Nos. 18-1685, 18-1706

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AIRGAS USA, LLC

Petitioner/Cross-Respondent

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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TABLE OF CONTENTS

Headings **Page(s)**

Oral argument statement 1

Jurisdictional statement 2

Issue presented 2

Relevant statutory provisions 3

Statement of the case 3

I. Procedural history 3

II. The Board's findings of fact 3

A. The Company has a practice of giving holiday pay to employees, including to those who take paid leave on a work day that precedes or follows a holiday 3

B. Rottinghouse files Board charges and participates in Board proceedings, despite disapproval by Company officials 6

C. The Company refuses to give Rottinghouse holiday pay, and makes a negative comment about his charge-filing activity 8

III. The Board's Conclusions and Order 10

Summary of the argument 11

Standard of review 13

Argument 15

Substantial evidence supports the Board's finding that the Company violated Section 8(a)(4) and (1) of the Act by withholding Rottinghouse's holiday pay because he engaged in Board processes 15

A. An employer violates Section 8(a)(4) and (1) by taking adverse action against an employee for engaging in Board processes 15

B. The Company withheld Rottinghouse's holiday pay because he filed charges with, assisted, and gave testimony to the Board 17

C. The Company failed to prove it would have withheld Rottinghouse's holiday pay even absent his Board activity 22

Conclusion 27

TABLE OF AUTHORITIES

Cases **Page(s)**

Airgas USA, LLC,
366 NLRB No. 104 (June 13, 2018)..... 7

Avondale Indus.,
329 NLRB 1064 (1999)..... 23

Birch Run Welding & Fabricating v. NLRB,
761 F.2d 1175 (6th Cir. 1985)..... 13

Caterpillar Logistics, Inc. v. NLRB,
835 F.3d 536 (6th Cir. 2016)..... 13,21,25

EF Int'l Language Schs., Inc.,
363 NLRB No. 20 (Oct. 1, 2015),
enforced, 673 F.App'x 1 (D.C. Cir. 2017)..... 20

Encino Hosp. Med. Ctr.,
360 NLRB 335 (2014)..... 20

FiveCap, Inc. v. NLRB,
294 F.3d 768 (6th Cir. 2002)..... 20

Ford Motor Co. v. NLRB,
441 U.S. 488 (1979)..... 14

Int'l Automated Machs.,
285 NLRB 1122 (1987), *enforced*, 861 F.2d 720 (6th Cir. 1988)..... 21

ITT Auto. v. NLRB,
188 F.3d 375 (6th Cir. 1999)..... 13

Kindred Nursing Ctrs. E., LLC v. NLRB,
727 F.3d 552 (6th Cir. 2013)..... 14

Limestone Apparel Corp.,
255 NLRB 722 (1981), *enforced mem.*,
705 F.2d 799 (6th Cir. 1982) 16,24

Metro. Edison Co. v. NLRB,
460 U.S. 693 (1983) 15

Mt. Clemens Gen. Hosp. v. NLRB,
328 F.3d 837 (6th Cir. 2003) 14

New Otani Hotel & Garden,
325 NLRB 928 (1998) 24

Newcor Bay City,
351 NLRB 1034 (2007) 17

NLRB v. ADT Sec. Servs., Inc.,
689 F.3d 628 (6th Cir. 2012) 13

NLRB v. E.I. Dupont de Nemours,
750 F.2d 524 (6th Cir. 1984) 17

NLRB v. Fry Foods, Inc.,
609 F.2d 267 (6th Cir. 1979) 15,16

NLRB v. Main St. Terrace Care Ctr.,
218 F.3d 531 (6th Cir. 2000) 13

NLRB v. Overseas Motor Inc.,
721 F.2d 570 (6th Cir. 1983) 16

NLRB v. RELCO Locomotives, Inc.,
734 F.3d 764 (8th Cir. 2013) 19

NLRB v. Scrivener,
405 U.S. 117 (1972) 15

NLRB v. Thurston Motor Lines, Inc.,
439 F.2d 1202 (6th Cir. 1971) 16

NLRB v. Transp. Mgmt.,
462 U.S. 393 (1983)..... 16

Parsippany Hotel Mgmt. Co. v. NLRB,
99 F.3d 413 (D.C. Cir. 1996)..... 19

Steelworkers v. Warrior & Gulf Navigation Co.,
363 U.S. 574 (1960)..... 26

Sysco Food Servs. of Cleveland,
347 NLRB 1024 (2006)..... 18,19

Temp-Masters, Inc. v. NLRB,
460 F.3d 684 (6th Cir. 2006)..... 16,17

United Auto Workers v. NLRB,
514 F.3d 574 (6th Cir. 2008)..... 15

Universal Camera Corp. v. NLRB,
340 U.S. 474 (1951)..... 13

Vanguard Fire & Supply Co. v. NLRB,
468 F.3d 952 (6th Cir. 2006)..... 14

Vision of Elk River, Inc.,
361 NLRB 1395 (2014), *affirming*,
359 NLRB 69 (2012)..... 19,20

Woelke & Romero Framing, Inc. v. NLRB,
456 U.S. 645 (1982)..... 25,26

Wright Line,
251 NLRB 1083 (1980),
enforced, 662 F.2d 889 (1st Cir. 1981)..... 16,17,20

Statutes **Page(s)**

National Labor Relations Act, as amended
(29 U.S.C. § 151 et seq.)

