

No. 18-1222

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UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

and

DURA-LINE CORPORATION, A SUBSIDIARY OF MEXICHEM

Intervenor

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ON PETITION FOR REVIEW OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD

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Line Corporation (“the Company”) is the intervenor before the Court. The Union, the Board’s General Counsel, and the Company appeared before the Board in Cases 09-CA-163289, 09-CA-164263, 09-CA-165972, 09-CA-166481, and 09-CA-167265.

**B. Ruling Under Review.** The case involves the Union’s s petition to review a Decision and Order the Board issued on July, 12, 2018, reported at 366 NLRB No. 126.

**C. Related cases.** The ruling under review has not previously been before the Court or any other court.

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Dated at Washington, DC  
this 29th day of March 2019

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**ON PETITION FOR REVIEW OF AN ORDER OF  
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**BRIEF FOR  
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**JURISDICTIONAL STATEMENT**

This case is before the Court on the petition of United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers

International Union, AFL-CIO-CLC, and its Local 14300-12 (“the Union”) to review a Decision and Order by the National Labor Relations Board (“the Board”) that issued against Dura-Line Corporation (“the Company”) on July 12, 2018, and is reported at 366 NLRB No. 126. (JA 209-41).<sup>1</sup> The Union’s petition challenges only the Board’s dismissal of a complaint allegation that alleged that the Company’s closure of its facility in Middlesboro, Kentucky, and the relocation of work and equipment to other facilities, violated Section 8(a)(3) and (1), 29 U.S.C. § 158(a)(3) and (1), of the National Labor Relations Act, as amended (“the Act”), 29 U.S.C. § 151, et seq. The Union’s petition was timely because the Act imposes no time limitation for such filings. Before the Court, the Company has intervened on the Board’s behalf.

The Board had jurisdiction over the proceeding below under Section 10(a) of the Act, 29 U.S.C. § 160(a), which authorizes the Board to prevent unfair labor practices affecting commerce. The Court has jurisdiction under Section 10(f) of the Act, 29 U.S.C. § 160 (f), which provides that petitions for review of final Board orders may be filed in this Court.

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<sup>1</sup> “JA” refers to the parties’ deferred appendix, and “Br.” refers to the Union’s Brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

## **STATEMENT OF ISSUE**

Whether the Board reasonably dismissed the complaint allegation that the Company violated Section 8(a)(3) and (1) of the Act by closing its Middlesboro facility and relocating production, after determining that the Company met its burden of proving its affirmative defense that it would have taken those actions even in the absence of union activity.

## **RELEVANT STATUTORY PROVISIONS**

The attached Addendum contains the pertinent statutory provisions.

## **STATEMENT OF THE CASE**

The Company, acting on plans to expand production and increase profitability, decided to relocate work from its oldest plant in Middlesboro, Kentucky, to other facilities. The 40-year-old Middlesboro plant had aging equipment and irremediable space constraints, which prevented the Company from modernizing or expanding that location. The Union challenged the Company's decision to move the work, claiming that the Company was motivated by anti-union sentiment, and the Board's General Counsel issued a complaint that, among other matters, asserted that allegation. Before the Board, the Company did not contest the findings that it committed unfair labor practices when certain of its managers made anti-union statements, but maintained that because of compelling economic considerations, it would have closed the facility and relocated regardless

of any union activity at the Middlesboro plant. The Board agreed with the Company and dismissed the allegation, which the Union now contests.

## **I. PROCEDURAL HISTORY**

Based on the investigation of timely charges filed by the Union, the Board's General Counsel issued a complaint alleging that the Company committed numerous unfair labor practices. After a hearing, an administrative law judge issued a decision and recommended order finding all but one of the alleged violations. Specifically, the judge found that company managers and supervisors threatened employees on at least six occasions in violation of Section 8(a)(1) of the Act, including: threatening and then blaming the plant closure on the Union, its president, and grievance filing; telling an employee he would need bodyguards to protect him from other employees for pursuing a grievance; telling an employee that the Company wanted to rid itself of the Union so that it could do whatever it wanted; telling an employee that the closure was because the Union secured the reinstatement of two employees; and telling an employee not to discuss his wages or the Clinton, Tennessee facility with anyone. The judge also found that the Company violated Section 8(a)(4) and (1) by destroying the personal property of an employee in retaliation for that employee's cooperation with the Board's investigation.

As to the plant closure, the judge found that the Company violated Sections 8(a)(3) and (1) of the Act by closing and relocating the work from its Middlesboro facility to other facilities, relying heavily on the unlawful threats as well as other factors in finding the decision and relocation were unlawfully motivated. The judge, however, dismissed the additional allegation that the Company violated Section 8(a)(5) and (1) of the Act by refusing to provide the Union with notice and an opportunity to bargain over the decision to close the Middlesboro facility, finding that the parties' collective-bargaining agreement privileged the Company to act unilaterally.

The judge further found that the Company violated Section 8(a)(1) of the Act by requiring employees to sign a confidentiality agreement, finding that the agreement was unlawful on two separate bases—first, that it was promulgated in response to union activity and, second, that employees could reasonably construe it as prohibiting protected activity. Lastly, the judge found that the Company violated Section 8(a)(5) and (1) by failing to bargain with the Union over the reduction of a Thanksgiving bonus.

The Company filed exceptions to the judge's decision. On review, the Board reversed the three findings challenged by the Company. Specifically, the Board found that: (1) the Company's closure of the Middlesboro facility and relocation of the work and equipment did not violate the Act; (2) the

confidentiality agreements were not unlawfully issued in response to union activity (but severed and retained the allegation that the agreements were overbroad); and (3) the Company's change to the Thanksgiving bonus program was not unlawful.

In the absence of exceptions, the Board adopted the judge's other findings.

## **II. THE BOARD'S FINDINGS OF FACT**

### **A. Background; the Parties**

The Company, headquartered in Knoxville, Tennessee, operated a plant in Middlesboro, Kentucky, between 1971 and 2015. The Middlesboro facility was the Company's first plant and only unionized facility in the United States. At the Middlesboro facility, the Company manufactured polyethylene conduit, pipe, and related products for use in the telecommunications industry. Nearly 20 percent of the product manufactured at Middlesboro was pipe – either MicroDuct, a small pipe about the size of a straw, or FuturePath, a bundle of MicroDuct. MicroDuct manufacturing is highly profitable. In 2015, it represented only two percent of the Company's business, but accounted for nearly 25 percent of its total “gross margin dollars.” The Company is the only domestic manufacturer of MicroDuct. The remaining product was standard conduit, which involves the conversion of resin into pipes. (JA 215, 217; JA 41-44, 70-72, 142, 168-81, 208.)

Since 1987, the Union represented a unit of production and maintenance employees at the Middlesboro facility, consisting of the following employees:

All production and maintenance employees employed by [the Company] at its Middlesboro, Kentucky facility, including plant clerical employees and assistant shift leaders, but excluding all office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

(JA 215; 85-100, 122-41.) In 2015, the Union represented about 125 unit employees. The parties' most recent collective-bargaining agreement was effective April 18, 2013, though April 18, 2016. It contained a management's rights clause that reserved to the Company "the sole and exclusive . . . the right to determine and from time to time redetermine the number, location and types of its plants and operations . . . to close, lease, or sell such plants or operations . . . [and] to temporarily or permanently limit or curtail any part of or all of such processes or operations." (JA 215; JA 124.) The parties' agreement limited operations at the Middlesboro facility and did not permit 24/7 operations. (JA 215; JA 44, 129-30.)

