

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

ERICKSON TRUCKING SERVICE, INC.

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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**BRIEF FOR
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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 credited record evidence, and that oral argument is therefore unnecessary. However, if the Court concludes that argument would be helpful, the Board requests to participate.

JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Erickson Trucking Service, Inc. (“the Company”) to review an order issued by the National Labor Relations Board (“the Board”) against the Company, and the Board’s cross-application to enforce that order. The Board’s Decision and Order issued on August 27, 2018, and is reported at 366 NLRB No. 171. (A. 1-19.)¹ The Board had jurisdiction over the unfair-labor-practice proceeding under Section 10(a) of the Act, 29 U.S.C. §160(a), which empowers the Board to prevent unfair labor practices affecting commerce.

The Board’s Order is final with respect to all parties. The Court has jurisdiction over this appeal under Section 10(e) and (f) of the Act, 29 U.S.C. §160(e) and (f). Venue is proper because the Company transacts business in this Circuit. The petition and application were both timely because the Act imposes no time limits for such filings.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board is entitled to summary enforcement of those portions of its Order remedying its uncontested findings that the Company violated Section

¹ “A” references are to the Joint Appendix filed by the Company. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

8(a)(1) of the Act by threatening employees with termination because of the Union's advocacy on their behalf, by telling employees it was terminating them because of that advocacy, and by implicitly promising employees that they could get their jobs back if they convinced the Union to change the proactive stance it had taken in representing them.

2. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by terminating employees Erin Baerman, Jason Baerman, Carlos Ocampo, Matthew Rowe, Keith Stephenson, and Nicholas Willer.

3. Whether the Board acted within its broad remedial discretion by ordering the Company to offer reinstatement to the six unlawfully terminated employees and to reimburse them for reasonable interim employment expenses.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Acting on an unfair-labor-practice charges filed by Local 324, International Union of Operating Engineers, AFL-CIO (OPEIU) ("the Union"), the Board's General Counsel issued a complaint alleging, as relevant here, that the Company committed numerous unfair labor practices that violated Section 8(a)(1) and (3) of the Act, 29 U.S.C. § 158(a)(1) and (3). (A. 4; 3935-3950.) The alleged unfair labor practices included various coercive statements made by the Company to its

employees about the Union's increased advocacy and their continued employment, and the termination of six employees. After a hearing, an administrative law judge issued a decision and recommended order finding that the Company committed most of the alleged unfair labor practices. (A. 4-19.) On review, the Board affirmed the judge's rulings, findings, and conclusions, and adopted the recommended Order, consistent with its Decision and Order.² (A. 1-3.)

II. THE BOARD'S FINDINGS OF FACT

A. Background; the Union's Representation of the Company's Operators; the Company's Hiring, Employment, and Pay Practices

The Company, a provider of cranes, rigging, and heavy hauling services to the construction industry, maintains offices in Grand Rapids and Muskegon, Michigan. Since 1983, Steve Erickson has owned the Company and served as its president. (A. 6-7; 23, 110-12, 3952.) For decades, the Union has represented the Company's full-time, year-round operators—20 employees prior to the six terminations found unlawful by the Board. Those employees operate the Company's cranes and some of its forklifts. (A. 7; 23, 27, 52, 59, 66, 71, 78, 82, 106, 113, 127, 143, 157, 3764, 4022-24.) Prior to December 2015, the Union had

² The Board reversed one Section 8(a)(1) violation found by the judge. (A. 2 and n.6.)

not filed grievances, nor had the operators sought the Union's assistance to address workplace issues. (A. 8; 54, 66, 88, 144.)

As relevant here, the parties' collective-bargaining agreement ("the Agreement") covers a number of counties in west Michigan, including those counties where the Company has its offices. (A. 7; 3960-88.) Through the Agreement, the Union operates a non-exclusive hiring hall, which permits the Company to hire "off the street." (A. 7; 26-27.) The Company has generally directly hired permanent, full-time employees, such as the 20 operators, and thereafter notified the Union of their hire. (A. 7; 52, 59, 65-66, 71, 77-78, 81-82, 87-88, 142-43.) The Agreement also requires the Company to give current employees the first opportunity for new jobs. (A. 7; 3965.) The Agreement does not set forth any layoff criteria. (A. 7; 3960-88.)

Work for the operators is seasonal, with summer months the busiest, and winter months the slowest. (A. 7; 38, 64, 72, 94, 113.) When the Company needs additional help during the busy season for job-specific work it has generally used the Union's hiring hall (A. 7; 23, 25-26, 142-44), or directly hired retired operators who could work for up to 39-hours per-month. (A. 7; 27, 142-44.) Prior to 2016, the Company used temporary employees sporadically, with the majority of work performed by the full-time operators. (A. 16; 23, 3995-4012.)

Also prior to 2016, the Company subjected its full-time operators to short-term layoffs, after which President Erickson directly called them back to work. The Company did not require the operators to reapply for work or to seek referral through the Union's hiring hall. (A. 7, 9; 52-53, 60, 71-72, 78, 82, 143.) During the short-term layoffs, the employees retained their company keys and credit cards. (A. 9; 52, 72, 75, 79, 90.) Employees who had short-term layoffs before Erickson recalled them included Nicholas Willer, who began working for the Company in 1998, and was laid off several times for a few days, but not since 2014. (A. 10; 77-80.) Carlos Ocampo, who began working for the Company in 2005, was laid off about five times for short periods that lasted a few weeks at most. (A. 11; 60, 63-64.) Jason Baerman, who began working for the Company in 2007, was laid off frequently in 2008 and 2009, usually for one or two days, but as long as two weeks, and in those years was unemployed more than he worked. After 2009, Baerman was mostly laid off in the spring months. (A. 10; 71-72, 75-76.) Erin Baerman, who began working for the Company in 2013, was laid off for the month of February 2014, and, at other times, for a day or two. (A. 10; 82.) At one point, employee Matthew Rowe, who began working for the Company in 2013, voluntarily left employment for approximately three months and was then hired back by President Erickson. (A. 10; 68.)

Under the Agreement, the Company pays operators based on the type of crane they operate. Operating the 500-ton crane pays the highest rate, with pay rates decreasing by 50-ton increments. The lowest paid classification, crane oiler, covers operators who are not yet certified to operate cranes. They assist the crane operators. (A. 7; 3983-87.) When operators work outside the geographic area covered by the Agreement, they come under the provisions of the “short-form agreement.” The short form agreement, first signed in 1984, and which, by its terms has been automatically renewed with each new contract between the Union and the Company, requires the Company to abide by the wage rates, fringe benefits, and all other provisions in seven named multi-contractor collective-bargaining agreements, including the one executed by the Associated General Contractors of America. (A. 7; 28-29, 3990.) The wage rates in the multi-employer agreements are generally higher than those in the Agreement. (A. 6; 29-30, 145-46.)

Prior to late 2015, employees with pay disputes handled them internally with President Erickson or Payroll Clerk Nancy Tejchma. (A. 8; 54, 61, 66, 72, 83, 88, 121.) On some occasions, the pay disputes were not resolved to the employees’ satisfaction. (A. 54, 83, 88.) Among employees with pay disputes, J. Baerman contacted the Company with a pay issue every few weeks (A. 10; 72); Keith Stephenson, who became an operator in August 2015, had pay issues

approximately twice a month (A. 9; 87-88, 91.); E. Baerman had payroll issues at least once a month (A. 11; 83); Ocampo had pay issues approximately five times a year (A. 11; 60-61); and Rowe had about five to ten pay disputes during his employment. (A. 10; 65-66, 68.)

B. In Fall 2015, the Union Seeks Higher Pay; in December, the Company Refuses to Deal With the Union When It Tries To Assist Employees Resolve Their Pay Disputes; in March 2016, the Company Enters Into an Informal Board Settlement that Requires It Not To Interfere With the Right of Employees To Seek the Union's Assistance

In approximately October 2015, Brandon Popp, the Union's new business agent, asked President Erickson to modify the existing Agreement to more broadly encompass the higher wage rates set forth in the most recent agreement with the Associated General Contractors of America. Erickson believed that the Union's request would increase wages by 30 or 40 percent. Popp also insisted on a more rigid application of the work classifications to ensure that union members performed all operating work. (A. 8; 144-46, 4048.)

