate-Level Statements Surrounding Closure of the Middlesboro Facility</u>

In addition to the Middlesboro facility management statements regarding the Union and the decision to close the facility, Dura-Line's corporate managers also

repeatedly referenced the Union when discussing plans to close the facility and transfer its work.

These corporate managers began discussing the closure of the Middlesboro facility prior to Mexichem's purchase of the company, and presented a plan to Mexichem in September 2014. *Ibid*. The initial plan was to close the Middleboro facility, and lease a new plant in the eastern United States; the Company would have transferred the work performed at the Middlesboro facility to the new plant. *Id*. at 7-8. The new plant, however, would have had expanded capacity for this work. *Id.* at 8.

Dura-Line CEO, Parish Chari, gave a presentation to Mexichem, entitled "New Eastern US Plant," that laid out the case for the new plant. *Ibid*, R. Ex. 3, p. 3. On a slide that provided background on the Middlesboro facility, the presentation states "Unionized workforce since 1987[.]" R. Ex. 3, p. 4. This statement is preceded and followed by two critical statements regarding the Middlesboro facility: "Current building cannot expand lengthwise" and "Critical facility in the development of new products (historically) without dedicated R&D and testing equipment" respectively. *Ibid*. Under "Current limitation[,]" the presentation states "Can't run all lines 24x7 (Union contract limitation)[.]" *Id*. at 10. These limitations slides also list items related to such things as low productivity, space constraints, power distribution system, poor layout,

transportation issues, and extrusion issues. *Id*. at 10-12. Under "Hourly staff requirements" for the new plant, the presentation states "No contractual limitations to run 24x7 all lines." *Id*. at 15. The slide also lists certain building space and location requirements that would address certain design, space, and transportation preferences. *Ibid*. At another point, the presentation sets out the projected "[n]ew headcount" for the new plant, and indicates that the projected "[f]ull staff" will be a "24x7" staff. *Id*. at 18. The presentation further describes the staff at the Middleboro facility as "stable and capable." *Id*. at 9.

In January 2015, Chuck Parke, the newly-hired Senior Vice-President of Operations, wrote in an email that the Middleboro facility "is the only union facility and I have been asked to shut it down this year." D&O 8, R Ex. 11. He further expressed that he found it to be "[k]ind of a strange situation" as the Middlesboro facility "produces the most volume and made the most profit last year." *Ibid*. Parke also indicated that the "team" at the Middleboro facility "knows a lot about making pipe" and further singled out the plant manager for praise. *Ibid*. This is in contrast with his discussion of issues at other plants, including a weak plant manager at the Erwin, Tennessee facility and high-turnover at the Midland, Texas facility. *Ibid*.

In February 2015[1], the roof at the Middlesboro facility collapsed under snow and ice buildup. D&O 8. The Company shifted some of Middlesboro's production to other locations, including a facility in Elyria, Ohio. *Ibid*. The Company ultimately repaired the roof prior to closing the Middlesboro facility. *Id*. at 8, fn. 6.

Sometime after this collapse, the Company focused its search to locate its new facility on Clinton, Tennessee. *Ibid*. On May 28, Joel Baker, Director of Manufacturing, asked Parke in an email whether Parke was sure that he wanted to post for the Clinton production manager position "given the concerns about folks and the Union in KY finding out[.]" *Ibid*, GC Ex. 14. Parke responded that he did not want it posted as the "Clinton production [manager]." *Ibid*.

On May 29, Dan Grosso, an employee in the finance department, emailed Lisa Jenkins, project engineer/project manager for the Clinton facility and later its plant manager, a draft of a section for "the Clinton proposal email" to send Mexichem. GC. Ex. 16. In providing reasons to replace the Middlesboro facility with the Clinton facility, Jenkins wrote, "The KY facility's equipment is outdated and in need of replacement and the facility has the only Union represented workforce out of the 10 Duraline (sic) manufacturing locations." *Ibid*, D&O 8.

On June 9, Chari sent a capital expenditure request to a Mexichem official for the new Clinton facility. D&O 8, R. Ex. 4. This $16.8 million request was for

[1] All dates hereafter are for 2015, unless noted otherwise.

the purchase of land and construction of the new facility, which would absorb the Middlesboro facility's MicroDuct and FuturePath manufacturing as well as establish a research and development center, along with the purchase of new equipment. *Ibid*. This request projected a 23% return on investment, with an increase of $7.3 million per year in EBITDA for the production of MicroDuct and FuturePath. *Ibid*. On these projections, it would take 7.2 years to repay the investment for the new facility. R. Ex. 4, p. 14.

In Chari's cover email with this request, he mentioned three reasons why this request included an accelerated timetable:

- Middlesboro roof collapse
- Increasing demand for microducts and need to meet customer requirements in an uninterrupted manner
- Impending union negotiations in Middlesboro (Q1 2016)

D&O 9, R. Ex. 4, p. 1. In an attached email, Wes Tomaszek, CFO, similarly writes,

> The roof collapse at our Middlesboro, Kentucky facility in February of 2015, the prospect of union contract negotiations at that facility in early 2016 (Middlesboro is our only unionized plant and the existing collective bargaining agreement is up for renewal in March 2016), combined with continued expansion of Microduct use in the U.S. marketplace requires us to accelerate moving forward with this initiative.

D&O 9, R. Ex. 4, p. 13. As it relates to the concerns regarding upcoming union negotiations, Parke admitted that the possibility of a work slowdown or strike by

the Union was considered, which could have prevented the Company's ability to meet MicroDuct demand uninterruptedly. D&O 9, fn. 9.

In October, Chari sent another capital expenditure request to Mexichem to accelerate the closure of the Middlesboro facility. D&O 9. By this point, the Company changed its plans to build a new plant in the northeast, and instead was to move the standard conduit manufacturing work from Middlesboro to plants in Elyria, Ohio and Tennille, Georgia. *Ibid*. Some of that work had already moved to Elyria due to the roof collapse. *Ibid*. The Tennille facility had been shut down for two to three years at this point. *Ibid*.