**B. Mexichem Acquires the Company; the Company Proposes Closing the Middlesboro Facility and Moving Production**

In September 2014, Mexichem, a multinational chemical company that manufactures chlorinated products, fluorine products, and pipes, purchased the Company. Shortly after acquisition, the Company proposed that Mexichem close the Middlesboro facility and transfer all of its production to a new, leased facility in the eastern United States. The Company had discussed the possible closure with

the prior owners, which the Company had disclosed to Mexichem during the acquisition. (JA 215; JA 40, 143-67.)

The Company's proposal included a detailed capital expenditure request seeking a \$13 million investment to lease a new facility. The Company's plan provided background information concerning the Middlesboro facility; described its current market position, including financial data and earnings projections; listed strengths and limitations of the Middlesboro facility; and detailed plans for the new facility. Among the background information in the proposal, the Company indicated that the Middlesboro facility had been unionized since 1987. For limitations on the existing facility, the Company listed: low productivity, space constraints, power distribution systems, high conversion costs, poor layout, no rail spur into the plant, and no nearby interstate highway. (JA 216; JA 143-67.)

Chief Executive Officer Paresh Chari explained these limitations, some of which were interrelated. For example, low productivity was due to the short length of the extrusion lines, and space constraints prevented more lines or expansion of existing lines. Space constraints likewise prevented the Company from installing a research and development line. CEO Chari also explained that the water process system was insufficient, and an upgrade would be logistically difficult and costly. High conversion costs, according to CEO Chari, arose from low-line productivity (again, due to the short length of the lines) and the inability to run the lines 24/7

due to a collective-bargaining-agreement limitation. (JA 216-17; JA 40-44, 168-81.)

CEO Chari identified multiple bases for the Company's assessment that Middlesboro had a poor layout. Namely, the poor layout included:

- Antiquated resin handling system;
- Insufficient process water systems;
- Low roof line, which prevented the Company from implementing an automation process that required the stacking of two pieces of equipment;
- Propensity for flash flooding because parts of the plant are below grade; and
- Land-locked facility that cannot be expanded.

(JA 216-17; JA 168-81.) The Company noted that Middlesboro also lacked a rail spur into the plant; a rail spur would facilitate the transportation of resin, which is used in the production of standard conduit. Lastly, the Company indicated that the 60-mile distance to a nearby interstate highway was a limitation. (JA 209 n.5, 216-17; 40-44, 168-81.)

The Company's proposal included plans to lease a new facility with more and higher output lines and house a dedicated research-and-development line. The research-and-development process at Middlesboro was cumbersome and required the Company to shut down production. Additional and more efficient lines would

increase profitability, even as compared to Middlesboro, which was a profitable plant. The proposal also provided that the new facility could run 24/7. (JA 209 n.6, 216; JA 40, 143-67.)

**C. The Middlesboro Facility's Roof Collapses, Causing the Relocation of Production to Other Facilities; Company Officials Exchange Internal Communications Concerning the Union**

In February 2015, the roof of the Middleboro facility collapsed due to snow and ice buildup, damaging equipment inside the building. While the equipment was under repair and to avoid losing customers, the Company transferred much of Middlesboro's manufacturing to a company facility in Elyria, Ohio. At this same time, the Company was searching for another facility to lease closer to its Knoxville headquarters, consistent with its proposal to close the Middlesboro facility and relocate that work. In March, the Company located a site in Clinton, Tennessee for its proposed new facility. Clinton is about 25 miles from the Company's headquarters in Knoxville, and unlike Middlesboro, is located near the interstate. (JA 209, 216; JA 33, 35, 45-48.)

In May, while the Company explored plans to purchase, rather than lease, the Clinton plant, company officials exchanged communications that referenced the Union. For example, on May 28, Chuck Parke, the Company's senior vice president of operations, instructed the director of manufacturing not to post a vacancy for a production manager at the Clinton facility "given the concerns about

folks and the Union at [Middlesboro] KY finding out.” (JA 216; JA 109.) Further, on May 29, Lisa Jenkins, the Company’s project engineer/manager at the Clinton facility, advised a finance department employee that Middlesboro’s “equipment is outdated and in need of a replacement and the facility has the only union-represented work force of the 10 [company] manufacturing locations.” (JA 216; JA 115-16.)

**D. The Company Submits a Second Capital Expenditure Request and Seeks To Hasten Closure of the Middlesboro Facility; Company Officials Make Threatening Remarks Concerning the Union**

By June, the Company had changed its plan from leasing a facility to purchasing the Clinton facility. Accordingly, on June 9, the Company submitted to Mexichem a second capital expenditure request for \$16.8 million. The second request sought to open a state-of-the-art manufacturing and research-and-development facility in Clinton and to relocate Middlesboro’s MicroDuct and FuturePath lines to Clinton. The new request showed a return on investment of 23 percent and increased annual earnings by \$7.3 million. (JA 216; JA 33, 46, 48, 55, 75.)

The second capital expenditure request explained that the Clinton facility would allow the Company to expand its highly profitable MicroDuct business. The requested capital would finance the purchase of three new MicroDuct lines,

two FuturePath lines, and one research-and-development line and would upgrade the MicroDuct and FuturePath lines relocated from Middlesboro. The investment would also develop the Clinton site, which included more square footage for production, office, and warehouse space as well as research-and-development space. The request also indicated that the Company would use the investment to build a rail spur. The Company expected the MicroDuct business to grow, and, as the only domestic manufacturer, wanted to increase its production. (JA 216-17; JA 46-47, 75, 168-81.)

In the cover email to Mexichem accompanying the second capital expenditure request, CEO Chari explained that the Company planned to accelerate the timeframe for closing the Middlesboro facility; the deadline for completing the Clinton facility was moved to the first quarter of 2016. CEO Chari indicated that the decision to hasten the closure was due to: the roof collapse at the Middlesboro facility, increasing demand for MicroDuct and the need to meet customer requirements in an uninterrupted manner, and impending union negotiations in Middlesboro.<sup>2</sup> CEO Chari explained that he wanted to avoid expending resources to prepare for contract negotiations given that the Company had decided to move

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<sup>2</sup> The Chief Financial Officer, Wes Tomaszek, referenced the same three reasons for hastening the closure in an email he sent to CEO Chari, which was attached to the capital expenditure request. (JA 217; JA 168-81.)

production. Mexichem purchased the Clinton facility in late June 2015. (JA 216-17-9; JA 46, 54, 168-81.)

Around the same time that the Company was seeking to acquire funds to purchase the Clinton facility, union president Robert Hatfield took a day off work from the Middlesboro plant to attend his cousin's funeral. When he returned to the plant, his supervisor told him that he would be disciplined for missing work. Hatfield consulted with human resources manager Patsy Wilhoit and pointed out the collective-bargaining agreement's bereavement policy allowing for one day for the death of a relative not specifically listed. (JA 221; JA 23, 131-32.) Wilhoit, who had originally sided with Hatfield's supervisor, responded that, "This is the type of shit that's going to get you guys out of job and get the facility shut down." (JA 221; JA 23.) The Company does not contest that Wilhoit's statement violated the Act.

Two former union presidents, Elmer Evans and Freddy Chumley, recounted similar conversations with Wilhoit. Wilhoit told Evans that Hatfield filed too many grievances, and someone needed to tell him to stop because the Company and Mexichem did not like it. She also told Evans that Hatfield's grievance filings would get the place shut down and told Chumley that headquarters did not like all the grievances. (JA 221; JA 5, 17.)

