

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

CHARTER COMMUNICATIONS, 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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STATEMENT REGARDING ORAL ARGUMENT

The National Labor Relations Board (“the Board”) submits that this case involves the application of established legal principles to factual findings which are well supported by record evidence and reasonable witness-credibility determinations, and that oral argument is therefore unnecessary. However, if the Court concludes that argument would be helpful, the Board requests to participate.

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Charter Communications, LLC (“the Company”) for review, and the cross-application of the Board for enforcement, of a Board Decision and Order issued against the Company on March 27, 2018, and reported at 366 NLRB No. 46. The Board had jurisdiction over the unfair-labor-practice proceeding below pursuant to Section 10(a) of the National Labor Relations Act, 29 U.S.C. §§ 151, *et seq.*, as amended (“the Act”). 29 U.S.C. § 160(a). The Board’s Order is final, and this Court has jurisdiction pursuant to Section 10(e) and (f) of the Act. 29 U.S.C. § 160(e), (f). The petition and application are timely, as the Act provides no time limit for such filings.

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the Board’s findings that the Company violated the Act by unlawfully surveilling union activity, making coercive statements and subjecting an employee to closer monitoring, and discriminatorily reassigning three employees to rural areas.

2. Whether substantial evidence supports the Board’s findings that the Company violated the Act by discriminatorily discharging three employees.

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

A. Background; the Company Employs Field Auditors French, DeBeau, and Schoof

The Company provides television, internet, and telephone services to customers throughout the United States, including from its field offices in Saginaw and Bay City, Michigan. (D&O13; R.380.)¹ Among the employees working out of the Saginaw office are field auditors responsible for inspecting residential properties. (D&O14; R.46-47.) Prior to the events of this case, there were four field auditors at the Saginaw office: Jonathan French, James DeBeau, Raymond Schoof, and Kent Payne. (D&O13-14; R.46-47.) French and Schoof were hired by the Company in August 2012, and DeBeau was hired in March 2013. (D&O14, 21; R.39, 1011.) From 2006 to 2009, French had worked for a third-party contractor in Saginaw that performed work for the Company. (D&O14; R.118-19.) Before being hired by the Company, DeBeau and Schoof had worked for employers with unionized workforces. (D&O21; R.180-81, 894, 1012-13, 1173.)

¹ "R." references are to the Page ID # pagination of the full administrative record as filed with the Court at ECF Docket No. 12 (Aug. 20, 2018). "D&O" references are to the Board's March 27, 2018 Decision and Order (R.2383-2408). References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." refers to the Company's opening brief.

B. Union Organizers Distribute Pro-Union Flyers on July 15; the Company's Supervisors and Managers Begin Monitoring the Union Activity

In June 2014, French contacted an organizer for the International Brotherhood of Electrical Workers about unionizing the Company's employees. (D&O14; R.51-53.) In mid-June, a non-employee friend of French placed pro-union flyers prepared by French on cars parked at the Bay City field office. (D&O14; R.53-54, 2031-33.) On July 15, three union organizers, including the one contacted by French, began distributing pro-union flyers outside the Saginaw office. (D&O1, 14; R.53-54, 303-05, 1942.)

In response, three of the Company's supervisors, including the direct supervisor of the Saginaw field auditors, Shawn Felker, went out to the parking lot to observe the handbilling. (D&O1, 14; R.306-07, 863-64.) Felker promptly called his direct superior, Manager of Plant Security Terry Teenier, and informed him of the union organizers' presence. (D&O1; R.381, 863-64.) Teenier proceeded to drive from the Bay City field office to the Saginaw office in order to observe the handbilling. (D&O1; R.382-85, 388-89.) Teenier also informed his own direct superior, Regional Plant Security Director Greg Culver, and was instructed to observe which employees were taking the pro-union flyers. (D&O1, 4; R.383.) Prior to Teenier's arrival, another supervisor asked Felker whether French worked for him, and stated that he had heard French was "one of the ones

who had orchestrated” the organizers’ presence. (D&O14; R.866.) The assembled supervisors stood near the union organizers for up to 90 minutes, spoke to passing employees, and asked at least one employee whether he had taken a flyer. (D&O1, 4; R.306-07, 864-66, 1305-06, 2034.)

Later that same day, company managers began holding regular conference calls regarding the threat of unionization. (D&O1, 14; R.389-90, 399, 2040-42.) During the first conference call, they identified French as potentially being involved with the union organizers. (D&O1; R.515.) The Company’s Human Resources Director and its Vice President for Michigan made written notes that French liked “to stir the pot” and was “trouble,” that French’s name was brought up as someone “trying to get [a] union,” and that another employee was a “trouble maker [who] listened to [French].” (D&O14-15; R.2042, 2059.) The Human Resources Director’s notes also included an instruction to “pull” French’s performance review and time card. (D&O15; R.2042.) Regional Vice President Joe Boullion directed Teenier to speak with French about the union activity. (D&O1, 15; R.390, 515, 2059.)

C. Teenier Speaks to French About the Union on July 16

The following day, July 16, Teenier drove out to French’s location in the field and instructed French to get in Teenier’s vehicle. (D&O5, 24; R.58-59, 390-91.) Teenier asked French if he “had any information about what went on with the

[distribution of pro-union flyers]” or if he knew the names of any employees involved with the union, to which French responded that he did not have any information. (D&O1-2; R.59, 200.) Teenier then stated that French’s name had come up as someone who was involved with the union, although he did not reveal how the Company’s managers had learned of French’s involvement. (D&O2, 5; R.391.) Teenier further warned that French was “being looked at closely by members of upper management” because of his suspected union activity. (D&O2, 5; R.391-93.) During that July 16 conversation, Teenier stated that if French had any concerns about the Company’s supervisors or managers, or any other concerns, then he could come to Teenier directly. (D&O2, 5; R.391.)

D. Culver Accompanies French on a Ride-Along on July 17

On July 17, Culver met French at the Saginaw office and went on a “ride-along” to observe French performing his job duties in the field. (D&O2, 6; R.59-60, 64, 203-04, 547, 2044, 2046.) Prior to July 17, Culver had never had any one-on-one contact with French, and he had never gone on a ride-along with a field auditor at the Saginaw office. (D&O6; R.61-62, 430.) No manager had ever previously accompanied French on a ride-along. (D&O6; R.203, 207.)

E. The Company Reassigns French, DeBeau, and Schoof to Rural Areas for Several Weeks

During another union-related conference call in late July, one of the Company’s managers stated that he had heard that French was the main union

instigator, and that the other Saginaw field auditors, including DeBeau and Schoof, were also involved with the union. (D&O2, 6; R.394-95.) In response, Regional Vice President Boullion instructed Teenier to “isolate” the field auditors from the other employees at the Saginaw office. (D&O2, 6; R.394-95.) Teenier complied by reassigning the field auditors to rural areas outside the vicinity of Saginaw; French, in particular, was reassigned to areas between 30 and 45 miles away. (D&O2, 6, 15; R.64-66, 395, 1033-34, 1180-82.) When DeBeau asked why he was being abruptly reassigned, Teenier responded that there was “a lot of attention on us from upper management because of union activity and that [DeBeau’s] name had [come] up.” (D&O6, 8; R.397, 1035.) The field auditors’ reassignments to rural areas lasted several weeks. (D&O6; R.399, 420.)

F. Teenier Reassigns French, DeBeau, and Schoof to Supervisor Lothian

Through July and August and into September, the Company’s managers continued to hold regular conference calls regarding the threat of unionization. (D&O1, 14; R.399, 2040-41.) The Company also began requiring employees at the Saginaw and Bay City offices, and across Michigan, to attend “union avoidance” meetings. (D&O1; R.68-70, 399-401, 870-71, 2040-41, 2045.) In early September, Teenier reassigned French, DeBeau, and Schoof, who had been working under the direct supervision of Felker, to work under supervisor Rob Lothian. (D&O15; R.71-72, 421-22.) Teenier’s goal was, in part, to take the

“union spotlight” off Felker and his team. (D&O7; R.420-22.) Referring to French, Lothian immediately complained that Teenier had given him “the guy that caused all the union problems.” (D&O15; R.881.) Lothian made it known to management that he was upset about having the three field auditors assigned to him, and that he suspected Teenier was setting him up for failure in an attempt to “force him out.” (D&O8; R.423, 537, 850, 2145.)

G. Lothian Prompts an Investigation of Teenier, DeBeau, and Schoof

Shortly thereafter, in mid-September, Lothian approached Human Resources Generalist Stephanie Peters and informed her that he had heard from Felker that Teenier and employees DeBeau and Schoof had been laying sod at Schoof’s house during working hours. (D&O2, 16; R.2145-47.) Lothian also alleged that Teenier had been instructing employees to complete other non-work-related “special projects” during working hours, including work on a haunted house for the owner of an auto-repair shop that did business with the Company, and repairs on a rental property owned by Teenier. (D&O2, 16-17; R.2145-47.) He made no claim that French had engaged in any wrongdoing. (D&O17 & n.23.) According to the investigatory report prepared by Peters, Lothian suggested that Felker wanted the three field auditors reassigned to Lothian due to poor productivity numbers resulting from their non-work-related projects. (D&O8-9; R.2145-47.) Culver checked the productivity numbers for Felker’s team and informed Peters that the

numbers were in fact “outstanding.” (D&O9; R.2113.) In mid-September, Peters instructed Lothian to maintain the confidentiality of the investigation and not to discuss it with anyone else. (D&O17 & n.20; R.2146.)