In early December 2015, Jamey Foster, a crane operator, and Cody Velat, an oiler, were unable to resolve a dispute with the Company as to whether they were entitled to additional pay and fringe benefits for work they performed under the geographical jurisdiction of the Great Lakes Fabricators and Erectors Association (one of the seven contractor associations set out in the short-form agreement).

Thereafter, they informed Business Agent Poppo of the pay dispute. (A. 8; 30, 47-51, 54-56, 58.)

During a mid-December phone conversation, Business Agent Poppo raised the pay dispute with President Erickson. Erickson stated that he would not talk about wages to a business representative and that Poppo did not have the right to receive such information without the employees' permission. Poppo responded that Erickson was on the verge of an unfair-labor-practice charge. Erickson told Poppo to file the charge. (A. 8; 31.) In text messages sent to Foster and Velat on December 18, Erickson stated that if they could not resolve a wage issue with Payroll Clerk Tejchma, they needed to contact him. The message concluded, "I refuse to discuss wages with a business agent." (A. 8; 4013-14.)

In a letter dated December 22 from the Union's attorney to President Erickson, the Union stated that it intended to file unfair-labor-practice charges if the Company continued to interfere with the Union's relationship with its members. (A. 8; 4047.) The next day, Erickson responded by email, saying that "employees need to follow our written policy regarding any payroll questions," under which every payroll dispute has been resolved internally for over 40 years. (A. 5-6, 8; 4048.) Erickson further wrote, if employees "cannot follow simple rules they may need to find other employment," and that "[i]t seems the current [union] representation wants to circumvent [the] company policy[] as punishment"

over the Company declining the Union's recent "bogus" request for higher wages. (A. 5, 8; 4048.) Erickson's email concluded by stating, "the Union would be better served if the representatives were trying to convert non-union contractors instead of pissing off the longstanding union contractor." (A. 5, 8; 4048.)

On December 28, the Union filed grievances on behalf of Foster and Velat concerning their pay disputes. (A. 8 and n.15; 3991-92.) On the same day, the Union filed unfair labor-practice-charges with the Board. (A. 8-9; 3993.) In early January 2016, President Erickson informed Foster that he was very upset with Business Agent Poppo. (A. 9; 56.)

In approximately mid-January 2016, employee Stephenson spoke with President Erickson about a pay dispute regarding out-of-state work that he had performed in mid-December. Erickson informed Stephenson of the amount he would be paid for the work. Erickson further stated that Stephenson should come to him with any further questions and that he "need[ed] to quit talking to [Poppo] because he's going to get you in trouble." (A. 9-10; 88-89.) Also in January 2016, Ocampo called Tejchma with a pay dispute. She told him to call Erickson. In a subsequent phone conversation, Erickson stated that both were right, and the paperwork with his check would explain. (A. 11; 61-62.) That same day, Ocampo reported the situation to Business Agent Poppo. Thereafter, Ocampo's pay was adjusted. (A. 11; 62.)

On March 31, 2016, the Board's Regional Director approved an informal Board settlement agreement. (A. 9; 3736-38.) The agreement, among other things, required the Company to: 1) not prohibit employees from seeking the Union's assistance regarding wages and/or other terms and conditions of employment, 2) rescind the December 18, 2015 text messages sent to employees on the subject, 3) not unilaterally impose preconditions, limitations, or new procedures on enlisting the Union's assistance with payroll questions or other disputes. (A. 9; 3736-38.)

C. On May 13, 2016, Employee Rowe Seeks the Union's Assistance on a Pay Issue; on May 16, the Company Permanently Terminates Employees Rowe and Stephenson; the Company Tells Stephenson that It Is Terminating Him Because of the Union's Advocacy in Representing Employees

On May 13, 2016, Rowe called President Erickson to express his belief that he should have been paid a higher rate for a recent job. Erickson told Rowe that he was wrong and hung up on him. (A. 10; 66-67.) Rowe then contacted Joe Shippa, a union business representative in west Michigan, who resolved the matter with the Company. (A. 10; 23, 67, 70.) On May 16, President Erickson requested to meet with Rowe in his Grand Rapids office. Erickson informed Rowe that the Company was going in a different direction, that work was drying up in the Grand Rapids area, and that he was selling all of the smaller cranes. Erickson further stated that he was laying people off according to seniority and ability. (A. 10; 67-68.)

Erickson concluded by stating that there were many “unhappy employees” working for him and that he saw “no reason to keep them.” (A. 10; 67-68.)

That same day, President Erickson told employee Stephenson that that he had to let him go for “lack of work” and was letting him go first based on experience, qualifications, and certifications. (A. 10; 89-90.) Erickson further stated, “[t]his has been in the works for a while.” (A. 10; 90.) Stephenson asked what had been in the works. Erickson replied, “all this union stuff,” “there [are] a lot of unhappy people around here,” and that Stephenson “seemed unhappy.” (A. 10; 90.)

D. In Late May, the Company Threatens Employee Erin Baerman With Termination Because of the Union’s Increased Advocacy

In late May, employee E. Baerman was in President Erickson’s office in Muskegon. Baerman asked, “I’m not next to get the ax, am I?” Erickson replied that he and Carlos Ocampo “might be” because they operated 40-ton cranes and would “be the next to go . . . unless this stuff stops with the Union, then you’ll be safe. . . . I’m going to keep letting guys go . . . unless this stuff stops with the Union.” (A. 11; 83-84.)

E. On June 20, the Company Terminates Employees Erin Baerman, Jason Baerman, and Nicholas Willer; the Company Informs Them that their Terminations Are Due to the Union and Implicitly Promises That It Would Reinstate Them If They Could Get the Union to Change How It Represents Them

When E. Baerman, J. Baerman, and Willer reported to work at the Muskegon facility on the morning of June 20, they saw a “job continuation order” that instead of listing a job or piece of equipment, had the number “324” (the Union’s local number) with an instruction to meet with President Erickson. (A. 11; 4015.) Thereafter, they met with Erickson who stated that he was letting them go and that it was nothing personal, but that was what the Union is “forcing [him] to do.” (A. 11; 84.) Erickson further stated:

I’m done dealing with the Union. I’m done dealing with [Business Agent] Popps. I’m not going to let the Union tell me how to run my business, so I’m selling the[40 and 60-ton cranes] and let[ing] go of the guys that run them. . . . They don’t really start making any money until the 120-ton crane. . . . [I]f the [Union is] going to force me out of business then I’m going to help them . . . but you guys can make this stop. You can go tell [Business Manager Doug] Stockwell that you do not want [Popps] talking for you. I’m done dealing with [Popps]. I’m not going to answer his calls or texts. I am done dealing with Stockwell also. He is about the most arrogant son of a bitch I’ve ever met who wants to run your union like Hitler. [Popps] and Stockwell are costing you your jobs. I’ve tried talking to them. They won’t listen.

(A. 8 n.6, 11; 23, 79, 84.) Erickson concluded by saying: “But maybe if I get rid of you guys, you guys could go talk to them and this could be reversed, and we could go back to doing business like we’ve done around here for the last 40 years.”

(A. 8 n.6, 11; 23, 79, 84.)

J. Baerman asked Erickson why he was being terminated after 9 years of employment instead of employees who had worked at the Company for a year or less and who made mistakes. Willer stated that he had worked at the Company for 18 years and then fired in 5 minutes. (A. 11; 74, 79, 85.) Erickson replied, that they should not be mad at him, but instead “be mad at the Union . . . things didn’t have to be this way.” (A. 11; 74.) Erickson further stated, that “the new union contract [Poppo and Stockwell] were trying to shove down his throat was going to get more people let go.” (A. 11; 74.)

F. On July 8, the Company Terminates Employee Carlos Ocampo

In late June or early July, Ocampo called President Erickson regarding a work matter. During the conversation, Ocampo asked if he was next. Erickson replied, “not right now.” (A. 11-12; 62.) On July 7, Ocampo was working in the Grand Rapids yard when Erickson texted him to meet. During their meeting, Erickson terminated Ocampo. Erickson informed Ocampo that the termination was not personal as he had done a great job, but that he needed to “play by the union rules,” and as a result was getting rid of the small cranes. Erickson further stated, “[Business Agent Poppo] is relentless, and no one seems to care about that.” (A. 12; 63.) The Company required Ocampo and the other five terminated employees to turn in their Company card and keys. (A. 9; 74, 75, 79, 85, 90.)