In its cover email accompanying the request, Tomaszek again listed the upcoming union negotiations as a reason, among others, to accelerate the plan to close the Middlesboro facility, writing, "the prospect of union contract negotiations at that facility in early 2016 (Middlesboro is our only unionized site and the collective-bargaining agreement is up for renewal in March 2016)." *Ibid*. The request further included a comparison of overall labor costs, with Middlesboro's $5.3 million accounting for more than the other workforces combined. *Ibid*.

On September 9, Jenkins sent an email to Richard Russell, an anti-union consultant, regarding using his services to "support [] our hiring/anti-union training" at the new Clinton facility. GC Ex. 17. Ultimately, Russell was not retained. D&O 10.

Closure of the Middlesboro Facility

Management at the Middlesboro facility knew for some time that the facility would likely close. *See* GC Ex. 12 (Roark email to resigning manager stating that he understood as "[w]e all know what's going to happen in KY."). Parke and Mike Hilliard, Senior Vice President of Global Operations, officially informed these managers on August 3; these managers signed confidentiality agreements to not disclose the impending closure. D&O 10.

In emails dated September 1, Parke and Hilliard both expressed a desire to not announce the new Clinton facility until after any necessary negotiations were completed with the Union. GC Ex. 13. Hilliard wrote that an announcement before then "will only make our labor negotiations with the Steel Workers Union more challenging." *Ibid*. No formal announcement of the new Clinton facility issued for nearly two months after this date.

On September 15, Parke and Hilliard announced to the Middlesboro union employees that the facility would be closing. *Ibid*. The first draft of talking points sought to hide the fact that the new Clinton facility would include manufacturing, stating only that it would be a research and development facility. R. Ex. 5 (the final version describes the Clinton facility as "an R&D and state of the art manufacturing facility[.]" R. Ex. 7). Parke and Hilliard did not discuss the possibility for bargaining unit employees to transfer to other Company facilities,

but instead did evaluate non-bargaining unit employees for transfer to Clinton. D&O 10. When asked about working in Clinton, Wilhoit would tell union employees that they could simply go down to Clinton and apply in person. *Ibid*. However, two union employees were transferred to Clinton, without needing to apply for new positions, prior to the closing of the Middlesboro facility. *Ibid*. These employees were required to sign confidentiality agreements that prohibited them from discussing their transfers and their wages. *Ibid*.

In late October, the Company finally relented to the State of Tennessee and agreed to the issuance of a press release by the State about the Clinton facility. D&O 11. On October 13, Hilliard indicated he would only agree to the release if nothing appeared in the press prior to Friday, October 16, which was the end of the first week of bargaining over the effects of the Middlesboro closure with the Union. *Ibid*, GC Ex. 15. On October 21, Hilliard, in agreement with Chari and the Company's labor attorney, requested that the reference to the Clinton facility creating 70 new jobs be removed. *Ibid*. Hilliard's reasoning for this request was that "[c]onfidentially… today, Clinton has not been an issuee (sic) at the bargaining table and we would prefer to keep it that way." *Ibid*. Jenkins indicated that she was "glad that Clinton hasn't been an issue at the bargaining table[,]" and that they may be able to soften the number of jobs in the draft. GC Ex. 15. Ultimately, the State included the 70 number in its press release. R. Ex. 9.

The Middlesboro facility is now fully shut down. Its MicroDuct and FuturePath work is performed in Clinton. D&O 12. The Clinton facility is able to run longer production lines than in Middlesboro; it also runs a 24x7 operation. *Ibid*. The Middlesboro standard conduit work is now performed at the Ohio and Georgia facilities. *Ibid*. The Company improved and lengthened these lines after their transfer. *Ibid*.

### C. The Administrative Law Judge's Decision

Reviewing this evidence, the ALJ found that the Company violated Section 8(a)(3) of the NLRA by closing the Middlesboro facility and transferring its work to non-union facilities. D&O 20-22. The ALJ began by applying the Board's test for such dual-motive cases established in *Wright Line*, 251 NLRB 1083 (1980), enfd on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). As described by the ALJ, under *Wright Line*, the "General Counsel bears the initial burden to show that the employees' protected activity was a motivating factor for the adverse action by demonstrating: 1) the employee's protected activity; 2) the respondent's knowledge of that activity; and 3) the respondent's animus." *Id*. at 20. After this showing is made, "the burden then shifts to the respondent to show that it would have taken the same action, even in the absence of the employee's protected activity." *Ibid*. The ALJ explained that "an employer

does not satisfy its burden merely by stating a legitimate reason for the action taken, but must persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct." *Ibid*.

The ALJ stated that "[t]he record evidence compels my finding that [the Company] indeed transferred work from Middlesboro to its other plants in retaliation for the employees' protected, concerted activity." *Ibid*. The ALJ found that the Company was "well-aware of its employees' union activities." *Ibid*. She further found that the timing of the work transfer, "just before negotiations for a successor agreement were to have commenced," supported a finding of unlawful motivation. *Ibid*.

The ALJ found anti-union animus based on several pieces of evidence. She found animus based on the Company's statements regarding the contract limitations and the Company's desire to avoid successor contract negotiations. *Id*. at 22. She further found animus based on the following:

- the "multiple and serious threats to employees" and "frequent disparaging remarks about [Hatfield]" made by local management officials, *id*. at 21;

- the Company's requirement that union employees had to travel to Clinton to apply for positions there, while considering hiring an anti-union consultant at that facility and secretly hiring some bargaining unit employees there, *ibid*;

- the Company's desire to keep its transfer of work from the Middlesboro facility a secret from the Union, including email statements by Parke and Hilliard expressing a desire that the Union not find out about the new facility or the number of available jobs there, *ibid*;

- the Company's multiple and shifting reasons for the closure and transfer of work, including Chari's testimony that a rail spur, which was presented as a requirement for a new facility but that had not been built by the time of the hearing, was not necessary at the Clinton facility, *id*. at 21-22.