**E. The Company First Notifies Middlesboro Managers of the Impending Closure and Then Tells Employees; Company Officials Tell the Union President To Stop Filing Grievances and Blame the Union for the Closure**

On August 3, Parke and Michael Hilliard, senior vice president of global operations, informed Middlesboro managers of the impending closure. The Company asked managers to sign confidentiality agreements and advised them not to discuss the closure with anyone. The Company did not consult any Middlesboro management official about the closure decision. Around this same time, company officials considered hiring a labor consultant who offered to provide an anti-union training and to assist with hiring at the Clinton facility. The Company never secured the consultant's services. (JA 218; JA 27, 30-33, 37, 49, 62, 67, 80, 117.)

Later that month, after union president Hatfield filed a grievance, Mike Roark, a plant manager in Middlesboro, told Hatfield that he was going to need bodyguards to escort him to and from work. Roark made a similar remark about Hatfield needing bodyguards after Hatfield filed two other grievances. (JA 221; JA 24, 33.) In early September, Roark told Hatfield that grievances are "the type of things that [were] going to get the doors closed at the facility," and that Hatfield needed to stop filing them. (JA 221; JA 26.) Around this same time, Hatfield and maintenance manager Bruce Wasson held a disciplinary meeting, after which Wasson told Hatfield that, "You guys are going to get what you want, they're

going to shut the doors, and you guys are going to be out of a job.” (JA 221; JA 25.) The Board found, and the Company does not contest, that Roark’s and Wasson’s statements were unlawful.

Chumley and Evans had similar conversations with Wasson. Wasson told Chumley that Mexichem would not tolerate grievances and that the grievances would get the plant shut down. (JA 221; JA 8.) Wasson also told Chumley that another non-company plant in town had shut due to union activity. (JA 221; JA 4.) Similarly, Wasson told Evans that the Union was ruining the Company; that the grievances were costing money and would shut down the plant; and that Hatfield needed to “quit doing what he was doing . . . Mexichem . . . don’t like the Union and it’s the only union plant they got, so you all figure it out.” (JA 222; JA 18.)

On September 15, Hilliard and Parke returned to the Middlesboro facility to announce the closure to all employees in a series of small-group meetings. Parke told employees that the Company was closing the facility because the plant was too far from the interstate and because the Company did not need so many plants in that region of the country. Parke mentioned that the Middlesboro plant was old and could not be expanded and that the Company was building a technology-and-manufacturing facility in the Knoxville area. Employees learned, too, that the Company would transfer manufacturing to facilities in Ohio, Georgia, and a new facility in the Knoxville area. Parke did not tell employees that they could transfer

to the new facility or the other facilities. (JA 218; JA 5, 10, 12-15, 25, 30, 37, 57, 68-70.)

After the closure announcement, Middlesboro supervisors and managers told employees that the Union, its president, and the grievances were to blame the closure. For example, immediately after the September 15 meeting, supervisor Clifton West told an employee that West had told Hatfield to “quit with all those grievances or they’re going to shut this place down.” (JA 222; JA 11.) A few days later, shift supervisor Jeffrey Hatfield told an employee that “all the grievances” were the reason for the closure. (JA 222; JA 11.) Supervisor David Jackson admitted to union president Hatfield that he had told other employees that Hatfield and the Union were responsible for the shuttering. (JA 222; JA 25-26.) Quality manager Will Calhoun told two employees that the Union and the grievances were the main reason for the closure. (JA 222; JA 13-14.) The Board found, and the Company does not contest, that the statements by West, supervisor Hatfield, Jackson, and Calhoun were unlawful.

On September 29, Wasson told an employee that the Company was shutting down the Middlesboro plant because the Company could not run the facility the way it wanted. (JA 222; JA 15.) Wasson added that the closure was also attributable to the Union having secured the reinstatement of two employees. And Wasson also blamed the closure on the “pile of grievances.” (JA 222; JA 15.) The

Board found, and the Company does not contest, that Wasson's statements were unlawful.

In September, company representatives discussed which non-bargaining-unit employees would be offered transfers to Clinton, and ultimately, the Company transferred at least six managers. The Company did not offer transfer options to unit employees and expected to address that issue during effects bargaining. It therefore instructed bargaining-unit employees to apply for jobs at the Clinton facility or to attend the job fair. While the Company did not discuss transfers with most employees, it transferred two hourly employees, Sean Chapman and David Ramsey, to Clinton before the closure without requiring them to complete job applications. Wilhoit directed Chapman not to talk to anyone about the closure, the Clinton facility, or his wages. The Company required Chapman and Ramsey to execute a confidentiality agreement that broadly prohibited the disclosure of "confidential information" to third parties. (JA 218; JA 28-29, 34, 36, 63, 81, 101-04.) The Board found, and the Company does not contest, that Wilhoit's statements to Chapman were unlawful.

**F. The Company Issues a Press Release Announcing the Clinton Facility; the Company Submits a Third Capital Expenditure Request**

In October, the Company issued a press release announcing the new facility in Clinton. The state of Tennessee, which had helped fund development of the Clinton facility, had requested the statement earlier, but the Company pushed back because the information regarding the new Clinton facility would have made bargaining with the Union more “challenging.” (JA 216-17; JA 168-81.) The Company also did not want to compromise production at the Middlesboro plant, which it intended to continue to operate until the end of December. The Company wanted to time the release for after the first week of effects bargaining with the Union. Hilliard also indicated that the Company did not want the release to specify the number of openings at Clinton, emphasizing that Clinton had not yet been an issue at the bargaining table and the Company preferred to keep it that way. (JA 219; JA 58, 110-14, 168-81.)

At this same time, the Company submitted a third capital expenditure to further “accelerate [the] shutdown of the Middlesboro, Kentucky facility.” (JA 217; JA 183-204.) The October request sought \$3.5 million and no longer proposed building a new plant in the eastern United States; rather, the Company proposed relocation of the standard conduit production from Middlesboro to Tennille, Georgia (a company facility that had been closed for two to three years)

and Elyria, Ohio, where the Company had already moved some of the Middlesboro production after the roof collapse. CEO Chari explained that the relocation of the standard conduit work due to the roof collapse unexpectedly revealed that other company facilities could absorb some of the Middlesboro production. According to CEO Chari, the Ohio facility had become a viable manufacturing location, was larger and more efficient than Middlesboro, and satisfied the Company's desire to be closer to its major customers in Ohio, Georgia, and Florida. The Company therefore shifted its focus to relocation to existing facilities rather than to an entirely new site. The expenditure request projected a return on investment of 33 percent and an annual-earnings increase of \$2.3 million. (JA 217; JA 45-47, 76, 183-204.)

In a cover email to CEO Chari, which was attached to the October capital expenditure request, CFO Tomaszek identified several reasons to accelerate the closure: the roof collapse, market demand, moving into a busier part of the year, and the identification of the Clinton location. (JA 217; JA 75, 183-84.) CFO Tomaszek also noted that "the prospect of union contract negotiations at that facility in early 2016 (Middlesboro is our only unionized site and the collective-bargaining agreement is up for renewal in March 2016)." (JA 217; JA 184.) The proposal analyzed labor costs at the Georgia and Ohio facilities and compared

them to Middlesboro; the document did not include any Clinton wages. (JA 217; JA 183-204.)