G. After the Terminations, the Company Increases Its Use of Temporary Referral Employees

Prior to 2016, the Company's use of temporary referrals from the Union's hiring hall was minimal. The Company requested referrals three times in 2010, four times in 2014, and six times in 2015. (A. 16; 3995-99.) In 2016, the Company requested referrals 26 times, all of which occurred after the Company began terminating the six employees. (A. 16; 3999-4008.) Between January 2017 and the April hearing, the Company requested referrals 13 times. (A. 16; 4008-12.)

H. The Company's Practice of Selling Cranes; the Number and Type of Cranes Placed For Sale in 2016 After the Terminations

The Company regularly buys and sells cranes, generally selling cranes when they reach 10 years of age or 10,000 hours of use. Between 2003 and 2016 the Company sold 22 cranes.³ On May 13, 2016, Gene Landres, of Utility Cranes and Equipment LLC, an equipment broker, emailed President Erickson to inquire if he had anything "coming up for sale," or if he was "looking for anything." (A. 12;

³ Those crane sales included: two in 2003 (one "carrydeck," a small crane used in rigging operations, and one under-120-ton crane); one in 2005 (an under-120-ton crane); two in 2006 (one over-120-ton crane, and one under-120-ton crane); two in 2008 (both under-120-ton cranes); nine in 2009 (two carrydecks, seven under-120-ton cranes, and two over-120-ton cranes); two in 2012 (both over-120-ton cranes); one in 2013 (an over-120-ton crane); and one in 2015 (an over-120-ton crane). (A. 12; 3740.)

3769.) Erickson replied by email the next day that he would have six to ten cranes “for sale this year. Details in a couple of weeks.” (A. 12; 3768.) In a July 13 email to Landres, Erickson set forth that he had 16 cranes for sale with proposed sale prices.⁴ The next day, Landres replied by email, noting that the “market is down,” and providing estimated selling prices for each crane that were lower than Erickson had proposed. (A. 13; 4051.)

After not hearing back from Erickson, Landres emailed him again on August 29, in which he noted the lack of response, asked whether Erickson was “still interested in selling,” and noted that the “market has declined a bit further over the past 45 days.” (A. 13; 4057-58.) Erickson replied by email that day, stating “I am interested in selling some machines. . . . I am not in a hurry to sell anything and will wait for the right buyer that wants well maintained equipment. With that said, I do understand that the market is down and would be willing to look at offers that fall between your pricing and mine.” (A. 13; 4057.) In a September 14 email exchange between Erickson and Landres, Erickson agreed to lower his asking prices for the cranes, and Landres asked to schedule a visit to take sales photos.

⁴ Those cranes included: one 14-ton, one 15-ton, two 40-ton, one 55-ton, two 60-ton, two 75-ton, one 82-ton, one 90-ton, one 275-ton, three 300-ton, and one 500-ton crane. (A. 12-13; 4053.)

(A. 13; 4054.) The following month, Landres arranged with Erickson to have sales photographs taken. (A. 13; 4063-64.)

As of April 2017, when the hearing was held before the administrative law judge, the Company owned 36 cranes, including the cranes put up for sale after the terminations of the six employees. (A. 12; 3739.)⁵

II. THE BOARD'S CONCLUSIONS AND ORDER

On August 27, 2018, the Board (Members Pearce, Kaplan, and Emanuel) issued its Decision and Order finding, in agreement with the administrative law judge, that the Company violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by threatening employees with termination because of the Union's advocacy on their behalf, by telling employees that it was terminating them because of that advocacy, and by implicitly promising employees that they can get their jobs back if they get the Union to change the way it represents them. (A. 1 and n.5, 16-17.)⁶

⁵ Those cranes included: 3 carrydecks; 14 under 120 tons; 17 over 120 tons; and 2 tower cranes—which are for large projects, such as apartment buildings. The under-120-ton category included 2 40-ton, 1 55-ton, 4 60-ton, 2 75-ton, 1 80-ton, 1 82-ton, and 3 90-ton. (A. 12; 3739.) Although the Company claims (Br. 5 n.5) that in June 2017 it sold 2 40-ton, 2 60-ton, and 2 90-ton cranes that it had listed for sale, there is no record evidence to support that claim. (A. 12 n.29.) The record does reflect that as of April 2017, the Company continued to use its 40 and 60-ton cranes. (A. 12; 151.)

⁶ The Board, in disagreement with the judge (Member Pearce dissenting), dismissed the complaint allegation that a statement made by President Erickson

The Board further found, in agreement with the judge, that the Company violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1), by terminating the six employees. (A. 1-3.)

The Board's Order requires the Company to cease and desist from the unfair labor practices found, and in any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act, 29 U.S.C. § 157. (A. 18.) Affirmatively, the Board's Order directs the Company to offer reinstatement to the six unlawfully terminated employees and to make them whole for any loss of earnings as a result of their unlawful terminations. (A. 18.) The Order also requires, among the Board's other typical remedies, to post a remedial notice. (A. 18.)

SUMMARY OF ARGUMENT

1. The Board is entitled to summary enforcement of those portions of its Order remedying its uncontested findings that the Company violated Section 8(a)(1) of the Act because the Company did not contest those violations in its opening brief. Accordingly, any challenge to those findings are waived before this Court. Those violations include President Erickson informing E. Baerman that he and Carlos

when discharging employees—that the Union's Business Agent ran the Union like Hitler—constituted a separate violation of Section 8(a)(1) of the Act. (A. 1-2 and n.6.)

Ocampo “would be the next to go . . . unless this stuff stops with the Union. . . . I’m going to keep letting guys go” (A. 1 n.5, 11, 14, 16; 83-84); referencing “all this union stuff” and “unhappy” employees, including Stephenson, when terminating him (A. 1 n.5, 10, 14; 90); informing E. Baerman, J. Baerman, and Willer that the Union was “forcing him” to terminate them, that the Union was “costing” them their jobs, and that he was “done dealing” with the Union (A. 11, 14; 24, 79, 84); and telling them that they could get their jobs back if they convinced the Union to change how it represented them (A. 11, 14; 24, 79, 84).

2. Substantial evidence supports the Board’s finding that the Company violated Section 8(a)(3) and (1) of the Act by terminating the six employees. The Company’s uncontested unfair labor practices provide direct evidence of hostility towards the Union and provide a direct link between the terminations and that animus against the Union. In addition, the Board also reasonably relied on the events underlying the earlier Board settlement as background evidence of animus.

The credited record evidence also amply supports the Board’s finding that the Company’s asserted reason for the terminations, that it was selling the under-120-ton cranes in response to market conditions and had no work for the employees whom it terminated, was a pretext. Factors supporting that finding include the Company having never previously terminated permanent employees, the close timing between the terminations and the Union’s increased advocacy, the

Company's contemporaneous uncontested unfair labor practices that expressly blamed the Union for the terminations, and the Company's own actions that demonstrated that there was no rush to sell any cranes. These factors, among others, significantly undermine the Company's claimed business reason. In the alternative, the Board reasonably found that, even if the Company's reason for terminating the six employees was not pretextual, it had not demonstrated by a preponderance of the evidence that it would have terminated the six employees due to a shift in operations toward larger cranes, rather than for the Union's increased advocacy in representing the Company's operators.

3. Finally, the Board acted within its broad remedial discretion by ordering the Company to offer reinstatement to the six unlawfully terminated employees and to reimburse them for reasonable interim employment expenses. It is well settled that reinstatement is the standard remedy for discriminatory discharges. Moreover, requiring reimbursement for such interim expenses is fully consistent with the remedial purpose of a backpay order.

STANDARD OF REVIEW

The Court must uphold the Board's factual findings if they are supported by substantial evidence, even if the reviewing court could justifiably make different findings if it considered the matter de novo. 29 U.S.C. § 160 (e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951); *Airgas USA, LLC v. NLRB*,

916 F.3d 555, 560 (6th Cir. 2019); *NLRB v. Gen. Fabrications Corp.*, 222 F.3d 218, 225 (6th Cir. 2000). Such findings of fact include determining an employer’s motive for taking adverse employment actions against employees. *Airgas USA, LLC*, 916 F.3d at 560; *Birch Run Welding & Fabricating v. NLRB*, 761 F.2d 1175, 1179 (6th Cir. 1985).