As part of her investigation, Peters separately interviewed Felker, Schoof, and DeBeau in late September. (D&O19.) All three refuted Lothian’s allegations while explaining that, several weeks earlier, Teenier and DeBeau had helped lay sod at Schoof’s house after working hours. (D&O8; R.2148-51.) In his interview, DeBeau did acknowledge that, at the request of the owner of the auto-repair shop, he had spent time helping at the owner’s haunted house while waiting for his work vehicle to be repaired. (D&O8; R.2151.) DeBeau otherwise would have sat idle during that time and, in keeping with the Company’s accepted practice, he adjusted his schedule to work the required eight hours on the day in question. (D&O8; R.1051-60, 2160.)

H. Lothian Discusses the Union and the Ongoing Investigation with French on September 30

On September 30, Lothian met French in the field to conduct a safety check of French’s work vehicle. (D&O2, 15-16; R.73.) At some point, Lothian abruptly asked French if he knew “what was going on,” to which French responded that he did not. (D&O2; R.74.) Lothian then stated that French had been “outed as the union mastermind.” (D&O2; R.74, 183-84.) French denied any involvement with the union and added that he was not “going to rat anyone out.” (D&O2; R.74.)

Lothian asked if he “could trust” French and, when French answered affirmatively, explained that he had contacted Human Resources about Teenier, DeBeau, and Schoof laying sod during working hours, and that “the landscape of the department was going to change.” (D&O2, 6; R.74-76.) Lothian reiterated that French had been “outed as the union mastermind,” and warned that French “should get on [Lothian’s] side with this because people were going to get fired.” (D&O2, 6; R.74-75, 87-88.) Lothian added that, “years ago,” he had become a supervisor “by squashing a union drive.” (D&O2, 16; R.75.) Lothian then began talking about a variety of subjects, including his personal finances and his concern that the Company might fire him. (D&O16, 18; R.75.)

I. French Contacts Schoof About Lothian’s Disclosures; Schoof Notifies Peters; Peters Interviews French

The day of the safety check, or the following day, French called Schoof and described his encounter with Lothian. (D&O16; R.1210.) Pursuant to an earlier confidentiality instruction, Schoof promptly notified Peters that French knew about the ongoing investigation. (D&O16; R.1211, 2151-52.) Schoof told Peters that, according to French, Lothian had informed French of the investigation during a safety check on September 30. (D&O17; R.1211, 2152.) Peters then instructed French to appear for an interview on October 2. (D&O18; R.77.)

During that interview, French explained to Peters that he had learned about the investigation from Lothian during the September 30 safety check, and that he

otherwise did not have any material knowledge of the alleged sod-laying incident. (D&O18; R.78.) French relayed the content of his conversation with Lothian, including his impression that Lothian had been acting “weird.” (D&O18; R.2152.) At one point, French mentioned that he had previously witnessed Lothian with a gun at work. (D&O18 & n.25; R.79-80, 241-42.)

Peters called Lothian the following day and he denied having spoken to French recently, while stating that he seldom talked to French “because of [French’s] union involvement.” (D&O18; R.2154.) Peters interviewed other employees who knew about the ongoing investigation, including one employee who explained that Lothian had tried to talk to him about it, and another employee who Peters failed to question further about the source of his information. (D&O19-20; R.2158-59.) Near the end of her investigation, Peters interviewed Teenier, who denied Lothian’s accusations and largely corroborated the other employees’ accounts. (D&O8; R.2155-58.)

J. The Company Discharges French, DeBeau, and Schoof; All Three Employees File Charges with the Board

On October 14, the Company informed French that his employment was being terminated for unspecified violations of its code of conduct and employee handbook. (D&O19; R.83-84, 1943.) The Company refused to be more specific at the time. (D&O19; R.84, 87.) The Company discharged DeBeau and Schoof the same day for violating the Company’s “Ethics Standards” and “Professional

Conduct” policy, and, in DeBeau’s case only, its “Timekeeping” policy. (D&O8, 20; R.2027, 2030.) The discharge notices did not further specify the reasons for the discharges. (D&O8; R.2027, 2030.)

In November 2014, French filed an unfair-labor-practice charge with the Board alleging that his discharge and Lothian’s comments during the September 30 safety check violated the Act. (D&O2 n.8; R.1919, 1924.) DeBeau and Schoof filed separate charges in early 2015 alleging that their discharges also violated the Act. (D&O13; R.1910, 1915.) French amended his charge in late 2015 to allege additional violations of the Act during the summer of 2014, including other coercive comments by company managers and discriminatory reassignment of French, DeBeau, and Schoof. (D&O13; R.1897-99, 1903-05.) The Board’s General Counsel issued a consolidated unfair-labor-practice complaint in January 2016. (D&O13; R.1883-89.) An administrative law judge held an evidentiary hearing and issued a recommended decision finding merit to numerous allegations while dismissing others. (D&O13-26.) The Company and the General Counsel filed exceptions with the Board to the judge’s decision. (D&O1.)

II. THE BOARD’S CONCLUSIONS AND ORDER

The Board (Members Pearce, McFerran, and Emanuel) affirmed some of the judge’s recommended findings, as modified, and reversed others. (D&O1.) Specifically, the Board found that the Company violated Section 8(a)(1) of the Act

by surveilling union activities, by creating the impression of surveillance of union activities, by coercively interrogating French about his union activities, by threatening French with closer supervision because of his union activities, by soliciting grievances from French and impliedly promising to remedy them to discourage support for a union, by closely monitoring French because of his union activities, and by threatening French with discharge for his union activities.

(D&O10.) The Board also found that the Company violated Section 8(a)(3) and (1) of the Act by discriminatorily reassigning employees French, DeBeau, and Schoof to rural areas, and by later discriminatorily discharging them. (D&O10.)

The Board's Order requires the Company to cease and desist from the unfair labor practices found, and from, in any like or related manner, restraining or coercing employees in the exercise of their statutory rights. (D&O11-12.)

Affirmatively, the Board's Order requires the Company to: offer French, DeBeau, and Schoof full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions; make French, DeBeau, and Schoof whole for any loss of earnings and other benefits as a result of the discrimination against them; remove from its files any reference to the unlawful discharges; provide necessary records and reports to the Board; and post remedial notices at its Saginaw and Bay City, Michigan facilities. (D&O11-12.)

SUMMARY OF ARGUMENT

This case involves a host of unlawful actions undertaken by the Company in response to nascent union activity among its employees during the summer of 2014. The Company's upper management launched a coordinated campaign to stop the union activity, beginning with its coercive surveillance of union handbilling in mid-July, and continuing with its identification of French as a lead union instigator—singling him out and subjecting him to closer monitoring and a variety of coercive threats. By late July, the Company had become convinced that the union activity was originating from the Saginaw field auditors as a group, and its managers (mistakenly) identified DeBeau and Schoof as being involved with the union along with French. The Company responded by ordering that the Saginaw field auditors be “isolated” to rural areas in order to make it more difficult for them to speak with coworkers. Substantial evidence supports the Board's findings that the above actions violated the Act, and that the relevant unfair-labor-practice allegations were procedurally timely. Indeed, the evidence of unlawful conduct is particularly strong in this case given the Board's reasonable decision to credit the candid testimony of one of the Company's former managers, who described some of the anti-union conduct that had gone on behind the scenes.

Substantial evidence also supports the Board's findings that the Company's anti-union campaign culminated in its discriminatory discharge of French, DeBeau,

and Schoof for pretextual reasons in early October. French's discharge occurred shortly after his direct supervisor threatened him with discharge and identified him as the "union mastermind," and was purportedly based on misconduct which the Company did not reasonably believe had occurred, and which the Company made no effort to investigate. The Company discharged DeBeau and Schoof the same day as French after a perfunctory and unreasonably credulous investigation into secondhand claims by an aggrieved supervisor, whose story the Company knew to be false in key respects. It is noteworthy that the Company declined to call this supervisor to offer any testimony at the unfair-labor-practice hearing. Moreover, the Board found that the Company's decision to summarily discharge the employees was inconsistent with a regular practice of not discharging employees for similar or worse offenses, thus establishing disparate treatment and supporting a finding of pretext. Tellingly, the Company ignores the Board's disparate-treatment finding in its opening brief—as such, it has waived any response.

In general, the Company has failed to show that the Board's findings lack the support of substantial evidence that could satisfy a reasonable factfinder, or that the Court should take the extraordinary step of rejecting the Board's witness-credibility determinations. Thus, full enforcement is warranted.

