

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

ST. PAUL PARK REFINING CO., LLC D/B/A WESTERN REFINING

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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SUMMARY OF THE CASE

This case arises from the Company's discipline of an employee after he and a coworker raised safety concerns about a dangerous procedure. The Court should affirm the Board's finding that the Company unlawfully disciplined the employee for his safety protest, which was statutorily protected, because that finding is supported by substantial evidence and is consistent with settled law.

The Board believes that this case turns on the straightforward application of settled law to well-established facts and, thus, oral argument would not materially assist the Court. In the event that the Court chooses to hear oral argument, the Board requests that it be permitted to participate and believes that 15 minutes per side will suffice.

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**UNITED STATES COURT OF APPEALS
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Nos. 18-2256 & 18-2520

ST. PAUL PARK REFINING CO., LLC D/B/A WESTERN REFINING

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION
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THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

JURISDICTIONAL STATEMENT

This case is before the Court on the petition of St. Paul Park Refining Co., LLC d/b/a Western Refining (“the Company”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Board Order finding that the Company violated the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* (“the Act”). The Order issued on May 8, 2018, and is reported at 366

NLRB No. 83.¹ The Company’s petition and the Board’s cross-application are timely as the Act imposes no time limit on those filings.

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

STATEMENT OF THE ISSUES

1. Whether the Board is entitled to summary enforcement of the portions of its Order remedying its uncontested finding that the Company violated Section 8(a)(1) of the Act by threatening employees because of their union activities.

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

2. Whether substantial evidence supports the Board’s finding that the Company violated Section 8(a)(1) of the Act by disciplining employee Topor for his protected concerted activities.

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

3. Whether the Board acted within its broad discretion in declining the Company’s requests to reopen the record.

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

NLRB v. Miller Waste Mills, 315 F.3d 951, 955 (8th Cir. 2003).

STATEMENT OF THE CASE

This case arises from the Company's discipline of employee Topor after he and a coworker raised safety concerns about a dangerous procedure, and Topor refused to carry out the task in the manner that a supervisor proposed because he believed that the proposed alternative method was also unsafe. Acting on unfair-labor-practice charges filed by Topor, the Board's General Counsel issued a complaint alleging that the Company violated the Act by issuing him a final warning and 10-day suspension, and withholding his quarterly bonus, because of his protected concerted activities in raising those safety concerns. (JA 730.) The complaint also alleged that, shortly before Topor was disciplined, the Company violated the Act by threatening employees with discharge, stricter enforcement of work rules, and surveillance because the Company was in contract negotiations with the union representing the employees. (JA 730.)

After a hearing, an administrative law judge issued a decision and recommended order finding that the Company violated the Act as alleged. On review, the Board issued a Decision and Order affirming, as amended, the judge's

findings, and adopting his recommended order, with minor modifications. (JA 728 & n.4.)² The relevant facts and procedural history are as follows.

I. THE BOARD'S FINDINGS OF FACT

A. Background: the Company's Operations, Its Bargaining Relationship with the Union, and Topor's Employment

The Company operates a refinery with 450 employees in St. Paul Park, Minnesota, where it processes crude oil into products like gasoline and asphalt. (JA 730; 8-9.) The refinery operates continuously with four crews working rotating 12-hour shifts. (JA 730-31.)

The International Brotherhood of Teamsters Local No. 120 ("the Union") has for 30 years represented a unit of refinery employees. (JA 731; 8-9.) The Company and the Union were parties to a collective-bargaining agreement in effect from January 1, 2014, to December 31, 2016. After efforts to negotiate a successor contract failed in 2015, negotiations resumed in late November 2016. (JA 731.)

Rick Topor has worked for the Company for 13 years. Since 2008, he has worked as a vacancy relief operator (a senior bargaining-unit position) in the north reformer, where he helps other employees and fills in for employees who are

² The Board also affirmed in the absence of exceptions the judge's dismissal of an additional complaint allegation that the Company violated Section 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3), by taking adverse actions against Topor because of his union activities. (JA 728 n.3.)

absent. Topor—who had served as union steward for 3 years—was on the Union’s bargaining team. His supervisors are Gary Regenscheid and Dale Caswell. (JA 731; 8-9, 25-26, 84.)

B. Supervisor Regenscheid Tells Employee Rennert the Company Will Retaliate Against Employees for their Union Activities

In September or October 2016, supervisor Regenscheid approached bargaining-unit employee Michael Rennert in a building known as the satellite, where employees attend meetings, take breaks, and use company computers. There, Regenscheid told Rennert, “Don’t be surprised if a few people get fired, and they start searching lunchboxes when you go out the gate and have the dogs sniffing cars.” (JA 731; 23.) When Rennert asked why, Regenscheid replied, “Your [union] contract is coming up.” (JA 731; 23.) Rennert asked, “Do you really think that they would do that?” Regenscheid said, “Yeah, I do.” (JA 731; 23.)

C. Company Policies Require Employees To Follow Applicable Written Procedures for Safely Performing Assigned Tasks, and To Stop Work They Consider Unsafe

Employees face many safety hazards at the refinery. (JA 731.) Accordingly, the Company requires employees and supervisors to follow detailed step-by-step written procedures for performing potentially dangerous tasks. It also requires that any change to a procedure be documented in a written step-change

form signed by three knowledgeable personnel. (JA 732; 21, 43, 90, 102-03, 145, 230.)

The collective-bargaining agreement and the Company's employee handbook also address workplace safety, and both require employees to report—and stop—work they believe to be unsafe. The collective-bargaining agreement obligates employees to “immediately inform” a company representative if they believe an unsafe condition exists, and provides that the Company “will examine the facts so as to determine the safety factors and whether the job will proceed.” (JA 731; 369.) The handbook, in turn, notes that “[t]he Health, Environmental, Safety, and Security Department can assist and advise Employees on safe work practices.” (JA 731; 404-05.) It requires employees “to immediately report any unsafe conditions to their supervisors,” and provides that “[t]he safety representative will issue a notice to correct any safety concerns and follow-up will be carried out to ensure compliance.” (JA 731; 404-05.)

The Company also maintains a “safety stop” policy to “give[] any [company] employee or contractor the authority to stop a job and discuss potential risks along with appropriate mitigation measures.” (JA 731; 550.) A bulletin detailing the policy instructs employees “to STOP Work That You Feel is Unsafe” and provides that “Everyone is empowered (expected) to call a Safety Time-Out so that we can address concerns before proceeding.” (JA 732; 551.) The bulletin

specifies that a safety stop may be appropriate when a procedure is “new or non-standard” or “has the potential of causing injury or harm.” (JA 732; 551.) It also states repeatedly that the Company will not punish employees, or consider them troublemakers, for calling a safety stop, which they are empowered and expected to do. (JA 732; 551.) Finally, the bulletin provides that safety stops “should be documented” using an electronic form. (JA 732; 550.)

D. Employees Rennert and Topor Raise Safety Concerns About a Work Assignment that Varies from the Applicable Procedure; Topor Calls a Safety Stop, and the Company Sends Him Home

1. In 2016, the Company begins using a steam-heat method to inject a dangerous chemical during the Penex restart without updating the written procedure to include that step

The Company performs certain refining functions with a machine known as the Penex. (JA 732; 24-25, 125, 199-200.) Every 5 years or so, the Penex must be shut down for maintenance and then restarted according to a 42-page procedure. (JA 732; 78, 95, 458.) The restart procedure requires employees to inject anhydrous hydrochloric acid from pressurized cylinders into the Penex. Topor had performed that task when he led the last restart prior to 2016. Following the applicable restart procedure, he monitored the amount of acid injected as the higher pressure in the acid cylinder forced the acid to flow into the lower-pressure Penex. (JA 732; 96.)

In September 2016, the Company began another Penex shutdown-maintenance-restart cycle. This time, it introduced a new method for injecting hydrochloric acid, which operators repeatedly followed between October 29 and November 2. After the injection process had ceased because the pressure between the cylinder and the Penex had equalized, operators placed each cylinder in a steel bucket filled with water and then heated it by applying steam to the outside of the bucket. Heating the cylinder by that method increased the pressure inside the partially depleted cylinder above the pressure in the Penex, causing the remaining acid in the cylinder to inject into the Penex. Meanwhile, the operator monitored the cylinder's temperature to ensure that it stayed at safe levels. (JA 732; 206, 222, 226-28.) The Company did not update its Penex restart procedure to reflect the new steam-heat injection method. (JA 732; 201, 208.) That procedure directs employees to review the applicable safety data sheet, which details the hazards of hydrochloric acid, including that it is a gas under pressure and "may explode if heated." (JA 78, 476, 502.)

