

Nos. 18-1247, 18-1267

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

CON-WAY FREIGHT, 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**

ELIZABETH HEANEY

Supervisory Attorney

MICHAEL R. HICKSON

Attorney

National Labor Relations Board

1015 Half Street, SE

Washington, DC 20570

(202) 273-1743

(202) 273-2985

PETER B. ROBB

General Counsel

ALICE B. STOCK

Associate General Counsel

DAVID HABENSTREIT

Acting Deputy Associate General Counsel

National Labor Relations Board

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

CON-WAY FREIGHT, INC.)	
)	
Petitioner/Cross-Respondent)	Nos. 18-1247, 18-1267
)	
v.)	Board Case Nos.
)	21-CA-135683
NATIONAL LABOR RELATIONS BOARD)	21-CA-140545
)	
Respondent/Cross-Petitioner)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board (“the Board”) certify the following:

A. Parties, Intervenors, Amici

Con-Way Freight, Inc. (“the Company”) was the respondent before the Board and is the petitioner/cross-respondent before the Court. The Board is the respondent/cross-petitioner before the Court. Jaime Romero and Juan Placencia were the charging parties before the Board. The Company, the Board’s General Counsel, and counsel for Mr. Placencia appeared before the Board in Case numbers 21-CA-135683 and 21-CA-140545. There were no amici before the Board, and there are none in this Court.

B. Rulings Under Review

This case involves the Company's petition to review and the Board's cross-application to enforce an Order the Board issued on August 27, 2018, reported at 366 NLRB No. 183.

C. Related Cases

The ruling under review has not previously been before this Court or any other court. Board Counsel are unaware of any related cases either pending or about to be presented before this or any other court.

/s/ David Habenstreit
David Habenstreit
Acting Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street SE
Washington DC 20570
(202) 273-2960

Dated at Washington, DC
this 16th day of May, 2019

TABLE OF CONTENTS

Headings	Page(s)
Statement of jurisdiction	1
Relevant statutory provisions.....	2
Statement of the issues.....	2
Statement of the case.....	2
I. Procedural history.....	2
II. The Board’s findings of fact.....	3
A. The Company’s operations; Romero’s tenure as a driver	3
B. The Union begins an organizing campaign; Romero leads organizing efforts; the campaign gains momentum; the Company escalates its opposition.....	4
C. The Company’s DriveCam system; after a minor traffic accident, Romero follows the Company’s protocols	6
D. The Company reviews DriveCam footage; then suspends and discharges Romero, claiming falsification	8
E. The Union files an election petition; Styers and Licon instruct Placencia not to wear a union lanyard; Styers threatens Placencia	12
F. The Company hires an anti-union campaign consultant who threatens Placencia with physical violence.....	13
III. The Board’s conclusions and order.....	14
Summary of argument.....	15
Standard of review	17
Argument.....	18
I. Substantial evidence supports the Board’s findings that the Company violated Section 8(a)(1) of the Act by instructing Placencia not to wear a union lanyard, threatening him with unspecified reprisals, and implicitly threatening him with physical harm for supporting the Union	18

A. Applicable principles	18
B. Styers and Licon unlawfully instructed Placencia not to wear a union lanyard	19
C. Styers unlawfully threatened Placencia with unspecified reprisals.....	22
D. Camarena implicitly threatened Placencia with physical harm.....	25
II. Substantial evidence supports the Board’s finding that the Company violated Section 8(a)(3) and (1) by suspending and discharging Romero because of his union activity	29
A. An employer violates Section 8(a)(3) and (1) by taking adverse action against an employee for engaging in union activity	29
B. The Company unlawfully suspended and discharged Romero because of his union activity.....	32
1. Romero’s union activity was a motivating factor in his suspension and discharge.....	33
2. The Company’s arguments do not undermine the Board’s finding of unlawful motive	36
3. The Company’s professed reason for suspending and discharging Romero was pretextual	42
4. The Company cannot defeat the Board’s pretext determination.....	51
Conclusion	56

TABLE OF AUTHORITIES

Cases	Page(s)
* <i>Allegheny Ludlum Corp. v. NLRB</i> , 104 F.3d 1354 (D.C. Cir. 1997)	25, 31, 33, 43
<i>American Federation of Musicians, Local 76</i> , 202 NLRB 620 (1973)	21
<i>Ark Las Vegas Rest. Corp. v. NLRB</i> , 334 F.3d 99 (D.C. Cir. 2003)	46
<i>Avecor, Inc. v. NLRB</i> , 931 F.2d 924 (D.C. Cir. 1991)	20
<i>Bally’s Park Place, Inc. v. NLRB</i> , 646 F.3d 929 (D.C. Cir. 2011)	17, 33, 52
<i>Bruce Packing Co. v. NLRB</i> , 795 F.3d 18 (D.C. Cir. 2015)	50
<i>C & W Super Markets, Inc. v. NLRB</i> , 581 F.2d 618 (7th Cir. 1978)	18
<i>Cadbury Beverages, Inc. v. NLRB</i> , 160 F.3d 24 (D.C. Cir. 1998)	50
<i>CC1 Ltd. Partnership v. NLRB</i> , 898 F.3d 26 (D.C. Cir. 2018)	17, 27, 31, 32, 35
<i>Citizens Inv. Servs. Corp. v. NLRB</i> , 430 F.3d 1195 (D.C. Cir. 2005)	31, 46
<i>Consol. Bus Transit, Inc.</i> , 350 NLRB 1064 (2007), <i>enforced</i> , 577 F.3d 467 (2d Cir. 2009)	44
<i>Cont’l Radiator Corp.</i> , 283 NLRB 234 (1987)	38
<i>Dallas Mailers Union, Local No. 143 v. NLRB</i> , 445 F.2d 730 (D.C. Cir. 1971)	21

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Davis Supermarkets, Inc. v. NLRB</i> , 2 F.3d 1162 (D.C. Cir. 1993)	34
<i>Enter. Leasing Co. of Fla. v. NLRB</i> , 831 F.3d 534 (D.C. Cir. 2016)	28
<i>Farm Fresh Co.</i> , 361 NLRB 848 (2014)	38
<i>Federated Logistics & Operations v. NLRB</i> , 400 F.3d 920 (D.C. Cir. 2005)	24
<i>Fort Dearborn Co. v. NLRB</i> , 827 F.3d 1067 (D.C. Cir. 2016)	19, 30, 33
<i>Golub Corp.</i> , 338 NLRB 515 (2002)	21
<i>Guard Publ’g Co. v. NLRB</i> , 571 F.3d 53 (D.C. Cir. 2009)	19
<i>HealthBridge Mgmt., LLC v. NLRB</i> , 798 F.3d 1059 (D.C. Cir. 2015)	28
* <i>Inova Health Sys. v. NLRB</i> , 795 F.3d 68 (D.C. Cir. 2015)	17, 31, 32, 39, 40, 49, 54
<i>Int’l Ladies’ Garment Workers’ Union v. Quality Mfg. Co.</i> , 420 U.S. 276 (1975)	40
<i>Inter-Disciplinary Advantage, Inc.</i> , 349 NLRB 480 (2007)	31, 41
<i>Jackson Corp.</i> , 340 NLRB 536 (2003)	31
<i>James Julian Inc. of Delaware</i> , 325 NLRB 1109 (1998)	36

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Jennings & Webb, Inc.</i> , 288 NLRB 682 (1988), <i>enforced</i> , 875 F.2d 315 (4th Cir. 1989)	46
<i>Kidde, Inc.</i> , 294 NLRB 840 (1989)	43, 44
<i>Kut Rate Kid & Shop Kwik</i> , 246 NLRB 106 (1979)	53
<i>Laro Maint. Corp. v. NLRB</i> , 56 F.3d 224 (D.C. Cir. 1995)	31, 32
<i>Liberty House Nursing Homes</i> , 245 NLRB 1194 (1979)	23
<i>Materials Processing, Inc.</i> , 324 NLRB 719 (1997)	48
<i>MEK Arden, LLC v. NLRB</i> , No. 17-1237, 2018 WL 6721352 (D.C. Cir. Dec. 7, 2018)	19, 21
<i>Metro. Edison Co. v. NLRB</i> , 460 U.S. 693 (1983)	30
<i>Mid-Mountain Foods. Inc.</i> , 332 NLRB 251 (2000), <i>enforced</i> , 11 F. App'x 372 (4th Cir. 2001)	46
<i>Nat'l By-Prod., Inc. v. NLRB</i> , 931 F.2d 445 (7th Cir. 1991)	22
<i>New York Rehab. Care Mgmt., LLC v. NLRB</i> , 506 F.3d 1070 (D.C. Cir. 2007)	29
<i>NLRB v. Gissel Packing Co.</i> , 395 U.S. 575 (1969)	19, 24, 25
<i>NLRB v. Interstate Builders, Inc.</i> , 351 F.3d 1020 (10th Cir. 2003)	36

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases	Page(s)
<i>NLRB v. Link-Belt Co.</i> , 311 U.S. 584 (1941).....	31
<i>NLRB v. Transportation Management Corporation</i> , 462 U.S. 393 (1983).....	30
<i>Novato Healthcare Ctr. v. NLRB</i> , 916 F.3d 1095 (D.C. Cir. 2019).....	28
* <i>Ozburn-Hessey Logistics, LLC v. NLRB</i> , 833 F.3d 210 (D.C. Cir. 2016).....	30, 31, 32, 33, 37, 51
* <i>Parsippany Hotel Mgmt. Co. v. NLRB</i> , 99 F.3d 413 (D.C. Cir. 1996).....	31, 34, 37, 39, 40
<i>Pioneer Hotel, Inc. v. NLRB</i> , 182 F.3d 939 (D.C. Cir. 1999).....	19
* <i>Progressive Elec., Inc. v. NLRB</i> , 453 F.3d 538 (D.C. Cir. 2006).....	18, 19, 22
<i>Prop. Res. Corp. v. NLRB</i> , 863 F.2d 964 (D.C. Cir. 1988).....	35, 43
<i>Regency at the Rodeway Inn</i> , 255 NLRB 961 (1981).....	21
<i>Republic Aviation Corp. v. NLRB</i> , 324 U.S. 793 (1945).....	19
<i>S. Power Co. v. NLRB</i> , 664 F.3d 946 (D.C. Cir. 2012).....	40
<i>SCA Tissue N. Am. LLC v. NLRB</i> , 371 F.3d 983 (7th Cir. 2004).....	36, 38
<i>Schaumburg Hyundai, Inc.</i> , 318 NLRB 449 (1995).....	36
<i>Serendippity-Un-Ltd.</i> , 263 NLRB 768 (1982).....	20