STANDARD OF REVIEW

The Court will defer to the Board's findings if they are supported by substantial evidence in the record as a whole. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (citing 29 U.S.C. § 160(e)); *NLRB v. Galicks, Inc.*, 671 F.3d 602, 607 (6th Cir. 2012). Substantial evidence exists if there is "sufficient evidence for a reasonable factfinder to reach the conclusions the Board has reached," *Dupont Dow Elastomers LLC v. NLRB*, 296 F.3d 495, 500 (6th Cir. 2002), even if the Court might "justifiably have made a different choice had the matter been before it de novo," *Universal Camera*, 340 U.S. at 488. The substantial-evidence standard "gives the agency the benefit of the doubt, since it requires not the degree of evidence which satisfies the court that the requisite fact exists, but merely the degree that could satisfy a reasonable factfinder." *Loral Def. Sys.-Akron v. NLRB*, 200 F.3d 436, 448 (6th Cir. 1999). Deference is warranted unless the Court "cannot conscientiously find that the evidence supporting [the Board's] decision is substantial." *Bowling Transp., Inc. v. NLRB*, 352 F.3d 274, 285 n.13 (6th Cir. 2003).

The Court affords even more deference to the Board's witness credibility determinations and will not normally set aside the Board's conclusions. *Galicks*, 671 F.3d at 607; see *Temp-Masters, Inc. v. NLRB*, 460 F.3d 684, 692 n.3 (6th Cir. 2006) (holding that "credibility determinations are the province of the Board");

Kamtech, Inc. v. NLRB, 314 F.3d 800, 812 (6th Cir. 2002) (noting that courts are “uniquely *unsuited* to pass upon the legitimacy of such disputes”).

ARGUMENT

I. Substantial Evidence Supports the Board’s Findings That the Company Unlawfully Surveilled Union Activity, Made Coercive Statements, Subjected French to Closer Monitoring, and Discriminatorily Reassigned French, DeBeau, and Schoof to Rural Areas

Section 7 of the Act guarantees employees “the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or mutual aid or protection.”

29 U.S.C. § 157. Section 8(a)(1) makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees” in the exercise of the rights guaranteed by Section 7. 29 U.S.C. § 158(a)(1). An employer violates Section 8(a)(1) when its actions would have a “reasonable tendency” to coerce employees, even in the absence of evidence that employees were actually coerced. *Beverly Health & Rehab. Servs., Inc. v. NLRB*, 297 F.3d 468, 476 (6th Cir. 2002). Section 8(a)(3) of the Act makes it a separate unfair labor practice for an employer to discriminate against its employees in an attempt to discourage membership in a labor organization. 29 U.S.C. § 158(a)(3). A violation of Section 8(a)(3) results in a derivative violation of Section 8(a)(1). *Temp-Masters*, 460 F.3d at 689.

In response to nascent union activity among its employees in the summer of 2014, the Company undertook a series of coercive and discriminatory actions

throughout July and lasting into September that the Board reasonably found to constitute violations of the Act.

A. The Unfair-Labor-Practice Allegations at Issue Were Not Untimely Under Section 10(b) of the Act

As a preliminary matter, the Company contends (Br.40-48) that several of the unfair-labor-practices findings made by the Board, based on events in July and August 2014, were procedurally invalid because the underlying allegations were time-barred. The Board reasonably found that the allegations in dispute were timely. (D&O2-4.)

Section 10(b) of the Act provides that “no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board.” 29 U.S.C. § 160(b). An otherwise untimely allegation is not barred by Section 10(b) if the allegedly unlawful conduct occurred within six months of a timely filed charge and is “closely related” to the allegations in that charge. *Don Lee Distrib., Inc. v. NLRB*, 145 F.3d 834, 844-45 (6th Cir. 1998) (citing *Redd-I, Inc.*, 290 NLRB 1115 (1988)). To make that determination, the Board considers three factors under its established *Redd-I* framework: (1) whether the new allegations involve the same legal theory or are of the same class as the original allegations; (2) whether they arise from the same factual situation or sequence of events; and (3) whether they are subject to the same or similar defenses. *Redd-I*, 290 NLRB at 1118. Contrary to the Company (Br.40), the Court

does not review such determinations by the Board *de novo*, but instead for substantial evidence. *Don Lee Distrib.*, 145 F.3d at 845.

In the present case, French initially filed an unfair-labor-practice charge with the Board on November 3, 2014, less than five months after he had first contacted a union organizer and only several weeks after the Company discharged him along with DeBeau and Schoof. (D&O2-3 n.8.) Thus, the entire course of conduct at issue in this case occurred less than six months prior to the original charge filed with the Board. *See supra* pp. 4-12. French's original charge alleged that he had been discriminatorily discharged for his union activity the previous summer, and that his supervisor, Lothian, had threatened him for his union support and had created an unlawful impression of surveillance. (R.1924, 1919.) Separate timely charges were later filed by DeBeau and Schoof alleging anti-union animus with respect to their own discharges. (R.1910, 1915.) In late 2015, French amended his original charge to allege additional anti-union statements and actions by the Company during the summer of 2014, including the three employees' discriminatory reassignment to rural areas. (R.1897-99, 1903-05.)

Applying its *Redd-I* framework, the Board concluded that the unfair-labor-practice allegations contained in the amended charges were closely related to French's original timely charge, and that they therefore satisfied the requirements of Section 10(b). (D&O2-4.) Substantial evidence supports that conclusion.

Under the first prong, the Board found that the amended allegations were of the same type as the original charge. (D&O3.) Most of the new allegations, like the original allegation that French had been threatened and given an impression of surveillance, involved the common theory that the Company engaged in conduct that had a reasonable tendency to discourage union activity. The only other new allegation, regarding the employees' discriminatory reassignment, relied on the same theory as the original allegation that French had been discriminated against because of union activity. The Company does not seriously dispute the Board's finding under the first *Redd-I* prong: it merely cites cases (Br.41-42) recognizing the undisputed proposition that the first prong alone is not determinative.

Under the second *Redd-I* prong, the Board found that the amended allegations were factually related to the original charge and, indeed, that the original and new allegations together demonstrated "a progression of events relating to [the Company's] response to the union campaign that culminated in the discharge of French." (D&O3.) The new allegations all involved interrelated examples of a coordinated anti-union campaign started in response to union activity initiated by French, and each incident alleged to be a violation of the Act was a manifestation of the anti-union animus that French originally alleged to have motivated his discharge. French was repeatedly singled out by the Company during the summer of 2014, resulting in the individual unfair labor practices

alleged in the amended charges as well as French's ultimate discharge, which was the focus of the original charge. In addition, the internal company response that instigated the Company's repeated targeting of French was the source of Lothian's later statements threatening French and identifying him as the "union mastermind," which were also alleged as unfair labor practices in the original charge. *See, e.g., Metro One Loss Prevention*, 356 NLRB 89, 100 (2010) (finding factual relation where allegations all concerned employer's reaction to union campaign and targeting of specific employee).

The Company's objections (Br.42-45) to the Board's analysis of the second *Redd-I* prong are without merit. First, the Company is incorrect that the union issue had died down by early August: the Company's managers continued to hold regular union-related calls into at least September, the charging parties remained isolated in rural areas during much of August, and the Company's supervisors and managers continued to be focused on the union during September even before Lothian's unlawful statements on September 30. Second, the allegations were not "of a different nature" (Br.43) simply because the Company seized on Lothian's claims of misconduct as pretext to launch a human-resources investigation that indirectly resulted in the discriminatory discharge of French, who was not himself implicated by Lothian's claims. Finally, the Company's assertion that "different actors" were involved (Br.44) is false: a small group of managers were involved

with monitoring the union handbilling, instructing Teenier to meet with French on July 16, instructing Teenier to isolate employees in late July, and deciding to discharge French. That group included Regional Plant Security Director Culver, who was responsible for coercively monitoring French on July 17, and who was the decisionmaker behind the discharges in October. (D&O3 & n.10.)

Under the third *Redd-I* prong, the Board found that a reasonable respondent would have preserved similar evidence and prepared a similar case in defending against all of the allegations at issue. (D&O4.) French's original charge alleged that he was discharged because of the Company's anti-union animus, and the incidents alleged as separate violations in the amended charges were all directly relevant to that claim and cited as such in the unfair-labor-practice complaint. Even if the events in the amended charges had never been alleged as separate violations, they would have been litigated as evidence of the Company's anti-union animus. Contrary to the Company (Br.46-47), the amended allegations did not involve unrelated and isolated examples of generalized anti-union animus, but instead specific evidence that the Company repeatedly targeted French and harbored animus toward him because of his union activity. The Company's claim (Br.45) that it only disputed the incidents at issue in the amended charges because they were alleged as independent violations would mean, quite implausibly, that

the Company would have otherwise been prepared to simply concede that it harbored considerable anti-union animus toward French.

In sum, substantial evidence supports the Board's reasonable application of its *Redd-I* framework, which fulfilled its duty of interpreting the general timeliness requirements in the statute. As demonstrated below, moreover, substantial evidence supports the Board's unfair-labor-practice findings based on both the original and amended allegations.