Section 8(a)(1) (29 U.S.C. § 158(a)(1)) 3,10,11,15,27
Section 8(a)(4) (29 U.S.C. § 158(a)(4)) 3,10,11,15,25-27
Section 10(a) (29 U.S.C. § 160(a)) 2
Section 10(e) (29 U.S.C. § 160(e)) 2,25-26
Section 10(f) (29 U.S.C. § 160(f)) 2

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BRIEF FOR
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ORAL ARGUMENT STATEMENT

This case involves the application of largely uncontested facts to settled law. Accordingly, the Board does not believe that oral argument is necessary. If the Court decides to hear argument, the Board requests to participate, and suggests that ten minutes per side would suffice for the parties to present their positions.

JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Airgas USA, LLC ("the Company") for review, and the cross-application of the National Labor Relations Board ("the Board") for enforcement, of a Board Order issued against the Company on May 21, 2018, and reported at 366 NLRB No. 92.[1] The Board had subject-matter jurisdiction over the proceedings below pursuant to Section 10(a) of the National Labor Relations Act ("Act") (29 U.S.C. § 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce.

The Board's Order is final with respect to all parties. The Court has jurisdiction over this case pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). Venue is proper because the unfair labor practices took place in Ohio. The petition and cross-application were timely, as the Act places no time limit on the initiation of proceedings to review or enforce Board orders.

ISSUE PRESENTED

Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(4) and (1) of the Act by withholding an employee's holiday pay because he filed charges with, assisted, and gave testimony to the Board.

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[1] JA 727-36. "JA" refers to the Joint Appendix filed by the Company, and "Br." refers to the Company's opening brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

RELEVANT STATUORY PROVISIONS

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

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Acting on an unfair-labor-practice charge filed by employee Steven Wayne Rottinghouse, Jr., the Board's General Counsel issued a complaint against the Company alleging that it violated Section 8(a)(4) and (1) of the Act (29 U.S.C. § 158(a)(1)) by refusing to give him holiday pay because he filed charges with, assisted, and gave testimony to the Board. (JA 228, 237.) Following a hearing, the administrative law judge issued a decision and recommended order, finding that the Company violated Section 8(a)(4) and (1) by withholding Rottinghouse's holiday pay. (JA 727-36.) After considering the Company's exceptions to the judge's recommended decision, the Board adopted the decision with minor corrections, and issued a modified Order. (JA 727-28, 727 n.1-3.)

II. THE BOARD'S FINDINGS OF FACT

A. The Company Has a Practice of Giving Holiday Pay to Employees, Including to Those Who Take Paid Leave on a Work Day that Precedes or Follows a Holiday

The Company, a distributer of industrial gasses and related products, operates a facility in Cincinnati, Ohio. (App. 729.) The International Brotherhood of Teamsters, Local 100 ("the Union") represents approximately twenty drivers

and plant operators working at that facility. (App. 729; App. 444.) The Company and the Union have been parties to a series of collective-bargaining agreements, the most recent of which is effective from December 1, 2015 to November 30, 2018. (JA 729; JA 444.)

The Company maintains a leave policy consistent with the terms of its collective-bargaining agreement. Under that policy, employees receive an annual allotment of paid "personal days" that may be used by following the procedure laid out in the agreement: employees need only call their supervisor an hour or more before their shift begins and state that they will be taking a personal day. (JA 730; JA 449.) Personal days are considered a "no questions asked" arrangement where no supervisory or managerial approval is required. (JA 39, 84.) Leaving a voicemail on a supervisor's phone is perfectly acceptable.[2] (JA 182.)

The Company also maintains a holiday policy, which affords employees holiday pay on days designated by the collective-bargaining agreement. The agreement recognizes Thanksgiving as a two-day holiday (Thanksgiving Day and the day after). (JA 731; JA 448.) It also states that an employee not working a shift during a designated holiday receives eight hours of straight-time pay,

[2] Employees may also make advance plans to use paid personal days through a request-and-approval process. (JA 90, 455.) However, the collective-bargaining agreement and the Company's practices do not distinguish between "scheduled" and "unscheduled" personal days. (JA 729 n.2; JA 194-95.)

provided he or she works "the regularly scheduled work day[s] that immediately precede and follow the holiday, except in cases of proven illness or injury substantiated by a doctor's statement." (JA 448.) In practice, however, the Company does not closely enforce the restrictive proviso. Instead, the Company maintains a practice of giving holiday pay to employees who cover holiday-adjacent work days with a day of paid leave, including personal days. (JA 727, n.2.)