Based on this evidence, the ALJ determined that the General Counsel established a *prima facie* case, shifting the burden to the Company to show that it would have taken the action regardless of the employee's protected activity. *Id*. at 22. The ALJ further found that the General Counsel had established that the Company "bore strong animus to the employees' union activity[,]" which made the Company's "rebuttal burden [] substantial." *Ibid*.

The ALJ then found the Company's economic justification for the closure of the Middlesboro facility and transfer of its work did not meet this burden. *Ibid*. According to the ALJ, "[a]lthough the [Company's] financial forecasts supply a legitimate reason for closing the Middlesboro facility, none of the credited evidence demonstrates that [the Company] would have closed the facility absent employees' protected conduct." *Ibid*. In support of this conclusion, the ALJ wrote:

> Middlesboro was [the Company's] most profitable and productive facility. [The Company] embedded references to the unionized status of its work force and upcoming collective-bargaining negotiations throughout its economic justifications for closing the Middlesboro facility and transferring its work to its nonunion facilities. Furthermore, the record is replete with threats by [the Company's] supervisors and agents that employees' union activities would result in plant closure or had caused the plant closure… [T]he requests to close and later accelerate the closure of Middlesboro are completely enmeshed with [the Company's] stated desire to avoid its bargaining obligation and with mentions of the unionized work force there.

> In every piece of correspondence and in the initial capital expenditure request, [the Company] links the presence of the Union, limitations imposed by the Union, and its desire to avoid bargaining with the Union with the
>
> closure of the Middlesboro facility. Therefore, I cannot find that [the Company] has carried its rebuttal burden.

*Ibid*.

**D. The Board's Decision**

In its decision, the Board affirmed the ALJ's factual findings, but drew different conclusions. D&O 1-3. Initially, while the Board agreed with the ALJ that the General Counsel met its burden under the first step of the *Wright Line* analysis, it found less evidence of animus than the ALJ. *Id*. at 2, fn. 11. The Board found that only the statements made by the local management in Middlesboro provided evidence of animus. *Ibid*.

In rejecting the ALJ's finding of animus based on corporate manager statements regarding closure of the Middlesboro facility in communications to Mexichem, the Board wrote

> The fact that the [Company] informed Mexichem that the Middlesboro plant was unionized and that the current contract restricted 24/7 production is not evidence of animus. Nor is the [Company's] pragmatic request that Mexichem accelerate its decision because bargaining for a new union contract at Middlesboro would commence about the time that operations there would be winding down.

*Ibid*.

In rejecting the ALJ's finding of animus based on corporate managers' desire to not inform the Union about the closing and transfer of work, the Board stated,

> [T]he [Company's] desire to delay a job posting and press release is not evidence of animus. The [Company] did not want the Union and its customers finding out about the closure before it was prepared to go public, reflecting a legitimate desire to minimize disruption. Notably, the [Company], despite initial secrecy, ultimately timely notified employees and the Union about its plans and engaged in effects bargaining.

*Ibid* (the Board further stated that to the extent that secrecy was evidence of a desire to avoid union employees from seeking employment at the new facility, the Board found it to no longer be relevant due to its findings related to the Company's *Wright Line* rebuttal showing).

The Board also stated that it did not find that the Company provided shifting reasons for the relocation, or that requiring union employees to travel to Clinton to apply for jobs created any hurdles for those employees, especially considering that there was no evidence to show that traveling dissuaded any employees from applying. *Ibid*. Lastly, the Board found that Jenkins' consideration of an anti-union consultant was "irrelevant to the [Company's] decision to close the Middlesboro plant." *Ibid*.

While rejecting some evidence of anti-union animus, the Board still found that the General Counsel met its burden at the first *Wright Line* step. However, the

Board disagreed with the ALJ, and found that the Company "met its *Wright Line* rebuttal burden." *Id*. at 2.

The Board found that the Company "established that it would have closed the outdated Middlesboro plant and relocated production for compelling economic reasons regardless of the Union's presence there and the relatively low-level union activities that Middlesboro managers complained about." *Ibid*. The Board continued:

> The [Company's] need for a modernized facility that could accommodate its production requirements and permit significant expansion, utilize new technology, establish a dedicated research and development line, and improve transportation options cannot reasonably be disputed. Such changes were critical to increasing the productivity and efficiency of the [Company's] operations, and the record establishes that these improvements could not be accomplished at its Middlesboro location. It is also undisputed that, as a result of the relocation, production of standard conduit doubled and gross earnings are projected to increase at a rate of $9.6 million per annum. Finally, it is implausible that the [Company] would have proposed that its new parent company embark on a $20 million relocation and expansion initiative in order to relieve itself of allegedly excessive union grievance filings over local matters or to otherwise undermine the Union.

*Id*. at 2-3.

## V. SUMMARY OF ARGUMENT

The Board's finding that the Company carried its burden and rebutted the inference that its decisions to close the Middlesboro facility and relocate its work to non-union facilities is not supported by substantial evidence in the record considered as a whole. Initially, the Board improperly rejected evidence of animus

beyond statements made by local Middlesboro management. Next, the Board improperly found that the Company met its rebuttal burden as the evidence in the record shows that the Company's decisions were influenced by its anti-union animus. At most, the evidence shows that the Company *could have* taken the same actions absent the union activity, but not that it *would have*. This is best demonstrated by considering whether the Company would have relocated the work performed by the Union workforce at Middlesboro to workforces engaged in similar levels of union activity. The record simply cannot establish that it would have.