B. The Company Unlawfully Surveilled the July 15 Union Activity

The Board first found that the Company violated Section 8(a)(1) of the Act when its supervisors unlawfully surveilled the union handbilling on July 15. Although an employer's managers may lawfully observe public union activities, it is a violation of Section 8(a)(1) for an employer to surveil such activities by engaging in conduct beyond mere lawful observation, such as "out of the ordinary" behavior, that would reasonably tend to interfere with employees' participation in the union activity. *Partylite Worldwide, Inc.*, 344 NLRB 1342, 1342-43 (2005); *see Clock Elec., Inc. v. NLRB*, 162 F.3d 907, 918 (6th Cir. 1998) ("[W]hen surveillance activity constitutes more than 'mere observation,' the employer's conduct violates the Act."); *Gainesville Mfg. Co.*, 271 NLRB 1186, 1188 (1984) (finding unlawful surveillance where supervisors stood close to union organizers

and observed handbilling, because, regardless of motive, such conduct “had a clear and obvious tendency to interfere with employee receipt of the union literature”).

Substantial evidence supports the Board’s finding that the Company’s conduct in response to the union handbilling crossed the line into unlawful surveillance. (D&O4.) The Company’s conduct was not limited to supervisors at the Saginaw facility passively observing the handbilling from a distance. Instead, they stood near the union organizers for the duration of the handbilling, spoke to passing employees, and asked at least one employee if he had taken a flyer. Moreover, a higher-level manager, Teenier, traveled from Bay City with the sole purpose of monitoring the handbilling. The Company does not dispute that Culver expressly instructed Teenier to observe which employees were taking the pro-union flyers, and it does not offer a legitimate reason for Teenier’s unexpected presence at the Saginaw facility. *See DHL Express, Inc.*, 355 NLRB 680, 680 n.2, 687 (2010) (finding unlawful surveillance where employer failed to explain presence of guards not normally present in area where handbilling was occurring).

In its brief (Br.47-49), the Company disregards or misconstrues the Board’s findings, and wrongly suggests that the Board and the administrative law judge reached different credibility determinations. The judge erroneously dismissed the allegation of unlawful surveillance on the basis that there was insufficient evidence that any supervisor took written notes or that supervisor Erskine reported the

names of employees to Teenier. (D&O23-24.) However, as the Board explained, the absence of that particular conduct is not determinative. (D&O4.) The Board did not “errantly” credit (Br.49) or rely on Teenier’s testimony about Erskine having reported names. Instead, the Board found unlawful surveillance based on the Company’s overall conduct “beyond the mere lawful observation of public union activity,” including Teenier’s out-of-the-ordinary decision to travel to Saginaw and (on the instructions of Culver) observe the handbilling, and the supervisors’ questioning of employees. (D&O4.) The Company ignores, and has thus waived any response to, those grounds for the Board’s finding. *Tri-State Wholesale Bldg. Supplies, Inc. v. NLRB*, 657 F. App’x 421, 425 (6th Cir. 2016).

C. The Company Made Coercive Statements to French on July 16

On July 16, just one day after the Company unlawfully surveilled the union handbilling, Teenier confronted French in the field and required him to engage in a one-on-one conversation inside Teenier’s vehicle. As the Board found, several aspects of that conversation violated the Act. The Company wrongly claims that French “denied” that Teenier made certain statements (Br.50, 54), whereas, in truth, French simply failed to mention all of the statements and Teenier’s testimony went uncontradicted. There is no basis for disturbing the Board’s decision to credit Teenier’s detailed account. *Galicks*, 671 F.3d at 607; *supra*, pp. 16-17.

1. Teenier created an unlawful impression of surveillance

An employer violates Section 8(a)(1) when it creates an unlawful impression of surveillance by making statements that would lead reasonable employees to believe that the employer has placed their union activities under surveillance.

Caterpillar Logistics, Inc. v. NLRB, 835 F.3d 536, 544 (6th Cir. 2016). Thus, for example, an employer acts unlawfully when it tells employees that it is aware of their union activities without revealing the source of that information—thereby leaving the employees to “speculate as to how the employer obtained its information” and “causing them reasonably to conclude that the information was obtained through employer monitoring.” *Stevens Creek Chrysler Jeep Dodge*, 353 NLRB 1294, 1296 (2009) (emphasis omitted), *enforced sub nom. Mathew Enter., Inc. v. NLRB*, 498 F. App’x 45 (D.C. Cir. 2012).

Substantial evidence supports the Board’s finding that Teenier created an unlawful impression of surveillance as part of his July 16 conversation with French. (D&O4-5, 24.) Pursuant to instructions from upper management, Teenier confronted French in the field and initiated a conversation with the goal of discussing the union activity. Teenier asked French if he had any information about the union handbilling, and then stated that French’s “name had [come] up” as someone involved with the union. (R.391.) Teenier did not elaborate or explain the source of that information. French had, in fact, secretly been in contact

the union and had initiated the handbilling. Thus, an employee in French's position would have been left to reasonably wonder how the Company knew of his involvement, creating an impression of surveillance.

The Company disregards (Br.51-53) the Board's finding that French was specifically told that *his* name had come up as being involved with the union. The fact that non-employee union organizers with no evident connection to French had engaged in public handbilling the previous day would not explain how the Company's managers knew that French, in particular, was involved. Contrary to the Company (Br.52), actual surveillance or further threatening remarks are not required to find a violation. *Caterpillar Logistics*, 835 F.3d at 544; *e.g.*, *NLRB v. Garon*, 738 F.2d 140, 143 (6th Cir. 1984) (affirming "clear[]" violation where employer created impression of surveillance by telling employees that it knew who was behind union campaign).

2. Teenier unlawfully interrogated French about the union

An employer also violates Section 8(a)(1) by interrogating employees about union activity in a manner that would, under the circumstances, reasonably tend to coerce them. *Caterpillar Logistics*, 835 F.3d at 543; *SAIA Motor Freight, Inc.*, 334 NLRB 979, 980 (2001). The Board considers factors such as the events leading up to the interrogation, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and whether or not the

employee being questioned was an open union supporter. *SAIA Motor Freight*, 334 NLRB at 980-81; *Kellwood Co.*, 299 NLRB 1026, 1026-27 (1990), *enforced mem.*, 948 F.2d 1297 (11th Cir. 1991).

Substantial evidence supports the Board's finding that Teenier unlawfully interrogated French. (D&O5.) Teenier was the superior of French's own direct supervisor, he confronted French alone in the field, and he instructed French to sit inside his truck. *See Caterpillar Logistics*, 835 F.3d at 543 (affirming unlawful interrogation where supervisor approached subordinate employee alone, creating "a potentially vulnerable setting," and asked about union). The conversation occurred just one day after union handbilling that had been secretly initiated by French. Teenier specifically asked if French "had any information" about the union or the handbilling. (R.59, 200.) The probing nature of Teenier's questioning is confirmed by the fact that Teenier was talking to French on the express instructions of the Company's upper managers, who had already identified French as a possible union supporter and wanted Teenier to find out what French knew. (R.390, 2059.) Given the context of the conversation, which involved additional coercive statements constituting violations of the Act, Teenier's questioning had a reasonable tendency to chill French's exercise of his statutory rights.

Contrary to the Company (Br.55), French's ambiguous testimony about not generally feeling "threatened" by Teenier does not suggest that his willingness to

engage in protected activities remained unaffected by Teenier's conduct. In fact, French testified that he recalled trying to change the subject away from the union during the July 16 conversation because he felt "uncomfortable." (R.59.) Even assuming, *arguendo*, that French did not feel intimidated, it is axiomatic that the subjective reactions of a particular employee are not determinative. *NLRB v. Elec. Steam Radiator Corp.*, 321 F.2d 733, 736 (6th Cir. 1963) ("[I]t is unnecessary to show that any employee was in fact intimidated or coerced by the statements made."); *see Seligman & Assocs., Inc. v. NLRB*, 639 F.2d 307, 309 (6th Cir. 1981) (holding that employees' friendly relationship with supervisor making threats was "irrelevant"). The Board applies an objective test and evaluates conduct based on whether it would reasonably *tend* to coerce employees. *Torbitt & Castleman, Inc. v. NLRB*, 123 F.3d 899, 906 (6th Cir. 1997) (reiterating that it is "unnecessary to show that any employee was in fact intimidated or coerced by the statements made," because the Board "does not consider subjective reactions" and "the test is whether the statement has a 'tendency to coerce'").

3. Teenier threatened French with closer supervision

The Board has additionally "long held" that an employer violates Section 8(a)(1) by threatening employees that they may be subject to closer supervision as a consequence of their protected activities. *Paul Mueller Co.*, 332 NLRB 312, 312 (2000) (citing cases). Substantial evidence supports the Board's finding that

Teenier unlawfully threatened French with closer supervision. (D&O5.) Along with the other coercive statements during the July 16 conversation, Teenier stated that French's name had come up as being involved with the union, that it was "bringing a lot of unwanted attention," and that French was "being looked at closely by members of upper management." (R.391-93.) Teenier could hardly have been more explicit in stating that French might be subject to closer scrutiny from the Company because of his association with union activity. The Company's renewed claim that French "never felt threatened by Teenier" (Br.54) is, again, factually unsupported and legally irrelevant. *See supra*, pp. 28-29.