**G. The Parties Bargain over the Effects of the Closure; the Company Refuses To Bargain over the Decision**

On October 12, the parties met for the first of three sessions to bargain over the effects of the Middlesboro plant closure. During bargaining, the parties discussed severance pay for employees, but the Union never proposed that the Company permit transfers to other facilities. Neither party raised the issue of the Clinton facility or the relocation of work during the bargaining sessions. (JA 219; JA 6, 83-84, 118.)

On November 2, the Union requested bargaining over the decision to close Middlesboro and sought information regarding the specific reason for moving operations to Clinton and the savings realized from the move, including any labor-cost savings. By letter dated November 6, the Company declined to bargain because the decision was not subject to collective bargaining. According to the November 6 response, the Company based its decision on present and future capital investment and a desire for production in the most advantageous manner and locations for its customers. The Company also informed the Union that it would transfer some of the production work from Middlesboro to other locations and that Clinton would have a research-and-development component. The

Company indicated that it did not anticipate any labor-cost savings nor did it close the Middlesboro facility based on labor costs. The parties never bargained over the decision to close the Middlesboro facility. The parties met for a second effects bargaining session on November 9; again, the Union remained silent on any proposals relating to transfers, and neither party discussed Clinton. (JA 219; JA 82, 119-21.)

#### **H. The Company Changes the Thanksgiving Bonus Amount; Chumley's Personal Property Is Destroyed**

The Company maintained a Thanksgiving bonus program at the Middlesboro facility, under which the Company gave employees a gift card to a local food store. While the collective-bargaining agreement specified a \$16 bonus, the Company had given employees \$25 gift cards in preceding years. In November, the Company distributed \$16 gift card to employees for Thanksgiving without notifying the Union of the lower amount. (JA 220; JA 7, 16, 19, 26, 31, 138.)

On December 1, while giving an affidavit as part of the Board's investigation of certain unfair-labor-practice charges filed by the Union, manager Wasson was asked about conversations he had had with Chumley regarding the closure. Wasson thus learned that Chumley had cooperated with the Board's investigation. The next day, Chumley, who was on medical leave, received a call

from a coworker, who told him that his personal belongings, including a grill and coffeemaker, were in the dumpster, and texted him photographs. Chumley went to the Middlesboro facility that evening and confirmed that his belongings were missing from his work area. Chumley also noticed that his cage and toolbox were missing. Wasson, Chumley's supervisor, admitted to throwing out the grill and coffeepot, and the Company does not contest that this conduct violated the Act. (JA 222-23; JA 61-62, 101-04.)

### **I. The Company Ceases Operations at the Middlesboro Facility**

In late December, after the third and final effects bargaining session on December 16, the Company ceased production at the Middlesboro facility. After the plant shuttered, the Company produced MicroDuct and FuturePath in Clinton. The Company transferred three full lines of equipment from Middlesboro to Clinton. The Clinton facility operates 24/7 and with production lines more than twice the length of those in Middlesboro. The Clinton production lines run faster and produce more MicroDuct and FuturePath than the Middlesboro lines. The lines in Clinton would not have fit inside the Middlesboro facility. The Company also began construction of a rail spur at the Clinton facility. (JA 220; JA 33, 44, 52, 70, 75.)

The Company moved the standard conduit manufacturing that once took place in Middlesboro to larger facilities in Ohio and Georgia. The Company

transferred, improved, and lengthened five lines from Middlesboro for use at the Georgia facility and four lines for use at the Ohio facility. The longer lines increased the rate of production; for example, in Ohio, the rate was 1200 pounds/hour, compared to 600 pounds/hour in Middlesboro. (JA 220; JA 183-204, 33, 42, 44, 52, 66, 70, 77.)

### **III. THE BOARD'S CONCLUSIONS AND ORDER**

On review, the Board (Members McFerran, Kaplan, and Emanuel) disagreed with the administrative law judge and found that the closure and relocation of work from Middlesboro to facilities in Tennessee, Georgia, and Ohio did not violate Section 8(a)(3) and (1) of the Act. (JA 209-11.) Specifically, the Board found that the record evidence supported an inference that union activity was a motivating factor in the decision to close the Middlesboro plant, but that the Company had established its affirmative defense that it would have closed the plant and relocated production for compelling economic reasons regardless of union activity, and dismissed the allegation. Also related to the closure, the Board agreed with the judge's dismissal of the allegation that the Company violated Section 8(a)(5) and (1) of the Act by refusing to provide notice and an opportunity to bargain over the Company's decision to close the Middlesboro facility. (JA 209 n.2.)

Further, the Board reversed the judge's findings that the Company's unilateral reduction of the Thanksgiving gift card amount was unlawful and that the confidentiality agreement was unlawfully promulgated in response to union activity.<sup>3</sup> Lastly, in the absence of exceptions, the Board adopted the judge's findings that the Company managers and supervisors had made numerous threats in violation of Section 8(a)(1) of the Act and that the Company violated Section 8(a)(4) and (1) by destroying an employee's personal property in retaliation for the employee's participation in the Board's investigation. (JA 209 n.2, 212.)

### **SUMMARY OF ARGUMENT**

The only issue before the Court is the Board's determination that the Company met its burden of proving its affirmative defense and thus dismissed the

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<sup>3</sup> Member McFerran would have affirmed the finding that the Agreement was unlawfully promulgated in response to union activity. (JA 208 n.16.) In its brief to the Court, the Union has not challenged the Board's dismissal of this separate allegation concerning the confidentiality agreement, and as such, has waived judicial review. *See* Fed. R. App. Proc. 28(a)(8)(A); *N.Y. Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007). The Board severed and remanded the allegation that the confidentiality agreement was unlawful because it would be reasonably construed as prohibiting protected activity for analysis under the Board's newly announced framework for evaluating workplace rules. *See The Boeing Co.*, 365 NLRB No. 154, 2017 WL 6403495 (Dec. 14, 2017). That allegation remains before the Board. In its brief to the Court, the Union likewise does not challenge the Board's dismissals of the allegations concerning the Thanksgiving bonus or the failure to bargain over the decision to close the plant. It has therefore waived judicial review. *See* Fed. R. App. Proc. 28(a)(8)(A); *N.Y. Rehab. Care*, 506 F.3d at 1076.

allegation that the Company's closure and relocation of work from Middlesboro to facilities in Tennessee, Georgia, and Ohio did not violate Section 8(a)(3) and (1) of the Act. In that regard, the Board found that the record evidence demonstrated that the Company relied on legitimate, business justifications to shutter its oldest facility and relocate the work to other facilities that could fulfill the Company's desire to increase production, establish a modern research-and-development line, and otherwise update and automate its processes and systems. Indeed, the uncontroverted evidence demonstrates that the Company transferred production to facilities that were larger and could accommodate longer production lines, that were more modern, that had state-of-the-art capabilities, and that allowed for automation of certain processes. As a result, the evidence also established that the Company could increase profits by, among other ways, growing the highly profitable MicroDuct business. Under these circumstances, the Board found that it was implausible that the Company undertook a \$20 million investment initiative to relieve itself of grievance filings and other local union matters at the Middlesboro facility. On the basis of that evidence, the Board determined that the Company would have acted on those compelling economic considerations regardless of the Union's presence or the employees' union activities at the Middlesboro facility.