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Southwire Co. v. NLRB</i> , 820 F.2d 453 (D.C. Cir. 1987)	31
<i>Sprain Brook Manor Nursing Home, LLC</i> , 359 NLRB 929 (2013), <i>incorporated by reference in</i> 361 NLRB 607 (2014), <i>enforced</i> , 630 F. App'x 69 (2d Cir. 2015)	31, 47
<i>Supershuttle of Orange County, Inc.</i> , 339 NLRB 1 (2003)	44
<i>Sw. Merch. Corp. v. NLRB</i> , 53 F.3d 1334 (D.C. Cir. 1995)	35
* <i>Tasty Baking Co. v. NLRB</i> , 254 F.3d 114 (D.C. Cir. 2001)	18, 22, 29
<i>Thalassa Restaurant</i> , 356 NLRB 1000 (2011)	26
<i>Trump Marina Assocs., LLC</i> , 353 NLRB 921 (2009), <i>incorporated by reference in</i> 355 NLRB 1277 (2010), <i>enforced</i> , 445 F. App'x 362 (D.C. Cir. 2011)	53
<i>TRW-United Greenfield Div. v. NLRB</i> , 637 F.2d 410 (5th Cir. 1981)	22
<i>Uniroyal Tech. Corp. v. NLRB</i> , 151 F.3d 666 (7th Cir. 1998)	55
<i>United Servs. Auto. Ass'n v. NLRB</i> , 387 F.3d 908 (D.C. Cir. 2004)	20
<i>Vincent Indus. Plastics, Inc. v. NLRB</i> , 209 F.3d 727 (D.C. Cir. 2000)	34, 50
<i>Waterbury Hotel Mgmt., LLC v. NLRB</i> , 314 F.3d 645 (D.C. Cir. 2003)	31

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Wilson Trophy Co. v. NLRB</i> , 989 F.2d 1502 (8th Cir. 1993)	31
* <i>Woelke & Romero Framing, Inc. v. NLRB</i> , 456 U.S. 645 (1982).....	28, 40
<i>Wright Line</i> , 251 NLRB 1083 (1980), <i>enforced on other grounds</i> , 662 F.2d 889 (1st Cir. 1981).....	15, 16, 30, 50
<i>Yukon Mfg. Co.</i> , 310 NLRB 324 (1993)	47
 <u>Statutes</u>	
National Labor Relations Act, as amended (29 U.S.C. §§ 151, et seq.)	
29 U.S.C. § 157	18
29 U.S.C. § 158(a)(1).....	3, 18
29 U.S.C. § 158(a)(3).....	3, 30
29 U.S.C. § 158(c)	23, 24
29 U.S.C. § 160(a)	2
*29 U.S.C. § 160(e)	2, 17, 28, 38, 40, 54
29 U.S.C. § 160(f).....	2

* Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY

A.	Joint appendix
Act	National Labor Relations Act
Board	National Labor Relations Board
Br.	Company's opening brief
Company	Con-Way Freight, Inc.
CWF	Con-Way Freight, Inc.
d/s	Driver side
DSR	Driver sales representative
e/b	Eastbound
HWY	Highway
p/s	Passenger side
SOS	Safe operations system
Union	International Brotherhood of Teamsters, Local 63
V2	Vehicle two; that is, the other vehicle in the accident involving Jaime Romero

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

Nos. 18-1247, 18-1267

CON-WAY FREIGHT, 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**

STATEMENT OF JURISDICTION

Con-Way Freight, Inc. (“the Company”) petitions for review of, and the National Labor Relations Board (“the Board”) cross-applies to enforce, a Board Order (366 NLRB No. 183) issued on August 27, 2018. (A. 590-621.)¹

¹ “A.” references are to the joint appendix. “Br.” refers to the Company’s brief. References preceding a semicolon are to the Board’s decision; those following are to the supporting evidence.

The Board had jurisdiction under Section 10(a) of the National Labor Relations Act (29 U.S.C. § 160(a)) (“the Act”). The Company’s petition and the Board’s cross-application were timely; the Act imposes no time limits for such filings. The Court has jurisdiction over the Board’s final Order pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)).

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions are reproduced in the Addendum to this brief.

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the Board’s findings that the Company violated Section 8(a)(1) of the Act by instructing employee Juan Placencia not to wear a union lanyard, threatening him with unspecified reprisals, and implicitly threatening him with physical harm for supporting the Union.

2. Whether substantial evidence supports the Board’s finding that the Company violated Section 8(a)(3) and (1) of the Act by suspending and discharging employee Jaime Romero because of his union activity.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

This case involves the Company’s unlawful actions in response to its employees’ union-organizing activities preceding a Board-conducted election that the International Brotherhood of Teamsters, Local 63 (“the Union”) won. Two

employees filed unfair-labor-practice charges, and after the election, the Company filed election objections. After investigating the charges, the Board's General Counsel issued a complaint alleging that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by prohibiting an employee from wearing union insignia, threatening an employee with unspecified reprisals, and implicitly threatening an employee with physical harm for supporting the Union; and violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by suspending and discharging employee Jaime Romero because of his union activity. The unfair-labor-practice allegations and election objections were consolidated for a hearing, after which the administrative law judge found that the Company violated the Act as alleged and overruled the Company's election objections. On review, the Board found no merit to the Company's exceptions and adopted the judge's findings and recommended order, as modified. It also certified the Union.²

II. THE BOARD'S FINDINGS OF FACT

A. The Company's Operations; Romero's Tenure as a Driver

The Company transports freight across North America. This case involves the Company's Los Angeles facility, where it employs about 44 drivers. (A. 590, 602; A. 24, 27, 407-08, 418.) Service Center Manager Paul Styers is the facility's

² The Board granted the parties' joint motion to sever allegations concerning additional violations. (A. 590 & n.2, 619-21.) Those violations, and the election objections, are not before the Court. (A. 590, 596.)

highest-ranking manager, and Rick Licon is the personnel supervisor. (A. 592, 602; A. 12-17, 31, 227, 233.) Kevin Huner is the human resources director for the Company's western area. (A. 602; A. 12-17, 346-47.)

Jaime Romero began working for the Company as a driver in 1990. At all material times, he worked at the Los Angeles facility. The Company awarded Romero a 10-year safety award in 2000 and a million-mile safety award in 2010. (A. 590, 602; A. 24-30, 340-41.)

B. The Union Begins an Organizing Campaign; Romero Leads Organizing Efforts; the Campaign Gains Momentum; the Company Escalates Its Opposition

The Union began a campaign to organize drivers at the Company's Los Angeles facility in 2009. In September 2014, the Union filed a petition seeking a representation election, which the Board conducted the following month. (A. 590 & n.5, 594, 602, 605; A. 31, 33-34, 374-75, 385, 394, 401-05.) Romero was the leader among employee organizers throughout the Union's campaign. (A. 590, 602; A. 31-33, 100-05, 115-16, 385, 394.) Among other activities, Romero communicated extensively with coworkers about unionization, and attended numerous union meetings. He also assisted in union-organizing initiatives at other Company facilities. (A. 590, 602; A. 32-33, 100, 102-03, 115-16, 124-29, 384-87.) The Company's managers and supervisors knew about Romero's role as leading

union organizer—including his activities in 2014, during the months leading up to the Union’s election petition. (A. 590-92, 602, 613; A. 34-42.)

Around late 2013, continuing into 2014, the campaign intensified. The employees formed an organizing committee, which included Romero and fellow driver Juan Placencia. (A. 590, 592, 602, 614; A. 46, 99, 102-05, 122-23, 126, 163-65, 387-88, 390-91.) In December 2013, Romero and other committee members began soliciting employees to sign union authorization cards. (A. 590, 602; A. 34, 100-01, 130, 156, 392.) Over the next several months, Romero collected about 20 signed authorization cards. (A. 590, 602; A. 34, 392.)

The Company grew concerned about the escalation in its drivers’ union-organizing activities. (A. 590-92, 603, 614; A. 37-40, 43-46, 94-99, 228-31.) In March 2014, Styers asked Romero why the employees were looking for third-party representation. In responding, Romero commented that he believed he was being targeted for his union activities. (A. 590-91, 602; A. 37-39, 94.) The Company also undertook new efforts to express its anti-union viewpoint. From March through May, Styers met with the drivers one-on-one or in pairs and read them a prepared, seven-page script conveying the Company’s opposition to the Union and emphasizing its concern about the solicitation of union-authorization cards. (A. 592, 603, 614; A. 40, 43-46, 95-99, 228-31, 447-53.)

C. The Company's DriveCam System; After a Minor Traffic Accident, Romero Follows the Company's Protocols

The Company's trucks are equipped with DriveCam, a recording device that has two lenses—one facing inward, toward the driver, and another facing outward, toward the road ahead. DriveCam continually records but does not save the footage unless triggered by an external event, such as an accident or a sharp brake or turn, or if the driver manually activates a save. Once a save is activated, DriveCam retains footage from 8 seconds before the trigger until 4 seconds after. (A. 591, 603; A. 51-52, 66, 255-57, 278.) DriveCam sends the Company a notification for automatic saves, but not for manual ones. (A. 603; A. 257, 338-39.) The Company does not review the saved DriveCam footage for every reported road accident. (A. 593 & n.18, 614; A. 258-59, 261, 263-64, 266-69, 329-333.)

On the evening of August 15, 2014, Romero was driving a tractor-trailer from the Los Angeles facility to another terminal. Romero was driving in a center lane when contact was made between his passenger-side mirror—which extended about 18 inches from the body of his truck—and a tractor-trailer passing Romero on the right. (A. 591, 603; A. 21-23, 47-66, 75-76, 92-93, 397.) At the time of contact, the other tractor-trailer was drifting toward Romero's lane. (A. 603; A. 53, 397.) Within a few seconds, Romero manually activated DriveCam's saving feature, per Company protocol. He also flashed his headlights to get the other

driver's attention, but the driver did not stop. (A. 591, 603; A. 57, 60-61, 64-68, 306, 397.)

Continuing to follow protocol, Romero pulled over and called the Company to report the accident, speaking with Tricia Plonte. Romero described the incident to Plonte, stating that the other vehicle had drifted to the left and that there were no injuries and no significant damage. (A. 591, 603; A. 66-72, 106-10, 116-18, 259-61, 265, 340, 344, 469-70.) Romero also filed a telephone report with the California Highway Patrol and informed Plonte that he had done so. (A. 591, 603; A. 70-72, 469-70.)