The record contains examples of employees receiving holiday pay when taking paid leave on a holiday-adjacent work day. Employee Rick Miller took a personal day on Monday, January 4, 2016, the first work day following the New Year's holiday on Friday, January 1.[3] (JA 730; JA 268.) Miller followed the typical process for using a personal day by calling out in the hours before his shift, and he did not produce a doctor's note. (JA 730; JA 188-89.) He was paid for the New Year's holiday and January 4. (JA 730; JA 189.) Similarly, employee John Jeffries took a personal day on Monday, November 28, 2016, the first work day following the two-day Thanksgiving holiday. (JA 730; JA 260.) Jeffries followed

[3] Monday through Friday are regularly scheduled work days, but Saturday and Sunday are not. (JA 191.) Thus, if a holiday falls on a Friday, the regularly scheduled work days immediately preceding and following the holiday (*i.e.*, the holiday-adjacent work days) would be Thursday and Monday.

the typical process for using a personal day by calling out in the hours before the shift, and there is no record evidence that he produced a doctor's note. (JA 730; JA 144.) He was paid for the two-day Thanksgiving holiday and November 28. (JA 730; JA 259.)

B. Rottinghouse Files Board Charges and Participates in Board Proceedings, Despite Disapproval by Company Officials

Operations Manager Clyde Froslear oversees the Cincinnati facility and has the authority to override decisions made by his subordinates. (JA 729; JA 21-22, 211.) Those subordinates include Plant Manager Todd Allender and Branch Facility Manager Dave Luehrmann, who are generally responsible for attendance and payroll. (JA 729; JA 21-22, 141-48.)

Rottinghouse worked as a driver at the Cincinnati facility from 2010 until his voluntary departure in 2017. (JA 729; JA 21.) During that time, he was involved in the Board's processing of a series of unfair-labor-practice charges and complaints against the Company. His early activity included personally filing a charge against the Company in 2013 and becoming the subject of a charge filed by the Union in February 2015. (JA 731; JA 240-41.)

In April 2015, at a meeting led by Operations Manager Froslear and Branch Facility Manager Luehrmann, and attended by Rottinghouse and about ten other employees, Froslear announced that the Company was introducing a stricter disciplinary policy because of the Board charges being filed by employees and the

Union. (JA 729; JA 78-82, 127-30.) Rottinghouse was not specifically named during this meeting, but he was the subject of the Union's recently-filed charge. (JA 74-75.)

Despite this disapproval, Rottinghouse filed a new charge against the Company over its threat to institute a stricter disciplinary policy in May 2015. He filed two other charges in July and August 2015. (JA 729, 731; JA 247-50). The General Counsel issued a complaint on the latter charge in Board Case No. 09-CA-158662. At the February 2016 hearing on that complaint, Rottinghouse, Froslear, and Luehrmann testified, and Froslear remained present for Rottinghouse's testimony. (JA 729; JA 466-69, 477-78.) The judge issued a decision in July 2016, finding merit to the allegations against the Company.[4] Meanwhile, in late June 2016, the General Counsel issued a complaint against the Company on Rottinghouse's May 2015 charge, and that case remains open.[5]

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[4] The Board subsequently adopted the judge's findings and issued an order against the Company. *See Airgas USA, LLC*, 366 NLRB No. 104 (June 13, 2018). That case is currently before this Court on a petition for review and cross-application for enforcement. *See Airgas USA, LLC v. NLRB*, Nos. 18-1686, 18-1711.

[5] Board Case No. 09-CA-152301. *See* https://www.nlrb.gov/case/09-CA-152301 (last visited Oct. 9, 2018, 10:30 AM).

C. The Company Refuses To Give Rottinghouse Holiday Pay, and Makes a Negative Comment About His Charge-Filing Activity

During his shift on Tuesday, November 22, Rottinghouse learned that his uncle had just passed away. (JA 731; JA 21, 47-48.) He immediately called and spoke with Plant Manager Allender, his immediate supervisor, informing him of the news and stating that he would call back with updates. (JA 731; JA 21, 47-48.) Rottinghouse called Allender again that evening, but he did not answer. (JA 727 n.1; JA 49-50.) Accordingly, Rottinghouse left a voice message saying he would be taking a paid personal day on Wednesday, November 23. (JA 731; JA 49-50.)