“The Board’s application of the law to the facts is also reviewed under the substantial evidence standard, and the Board’s reasonable inferences may not be displaced on review.” *Indiana Cal-Pro, 23 Inc. v. NLRB*, 863 F.2d 1292, 1297 (6th Cir. 1988). “Deference to the Board’s factual findings is particularly appropriate where the record is fraught with conflicting testimony and essential credibility determinations have been made.” *Conley v. NLRB*, 520 F.3d 629, 638 (6th Cir. 2008) (quotation marks and citation omitted); *accord Gen. Fabrications Corp.*, 222 F.3d at 225. In such cases, this Court’s review is “severely limit[ed],” and the Board’s credibility determinations should be affirmed “unless they have no rational basis.” *Fluor Daniel, Inc. v. NLRB*, 332 F.3d 961, 967 (6th Cir. 2003).

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THOSE PORTIONS OF ITS ORDER REMEDYING ITS UNCONTESTED FINDINGS THAT THE COMPANY REPEATEDLY VIOLATED SECTION 8(a)(1) OF THE ACT

The Company's brief does not challenge the Board's findings that President Erickson made numerous statements that violated Section 8(a)(1) of the Act.⁷

Thus, the Company does not dispute that Erickson unlawfully threatened E.

Baerman and other employees with termination by informing E. Baerman that he and Carlos Ocampo "would be the next to go . . . unless this stuff stops with the Union. . . . I'm going to keep letting guys go." (A. 1 n.5, 11, 14, 16; 83-84.) As the Board found, Erickson's statements to E. Baerman "were explicit threats that [E. Baerman] and other employees would be terminated because of [Erickson's] animus toward the Union for the way it was representing employees." (A. 14.)

Nor does the Company dispute that Erickson unlawfully told employee Stephenson that his termination was due to the Union's advocacy on his behalf, or that Erickson thereafter made similar unlawful statements to employees E.

⁷ Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" in the exercise of their rights under Section 7 of the Act. 29 U.S.C. §158(a)(1). Section 7, in turn, guarantees employees "the right to self-organization, to form, join, or assist labor organizations, . . . and to engage in other concerted activities . . ." 29 U.S.C. §157. *See Dayton Newspapers, Inc. v. NLRB*, 402 F.3d 651, 659-60 (6th Cir. 2005).

Baerman, J. Baerman, and Willer. Thus, when Erickson terminated Stephenson he referenced “all this union stuff” and “unhappy” employees, including Stephenson. (A. 1 n.5, 10, 14; 90.) As the Board found, “Erickson’s statements would reasonably have caused Stephenson to believe that there was a nexus between his termination and the way the Union was representing employees.” (A. 14.) Similarly, Erickson informed E. Baerman, J. Baerman, and Willer that the Union was “forcing him” to terminate them, that the Union was “costing” them their jobs, and that he was “done dealing” with the Union. (A. 11, 14; 24, 79, 84.) Such comments “emphasized” that the terminations were due to the Union. (A. 14.)

Finally, the Company does not dispute that it implicitly promised employees E. Baerman, J. Baerman, and Willer that they could get their jobs back if they convinced the Union to change how it represented them. Erickson’s statement that they “could talk to [the Union],” and could “reverse” the terminations were, as the Board found, “coercive and constituted another independent violation of Section 8(a)(1).” (A. 11, 14; 24, 79, 84.)

Because the Company did not contest those violations in its opening brief, any challenge to those findings is waived before the Court. *See Conley*, 520 F.3d at 638 (where employer “does not argue in its appellate brief against the validity of the Board’s rulings . . . [a]ny challenges to those rulings have thus been waived”); *Hyatt Corp. v. NLRB*, 939 F.2d 361, 368 (6th Cir. 1991) (when an employer “fails

to address or take issue with the Board’s findings and conclusions with regard to violations of the Act, then the [employer] has effectively abandoned the right to object to those determinations”); *see generally* *Wu v. Tyson Foods Inc.*, 189 F. App’x 375, 381 (6th Cir. 2006) (“This court has consistently held that arguments not raised in a party’s opening brief, as well as arguments adverted to in only a perfunctory manner, are waived.”)

It follows that the Board is entitled to summary enforcement of those portions of its Order remedying the uncontested findings that the Company violated the Act. *See General Fabrications Corp.*, 222 F.3d at 231-32; *NLRB v. Autodie Int’l*, 169 F.3d 378, 381 (6th Cir. 1999); *Hyatt Corp.*, 939 F.2d at 368. Moreover, the uncontested violations “do not disappear altogether. They remain, lending their aroma to the context in which the contested issues are considered.” *General Fabrications*, 222 F. 3d at 232.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY TERMINATING THE SIX EMPLOYEES

Before the Court, the Company makes no attempt to downplay President Erickson’s “irritation at [Business Agent] Popp and the other union officials for injecting the Union into employee wage disputes that he and [Payroll Clerk] Tejchma had previously handled internally.” (A. 5.) Indeed, President Erickson was admittedly “piss[ed] off” at the Union for its increased advocacy on behalf of

the Company's employees and its request for higher contractual wages. (A. 5, 8; 4048.) Nor has the Company tried to hide that its displeasure with the Union extended well beyond irritation. Rather, as shown above, in conjunction with the Company's first-ever permanent terminations of employees in the many decades that the Union has represented the operators, it does not dispute that President Erickson made numerous unlawful statements that violated Act. Those uncontested violations—threatening to terminate operators because of the Union, blaming the Union for the terminations, and suggesting to the terminated employees that it would restore their jobs if they convinced the Union to change—provide direct evidence that the six terminations were unlawfully motivated.

Nevertheless, the Company contends that it terminated the employees for a legitimate business reason. Specifically, the Company claims that changing market conditions led President Erickson to sell company cranes. As a result, the Company further asserts that the selling of those cranes resulted in no work for the six terminated employees because they were assigned to those cranes and were the least-qualified employees to continue employment with the Company. The Board reasonably found that the Company's asserted business reason was a pretext. In the alternative, the Board reasonably found that even if the Company's business justification was not pretextual, it nonetheless failed to establish by a preponderance of the evidence that it would have terminated the operators for

business reasons absent the Union's increased advocacy on their behalf. (A. 16.)

As we now show, substantial evidence supports the Board's findings, and the Company's challenges to those findings are without merit.

A. Applicable Principles

An employer violates Section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1), by taking adverse action against an employee for engaging in union activity.⁸ In most discrimination cases, the critical inquiry is whether the employer's actions were motivated by union animus. In *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Supreme Court approved the Board test for determining motivation in unlawful discrimination cases first articulated in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981).

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 against the employee, the adverse action is unlawful unless the record as a whole compelled the Board to accept the employer's affirmative defense that it would have taken the adverse action even in the absence of

⁸ A violation of Section 8(a)(3) creates a derivative violation of Section 8(a)(1). See *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *Architectural Glass & Metal Co. v. NLRB*, 107 F.3d 426, 430-31 (6th Cir. 1997).

protected activity. *Transp. Mgmt. Corp.*, 462 U.S at 397, 401-03; *Airgas USA, LLC v. NLRB*, 916 F.3d 555, 560 (6th Cir. 2019); *Airgas USA, LLC v. NLRB*, ___ F. App'x ___ (6th Cir. 2019), 2019 WL 181603, *3. If the lawful reasons advanced by the employer for its actions are a pretext – that is, if the reason either did not exist or was not in fact relied upon – the employer has not met its burden, and the inquiry is logically at an end. *Airgas*, 916 F.3d at 561, 565; *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981), *enforced mem.*, 705 F.2d 799 (6th Cir. 1982).

Unlawful motivation can be “inferred from circumstantial as well as direct evidence.” *W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 873 (6th Cir. 1995). “Direct evidence, such as an employer’s announcement of ‘an intent to discharge or otherwise retaliate against an employee for engaging in protected activity,’ is ‘especially persuasive.’” *Airgas*, 2019 WL 181603, *3 (quoting *Turnbull Cone Baking Co. v. NLRB*, 778 F.2d 292, 297 (6th Cir. 1985)). As further relevant here, animus may also be inferred from circumstantial evidence, including expressed hostility towards protected activity combined with knowledge of the protected activity, inconsistencies between the proffered reason for the employer’s action and other actions it has previously taken, and the proximity in time between the protected activity and the adverse action. *Airgas*, 916 F.3d at 561; *W.F. Bolin*, 70 F.3d at 871.