Romero then continued to perform his work assignment. Upon his return the next morning, August 16, to the Los Angeles facility, he filled out an accident-report form with a written description of the accident:

I was going on the number three lane, driving eastbound on 60 Freeway when a truck in the 4th lane passed by me hitting the rear view mirror on the passenger side. As a result, paint residue from the hit is visible. I flashed the headlights on the other driver; however, the driver of the other truck did not stop. He continued driving.

(A. 591, 603; A. 72-76, 119-20, 333, 423-24.) Romero drew a diagram of the accident on the form, then slid it under Licon's office door. (A. 591, 593, 603; A. 76-77, 119-20, 423-24.)

There was no damage to Romero's truck other than the paint residue on the passenger-side mirror. (A. 591, 603, 614; A. 68, 76.) Romero never asserted, in

any of his accident reports, that the other truck had left its lane. (A. 593, 614; A. 75-76, 423-24, 461-62, 469-70.)

D. The Company Reviews DriveCam Footage; Then Suspends and Discharges Romero, Claiming Falsification

Also on August 16, Plonte sent an email concerning Romero's accident to a safety event notification group that included Styers, Regional Safety Manager Don Andersen, and Director of Operations Mike Wattier. Plonte stated that she had ruled the accident non-preventable. She also included her description of Romero's roadside report, which stated:

SOS Description: Hit/Run V2 side swiped. V2 – tractor pulling a container trailer, no other information. CWF damage – tractor #432-3575 – p/s mirror pushed forwards, paint scuffed; No V2 damage. No injuries. DSR was traveling e/b HWY 60 in the third lane (of six lanes) when V2 started to drift to the left. The d/s of V2's container trailer made contact with DSR's p/s mirror. V2 did not stop. DSR called police but they said he would have to go to police station to make a report. A reference # was given. #1002319.

(A. 591, 603-04; A. 223, 225-26, 232, 241, 254-55, 259-60, 263-67, 320-22, 461-62.)

Wattier replied, asking: "Any way to verify that V2 left their lane?" (A. 591, 593, 604; A. 266-67, 462.) Styers responded by suggesting that Andersen check DriveCam. (A. 591-92, 604; A. 258-59, 266-67, 462.) Per Styers' suggestion, Andersen located the DriveCam footage that Romero had manually saved; he reviewed the footage that same day. (A. 591-92, 604; A. 258-59, 261, 263-64, 266-69, 329-33, 338-39, 461-62.)

The DriveCam video shows the other tractor-trailer drifting to the left in the moments leading to impact, its front left tires overlapping the dividing line that separated the two lanes at the time that contact was made with Romero's passenger-side mirror. (A. 603; A. 21-23, 397.) The video also shows that Romero was holding an electronic device in his hand while he was driving. It is impossible to discern the type of device based on the video. (A. 591, 593, 603, 614; A. 56-57, 298, 328-29, 397.) The footage shows that 1.25 seconds before impact, Romero glanced down at the device for one half of one second, and pressed down on it once with his thumb. (A. 603, 614; A. 57-59, 277-80, 301-03, 397.) From that point until the time of impact, Romero was looking forward. (A. 603; A. 57-60, 290, 303, 397.)

The electronic device in Romero's hand was an iPod. Before impact, as shown in the video, he pressed on it to change a song. (A. 591, 603, 614; A. 56-57.) Romero did not mention the iPod in his accident reports. (A. 591, 615; A. 111, 117-18, 423-24, 469-70.)

After reviewing the DriveCam video numerous times, Andersen emailed Styers, Wattier, and Huner, and revised Plonte's accident report. In his emails and revisions, Andersen claimed that Romero had falsified his report because: (1) the other vehicle "never left their lane and came into ours;" and (2) Romero omitted mention of being distracted by an electronic device. (A. 591, 604; A. 268-76, 320-

24, 328-29, 337, 347-48, 461-62, 464-65, 469-70.) In Andersen's initial email—which he sent after having studied the video frame by frame about a dozen times—he stated that Romero was holding “an electronic device” and looked down at it for 0.5 second. (A. 591, 593, 604, 614; A. 269, 328-29, 337, 461.) A few hours later, Andersen sent an additional email stating that, having scrutinized the video further, he “believe[d]” the device was a cell phone, and that Romero was “actually texting using his thumb.” (A. 593, 604, 614; A. 272-73, 337, 461.) Ultimately, in his final revisions to the accident report, Andersen asserted that Romero was “seen with a cell phone in his right hand texting” before the accident. (A. 591, 593, 604, 614; A. 276, 470.) The emails and final revised report further stated that “both trucks move[d] towards each other and because of [Romero's] driving distracted he failed to react to the other truck coming close to his unit while at the same time [Romero] is seen drifting to the far right of his lane” (A. 591, 593, 604; A. 461, 470.) Andersen acknowledged in his initial email that Romero had manually preserved the DriveCam footage under review, as the footage itself depicts. (A. 604; A. 60-61, 306, 397, 461.) Prompted by Andersen's emails, Huner also reviewed the footage numerous times. (A. 604; A. 347-50.)

On August 20, Romero met with Andersen, Styers, and Licon. Andersen read Romero the accident report, showed him the DriveCam footage, and said that he believed Romero was at fault. Romero disagreed that he was distracted or at

fault. (A. 591, 604; A. 78-80, 111-13, 232-35, 246-47, 250, 310-17.) Andersen also accused Romero of falsifying his report by failing to mention that he had been distracted by texting on his cell phone. Romero denied that he was texting or using a cell phone, but acknowledged that he was holding his iPod and pressed down on it to change a song. (A. 591, 604; A. 80-81, 314-15, 334.) Styers then suspended Romero. (A. 591, 604; A. 25, 84, 113-14, 236-37, 318, 455-56.) Licon asked Romero to provide a written statement, and Romero wrote: "I'm being suspended for other reason this is being created to terminate me." (A. 591, 604; A. 81-84, 318, 426.)

Later that day, Styers drafted an "Out of Service Message" stating that Romero was suspended because he had falsified his accident report. To support that conclusion, Styers adopted and inserted verbatim Andersen's comments from the final accident report. Styers then emailed the suspension notice to Huner. (A. 591-92, 604; A. 236-39, 240-41, 357, 455-56, 458-59.) Huner made the final decision to discharge Romero, as memorialized in his email forwarding Styers' suspension email and instructing, without further elaboration, to "[p]roceed with termination" on the grounds of falsification. (A. 591, 604; A. 347, 357-58, 360, 377-78, 458-59.) On September 3, Styers advised Romero that he was discharged effective immediately, purportedly for falsifying his accident report. (A. 591, 604; A. 25, 85-91, 241-44.)

On September 9, Styers prepared an employee separation checklist in connection with Romero's discharge. Styers indicated, by checking a box on the document, that Romero did not "work well with customers and others." (A. 591, 592 & n.15, 604; A. 247-49, 432.)

E. The Union Files an Election Petition; Styers and Licon Instruct Placencia Not to Wear a Union Lanyard; Styers Threatens Placencia

On September 11, the Union filed its petition for a representation election. Around that time, Placencia and other employees began wearing union lanyards at work that bore lettering stating: "LOCAL 63." (A. 594, 605; A. 133-35, 157-62, 174-75, 209, 389, 430.) Other drivers wore similar, non-union lanyards, such as those that bore the logos of sports teams. (A. 605 n.15; A. 137, 141-42.)

On about September 15, Styers approached Placencia in the facility's break room, pointed at his union lanyard, and asked him what it was. After Placencia responded that it was his lanyard, Styers told him to take it off because it was against Company policy. (A. 605, 610; A. 135-36.)

A few minutes later, Placencia went to Licon's office and complained about the way Styers was treating him, specifically citing the lanyard incident. Placencia further commented that the "drama" going on because of the union campaign was unnecessary. (A. 605; A. 137-39.) Licon told Placencia that he could wear a union button, but not a lanyard. (A. 605, 610; A. 139.) Styers then entered the office and asked what the two were discussing. Placencia again stated that the "drama"

occurring between the drivers and management was unnecessary. Styers responded, “[y]ou haven’t seen nothing yet.” (A. 605, 610; A. 140-41, 152.) Placencia replied: “What else can you do[?] You already harassed me. Are you going to fire me?” (A. 605; A. 141.) Styers did not answer. (A. 605; A. 141, 152.)

F. The Company Hires an Anti-Union Campaign Consultant Who Threatens Placencia with Physical Violence

In response to the Union’s election petition, the Company hired labor consultant Luis Camarena to disseminate its anti-union message to employees. (A. 594, 605, 611-12; A. 176-83, 187-90, 202-04.) On October 6, Placencia and Camarena had an extended conversation regarding the organizing campaign. Placencia expressed his support for the Union and his conviction that the employees needed union representation. In doing so, he stated that the drivers “felt like battered wives.” (A. 594, 606, 612 & n.44; A. 143-47, 168-69, 191-92, 210-14, 216, 221-222, 428, 444-45.) Camarena responded by describing himself as “the type of person that if you owe him money, that he will call you. If you ignore his calls, he will go down to your house and . . . kick the door down, come up, push you to the ground, put his foot on your chest and . . . stick a gun out, pull my .45, put it to your head and I’ll get my money one way or the other.” (A. 594, 606, 612; A. 147, 153-55, 428.) Camarena pantomimed the actions of kicking down a door, pushing someone down, placing his foot on that person’s chest, grabbing that

person by the hair, and aiming a gun at his head. (A. 594, 606, 612-13; A. 147-48.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On August 27, 2018, the Board (Members Pearce and McFerran, Chairman Ring dissenting in part) issued its Decision, Order, and Certification of Representative. The Board panel unanimously found, in agreement with the administrative law judge, that the Company violated Section 8(a)(1) of the Act by instructing Placencia not to wear a union lanyard and by threatening him with unspecified reprisals. Members Pearce and McFerran further found, also in agreement with the judge, that the Company violated Section 8(a)(1) by implicitly threatening Placencia with physical harm, and violated Section 8(a)(3) and (1) of the Act by suspending and discharging Romero.

The Board's Order directs the Company to cease and desist from the unfair labor practices found, and from, in any like or related manner, interfering with employees' exercise of their rights under the Act. Affirmatively, the Order requires the Company, among other things, to offer Romero reinstatement and make him whole. It also requires the Company to post a remedial notice. (A. 595-96.)