2. The Company assigns Rennert to use the new steam-heat injection method; Rennert and Topor raise safety concerns

On the morning of Friday, November 4, 2016, supervisor Caswell assigned Rennert to inject acid into the Penex using steam heat. (JA 732; 21, 95.) Rennert had never done that before, and was "extremely nervous" about it, so he consulted Topor. (JA 732; 21, 26-27, 95, 97.) Rennert asked whether it was safe to steam-

heat a compressed-gas cylinder. Topor said it was not, and that he had never heard of that being done. (JA 732; 21, 97.) He advised Rennert to ask Caswell for the procedure, and Rennert did so. (JA 732; 44.) Caswell did not know of a procedure for the task. (JA 732; 44, 48.) Instead, about 9:30 a.m., Caswell, supervisory maintenance planner Corey Freymiller, unit-process engineer Eric Rowe, and utility operator Jacob Johnson met with Rennert to show him how to perform the job. (JA 733; 30-31, 228.)

After the demonstration, Rennert stated that he was comfortable with the task. By 10:30 a.m., still concerned about whether heating the cylinder could cause an explosion, he sought out Rowe and Topor. (JA 733; 31, 201.) Together, the three reviewed a report from the Penex manufacturer, which warned that “[t]here may be safety concerns with [steam-heating a cylinder] since the steam could cause overheating of the cylinder.” (JA 733; 78, 98, 454, 613.) The report specified that “the cylinders should never be exposed to temperatures above 125 degrees F.” (JA 733; 97-99, 454.)

Rennert and Topor told Rowe their safety concerns, which also included questions about what kind of protective suit to wear; the use of a bucket (about one-and-a-half or two feet tall) for heating instead of a drum (about four or five feet tall); and how to monitor the cylinder’s pressure. (JA 733; 97-99.) They also questioned the accuracy of readings from the temperature gun they would be using

to monitor cylinder temperature. Finally, Topor requested a procedure for the job. (JA 733; 99.)

Over the next several hours, Rowe prepared a step-change form adding instructions for steam-heating to the existing acid-injection procedure, which Freymiller and operations superintendent Briana Jung reviewed and signed. (JA 733; 203-04, 544.) The second step of the step-change form stated: “Verify other [hydrochloric acid] cylinders are not in the area near the [hydrochloric acid] cylinder that will be heated.” (JA 733; 99-100, 544.)

3. The Company reassigns the job of heating the acid cylinder to Topor; Topor calls a safety stop because he believes the job is unsafe and does not conform to the written procedure; the Company sends him home

Around 3:30 p.m., Regenscheid and Jung reassigned the task of injecting the hydrochloric acid to Topor and gave him the step-change form. (JA 733; 100, 544.) Topor, Regenscheid, and Jung went to the satellite, where Topor reviewed the form. Citing the second step of the newly revised procedure, Topor objected that three other acid cylinders were near the one to be heated; they were housed together in a five-by-five-foot cage. (JA 733; 100, 121; *see also* JA 31, 143, 217.) Regenscheid left the satellite to examine the cylinders, while Topor requested the safety-data sheet for hydrochloric acid, which describes the hazards of the chemical (including explosion if heated) and how to use it safely. (JA 733; 24,

110, 502.) Jung and employee Joshua Johnson attempted unsuccessfully to find it. (JA 733; 36.)

Meanwhile, Regenscheid returned and announced that he wanted to keep the cylinders together in the same small cage, and mitigate the hazard by putting insulation blankets over the three not in use, which would remain, at most, only a few feet from the one being heated. (JA 733; 100, 121, 218, 603.) Topor insisted that the applicable procedure called for removing excess cylinders, and said he did not think Regenscheid's proposed alternative method was safe because steam-heating a compressed gas cylinder might cause an explosion. (JA 733; 100, 110.) Topor stated that he wanted to do a safety stop. (JA 733; 100-01.) Regenscheid repeated that Topor should use the insulation, and Topor said he was "calling a safety stop" because he did not "think this is safe," and wanted the safety department to come assess Regenscheid's proposal. (JA 733; 101, 112.) Ultimately, Jung and Regenscheid left the satellite, and Topor began filling out the Company's electronic safety-stop form. (JA 733; 101, 552.)

Jung and Regenscheid walked to the Penex, and Jung radioed Topor to join them there. Topor responded within a minute and said he would come after filling out the safety-stop form. When Regenscheid radioed again and instructed Topor to fill it out later, Topor went to the Penex as requested. (JA 733; 22, 38, 101, 133-34.)

At the Penex, Topor pointed out the closely grouped acid cylinders, again insisting that the revised procedure required excess cylinders to be removed. (JA 733; 36, 101, 121.) He stated that if the process was different, the step-change form needed to be changed. (JA 733; 101-03.) Regenscheid again insisted that the hazard could be mitigated with insulation. (JA 734; 34, 134.) Topor responded that he had called a safety stop because he felt the job was unsafe, pointed out that they were refusing to follow the safety-stop process by pressuring him to do the job, and insisted that he wanted the safety department there. (JA 734; 102.)

In response, after consulting with Jung, Regenscheid sent Topor home. (JA 734; 23, 102.) Both Topor and Regenscheid spoke loudly during that exchange, which took place in a noisy area. (JA 733; 25, 38, 104, 120.) As Topor left, Regenscheid asked him to return the step-change form; Topor heard Regenscheid's voice behind him as he walked to the satellite, but did not hear what Regenscheid said and kept walking. He did not return the form. (JA 734, 737; 102, 115.) A few minutes later, Regenscheid met Topor at the satellite and gave him a ride to a different building to change out of his work clothes. They did not speak during the ride; Regenscheid did not renew his request for the form. (JA 734; 115.)

Later that day, Topor left a voice message with the Company's director of human resources, Tim Kerntz. Topor stated that he had called a safety stop and asserted that Regenscheid and Jung had pressured him to do a job he felt was

unsafe and had refused to follow the safety-stop process. (JA 734; 102.) That same afternoon, Jung contacted the human-resources department to report what had happened and was advised that she and Regenscheid should document the events of the day for future investigation. (JA 734; 135.) The Company placed Topor on administrative leave pending the investigation. (JA 734; 232.)

Early the next morning, Regenscheid instructed Rennert to perform the steam-heat acid-injection process. Rennert responded, “To be honest with you Gary, this scares the crap out of me and I don’t want to do it, but if you are going to do the same thing to me that you did to [Topor], then I will do it.” (JA 734; 24.) They went to the Penex, where Rennert repeated that he did not want to do it. Regenscheid told Rennert not to worry about it, and another employee ultimately performed the task. (JA 734; 24.) Rennert was not disciplined. (JA 734; 24.)

E. The Company Conducts an Investigation without Interviewing Any Unit-Employee Witnesses, then Disciplines Topor

Shortly after sending Topor home, Regenscheid and Jung prepared statements about the day’s events, which Jung sent to Kerntz. (JA 734; 601-03.) Regenscheid wrote that his statement “pertains to issues with Rick Topor refusing to do assigned work.” (JA 734; 603.) He stated that Topor “was being insubordinate to me by refusing to do the work to correct the issue.” (JA 734; 603.) Regenscheid also opined that Topor “utilizes safety stops and procedures to not have to perform work.” (JA 734; 603.) Jung wrote that Topor was sent home

because he was “unwilling to discuss with [Regenscheid] and I the mitigation and work through the potential options to inject the [hydrochloric acid] in the system, which is viewed as insubordination.” (JA 734; 602.) Both managers noted in their statements that Topor had requested that a safety representative assess the situation, and Jung further noted that Topor stated he was calling a safety stop because he felt the supervisors were pressuring him to do something unsafe. (JA 734; 602-03.) Three days later, after meeting with human resources, Jung modified her prior statement, adding claims that Topor was loud and pointed at Regenscheid when he said he was calling a safety stop, and adding highlighting to parts of the revised statement. (JA 734-35; 137, 590, 606.)

Jung’s statement (JA 601-03) identified engineer Rowe, supervisors Freymiller and Caswell, and emergency-response technician Olson, as well as bargaining-unit employees Rennert, Brian Bestler, and Jacob Johnson as potential witnesses present during Topor’s interactions with Regenscheid and Jung on November 4. During its investigation of the incident, the Company collected statements from Rowe, Freymiller, Caswell, and Olson, and interviewed Regenscheid, Jung, Rowe, Caswell, Olson, and Topor. (JA 734-35; 14, 602-03, 608-14.) It did not obtain statements from, or interview, any of the three unit-employee witnesses. (JA 735;14-15, 237, 247.)

On November 9, human resources director Kerntz interviewed Topor. (JA 735.) In response to Kerntz's questions, Topor insisted that he would never point at, or raise his voice to, a supervisor and repeatedly stated that he had called a safety stop. Topor acknowledged that he still had the step-change form at home, and denied that he had refused an order to return it before leaving on November 4. (JA 735; 18-19.) He also initially denied that he had spoken with Rowe that day, but immediately corrected himself, stating that they had talked briefly. (JA 735; 248.)