B. Substantial Evidence Demonstrates that the Company Was Unlawfully Motivated in Terminating the Six Employees, and that Its Asserted Reason Was Pretextual

1. The Company amply demonstrated its animus and knew of the Union's actions on its employees behalf

Ample credited evidence supports the Board's finding that the Company's termination of the six employees who worked as operators, and who comprised 30 percent of the bargaining unit, was unlawfully motivated. Indeed, the uncontested unfair labor practices committed by President Erickson provide direct evidence of hostility towards the Union and unambiguously link the terminations to that animus. In addition, the Board also reasonably relied on the events underlying the earlier Board settlement as background evidence of animus. In these circumstances, the Company's reference (Br. 2) to "alleged union animus" is specious. And in light of President Erickson's unlawful statements in response to the Union's increased advocacy on behalf of the employees it represented, the Company's knowledge of that advocacy is undisputable.

At the outset, as the Board found, President Erickson made unlawful statements to employees over a period of months that demonstrated hostility "toward them for seeking the Union's assistance with their wage rates, and/or toward [Business Agent] Poppo or union officials in general for seeking higher wage rates for them." (A. 4.) Those unlawful statements began with Erickson linking Stephenson's termination to "all this union stuff" and "unhappy"

employees, including Stephenson. (A. 10; 90.) Thereafter, Erickson unlawfully threatened E. Baerman that he and Ocampo would “be the next to go . . . unless this stuff stops with the Union,” and that he would “keep letting guys go . . . unless this stuff stops with the Union.” (A. 11; 83-84.)

Moreover, consistent with the unlawful threat to E. Baerman, President Erickson proceeded to unlawfully inform him, J. Baerman, and Willer that the Union was “forcing him” to terminate them, that the Union was “costing” them their jobs, and that he was “done dealing” with the Union. (A. 11, 14; 24, 79, 84.) Similarly, Erickson unlawfully informed Ocampo that his termination was due to Erickson having to “play by the union rules” and the Union’s current representatives who are “relentless.” (A. 12; 63.) Significantly, Erickson reinforced that union animus was the reason for their terminations by unlawfully suggesting to the terminated employees that he would “reverse[]” the terminations if they talked “to [the Union]” and convinced it to change how it represented them. (A. 11, 14; 24, 79, 84.)

In sum, President Erickson’s unlawful statements expressly linking the Union’s activity on behalf of the employees it represents to the terminations “are direct, relevant evidence that ‘a reasonable mind might accept as adequate to support a conclusion’ that [the Company] was motivated by animus” when it terminated the six employees. *Airgas*, 2019 WL 181603, *4 (direct evidence of

animus where employer blamed adverse action on an employee having filed unfair-labor-practice charges with the Board) (quoting *NLRB v. Local 334, Laborers Int'l Union of N. Am.*, 481 F.3d 875, 878-79 (6th Cir. 2007)).

In addition to the direct evidence of animus established by the Company's uncontested unfair labor practices that occurred at the time of the terminations, the Board also reasonably relied (A. 15) on background evidence of animus based on events that occurred a few months earlier and which underlie the informal Board settlement agreement. See *NLRB v. N. Cal. Dist. of Hod Carriers & Common Laborers of Am.*, 389 F.2d 721, 724-25 (9th Cir. 1968); *Steves Sash & Door Co. v. NLRB*, 401 F.2d 676, 678 (5th Cir. 1968); see also *Overnite Transp. Co.*, 335 NLRB 372, 376 n.18 (2001). Thus, in response to employees seeking the Union's assistance in resolving wage issues, President Erickson informed Union Business Agent Popp and those employees that he would not talk to the Union about wages. In addition, Erickson expressed antagonism toward the Union to the Union's attorney, stating that the Union's conduct in raising pay issues was "pissing off" a longtime union contractor (referring to himself). Similarly, the evidence reflects that Erickson was very upset with Popp for seeking a mid-term modification to the Agreement that in his view would have raised wage rates by 40 percent. (A. 15.) In sum, as the Board noted, "Erickson's statements to employees emphasized

his frustration and anger at the Union's leadership for the actions it was taking on their behalf, as did his statements to union representatives." (A. 15.)

Finally, given the undisputed evidence that the Union had taken a more aggressive stance in its representation of the unit employees and the Company's repeated unlawful statements to the terminated employees regarding that activity, the Board reasonably found that "the Union's conduct on behalf of operators in general, and [the Company's] knowledge thereof, are undeniable." (A. 15.) Such knowledge further supports the Board's finding that the Company's terminations were unlawfully motivated.

Despite the ample evidence supporting the Board's finding of unlawful motivation, the Company (Br. 25-26, 43-45) nevertheless disputes that finding with regard to the terminations of E. Baerman, J. Baerman, and Willer. Specifically, the Company claims that the Board erred because the record does not disclose that those three terminated employees, unlike the other terminated employees (Ocampo, Rowe, and Stephenson), also complained to the Union about pay rates. That claim is baseless because the Company does not dispute that it unlawfully told E. Baerman that he would be terminated if the Union did not change. Nor does the Company dispute that thereafter Erickson unlawfully told E. Baerman, J. Baerman, and Willer that their terminations were due to the Union and unlawfully suggested that he would reverse the terminations if the Union changed how it

represented the employees. Accordingly, whether E. Baerman, J. Baerman, and Willer had specifically complained about wages does not in any way detract from the Board's finding that their terminations were unlawfully motivated. In these circumstances, the Board is not, as the Company contends (Br. 48-49), protecting these three employees simply because they are union members. Rather, the evidence establishes that union animus was the precise reason for their terminations.⁹

Moreover, it is well settled, as the Board explained, that “employees are protected from discriminatory conduct by an employer due to their suspected union or other protected activity, even if the employer’s belief is mistaken.” (A. 15.) *See NLRB v. Link Belt Co.*, 311 U.S. 584, 589–90 (1941); *Alternative Energy Applications, Inc.*, 361 NLRB 1203, 1206 n.8 (2014). And here, Erickson’s specific unlawful remarks about the Union to E. Baerman, J. Baerman, and Willer

⁹ Before the Board, the Company argued that the *Wright Line* test required the Board to establish a specific nexus between the Company’s animus and the terminations. To the extent the Company’s current argument can be read as requiring such a nexus, that claim is misplaced. This Court has previously held that the *Wright Line* test contains no such requirement. *See Conley v. NLRB*, 520 F.3d 629, 642 (6th Cir. 2008). *FiveCap, Inc. v. NLRB*, 294 F.3d 768 (6th Cir. 2002), cited by the Company (Br. 26, 43), is not to the contrary, because it only mentions a “particularized showing” as rebuttal evidence to defeat an employer’s legitimate reason for taking the action in question. *Id.* at 781. Here, in contrast, the Board explicitly found that the Company did not possess a legitimate reason for terminating the employees.

suggest a belief by President Erickson that they also supported the Union’s increased advocacy on the employees’ behalf. Furthermore, as the Board also explained, “in mass layoff situations where the purpose is discouraging employees from engaging in union activity, or retaliating against them for such activity,” the Board does “not need to establish each individual employee’s union activity and knowledge, or that all union adherents were laid off.” (A. 15.) As this Court has explained, “[t]he rationale underlying this theory is that general retaliation by an employer against the workforce can discourage the exercise of [S]ection 7 rights just as effectively as adverse action taken against only known union supporters.” *Birch Run Welding & Fabricating Inc. v. NLRB*, 761 F.2d 1175, 1179-80 (6th Cir. 1985); *see also Novato Healthcare Ctr. v. NLRB*, 936 F.3d 1095, 1105 (D.C. Cir. 2019) (“an employer’s discharge of uncommitted, neutral, or inactive employees in order to ‘cover’ or to facilitate discriminatory conduct against a targeted union-supporting employee or to discourage employee support for the union is violative of Section 8(a)(3) of the Act”) (quoting *Dawson Carbide Indus., Inc.*, 273 N.L.R.B. 382, 389 (1984)).

2. The Company’s asserted reason for terminating the six employees is pretextual

Substantial evidence supports the Board’s additional finding that the Company advanced a pretextual reason for terminating the six employees. Thus, the evidence belies the Company’s assertion that the terminations were

legitimately business-related, namely that it was selling the under-120-ton cranes in response to market conditions and had no work for the employees whom it terminated.

As an initial matter, as the Board found, the Company had never permanently laid off or terminated any regular full-time operators in the several decades prior to 2016. (A. 16.) To the contrary, the evidence reflects that on occasion the Company temporarily laid off operators and then recalled them back to work. For example, the Company temporarily laid off employees E. Baerman, J. Baerman, Willer, and Ocampo, often for just a few days or weeks, before recalling them. In these circumstances, the Board (A. 16), contrary to the Company's contention (Br. 39), reasonably found pretext based, in part, on the Company's first-ever, permanent terminations, despite what President Erickson characterized (A. 114-15) as a long-term practice of selling the Company's smaller cranes.