4. Teenier unlawfully solicited grievances from French

Finally, an employer violates Section 8(a)(1) by soliciting grievances from employees in a context reasonably suggesting a promise to remedy the grievances, thereby "impressing upon employees that union representation [is] no longer necessary." *Amptech, Inc.*, 342 NLRB 1131, 1137 (2004), *enforced*, 165 F. App'x 435 (6th Cir. 2006). An employer's solicitation of grievances is not *per se* unlawful, but it raises a rebuttable inference that the employer is coercively promising benefits—and such inference is particularly strong where the solicitation of grievances deviates from the employer's established procedures for addressing employee complaints. *Amptech*, 342 NLRB at 1137; *Reliance Elec. Co.*, 191 NLRB 44, 46 (1971), *enforced*, 457 F.2d 503 (6th Cir. 1972).

Substantial evidence supports the Board's finding that Teenier unlawfully solicited grievances from French. (D&O5-6.) One day after the union handbilling had occurred, and in the context of a one-on-one conversation that repeatedly touched on the union, Teenier informed French that he could bring any concerns he had about his employment to Teenier directly. Teenier was not French's direct supervisor, and there is no evidence that he normally solicited grievances from employees. Indeed, Teenier's solicitation was inconsistent with the Company's written policies, which instructed employees to raise grievances with their immediate supervisor. (R.1951-52.) *See Reliance Elec.*, 191 NLRB at 46 (finding unlawful solicitation of grievances where employer deviated from normal practices shortly after learning of organizational campaign). In its brief, the Company misleadingly claims that Teenier's solicitation had "nothing" to do with the union. (Br.53-54.) In reality, it occurred during a conversation which was initiated by management specifically because of French's suspected union involvement, and which included several other unlawful union-related statements.

D. The Company Subjected French to Closer Monitoring on July 17

In addition to the coercive conduct described above, an employer violates Section 8(a)(1) by taking actions that reasonable employees would interpret as a sign that they are being monitored more closely as a result of their union activities. *See, e.g., Joseph Chevrolet, Inc.*, 343 NLRB 7, 19 (2004) (finding unlawful

coercive monitoring where it was unusual for supervisor to remain in work area or observe employees at work), *enforced*, 162 F. App'x 541 (6th Cir. 2006); *Gen. Fabrications Corp.*, 328 NLRB 1114, 1115, 1125-26 (1999) (finding unlawful coercive monitoring where manager began observing employee throughout workday), *enforced*, 222 F.3d 218 (6th Cir. 2000).

Substantial evidence supports the Board's finding that French would have reasonably interpreted Culver's ride-along as an indication that the Company was subjecting him to closer monitoring because of his suspected role in the ongoing union activity. (D&O6.) Prior to July 17, French had never had any one-on-one contact with Culver, who was a regional manager three levels of hierarchy above him, and Culver had never accompanied another Saginaw field auditor on a ride-along. Indeed, French had never previously been accompanied on a ride-along by any manager. Thus, just two days after union handbilling initiated by French, and just one day after French had been expressly threatened with closer supervision as a result of his perceived association with the union, he was subjected to an unprecedented ride-along with an unfamiliar senior manager.

The arguments in the Company's brief (Br.55-56) are largely inapposite, as the Board clarified that Culver did not engage in unlawful *surveillance* of protected conduct by accompanying French on a ride-along (D&O6). Instead, the Board found that Culver's decision to more closely monitor French's normal work

duties—in the unusual context described above—would have reasonably been interpreted as a response to French’s association with previous union activity. Even in the absence of an explicit threat or any resulting discipline (Br.56), and regardless of Culver’s subjective intent or the content of their discussion, the coercive effect of an upper-level manager accompanying an employee on an unexpected and highly unusual one-on-one ride-along is readily apparent given the circumstances of this case. *Cf. NLRB v. Homemaker Shops, Inc.*, 724 F.2d 535, 550 (6th Cir. 1984) (affirming violation where “ostensibly friendly” comments from manager “effectively put [employee] on notice that she was being watched on the orders of the highest management official, something the average employee would certainly take as a warning”).

E. The Company Discriminatorily Reassigned French, DeBeau, and Schoof to Rural Areas in July and August

It is “well settled” that an employer violates Section 8(a)(1) and (3) by transferring or reassigning employees in response to their union activity. *Temp-Masters*, 460 F.3d at 689-90; *e.g., Am. Red Cross Mo.-Ill. Blood Servs. Region*, 347 NLRB 347, 348 (2006) (finding that employer violated Act by “isolating” pro-union employees and rescheduling shifts to minimize contact with coworkers); *Alamo Rent-A-Car*, 336 NLRB 1155, 1179 (2001) (finding unfair labor practice where manager reassigned union supporter to remote worksite to prevent him from talking with other employees).

Substantial evidence supports the Board's finding that, in late July, the Company unlawfully reassigned French, DeBeau, and Schoof to rural areas as a result of their suspected union activity. (D&O6.) Indeed, the evidence here is remarkably clear. The Board credited testimony from Teenier—the manager directly responsible for reassigning the employees—admitting that Regional Vice President Boullion instructed him “to isolate the employees and keep them away from other technicians, other audiences so to speak,” due to the employees’ perceived union sympathies. (D&O6; R.394-95.) This occurred after another manager specifically identified each of French, DeBeau, and Schoof as being involved with the union. According to Teenier’s candid testimony, the directive from upper management to isolate the perceived union supporters was his sole reason for reassigning the employees when he did. When DeBeau expressed confusion about being abruptly moved “in the middle of [his] regular assignment,” Teenier explained that “there was a lot of attention on us from upper management because of union activity.” (R.394-97.) Teenier’s testimony was corroborated by DeBeau, who recalled Teenier stating at the time that he had been instructed “to keep the field auditors separated so that we wouldn’t talk about the union activity.” (R.1035.)

In its brief to the Court (Br.56-58), the Company misconstrues the Board’s findings. Contrary to the Company, Teenier did not state, and the Board did not

find, that Culver was the manager who instructed Teenier to reassign the field auditors. As such, the Company is wrong to imply that Culver's testimony, even if credited, would contradict the testimony given by Teenier. (D&O23.) Culver merely testified that *he* did not give instructions to isolate the field auditors, or hear another manager give such instructions. (R.1669-70.) The Board acknowledged that Culver's testimony was in conflict with testimony from supervisor Felker, who stated that Culver had also directed that the field auditors should be isolated (R.872-75), but the Board found it unnecessary to credit either witness in light of Teenier's separate admissions (D&O23 n.39).

In any event, as previously noted, the Court "will not readily disturb" the Board's credibility findings. *Temp-Masters*, 460 F.3d at 692 n.3. The testimony from Teenier, DeBeau, and Felker was all mutually corroborative, whereas on related issues the Board generally discredited Culver's testimony as "incredible" and "riddled with . . . inaccuracies." (D&O14 n.6, 19 n.28.) Moreover, the question of whether Teenier was ordered to do what he did is largely immaterial: even assuming that Teenier acted unilaterally, he was the Company's agent and he admittedly reassigned the employees because of their association with the union.

Given the Board's reasonable decision to credit Teenier's testimony, the remainder of the Company's arguments (Br.57-58) are irrelevant. Nonetheless, the Company is also wrong to assert that in rural areas the field auditors were not more

isolated (*see, e.g.*, R.66, 396, 1035), that the work in Saginaw had been fully completed (*see, e.g.*, R.212, 397, 525), and that the parties involved did not consider the abrupt reassignments unusual (*see, e.g.*, R.212, 397, 874-75, 1034-35). The Company also misrepresents Teenier’s testimony as stating that the union issue had subsided. (Br.57-58.) Teenier testified that he was personally unaware of any union activity that may have been going on “behind closed doors” as of August, but that upper managers continued to hold union-related conference calls into September or October. (R.399, 510-11.)

Even assuming the Company could now come up with plausible *post hoc* justifications for having reassigned the employees away from Saginaw in late July, it has failed to show—contrary to the credited testimony of the supervisor directly responsible—that Teenier would have reassigned the field auditors when he did even in the absence of the employees’ perceived association with union activity. (D&O6.) *See Temp-Masters*, 460 F.3d at 691-93 (affirming discriminatory reassignment where employer failed to affirmatively prove it would have taken same actions in absence of anti-union animus); *cf. NLRB v. White Motor Corp.*, 404 F.2d 1100, 1102 n.3 (6th Cir. 1968) (holding that it is unavailing for an employer to show that anti-union motives were not the “sole factor” leading to employee transfers, as “[i]t is enough if they were a contributing factor”).

Tellingly, the Company points to no evidence that Teenier was directed to reassign the employees at that time by another manager for a legitimate reason.