On November 10, human resources generalist Christina Powers emailed a final "incident investigation" report to company officials including the refinery manager. (JA 735; 502.) The report summarizes the accounts of Regenscheid, Jung, Olson, Rowe, Topor, and Caswell. For Olson, the report notes that he was in the satellite during the conversations in question and recalled Regenscheid loudly stating, "Nope, this is how we mitigate using an insulation blanket," and Topor responding "no, follow the procedure" and stating he wanted to get the safety department involved. The report states that, unlike other witnesses, Olson did not see Topor pointing his finger at Regenscheid, and speculates that Topor could have done so after Olson left. The report further notes that Topor stated he was refusing to do unsafe work, wanted a safety representative, and was exercising his right to

call a safety stop. It concludes that Topor failed to follow his supervisor's instructions on November 4. (JA 735; 584, 586, 588.)

On November 14, the Company issued Topor a 10-day unpaid suspension and a final written warning. (JA 735; 564.) The disciplinary form stated that Topor was suspended on November 4 "for inappropriate behavior and insubordinate conduct towards your Supervisors." It stated that the Company's investigation revealed that Topor had violated company policies and work rules by: failing to follow instructions when he refused to discuss mitigation steps; raising his voice and pointing at a supervisor; refusing to return step-change paperwork when instructed to do so; and failing to be accurate and truthful in his interview. (JA 735-36; 564.) Based solely on that discipline, the Company denied Topor his next quarterly bonus in January 2017. (JA 736; 105, 245, 452, 567.) Topor had no prior disciplinary record of any kind. (JA 94, 249.)

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board (Members Pearce, McFerran, and Kaplan) found, in agreement with the administrative law judge, that the Company violated Section 8(a)(1) of the Act by suspending Topor, issuing him a final warning, and denying him a quarterly bonus because he engaged in protected concerted activity by refusing to perform work he believed was unsafe. (JA 278 & n.3.) The Board also found that the Company did not meaningfully except to the judge's finding that it violated

Section 8(a)(1) by threatening employees with termination, surveillance, and stricter enforcement of work rules due to their union activities, or to the judge's denial of the Company's motion to reopen the record to admit correspondence it received from Minnesota OSHA ("MNOSHA") after the close of the unfair-labor-practice hearing in this case. (JA 278 n.3.)

The Board also denied the Company's motion to reopen the record to enter an arbitration award, which had concluded that Topor's discipline did not violate the collective-bargaining agreement. The Board denied that second motion to reopen because the arbitration award issued after the hearing closed, and thus did not meet the standard for reopening set in the Board's regulations and caselaw. (JA 278 n.1.)

The Board's Order requires the Company to cease and desist from the violations found or, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under the Act. Affirmatively, the Order requires the Company to make Topor whole for losses suffered as a result of the unlawful discrimination against him; to remove from its files any reference to the unlawful discipline and notify Topor in writing that this has been done; and to post a remedial notice.

SUMMARY OF ARGUMENT

1. The Board is entitled to summary enforcement of the portion of its Order remedying the Board's finding that the Company violated Section 8(a)(1) of the Act by threatening employees because of their union activities. The Company waived any right to challenge that violation by failing to contest the issue in its opening brief.

2. Substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by disciplining Topor for his protected concerted activity—that is, stopping work based on safety concerns shared by a coworker. That activity was protected under longstanding precedent, and was a continuation of admittedly protected activity. The Company's challenge to the Board's finding of protected concerted activity relies on artificially truncating protection of Topor's safety protest after his indisputably protected assertion of safety concerns with another employee in the morning. But the Board reasonably found that his refusal later in the afternoon to discuss his supervisor's proposal to mitigate the danger, or to perform the unsafe task as the supervisor proposed, was part of the same course of conduct advancing the same concerns. Considering the afternoon conduct in isolation would improperly require the Board to “turn a blind eye” to everything leading up to it.

That the Company's decision to discipline Topor was unlawfully motivated by his protected activity is clear because the Company expressly sent him home for that reason, and still cites aspects of the protected safety protest in defending its decision. Although the Company later asserted additional grounds for Topor's discipline, its reliance on an inadequate investigation and pretextual justifications (including alleged misconduct that did not occur) further demonstrate its unlawful motive. The bulk of the Company's challenges to the Board's motivation finding depend on this Court rejecting underlying credibility determinations the judge made, and the Board adopted. However, the Company fails to demonstrate, as it must to prevail, that those determinations "shock the conscience."

Finally, the Company failed to show that it would have taken the same actions against Topor—whom it had never disciplined in his 13-year tenure—in the absence of his protected activity. Its failure to substantiate its claim that it actually would have done so dooms its defense, particularly viewed in the context of its inadequate investigation and pretextual explanations. Accordingly, the Board reasonably found that the Company violated the Act by disciplining Topor.

3. The Board did not abuse its broad discretion in denying the Company's motions to reopen the record to admit two documents—an arbitration award and MNOSHA letter—both of which were created after the close of the hearing and, therefore, were not "newly discovered" as required by Board rules

and regulations. As to the letter, moreover, the Court is barred from considering the Company's arguments, which were never presented to the Board.

STANDARD OF REVIEW

The Board's findings of fact are "conclusive" if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). The Court "afford[s] great deference to the Board's affirmation of the [administrative law judge]'s findings." *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 780 (8th Cir. 2013). And the Court may not displace the Board's choice between two fairly conflicting views of the facts, even if it "would justifiably have made a different choice had the matter been before it de novo." *Universal Camera*, 340 U.S. at 488.

The Court "defer[s] to the Board's conclusions of law if they are based upon a reasonably defensible construction of the Act." *JCR Hotel, Inc. v. NLRB*, 342 F.3d 837, 841 (8th Cir. 2003). In particular, the Board's determination of the scope of protected concerted activity under Section 7 is entitled to "considerable deference." *RELCO*, 734 F.3d at 790 (quoting *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 829 (1984)); accord *NLRB v. Main St. Terrace Care Ctr.*, 218 F.3d 531, 540 (6th Cir. 2000).

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THE PORTION OF ITS ORDER REMEDYING THE COMPANY'S UNLAWFUL THREAT

In its opening brief, the Company failed to articulate any challenge to the Board's finding (JA 728 n.3, 744) that supervisor Regenscheid unlawfully threatened employees with retaliation for their union activity. *See DeQueen Gen. Hosp. v. NLRB*, 744 F.2d 612, 614 (8th Cir. 1984) (applying well-settled law that such threats violate Section 8(a)(1) of the Act). Under the Court's practice, "points not meaningfully argued in an opening brief are waived." *Ahlberg v. Chrysler Corp.*, 481 F.3d 630, 634 (8th Cir. 2007); *Cintas Corp. v. NLRB*, 589 F.3d 905, 916 (8th Cir. 2009) (same); *see also* Fed. R. App. P. 28(a)(8)(A) (brief must contain party's contentions with citation to authorities and record). Moreover, this Court would be jurisdictionally barred from considering any challenge to this violation under Section 10(e) of the Act, 29 U.S.C. § 160(e), because the Company failed to properly raise any such argument to the Board. *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *NLRB v. Cornerstone Builders, Inc.*, 963 F.2d 1075, 1077 (8th Cir. 1992).³ Accordingly, the Board is

³ Although the Company technically excepted to the Board's finding of an unlawful threat, it did not provide any supporting argument. (JA 695, 698.) As the Board explained (JA 728 n.3), such a "bare exception[]" does not preserve an

entitled to summary enforcement of the portion of its Order remedying the Company's unlawful threat. *See NLRB v. Rockline Indus., Inc.*, 412 F.3d 962, 966 (8th Cir. 2005); *J&P Assoc., LLC v. NLRB*, 360 F.3d 904, 912 (8th Cir. 2003).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY DISCIPLINING TOPOR FOR HIS PROTECTED CONCERTED ACTIVITIES

Section 7 of the Act guarantees employees the right “to engage in concerted activities for the purpose of . . . mutual aid or protection” 29 U.S.C. § 157. In turn, Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to “interfere with, restrain, or coerce” employees in the exercise of rights guaranteed by Section 7. 29 U.S.C. § 158(a)(1). An employer thus violates Section 8(a)(1) by disciplining employees because of their protected concerted activities. *Cintas*, 589 F.3d at 916-17.

When, as here, an employer's motivation for issuing discipline is contested, the Board evaluates the motive by applying the framework set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981), and approved by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397, 401-03 (1983). Under that test, if

argument under Section 102.46(a)(1)(ii) of the Board's Rules and Regulations. *See* cases cited at p. 54.

substantial evidence supports the Board’s finding that an employee’s protected concerted activity was “a motivating factor” in an employer’s decision to take adverse action against the employee, the adverse action is unlawful, and the Board’s finding of a violation must be affirmed unless the employer demonstrates, as an affirmative defense, that it would have taken the same action even in the absence of the protected activity. *Transp. Mgmt. Corp.*, 462 U.S. at 397, 401-03; *RELCO*, 734 F.3d at 780.