The Union's challenges to the Board's finding that the Company established a compelling business reason are unavailing and largely reflect disagreement with

the weight the Board accorded to various factual findings. Further, while the Union does not contest the Board's threshold finding that an inference of an unlawful motive was established on this record, it argues that the Board should have found more evidence of anti-union animus, which, in turn, would (apparently, it seems to contend) weigh against accepting the Company's affirmative defense. The Union fails to explain, however, exactly how this assertion would affect the ultimate analysis or defeat the Company's affirmative defense. By simply presenting the Court with its own view of the facts, which the Board rejected, the Union shows only that another factfinder could have reached a different conclusion, and not that the Board's determination was unsupported by substantial evidence or unreasonable. Likewise, the Union gains no ground by relying on inapposite cases and wrongly arguing that the decision here departed from Board precedent.

### **STANDARD OF REVIEW**

Under Section 10(c) of the Act (29 U.S.C. § 160 (c)) the Board's General Counsel bears the burden of establishing an unfair labor practice by a preponderance of the evidence. *See NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 395 (1983). Where, as here, the Board decides that the General Counsel has failed to establish a violation of the Act that determination must be upheld "unless its findings are unsupported by substantial evidence in the record considered as a

whole, or unless the Board ‘acted arbitrarily or otherwise erred in applying established law to facts.’” *UFCW v. NLRB*, 506 F.3d 1078, 1080 (D.C. Cir. 2007) (quoting *General Elec. Co. v. NLRB*, 117 F.3d 627, 630 (D.C. Cir. 1997).) Under this deferential standard of review, the Court will reverse the Board’s findings of fact “only when the record is so compelling that no reasonable factfinder could fail to find to the contrary.” *Id.*; see *Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 217 (D.C. Cir. 2016) (same). In other words, under that deferential standard, the Court will uphold the Board’s findings if they are supported by substantial evidence and will overturn them only if the Board “acted arbitrarily or otherwise erred in applying established law to the facts of the case.” *Tenneco Auto., Inc. v. NLRB*, 716 F.3d 640, 646-47 (D.C. Cir. 2013) (internal quotation marks omitted); see *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); 29 U.S.C. § 160(e). Moreover, when reviewing for substantial evidence, the Court “do[es] not ask whether record evidence could support the petitioner’s view of the issue, but whether it supports the [agency’s] ultimate decision.” *Bruce Packing Co. v. NLRB*, 795 F.3d 18, 22 (D.C. Cir. 2015).

## ARGUMENT

### **THE BOARD REASONABLY DISMISSED THE COMPLAINT ALLEGATION THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY CLOSING ITS MIDDLESBORO FACILITY AND RELOCATING PRODUCTION AFTER DETERMINING THAT THE COMPANY MET ITS BURDEN OF PROVING ITS AFFIRMATIVE DEFENSE**

Given the deferential standard of review, the question before the Court is whether the evidence can be read, as the Board reads it, to support the conclusion that the Company demonstrated that it would have closed the Middlesboro plant and relocated production even in the absence of union activity. The Board urges the Court to conclude that it can be so read and to affirm the Board's dismissal of the allegation.

#### **A. Applicable Principles**

Section 7 of the Act guarantees employees the right “to form, join or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .” 29 U.S.C. § 157. Section 8(a)(3) of the Act implements Section 7 by prohibiting employer “discrimination in regard to hire or tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization.” 29 U.S.C. § 158(a)(3). Accordingly, an employer violates Section 8(a)(3) by discharging or taking other adverse employment actions against employees for

engaging in activities protected by Section 7. *Transp. Mgmt.*, 462 U.S. at 397-98; *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 125 (D.C. Cir. 2001).<sup>4</sup>

In *Transportation Management*, 462 U.S. 393, the Supreme Court approved the Board's test for determining motivation in unlawful discrimination cases first articulated in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083, 1088-1089 (1980), *enforced on other grounds*, 662 F.2d 889 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). Under that test, if substantial evidence supports the Board's finding that an employee's protected activity was "a motivating factor" in an employer's decision to take adverse action, the adverse action is unlawful unless the record as a whole compelled the Board to accept the employer's affirmative defense that the adverse action would have been taken even in the absence of the protected activity. *Transp. Mgmt. Corp.*, 462 U.S. at 397, 401-03; *see also Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1167 (D.C. Cir. 1993). An employer must establish its affirmative defense by a preponderance of the evidence. *See Laro Maint. Corp. v. NLRB*, 56 F.3d 224, 228 (D.C. Cir. 1995).

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<sup>4</sup> Violations of Section 8(a)(3) result in derivative violations of Section 8(a)(1), which forbids employers from interfering with, restraining, or coercing employees in the exercise of rights protected by the Act. *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

Unlawful motivation can be inferred from circumstantial as well as direct evidence. *Waterbury Hotel Mgmt., LLC v. NLRB*, 314 F.3d 645, 651 (D.C. Cir. 2003). Evidence of unlawful motivation includes the employer's knowledge of protected activity, *Tasty Baking*, 254 F.3d at 125, and hostility toward protected conduct, including the commission of other unfair labor practices, *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 735 (D.C. Cir. 2000).

A determination regarding an employer's motive "invokes the expertise of the Board, and consequently, the court gives 'substantial deference to inferences the Board has drawn from the facts,' including inferences of impermissible motive." *Laro Maint.*, 56 F.3d 228-29. Thus, the Court's "review of the Board's conclusions as to discriminatory motive is even more deferential, because most evidence of motive is circumstantial." *Fort Dearborn Co. v. NLRB*, 827 F.3d 1067, 1072 (D.C. Cir. 2016).

**B. Substantial Evidence Supports the Board's Finding that the Company Proved Its Affirmative Defense**

In analyzing whether the closure of the Middlesboro facility and relocation of its production constituted an unfair labor practice, the Board first found that union activity motivated the Company's decision based on the uncontested findings that company representatives had made unlawful threats and disparaging remarks about the Union. The Board then, however, accepted the Company's

affirmative defense that it would have taken those same actions even in the absence of union activity. Specifically, the Board found that legitimate and compelling business reasons motivated the Company to close an outdated facility that would not allow for much-needed capital improvements and move production to other more modernized facilities that could have longer production lines, thereby significantly increasing both efficiency and profit.

Both the Board and the Union agree that the employees' union activity was a motivating factor in the closure and work transfer, disagreeing only as to what facts support that finding. But that disagreement is entirely irrelevant to the ultimate issue presented to the Court, namely, whether the Board properly found that the Company would have made the same decision even in the absence of union activity. The Board therefore begins with that determinative issue.

**1. Substantial evidence supports the Board's finding that the Company would have closed the Middlesboro plant and relocated production even in the absence of union activity**

In finding that the Company had shown that legitimate business reasons motivated its closure decision, the Board relied on several considerations. The Board emphasized the Company's need for a modern facility and the desire to increase profits and efficiency. And the Board found it unlikely that the Company would solicit such a massive financial investment merely to avoid grievances. The

Union's challenges ignore the sheer weight of uncontroverted evidence concerning the massive drawbacks to the Middlesboro facility.

First, the Board underscored the Company's need for a modernized facility that could accommodate its desired production rates and "permit significant expansion, utilize new technology, establish a dedicated research and development line, and improve transportation options." (JA 210.) The record establishes, and the Union does not dispute, that these goals and improvements "could *not* be accomplished at its Middlesboro location." (JA 211, emphasis added.) It is beyond dispute that the Middlesboro facility was the Company's oldest plant and, while profitable, could not expand or accommodate new technology. The unavoidable inability to expand the Middlesboro plant foreclosed the construction of research-and-development lines in Middlesboro, prevented lengthening the existing lines to increase production, and eliminated the flexibility to construct lines that could be converted to manufacture different kinds of products, such as smooth or ribbed products. The landlocked nature of the Middlesboro facility meant that these constraints on the Company's business would persist in perpetuity. In contrast, the production lines at the three facilities now performing the work are longer than Middlesboro's lines and more productive. (JA 211.)