Additionally, the Board does not provide a reasoned explanation for finding certain cases cited by the ALJ to be inapposite to the instant case. In each of those cases, the Board found that the employer failed to rebut the inference that its actions were motivated by anti-union animus, at least partly because the record contained evidence that directly linked the employer's decisions to employees' union or protected activity. As that type of evidence is in the instant record, these cases are on point, and the Board fails to provide a reasoned explanation for distinguishing them.

## VI. STANDING

As the party aggrieved, the Union has standing under Section 10(f) of the NLRA, 29 U.S.C. § 160(f), to petition this Court to review the Board's Decision and Order.

## VII. ARGUMENT

### A. Standard of Review

"This court's role in reviewing an NLRB decision is limited." *DHL Express, Inc. v. NLRB*, 813 F.3d 365, 371 (D.C. Cir. 2016) (internal quotation marks omitted). However, "the court's review is not without substance." *David Saxe Productions, LLC v. NLRB*, 888 F.3d 1305, 1311 (D.C. Cir. 2018). "The Board's findings of fact are conclusive only if supported by substantial evidence on the record considered as a whole." *Ibid*. Additionally, "the court's review of the substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Ibid* (internal quotation marks and brackets omitted).

Judicial deference is not warranted where "the Board acted arbitrarily or otherwise erred in applying established law to the facts of the case[,]" *Cmty. Hosp. of Centr. Cal. v. NLRB*, 335 F.3d 1079, 1082-83 (D.C. Cir. 2003), or "where the Board fails to adequately explain its reasoning, or where the Board leaves critical gaps in its reasoning." *David Saxe Productions*, 888 F.3d at 1311 (internal quotation marks and brackets omitted). An agency acts arbitrarily where it departs

from established precedent without a reasoned explanation. *ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901 (D.C. Cir. 1995). Accordingly, the Board cannot "ignore its own relevant precedent but must explain why it is not controlling." *BB&L, Inc. v. NLRB*, 52 F.3d 366, 369 (D.C. Cir. 1995).

When the Board disagrees with the ALJ, the standard of review does not change. *Fort Dearborn Co. v. NLRB*, 827 F.3d 1067, 1072 (D.C. Cir. 2016). However, while "[t]he Board is free to disagree with the ALJ," "it must explain the basis for its disagreement." *Id*. at 1073.

### B. The Board's Failure to Find Certain Company Actions to be Evidence of Animus Is Not Supported by Substantial Evidence and Is Not Adequately Explained

As noted above, the Board disagreed with the ALJ that certain Company actions constituted evidence of anti-union animus. These findings are not supported by substantial evidence in the record, or the disagreement with the ALJ is not adequately explained.

<u>Finding that Informing Mexichem that Middlesboro was Unionized and of Contract Restrictions Not Animus</u>

The Board found, contrary to the ALJ, that "[t]he fact that the [Company] informed Mexichem that the Middlesboro plant was unionized and that the current contract restricted 24/7 production is not evidence of animus." D&O 2, fn. 11. The Board offered no further explanation for its disagreement with the ALJ on this

point. This failure alone renders the Board's finding in error. However, the Board's finding is not supported by substantial evidence in the record.

The Board limits the Company's actions to simply "inform[ing]" Mexichem that the Middlesboro facility was unionized and that the contract restricted 24/7 production. The record evidence shows that the Company did more than simply inform. Chari's presentation lists "Can't run all lines 24x7 (Union contract limitation)" as a "[c]urrent limitation[]" of the Middlesboro facility. R. Ex. 3, p. 10. Additionally, and ignored by the Board, the presentation states "No contractual limitations to run 24x7 all lines" as an "Hourly staff requirement" for the proposed new facility to replace Middlesboro. *Id*. at 15. It further proposed a "24x7" "Full staff" for the new facility. *Id*. at 18. The Company clearly juxtaposed the Union contract limits on 24/7 production at Middlesboro with the benefit of running 24/7 production offered by opening a new facility with a non-union workforce. This is a classic example of anti-union animus, and the Board's finding otherwise cannot be sustained based on the record evidence.[2]

[2] Jenkins' May 29 email to Grosso further undermines the Board's finding. In addressing deficiencies with the Middlesboro facility, in order to justify its closure and the expenditure for a new facility, she added the following sentence, "The KY facility's equipment is outdated and in need of replacement and the facility has the only Union represented workforce out of the 10 Duraline (sic) manufacturing locations." GC Ex. 16, D&O 8. Again, it is clear that this reference is not intended to simply "inform[]" Mexichem that the Middlesboro facility is unionized, but is presented as a reason to close the facility.

Finding that Desire to Accelerate Plant Closing Not Animus

The Board further finds that the Company's desire to accelerate the plant closing in order to avoid bargaining for a successor agreement was not evidence of animus, calling it a "pragmatic request" "because bargaining for a new union contract at Middlesboro would commence about the time that operations there would be winding down." This Board finding is again unsupported by substantial evidence on the record.

In his email to Mexichem officials on June 9, 2015, Chari coupled the "need to meet customer requirements [for MicroDuct products] in an uninterrupted manner" with the "[i]mpending union negotiations in Middlesboro[.]" R. Ex. 4, p. 1. In the only credited testimony in the matter, Parke admitted that the possibility of a work slowdown or strike by the Union was considered by the Company. D&O 9, fn. 9.

The record, thus, indicates that the request to accelerate the closing of the Middlesboro facility was not just a pragmatic attempt to avoid engaging in bargaining while the plant was winding down operations, but also an attempt to avoid the potential disruptions in production caused by a work stoppage.

Additionally, the Company's statements regarding the impending negotiations were often accompanied with a reference to the Middlesboro facility having the only union workforce in the corporation. *See* R. Ex. 4, p. 1, 13; D&O 8.

Upon considering the record as a whole – including numerous statements by local management officials linking the plant closing to the Union's activity, the Company's animus to contractual limitations, and its secrecy about the movement of the plant's work – these references to the Middlesboro facility being the only unionized facility are clearly a reflection of a desire to avoid any continuing engagement in union activity.