Substantial evidence supports the Board’s finding that Topor was engaged in protected activity on November 4 and that the Company unlawfully suspended him, issued him a final warning, and denied him a quarterly bonus, because of that activity. In contrast, the Company raises meritless arguments in contending that Topor’s activity stopped being protected midstream, that it actually disciplined him for conduct unrelated to his safety concerns, or that it would have disciplined him even in the absence of his protected activity.

A. Topor Engaged in Protected Concerted Activity on November 4

It is settled that an employee engages in activity for mutual aid or protection by raising safety concerns or refusing to do work the employee believes in good faith to be unsafe. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962); *NLRB v. Tamara Foods, Inc.*, 692 F.2d 1171, 1176-77 (8th Cir. 1982). An activity is “concerted” when it is “engaged in with or on the authority of other employees,

and not solely by and on behalf of the employee himself.” *RELCO*, 734 F.3d at 785-86 (internal quotes and citation omitted). Activity by a single employee may also be concerted when “it represents either a continuation of earlier concerted activities or a logical outgrowth of concerted activities.” *RELCO*, 734 F.3d at 785 (internal quotes and citation omitted); *Summit Reg’l Med. Ctr.*, 357 NLRB 1614, 1617 n.13 (2011); *Amelio’s*, 301 NLRB 182, 182 n.4 (1991). The Company does not dispute that Topor’s conduct in raising and discussing safety concerns with a coworker and supervisors, then calling a safety stop, on the morning of November 4 was protected concerted activity, and for good reason. Such conduct is plainly protected and concerted under settled law. As the Board found (JA 740), the record evidence further establishes that Topor’s individual conduct in the afternoon was equally within the scope of Section 7, as a continuation and outgrowth of his admittedly protected concerted activity of that morning.

On the morning in question, Topor and fellow employee Rennert discussed the safety of the new steam-heat injection method for the Penex restart. Convinced that it was dangerous, the two employees raised their concerns, including the risk of explosion, with unit-process engineer Rowe. Those concerns were indisputably reasonable, given that explosion is a potential risk of heating a cylinder of hydrochloric acid—as noted in the Company’s own procedure and in the Penex manufacturer’s documentation—and that both employees were unfamiliar with the

method. Topor then requested a written step-change form officially altering the restart procedure. That request was consistent with company policy that, to ensure safe processes, a procedure can only be altered by formal, written amendment. That the Company responded by discussing the employees' concerns and by immediately commencing the step-change process, manifests its understanding that those concerns were well founded. There is no dispute, as noted, that Topor's conduct up to this point was protected and concerted.⁴

As the day progressed, Topor maintained his position regarding the dangers of heating the acid cylinders. Although Topor acted individually from this point on, his conduct was, as the Board found (JA 728 n.3, 740), a "logical outgrowth" of his earlier protected concerted safety discussions with Rennert and Rowe. *RELCO*, 734 F.3d at 785-86. When Topor read the step-change form, he asserted that it required removal of any excess cylinders housed in the same five-by-five-foot cage with the cylinder being heated. And when Regenscheid repeatedly insisted that Topor mitigate the risk by covering the other cylinders with an insulation blanket (which Regenscheid acknowledged would keep them within about a foot of the cylinder being heated, JA 603), Topor called a safety stop. In

⁴ Indeed, underscoring the reasonableness of Rennert and Topor's concerns, operations superintendent Jung acknowledged that prior to November 4 she had only heard about the steam-heat method in articles discussing "explosions." (JA 141.)

doing so, Topor communicated that the supervisor's solution did not allay his concerns, and cited the step-change form, which required that no other cylinders be "in the area near" the cylinder to be heated. (JA 733; 100-10, 544.) At that point, Regenscheid and Topor reached a stalemate: Regenscheid continued to insist that his solution was adequate; Topor replied each time that it was unsafe (did not remove the risk of explosion) and was contrary to the written procedure. When neither man would change his view, Topor asked that a safety representative intervene. As Regenscheid (and Jung) continued to pressure Topor to perform work he considered unsafe, he reiterated that he was calling a safety stop. That sequence of events amply supports the Board's finding (JA 740) that Topor's expressions throughout the day of the reasonable safety concerns that he and Rennert had first raised in the morning, and refusal to perform work he believed to be unsafe, were not only inextricably linked in an unbroken course of conduct but clearly constitute protected concerted activity under settled law.⁵

There is no merit to the Company's attempts, at various points in its brief (pp. 12-13, 26-29, 32-34), to artificially truncate Section 7's protection of Topor's communication of reasonable, shared safety concerns and refusal to perform work

⁵ Rennert also remained concerned, as he reiterated when asked to perform the task the next day, but no longer actively participated in the protest, perhaps because the task of heating the cylinders had been transferred from him to Topor.

he deemed unsafe. The Company cannot insulate its reactions to Topor's conduct from scrutiny by characterizing, as a "refusal to discuss mitigation," Topor's good faith, reasonable disagreement that insulation blankets would resolve the dangerous condition he and Rennert had identified—a danger the Company itself had acknowledged. That the Company did not agree with Topor's safety concern after Regenscheid's proposed mitigation, and found it inconvenient, did not suddenly make the concern illegitimate and unprotected, much less transform his conduct into insubordination.

As an initial matter, the record undermines the Company's claim (Br. 27, 34) that Topor completely "refus[ed] to engage in dialogue" about mitigation. As just detailed, Topor began the discussion of mitigation when he correctly pointed out that the step-change document required the removal of the other cylinders, and disagreed with Regenscheid's proposed solution. He then suggested consulting a safety representative and reiterated his refusal to perform a task he considered unsafe. In other words, Topor did not refuse to engage with Regenscheid, he refused to *agree* with Regenscheid. Meanwhile, Regenscheid did not attempt to move the mitigation "discussion" forward by, for example, proposing another solution when Topor protested that one or providing something to substantiate his claim that the insulation blankets would be adequate to avoid an explosion.

Topor's protection is not dependent on the Company's agreement with his safety concerns, which the Company does not—and cannot credibly—label unreasonable. *See Odyssey Capital Group, L.P., III*, 337 NLRB 1110, 1111 (2002) (employees' refusal to work in apartment due to concern over asbestos exposure was protected concerted activity despite their supervisors' believing no such risk existed); *Burhle Indus., Inc.*, 300 NLRB 498, 498 n.1, 503 (1990) (employee who urged coworkers to leave work area if they felt ill due to chemical fumes was engaged in protected concerted activity despite supervisors' insistence work area was safe), *enforced mem.* 932 F.2d 958 (3d Cir. 1991); *Brown & Root, Inc.*, 246 NLRB 33, 36-37 (1979) (pipefitters engaged in protected concerted activity in refusing to work due to concern over using electric equipment in the rain despite supervisors' belief work was safe), *enforced* 634 F.2d 816 (5th Cir. 1981). The Company's assertion that the employees in those cases were justifiably resisting “*directives* to complete work they specifically believed was unsafe” (Br. 29, emphasis in original) exactly describes Topor's circumstances—the Company's position is that Topor lost protection by refusing to accede to Regenscheid's proposed mitigation solution and perform the acid injection in a manner that Topor specifically believed was unsafe. At bottom, the Company's argument relies on an implicit premise that Topor's disagreement regarding the safety of the proposed mitigation was insincere or unreasonable, but the record does not support that

position. Regardless of Jung’s and Regenscheid’s opinions, Topor’s belief—shared by Rennert (JA 24)—that insulation blankets were an insufficient safeguard was legitimate and the Company’s contrary view cannot strip Topor’s conduct of protection.⁶

The Board also properly rejected (JA 740) the Company’s attempt (Br. 26-29) to consider Topor’s ultimate refusal to discuss mitigation “in isolation” from his and Rennert’s earlier objections and his refusal to perform unsafe work. As the Board explained, doing so “would require [the Board] to turn a blind eye to everything leading up to Topor’s refusal to discuss mitigation,” which it found “c[ould] not be separated” from the refusal. (JA 740.) Protected conduct “cannot be considered in a vacuum.” *Thor Power Tool, Co.*, 351 F.2d 584, 586-87 (7th Cir. 1965); *accord Emarco, Inc.*, 284 NLRB 832, 834 (1987). Accordingly, the

⁶ Nor, contrary to the Company’s suggestions (Br. 12, 29), would it undermine Topor’s protection if he failed to follow the Company’s precise safety-stop procedures—although, as shown, he did not. “[T]he protections of Section 7 do not depend on the *manner* in which the employees choose to protest the dispute, but rather on the *matter* they are protesting.” *NLRB v. Tamara Foods, Inc.*, 692 F.2d 1171, 1176-77 (8th Cir. 1982) (emphasis in original) (employees protected when they clocked out due to ammonia fumes, despite employer rule allowing them to remain, with pay, in cafeteria where there were no fumes); *accord NLRB v. Plastilite Corp.*, 375 F.2d 343, 350 (8th Cir. 1967) (company work rules do not supersede statutory right to engage in protected concerted activities) (citing *Washington Aluminum*, 370 U.S. at 14, 16) (employees protected when they left work without permission due to cold conditions despite employer rule requiring permission to leave)).