SUMMARY OF ARGUMENT

The Board found that the Company responded to the intensifying union-organizing campaign among its drivers by committing multiple unfair labor practices. Substantial evidence supports the Board's findings that the Company violated Section 8(a)(1) by twice instructing Placencia, a member of the Union's organizing committee, to remove his union lanyard, threatening him with unspecified reprisals if he continued to engage in union activity, and implicitly threatening him with physical violence for supporting the Union. Based on the credited evidence and the governing objective standard for assessing whether employer statements unlawfully tend to coerce employees' exercise of protected rights, the Board reasonably determined that the Company committed these violations.

Substantial evidence also supports the Board's finding that the Company violated Section 8(a)(3) and (1) by suspending and discharging Romero—the 24-year employee who led the Union's organizing campaign. Applying its well-established *Wright Line* framework, the Board first determined that Romero's prominent union activity was a motivating factor in the Company's adverse actions. The Company knew about Romero's leading role in the organizing campaign, and his suspension and discharge occurred as the campaign's increasing momentum engendered escalating concern among the Company's management.

Moreover, the Company exhibited anti-union hostility through the Section 8(a)(1) violations that it directed at Placencia—Romero’s junior partner on the organizing committee. And furthermore, Service Center Manager Styers, the facility’s top manager who was intimately involved in the suspension and discharge as well as the 8(a)(1) violations, injected into Romero’s termination paperwork the claim that he did not work well with others—an utterly false and post hoc assertion, conjured without basis or precedent in Romero’s near quarter-century of service, that, in context, constituted no less than code for his union activity.

Substantial evidence also supports the Board’s finding that the Company could not meet its *Wright Line* affirmative defense of proving that it would have discharged Romero even absent his union activity, because the Company’s proffered justification for its adverse actions—which was solely that Romero had falsified an accident report—was mere pretext. Indeed, the record amply supports the Board’s findings that the Company demonstrated pretext throughout its course of action in responding to Romero’s minor accident—from the implausible commencement of its accident investigation, to its exaggerations, distortions, and outright misrepresentations of Romero’s conduct, as well as its transparent attempts to buttress its actions with shifting, post hoc, and false explanations.

Before the Court, the Company’s meritless contentions—many of which also are jurisdictionally barred from review—rest on mischaracterizations of the

law, the record evidence, and the Board's decision. They provide no basis to deny enforcement of the Board's Order.

STANDARD OF REVIEW

This Court's review of Board decisions is "narrow and highly deferential." *Inova Health Sys. v. NLRB*, 795 F.3d 68, 73 (D.C. Cir. 2015) (quotation marks omitted). The Board's unfair-labor-practice findings will be upheld unless they have no rational basis or are unsupported by substantial evidence on the record as a whole. *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011); *see also* 29 U.S.C. § 160(e). Substantial evidence is "less than a preponderance of the evidence, albeit more than a scintilla." *Inova*, 795 F.3d at 80 (quotation marks omitted). Indeed, this Court will reverse the Board for lack of substantial evidence "only" if it determines that the record is "so compelling that no reasonable factfinder could fail to find to the contrary." *Id.* (quotation marks omitted). In making that determination, moreover, the Court gives substantial deference to the inferences drawn by the Board from the facts. *Bally's*, 646 F.3d at 938. Finally, this Court will accept all credibility determinations made by the judge and adopted by the Board unless those determinations are "hopelessly incredible, self-contradictory, or patently unsupportable." *CCI Ltd. Partnership v. NLRB*, 898 F.3d 26, 31 (D.C. Cir. 2018) (quotation marks omitted).

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY INSTRUCTING PLACENCIA NOT TO WEAR A UNION LANYARD, THREATENING HIM WITH UNSPECIFIED REPRISALS, AND IMPLICITLY THREATENING HIM WITH PHYSICAL HARM FOR SUPPORTING THE UNION

A. Applicable Principles

Section 7 of the Act guarantees to employees “the right to self-organization, to form, join, or assist labor organizations,” and to “bargain collectively through representatives of their own choosing” 29 U.S.C. § 157. Section 8(a)(1) of the Act implements those rights by making it an unfair labor practice to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7].” 29 U.S.C. § 158(a)(1).

The test for whether an employer’s statement violates Section 8(a)(1) is whether, considering the totality of the circumstances, the statement had a “reasonable tendency” to coerce or interfere with employees’ Section 7 rights. *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 124 (D.C. Cir. 2001). The employer’s statements “must be judged by their likely import to [the] employees.” *C & W Super Markets, Inc. v. NLRB*, 581 F.2d 618, 623 n.5 (7th Cir. 1978); accord *Progressive Elec., Inc. v. NLRB*, 453 F.3d 538, 544-45 (D.C. Cir. 2006) (assessing legality of employer statements based on how the employees “could reasonably perceive” them). The critical inquiry, then, is what an employee could reasonably

have inferred from the employer's statements in context. *Fort Dearborn Co. v. NLRB*, 827 F.3d 1067, 1073-74 (D.C. Cir. 2016); *Progressive*, 453 F.3d at 544-45. Moreover, this Court "recognize[s] the Board's competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship." *Progressive*, 453 F.3d at 544 (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 620 (1969)).

B. Styers and Licon Unlawfully Instructed Placencia Not to Wear a Union Lanyard

Substantial evidence supports the Board's finding (A. 610) that the Company violated Section 8(a)(1) by twice instructing Placencia not to wear a union lanyard. Employees have a Section 7 right to wear union insignia while at work. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801-04 (1945); *Guard Publ'g Co. v. NLRB*, 571 F.3d 53, 61 (D.C. Cir. 2009). An employer therefore violates Section 8(a)(1) by restricting employees' wearing of such insignia, unless the employer establishes a "special circumstances" defense. *Id.*

Here, the Board found that Styers and Licon directed Placencia to remove his union lanyard. The Company does not dispute these findings or contend that "special circumstances" excused its actions. Thus, the Company plainly violated Section 8(a)(1). *Pioneer Hotel, Inc. v. NLRB*, 182 F.3d 939, 946 (D.C. Cir. 1999) ("directing employees to remove their union buttons constituted an unfair labor practice"); *MEK Arden, LLC v. NLRB*, No. 17-1237, 2018 WL 6721352, at *4

(D.C. Cir. Dec. 7, 2018) (employer violated Section 8(a)(1) by telling employee to take off his union scrubs).

The Company contends (Br. 50)—without citation to any supporting authority—that the Court should not uphold the finding of a violation because of Licon’s suggestion to Placencia to wear a union button instead of a lanyard. But Styers made no similar suggestion, and, in any event, an employer’s unlawful restriction of an employee’s Section 7 rights is not rendered lawful merely because the employer suggests that the employee exercise his rights in a different manner. *See Serendippity-Un-Ltd.*, 263 NLRB 768, 774-75 (1982) (Act “allows employees to engage in concerted activity which they decide is appropriate”) (quotation marks omitted).

The Company likewise errs in urging that its coercive instructions “had no deleterious effect” because Placencia “continued to wear the lanyard without incident.” (Br. 50-51.) Under this Court’s precedent—which the Company fails to acknowledge—the issue is “a remark’s tendency to coerce, not . . . its actual impact.” *Avecor, Inc. v. NLRB*, 931 F.2d 924, 932 (D.C. Cir. 1991); *accord United Servs. Auto. Ass’n v. NLRB*, 387 F.3d 908, 913 (D.C. Cir. 2004) (in finding reasonable tendency to coerce, Board “need not find that the employer’s language or acts were coercive in actual fact”) (quotation marks omitted).

Finally, established Board precedent undermines the Company’s claim that its instructions, issued to a single employee, are “*too de minimis*” (Br. 51) to warrant a violation. *Golub Corp.*, 338 NLRB 515, 516-17 (2002); *Regency at the Rodeway Inn*, 255 NLRB 961, 961-62 (1981). Unlike in *American Federation of Musicians, Local 76*, 202 NLRB 620 (1973)—cited by the Company (Br. 51)—there is no evidence here that the Company later took actions that “substantially remedied or effectively contradicted” its unlawful instructions. *Golub*, 338 NLRB at 517 & n.18; *accord MEK Arden*, 2018 WL 6721352, at *3 (manager’s instruction not to wear union scrubs was not de minimis violation, where instruction was made “during the height of a hotly contested campaign for union representation” and was not retracted or corrected).³ Moreover, as the Board here noted (A. 610), any contention that these two violations are de minimis is defeated when they are considered together with the Company’s other unfair labor practices discussed below.

³ In *Dallas Mailers Union, Local No. 143 v. NLRB*, 445 F.2d 730, 732-33, 735 (D.C. Cir. 1971), cited by the Company (Br. 51), although the Court referred to the controversy before it as involving an “infinitesimally small abstract grievance[,],” it nonetheless enforced the Board’s order.

C. Styers Unlawfully Threatened Placencia with Unspecified Reprisals

Under the objective test for assessing potential Section 8(a)(1) violations (pp. 18-19), an employer's statement is unlawful if an employee could reasonably perceive it, in context, as a threat to retaliate against protected activity. *E.g.*, *Progressive*, 453 F.3d at 544-45. It is well settled that "coercive threats may be implied rather than stated expressly." *Nat'l By-Prod., Inc. v. NLRB*, 931 F.2d 445, 451 (7th Cir. 1991). Likewise, an employer's threat need not specify the form of retaliation; threats of unspecified reprisals also violate the Act. *See, e.g., Tasty Baking*, 254 F.3d at 124-25 (explaining that statements that may appear ambiguous when viewed in isolation can have a more ominous meaning for employees when viewed in context). Additionally, "[t]he presence of contemporaneous threats or unfair labor practices is often a critical factor in determining whether there is a threatening color to [an] employer's remarks." *TRW-United Greenfield Div. v. NLRB*, 637 F.2d 410, 420 (5th Cir. 1981) (quotation marks omitted).