Finding that Desire to Delay Job Posting and Press Release Not Animus

The Board additionally found in error that the Company's desires to delay a job posting and press release were not evidence of animus. D&O 2, fn. 11. According to the Board, the Company "did not want the Union and its customers finding out about the closure before it was prepared to go public, reflecting a legitimate desire to minimize disruption." *Ibid*. This finding too is unsupported by substantial evidence on the record.

On May 28, Baker, Director of Manufacturing, emailed Parke and asked if he was sure that he wanted to post for the Clinton production manager position, "given the concerns about folks and the Union at KY finding out[.]" GC Ex. 14. Parke responded that he did not want it posted "as the Clinton production mgr." *Ibid*. Parke (not Baker) offered testimony that "folks" included customers. On September 1, Hilliard, Senior VP of Operations, requested that a press release about Clinton be delayed as it would "only make our labor negotiations with the

Steel Workers Union more challenging." GC Ex. 13. Parke responded by saying "I was thinking we would get through effect (sic) bargaining and then make the announcement." *Ibid*. In an October 13 email, Hilliard again sought to delay the issuance of a press release on Clinton until after the "end of week 1 'effects bargaining' with the Steel Workers Union." GC Ex. 15. On October 21, Hilliard wrote that the press release had been reviewed by Chari, Jackson (the labor attorney), and himself and that "we are aligned with the message with the exception of" "broadcasting the 70 hires for Clinton." *Ibid*. He further revealed why they had issues with broadcasting the number of hires: "Confidentially… today, Clinton hasn't been an issue at the bargaining table and we would prefer to keep it that way." *Ibid*.

These exchanges show that the Company's desire to delay the job posting and press release did not "reflect[] a legitimate desire to minimize disruption" until "it was prepared to go public," but was instead intended to hide the new Clinton facility, and its available jobs, from the Union. Hilliard's and Parke's concerns about the timing of the press release were tied specifically to avoiding the topic of the Clinton facility in bargaining with the Union over the effects of the Middlesboro closing. Effects bargaining, by definition, would only occur after the Company has announced to the Union that the Middlesboro plant would be closing. And, in fact, the closing was announced on September 15. Hence, hiding

the announcement of the Clinton facility, or the number of hires there, until effects bargaining concluded, or was well along its way, would not minimize disruption until the Company was prepared to go public with its plans.

The Board seemingly tries to bolster its finding by claiming, "Notably, the [Company], despite initial secrecy, ultimately timely notified employees and the Union about its plans and engaged in effects bargaining." D&O 2, fn. 11. This statement is simply not relevant. The Company's desire was to hide the extent of the new Clinton facility, and its 70 new hires, from the Union. The fact that it was willing to discuss the effects of the Middlesboro closing is irrelevant to its desire to keep the Union out of Clinton.[3]

Finding that Company's Attempt to Hire Anti-Union Consultant at Clinton Was Irrelevant

The Board found that Jenkins' desire to hire an anti-union consultant "is irrelevant to the [Company's] decision to close its Middlesboro plant." *Ibid*. This conclusion is arbitrary and unsupported by substantial evidence in the record. As just noted, the Board itself a few sentences earlier seemed to acknowledge that the evidence suggests that the Company desired to avoid having unionized

[3] The Board seems to acknowledge this point when it says, "To the extent the [Company's] secrecy might suggest a desire to avoid having unionized Middlesboro employees seek positions at the new facility, we find (as we now discuss) that the [Company's] rebuttal evidence establishes that the relocation decision itself was based on corporate-level operations and financial considerations." D&O 2, fn. 11.

Middlesboro employees seek positions at the new facility. *Ibid*. Jenkins' exploration of retaining an anti-union consultant at Clinton, coupled with Chari's statements that the new facility would be free of any contractual limitations on 24x7 production, clearly show that the Company intended for the new Clinton facility to be non-union. Furthermore, evidence in the record suggests that the Company did not want other facilities to organize. *See* GC Ex. 10 (Wilhoit's April 2015 email to Fraley stating that she could not recommend Hatfield for a transfer to the Company's facility in Texas for fear that he might attempt to organize that plant). When the record is examined as a whole, Jenkins' desire to retain an anti-union consultant in Clinton must be viewed as relevant to the question of whether the Company bore anti-union animus when it decided to shut down its only unionized facility, and send that facility's work to plants that it intended to be non-union.

### C. The Board's Finding that the Company Rebutted the Inference that Anti-Union Animus Was a Motivating Factor in its Decision to Close the Middlesboro Facility is Not Supported by Substantial Evidence on the Record as a Whole

The Board agreed with the ALJ that the *Wright Line* test applied to its analysis of whether the Company violated Section 8(a)(3) of the Act when it closed the Middlesboro facility and relocated the work to non-union facilities. As described above, the Board did not agree with the ALJ's conclusion, and instead found that the Company rebutted the General Counsel's showing that anti-union

animus was a motivating factor in the Company's decisions. The Board's finding is not supported by substantial evidence on the record as a whole.

Section 8(a)(3) of the Act makes it an unfair labor practice for an employer "to encourage or discourage membership in any labor organization" "by discrimination in regard to hire or tenure of employment of any terms or condition of employment[.]" 29 U.S.C. § 158(a)(3). This section bans "adverse employment action taken to discourage union activity, and motive is [the] chief inquiry." *Chevron Mining, Inc. v. NLRB*, 684 F.3d 1318, 1326 (D.C. Cir. 2012) (internal quotation marks, citations and brackets omitted). "The *Wright Line* test determines whether an employer's motive for adverse action is unlawful." *Ibid*.

"Under *Wright Line*, the Board's General Counsel bears the initial burden to make a *prima facie* showing sufficient to support the inference that protected [*i.e.*, legitimate, union-related] conduct was a motivating factor in the employer's decision to take adverse employment action." *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 228 (D.C. Cir. 1995) (internal quotation marks and citation omitted, brackets in original). Once this burden is met, "[t]he employer may then rebut the inference by showing by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Ibid* (internal quotation marks and citation omitted).