Board reasonably found that “the sequence of events for the entire day must be considered.” (JA 740.) The Company’s attempt to distinguish *Thor Power Tool* because the comment at issue in that case took place just moments after a protected meeting, whereas Topor’s safety protest stretched out over several hours, is misguided. While timing was an important factor in finding interconnectedness in that case, the link the Board identified here is substantive: Topor and Rennert raised a safety concern in the morning that Topor pursued throughout the day. In any event, there is no significant temporal distance in this case: as the Company itself recognizes, by the time it disciplined Topor, a “genuine safety stop had been underway for hours” (Br. 29)—and it had still not been resolved, regardless of whether the Company tired of the situation.⁷

By the same token, the Company’s attempt (Br. 33) to distance Topor’s refusal to accept Regenscheid’s mitigation proposal from his other protected conduct by analogizing it to the “intervening events” in *Freeman v. Ace Telephone Association*, 467 F.3d 695, 698 (8th Cir. 2006), is plainly off-base. Topor’s position was undeniably related to his initial, protected objection that same

⁷ Moreover, the Company’s rules emphasize employees must trust their own assessment of safety issues. For example, the rules: instruct employees to stop work they “feel is unsafe,” particularly where, as here, the safety issue involves a “new or nonstandard” procedure; reiterate “we need [employees] to prevent unsafe activities”; and state that “[c]alling a safety stop is not a problem; it is the right thing to do.” (JA 732; 550-51.)

morning to heating acid cylinders. The employee in *Freeman* admitted to having a sexual affair with a coworker, lying about it, and using a company credit card to continue and to hide the affair—misconduct that “intervened” between his allegedly protected, and entirely unrelated, conduct weeks earlier and his termination.⁸

B. Topor’s Protected Concerted Activity Was a Motivating Factor in the Company’s Decision To Discipline Him

As noted, to determine whether an employer’s adverse action against an employee violates Section 8(a)(1) of the Act, the Board examines whether the employee’s protected concerted activities were “a motivating factor” for the adverse action. *RELCO*, 734 F.3d at 780. Motive is a question of fact subject to the deferential substantial evidence test (*see* p. 20), and the Board may rely on circumstantial evidence to find that discriminatory motive has been established. *NLRB v. Link-Belt Co.*, 311 U.S. 584, 602 (1941); *Concepts & Designs, Inc. v. NLRB*, 101 F.3d 1243, 1244 (8th Cir. 1996). The Board may thus infer unlawful motive from a number of factors, including the employer’s demonstrated hostility to the protected conduct, *RELCO*, 734 F.3d at 782 (collecting cases); *Rockline*

⁸ The Board (JA 728 n.3) expressly found it unnecessary to pass on the judge’s alternative theory of Section 7 protection in which he cited *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822 (1984), and *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966), *enforced* 388 F.2d 495 (2d Cir. 1967). Thus, the discussion of that theory in the Company’s brief (pp. 26, 29-31) is beside the point.

Indus., 412 F.3d at 967-68 (same); *Lemon Drop Inn, Inc. v. NLRB*, 752 F.2d 323, 325 (8th Cir.1985) (per curiam); *McGraw-Edison Co. v. NLRB*, 419 F.2d 67, 75 (8th Cir. 1969); the employer’s failure to adequately investigate alleged misconduct before taking action, *RELCO*, 734 F.3d at 787; *Rockline Indus.*, 412 F.3d at 969; and the employer’s pretextual justifications for the adverse action, *RELCO*, 734 F.3d at 782; *Rockline Indus.*, 412 F.3d at 968; *Hall v. NLRB*, 941 F.2d 684, 688 (8th Cir. 1991); *York Prods, Inc. v. NLRB*, 881 F.2d 542, 545-46 (1989).

Here, the Board reasonably found that Topor’s protected concerted activity was a motivating factor in the Company’s decision to warn and suspend him and, consequently, to withhold his quarterly bonus. As the Board detailed, that finding is amply supported by the record evidence of the Company’s hostility towards his protected concerted activity, its inadequate investigation of the incident before imposing discipline, and its reliance on pretextual justifications.

1. The Company’s hostility towards Topor’s protected activity on November 4 supports a finding of unlawful motive

As the Board explained (JA 742), the Company’s animus towards Topor’s protected activity was established when it sent him home and put him on administrative leave on November 4, explicitly because he had called a safety stop and refused to discuss mitigation. *See* JA 603 (supervisory incident report linking sending Topor home to his “refusal to do assigned work”). As the Board put it,

“[w]ithout question, the Company was hostile towards this protected conduct, as it sent Topor home as a result of it.” (JA 742.) As the Board further noted, the Company’s stated basis for sending Topor home demonstrated a “direct link” between his protected activities and his discipline. (JA 742.)

The Company’s objection (Br. 33-34) that its decision did not evidence animus because it sent Topor home due to his refusal to discuss mitigation (i.e., to perform the steam-heat acid-injection process with insulation blankets despite his reservation), is without merit.⁹ First, as just noted, the incident reports cited his refusal to perform work he believed to be unsafe. Second, as explained (Part II.A), Topor’s concerted assertion of reasonable concerns regarding the dangers of heating acid cylinders cannot be bifurcated into protected and unprotected elements based on the Company’s opinion that the concerns had been adequately resolved at a certain point. Finally, the explicit link between Topor’s refusal to perform the steam-heat injection and his suspension answer any question raised by the Company as to a “causal connection” in this case. (Br. 31 (citing *Transp. Mgmt. Corp.*, 462 U.S. at 399-403; *Nichols Aluminum, LLC v. NLRB*, 797 F.3d 548, 554 (8th Cir. 2015).)

⁹ Although the Company also asserts that it sent Topor home because he pointed his finger at Regenscheid, the Board found, as a factual matter, that the alleged finger pointing did not occur. As discussed below (pp. 40-44), the Company’s challenge to the credibility determinations underlying that finding is unavailing.

Likewise, it is of no moment (Br. 32-34) that the Company usually encourages employees to report safety concerns or that Rennert was not disciplined for doing so on November 4. The record shows the Company disciplined Topor because, unlike Rennert, he would not relent when pressured to perform work he believed to be unsafe. That the Company rewarded Topor before and since for “safety conscious work” (Br. 32) is also immaterial to the question of whether it harbored animus against his safety-conscious refusal to perform his assignment on November 4. But it does undermine the implication in Regenscheid’s incident report (and in the Company’s brief, p. 7) that Topor’s objection to Regenscheid’s mitigation proposal was grounded in laziness rather than safety concerns.

2. The Company’s reliance on an inadequate investigation is strong evidence of an unlawful motive

The Board’s finding of unlawful motive is also supported by the Company’s inadequately conducted investigation, which was skewed to substantiate the supervisors’ accusations against Topor, discounted or disregarded any potentially inconsistent evidence, and did not seek statements from unit employees who witnessed the events. (JA 742-43.) The Company claims (Br. 15, 36, 47, 53) to have disciplined Topor in part for yelling and finger-pointing at Regenscheid, knowingly refusing Regenscheid’s request to return the step-change form, and lying during the investigation by denying he had engaged in that conduct. But Human Resources Director Kerntz, who led the investigation, received conflicting

accounts. Only the two supervisors, Regenscheid and Jung, claimed to have observed Topor's alleged misconduct. And Topor's denial was corroborated in a written statement by Olson, a neutral employee who was present during the events in question but did not see belligerent or insubordinate conduct. Yet Kerntz explained away Olson's account and declined to interview, or solicit a statement from, any unit-employee witness. And he made that choice despite having Jung's statement identifying Rennert and two other unit employees as present during the incidents under investigation. Instead, Kerntz hastily credited the supervisors' accusations over Topor's denials, and disciplined Topor not only for his alleged misconduct but also for denying that it happened.

As the Board found, Kerntz's decision not to interview Rennert, in particular, "defies explanation." (JA 742.) Similarly suspicious was Kerntz's attempt to disclaim awareness of other unit-employee witnesses specifically identified in Jung's statement. (JA 742; 602-03.) When asked why he did not interview any of them, Kerntz replied that he simply assumed they had no "relevant information." (JA 247.) But that assumption makes no sense unless he had already decided to credit Jung's and Regenscheid's disputed version of events. When asked if anyone other than the two supervisors saw Topor point, Kerntz responded that he "didn't think anyone else was . . . present," a response that, if charitably construed, reflects deliberate ignorance. (JA 253.) Even when

confronted with Jung's witness list, Kerntz still insisted he had not known whether Rennert and the other employees were in the "direct vicinity" or "part of the discussion." (JA 253-54.) Setting aside that a witness need not participate in a conversation to describe it accurately, that response further substantiates the Board's finding (JA 742) that Kerntz deliberately chose to disregard apparently material witnesses when conducting his investigation.