In keeping with the collective-bargaining agreement's leave policy and company practice, Rottinghouse took his paid personal day on November 23. (JA 731; JA 47, 108-09.) He did not work Thursday, November 24 or Friday, November 25, the two-day Thanksgiving holiday. (JA 731; JA 448.) He also did not work Saturday, November 26, or Sunday, November 27, as those are not regularly scheduled work days. (JA 731; JA 191.) Over the weekend, Rottinghouse learned that his uncle's funeral would be held on Monday, November 28. Accordingly, pursuant to the bereavement policy, Rottinghouse called Allender on Saturday and left a voicemail message stating he would be taking a

paid bereavement day on Monday to attend the funeral.[6] (JA 735, JA 37-38.) Rottinghouse returned to work on Tuesday, November 29.

Around December 5, Rottinghouse checked the Company's computer system and learned that he had not been paid for the two-day Thanksgiving holiday. (JA 731; JA 28-29.) Rottinghouse asked Operations Manager Froslear for an explanation. (JA 731; JA 29-31.) Froslear, who was aware of the situation, told Rottinghouse that he had not been paid for the holiday because he had not worked on November 23, the day before the holiday—a day on which he had taken a paid personal day. (JA 731; JA 29-30.)

Rottinghouse filed a grievance over the unpaid holiday. (JA 731; JA 252.) On December 9, company officials, including Operations Manager Froslear and Branch Facility Manager Luehrmann, met with him and Union Steward Barry Perkins to discuss the grievance. During the meeting, Froslear repeated his position that Rottinghouse would not be paid for the Thanksgiving holiday because he had not worked the preceding, regularly scheduled work day. (JA 731; JA 41, 124). The parties were unable to come to a resolution. (JA 731; JA 40.)

[6] The collective-bargaining agreement includes a paid bereavement leave policy that gives employees one day of paid bereavement for family members such as uncles. (JA 730.)

In January 2017, Froslear, Luehrmann, Rottinghouse, and Perkins had a grievance meeting on a separate, attendance-related disciplinary action against Rottinghouse. (JA 729; JA 82-84,134.) After Luehrmann recited the write-up, Rottinghouse asked why management was giving him a formal write-up instead of a verbal warning. Specifically, he asked: "Why does it always have to come to this? Why couldn't we have talked about this before it comes to this?" (JA 729, JA 82-83, 133-34.) Froslear replied, "It's not like you've ever come and talked to us before you filed all these NLRB charges." (JA 729; JA 83-84, 134.)

III. THE BOARD'S CONCLUSIONS AND ORDER

The Board (Members McFerran, Kaplan, and Emanuel), in agreement with the administrative law judge, found that the Company violated Section 8(a)(4) and (1) of the Act by refusing to pay Rottinghouse for the two-day Thanksgiving holiday because he filed charges with, assisted, and gave testimony to the Board. (JA 727, 732.) To remedy that violation, the Board ordered the Company to cease and desist from the unfair labor practice found and, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by the Act. (JA 727.) Affirmatively, the Board's Order requires the Company to make Rottinghouse whole for the holiday pay discriminatorily withheld in the amount of $337.12, plus interest accrued to the date of payment, and minus tax withholding required by federal and state law, compensate him for

any adverse tax consequences resulting from the backpay award, post notices at the Cincinnati facility, and certify compliance with the Order. (JA 727-28.)

SUMMARY OF THE ARGUMENT

Substantial evidence supports the Board's finding that the Company violated Section 8(a)(4) and (1) of the Act by withholding Rottinghouse's holiday pay because he filed unfair-labor-practice charges with the Board, assisted the Union with its charges, and testified at a Board hearing on a complaint issued against the Company on one of his charges. The Company does not dispute its knowledge of this plainly protected activity. Moreover, the record contains ample evidence of the Company's animus, which includes statements by Operations Manager Froslear, a high-ranking official who clearly communicated his disdain for employees' Board-related activity. Thus, Froslear—who later attended the hearing where Rottinghouse gave Board testimony—squarely told him and his coworkers that the Company was instituting a stricter disciplinary policy because of their charge-filing activity. Further, at a subsequent grievance meeting, Froslear gratuitously complained about Rottinghouse's charge-filing activity. The timing of the Company's decision to withhold his holiday pay—just as Board proceedings stemming from the charge-filing were reaching their apex—also supports the finding of unlawful motive.

Given this strong evidence, it cannot be said that the record as a whole compelled the Board to accept the Company's affirmative defense that regardless of Rottinghouse's protected activity, it would have withheld his holiday pay based on the collective-bargaining agreement. Specifically, the Company claims that the agreement requires it to deny holiday pay when an employee takes a paid personal day on a date adjoining the holiday without submitting a doctor's note. To be sure, Rottinghouse took paid personal leave the day before Thanksgiving because his uncle had just died, and he did not submit a doctor's note. But as the record shows, in practice the Company granted holiday pay to other employees who took paid personal leave on an adjoining date without giving a doctor's note. Thus, as the Board found, if the Company had applied its pay policy in a nondiscriminatory manner, it would likewise have paid Rottinghouse for the holiday. Relying on a manager's discredited testimony, the Company asserted that any holiday pay given to an employee who took a paid personal day on an adjoining date without a doctor's note would have been a mistake, but it fails to meet its heavy burden of showing that the Board's credibility ruling overstepped the bounds of reason. Accordingly, substantial evidence supports the Board's finding that the Company's stated reason for denying Rottinghouse's holiday pay was a pretext, designed to mask its true motive, which was to retaliate against him for filing charges and participating in Board proceedings.