To carry its rebuttal burden, an employer must show that it "*would* have" taken the adverse employment action "*because of*" a legitimate business reason, "not that it *could* have done so." *Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 31 (D.C. Cir. 1998) (italics in original) (*also*, "company bears the burden of proving that nondiscriminatory motive *was in fact* the cause of the action." citing *Southwest Merchandising, 53 F.3d 1334, 1340 (D.C. Cir. 1995)* (emphasis added)). Additionally, it is not sufficient to show that the employer's actions were "reasonable." *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F3d 212, 224 (D.C. Cir. 2005). "[A]ssertions of a legitimate business reason" must be sufficient to show that the anti-union animus did not "influence[] the decision" to take the adverse employment action. *Laro Manufacturing Corp.*, 56 F.3d at 231. This is so because an employer violates Section 8(a)(3) if "any anti-union animus" "contribute[d] *at all* to an otherwise lawful" adverse employment action. *Transportation Management Corp.*, 462 U.S. at 398 (emphasis added).

Applying *Wright Line*, the Board agreed with the ALJ that the General Counsel met its burden to show that anti-union animus was a motivating factor in the closing of the Middlesboro facility and relocation of its work to non-union facilities. D&O 2. It based this finding solely on the numerous threats and anti-union statements made by local Middlesboro management officials. *Id.* at 2, fn. 11. The Board then found that the Company met its rebuttal burden based on its

asserted economic justification. The Board's finding is not supported by substantial evidence in the record considered as a whole, as the record does not establish that the Company's anti-union animus did not "influence," or "contribute at all to," its decisions.

The Middlesboro facility was the Company's most profitable and productive plant. When identifying plant strengths, Chari describes the hourly workforce as "stable and capable." R. Ex. 3, p. 9. Parke further praised the plant's workforce when he stated that the "team [at Middlesboro] knows a lot about making pipe[.]" R. Ex. 11. Yet, the Company decided to close this plant, and relocate its work to non-union facilities, while offering virtually none of the union workers the opportunity to transfer to any of those facilities. The Company simply cannot show that it would have taken these same actions absent anti-union animus.

Initially, the local Middlesboro management, from the plant manager down to the first-line supervisors, repeatedly told the Union that its activity would result in the plant being shut down. In fact, Roark, the interim plant manager at the time of the closing, told bargaining unit members at the time the parties agreed to the last collective bargaining agreement that he guaranteed it would be their last contract. The record is replete with manager and supervisor statements linking union activity to the plant closing in the months leading up to and around the time of the announced plant closing. *See*, *supra*, pp. 4-5. Many of these statements

explicitly stated that the Union's activity was a major reason for the plant closing. *See, e.g.*, *supra*, p. 5 (Wasson statement that one of the reasons the Company was closing the Middlesboro facility was because the Company cannot run it the way they want to run it, along with the large pile of grievances and a recent reinstatement and backpay award for two employees; Jackson statement that Hatfield and the Union caused the closing; J. Hatfield statement that the plant was closing "basically because [of] all the grievances").

The Board diminished these statements as complaints regarding the "relatively low-level union activities" of "excessive union grievance filings over local matters[.]" D&O 2-3. But this is too narrow a view of these local management's statements. For instance, Wilhoit, local HR manager, claimed the collective bargaining agreement's bereavement policy was "the type of shit that's going to get you guys out of a job and get the facility shut down." *Id*. at 13. Roark told the Union "those grievances was (sic) *the type of things* that was going to get the doors closed on the facility." *Ibid* (emphasis added). The complaints, therefore, were more wide-ranging than specifically about the grievances.

But more importantly, these statements reflected the Company's anti-union animus generally about union activity, and the local managers' knowledge that the union activity would lead to the plant's closure. In other words, the local

Middlesboro managers knew the facility was at risk of closure[4] and that the Union's activity generally increased that risk. These managers often expressed animus in terms of the Union's grievances, but during the mid-term of a contract, that is where local management would interact most with the Union. However, the managers' references to Mexichem, or the corporate office's review of grievances, show that the local managers were concerned that the risk of plant closure was increased by a higher level of Union activity generally. Accordingly, the local managers' statements are not simply complaints about low-level grievance matters, but reflect the Company's animus towards Union activity generally, and also these managers' knowledge that such activity will lead, or did lead, to the plant's closure.

Statements by the Company's corporate managers further show that there is not substantial evidence in the record to support the Board's finding that anti-union animus did not "influence" or "contribute at all to" the Company's decisions to close the Middlesboro facility and relocate its work to non-union facilities. The Company's economic and operational justifications certainly suggest that it *could have* made its decisions based solely on these considerations, but the evidence does not allow for a finding that it *would have* made its decisions based solely on these

[4] See, for example, Roark's July 28 email to Paul Velasquez, in which Roark expresses his understanding that Velasquez was resigning as "[w]e all know what's going to happen in KY." D&O 10.

considerations. As the ALJ found, the Company "embedded references to the status of its unionized work force and upcoming collective-bargaining negotiations throughout its economic justifications for closing the Middlesboro facility and transferring its work to non-union facilities." D&O 22. "In every piece of correspondence and in the initial capital expenditure request, [the Company] links the presence of the Union, limitations imposed by the Union, and its desire to avoid bargaining with the Union with the closure of the Middleboro facility." *Ibid*. These statements show how the Company's anti-union animus was "completely enmeshed" with its decision-making. *Ibid*.

The deficiency of the Board's finding is best illustrated not by considering whether the Company would have made the same decisions in the *absence* of Union activity by the Middlesboro Union members, but whether it would have in the *presence* of the same union activity by the workforces at the facilities where the Company moved the work. The Company here moved the work performed by the Middlesboro workforce and gave that work to three different workforces. Therefore, another way to evaluate whether the Company met its rebuttal burden under *Wright Line* is whether it can establish that it would have taken that work from the unionized workforce and given it to a workforce that engaged in the same level of union activity.