Here, substantial evidence supports the Board's finding (A. 610) that Styers unlawfully threatened Placencia with unspecified reprisals by telling him "[y]ou haven't seen nothing yet." Indeed, the context in which Styers made this admonition amply reveals its threatening character. Only a few minutes after Styers unlawfully instructed Placencia to remove his union lanyard, Placencia complained to Licon about Styers' unlawful order and more generally about the

“drama” surrounding the union campaign. In immediate reply, Licon echoed Styers’ unlawful instruction. Placencia—having just been subjected to two coercive directives, and having just expressed an association between Styers’ unlawful directive and the general campaign “drama”—then similarly commented to Styers, who had just entered, about the unnecessary “drama” between the drivers and management. It was at this moment that Styers forewarned Placencia, “[y]ou haven’t seen nothing yet.” (A. 605, 610.) Thus, viewing Styers’ statement in context and from the employee’s perspective—as the law requires—Placencia could reasonably have perceived it as a warning that unspecified reprisals could ensue if he continued to engage in union activity, particularly given the unlawful treatment he had just suffered for having engaged in such activity. *See Liberty House Nursing Homes*, 245 NLRB 1194, 1199 (1979) (unlawful threat where, as employees discussed tension surrounding ongoing union campaign, manager interjected, “you ain’t seen nothing yet . . . things are going to get more up tight, and you all are going to be more nervous”).

The Company’s challenges (Br. 52-55) are meritless. The Company erroneously invokes its free-speech rights under Section 8(c) of the Act (29 U.S.C. § 158(c)). Consistent with Section 8(a)(1)’s bar on coercive conduct, Section 8(c) provides that an employer may state its opinion about unionization, but only if its statements do not contain an express or implied “threat of reprisal or force or

promise of benefit.” 29 U.S.C. § 158(c). *See generally Gissel*, 395 U.S. at 617-20. The Company fails to acknowledge that the standard for determining whether an employer statement contains such an implied threat—and is therefore unlawfully coercive rather than protected by Section 8(c)—is an objective one that focuses on the employee’s perspective. As shown, substantial evidence supports the Board’s finding that, under this standard, Styers’ remark had a reasonable tendency to coerce Placencia, and Section 8(c) therefore provides the Company no refuge. *See, e.g., Federated Logistics & Operations v. NLRB*, 400 F.3d 920, 924-25 (D.C. Cir. 2005) (rejecting 8(c) defense because employer failed to show that “no reasonable factfinder could find” that its statements “amounted to implications” that employer “might” take action to render unionization futile).

The Company does not help itself by citing (Br. 54) plainly inapposite election-objections cases that characterize threats between employees as “mere bravado.” The Company’s attempt (Br. 54) to analogize Styers’ comment to exchanges between employees ignores Styers’ status as a high-ranking management official. Likewise, depicting his statement as mere “puffery” (Br. 55) fails to take into account “the economic dependence of [] employees on their employers, and the necessary tendency of the former . . . to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.” *Gissel*, 395 U.S. at 617. Finally, the Company’s suggestion

(Br. 53) that the Board deserves “no deference” in determining whether Styers’ statement violated Section 8(a)(1)—merely because the Company has invoked Section 8(c) and its incorporation of First-Amendment rights as a defense—is contrary to settled precedent. *See Gissel*, 395 U.S. at 620; *Allegheny Ludlum Corp. v. NLRB*, 104 F.3d 1354, 1364-67 (D.C. Cir. 1997).

D. Camarena Implicitly Threatened Placencia with Physical Harm

Substantial evidence supports the Board’s finding (A. 594, 611-13) that the Company violated Section 8(a)(1) by implicitly threatening Placencia with physical harm. As the Board found, when Placencia, in the context of a discussion concerning the union-organizing drive, expressed that the employees needed the Union because they felt like battered wives, Camarena directly responded with a “pointed statement about his . . . aggressive and vengeful nature in the face of opposition.” (A. 594.) Thus, Camarena told Placencia that he was the type of person that “if you owe him money,” he would “go down to your house,” “kick the door down,” “push you to the ground,” “put his foot on your chest,” and “stick a gun . . . to your head,” and that he would get his money “one way or the other.” (A. 594.) Camarena, moreover, pantomimed these violent actions while or immediately after he spoke. (A. 594.)

The credited evidence therefore amply supports the Board’s finding that Camarena’s statements and gestures “reasonably . . . tend[ed] to interfere” with

employee rights under the Act. (A. 594 (quotation marks omitted).) As the Board explained, Camarena—“who had been hired to disseminate the [Company’s] antiunion message”—reacted to Placencia’s protected comment about the employees needing a union by expressing “a graphic account of his . . . propensity for violence when opposed,” complete with “lurid . . . accompanying gestures.” (A. 594.) Thus, the Board properly found that Camarena’s conduct violated Section 8(a)(1), as it could reasonably be construed to imply that he “was willing to do anything—including committing acts of physical violence—to stop the Union.” (A. 594.) *See Thalassa Restaurant*, 356 NLRB 1000, 1017 (2011) (implicit threat of physical harm where, in response to protected activity, employer agent referred to his military training and said he could “take care” of employee).

The Company’s credibility-based challenges (Br. 45-46) are unavailing. Contrary to the Company (Br. 45-46), the mere fact that supervisor Armando Rosado, whom the judge found credible, testified that he did not witness Camarena’s threatening conduct does not compel a conclusion that the conduct did not occur. As the judge found and Rosado testified, Rosado was not present for approximately 7-8 minutes of the conversation, and the judge reasonably concluded that Camarena’s threatening behavior occurred outside of Rosado’s presence. (A. 606, 612-13; A. 216, 221-22.) In doing so, the judge properly credited Placencia’s testimony that Camarena behaved as described above and

discredited Camarena's denial. Placencia's testimony was "clear and forthright," whereas Camarena, who "generally lack[ed] credibility," provided testimony that was "evasive, slippery, and at times outright dishonest." (A. 612-13.) The Company has not shown that this credibility determination was "hopelessly incredible, self-contradictory, or patently unsupportable." *CCI Ltd.*, 898 F.3d at 31.

The Company likewise errs in arguing (Br. 48-50) that Camarena's conduct did not violate Section 8(a)(1) because it did not "actually affect[] union organizing," and Placencia did not actually "[feel] threatened." (Br. 49-50.) As explained (p. 20), the conduct's actual impact or effect is not the issue, and the Company's claim (Br. 48) that the Board's inquiry is a "solipsistic exercise" misunderstands the objective nature of the test.

Before the Court, the Company asserts (Br. 44, 47-48) three additional challenges to the Board's finding. Specifically, the Company contends (i) that Camarena's conduct was shielded by "the First Amendment protections guaranteed by Section 8(c) of the Act" (Br. 48); (ii) that his conduct could not have constituted an unlawful threat because Camarena's separate, lawful statement about fighting his own fight and knocking down doors purportedly preceded the threatening conduct (Br. 47); and (iii) that the Court should displace the Board's finding as to how Placencia could reasonably have interpreted Camarena's conduct with an

alternative interpretation articulated by dissenting Chairman Ring. (Br. 44, 47.)

The Court lacks jurisdiction to consider these arguments.

Section 10(e) of the Act provides in relevant part: “No 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.” 29 U.S.C. § 160(e). Courts thus “lack[] jurisdiction to review objections that were not urged before the Board.” *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *Novato Healthcare Ctr. v. NLRB*, 916 F.3d 1095, 1107 (D.C. Cir. 2019) (refusing to consider argument not raised to Board that finding of unlawful interrogation “violate[d] [employer’s] free-speech rights under the First Amendment and Section 8(c)”). Moreover, a party “may not rely on arguments raised in a dissent or on a discussion of the relevant issues by the majority to overcome the [Section] 10(e) bar; the Act requires the party to raise its challenges itself.” *Enter. Leasing Co. of Fla. v. NLRB*, 831 F.3d 534, 551 (D.C. Cir. 2016) (quotation marks omitted); *accord HealthBridge Mgmt., LLC v. NLRB*, 798 F.3d 1059, 1068-69 (D.C. Cir. 2015). Because the Company did not raise any of these contentions to the Board in its exceptions to the judge’s decision or show any “extraordinary circumstances” excusing its failure to do so, the Court does not have jurisdiction to consider them.

In any event, the Company’s contentions lack merit. First, its Section 8(c) argument—apart from being inadequately developed and therefore waived⁴—fails because Camarena’s statements were coercive and plainly without Section 8(c) protection. Second, the notion that an employee cannot reasonably perceive a statement as threatening merely because an unthreatening statement preceded it is unsupported and irrational. And third, even if the Company’s alternative interpretation of Camarena’s conduct were “equally plausible,” the Court must uphold the Board’s finding of an unlawful threat “as long as [it] rest[s] upon reasonable inferences, and . . . may not reject [it] simply because other reasonable inferences may also be drawn.” *Tasty Baking*, 254 F.3d at 124-25.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) BY SUSPENDING AND DISCHARGING ROMERO BECAUSE OF HIS UNION ACTIVITY

A. An Employer Violates Section 8(a)(3) and (1) by Taking Adverse Action Against an Employee for Engaging in Union Activity

Section 8(a)(3) of the Act protects employees’ rights to engage in union activity by making it an unfair labor practice for an employer to “discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to

⁴ See *New York Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007).

. . . discourage membership in any labor organization.” 29 U.S.C. § 158(a)(3).⁵

Thus, an employer violates Section 8(a)(3) “by taking an adverse employment action . . . in order to discourage union activity.” *Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 217-18 (D.C. Cir. 2016) (quotation marks omitted).

In determining whether an employer has taken an adverse action because of union activity, the Board applies the test of motivation set forth in *Wright Line*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 889 (1st Cir. 1981), and approved by the Supreme Court in *NLRB v. Transportation Management Corporation*, 462 U.S. 393 (1983). *Fort Dearborn*, 827 F.3d at 1072. Consistent with that test, if substantial evidence supports the Board’s finding that protected activity was “a motivating factor” in the employer’s adverse action, a court must uphold the finding that the action was unlawful unless the record as a whole compelled the Board to accept the employer’s affirmative defense that it would have taken the same action in the absence of protected conduct. *Transp. Mgmt.*, 462 U.S. at 400-05; *accord Fort Dearborn*, 827 F.3d at 1072. If the employer’s proffered reasons for its action were pretextual—that is, if they either did not exist or were not in fact relied upon—the employer “fails as a matter of law” to establish its affirmative defense. *Ozburn-Hessey*, 833 F.3d at 218-20 (collecting cases).