STANDARD OF REVIEW

This Court reviews the Board's factual determinations and its application of the law to the facts under the substantial-evidence standard. *ITT Auto. v. NLRB*, 188 F.3d 375, 384 (6th Cir. 1999). Under this standard, the Court will defer to the Board's findings if they are supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Caterpillar Logistics, Inc. v. NLRB*, 835 F.3d 536, 542 (6th Cir. 2016). A reviewing court may not displace the Board's choice between two fairly conflicting views of the evidence, even if the court "would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *accord NLRB v. ADT Sec. Servs., Inc.*, 689 F.3d 628, 633 (6th Cir. 2012). Such findings of fact include determining an employer's motive for its actions. *Birch Run Welding & Fabricating v. NLRB*, 761 F.2d 1175, 1179 (6th Cir. 1985). It also includes determining whether an employer maintains an unwritten rule, policy, or practice. *See, e.g.*, *NLRB v. Main Street Terrace Care Ctr.*, 218 F.3d 531, 534, 538-89 (6th Cir. 2000) (finding substantial evidence supported the Board's finding that the employer maintained an unwritten work rule). This Court will not disturb the Board's credibility determinations unless "they overstep the bounds of reason . . . or are inherently unreasonable or self-contradictory." *Caterpillar Logistics, Inc.*, 835 F.3d at 542 (internal citations and quotation marks omitted).

With respect to legal findings, "this Court is deferential to the Board's interpretation" of the Act and, as "long as the [Board]'s interpretation of the statute is 'reasonably defensible,' this Court will not disturb such interpretation." *Vanguard Fire & Supply Co. v. NLRB*, 468 F.3d 952, 957 (6th Cir. 2006) (quoting *Mt. Clemens Gen. Hosp. v. NLRB*, 328 F.3d 837, 844 (6th Cir. 2003)). The Court "may not reject the Board's interpretation 'merely because the courts might prefer another view of the statute.'" *Kindred Nursing Ctrs. E., LLC v. NLRB*, 727 F.3d 552, 559 (6th Cir. 2013) (quoting *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979)).

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(4) and (1) OF THE ACT BY WITHOLDING ROTTINGHOUSE'S HOLIDAY PAY BECAUSE HE ENGAGED IN BOARD PROCESSES

A. An Employer Violates Section 8(a)(4) and (1) by Taking Adverse Action Against an Employee for Engaging in Board Processes

The right of employees to engage in Board processes is guaranteed by Section 8(a)(4) of the Act, which makes it an unfair labor practice for an employer to discriminate against an employee for engaging in protected activities such as filing Board charges or testifying in an unfair labor practice proceeding. 29 U.S.C. § 158(a)(4); *NLRB v. Scrivener*, 405 U.S. 117, 121-25 (1972); *United Auto Workers v. NLRB*, 514 F.3d 574, 586 n.14 (6th Cir. 2008).[7] The Board has found that the purpose of Section 8(a)(4) is to "assure an effective administration of the Act by providing immunity to those who initiate or assist the Board in proceedings under the Act." *Briggs Mfg. Co.*, 75 NLRB 569, 571 (1947). Discrimination includes adverse actions such as the deprivation of wages and benefits. *See, e.g.*, *NLRB v. Fry Foods, Inc.*, 609 F.2d 267, 270 (6th Cir. 1979) (employer violated

[7] A violation of Section 8(a)(4) creates a derivative violation of Section 8(a)(1) of the Act, which makes it "an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 [of the Act]." 29 U.S.C. § 158(a)(1). *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

Section 8(a)(4) by discharging, suspending, demoting, and reducing wages of employees); *NLRB v. Thurston Motor Lines, Inc.*, 439 F.2d 1202, 1202-03 (6th Cir. 1971) (employer violated Section 8(a)(4) by withholding vacation pay).

In analyzing whether an employer violated Section 8(a)(4), the Board applies the test articulated in *Wright Line*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 889 (1st Cir. 1981), and approved by the Supreme Court in *NLRB v. Transportation Management*, 462 U.S. 393, 404 (1983). *Accord NLRB v. Overseas Motor Inc.*, 721 F.2d 570, 571 (6th Cir. 1983). Under *Wright Line*, the Board determines whether an employee's protected activity was "a motivating factor" in the employer's decision to take adverse action against him. *Transp. Mgmt.*, 462 U.S. at 400-02. If so, the adverse action is unlawful unless the record as a whole compelled the Board to accept the employer's affirmative defense that it would have taken the same action even absent the protected activity. *Id.* at 397, 401-03; *accord Temp-Masters, Inc. v. NLRB*, 460 F.3d 684, 691 (6th Cir. 2006). If the employer's proffered reasons for its actions are pretextual—that is, if they either did not exist or were not in fact relied upon—the employer necessarily fails to establish its affirmative defense. *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981), *enforced mem.*, 705 F.2d 799 (6th Cir. 1982).