There is not substantial evidence in the record to establish as fact that the Company would have given the Middlesboro work to a different workforce engaged in the same level of union activity. For instance, Chari's presentation to Mexichem shows that a significant consideration for closing Middlesboro and moving its work to a new facility was that the Union's contract at Middlesboro did not allow for a 24x7 operation, and that a new non-union facility would be able to operate on that schedule. Regarding the reference to upcoming negotiations in the Clinton capital expenditure request, Parke admitted that the possibility of a work slowdown or strike by the Union was considered, which could have prevented the Company's ability to meet MicroDuct demand uninterruptedly. D&O 9, fn. 9. In a draft of the Clinton proposal to be sent to Mexichem, Jenkins provided two reasons for closing Middlesboro: 1) "The KY facility's equipment is outdated and in need of replacement" and 2) "the facility has the only Union represented workforce out of the 10 Duraline (sic) manufacturing locations." GC Ex. 16. Tomaszek, the CFO, admitted that the Company compared the labor costs of Middlesboro's workforce with those workforces where the standard conduit work was moved. D&O 9, fn. 11. Jenkins sought to hire an anti-union consultant to assist in the hiring at the Clinton facility. With this record, the Board simply could not find that the Company would have made the same decisions if the workforces that received Middlesboro's work were unionized, had union contracts that restricted 24x7

production, had contracts that were set to expire such that there was a concern about a work stoppage, had the same labor costs or labor costs that were set to be re-negotiated soon, or engaged in an active practice of grievance filing.

Moreover, the Company would not have engaged in the level of secrecy it did regarding the Clinton facility if the workers at Clinton were engaged, or would engage, in the same level of union activity as those in Middlesboro. The Company shrouded the Clinton facility in secrecy throughout the period in which it decided to close the Middlesboro facility and relocate its work. The Company's obvious intent was to avoid unionized Middlesboro workers from gaining employment at the Clinton facility. Parke sought to avoid posting for a "Clinton" plant manager so that the Union would not find out about the facility. Parke and Hilliard wanted to avoid any public announcement of the Clinton facility until after the conclusion of effects bargaining with the Union. Chari, Hilliard, and the Company's labor attorney all wanted to obscure the number of available jobs at Clinton reported in a press release. Neither Parke nor Hilliard discussed with the Union the possibility of bargaining unit members transferring to or applying for Clinton positions, even though the Company believed them "stable and capable" and that the "team [at Middlesboro] knows a lot about making pipe[.]" Their talking points for the Middlesboro closing announcement, at least initially, even tried to hide the fact that the Clinton facility would have any manufacturing component. R. Ex. 5. The

only two bargaining unit employees who transferred to Clinton were required to sign confidentiality agreements that prevented them from discussing their transfers and their wages at Clinton. None of these actions makes sense if the Company solely based its decisions to close the Middlesboro facility and relocate its work on operational and financial considerations, irrespective of whether the work would move from one unionized workforce to another similarly-situated workforce. These actions only make sense if the Company intended to move the work from a unionized workforce to non-union workforces.

Ultimately, there is not substantial evidence to support the Board's finding that the Company carried its burden to rebut the inference that its anti-union animus influenced or motivated its decisions to close Middlesboro and relocate its work to non-union facilities. This Court must grant this request for review, vacate the Decision and Order to the extent that the Board found that the Company did not violate Section 8(a)(3) by closing the Middlesboro facility and relocating the work to non-union facilities due to an anti-union motivation, and remand to the Board for further proceedings consistent with this Court's opinion.

### D. The Board's Decision Departed from Prior Precedent Without Reasoned Explanation

In reaching its decision that the Company met its rebuttal burden, the Board sought to distinguish three cases cited by the ALJ. The Board wrote, "The judge cited other inapposite cases where, among other things, respondents admittedly

relocated to avoid union or protected activity." D&O 3, fn. 12. The Board then identified *Amglo Kemlite Laboratories, Inc.*, 360 NLRB 319, 325-326 (2014), enfd. 833 F.3d 824 (7th Cir. 2016); *Allied Mills, Inc.*, 218 NLRB 281, 282-283 (1975), enfd. mem. 543 F.2d 417 (D.C. Cir. 1976), cert. denied 431 U.S. 937 (1977); and *Royal Norton Mfg. Co.*, 189 NLRB 489, 490-92 (1971). A review of these cases shows that the Board did not provide a reasoned explanation for distinguishing them by simply stating that, in those cases, "respondents admittedly relocated to avoid union or protected activity."

All three of these cases included evidence in the record that directly linked the decisions to close a facility and relocate its work with employees' union or protected activity, or as the Board characterized it, evidence that "respondents admittedly relocated to avoid union or protected activity." *Amglo Kemlite Laboratories*, 360 NLRB at 325-26 (Employer's president told employees that the employer was "moving the production to Mexico because of the situation [meaning the employees' work stoppage to demand higher wages]"; Employer's plant manager told a Board agent during the Board's investigation that "the company accelerated its decision to transfer the work to Mexico because of the strike."); *Allied Mills*, 218 NLRB at 283 (The employer's manager of labor relations testified that the employer did not want to transfer employees in bulk and have them bring the collective bargaining agreement with them to new facility;

employer's plant manager told union during effects bargaining that employees at closing facility were "too union oriented, and militant[.]"); *Royal Norton Mfg.*, 189 NLRB at 490-92 (employer's owner repeatedly told treasurer and others that he planned to move facility to get away from the union).