⁵ A violation of Section 8(a)(3) produces a derivative violation of Section 8(a)(1) of the Act. *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

An employer's 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). Indeed, "circumstantial evidence alone may establish unlawful motivation in a § 8(a)(3) case." *Southwire Co. v. NLRB*, 820 F.2d 453, 460 (D.C. Cir. 1987) (citing *NLRB v. Link-Belt Co.*, 311 U.S. 584, 602 (1941)); accord *Laro Maint. Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1995). Such evidence may include the employer's knowledge of protected activity, *Ozburn-Hessey*, 833 F.3d at 218, hostility toward protected conduct, including by the commission of other unfair labor practices, *Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 423-24 (D.C. Cir. 1996), the timing of the adverse action, *Inova*, 795 F.3d at 80, 82, and the pretextual nature of the employer's justifications, *Laro*, 56 F.3d at 230. Pretext may be shown in a variety of circumstances, including where an employer's explanations are implausible or illogical;⁶ unfounded or untrue;⁷ exaggerated or inflated;⁸ or inconsistent, shifting, or post hoc.⁹ Ultimately, drawing an inference

⁶ *Allegheny Ludlum*, 104 F.3d at 1368; *Wilson Trophy Co. v. NLRB*, 989 F.2d 1502, 1509 (8th Cir. 1993).

⁷ *CC1 Ltd.*, 898 F.3d at 32 & n.*; *Inova*, 795 F.3d at 88.

⁸ *Sprain Brook Manor Nursing Home, LLC*, 359 NLRB 929, 942-43 (2013), incorporated by reference in 361 NLRB 607 (2014), enforced, 630 F. App'x 69 (2d Cir. 2015); *Jackson Corp.*, 340 NLRB 536, 588-89 (2003).

⁹ *Citizens Inv. Servs. Corp. v. NLRB*, 430 F.3d 1195, 1202 (D.C. Cir. 2005); *Inter-Disciplinary Advantage, Inc.*, 349 NLRB 480, 509 (2007).

of unlawful motive “invokes the expertise of the Board” (*Laro*, 56 F.3d at 229), and this Court is “especially deferential” to such Board findings. *CCI Ltd.*, 898 F.3d at 32 (quotation marks omitted); *accord Ozburn-Hessey*, 833 F.3d at 217, 221.

B. The Company Unlawfully Suspended and Discharged Romero Because of His Union Activity

The Board reasonably found that the Company violated Section 8(a)(3) and (1) by suspending and discharging Romero because of his prominent union activity. Substantial evidence supports the Board’s inference that Romero’s protected activities as a “recognized leader” of the ongoing union-organizing campaign motivated the Company’s adverse actions against him, and likewise supports the Board’s determination that the Company’s proffered justification for suspending and discharging Romero was no more than a pretext to conceal its discriminatory motive. (A. 592-94 & n.13.) The Company’s challenges to the Board’s findings are unavailing. Several are not properly before the Court, and all are meritless. The Company, in large part, would have the Court supplant the Board’s reasonable view of the record evidence with the Company’s preferred alternative view. “The question before [the Court],” however, “is not whether [the Company’s] view of the facts supports its version of what happened,” but rather, “whether the Board’s interpretation of the facts is reasonably defensible.” *Inova*,

795 F.3d at 80-81 (quotation marks omitted); *accord Fort Dearborn*, 827 F.3d at 1076; *Bally's*, 646 F.3d at 938-39.

1. Romero's union activity was a motivating factor in his suspension and discharge

In finding that the Company acted with an unlawful motive, the Board relied on “multiple sources of animus” (A. 592 n.13) and not just pretext, as the Company erroneously contends. (Br. 29.) Indeed, ample evidence—including knowledge, suspicious timing, other unlawful conduct, and a pretextual explanation that doubles as a euphemism for anti-union animus—supports the Board’s finding (A. 591-92) that Romero’s union activity was a motivating factor in the Company’s adverse actions against him. To begin, it is undisputed that Romero engaged in extensive union activities, *see* pp. 4-5, and was “the leader among employee organizers” in the Union’s campaign. (A. 590, 592.) And as the Board found, the Company was “well aware” of these activities. (A. 590, 592, 613.) *See Ozburn-Hessey*, 833 F.3d at 218 (employer’s knowledge of protected conduct is relevant factor in assessing motive); *Allegheny Ludlum*, 104 F.3d at 1368 (employee’s “outspoken and aggressive support for the [u]nion . . . set him apart” from others and supported inference that discharge was unlawfully motivated).

Nor does the Company contest the Board’s well-supported finding (A. 592, 614) that the timing of Romero’s suspension and discharge was suspicious. As the

Board found, the Company took adverse action against Romero only weeks before the Union’s election petition was filed, at a time when the Company “clearly knew [that] the organizing campaign was gaining strength,” and as it “became increasingly concerned about the [campaign]—of which Romero was a recognized leader.” (A. 592, 614.) *See Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1168 (D.C. Cir. 1993) (timing suggested unlawful motivation when discharges “occurred just as [the organizing] campaign was picking up steam”).

The Board also reasonably found that the Company’s other violations of Section 8(a)(1) support a finding of unlawful motivation. (A. 592, 613-14.) Indeed, this Court has held that “[a] company’s open hostility toward [u]nion activity, and its 8(a)(1) violations, are clearly sufficient to establish anti-union animus on the part of that company.” *Parsippany Hotel*, 99 F.3d at 423 (quotation marks omitted); *see also Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 735-36 (D.C. Cir. 2000). As demonstrated above (pp. 18-29), the Company here violated Section 8(a)(1) by telling Placencia—who was “Romero’s partner on the Union organizing committee”—to remove his union insignia, threatening him with unspecified reprisals, and implicitly threatening him with physical harm. (A. 592.) Furthermore, as the Board emphasized, the inference of unlawful motivation arising from these other unlawful acts is significantly strengthened by the fact that “Styers, the highest-ranking manager at the facility and the person who initiated

the . . . review [of Romero’s DriveCam video] and drafted Romero’s suspension notice and termination report, was also responsible for [unlawfully] ordering Placencia to remove his union lanyard and [unlawfully] threatening Placencia.” (A. 592.)

Moreover, substantial evidence supports the Board’s finding (A. 592) that Styers’ assertion in Romero’s discharge paperwork that he did not “work well with customers and others” reveals the Company’s unlawful animus. As the Board explained (A. 592), this “telling[]” assertion was “unrelated” to the accident, “unfounded,” and a “recognized euphemism for union animus.” Indeed, this claim of Romero’s alleged difficulties working with others “came out of nowhere,” had nothing to do with Romero’s reporting of the accident, and had not once been raised by the Company prior to Styers completing the termination form. (A. 592.) *See Sw. Merch. Corp. v. NLRB*, 53 F.3d 1334, 1344 (D.C. Cir. 1995) (shifting explanations support inference of unlawful motive); *Prop. Res. Corp. v. NLRB*, 863 F.2d 964, 967 (D.C. Cir. 1988) (same).

Further, Styers’ assertion “had no predicate in Romero’s 24-year career with [the Company].” (A. 592.) As the Board found, there is not a shred of evidence to substantiate Styers’ claim. At the hearing, when pressed to explain the claim, Styers was unable to provide specific examples or documentation and offered only vague and conclusory assertions. (A. 592 & n.11; A. 247-49.) *See CCI Ltd.*, 898

F.3d at 32 (Board “can infer from falsity of employer’s stated reason for discharge that motive is unlawful”) (quotation marks omitted); *NLRB v. Interstate Builders, Inc.*, 351 F.3d 1020, 1034 (10th Cir. 2003) (“a flimsy or unsupported explanation may affirmatively suggest that the employer has seized upon a pretext to mask an anti-union motivation”) (quotation marks omitted).

Moreover, in the context of the ongoing organizing campaign, Styers’ assertion that Romero—a known union advocate—did not “work well with . . . others” amounted to no less than a “euphemism for union animus,” as the Board found. (A. 592.) *Schaumburg Hyundai, Inc.*, 318 NLRB 449, 458 (1995) (claims that employee did not work well with his team and had a bad attitude were euphemisms for union animus); *see also SCA Tissue N. Am. LLC v. NLRB*, 371 F.3d 983, 989-90 (7th Cir. 2004) (comment about employee’s “attitude” suggested unlawful animus). This is especially so given that “there is no credited evidence of an alternative explanation” for Styers’ assertion. *James Julian Inc. of Delaware*, 325 NLRB 1109, 1109 (1998) (comment about employee’s “attitude” supported finding of animus).

2. The Company’s arguments do not undermine the Board’s finding of unlawful motive

The Company cannot muster a successful challenge to the Board’s finding of unlawful motivation. Some of its arguments are jurisdictionally barred, and all lack either precedential or evidentiary support.

The Company broadly contends (Br. 27-29) that its other violations and Styers' termination-report assertion that Romero did not work well with others do not support the Board's unlawful motive finding because there is no nexus between the Company's actions and Romero's discharge. But this Court has held that there is no requirement "to demonstrate a 'nexus' between each item of employer conduct evidencing anti-union animus and a reprisal taken against an employee." *Parsippany Hotel*, 99 F.3d at 424. Rather, the employer's anti-union conduct "*acts as the link* between an employer's knowledge of an employee's union activities and reprisals taken against that employee." *Id.* See also, e.g., *Ozburn-Hessey*, 833 F.3d at 217-18 (upholding Board's motive findings as to adverse actions against two employees because substantial evidence showed "that [the two employees] were active supporters of the [u]nion, that [the employer] had knowledge of their union-related conduct, and that [the employer] harbored animus toward the [u]nion and its supporters").

The Company's narrower attacks on the Board's motive finding are equally unavailing. As to the other 8(a)(1) violations, the Company first notes that these violations occurred after Romero's discharge. The Court lacks jurisdiction to consider the claim that subsequent violations cannot be used to support unlawful motive because the Company never raised it before the Board and, as explained,

the majority and dissenting Board members' discussion of the issue does not excuse the Company's failure. 29 U.S.C. § 160(e). (*see* p. 28.)

And in any event, the contention is meritless. “[E]vents occurring after [a] termination” are relevant “to determining [the] company’s motivation at the time of the discharge.” *SCA Tissue*, 371 F.3d at 990. Thus, contrary to the Company, “it would be fatuous to ignore [the] violations that [it committed] subsequent to [Romero’s] discharge in attempting to determine the real reason for that discharge.” *Cont’l Radiator Corp.*, 283 NLRB 234, 238, 249 (1987); *accord Farm Fresh Co.*, 361 NLRB 848, 862 & n.31, 864-66 (2014) (post-discharge 8(a)(1) violations supported finding that discharge was unlawfully motivated).