F. The Company Made Coercive Statements to French in September

On September 30, supervisor Lothian performed a safety check on French's vehicle in the field and subsequently began discussing the union with French. The Board found that two aspects of that conversation violated the Act. The allegations regarding Lothian were undisputedly timely under Section 10(b).

1. Lothian created an unlawful impression of surveillance

As previously discussed, *supra* pp. 26-27, an employer violates Section 8(a)(1) by creating an unlawful impression of surveillance when it tells employees that it is aware of their union activities without revealing the source of that information. Substantial evidence supports the Board's finding that Lothian did just that on September 30 when he stated that French had been "outed as the union mastermind," without elaborating further. (D&O6; R.74-75, 87-88, 183.) The Company essentially ignores (Br.59-60) the merits of the Board's unfair-labor-practice finding, which it conflates with the distinct finding that Lothian issued an unlawful threat of discharge, and the Company has therefore waived any challenge. *Tri-State Wholesale*, 657 F. App'x at 425.

To the extent that the Company is generally disputing the credibility of French's unrebutted testimony by suggesting that, in the Company's opinion,

“there [was] no reason” why Lothian should have brought up the union (Br.59), the Company has once again failed to carry its heavy burden to overturn credibility determinations, *e.g.*, *Galicks*, 671 F.3d at 607. French’s testimony was deemed credible by the Board, and the Company deliberately declined to call Lothian as a witness to offer a conflicting account.

2. Lothian threatened French with discharge

Employer statements that a reasonable employee would construe as threatening discharge or retaliation for engaging in protected activity also violate Section 8(a)(1), because they have an obvious tendency to coerce. *Armstrong Mach. Co.*, 343 NLRB 1149, 1151-52 (2004). Substantial evidence supports the Board’s finding that Lothian’s remarks during the safety check violated the Act in this respect. (D&O6-7.) Just after he stated that French had been “outed as the union mastermind,” Lothian proceeded to explain that French should “get on [Lothian’s] side,” because the “landscape of the department” was going to change and “people were going to get fired.” (R.74-76.) As part of this same conversation, Lothian stated that the Company had previously promoted him for “squashing a union drive.” (R.75.) A reasonable employee would understand Lothian’s statements as threatening discharge in connection with union activity.

The Company’s argument that French may not have subjectively felt threatened (Br.59-60) is, once again, immaterial. *Torbitt & Castleman*, 123 F.3d at

906; *supra*, pp. 28-29. Moreover, even assuming, *arguendo*, that French thought Lothian's threat was only referring to the human-resources investigation (Br.59-60), the obvious implication was that French was vulnerable as a known union supporter and that he should support Lothian's story to avoid getting fired himself—something which did in fact occur shortly thereafter.

II. Substantial Evidence Supports the Board's Findings That the Company Violated Section 8(a)(3) of the Act by Discriminatorily Discharging French, DeBeau, and Schoof

Section 8(a)(3) of the Act prohibits an employer from attempting to discourage membership in a labor organization by discriminating against its employees “in regard to hire or tenure of employment.” 29 U.S.C. § 158(a)(3). As a result, an employer violates the Act by discharging employees because of their association with union activity. *NLRB v. Link-Belt Co.*, 311 U.S. 584, 362 (1941). To determine whether an employer has discriminatorily discharged an employee, the Board applies its well-established *Wright Line* framework. *Wright Line*, 251 NLRB 1083, 1089 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981); *see NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 397-404 (1983); *FiveCAP, Inc. v. NLRB*, 294 F.3d 768, 777 (6th Cir. 2002). A violation is established under *Wright Line* if substantial evidence supports the Board's finding that an employee's association with union activity was “a motivating factor”

contributing to the employer's decision to discharge the employee. *FiveCAP*, 294 F.3d at 777; *see W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 870 (6th Cir. 1995).

Under the *Wright Line* framework, an employer can prevent the finding of a violation by proving, as an affirmative defense, that it would have made the same decision to discharge the employee even in the absence of any union activity.

Bowling Transp., 352 F.3d at 283; *NLRB v. E.I. du Pont de Nemours*, 750 F.2d 524, 528-29 (6th Cir. 1984). It is not enough for the employer simply to show that there is record evidence supporting an “alternative story”—the employer must prove that the Board could not have reasonably found that union activity was a motivating factor. *Galicks*, 671 F.3d at 608; *see W.F. Bolin*, 70 F.3d at 873-74. Where the employer's proffered justifications for discharging the employee are pretextual, the employer fails as a matter of law to carry its *Wright Line* burden; instead, such pretext reinforces a finding of anti-union animus. *Conley v. NLRB*, 520 F.3d 629, 643 (6th Cir. 2008); *Temp-Masters*, 460 F.3d at 692-93.

A. The Company's Decision To Discharge French Was Motivated by His Union Activity, and the Company Failed To Prove That It Would Have Discharged Him in the Absence of Union Activity

On October 14, the Company informed French that his employment was being terminated for unspecified violations of its code of conduct and employee handbook. At the time, the Company refused to elaborate further. The Board's

finding that French's discharge violated the Act is based on extensive record evidence.

1. The Company exhibited considerable anti-union animus and targeted French for his known union activity

Substantial evidence supports the Board's finding that French's union activity was a motivating factor for his discharge. (D&O7.) *See FiveCAP*, 294 F.3d at 777 (explaining that an unlawful motive can be established under *Wright Line* where an employee was engaged in protected activity, the employer knew of the employee's protected activity, and the employer exhibited anti-union animus). Within one day of the union handbilling, the Company's managers had identified French as being involved with the union. The Company then commenced a series of actions directed at French exhibiting anti-union animus, which continued through July, August, and September, and culminated in French's discharge (along with DeBeau and Schoof) in early October. The Company's actions in mid-July included coercively surveilling union handbilling initiated by French and singling out French while subjecting him to numerous instances of threatening conduct. In late July and August, the Company sought to isolate French by reassigning him to work in a rural area over 30 miles away from Saginaw. As of September, French's supervisors continued to view him as the source of a "union spotlight" from upper management (R.420-22), and as "the guy that caused all the union problems" (R.881). In late September, just two weeks

before French's eventual discharge, his direct supervisor singled him out as the "union mastermind" and threatened him with the possibility of discharge. (R.74-76.) *Turnbull Cone Baking Co. of Tenn. v. NLRB*, 778 F.2d 292, 297 (6th Cir. 1985) (noting that prior statements threatening discharge or retaliation constitute "especially persuasive evidence" of unlawful motivation). As discussed above, pp. 23-39, many of the Company's actions targeting French constituted independent violations of the Act, further reinforcing a finding of animus. *See, e.g., WXON-TV*, 289 NLRB 615, 625 (1988) (inferring anti-union animus from the presence of other unfair labor practices), *enforced*, 876 F.2d 105 (6th Cir. 1989).

The Company does not (Br.30-31) seriously dispute that substantial evidence supports the Board's findings that French was involved with union activity, that the Company was aware of his involvement, and that the Company's actions over a period of several months exhibited animus towards French's union activity. As a result, the primary question before the Court is whether the Board reasonably found that the Company failed to prove, as an affirmative defense, that it would have discharged French even in the absence of his union activity. The Company failed to carry its burden because, as explained below, its proffered justifications for discharging French were pretextual. Such pretext further reinforces the Board's finding of anti-union animus. *W.F. Bolin*, 70 F.3d at 871.

2. The Company's stated justifications for discharging French were pretextual

In its brief to the Court, the Company now claims that it would have discharged French in the absence of his union activity because he allegedly lied to Peters about Lothian informing him of the ongoing human-resources investigation, and because he allegedly lied about having seen Lothian with a gun at work in the past. (Br.31-34.) The Board found that both proffered reasons for discharging French were pretextual, and that the Company thereby failed to prove its affirmative defense under *Wright Line*. (D&O7, 14-21.)

As an initial matter, the Company does not address the Board's finding that the Company's failure to consistently identify the first of these justifications as a reason for French's discharge was conclusive evidence of pretext. (D&O7, 20.) As the Board explained, the Company failed to even raise French's alleged dishonesty about how he learned of the investigation in its post-hearing brief to the administrative law judge, and thus the Board found that the Company effectively admitted that it had no reasonable basis for concluding that French was lying in that respect. (D&O20.) The Company has waived any response to that specific finding by failing to address it. *Tri-State Wholesale*, 657 F. App'x at 425. Moreover, the fact that the Company has continued to proffer shifting explanations by now renewing its claim of having relied on the previously abandoned justification only further supports the Board's finding of pretext. *NLRB v. Evans*

Packing Co., 463 F.2d 193, 195 (6th Cir. 1972) (affirming violation where employer proffered “several inconsistent explanations” for discharge).

In any event, the Board found that the Company failed to prove that it reasonably believed that French was dishonest about how he learned of the investigation. (D&O19-20.) The Company was aware that at least two other employees also knew about the investigation, including one who told Peters that Lothian had tried to discuss it with him. (R.2158-59.) The Company made no attempt to pursue those leads. (D&O9, 19-20.) In addition, Peters’ own notes confirm that she was aware from Schoof that French had already identified Lothian as the source of his information even before being called in for an interview. (D&O17.) French had no discernible reason to lie about how he learned of the investigation, while Lothian had an obvious incentive insofar as he may have been subject to discipline for violating Peters’ confidentiality instruction. Given those facts, the Board found that the Company lacked a reasonable belief that French was lying about what Lothian had told him.