In each case, the employer provided a non-discriminatory reason for its action. *Amglo Kemlite Laboratories*, 360 NLRB at 326, 332-33 (employer claimed that decision to layoff employees occurred prior to employees' work stoppage, and also provided economic justifications showing benefits of the relocation); *Allied Mills*, 218 NLRB at 282-83, 286 (facility set to close was "too old, inefficient, and uneconomic for profitable operations"; employer not willing to agree to the transfer proposal because: 1) the employer made commitments to the county where a new plant was being built to hire local persons; and 2) the new plant had new machinery that the union employees were not capable of operating.); *Royal Norton Mfg.*, 189 NLRB at 491-92 (lease dispute at facility required relocation).

In each case, the Board found that the employer's non-discriminatory justifications did not rebut the evidence that anti-union animus was a motivation for the decisions, including the direct evidence that linked the decision to close the impacted facility and relocate the work to the union or protected activity. *Amglo Kemlite Laboratories*, 360 NLRB at 326, 332-33 (Board adopted the ALJ's finding discrediting the employer's claim that it had planned to layoff Bensenville

employees prior to the strike, and that this claim was belied by the plant manager's admission that the relocation was in response to the strike; ALJ rejected the employer's economic justification for the relocation, both because it was not persuasive and because of the plant manager's statement.); *Allied Mills*, 218 NLRB at 288 (ALJ, adopted by the Board, found that "while the move was dictated primarily because of economic considerations, the Respondent utilized it as a vehicle to rid itself of the Union as the representative of the production and maintenance employees" and because the union activity constituted "a portion of the reason for [the] employee[s'] termination[s], a violation of the Act resulted even though other, legitimate reasons existed."); *Royal Norton Mfg.*, 189 NLRB at 492 (ALJ, adopted by the Board, found that the "evidence clearly established that, regardless of the economic justification Respondent may have had as a result of the lease difficulties or terminating its operations… and relocating elsewhere, the decision to make the move… was motivated almost entirely by Respondent's desire and purpose to eliminate the Union[.]").

Reading these cases together teaches that, where the record contains evidence that directly links union or protected activity to decisions to close a facility and relocate its work [such as a statement by a management official that the decision was made due to the union activity or citing union activity as a justification for the decision], the Board will set a high bar for an employer to meet

its rebuttal burden. This is consistent with the principle identified by the ALJ in the instant case, that "[w]here the General Counsel makes a strong showing of discriminatory motive, Respondent's rebuttal burden is substantial." D&O 22, citing *Eddyleon Chocolate Co., 301 NLRB 887, 890 (1991)*. This teaching is applicable to the instant case, as there is evidence in the record that directly links the employees' union activity with the decision to close the Middlesboro facility and relocate its work to non-union plants.

As mentioned above, Chari's presentation to Mexichem shows that a significant consideration for closing Middlesboro and moving its work to a new facility was that the Union's contract at Middlesboro did not allow for a 24x7 operation, and that a new non-union facility would be able to operate on that schedule. In the Clinton proposal draft, one of two reasons Jenkins provided for closing Middlesboro was that "the facility has the only Union represented workforce out of the 10 Duraline (sic) manufacturing locations." In September, after he had already been informed of the Middlesboro closing, Roark told the Union "those grievances was (sic) the type of things that was going to get the doors closed on the facility." After the closing was announced, several managers and supervisors explicitly linked the closing to the Union's activity. (Wasson statement that one of the reasons the Company was closing the Middlesboro facility was because the Company cannot run it the way they want to run it, along with the

large pile of grievances and a recent reinstatement and backpay award for two employees; Jackson statement that Hatfield and the Union caused the closing; J. Hatfield statement that the plant was closing "basically because [of] all the grievances").

Accordingly, the Board's decision does not provide a reasoned explanation for why these cases, and their teaching, are "inapposite." These cases are, in fact, directly on point. Due to the Board's failure to provide a reasoned explanation for distinguishing these cases, this Court must grant the request for review, vacate the Decision and Order to the extent that the Board found that these cases inapposite, and did not apply their teaching, and remand to the Board for further proceedings consistent with this Court's opinion.[5]

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[5] The Board's departure from prior precedent without reasoned explanation becomes even clearer when reviewing the cases it cites as applicable. In support of its decision that the Company met its rebuttal burden, the Board cites *Gunderson Rail Services LLC*, 362 NLRB No. 30 (2016), *Chemical Solvents, Inc.*, 362 NLRB No. 164 (2015), *Nu-Skin International*, 320 NLRB 385 (1995), and *Litton Mellonics Systems Division*, 258 NLRB 623 (1981). In each of these cases, the Board held that the employer met its rebuttal burden under *Wright Line* by providing an economic justification for its adverse employment action. However, in none of these cases is there any evidence that directly links the decision related to the adverse employment action with union activity, such as a statement by a management official that the decision was made due to the union activity or citing union activity as a justification for the decision. *See Gunderson Rail Services*, 362 NLRB No. 30, sl. op. at 40, 42-3 (while employer, during an organizing drive, implicitly threatened employees with plant closure if they chose to unionize, no evidence in decision that linked the actual plant closure, caused by the loss of largest customer, to the employees' union activity); *Chemical Solvents, Inc.*, 362 NLRB No. 164, sl. op. at 6-7, 29 (while employer implicitly threatened employees

## VIII. CONCLUSION

For all the foregoing reasons, the Union respectfully requests that this Court grant the Union's Petition for Review, and remand the case to the Board for further consideration consistent with this Court's opinion.

Respectfully submitted,

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that if they file grievances, their work could be contracted out, no evidence in decision that directly linked earlier decision to contract out work to the employees' union activity); *Nu-Skin International*, 320 NLRB at 385, 391-400, 403-5 (while employer, during an organizing drive, implicitly and explicitly threatened plant closure if employees support the union, no evidence in decision that directly linked decision to close facility and relocate work 7 months later to union activity); *Litton Mellonics Systems Division*, 258 NLRB at 623-625 (evidence of anti-union animus unrelated to decision to close facility and relocate work). These cases, therefore, are much less applicable than those the Board found to be inapposite.

## CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 10,374 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

2. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font.

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## CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2018, 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.

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