The record also establishes, without challenge by the Union, that the equipment at the Middlesboro plant was aging and, in some instances, in need of

repair or upgrade. For example, CEO Chari testified, without contradiction, that the 40-year-old water system was inefficient, but could not be easily updated because doing so would require halting production to dig up the facility floor and retrench. (JA 43.) He also testified that the piecemeal installation of the power-distribution system over the last 40 years meant that improvements to the power system at the Middlesboro plant required re-doing the entire building at a substantial cost. (JA 42, 44.) The antiquated equipment at the Middlesboro facility was entirely inconsistent with the Company's goal of innovation and modernization.

Contrary to the Union's suggestion (Br. 30), the profitability of Middlesboro is not dispositive, particularly when presented with a facility that promises only profit stagnation. As CEO Chari testified, profitability does not end the inquiry; rather, the Company considered whether the high-margin business of MicroDuct and FuturePath production could further increase profits if done at a more modern, state-of-the-art, and larger facility. (JA 52-53.) This testimony was unrefuted.

Second, with respect to the Board's next basis for finding that the Company would have made the same decision even in the absence of union activity, the Board observed that the Company offered uncontroverted evidence that, "as a result of the relocation, production of standard conduit doubled and gross earnings are projected to increase at a rate of \$9.6 million per annum." (JA 211.) Such

reasoning relies on the unassailable proposition that if the Company could make its product faster and more efficiently, it would necessarily have more product to sell and would increase its profits – a goal that simply could not be realized at Middlesboro. Indeed, the unchallenged record evidence establishes that the relocation of work now allows the Company to produce 1200 pounds/hour of standard conduit, compared to the 600 pounds/hour it produced in Middlesboro. Company witnesses testified that the relocation took a profitable product and “made them more profitable.” (JA 77.)

And third, the Board found it simply “implausible that the Company would have proposed that its new parent company embark on a \$20 million relocation and expansion initiative in order to relieve itself of allegedly excessive union grievance filings over local matters or to otherwise undermine the Union.” (JA 211.) The union activity in this case is akin to the grievances found by the Board in *Chemical Solvents, Inc.*, to be only “a smattering of comparatively low-level union activities” that could not plausibly support a determination that the employer would shut down an entire division in response. 362 NLRB No. 164, 2015 WL 5013400, \*9 (Aug. 24, 2015). The Board thus properly found that profitability considerations motivated the Company to close an outdated, landlocked facility prone to flooding and to transfer that work to other facilities that could efficiently make more

product . That is to say, the Company would have made the same decisions, the Board found, even in the absence of union activity.

In attempting to refute the Company's justification, the Union makes several arguments that simply ask the Court to reweigh the facts – a request the Court must decline. For example, the Union claims that the Board “diminished” (Br. 31) the threats and disparaging comments by company representatives. To the contrary, the Board adopted the findings of the administrative law judge in this regard, who characterized the threats as serious and the comments as frequent and disparaging. The Board did not view these actions “too narrowly” (Br. 31); rather, the Board simply disagreed that these facts outweighed the Company's compelling financial considerations or overcame the implausibility of requesting \$20 million dollars as a response to grievance filing.

Contrary to the Union's claim (Br. 33) that unlawful motivation was “enmeshed” in the Company's decision-making, the Board found (JA 210 n.11) that the Company's isolated references to a unionized workforce and to a collective-bargaining agreement limitation on the hours of operation were insufficient to explain the Company's actions when compared to the Company's stated justifications. Equally unavailing is the Union's claim (Br. 31) that local matters took on greater import due to the nature of the managers' responses and that their statements demonstrate a general anti-union animus. The Board fully

considered the threats, statements, and their effect and agreed that they displayed animus toward the Union; however, the Board concluded that the Company's legitimate, business justification for the closure and relocation represented a more compelling reason to explain the massive economic investment.

And the Union lodges another (Br. 35-36) complaint with how the Board viewed the facts in urging the Court to find that the Company sought to avoid a unionized workforce at the Clinton facility by engaging in "secretive" tactics. The Union's argument fails for several reasons. First, the assertion largely ignores that employees were free to apply for positions at the Clinton facility. Second, the Union's claim (Br. 35) that the Company's talking points hid the fact that the new facility would have a manufacturing component is irrelevant inasmuch as the judge expressly found (JA 218) that company representatives informed unit employees on September 15, that manufacturing work would be split among all three facilities, including the new facility. Thus, written talking points notwithstanding, the Company conveyed the very information the Union complains was withheld. Third, and in any event, even if the Company had not verbally deviated from the written talking points, contrary to the judge's finding, the Union fails to show how employees were prevented for applying for jobs once they learned about manufacturing at the new facility.

And in attempting to assign secrecy and ill motives to company representatives in not discussing transfers, the Union overlooks its own failure to raise the issue during effects bargaining. Even if the Company had engaged in a campaign to hide facts, the press release announcing the opening of the Clinton facility would have pulled the curtain back on these tactics. The parties bargained for the last time on December 16 – two months after the press release issued. In short, the Board fully considered the evidence the Union now encourages the Court to reweigh; the fact that the Board simply came to a different conclusion than the Union wanted is no reason to disturb the Board's findings.

The Union wrongly asserts (Br. 32-33) that the Board needed to find that anti-union animus did not “contribute at all” to the Company's decision to close the Middlesboro facility and relocate production. As the longstanding precedent makes clear, the Company needed to prove by a preponderance of the evidence that it would have taken the same action even in the absence of union activity. *See, e.g., Merillat Inds.*, 307 NLRB 1301, 1303 (1992) (recognizing that an employer's affirmative defense under *Wright Line* needs to be proven only by a preponderance of the evidence and does not necessarily fail if not all the evidence supports it, or even if some evidence tends to negate it). Here, the Board properly found that it had made such a showing.

The Court must also reject the Union's remaining argument that the analysis should be whether the Company would have given the Middlesboro production work "to a workforce that engaged in the same level of union activity." (Br. 33.) Notably, the Union cites (Br. 33-36) no case law for its proffered analytical approach, and for good reason, none exists. The analytical landscape in this regard is clear: has the Company shown that, even in the absence of protected activity, it would have closed the Middlesboro facility and relocated the production work. This question is rooted in reality and can be answered by weighing the established record evidence. The Union's approach, on the other hand, introduces fictions and engages in speculation.

In any event, the factors on which the Union relies (Br. 34-35) were fully considered by the Board, but ultimately rejected as insufficient to cast doubt on the Company's justification for undertaking a \$20 million initiative: a desire for a modern facility that would permit expansion to increase productivity, efficiency, and, ultimately, profits. The Board's finding in this regard is due high deference, *Bally's Park Place v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011), and the Court should decline the Union's repeated requests to reweigh the facts.