The only other nondiscriminatory justification offered by the Company for French’s discharge is the claim that he “lied” about having previously seen Lothian with a gun at work. (Br.32-34.) Once again, the Company disregards much of the Board’s analysis as to why the Company failed to prove that it reasonably believed French had lied. (D&O18-20.) French’s claim that Lothian had shown him a gun

at work on a previous occasion was entirely plausible. The testimony of numerous witnesses confirms that Lothian regularly brought guns to work. (R.241-42, 893, 1218-20, 1316-17.) Lothian had even been disciplined by the Company on a previous occasion for bringing a gun to work. And, once again, French was not a subject of the ongoing human-resources investigation and had no compelling reason to make up a story about Lothian.

In contrast, Lothian had already been disciplined in the past for bringing a gun to work and thus had an obvious incentive to deny having done so again. Despite that fact, the Company performed no real investigation to determine whether French was being honest. The extent of its inquiry was simply to note, irrelevantly, that the date of Lothian's *recorded discipline* for bringing a gun to work occurred before French's tenure with the Company. (D&O19-20; R.736, 829-32, 1438-41.) The Company did not take any steps to verify whether Lothian brought guns to work on later occasions as well—which, it would have quickly become apparent, he did. These facts amply support the Board's findings that the Company did not reasonably believe that French was making up his story about having seen Lothian with a gun at work, and that the Company's reliance on such claim was thus pretextual. (D&O7.)

Even assuming that the Company did reasonably believe French had lied, the Company cannot satisfy its *Wright Line* burden simply by showing that French

engaged in *some* minor misconduct—particularly where, as here, the evidence of anti-union animus is so strong. *Bally’s Park Place, Inc.*, 355 NLRB 1319, 1321 (2010) (noting that rebuttal burden increases with strength of animus evidence), *enforced*, 646 F.3d 929 (D.C. Cir. 2011). The Company has failed to prove that, in the absence of its months-long targeting of French for his union activities, it would have discharged French—who had no record of disciplinary issues—for making one or two irrelevant false statements. The Company never explains how French’s alleged lies “obstructed” (Br.31) its investigation into possible misconduct that had nothing to do with French (D&O17 & n.23). As the Board found, they would “not in any way [have interfered] with Peters’ investigation into the conduct of Teenier, Schoof and Debeau” and would have had no bearing on the truth or falsity of Lothian’s unrelated allegations. (D&O20.) As the Board further found in the context of analyzing the Company’s undisputed disparate treatment of DeBeau and Schoof (D&O9-10), the Company consistently issued less severe discipline to employees who had engaged in far more egregious misconduct.

In sum, there is no basis for setting aside the Board’s well-supported findings that the Company’s proffered justifications for abruptly discharging French were pretextual and that the Company was in fact motivated by French’s union activity.

B. The Company’s Decision To Discharge DeBeau and Schoof Was Motivated by Their Perceived Union Activity, and the Company Failed To Prove That It Would Have Discharged Either Employee in the Absence of Union Activity

The Company discharged DeBeau and Schoof on the same day that it unlawfully discharged French. Substantial evidence supports the Board’s findings that the discharges of DeBeau and Schoof also violated the Act.

1. The Company harbored anti-union animus and mistakenly believed or suspected that DeBeau and Schoof were involved with the union along with French

Unlike French, neither DeBeau nor Schoof actively participated in the union activity during the summer of 2014. However, it is well established that an employer violates the Act if it discharges an employee based on a mistaken belief that the employee had engaged in union activity or would do so in the future. *See Link-Belt*, 311 U.S. at 362 (affirming unlawful-discharge finding where employer mistakenly believed that employee was active member of union); *Remington Lodging & Hosp., LLC v. NLRB*, 847 F.3d 180, 185 (5th Cir. 2017) (citing cases). It is “immaterial that the employee was not *in fact* engaging in union activity as long as that was the employer’s perception and the employer was motivated to act based on that perception.” *Dayton Hudson Dep’t Store*, 324 NLRB 33, 35 (1997).

Substantial evidence supports the Board’s finding that the Company’s upper management suspected both DeBeau and Schoof of supporting unionization, and mistakenly believed that they were involved with the union. (D&O7-8.) Both

employees had been part of unionized workforces before being hired by the Company. The day after the union handbilling took place, company managers identified Schoof as a possible union supporter along with French, and Culver spoke to Schoof the same day he went on a ride-along with French. (R.2054.) Around the same time, Teenier questioned DeBeau about his union sympathies and warned him to steer clear of the union. (R.1031-32.) Later on, the Company's upper managers began to impute responsibility for the fledgling union activity to the Saginaw field auditors as a group, and Boullion remarked that all of the union activity seemed to be originating from Felker's team. (R.419-20.) As confirmed by the credited testimony of Teenier, by late July the Company's upper managers were specifically naming DeBeau and Schoof as being involved with the union along with French. (R.394.)

The Company's belief regarding DeBeau and Schoof was not merely idle speculation: it resulted in the Company actively interrupting their normal work in order to reassign them to rural areas for several weeks in late July and August, as discussed previously, pp. 33-37. The Company did so with the deliberate purpose of "isolating" DeBeau and Schoof (along with French) from coworkers due to upper management's belief that all three employees were involved with the union. (R.394-97, 1035.) The Company has not shown or alleged that anything occurred between late July and early October to change this belief on the part of its upper

management. To the contrary, in early September, Teenier moved French, DeBeau, and Schoof to Lothian's team in part to take the "union spotlight" from upper management off of Felker. (R.420-22.)

In sum, ample evidence supports the Board's finding that the Company mistakenly believed or suspected that DeBeau and Schoof were involved with the union along with French, and the backdrop to these events in the summer of 2014 was a coordinated anti-union campaign that repeatedly violated the Act and demonstrated the Company's anti-union animus, *see supra*, pp. 23-46.

2. The Company's reliance on allegations of misconduct to discharge DeBeau and Schoof was pretextual

In further support of its finding that the Company violated the Act by discriminatorily discharging DeBeau and Schoof, the Board found that the Company's stated justifications for discharging both employees were pretextual. (D&O8-10.) The Company claims (Br.36) to have discharged DeBeau and Schoof for misusing company time and for lying during the human-resources investigation into their alleged misconduct. However, as the Board found, there is "strong evidence" of pretext, thereby both reinforcing the Board's finding of anti-union animus and precluding the Company from carrying its *Wright Line* burden. (D&O8-9.) The Company entirely ignores one of the grounds for the Board's finding of pretext—that the Company inexplicably treated DeBeau and Schoof more harshly than similarly situated employees—and it has thereby effectively

conceded that substantial evidence supports the Board's ultimate finding. In any event, the Board's findings of pretext are well-supported by the record evidence.

a. The Company inexplicably treated DeBeau and Schoof more harshly than other employees

The Company fails to address the Board's finding that, even assuming the Company reasonably believed that DeBeau and Schoof had engaged in wrongdoing by lying or by misusing company time, it treated both employees disparately compared to other employees who had engaged in similar misconduct. (D&O9-10.) That finding of disparate treatment provides an independent basis for the Board's conclusions that the Company's proffered explanations were pretextual, and thus that its decision to discharge both employees was motivated by their perceived association with union activity. (D&O10.) *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1124 (2002) (rejecting employer's affirmative defense and finding pretext where discharge of two employees was inconsistent with employer's failure to discharge employees for comparable infractions in the past), *enforced mem.*, 71 F. App'x 441 (5th Cir. 2003); *see, e.g., Turnbull Cone Baking*, 778 F.2d at 297 (affirming that anti-union motivation can be inferred from "disparate treatment of certain employees compared to other employees with similar work records or offenses"). The Company has waived any response to the Board's finding of disparate treatment. *Tri-State Wholesale*, 657 F. App'x at 425.

In any event, substantial evidence supports the Board's disparate-treatment finding. The Board noted numerous prior incidents of comparable employee misconduct for which the Company failed to discharge the employees involved. (D&O9-10.) In one incident, the Company learned that an employee was regularly falsifying his timecard to add three to four hours per day while his vehicle was parked at home. (R.463-66.) In another incident, several employees were found to be falsifying work reports by claiming to have performed jobs at addresses that did not exist. (R.460-63.) The Board also relied on corrective-action reports demonstrating that the Company regularly chose to not discharge employees for misconduct involving falsification of records, dishonesty, and misuse of company time. (D&O9-10; *e.g.*, R.2063, 2066-67, 2071, 2075, 2088, 2092-95, 2098.) Moreover, the Company maintained a system of progressive discipline, and many of the employees subjected to discipline for the comparable misconduct noted above had extensive records of previous disciplinary warnings without being discharged.