Accordingly, the Board reasonably concluded (JA 743) that the patent inadequacy of Kerntz's investigation supported its finding that the Company had an unlawful motive for disciplining Topor. *See Woodlands Health Ctr.*, 325 NLRB 351, 364-65 (1998) (failure to interview two residents whom employee was alleged to have abused indicative of inadequate investigation); *Sheraton Hotel Waterbury*, 312 NLRB 304, 322 (1993) (failure to interview other witnesses to alleged insubordination supported finding of unlawful motivation); *see generally RELCO*, 734 F.3d at 787. Contrary to the Company's assertion, the Board did not base that finding on the erroneous proposition that only a "perfect" investigation will be deemed adequate. (Br. 34.) Rather, just as the Company suggests it should (Br. 35), the Board acknowledged and followed its established policy "that the fact an employer does not pursue an investigation on some preferred manner before imposing discipline does not necessarily establish an unlawful motive." (JA 743 n.34) (citation omitted.)) As shown, the problem with the Company's

investigation was not mere imperfection, but that it was patently and unapologetically one-sided. None of the Company's specific arguments warrants disturbing that conclusion.

The Company notes (Br. 34), for example, that the Board in *Bonanza Aluminum Corp.*, 300 NLRB 584, 589-90 (1990), generally observed that an employer need not interview "all possible witnesses to an incident" to avoid a finding that its investigation was a sham. And it points out (Br. 35) that Kerntz interviewed six people. As shown, however, the problem here was not a mere failure to interview every possible witness or to act with "20/20 hindsight." (Br. 35.) It was the Company's inexplicable refusal to consult *any* of the unit-employees on its own witness list, despite contradictory accounts from the parties immediately involved—and Olson's neutral statement, which tended to support Topor. The Board thus reasonably rejected the Company's view that Kerntz's approach was "clear and reasonable," much less that he spoke to all the individuals who were "actually present and involved in the critical events." (Br. 36.) To the contrary, Kerntz's own testimony only serves to confirm that, as the Board reasonably concluded, he "did not pursue a clear avenue for resolving the conflicting accounts of the supervisors and Topor." (JA 743.)

In sum, the Company's investigation was not merely imperfect or incomplete, but so obviously deficient and one-sided as to show, as the Board

found (JA 742-43), that its real purpose was to justify sending Topor home on November 4 for refusing to perform work he thought was unsafe. That finding is factually well founded and consistent with precedent, including the cases the Company cites (Br. 34), which establish that a “cursory and ineffective investigation suggests an unlawful motivation.” *Brookshire Grocery*, 282 NLRB 1273, 1273 (1987), *enforcement denied on other grounds*, 837 F.2d 1336 (5th Cir. 1988); *accord Bonanza Aluminum Corp.*, 300 NLRB at 589-90.

3. Unlawful motive is shown by the Company’s pretextual justifications

The Board’s finding of unlawful motive is further supported by the Company’s reliance on pretextual justifications. The Company’s various and shifting explanations—from sending Topor home for refusing to work, to refocusing on his refusal to discuss mitigation while denying any directive that he perform the work, to adding as a rationale for disciplining him his purported belligerence and deliberate insubordination—all support the Board’s finding of pretext. Moreover, the Board concluded (JA 736-37, 743), as a factual matter, that Topor did not engage in the purported misconduct (the finger-pointing, and refusing an order) and, therefore, that those justifications were also false. Under settled law, the Company’s reliance on false and shifting explanations demonstrates pretext, which is strong evidence of unlawful motive, particularly

when combined with its failure to conduct an adequate investigation. *See RELCO*, 734 F.3d at 782, 787, and cases cited at p. 32.

First, the Company has equivocated on its principal objection to Topor's protest of the steam-heat acid-injection method. When Regenscheid and Jung sent him home, they cited both his refusal to discuss Regenscheid's mitigation proposal and his refusal to perform the acid injection pursuant to that proposal. *See* JA 601-06. When the Company issued his formal discipline, it did not specifically mention his refusal to perform the acid injection. *See* JA 564. That said, it has never disavowed its original reliance on that refusal.

Second, Regenscheid and Jung both changed their stories to add two of the now-asserted reasons for disciplining Topor: that he pointed a finger at Regenscheid and that he knowingly refused to return the step-change form. Neither supervisor mentioned either allegation in the statements they wrote on November 4, and Jung added only the finger-pointing when she amended her statement days later, after discussing the events of that day with human resources. Both then testified to the purported additional misconduct at the unfair-labor-practice hearing. Their shifting claims indicate a post-hoc effort to justify sending an employee home for insistently raising undeniably legitimate safety concerns and refusing to perform work perceived as unsafe.

The Company does not—and cannot—dispute that Jung’s and Regenscheid’s accounts of the events of November 4 changed as its investigation got underway. But it disputes the Board’s finding that the misconduct did not in fact occur and, therefore, that the misconduct-based explanations were false and pretextual. (Br. 36-50.) The Board grounded that factual finding in credibility determinations made by the judge—who observed the witnesses—to resolve conflicting testimony. Determinations of witness credibility are “within the sound discretion of the trier of facts, and should be reversed only in extraordinary circumstances.” *Porta-King Bldg. Sys. v. NLRB*, 14 F.3d 1258, 1262 (8th Cir. 1994) (citation and internal quotation marks omitted). For those reasons, the Court will not overturn the Board’s adoption of the administrative law judge’s credibility determinations “unless they shock the conscience.” *RELCO*, 734 F.3d at 787. The Company does not come close to meeting its heavy burden of showing that the judge’s sound credibility determinations should be overturned.

The judge reasonably credited Topor’s denial, corroborated by other employee witnesses, over Regenscheid and Jung’s claim that Topor pointed his finger in Regenscheid’s face and refused to return a step-change form when ordered to do so. With respect to Topor, whom the judge found “most believable,” the judge noted his “confident demeanor” and consistent testimony. (JA 736-37.) By contrast, the judge found Regenscheid’s demeanor less credible, describing him

as hesitant and noting his rapid, abbreviated responses. (JA 736-37.) In addition, the judge noted that Regenscheid's account conflicted with Jung's over, for example, which of the two spoke to Topor in the satellite. (JA 736-37.) Moreover, Regenscheid and Jung undermined their own credibility by changing stories to add allegations of misconduct that they had omitted when they submitted written, contemporaneous statements describing the events of November 4. Jung did so by amending her written statement three days later to add the alleged finger-pointing, and later testified to the refusal to return the form.¹⁰ (JA 736-37; 137.)

Regenscheid never amended his written statement but later said that Topor had pointed at him and refused to return the form. (JA 90, 218-19.) Finally, Jung could not explain why she highlighted portions of her statement when she revised it—a lack of recall the judge found “inherently improbable,” and which suggests that she did not disclose the actual reason for the modifications. (JA 737; 139, 590.)

The Company attacks (*e.g.*, Br. 37-38) the judge's demeanor assessments, but courts are particularly deferential to such findings, because it is the judge who “was in the superior position of observing the witness.” *V&S ProGavl, Inc. v.*

¹⁰ Jung also testified that she was very surprised to see the finger-pointing, and had never seen an employee do that, which is inconsistent with her failure to include it in her initial written report. (JA 133.) She further testified that her initial report included everything she thought was important. (JA 136-37.)

NLRB, 168 F.3d 270, 276-77 (6th Cir. 1999); *accord RELCO*, 734 F.3d at 787.

Contrary to the Company's suggestion (Br. 37), the judge was not required to dismiss as "inconsequential" Jung's and Regenscheid's conflicting accounts regarding who spoke to Topor at key moments on November 4. And the Company's observation (Br. 44) that Topor's recall was also imperfect does not warrant disregarding the judge's credibility assessment. While the Company opines that it is "hardly damning" when supervisors change their story to add allegations over the course of an investigation (Br. 46-47), it cannot deny that the judge permissibly considered their shifting justifications, along with other factors, in discrediting their testimony. Nor does the Company explain how the investigation would have led it to shift its stated objection to Topor's safety protest from a focus on his refusal to work to a focus on his refusal to discuss. And, finally, the Company cannot meet its heavy appellate burden with respect to credibility determinations by cherry-picking and reproducing (Br. 39-45) long testimonial quotes it believes supports its position. It never establishes that the judge's decision to credit or discredit any of this testimony was unsupportable. Nor can the dry, written record of the testimony capture the nuances that the judge heard and observed.