In addition, as the Board further found, "the terminations closely followed the Union's leadership taking a more proactive stance in representing employees' interests." (A. 16.) Thus, the Company began discharging employees within months of the Union becoming directly involved in resolving employee pay disputes and seeking higher wages for employees. Critically, as the Board explained, "Erickson repeatedly made statements to employees that tied [the]

terminations [to] the Union’s conduct.” (A. 16.) Indeed, as shown, the Company committed several uncontested violations of the Act that directly implicated the Union as the reason for the terminations. Again, those unlawful statements included President Erickson unlawfully threatening an employee that he would “be the next to go . . . unless this stuff stops with the Union,” and that he would “keep letting guys go . . . unless this stuff stops with the Union.” (A. 11; 83-84). In addition, when Erickson terminated the employees he, among other statements, unlawfully referenced “all this union stuff,” and the need to “play by union rules.” (A. 12; 63.) Likewise, Erickson unlawfully blamed the Union for “forcing him” to terminate employees, stated that the Union was “costing” employees their jobs, and further stated that he was “done dealing” with the Union. (A. 11, 14; 24, 79, 84.) Significantly, Erickson even unlawfully promised employees that they could have their terminations “reversed” by talking “to [the Union]” to have it change its ways. (A. 11, 14; 24, 79, 84.) In these circumstances, President Erickson’s unlawful statements significantly undermine the Company’s claim that it acted for a legitimate business reason.

Finally, President Erickson’s own actions and words undermine the Company’s asserted business justification. Thus, the Company first received a general inquiry in May 2016 from Gene Landres as to whether it would have any cranes for sale. Yet, after initial communication, Erickson failed to respond to

Landres which led Landres, in late August, well after the last termination, to clarify whether Erickson was still interested in selling cranes that year. Thereafter, Erickson acknowledged to Landres that he was “in no hurry” to sell any of the cranes that he offered for sale. (A. 16; 4057.) In addition, it was not until September, that Erickson agreed, after several requests, to lower his asking prices, and it was not until October that Erickson even arranged to have sales photographs taken of the cranes. In these circumstances, the Board was fully warranted to find that “Erickson, by his actions and his own words was in ‘no hurry’ to sell any of the cranes that he offered for sale, including the 40-and 60-ton cranes.” (A 16.) Moreover, while President Erickson may be entitled to maximize his sale price for the cranes (Br. 40), the fact that the cranes were not even identified for sale or placed for sale until well after the last termination supports the Board’s pretext finding.¹⁰

In sum, the Board reasonably concluded that the Company’s asserted reason for terminating the employees was pretextual. *See Airgas*, 916 F.3d at 565-66

¹⁰ The Board found that the emails between President Erickson and Landres “contradict Erickson’s testimony that he believed the cranes were put up for sale on the web in July.” (A. 13 n.30; 4051-62.) The Board further found that those emails “shed doubt on [Erickson’s] testimony that the delay in putting them up for sale was due to logistic[al] issues regarding Landres’ getting professional photographs of the equipment, rather than in large measure to his own actions or inactions.” (A. 13 n.30.)

(substantial evidence supported Board’s determination that the employer’s stated nondiscriminatory reason for issuing a written warning to an employee was pretextual); *Airgas*, 2019 WL 181603, *5 (substantial evidence supported the Board’s determination that the employer’s stated nondiscriminatory reason for withholding pay was pretextual).

C. The Company Failed To Establish By a Preponderance of the Evidence that It Would Have Terminated the Six Employees Absent the Union’s Advocacy on Their Behalf

1. The Company’s asserted business justification fails to withstand scrutiny

The Board reasonably found (A. 16) that, even if the Company’s asserted reason for terminating the six employees was not a pretext, the asserted reason would nonetheless be insufficient to satisfy the Company’s burden on its affirmative defense under *Wright Line*. It is settled that an employer does not carry that burden merely by showing that—in addition to the existence of its unlawful reason—it also had a legitimate reason for its action. Rather, in such a mixed-motive case (which this one is not, given the asserted reason is a pretext), the employer must demonstrate by a preponderance of the evidence that it would have taken the same action even in the absence of the protected activity. *See Transp. Mgmt.*, 462 U.S. at 395; *NLRB v. Kentucky May Coal Co.*, 89 F.3d 1325, 1241-42 (6th Cir. 1996); *W.F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), *enforced*, 99 F.3d 1139 (6th Cir. 1996). Here, the Company has not demonstrated that it would have

terminated the six employees due to market forces that required it to shift its operations toward larger cranes and permanently terminate employees who operated the smaller cranes that it needed to sell.

As an initial matter, as the Board emphasized as a point “[o]f great significance,” there is no evidence that the Company had ever permanently terminated employees “at any time prior to 2016, even though [it] has recognized the Union for over 40 years.” (A. 16.) Rather, as shown, at most, the Company had a practice of short temporary layoffs. Moreover, as the Board further emphasized, the Company’s practice of never permanently terminating employees continued during what President Erickson claimed was a “trend for the last 10 years” toward less work for small cranes in the Company’s geographic area, and that it was therefore “selling smaller cranes [and] buying larger cranes all the time.” (A. 12, 16; 115.)

Significantly, as the Board further found, the documentary evidence does not corroborate President Erickson’s claim that he had “been selling smaller cranes since 2003.” (A. 16; 115.) Thus, between 2010 and 2016 all four of the cranes sold by Erickson were over 120 tons. (A. 16.) Similarly, “of the 16 cranes that the [Company] put up for sale in 2016, only four were 40- or 60-ton, and nine were over 60-ton (the largest were 275, 300, and 500 tons).” (A. 16.) In these

circumstances, the Board was fully warranted to conclude that the documentary evidence “shows no pattern in recent years of selling smaller cranes.” (A. 16.)

Moreover, given President Erickson’s testimony that divesting the Company of smaller cranes was a longstanding business decision due to changes in the industry, the Board reasonably discounted Erickson’s testimony “that in approximately March or April [2016] he first discussed with [his son,] Brent Erickson, selling the[] smaller cranes.” (A. 16; 117, 120.) As the Board noted, such testimony was “at odds with his testimony that divesting the Company of smaller cranes was a longstanding business decision due to changes in the industry going back at least a decade.” (A. 16.)

Equally important, there is no serious dispute that “none of the [cranes] were up for sale at the time of the last layoff, on July 8.” (A. 16.) Thus, when Landres first inquired in May about any cranes for sale, President Erickson merely responded that he would have some cranes later in the year without specifically mentioning any of the cranes, let alone the smaller cranes, that he had allegedly already decided to sell. Thereafter, Erickson admittedly informed the broker that he was “not in a hurry to sell anything.” (A. 16; 4057.) And based on the email correspondence between President Erickson and Landres, the cranes were apparently, as the Board found, “not actually put on the market until after October 8,” well after the last termination. (A. 16.) Nor is there any dispute that the cranes

were still being used at the time of the trial before the administrative law judge.

(A. 16.)

Finally, the Company has not disputed before the Court that, as the Board found, the Company “markedly increased its use of the union hiring hall for temporary hires starting in mid-2016—during the period of the layoffs—and continued to do so into 2017.” (A. 16.) Indeed, in 2016, the Company requested 26 referrals—double the number of referrals it had requested in all the years 2010–2015. Similarly, the 13 referrals from January 1 through April 18, 2017 (approximately 3-1/2 months), equaled the total number of referrals from 2010–2015. The dramatic increase in the Company’s use of referrals at the expense of long-term employees “undercuts the [Company’s] claim that decreased work for operators in mid-2016 justified the six [terminations].” (A. 16.)

In sum, the Board reasonably found that this body of evidence “sheds considerable doubt on whether the timing of the layoffs was based on bona fide business considerations.” (A. 16.) Rather, the Board reasonably concluded that the Company “has not satisfactorily demonstrated that the timing of the layoffs in 2016 was based on specific economic conditions or events occurring in the months immediately preceding them, rather than on animus toward the Union for its increased assertiveness in representing unit employees.” (A. 16.) *See Rain-Ware, Inc.*, 732 F.2d 1349, 1354-55 (7th Cir. 1984) (“Business decline cited by the

[employer] was [not] so drastic or so markedly different from prior declines as to compel an inference that the decline was the actual motive for the mass layoffs and warehouse closing.”)