The Company is wrong that its subsequent violations are too “attenuated” (Br. 28) to infer unlawful motive. As the Board found (A. 592 n.10), the Company’s adverse actions and 8(a)(1) violations alike occurred during the climax of the union-organizing campaign of which Romero was the leader. In these circumstances, as the Board explained, the Company’s “post-petition” unfair labor practices are relevant to the actions that it took “against the primary employee proponent of that petition in the period shortly before its filing.” (A. 592 n.10.)

Furthermore, contrary to the Company, its subsequent violations do not lose their potent relevancy simply because Huner—the person who made the “final decision” to discharge Romero—did not commit those violations or otherwise

display anti-union animus.¹⁰ (Br. 28-29.) As this Court has recognized, there is no “require[ment] . . . that the final decisionmaker must independently have . . . animus toward the protected activity.” *Inova*, 795 F.3d at 83. As demonstrated, the Board here reasonably inferred—based on the wealth of circumstantial evidence detailed above—that Romero’s union activity was a motivating factor in his suspension and discharge; the absence of additional evidence that Huner personally exhibited anti-union animus is therefore immaterial. Moreover, the Company’s argument ignores that Styers was “the highest-ranking manager at the facility,” and that he “played a central role” both in Romero’s suspension and discharge as well as in the unlawful post-petition conduct. (A. 592 & n.10.) *See Inova*, 795 F.3d at 83-84 (Board properly relied on animus held by “high-level managers” who were “directly and intimately involved” in events leading to employee’s discharge, notwithstanding that ultimate discharge decision was made by someone else); *cf. Parsippany Hotel*, 99 F.3d at 423-24 (finding it “eminently reasonable” to attribute to the employer the anti-union animus expressed in “high-level” manager’s 8(a)(1) speech, even though manager not involved in discharge).

¹⁰ The Company does not dispute that Huner knew about Romero’s union activities. Nor could it, given its broad stipulation at the hearing (A. 41-42) and its failure to except to the judge’s broad findings concerning the Company’s knowledge. (A. 613.)

The Company fares no better in challenging (Br. 29, 42-43) the Board's reliance on Styers' termination-report assertion that Romero did not work well with others. As an initial matter, these challenges are also not properly before the Court. The Board's sua sponte reliance on this factor as further evidence of improper motive does not excuse the Company's failure to challenge that reasoning before the Board by filing a motion for reconsideration. Consequently, pursuant to Section 10(e) of the Act (*see generally* p. 28), this Court is jurisdictionally barred from considering challenges to that reasoning now. 29 U.S.C. § 160(e); *see Woelke*, 456 U.S. at 666 (holding that Section 10(e) "bar[red]" argument that could have been raised to Board in a "petition for reconsideration or rehearing"); *Int'l Ladies' Garment Workers' Union v. Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975) (holding that where party could not have raised issue on exceptions, it must raise it in motion for reconsideration in order to preserve it for review); *S. Power Co. v. NLRB*, 664 F.3d 946, 949 (D.C. Cir. 2012) (same).

In any event, as shown, and contrary to the Company (Br. 29, 42-43), the fact that Styers, a high-level manager who openly displayed animus, was not the final decision-maker in Romero's discharge does not undermine the reasonable inferences that the Board drew from his termination-report assertion. *See Inova*, 795 F.3d at 83-84; *Parsippany Hotel*, 99 F.3d at 423-24. The Company likewise errs in contending (Br. 29, 42-43) that the assertion is irrelevant because it did not

constitute an explanation or reason for the discharge. As the Board aptly observed, “[t]his begs the question”—which the Company has not adequately answered—“of why Styers would check the box at all if not to bolster [the Company’s] primary assertion that Romero falsified his accident report.” (A. 592 n.15.) Further, there is no merit to the Company’s apparent suggestion (Br. 29, 42-43) that Styers’ assertion is immaterial because he completed the termination form after Romero’s discharge. As explained, an employer’s post-disciplinary statements and conduct may show that a discipline was unlawfully motivated (*see* p. 38), and a “post hoc attempt to rationalize . . . a [discharge] decision, [is] suggestive of a pretext.” *Inter-Disciplinary Advantage*, 349 NLRB at 509.

The Company (Br. 30-33) likewise misses the mark in seeking to undercut the Board’s finding of unlawful motive by attacking the Board’s reliance on the investigation into Romero’s accident. The Company misreads the Board’s decision, which does not rely on the investigation in concluding that Romero’s union activity was a motivating factor in his suspension and discharge. (*See* A. 592 & n.13.) Rather, as explained below (pp. 42-51), the Board relied on the investigation—and the dubious grounds supporting it—as one of several points demonstrating that the Company’s proffered reason for its adverse treatment of Romero was mere pretext.

3. The Company's professed reason for suspending and discharging Romero was pretextual

Substantial evidence supports the Board's finding that the Company's purported reason for suspending and discharging Romero, which was solely that he falsified his accident report, "was pretextual—that is, it was not in fact relied upon." (A. 594.) Indeed, the Board reasonably concluded that the Company's "entire course of action" demonstrated that it "manipulated the situation to trump up a disingenuous claim of falsification" against Romero. (A. 592, 594.) As shown below, the Company launched its investigation "for an implausible reason" (A. 593), and it then engaged in a "sustained effort" to "inflate and mischaracterize the nature of Romero's conduct" and to "supplement and bolster" the rationale for its disciplinary actions with "shifting," "post hoc," and "false" explanations. (A. 592-94.) Thus, the Board reasonably determined that the Company seized on an opportunity to develop a pretext for dismissing Romero—"in order to discharge the leader of the Union's organizing campaign as it reached its climax." (A. 592.)

To begin, the Board reasonably found (A. 593, 614) that the "initial impetus" for the investigation was "suspect." As the Board noted (A. 592-93, 614), the circumstances of the accident do not explain Wattier's interest in investigating it. The accident was minor, had been ruled non-preventable, and involved no injuries or damage other than some paint residue on a mirror. And although Wattier requested to review the accident specifically "to verify" that the

other vehicle “left their lane,” Romero “had never asserted—in his report to Plonte, his written statement, or his diagram—that the other vehicle had left its lane.” (A. 593, 614; A. 75-76, 423-24, 462, 469-70.) Thus, the Board reasonably concluded that the investigation “was initiated for an implausible reason.” (A. 593, 614.) *See Kidde, Inc.*, 294 NLRB 840, 849-50 (1989) (employer’s explanations for initiating investigation shown pretextual by their inconsistent and implausible nature).

Moreover, Wattier was not called to testify at the hearing, Styers was not asked to explain Wattier’s request, and Andersen’s testimony—that he did not know why Wattier was interested in verifying that the other vehicle left its lane—only accentuates the request’s implausible nature. (A. 593 n.18, 604, 614; A. 331.) *See Allegheny Ludlum*, 104 F.3d at 1368 (implausibility of employer’s explanations suggests pretext to mask unlawful motive); *Prop. Res. Corp.*, 863 F.2d at 967 (same).

Further, there is no dispute that Styers—who, as demonstrated above, displayed ample animus—“initiated the video review” by prompting Andersen to check DriveCam in specific response to, and for the specific stated purpose of fulfilling, Wattier’s implausible and unexplained request. (A. 592-93 & n.18.) It likewise is undisputed, as the Board moreover found, that “absent Wattier’s request, the inquiry into Romero’s accident would have been closed without any review of the [DriveCam] footage.” (A. 593 n.18.) The Board thus reasonably

inferred that the Company investigated Romero’s accident because of his union activity, and therefore that the DriveCam footage—as purported evidence of falsification discovered only pursuant to that unlawfully motivated investigation—could not render the Company’s disciplinary actions lawful. (A. 593 & n.18, 614.) *Kidde*, 294 NLRB at 840 n.3 (“employee[] misconduct discovered during an investigation undertaken because of an employee’s protected activity does not render a discharge lawful”); *see also Consol. Bus Transit, Inc.*, 350 NLRB 1064, 1066 (2007) (where employer unlawfully singled driver out for testing, that driver’s discharge for failing improperly-motivated test was also unlawful), *enforced*, 577 F.3d 467 (2d Cir. 2009); *Supershuttle of Orange County, Inc.*, 339 NLRB 1, 1-3 (2003) (“employers should not be permitted to take advantage of their unlawful actions, even if employees may have engaged in conduct that—in other circumstances—might justify discipline”).

Having launched its investigation for a pretextual reason, the Company then conducted itself in a manner demonstrating pretext during the investigation and beyond. As the Board found (A. 591, 593, 604, 614), the Company perpetuated the implausible stated impetus for the investigation, and effectively “misstate[d] . . . what Romero reported” (A. 614), by claiming that he falsified his report in part because the other truck “never left their lane and came into ours.” (A. 455, 470.) Once again, Romero never asserted that the other vehicle had left its lane. Indeed,

the Company’s suspension notice reflects that Romero merely reported that the other vehicle “started to drift to the left.”¹¹ (A. 455.) Despite this, and contrary to all available evidence, the Company irrationally persisted in attributing to Romero a claim he never made, and then charging him with falsification for having made it. (A. 455, 458-59.)

Additionally, as the Board reasonably found, Andersen further revealed the Company’s pretext by claiming for the first time at the hearing that Romero left his lane and struck the other vehicle. (A. 593, 614.) The final accident report and suspension notice stated only that Romero “drift[ed] to the far right of his lane”—while at the same time the other truck “move[d] towards” and “[came] close to [Romero’s] unit,” and then “contact [was] made between both trucks.” (A. 455, 470.) By contrast, Andersen testified at the hearing that Romero “veered over into [the other driver’s] lan[e] and struck him” (A. 317), or that Romero “cross[ed] over into the [other vehicle’s] lane” and “hit vehicle two”—whereas “vehicle two didn’t hit [Romero].” (A. 270, 314-15, 342, 345.) As this Court has held, “the lack of clarity and consistency in explaining reasons for termination is an important factor in evaluating the proffered justifications,” and “when an employer vacillates in

¹¹ Notably, the DriveCam video shows (A. 603; 397), and the Company concluded, that this was true—as stated in the suspension notice, the other vehicle “move[d] towards” and was “coming close” to Romero’s truck in the moments before impact. (A. 455.)

offering a rational and consistent account of its actions, an inference may be drawn that the real reason for its conduct is not among those asserted.” *Citizens Inv.*, 430 F.3d at 1202 (quotation marks omitted); *accord Ark Las Vegas Rest. Corp. v. NLRB*, 334 F.3d 99, 105 (D.C. Cir. 2003).