As to the finger-pointing allegation in particular, Topor's denial was corroborated by employees Joshua Johnson and Duke Morales, who were both

present when it allegedly occurred. (JA 736; 38, 81.) The judge properly considered (JA 736) that such testimony—by current employees, and which contradicted their supervisors’ statements—was “apt to be particularly reliable” because the employees were testifying adverse to their pecuniary interests. *See G4S Secure Solutions (USA), Inc.*, 364 NLRB 92, slip op. at 10 (2016); *Flexsteel Indus.*, 316 NLRB 745, 745 (1995), *aff’d mem.*, 83 F.3d 419 (5th Cir. 1996). The Company, in contrast, provided no neutral witness to the alleged finger-pointing, though other employees were present at the relevant time. (JA 736.)

The Company responds (Br. 45-46) that Johnson and Morales were not one-hundred-percent certain. However, absolute certainty cannot be expected in most cases, and the judge is entitled to make reasonable inferences as to what happened. At bottom, the Company ignores its appellate burden when it claims that “the evidence supports a finding that Topor pointed a finger in Regenscheid’s face.” (Br. 47.) The dispositive question is whether the judge permissibly came to the opposite conclusion; he clearly did.

The judge also reasonably credited Topor’s claim that he did not hear Regenscheid’s request to return the step-change form (JA 102, 104) over Regenscheid and Jung’s claim that he heard the request and refused to comply (JA 134-35, 219). The judge chose to believe the only neutral witness to the exchange—employee Rennert. Rennert explained that Topor was 20 yards away

from Regenscheid at the time, in a loud area (JA 23), which corroborated Topor’s account that he did not hear the request. And the judge noted Rennert’s confident and reliable demeanor, which bolstered his credibility compared to Regenscheid and Jung. (JA 737.) The Company’s argument (Br. 48) that it “makes no sense” for the judge to credit Rennert’s account because he was wearing headphones depends on its speculation (Br. 49) about what Rennert could or could not hear. The judge reasonably credited Rennert’s testimony that he could hear—and indeed relied in part on Rennert to find that Regenscheid made the request. Further supporting the judge’s finding, Regenscheid and Jung both failed to mention any insubordinate refusal to comply with the request in their initial statements, and Jung did not mention it when she revised her statement. Accordingly, the Board reasonably found that Regenscheid made the request, but Topor did not hear it.

C. The Company Failed To Show It Would Have Imposed the Same Discipline Absent Topor’s Protected Concerted Activity

Having found Topor’s protected concerted activity was a motivating factor for the Company’s adverse actions against him, the Board assessed, and reasonably rejected, the Company’s affirmative defense. This Court has held that, to establish such a defense, “it is not enough that an employer put forth *a* nondiscriminatory justification for discipline. It must be *the* justification.” *Rockline Indus., Inc.*, 412 F.3d at 970 (emphasis in original) (citation omitted). If the lawful reasons the employer advances for its actions are a pretext—that is, if the reasons either did not

exist or were not in fact relied upon—the employer has not met its burden, and the inquiry is logically at an end. *York Prods., Inc. v. NLRB*, 881 F.2d 542, 545-46 (8th Cir. 1989); *Lemon Drop Inn, Inc. v. NLRB*, 752 F.2d 323, 325 (8th Cir. 1985) (per curiam).

The Company claims (Br. 51-54) that it met its *Wright Line* burden because it acted on a reasonable belief that Topor engaged in misconduct. Even setting aside that the Board found the Company's justification of Topor's discipline to be pretextual, however, the Company must show *both* that its belief was reasonable *and* that it would have—not merely could have—taken the same action based on that belief even absent Topor's protected concerted activity. *See Rockline Indus., supra*; *see also Transp. Mgmt. Corp.*, 462 U.S. at 397, 401-03; *RELCO*, 734 F.3d at 780. Substantial evidence supports the Board's determination (JA 743-44) that the Company failed to prove either point.

First, the Company lacked a reasonable belief that Topor had engaged in misconduct by yelling and pointing his finger at a supervisor, refusing to return company property in violation of a direct order, and lying when he denied doing so. As just shown, substantial evidence supports both the Board's finding that Topor did not actually engage in any of that alleged misconduct, and the Board's conclusion that the Company's investigation of the events of November 4 was deficient and intended merely to justify the Company's discipline of Topor for

refusing to perform work that he and Rennert believed to be unsafe. And as the Board found (JA 743), the Company cannot establish a good-faith belief based on a bad-faith investigation. *See Rockline Indus.*, 412 F.3d at 969; *RELCO*, 734 F.3d at 782, 787; *see also Allstyle Apparel*, 351 NLRB 1287, 1287 (2007) (employer failed to establish *Wright Line* defense because its limited investigation and cursory decisionmaking process support conclusion that discharges were discriminatorily motivated, not based on reasonable belief of misconduct); *Midnight Rose Hotel & Casino, Inc.*, 343 NLRB 1003, 1005 (2004) (inadequate investigation precluded reasonable belief employee engaged in theft).¹¹

Second, as the Board reasonably found (JA 743), even if the Company’s belief were reasonable and held in good faith, the Company failed to show it would have disciplined Topor—whom it had never before disciplined during his 13-year tenure—based only on the purported misconduct in the absence of his protected concerted activity. *See Hall*, 941 F.2d at 688 (lack of prior discipline may indicate unlawful motive). As an initial matter, the Company has never denied that one

¹¹ The Board’s finding that the misconduct did not occur also undermines the Company’s defense. As this Court has explained, lack of actual misconduct “supports the inference that [the employer] was looking for an excuse” to punish the employee for his protected conduct, and the employer’s *Wright Line* defense fails as a result. *RELCO*, 734 F.3d at 783; *see also id.* at 788-89 (finding that “in all likelihood” misconduct did not occur casts doubt on “claims of supervisors that they honestly believed” employee engaged in misconduct, and permits finding that “their purported rationale was a pretext” designed to conceal unlawful motive).

reason it disciplined Topor was his “refusal to discuss mitigation”—i.e., refusal to perform the acid injection according to Regenscheid’s proposed mitigation, which Topor considered unsafe. Even now, in its brief to the Court (pp. 26-28, 33-34), it counts that refusal to discuss as part of the insubordinate conduct for which it avowedly disciplined Topor. To the extent it does, that reliance alone precludes a finding that it would have disciplined Topor in the absence of protected activity because, as demonstrated above (pp. 23-30), Topor’s objection to the proposed mitigation was itself protected concerted conduct.

In any event, the Board reasonably found (JA 743-44) that the Company did not prove it would have disciplined Topor only for the finger pointing, refusal to return the step-change form, and lying in the absence of his protected activity (including his refusal to discuss). As the Board noted, the Company failed to show that it had ever previously imposed similar discipline for an employee’s first offense of insubordination, dishonesty, or unauthorized removal of a step-change form—or for any other type of first offense, similar or not. (JA 743.) Nor did the Company attempt to explain its lack of evidence on that score by showing that it had never encountered similar conduct. (JA 743.) *See Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 31 (D.C. Cir. 1998) (employer offered no evidence of similar treatment of employees who acted similarly); *Kitsap Tenant Support Servs., Inc.*, 366 NLRB No. 98, slip op. at 12 (2018) (employer failed to meet rebuttal burden

in part because, although employee engaged in misconduct, employer failed to identify any prior instances of having discharged others for similar misconduct). As the Board noted (JA 743), the Company's control over the relevant comparator evidence and failure to offer any combine to suggest that such evidence would not have supported the Company's defense. That the Company reserved the right, in its work rules and collective-bargaining agreement, to discipline employees for the types of offenses alleged here merely establishes that it could have done so in Topor's case—not that it would have absent his protected concerted activities. (JA 743.) *See McKenzie Eng'g Co.*, 326 NLRB 473, 484 (1998) (“[T]he mere existence of a valid ground for [discipline] is no defense . . . if such ground was a pretext and not the moving cause.”) (quoting *NLRB v. Yale Mfg. Co.*, 356 F.2d 69, 74 (1st Cir. 1966)), *enforced*, 182 F.3d 622 (8th Cir. 1999); *see also McGraw-Edison Co. v. NLRB*, 419 F.2d 67, 76 (8th Cir. 1969) (justifiable grounds for discharge do not themselves preclude violation).

The Company responds (Br. 52-53) that it did not bear the burden to prove it had previously imposed the same discipline for the same misconduct, and that the Board was not empowered to draw any inference from the absence of such evidence. The Company misses the point. The Board did not require such evidence or find Topor's discipline unlawful based solely on an adverse inference respecting that issue, but drew that inference in the context of many other pieces of

evidence. As demonstrated above, it found, based on ample evidence: that Topor's protected concerted activity was a motivating factor in the Company's decision to discipline him; that, to the extent the Company cited misconduct unrelated to that protected activity to explain the discipline, substantial evidence failed to prove it reasonably believed Topor had engaged in such misconduct; and that, in any event, the Company provided no evidence that it actually would have taken the same action against this long-term employee with no disciplinary record based on such misconduct in the absence of protected concerted activities.