**2. The Union's challenges to the Board's animus findings are inconsequential to the outcome, and, in any event, substantial evidence supports the Board's findings**

The Board agreed (JA 210 n.11) with the judge that the General Counsel produced sufficient evidence to raise the inference that union activity was a motivating factor in the Company's decision to close the Middlesboro plant and relocate its production, relying on the judge's uncontested findings that "Middlesboro managers made numerous statements and unlawful threats blaming the closure on employees' activities, primarily the union president's grievance filings." (JA 210 n.11.) In affirming the judge with respect to unlawful motivation, the Board narrowed the evidentiary basis for the finding. Specifically, the Board disagreed (JA 210 n.11) that references to the Union in communications between the Company and Mexichem, the decision to accelerate the closure, and the delay in posting jobs and issuing a press release constituted further evidence of anti-union animus, from which unlawful motivation could be inferred. The Board likewise rejected (JA 210 n.11) the judge's finding that the Company provided shifting reasons or imposed hurdles on employee applications for Clinton positions and found that the Company's fleeting interest in hiring a labor consultant was irrelevant. To be clear, the Board's disagreement on these factors did not affect the ultimate finding that union activity was a motivating factor in the Company's decisions. These factual findings concerning the Company's motives involve the

Board's experience and are entitled to "substantial deference." *See Laro Maint.*, 56 F.3d at 229.

The Union maintains (Br. 21-27) that the Board erred in discounting these factors, but does not explain how *additional* examples of animus, were the Court to agree with its challenge, would change the analytical framework or the outcome. The Union's contention that the Board should have made additional findings of anti-union animus begs the question: to what end? The Union does not identify how judicial review of facts not evidencing animus serves any purpose where, as here, the Board otherwise found anti-union animus giving rise to an inference of unlawful motivation.

To the extent that the Union urges more than an academic exercise and argues that more animus in this case would heighten the Company's rebuttal burden, an argument not clearly articulated, the Board highlights that it found the Company's economic defense "compelling," (JA 210), and the changes, which were impossible at Middlesboro, "critical to increasing production and efficiency," (JA 210). Thus, the Company has met any "heightened" burden that additional animus findings would have imposed, rendering irrelevant the Union's complaints about the Board's animus finding.

In any event, the Union's challenges (Br. 21-27) to the facts underlying animus are mere disagreements with the Board's view of the facts. For example,

the Union takes issue (Br. 21-22) with the Board's failure to find that the Company's union references in its communications with Mexichem demonstrated animus and faults the Board for not explaining its departure from the judge's analysis. The Union ignores, however, that the Board expressly found (JA 210 n.11) that the Company intended to convey factual information concerning the Middlesboro facility with its references to the Union. The Board found that the Company sought only to "inform[]" Mexichem. (JA 210 n.11.) The Union's claim (Br. 21-22) that the Company did more than inform, that it contrasted the union facility with the benefits of a non-unionized work force, fails to show error inasmuch as its argument is insufficient to show that a reasonable factfinder could not find as the Board did: that detailing the background information of a \$20 million investment request to a parent company, including the change in the hours of operation as a function of increased revenue, does not necessarily show anti-union animus.<sup>5</sup> See *Bally's*, 646 F.3d at 935 ("[T]he Board is to be reversed only

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<sup>5</sup> The Union does not advance its claim by citing (Br. 22 n.2) to a May 29, 2015 email exchange between Lisa Jenkins, a project engineer at the Clinton facility, and an employee in the Company's finance department. In September 2014, the Company had already shared with Mexichem the first capital expenditure plan, which referenced the Union. This email therefore is repetitive of prior communications, which as shown above, do not evidence anti-union animus. (JA 115-16.) In any event, the email also included information concerning the aging equipment and need for modernization, which aligned with the Company's stated reasons to relocate production.

when the record is so compelling that no reasonable factfinder could fail to find to the contrary.”) (internal citation omitted).

With respect to the desire to hasten the plant closure, the Union contends (Br. 23) that the Company sought to avoid a work slowdown or stoppage. The Board found (JA 210 n.11), however, that the Company made a “pragmatic request” to accelerate closure plans to avoid simultaneously bargaining a new contract and ceasing operations at the facility covered by the contract. That is to say, expending resources on a contract covering a soon-to-be shuttered facility made little practical sense. The Union acknowledges that “the request to accelerate . . . was not *just a pragmatic attempt* to avoid engaging in bargaining while the plant was winding down operations,” (Br. 23), but maintains that it was also an attempt to avoid a strike. In doing so, the Union concedes that the facts can reasonably be read to establish two plausible explanations; and, as discussed above (pp. 27-28), the Court is not to consider whether the evidence could support the Union’s view of the issues, but whether it can be read to support the Board’s ultimate conclusion. *See Bruce Packing*, 795 F.3d at 22 (noting that the Court “do[es] not ask whether record evidence could support [another] view of the issue, but whether it supports the [agency’s] ultimate decision”).

Likewise, the Union (Br. 23-25) asks the Court to adopt its view that the Company’s delay in posting Clinton jobs and issuing the press release was

designed to prevent the Clinton facility from becoming unionized. The Board found, however, that “the [Company] did not want the Union and its customers finding out about the closure before it was prepared to go public, reflecting a legitimate desire to minimize disruption.” (JA 210 n.11.) Indeed, as the Board further noted (JA 211) when finding that union activity did not prompt the Company to promulgate its confidentiality agreement, the Company had a “legitimate concern” about a premature disclosure of its decision to reallocate resources to allow for the closure of Middlesboro and its reliance on funding from Tennessee to open a new facility.

Nor does the Union demonstrate error by highlighting (Br. 25-26) the Company’s decision not to post the precise number of vacancies available at the Clinton facility. Employees ultimately learned that the Company would transfer some Middlesboro work to the facility in Clinton, and company representatives told employees that they could complete job applications for positions at that facility. The Union has not identified how not knowing the number of available positions hindered employees from applying. Further, the Board noted (JA 210 n.11) that the Company timely notified the Union about its plans and engaged in effects bargaining, which could have included bargaining over transfers. These actions, according to the Board (JA 210 n.11), undermine any anti-union motive associated with secrecy. Once again, the Union cannot show that a reasonable

factfinder could not adopt the Board's view that the delay was, in fact, to minimize disruption and avoid unnecessary anxiety among the Company's customers, who had already dealt with a roof collapse affecting production and were aware that the Company was the only domestic manufacturer of MicroDuct. Nor has the Union identified (Br. 26-27) how a suggestion to hire a labor consultant at the Clinton facility – a suggestion that was not adopted – is relevant to anti-union animus in closing the Middlesboro facility.

To the extent that the Union casts doubt on the Board's findings that the Company did not, in fact, impose hurdles on employees to apply for Clinton positions or offer shifting explanations to justify the closure-and-relocation decision, the findings are amply supported by substantial evidence. The Board properly found (JA 210 n.10) that telling employees that they needed to apply for jobs in Clinton was not a hurdle, particularly given the absence of any evidence that travel to that facility was prohibitive. As for the Union's claim that the Company provided shifting reasons for the transfer, the Board acknowledged (JA 210-11) that the Company, in fact, was steadfast in emphasizing that increased efficiency and profits required modernization, an unattainable goal at the Middlesboro facility. Accordingly, the Union has failed to show that either employees faced hurdles in applying for jobs or that the Company changed the basis for its decision to close Middlesboro and relocate its production.

In short, the Board properly found that union activity was a motivating factor in the Company's decisions regarding the Middlesboro facility, and the narrowing of the factual underpinnings of that finding does not provide the Union with any basis for judicial review. In any event, the Board's findings with respect to factors showing the Company's unlawful motivation are fully supported by substantial evidence, and the Union's challenges ask this Court to reweigh the facts. Thus, to the extent that the challenges bear on the resolution of this case, which is not obvious, the Court should defer to the Board's factual findings.