In contrast, neither DeBeau nor Schoof had any record of prior discipline, and their recent productivity numbers were known to be "outstanding." (R.2113.) Indeed, all three discharged field auditors were considered model employees. (R.414, 423.) Based on the foregoing evidence of disparate treatment, the Board reasonably found that the alleged misconduct identified by the Company was used

as a pretextual excuse to discharge both DeBeau and Schoof. *See, e.g., Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 223-24 (D.C. Cir. 2016) (affirming finding of pretext where employer departed from progressive-discipline policy and had not discharged employees for comparable misconduct).

The considerable evidence of disparate treatment is by itself sufficient to support the Board's finding that the terminations of DeBeau and Schoof were pretextual. *Ozburn-Hessey Logistics*, 833 F.3d at 223-24. Thus, the Court does not even need to reach the issue of whether the Company reasonably believed that the alleged misconduct occurred. Even if the Company had reasonably held such a belief, the Board's unchallenged disparate-treatment finding precludes the Company from affirmatively proving that it would have discharged DeBeau and Schoof in the absence of their perceived association with union activity.

b. The Company lacked a reasonable belief that misconduct had occurred

However, substantial evidence also supports the Board's primary finding that the Company did not reasonably believe that DeBeau and Schoof engaged in the misconduct for which they were ostensibly discharged. (D&O8-9.) Although the Company interviewed numerous witnesses, it ultimately based its investigation into the employees' alleged misuse of company time almost entirely on the secondhand accusations made by Lothian. The Board properly found that the Company was not interested in determining whether DeBeau or Schoof had

actually misused company time—or, as the investigation proceeded, in determining whether they were actually being dishonest—and that the Company instead seized on Lothian’s questionable accusations as pretextual excuses to rid itself of employees it associated with the lingering threat of unionization. *See, e.g., Bourne Manor Extended Health Care Facility*, 332 NLRB 72, 80 (2000) (finding pretext where employer credulously accepted unreliable accusations and disregarded statements from other employees); *Burger King Corp.*, 279 NLRB 227, 239 (1986) (finding pretext where employer took complaint about employee at face value and exhibited “no real effort . . . to find out what truly happened”).

As the Board explained (D&O8-9), the Company inexplicably disregarded several obvious indications that Lothian was potentially biased and that he was not being entirely truthful. The Company was aware that Lothian was upset about Teenier recently transferring the three field auditors to him and that Lothian believed Teenier was trying to “force him out” or get him fired. (R.849-50, R.2145.) The Company was also aware, from Peters’ interview with French, that Lothian had relayed similar concerns to French and that Lothian was generally acting erratic. The Company’s illogical claim before the Board that it accepted Lothian’s story because he had no reason to lie thus suggests pretext. (D&O8.)

Even more revealing is the fact that, without explanation, the Company ignored concrete evidence that Lothian was being untruthful: he claimed that

Teenier was causing the field auditors to have poor productivity numbers, but the Company knew that the numbers were “outstanding” (R.2113); he claimed that he had not spoken to French recently, but the Company knew that he had performed a safety check with French just days earlier; and he claimed that he had not discussed the investigation with anyone, but the Company received multiple reports that he had. Furthermore, Lothian had initially made a host of accusations regarding specific “special projects” (R.2145-48), the majority of which were never investigated or verified in any way. Aside from the two incidents that the Company chose as pretextual excuses for discharging the employees, the only other allegation that the Company apparently bothered pursuing—the claim that DeBeau and Schoof had performed work on Teenier’s rental property—was immediately contradicted by the tenant of the property. (R.2155.)

Meanwhile, the other interviews conducted by the Company undermined Lothian’s claims. (D&O8.) According to the Company’s investigatory report, Felker—who Lothian claimed was the source of his information—disputed Lothian’s account and denied being aware of employees performing non-work-related projects during working hours or telling Lothian that they had. (R.2148-49.) Felker was under the impression that, four or five weeks earlier, Teenier and DeBeau had helped lay sod at Schoof’s house after work. (R.2148-49.) In his own interview, Schoof denied that he had ever performed a non-work-related project

during working hours. (R.2149-50.) Schoof explained that, four or five weeks earlier, DeBeau had helped him lay sod at his house after work, around 5:45 p.m. or 6:00 p.m., and that Teenier assisted them later in the evening. (R.2150.)

DeBeau likewise denied that Teenier had ever asked him to perform a non-work-related project during working hours. (R.2150-51.) DeBeau recalled that he had helped lay sod at Schoof's house a few weeks earlier after work, around 5:30 p.m. or 6:00 p.m., and that Teenier had joined them around 7:00 p.m. (R.2151.) The employees' recollections were remarkably consistent and mutually corroborative, and thus the Company's own investigatory report highlights the unreasonableness of taking Lothian's claims at face value.

The Board also explained why the administrative law judge's analysis was flawed. (D&O9.) *See Galicks*, 671 F.3d at 607 (clarifying that the Court owes deference to the Board, and that the Board's disagreement with the administrative law judge does not affect the standard of review). The judge relied heavily on Felker's apparent failure to show Peters a photograph he had taken of the sod project two weeks after its completion (D&O22), but, as the Board noted, that photograph was irrelevant and "would not have assisted in determining whether Schoof and DeBeau laid the sod during worktime" (D&O9). Felker told Peters at the time that he had no photos of anyone in the act of laying the sod. (R.2149.) Moreover, the judge never explained how Felker's failure to volunteer the

photograph was relevant to the reasonableness of the Company's investigation, or how Felker's own credibility was relevant to the Company's pretextual claims that DeBeau and Schoof were the ones being dishonest. The judge also mistakenly faulted DeBeau and Schoof for not remembering the exact date of the sod laying (D&O9), and suggested, contrary to Felker's testimony, that Felker thought DeBeau and Schoof were leaving work early despite Felker's clarification that he routinely had difficulty reaching numerous employees on their work phones (R.876-79).²

The Company's claim that it thought DeBeau was lying to protect himself is further undermined by the fact that DeBeau candidly admitted to Peters that he had helped with a haunted house during working hours as Lothian claimed. However, as the Board found (D&O8), and the Company does not contest, it was an accepted practice for employees to adjust their schedules as long as they worked eight hours

² In its brief to the Court (Br.37-39), the Company wrongly implies that DeBeau and Schoof admitted at the hearing that they were dishonest to Peters. None of the cited testimony supports that mischaracterization. Both employees indicated that, nearly two years after the events in question, there were many details they did not recall. (*E.g.*, R.1137, 1147, 1290.) Schoof's comment that he had "come up with a story" (Br.39) referred to having guessed about his exact work schedule (R.1207-10), and the Company fails to explain how telling Peters that he was on a 10-hour schedule was materially deceptive or self-beneficial. Moreover, the employees' testimony at the hearing is not directly relevant to the Board's findings that the investigation in October 2014 was perfunctory and that the Company did not have a reasonable basis for concluding that the employees had engaged in misconduct.

on the day in question. DeBeau briefly helped with the haunted house while his work vehicle was being repaired—which prevented him from performing any other work for the Company and would have required him to sit idle—and he adjusted his schedule to work eight hours on the day in question. Moreover, DeBeau asked for and received permission to help with the haunted house, and the Company’s assertion that DeBeau should have been discharged despite receiving permission merely reinforces a finding of pretext. *Marriott Corp.*, 310 NLRB 1152, 1158-59 (1993).³ Particularly given the evidence of disparate treatment discussed previously, this lone incident of an alleged “timekeeping” violation does little to help the Company’s implausible claim that it would have immediately discharged DeBeau in the absence of his perceived association with the union. To the contrary, the Company’s reliance on this minor incident even more clearly demonstrates the pretextual nature of the Company’s proffered justifications.

In sum, substantial evidence supports the Board’s findings that the Company was motivated by anti-union animus when it seized on pretextual allegations of

³ The Company once again mischaracterizes DeBeau’s testimony by stating that “he had worked at the haunted house on three occasions, but only once had permission.” (Br.37.) DeBeau’s testimony was clear that the other two times he helped at the haunted house were after work. (R.1048-51.)

wrongdoing to discharge DeBeau and Schoof on the same day that it unlawfully discharged French.⁴

⁴ The fact that the Company also discharged supervisors Teenier and Felker (Br.8-9, 20-21) does not cut in either direction, as the motive for those discharges was not litigated in this case. There was evidence, which the Board did not rely on and which was not fully developed, that the Company had come to suspect both supervisors of also being unduly sympathetic to unionization. (*E.g.*, D&O22-23; R.2049-50, 2054, 2060.)

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

Respectfully submitted,

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National Labor Relations Board
January 2019

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

CHARTER COMMUNICATIONS, LLC)	
)	
Petitioner/Cross-Respondent)	Nos. 18-1778, 18-1895
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent/Cross-Petitioner)	07-CA-140170 et al.
)	
)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 12,954 words of proportionally-spaced, 14-point type, and that the word processing system used was Microsoft Word 2016.

s/ Linda Dreeben
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Dated at Washington, DC
this 22nd day of January, 2019

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

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)	
)	

CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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Dated at Washington, DC
this 22nd day of January, 2019