Unlawful motivation is a factual question that the Board may find established on circumstantial as well as direct evidence. *NLRB v. Link-Belt Co.*,

311 U.S. 584, 602 (1941); *see also Temp-Masters*, 460 F.3d at 689. In doing so, the Board may rely on a variety of factors, including an employer's "expressed hostility towards [protected activity] combined with knowledge of the employee's activities." *NLRB v. E.I. Dupont de Nemours*, 750 F.2d 524, 529 (6th Cir. 1984). Other circumstantial evidence supporting of finding of unlawful motive includes the proximity of time between the protected activity and measures taken against the employee. *Id.*[8]

B. The Company Withheld Rottinghouse's Holiday Pay Because He Filed Charges With, Assisted, and Gave Testimony to the Board

The record amply supports the Board's finding that the Company withheld Rottinghouse's Thanksgiving holiday pay because he engaged in Board processes. To begin, the Company was indisputably aware of his protected activities, which included filing two Board charges himself and being involved with three charges filed by the Union against the Company. Indeed, the Company could hardly dispute its knowledge of this activity, given that Rottinghouse subsequently

[8] The Company's citation (Br. 13) to *Newcor Bay City*, 351 NLRB 1034 (2007), is misleading. In that case, the administrative law judge's decision contained language about "a link, or nexus" in its discussion of the *Wright Line* test, *id.* at 1036, but the Board on review restated the necessary showing without any such additional requirement. *See* 351 NLRB at 1034 n.4. And there, the Board's restatement of the test, which corrected the judge's decision, is consistent with this Court's precedent. *See, e.g.*, *Conley v. NLRB*, 520 F.3d 629 642 (6th Cir. 2008) (describing *Wright Line* test with no such additional requirement).

testified in the presence of Operations Manager Froslear at an unfair-labor-practice hearing that was based on one of his charges. Moreover, at a subsequent meeting also attended by Facility Manager Luehrmann, Froslear specifically commented on Rottinghouse's charge-filing activity.

Company officials clearly communicated not only their knowledge but also their hostility towards the Board-related activity of Rottinghouse and his coworkers. Thus, in April 2015, Operations Manager Froslear told employees that the Company was instituting a more stringent disciplinary policy *because* of the Board charges that employees and the Union had been filing. Subsequently, in January 2017, Froslear communicated his disdain for Rottinghouse's charge-filing when, in response to his request that management give him an informal warning instead of a write-up for an attendance issue, Froslear complained, "It's not like you've ever come and talked to us before you filed all these NLRB charges." (JA 83-84, 134.) This gratuitous reference to Rottinghouse's protected activity during a discipline-related meeting, and Froslear's implicit reliance on it as a justification for the write-up, in conjunction with Froslear's threat to impose a stricter disciplinary policy because of employees' Board activity, provide ample evidence of animus. After all, the statements were made by a senior company official, and they "married" the Company's retaliatory actions to Rottinghouse's charge-filing. (JA 733.) *See Sysco Food Servs. of Cleveland*, 347 NLRB 1024, 1035 (2006)

(statement by senior management official expressly linking employee's grievance-filing activity to a suggestion that he work elsewhere constituted evidence of unlawful motivation). Therefore, the Company seriously errs (Br. 14 & n.4) in dismissing Operations Manager Froslear's statements as mere "frustration" with Rottinghouse's grievances and charge-filing.

The Company argues (Br. 12-13, 15) that Froslear's statements cannot constitute evidence of unlawful motivation because Allender and Luehrmann, not Froslear, are responsible for day-to-day scheduling and payroll decisions, and Froslear purportedly had no connection to the denial of Rottinghouse's holiday pay. Those arguments ignore Froslear's status as a high-level manager with the authority to direct all scheduling and payroll decisions, as well as his direct involvement with the events at issue here. (JA 731, 733.) In these circumstances, it was entirely appropriate for the Board to impute his animus to the Company, as "high-level corporate managers speak on behalf of the company when they express anti-union animus." *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 782 (8th Cir. 2013). *Cf. Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 423-24 (D.C. Cir. 1996) (holding imputation of high-level manager's animus appropriate even though he was not personally involved with the employee's discharge)); *Vision of Elk River, Inc.*, 361 NLRB 1395 (2014), *affirming* 359 NLRB 69, 74 (2012) (holding general manager's anti-union animus was probative of the employer's

motivation to lay off employees because, although he was not involved in that decision, "he was still the [employer's] highest authority").