2. The Company’s evidentiary arguments lack merit

Despite President Erickson having specifically blamed the Union when terminating employees, and Erickson himself, after first claiming that the Union had nothing “whatsoever” to do with his decision to sell the smaller cranes (A. 120), subsequently conceding (A. 155) that the Union’s activities were in fact “part” of the reason for the terminations, the Company nevertheless disputes the Board’s reasonable finding that it failed to carry its burden. The Company’s claim (Br. 33) that “[o]verwhelming evidence” establishes that the Company acted for a legitimate reason absent its undisputed union animus, fails to withstand scrutiny.

Thus, the Board’s finding that the Company failed to carry its burden is not undermined by the Company’s claim (Br. 1, 8, 34, 37) that as early as March 2015 it contemplated exiting the small-crane market. The Company is apparently referring to statements allegedly made by President Erickson to Stephenson when he became an operator in May 2015 that, unlike his previous position, operators were subject to layoff. However, as the Board found, even fully crediting Erickson, he “did not say anything that indicated the layoffs would be anything more than short-term and temporary.” (A. 10; 129.)

Nor is the Board's finding undermined by material prepared in 2016 by Steve Erickson, President Erickson's son, regarding crane usage. (Br. 1, 40) President Erickson testified that his decision to sell the small cranes was made prior to his son making the "pretty charts." (A. 120.) And any reliance on those charts conflicts with President Erickson's statements that the decision to sell was part of a long-term practice of selling smaller cranes. Moreover, it is undisputed that Steve Erickson had no role in President Erickson's decision to terminate the employees. (A. 6; 108.)

In any event, although the material prepared by Steve Erickson establishes that in general between 2005 and 2016 the percentage of hours of use for the under-120-ton cranes had decreased when compared with the hours of use for the over-120-ton cranes, the under-120-ton cranes still had considerable usage. (A. 12; 3755.) For example, in 2005, the under-120-ton cranes had 12,664 billing hours comprising approximately 78 percent of the Company's crane operations, and the over-120-ton cranes had 2,645 billing hours comprising approximately 16 percent of the operating hours. (A. 3755.) Thereafter, in 2016, the under-120-ton cranes had 6,688 billing hours comprising 39 percent of the operating hours, and the over-120-ton cranes had 8,662 billing hours comprising approximately 50 percent of the operating hours. (A. 3755.) Those billing hours demonstrate that although the billing hours for the over-120-ton cranes had increased substantially in 11 years,

the number of hours for the under-120-ton cranes hours in 2016 (6,688) was still more than in 2006 (6,111). Moreover, the billing hours in 2016 for the small cranes was similar to the hours in 2009 (7,294), 2010 (7,270), 2013 (7,164) and 2014 (7,803.) (A. 3755.)

The Company also misleadingly asserts (Br. 7, 36-37) that there was a dramatic decrease in small crane usage in 2016 and overall crane usage at the start of 2017. In 2015, the billing hours for both the under and over 120-ton cranes increased greatly when compared with 2014. Both types of cranes then returned to more typical levels of use in 2016. (A. 3755.)¹¹ Moreover, there is no dispute that the first part of a year is normally a slower time for crane use, and the Company has offered no claim that the hours of usage for the first part of 2017 was atypical in relation to the first part of other years.¹²

¹¹ Hours of use for the under-120-ton cranes between 2014 and 2016 was 7,803, 9,829, and 6,688, respectively. Hours of use for the over-120-ton cranes between 2014 and 2016 was 7,131, 11,236, and 8,862, respectively. (A. 3755.)

¹² There is no dispute that, with the exception of 2011, the four 40-ton and 60-ton cranes that were still for sale in 2017 had a continuous drop in their hours of use. (A. 12; 3755.) However, as the Company acknowledged, only the distinction between over-120-ton and under-120-ton cranes is “relevant for this appeal.” (Br. 5.) In any event, although the Company’s claims (Br. 7) that the four smallest cranes had not billed a sufficient number of hours in over 10 years, the fact remains that throughout that time period the Company not only kept the cranes, but that despite what it characterized as insufficient use, it never permanently terminated any employees.

Accordingly, the evidence does not support the Company's contention that there was a drastic decrease in small crane usage in the years leading up to the sudden termination of 30 percent of the Union's unit employees. And as noted, regardless of crane usage, the Company has offered no explanation for its sudden dramatic increase in the use of temporary employees after the terminations.

There is also no merit to the Company's claim (Br. 42-43, 45) that it terminated each of the six employees because they did not have an assigned crane. The Company's claim is undermined by the undisputed Board finding that, in describing the reasons for selecting the six terminated employees for layoff "[President] Erickson said nothing on direct examination about the [Company] not having an assigned crane being considered." (A. 6.) Only on cross-examination, as the Board further noted, did Erickson mention that the terminated employees operated either 40-ton or 60-ton cranes, "[o]r didn't have a crane assigned to them." (A. 6; 152.) Moreover, the Company's brief fails to address the Board's finding that Erickson's testimony on cross-examination is "curious" given the undisputed documentary evidence that five of the remaining crane operators are listed as "not assigned" to particular cranes. (A. 6; 3815-18.)

Finally, contrary to the Company's contention (Br. 42-43), the evidence is not undisputed that it terminated the least-qualified employees. Rather, the Board found that President Erickson "gave only a very nonspecific answer when asked if

he had a general methodology that he uses to assess qualifications based on experience and other factors.” (A. 6.) And in light of the Board’s finding that the Company failed to carry its burden that it relied on a legitimate business reason for the terminations, the Board did not “individually address the qualifications or experience of specific employees, including weighing Jason Baerman’s possession of certifications to run all cranes under the tower crane, and his recent operation of a 120-ton crane; Erin Baerman’s possession of certifications to run all cranes under the tower crane; or Willer’s 18 years’ employment with the Company.” (A. 16.)

In sum, the Board reasonably rejected the Company’s asserted business reason as pretextual and found that the “the terminations were motivated by Erickson’s frustration and anger at the Union for the conduct of its officials in seeking to secure higher pay for the operators whom they represented, including the filing of grievances and unfair labor practice charges.” (A. 16.)

D. The Court Has No Jurisdiction To Consider the Company’s Claim that the Board Erred In Applying Its *Wright Line* Test

The Company asserts (Br. 3, 23-24, 29-33) that the Board misapplied its *Wright Line* standard. Although a bit obtuse, the Company appears to claim (Br. 3, 24, 30-31, 39) that the Board’s pretext finding was deficient because it relied solely on having found animus without separately considering the Company’s affirmative defense on the merits. The Company also appears to argue (Br. 23, 29-33) that the Board’s alternative “mixed motive” analysis was deficient because it improperly

shifted the burden to the Company to establish that it had no union animus. The Company did not raise these claims before the Board, rendering this Court without jurisdiction to consider them. *See* Section 10(e) of the Act, 29 U.S.C. § 160(e) (“[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances”); *see also* *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (holding that Section 10(e) bars courts from considering issues not raised before the Board); *Conley*, 520 F.3d at 638 (the Court will not consider an issue not raised in exceptions to the Board); *Lee v. NLRB*, 325 F.3d 749, 752 (6th Cir. 2003) (same).

In any event, the Company’s claim regarding the Board’s pretext would be found meritless, even if reached. As noted, it is settled that pretext is established if the reason asserted for taking the adverse action either did not exist, or was not in fact relied upon. *Airgas*, 916 F.3d at 561, 565; *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981), *enforced mem.*, 705 F.2d 799 (6th Cir. 1982). In such circumstances, the finding of pretext not only leaves intact the Board’s finding of unlawful motivation, but also demonstrates that the Company has failed by definition to establish its affirmative defense that it would have terminated the six employees absent the Union’s activity on their behalf. As the Court has explained, when “the employer’s proffered justification for the [adverse] decision is

determined to be pretextual, the Board is not obligated to consider whether the employer would have taken the same decision regardless of the employee’s union activity.” *Airgas*, 916 F.3d at 561; *see also Conley*, 520 F.3d at 644 (when employer’s “stated reasons at the hearing for discharging [an employee] are pretextual and an attempt to disguise the fact that antiunion animus was the true motivation for the discharge . . . [it] pretermits the need to perform the second part of the *Wright Line* analysis”); *Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 219-20 (D.C. Cir. 2016) (where the Board properly concluded that “the employer’s purported justifications for the adverse action against an employer [were] pretextual, then the employer fail[ed] as a matter of law to carry its burden at the second prong of *Wright Line*.”)