### **C. The Board's Decision Comports with Precedent**

Contrary to the Union's claim (Br. 41 n.5), the Board properly relied on precedent (JA 211 n.12, citing cases) to support its finding that it was "implausible" that local union matters would have prompted the Company's \$20 million proposal. The cases cited by the Board demonstrate that the inquiry does not end with a showing that there is substantial evidence supporting an inference that union activity was a motivating reason for an employer's action. Rather, an employer can rebut that inference by demonstrating that legitimate business justifications drove its decision and that it would have therefore taken the same action even in the absence of union activity.

For example, in *Gunderson Rail Services*, despite "apparent and pronounced" animus, the employer's decision to close a facility "was part of a

much larger plan to increase profits and meet Wall Street demands in the wake of a hostile takeover attempt” and unrelated to union organizing. 364 NLRB No. 30, 2016 WL 3457653, at \*12 (June 23, 2016). Similarly, in *Litton Mellonics Systems Division*, the employer demonstrated that closing a facility constituted a “reasonable business decision” due to unsatisfactory physical conditions even though the employer threatened employees with job loss if they continued to engage in protected activity. 258 NLRB 623, 625-26 (1981). In *Chemical Solvents*, the employer established that the relatively minor union activity of grievance filing did not prompt its decision to subcontract work; the annual \$300,000 savings triggered the decision. 2015 WL 5013400, \*9. The employer demonstrated a “sound financial reason” that was “separate from and unrelated to any anti-union animus.” *Id.*; see also *Nu-Skin Int’l*, 320 NLRB 385, 404-05 (1995) (finding employer relocated business based on financial considerations notwithstanding its threats to close the facility if the employees voted for the union).

The Union claims (Br. 41 n.5) that these cases are inapplicable because they have no evidence directly linking the adverse employment decision to union activity. But, as discussed above, each employer made no secret of its unlawful motive. These cases make clear, however, that a showing of unlawful motivation alone is insufficient; an employer still has the opportunity to show that,

notwithstanding this factor, it would have taken the same action even in the absence of union activity. Here, the Board applied this principle and found that the Company would have closed Middlesboro and transferred production because of compelling business considerations, notwithstanding the inference of unlawful motivation, which was arguably less troubling than that displayed in the cases cited above.

The Union claims (Br. 39-40) that the Board disregards precedent that imposes a “substantial” burden on an employer in proving a lawful motivation where evidence directly links employees’ union activity to an employer’s adverse employment action. But this claim ignores the Board’s explicit finding that the Company did, in fact, present such evidence. Specifically, as the Board found, the Company presented “compelling economic reasons regardless of the Union’s presence” for its decision to close Middlesboro and transfer the work (JA 210) and the changes were “critical” for increased productivity and efficiency. Indeed, *Eddyleon Chocolate Co.*, 301 NLRB 887 (1991), the case cited by the Union (Br. 40) to support its claim that a strong showing of union animus shoulders an employer with a “substantial burden” of proving a lawful motivation, illustrates why the Board’s decision here is correct. In *Eddyleon*, the employer laid off several union supporters, two days after threatening to lay off “friends” of the union and after requesting and obtaining a list of known union supporters. *Id.* at

890. The Board rejected the employer's claim that the layoffs were economically necessary due to the seasonal nature of its work, noting that there was "scant record evidence" to support that claim. *Id.* In contrast, here, as discussed above, the Company presented "compelling" evidence supporting its economic justification – evidence that included the facility's geographic limitations, its antiquated equipment, low productivity, and financial data and earnings projections. (JA 209.)

Further, the cases cited by the Union (Br. 39-40) to support its argument are decidedly distinguishable inasmuch as those employers not only admitted that their adverse actions were because of the union, but the evidence also revealed that their asserted economic justifications did not rebut their ill motive. For example, in *Royal Norton Manufacturing Co.*, the president, who was also general manager and sole stockholder, told executives that he would endeavor to eliminate the union and wanted to move the plant to be rid of the union; instructed a subordinate to determine which employees would be favorably disposed towards voting the union out; secretly recorded union members during private caucuses; and offered to pay an employee to discourage others from joining the union. 189 NLRB 489, 490-92 (1971). The employer also admitted to using his lease problems as a proxy for moving the plant and getting rid of the union. *Id.* at 490. Under these circumstances, which are flatly dissimilar from the present case, the Board found

that the employer's decision, "regardless [of] what economic justification [the employer] may have had as a result of its lease difficulties," was motivated "almost entirely" by a desire to eliminate the union. *Id.* at 492.

Likewise, in *Anglo Kemlite Laboratories, Inc.*, the company president explicitly told striking employees who made an unconditional offer to return to work that she did not know whether workers would be recalled because the company was transferring the work to Mexico "because of the situation." 360 NLRB 319, 332 (2014), *enforced*, 833 F.3d 824 (7th Cir. 2016). The president also admitted to accelerating the transfer-of-work decision because of the strike, and the evidence demonstrated that the transfer decision post-dated the strike, thereby undermining any claim of economic necessity. *Id.* The Company in this case made no similar declaration, and its decision to relocate the work done at Middlesboro, unlike the transfer decision in *Anglo*, had been under consideration for at least 18 months.

Finally, in *Allied Mills, Inc.*, unlike in this case, a manager, before closing a unionized plant and opening a new facility, told employees that "there would never be a union if he could help it" and that he would not accept any employees from the unionized plant at the new facility. 218 NLRB 281, 284-85 (1975), *enforced*, 543 F.2d 417 (D.C. Cir. 1976). The employer made good on its threat and refused to allow unionized employees to transfer to the new facility, which the Board

deemed “inherently destructive” of the employees’ Section 7 rights and convinced the Board that the employer “utilized the move as a device to rid itself of the [u]nion.” *Id.* at 288-89. The employers’ blatant admissions of unlawful motive in those cases, and their weak asserted justifications for their adverse actions, readily distinguish them from the Company’s actions here, and the Board did not depart from precedent in finding them inapposite.

In sum, the Court should reject the Union’s misguided claims that the Board’s decision departs from precedent. Rather, as shown, precedent supports the Board’s finding that the Company proved its *Wright Line* defense by a preponderance of the evidence, and that the Board reasonably dismissed the complaint allegation.

## CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter judgment denying the Union's petition for review.

Respectfully submitted

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March 2019

# **ADDENDUM**

**National Labor Relations Act, as amended, 29 U.S.C. §§ 151, et seq.****Section 7 (29 U.S.C. § 157)**

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

**Section 8(a)(1) (29 U.S.C. § 158(a)(1))**

It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

**Section 8(a)(3) (29 U.S.C. § 158(a)(3))**

It shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

**Section 8(a)(4) (29 U.S.C. § 158(a)(4))**

It shall be an unfair labor practice for an employer to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter.

**Section 8(a)(5) (29 U.S.C. § 158(a)(5))**

It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

**Section 10(a) (29 U.S.C. § 160(a))**

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

**Section 10(e) (29 U.S.C. § 160(e))**

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge

such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

**Section 10(f) (29 U.S.C. § 160(f))**

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

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

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

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

and

DURA-LINE CORPORATION,  
A SUBSIDIARY OF MEXICHEM

Intervenor

No. 18-1222

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its motion contains 11,172 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

/s/ David Habenstreit  
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Dated at Washington, DC  
this 29th day of March 2019

**UNITED STATES COURT OF APPEALS  
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**CERTIFICATE OF SERVICE**

I hereby certify that on March 29, 2019, I electronically filed the foregoing with the Clerk for the Court of the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that this document was served on all parties or their counsel of record through the appellate CM/ECF system.

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Dated at Washington, DC  
this 29th day of March 2019