The Company's related contention (Br. 15), that some showing of particularized animus was required here, is also without merit. *See, e.g.*, *EF Int'l Language Schools, Inc.*, 363 NLRB No. 20, slip op. at 1, n.2, 2015 WL 5769947 (Oct. 1, 2015) (violation can be shown without evidence that employer had "particularized motivating animus" against protected activity), *enforced*, 673 F. App'x 1 (D.C. Cir. 2017); *Encino Hosp. Med. Ctr.*, 360 NLRB 335, 336 n.6 (2014) (*Wright Line* does not require a "further showing of particularized animus toward" protected activity).[9] In any event, Operations Manager Froslear directly showed his animus against Rottinghouse's charge-filing activity.

The Company gains no more ground with its blanket assertion (Br. 10) that the judge's credibility determinations, which the Board adopted, were erroneous. Here, the Company not only fails to challenge specific credibility rulings, it does not even attempt to meet its heavy burden of showing that any particular rulings

[9] The principle for which the Company cites (Br. 15) *FiveCap, Inc. v. NLRB*, 294 F.3d 768 (6th Cir. 2002), has no application here because it pertains instead to rebuttal evidence that may be presented *after* the employer has satisfied its burden of proving its affirmative defense that it had a legitimate reason for the adverse action. *See id.* at 781. That principle is inapplicable here, given the Company's complete failure to meet its burden of showing that it would have denied Rottinghouse his holiday pay even absent his protected activity. *See infra* page 22.

"overstep the bounds of reason" or are "inherently unreasonable or self-contradictory." *Caterpillar Logistics, Inc.*, 835 F.3d at 542 (internal citations and quotation marks omitted).

Nor does the Company provide any basis for disturbing the judge's credibility rulings by complaining (Br. 10) about an adverse inference she drew. Specifically, based on the Company's failure to call Operations Manager Froslear as a witness even though he was present in the room throughout the unfair-labor-practice hearing in this case, the judge inferred that Froslear would have corroborated testimony by other witnesses that he "made statements maligning Rottinghouse's Board activity in filing charges with the Board." (JA 732.) This inference is fully consistent with Board and Sixth Circuit precedent, as adverse inferences may be drawn where "a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party" regarding "any factual question on which the witness is likely to have knowledge." *Int'l Automated Machs.*, 285 NLRB 1122, 1123 (1987), *enforced*, 861 F.2d 720 (6th Cir. 1988). Froslear plainly was on the Company's side and would have known that he made statements about Rottinghouse's Board activity. Given the Company's decision not to call Froslear as a witness, the judge properly exercised her discretion in drawing an inference that he in fact made the derogatory statements about Rottinghouse's charge-filing activity, as other witnesses testified.

The Company's unlawful motive is also demonstrated by the temporal connection between the decision to withhold Rottinghouse's holiday pay and the litigation precipitated by his protected charge-filing activity. Thus, after the unfair-labor-practice hearing in Board Case No. 09-CA-158662, where Rottinghouse testified against the Company, an administrative law judge issued a decision finding that the Company had unlawfully retaliated against him. Around that time, the Board's General Counsel issued a complaint against the Company based on a separate charge filed by Rottinghouse. Several months later—while both cases were pending before the Board—the Company withheld Rottinghouse's holiday pay. This overlap in timing further supports the finding that the Company sought to retaliate against Rottinghouse based on the rising tides flowing from his Board activity.

C. The Company Failed To Prove It Would Have Withheld Rottinghouse's Holiday Pay Even Absent His Board Activity

Faced with this compelling evidence of unlawful motive, it was incumbent on the Company to show it would have withheld Rottinghouse's holiday pay even if he had not filed charges and testified against the Company. As the Board found, however, the Company utterly failed to meet its burden because its stated reason for denying his holiday pay was pretextual. (JA 732.)

The Company argues (Br. 4, 10-12), as it did before the Board, that the holiday policy set forth in the collective-bargaining agreement entitled it to

withhold his Thanksgiving pay. Specifically, it claims the agreement requires it to withhold pay for a designated holiday if an employee fails to work on the adjoining days, unless he "scheduled" leave in advance or submitted a doctor's note. (Br. 4, 10 (citing JA 448).) As the Board explained, however, in practice the Company paid employees for holidays when they took a paid personal day on a shift preceding or following a holiday. Indeed, employees Miller and Jeffries both received holiday pay after calling out of a holiday-adjacent work day and using a paid personal day to cover the absence. Neither employee submitted a doctor's note to support those absences, and neither employee "scheduled" the absence ahead of time. [10]

By contrast, the Company failed to apply this practice to Rottinghouse. Instead, it treated him more harshly by asserting that it would not pay him for the