Moreover, when the Board finds pretext it is not, as the Company suggests (Br. 3, 32-33), conflating the General Counsel’s burden to establish unlawful motivation with an employer’s affirmative defense. Rather, when the Board finds that the reason for an employer’s adverse action was pretextual it “not only dooms [the employer’s] defense but it buttresses the . . . affirmative evidence of discrimination” and supports an inference of unlawful motive. *U-Haul Co. of California*, 347 NLRB 375, 388-89 (2006), *enforced mem.*, 255 F. App’x 527 (D.C. Cir. 2007); *accord Conley*, 520 F.3d at 644 (a finding that the employer’s “stated reasons at the hearing for discharging [an employee] are pretextual . . . adds

further weight” to the Board’s finding of unlawful motive); *see also Fort Dearborn Co. v. NLRB*, 827 F.3d 1067, 1075 (D.C. Cir. 2016) (finding of pretext supports inference of unlawful motive). Applying those principles here, the Board did not, as the Company suggests (Br. 39), find pretext simply because it found evidence of unlawful motivation. Rather, Erickson’s unlawful statements that directly linked the terminations to the Union’s actions not only support a finding of unlawful motivation, but also undermine the Company’s asserted business reason and support a finding of pretext.

Similarly, the Company fundamentally mischaracterizes its burden regarding the Board’s alternative finding that the Company, even if this case did not contain a finding of pretext, could not carry its burden under a “mixed motive” analysis—that is, the assessment of circumstances where there can be both lawful and unlawful reasons at play. Contrary to the Company’s bald assertion that “dual motive cases do not violate the Act” (Br. 30), it was required, as it concedes, to prove “through a preponderance of evidence, that there was an independent legitimate reason that would have resulted in the same adverse employment action” (Br. 29), even absent its unlawful motive. In other words, it is not enough if the Company were to establish that there might have been a legitimate reason for the terminations. It must do much more than that. In these circumstances the Board’s inquiry did not end, as the Company contends (Br. 2, 3, 23-24, 31, 39, 43), simply

because it did not “doubt Erickson’s contention concerning general trends in the industry and his long-term plans to adapt to them.” (A. 16.) Rather, again, the Company was required to so show by a preponderance of the evidence that it would have terminated the six employees in the absence of the Union’s increased advocacy on their behalf. Here, as shown, the Board reasonably found that the Company failed to carry that burden notwithstanding whatever long-term trends may have been occurring in the Company’s business.

The Company’s reliance on *NLRB v. Flour Daniel, Inc.*, 161 F.3d 953 (6th Cir. 1998) (Br. 4, 24, 30, 31, 32), and *Dayton Newspapers, Inc. v. NLRB*, 402 F.3d 651 (6th Cir. 2005) (Br.25, 35), do not support the Company’s contention that it met its burden on its affirmative defense. For example, in *Flour Daniel*, a case in which the Court addressed the very specific burdens in a refusal-to-hire case, the Court held that the General Counsel was required to show, in order to establish that an adverse action had been taken, that applicants applied for available jobs that they were qualified to perform. 161 F.3d at 967. That holding has no bearing on this case where there is no dispute that an adverse action occurred: the Company’s termination of the six employees. *See generally NLRB v. Beacon Elect. Co.*, 504 F. App’x 355 (6th Cir. 2012) (discussing *Flour Daniel* and the subsequent standard developed by the Board to apply in refusal-to-hire cases.)

The Company gains no more ground by citing *Dayton Newspapers*, where the Court held that the Board had failed to establish that the employer was unlawfully motivated when it laid-off unit employees. 402 F.3d at 660-66. In doing so, the Court relied on evidence that five months earlier the employer had notified the union of its plan to move to a new facility, which would result in driver layoffs, and concluded that the employer's slight acceleration of its legitimate business plan was not unlawfully motivated because "it had long since planned to lay off these drivers as the transition to a new facility progressed." *Id.* at 665. Here, in contrast, prior the Union's increased advocacy of the Company's operators, there is simply no credited evidence that the Company had planned to terminate the six employees.

III. THE BOARD ACTED WITHIN ITS BROAD REMEDIAL DISCRETION BY ORDERING THE COMPANY TO OFFER REINSTATEMENT TO THE SIX UNLAWFULLY TERMINATED EMPLOYEES AND TO REIMBURSE THEM FOR REASONABLE INTERIM EMPLOYMENT EXPENSES

The Board's remedial power is "a broad, discretionary one, subject to limited judicial review." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964); accord *NLRB v. Jackson Hosp. Corp.*, 669 F.3d 784, 787 (6th Cir. 2012). As the Supreme Court has explained, "In fashioning its remedies . . . , the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts." *NLRB v.*

Gissel Packing Co., Inc., 395 U.S. 575, 612 n.32 (1969); accord *NLRB v. Ryder Sys., Inc.*, 983 F.2d 705, 709 (6th Cir. 1983). Thus, the authority to fashion remedies under the Act “is for the Board to wield, not for the courts.” *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969) (quoting *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953)).

Applying those principles here, there is no merit to the Company’s contention (Br. 50-51) that the Board erred by ordering the Company to reinstate the six terminated employees “to their former jobs or, if those jobs no longer exist, to substantially equivalent positions” (A. 17.) Indeed, under Section 10(c) of the Act, Congress granted the Board the authority, upon finding a violation of the Act, to order an employer “to take such affirmative action including reinstatement of employees . . . as will effectuate the policies of [the Act].” 29 U.S.C. § 160(c); see generally *Jackson Hosp.*, 669 F.3d at 787. Consistent with that provision, the Supreme Court has explained that the basic purpose of a Board remedial order is “a restoration . . . , as nearly as possible, to that which would have obtained but for the illegal discrimination.” *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); accord *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 175 (2d Cir. 1965). Accordingly, from the earliest days of the Act, “[r]einstatement [has been] the conventional correction for discriminatory discharges.” *Phelps Dodge Corp.*, 313 U.S. at 194; accord *NLRB v. Int’l Van Lines*, 409 U.S. 48, 54 (1972). Furthermore,

as the Board noted, to the extent the Company argues that it currently has no work for the six terminated employees “that would be a compliance matter.” (A. 17.) In this regard, the Company’s reliance on *We Can, Inc.*, 315 NLRB 170 (1994), is not to the contrary. Rather, in that case, the Board explained that deferral of a changed-circumstances argument to the later compliance phase of the case “is simply an explicit recognition of the reality that the appropriateness of almost any affirmative remedy may change over time, and an effective mechanism” for amending the status-quo remedy. *Id.* at 175-76.

Nor is there any merit to the Company claim (Br. 49-50) that the Board abused its discretion by including in the make-whole remedy a requirement that the Company reimburse the employees for any reasonable interim employment expenses they may have incurred. Tellingly, the Company’s short-sheeted challenge fails even to acknowledge that the remedy was thoroughly reviewed and upheld on policy grounds by the D.C. Circuit in *King Soopers, Inc. v. NLRB*, 859 F.3d 23, 39 (D.C. Cir. 2017). There, the court concluded that “the Board offered clear, reasonable, and compelling justifications for the new remedial framework,” *id.* at 37, each of which the court discussed at length, and none of which the Company here has even attempted to challenge. As such, the Company has presented the Court with no basis to review, much less disturb, this remedy that is entirely consistent with the remedial purpose of a backpay order—that is, “to

achieve a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination.” *Phelps Dodge*, 313 U.S. at 194. Nor does the Company’s reference (Br. 50) to General Counsel Memorandum 18-02 further its position, given that such memoranda are not binding on the Board. *See NLRB v. Pier Sixty, LLC*, 855 F.3d 115, 123 n.36 (2d Cir. 2017); *NLRB v. Gaylord Chem. Co., LLC*, 824 F.3d 1318, 1332 n.42 (11th Cir. 2016).

CONCLUSION

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

Respectfully submitted,

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March 2019

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

ERICKSON TRUCKING SERVICE, INC.)	
)	
Petitioner/Cross-Respondent)	Nos. 18-2283 & 18-2830
)	
v.)	
)	Board Case No.
NATIONAL LABOR RELATIONS BOARD)	07-CA-178824
)	
Respondent/Cross-Petitioner)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that this brief contains 12,688 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

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

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

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CERTIFICATE OF SERVICE

I hereby certify that on March 29, 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 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