The Company gains little in citing (Br. 52-53) factually distinguishable cases where employers proved their *Wright Line* defenses without presenting comparable instances of discipline. The employers' defenses in those cases did not involve either inadequate investigations or pretextual explanations, whereas the Board here specifically found that the Company relied on both. In sum, the Board reasonably found that the Company failed to prove that it would have taken the same adverse actions against Topor in the absence of his protected activity.

III. BOARD ACTED WITHIN ITS DISCRETION IN DENYING THE COMPANY'S MOTIONS TO REOPEN RECORD

The Company challenges (Br. 58-62) the Board's denial of its motions to reopen the record to introduce new evidence that was created after the close of the hearing in this case. As shown below, the Board acted well within its discretion,

and in accordance with precedent construing applicable Board rules and regulations, in denying the Company's motions.

A. Pursuant to the Applicable Regulation, the Board Has Long Denied Motions To Introduce Evidence Created after the Close of Hearing

Under Board regulation, a party to a Board proceeding may, because of “extraordinary circumstances,” move for reopening the record. 29 C.F.R. § 102.48(c)(1). That regulation requires that the motion “state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result.” *Id.* Lastly, the regulation restricts reopening to instances of “newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing.” *Id.*¹²

For nearly four decades, the Board, with court approval, has consistently defined “newly discovered” evidence as “evidence which was in existence at the time of the hearing and of which the movant was excusably ignorant.” *Owen Lee Floor Svc., Inc.*, 250 NLRB 651, 651 n.2 (1980), *enforced*, 659 F.2d 1082 (6th Cir. 1981). *See Manhattan Ctr. Studios, Inc. v. NLRB*, 452 F.3d 813, 816 (D.C. Cir. 2006) (evidence must be “in existence at the time of the hearing”); *Fitel/Lucent*

¹² Prior to revisions in 2017, the cited language appeared in Section 102.48(d)(1).

Techs., Inc., 326 NLRB 46, 46 n.1 (1998) (same). *Accord Winchell Co.*, 305 NLRB 903, 903 n.1 (1991), *enforced*, 977 F.2d 570 (3d Cir. 1992).

The Company faces an uphill battle in challenging the Board’s denial of a motion to reopen the record, which is an “extraordinary” request. 29 C.F.R. § 102.48(c)(1). The Court reviews the Board’s denial of such a motion only for an abuse of its discretion. *NLRB v. Miller Waste Mills*, 315 F.3d 951, 955 (8th Cir. 2003) (Board acted within its discretion in denying motion to reopen record that “failed to meet the requirements of the Board’s rules and regulations”). Further, the Board’s interpretation of its rules and regulations is given “controlling weight” unless it is “plainly erroneous or inconsistent with the regulation itself.” *Canadian Am. Oil Co. v. NLRB*, 82 F.3d 469, 473 (D.C. Cir. 1996); *accord Parkwood Developmental Ctr., Inc. v. NLRB*, 521 F.3d 404, 410 (D.C. Cir. 2008).

B. The Board Acted Within Its Discretion in Denying the Motion To Add the Arbitration Award, which Issued Long after the Close of the Hearing, to the Record

In April 2018, nine months after the record closed, the Company filed a motion to reopen the record to submit an arbitration award issued in March 2018, which addressed no statutory issue or *Wright Line*-motive analysis, but only determined whether the Company had grounds for disciplining Topor under the

collective-bargaining agreement. (JA 715, 721-25.)¹³ The Board properly denied the motion because the Company “had not demonstrated that the award constituted evidence that is newly discovered or previously unavailable.” (JA 728 n.1.) As just shown, it is settled that evidence is not “newly discovered” under 29 C.F.R. § 102.48(c)(1) if, as is admittedly the case here, it came into existence after the close of the hearing. Thus, the Board acted well within its discretion—and in accordance with longstanding precedent, including the recent decisions cited by the Company (Br. 56-58)—in denying the Company’s motion to introduce evidence that was created long after the hearing closed.

The Company insists that the Board was “empowered to . . . receive” the arbitration award pursuant to 29 C.F.R. § 102.48(c)(1). (Br. 61.) The issue, however, is not whether the Board was empowered to receive it, but whether the Board abused its discretion in declining to do so. It clearly did not.

Nor does the Board’s long-held interpretation of its own regulation obviate the regulation’s reference to “evidence which has become available only since the close of the hearing,” as the Company wrongly contends. (Br. 57). Rather, the rule’s requirements together cover evidence that was in existence at the time of the

¹³ As such, the arbitration award did not address, much less “govern” (Br. 60-61), the issue presented here, and would not “require a different result” as is necessary to warrant reopening the record pursuant to 29 C.F.R. § 102.48(c)(1). It is of no moment (Br. 60) that the arbitrator did not find Topor credible, as the judge here was entitled to rely on the testimony he heard and demeanor he observed.

hearing and previously unavailable, which entails a good reason (i.e., no undue delay or lack of diligence) for not offering the evidence during the hearing. As the courts have noted, “any other approach would put a premium on protracted litigation by encouraging employers to delay compliance in the hope that new and favorable circumstances would develop.” *NLRB v. Cutter-Dodge, Inc*, 825 F.2d 1375, 1380-81 (9th Cir. 1987).¹⁴

C. Before the Board, the Company Failed To Preserve any Challenge to the Denial of Its Motion To Reopen the Record To Admit the MNOSHA Letter; In Any Event, the Judge Acted Within His Discretion

In October 2017, the Company moved the administrative law judge to reopen the record to introduce a letter it had received that September—after the close of the hearing—from MNOSHA. The judge denied the motion because the letter did not qualify as “newly discovered” evidence, and because it would not impact the outcome of this case. (JA 738); *see* p. 50.¹⁵ The Company failed to

¹⁴ The Company failed to preserve any claim regarding any failure to defer to the arbitration process, which it did not raise to the Board on exceptions, in its motion to reopen, or otherwise. (Br. 60-61.) The Court, as shown (p. 21), lacks jurisdiction to consider claims that were not raised to the Board.

¹⁵ The Company errs in suggesting (Br. 59) the Board relied heavily on an earlier MNOSHA letter regarding Topor’s state-law discrimination claim. While there was no error in admitting that letter, which, unlike the second letter, existed during the hearing, the Board did not discuss it in its *Wright Line* analysis (JA 739-43), or otherwise rely on it. The letter the judge refused to enter in the record did not discuss the validity of Topor’s safety concerns, or of the Company’s decision to

present any substantive arguments to the Board challenging the judge's denial of its motion. Accordingly, the Court lacks jurisdiction to consider them now.

As shown (p. 21), Section 10(e) of the Act, 29 U.S.C. § 160(e), bars the Court from considering any argument not presented to the Board. Section 10(e) implements the bedrock principle that agency determinations should not be overturned except based on objection made at the time and in the manner appropriate under its practice and procedures. *See generally United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952). While the Company formally excepted to the judge's denial of its motion to reopen before the Board, it failed to provide any supporting argument. (JA 701.) As the Board explained (JA 728 n.3), that "bare" exception does not preserve an argument under Board rules and regulations. *See Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 n.1 (2005) (disregarding, as failing to meet the minimum requirements of Board Rule 102.46(a), 29 C.F.R. § 102.46(a), bare exceptions that fail to state "on what grounds the purportedly erroneous findings should be overturned"), *enforced*, 456 F.3d 265 (1st Cir. 2006). Accordingly, this Court is jurisdictionally barred from reviewing any such argument now. Moreover, the Company has waived before this Court any challenge to the Board's ruling that its bare exception was

discipline him; it stated only that MNOSHA would issue no citation as a result of a safety inspection it conducted at the Company that June. (JA 646.)

inadequate, which its opening brief does not mention, much less challenge. *See* pp. 20-21. Because the Company waived any challenge to the judge's ruling before the Board, and has waived, before this Court, any challenge to the Board's determination that it did so, the Court should summarily affirm the Board's denial of the motion.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court deny the Company's petition for review and enforce the Board's Order in full.

Respectfully submitted,

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November 2018

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

ST. PAUL PARK REFINING CO., LLC)
D/B/A WESTERN REFINING)

Petitioner/Cross-Respondent)

Nos. 18-2256 & 18-2520

v.)

NATIONAL LABOR RELATIONS BOARD)

Respondent/Cross-Petitioner)

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 27(d)(2), the Board certifies that its brief contains 12,897 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016. The Board further certifies that the brief has been scanned for viruses using Symantec Endpoint Protection version 13.3.1.14 and it is virus-free according to that program.

/s/ Linda Dreeben

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Dated at Washington, DC
this 16th day of November 2018

**UNITED STATES COURT OF APPEALS
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Respondent/Cross-Petitioner)

CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2018, I electronically filed the foregoing with the Clerk for the Court of the United States Court of Appeals for the Eighth 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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