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[10] The Company errs in suggesting (Br. 11) that there was insufficient evidence to conclude that Jeffries never submitted medical documentation. Here, the Board found the Company's decision to withhold holiday pay was discriminatorily motivated without relying on evidence of disparate treatment. The evidence of discriminatory treatment became relevant only when the Company tried to claim, as an affirmative defense, that it treated Rottinghouse the same as similarly situated leave-takers, who purportedly received holiday pay only if they provided a doctor's note. At that point, it became the Company's responsibility to rebut the evidence in the process of proving its defense, but it failed to do so. *See Avondale Industries, Inc.*, 329 NLRB 1064, 1066 (1999) (where the Board finds discriminatory motivation without relying on evidence of disparate treatment, the value of such evidence lies principally in its tendency to rebut the employer's defense that it would have taken the same action even absent the employee's protected activity).

holiday because he had failed to provide a doctor's note for the paid personal day that he took the day before Thanksgiving. Such disparate treatment "rebut[s] the employer's own attempt to . . . demonstrate[e] that it would have taken the same action . . . even absent [the protected activity]." *New Otani Hotel & Garden*, 325 NLRB 928, 941 (1998). Moreover, given the Company's practice of granting holiday pay to employees who covered holiday-adjacent work days with paid personal days, its reliance on the inconsistently-applied written policy is pretextual. *See, e.g.*, *Limestone Apparel Corp.*, 255 NLRB at 722, *enforced*, 705 F.2d 799 (6th Cir. 1982).

The Company provides no basis for disturbing the Board's finding that it had a practice of granting holiday pay to employees who took paid personal days on dates adjoining the holiday. It does not help itself by relying on Allender's discredited testimony that Miller's receipt of holiday pay for New Year's 2016 was simply an administrative error. (Br. 12; JA 189.) The Company would gain no more ground by citing Allender's further claim that Jeffries was also paid by mistake. (JA172-174.) In the proceedings below, the judge found that latter claim "especially implausible" given the undisputed evidence that the Company paid Jeffries for the very same holiday that it refused to pay Rottinghouse, even though both employees had called in to use a paid personal day. (JA 730, n.10.) Simply put, the judge found that "Allender's self-serving attempt to characterize the

paying of these employees as a mistake or an error" was not credible. (JA 730, n.10.) The Company utterly fails to meet its heavy burden of showing that this credibility ruling was outside "the bounds of reason" or "inherently unreasonable or self-contradictory." *Caterpillar Logistics, Inc.*, 835 F.3d at 542.

The Company also wastes ink by challenging (Br. 11) the Board's finding (JA 727, n.2) that "there is no evidence that prior to this incident the [Company] had ever denied an employee holiday pay when he or she took a personal day immediately before or after the holiday." In this regard, the Company (Br. 12) cites only the example of Dennis Hibbard, who called off work on Monday, November 28, 2016, and did not get paid for the Thanksgiving holiday. The Company, however, fails to mention the fact that Hibbard took a day of *unpaid leave* on November 28. (JA 727, n.2; JA 288.) That critical fact distinguishes Hibbard from employees who took *paid leave* before or after a holiday—employees like Rottinghouse, Miller, and Jeffries.

Finally, the Company misses the mark with its passing assertion that the Board's Section 8(a)(4) finding "would mean that the Employer was engaged in a . . . violation of the parties' collective-bargaining agreement." (Br. 13.) As an initial matter, this groundless, last-ditch effort to avoid its unfair-labor-practice liability is not properly before the Court for review because the Company failed to raise it before the Board. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S.

645, 665 (1982) (Section 10(e) of the Act, 29 U.S.C. § 160(e), precludes courts of appeals from reviewing claims not raised before the Board). In any event, the record shows that the Company's actual practice was more lenient—in fact it granted holiday pay to employees who took a paid personal day on an adjacent date, even without a doctor's note. And because practices of the shop are "equally part of the collective-bargaining agreement," *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960), the Company can hardly escape liability for its Section 8(a)(4) violation by invoking written language it had chosen to ignore with respect to other employees. In short, having followed a more lenient practice in dealing with other employees, the Company was not free to disregard that practice and deny Rottinghouse holiday pay in retaliation for his protected activity.

CONCLUSION

For the above-stated reasons, the Company violated Section 8(a)(4) and (1) of the Act by withholding Rottinghouse's holiday pay. Accordingly, the Board respectfully requests that the Court deny the Company's petition and enforce the Board's Order in full.

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October 2018

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AIRGAS USA, LLC	)	
Petitioner/Cross-Respondent	)	
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	Nos. 18-1685 & 18-1706
Respondent/Cross-Petitioner	)	Board Case No. 09-CA-189551

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 27(d)(2), the Board certifies that this motion contains 5890 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 9th day of October 2018

UNITED STATES COURT OF APPEALS
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CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2018, I electronically filed the foregoing with the Clerk for the Court of the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. I further certify that this document was served on all parties or their counsel of record through the appellate CM/ECF system.

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Dated at Washington, DC
this 9th day of October 2018