Moreover, Andersen’s belated claim that Romero veered into the other lane also is “contradicted by [the] evidence that there is no way to tell where in the lane Romero’s vehicle was by looking at [the] DriveCam [footage]” (A. 614; A. 335, 397), as Andersen himself admitted. Thus, as the Board additionally found (A. 614), the belated claim not only is shifting and inconsistent, but also constitutes an “embellishment[] and misrepresentation[],” *Jennings & Webb, Inc.*, 288 NLRB 682, 695 (1988), *enforced*, 875 F.2d 315 (4th Cir. 1989), thereby further highlighting the Company’s pretextual effort to “seize[] [on an opportunity] to mask its true reason for its actions.” *Id.*; *accord Mid-Mountain Foods. Inc.*, 332 NLRB 251, 260-61 (2000) (employer’s exaggerated testimony evidenced pretext), *enforced*, 11 F. App’x 372 (4th Cir. 2001).

Similarly, substantial evidence supports the Board’s finding that the Company also mischaracterized and exaggerated Romero’s conduct with respect to the electronic device. (A. 593, 614.) As the Board found, “it [was] completely impossible to discern from the [DriveCam] video what type of device Romero was holding,” and the video shows that Romero glanced down at the device for just one

half of one second, pressing it once with his thumb. (A. 593, 603, 614.) From this evidence, the Company claimed that Romero was “seen with a cell phone in his right hand texting” as he drove (A. 455, 470)—a distortion that conveyed a degree of interaction with and focus on the device far greater than warranted by the video evidence. (A. 593, 614.) “The aggrandizement of the offense is, itself, indicative of pretext.” *Yukon Mfg. Co.*, 310 NLRB 324, 340 (1993); *accord Sprain Brook Manor*, 359 NLRB at 942-43.

Indeed, as the Board observed (A. 593, 614), “over the course of the [Company’s] investigation, it appeared to escalate the severity of [the] assertion—from holding an electronic device, to holding a cell phone, to texting.” (A. 593; A. 461, 470.) (*see pp. 9-11.*) And, in attempting to justify Romero’s discharge, the Company unreasonably adhered to its exaggerated account of the facts in its disciplinary documents (A. 455, 458-59)—even after Romero had credibly denied at the August 20 meeting that he was texting, and clarified, consistent with the video evidence, that he only had changed a song on his iPod. (A. 593, 614.)

Moreover, as the Board further explained, Andersen’s testimony at the hearing underscores the unreasonableness of the Company’s ultimate depiction of Romero’s device usage. (A. 593, 614.) Thus, although the Company’s final accident report and suspension notice averred that Romero was “seen with a cell phone in his right hand texting” (A. 455, 470), Andersen, when forced to explain

the DriveCam footage under oath, scaled back this account significantly—testifying only that Romero was shown holding an “electronic device,” and that his “thumb [went] in a downward motion and appear[ed] to touch the device” exactly once, while he looked down at it for half a second. (A. 593, 614; A. 298, 301-03.) (*see also* A. 272.) Accordingly, Andersen’s testimony reinforces that the version of events relied on by the Company in suspending and discharging Romero “was an inflated and distorted interpretation of Romero’s recorded conduct that was specifically intended to form a . . . basis for disciplinary action.” (A. 593.) *See Materials Processing, Inc.*, 324 NLRB 719, 719 (1997) (employer “grossly exaggerated” employees’ behavior “as a pretext in order to discipline them because of their union activities”).

Substantial evidence also supports the Board’s additional finding that other circumstances underscore the disingenuousness of the Company’s claim that Romero was suspended and discharged for falsifying his accident report. (A. 593 & n.19, 594, 614-15.) Romero was “a longtime employee with a track record of safe driving,” and he “followed the [Company’s] accident protocol in full.” (A. 593.) Specifically, Romero manually “activated [the] DriveCam after the collision, [] reported the incident through the appropriate channels, and [] cooperated with the [Company’s] investigation.” (A. 593.) As the Board found, the Company’s professed good-faith belief that Romero engaged in willful deception by omitting

mention of the iPod in his reports is especially undermined by the Company’s full knowledge that Romero *voluntarily* “activated the [DriveCam] recording device even though it . . . obviously [would] show him using an iPod.” (A. 593 n.19.) Thus, as the Board observed, the Company “[p]aradoxically” founded its assertion that Romero deceptively “omitted key information from his accident report” on evidence “that Romero himself chose to record as part of his accident report.”¹² (A. 593 n.19.)

Finally, the Board properly relied on perhaps “[t]he most jarring example” of the Company’s pretextual conduct. (A. 592.) As explained above (pp. 35-36, 40-41), Styers sought to bolster the Company’s falsification rationale by asserting on Romero’s termination form, 6 days after his discharge, that he did not “work well with customers and others”—a claim that was, blatantly, both shifting and false. (A. 592.) *See Inova*, 795 F.3d at 88 (management notation that employee denied promotion in part because “prone to gossip” undermined affirmative defense, where manager had no idea what notation referred to); *Vincent*, 209 F.3d

¹² Contrary to the Company, there is no evidence that Romero ever “acknowledged” (Br. 35) trying to hide the device. (*See also* Br. 41.) Andersen ultimately clarified in his testimony that at the August 20 meeting, Romero did not agree with Andersen’s assertion that he had tried to conceal the device, but instead expressed only that he had moved the device to his left hand so that he could activate the DriveCam with his right hand. (A. 316, 325-27.) In any event, as the Board found, “had [Romero] wanted to hide the fact that he was holding something, it is curious [that] he would choose to record himself.” (A. 614.)

at 736 (employer’s “cryptic” and shifting or inconsistent explanations amounted to “inartful pretext” and evidenced unlawful motive). As the Board reasonably found, “[t]he fact that Styers added this information . . . after Romero’s actual discharge only lends credence to [the] conclusion that, even after the fact, the [Company] continued to generate new rationales to support its disciplinary action against Romero.” (A. 592 n.15.)

The Board acknowledged that Romero “may not have been blameless in failing to mention that he was holding an iPod before the accident.” (A. 593.) Nonetheless, based on the several well-supported reasons detailed above, the Board reasonably concluded that the Company did not in fact rely upon that failure in suspending and discharging Romero, and indeed, that its entire professed falsification justification was a pretext. (A. 592-94.) As discussed (p. 30), an employer does not establish its *Wright Line* affirmative defense merely by showing that its adverse action “also served some legitimate business purpose;” rather, the employer must demonstrate that “the legitimate business motive would have moved [it] to take the [same] action absent the protected conduct.” *Bruce Packing Co. v. NLRB*, 795 F.3d 18, 22-23 (D.C. Cir. 2015) (quotation marks omitted); accord *Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 31 (D.C. Cir. 1998). Accordingly, as previously explained (p. 30), if the Board reasonably finds, as it did here, “that the employer’s purported justification[] for adverse action against

an employee [is] pretextual,” then the employer “fails as a matter of law” to establish its affirmative defense. *Ozburn-Hessey*, 833 F.3d at 218-20.

4. The Company cannot defeat the Board’s pretext determination

The Company fails to undermine the Board’s findings that its investigation was implausibly initiated and that its ultimate reliance on falsification as the basis for Romero’s discharge was “simply not credible.” (A. 593-94.) Challenging the Board’s finding that it investigated the accident solely because of Romero’s protected activity, the Company claims that the Board failed to consider evidence demonstrating that its investigation was reasonable and that its review of the DriveCam video was not unusual. (Br. 30, 32, 35, 40.) This argument ignores the Board’s findings—which the Company notably does not contest (Br. 32-33)—that the Company “[does] not review the DriveCam footage for every road accident,” and critically, that “absent Wattier’s request, the inquiry into Romero’s accident would have been closed without any review of the footage.” (A. 593 & n.18.) These uncontested and well-supported findings, in conjunction with the Board’s determination that the reason for Wattier’s request was implausible, render irrelevant the Company’s claims about what was “not unusual.”

Additionally, contrary to the Company’s suggestion (Br. 33, 40), the Board found pretext not in the mere *fact* that the Company initiated an investigation into Romero’s accident but in the implausible *manner* in which it did so. The record

evidence undermines the Company's assertion (Br. 39 & n.7) that Wattier requested the investigation only because he "wanted to ascertain how far [the other vehicle] drifted," not necessarily whether the other vehicle left its lane. This explanation is contrary to Wattier's email, which specifically requested "to verify" that the other vehicle "left their lane." It also is in tension with the Company's eventual conclusion that Romero falsified his report because although the other vehicle did in fact drift to the left, it "never left their lane and came into ours." Moreover, the Company failed to call Wattier to testify as to his purpose for requesting the investigation. And furthermore, whether the Board "derived the wrong inference" concerning Wattier's request is "not the question," as the Court "ask[s] only whether . . . it would have been possible for a reasonable jury to reach the Board's conclusion[s], *giving substantial deference to the inferences drawn by the [Board] from the facts.*" *Bally's*, 646 F.3d at 938.

The Company further argues that "comparators defeat pretext" and faults the Board for failing to consider purported comparator evidence demonstrating that it treated Romero similarly to other individuals charged with falsification. (Br. 32.) Given the Board's finding that the Company here launched its investigation for an illicit purpose, to create an "aura of legitimacy" to Romero's discharge, the Board did not fail to consider this evidence, but instead properly rejected it as inapplicable. *Kut Rate Kid & Shop Kwik*, 246 NLRB 106, 121 (1979) (discharges

unlawful when premised on investigation undertaken to create lawful reason for terminating union supporters). Contrary to the Company, those other individuals are simply not “comparators.” (Br. 30-32, 35, 43.) As the Board explained, “[u]nlike the employees in those cases, Romero’s conduct was investigated solely because he engaged in protected concerted activity, and the purported . . . falsification . . . was discovered pursuant to that unlawfully motivated inquiry.” (A. 593 n.18.) The Company’s claim, therefore, that it “treated comparables as it did Romero” (Br. 19, 30), ignores the substantial evidence showing that it investigated Romero for a pretextual reason to conceal its unlawful motive, rendering any “comparator” evidence irrelevant. *See Trump Marina Assocs., LLC*, 353 NLRB 921, 953-56 & n.99 (2009) (finding, where pretext determination not based on disparate treatment, that because the case “sound[ed] in pretext” it was “[t]herefore . . . irrelevant . . . how [the alleged discriminatee] was treated vis-a-vis other employees who were disciplined for arguably similar . . . misconduct”), *incorporated by reference in* 355 NLRB 1277 (2010), *enforced*, 445 F. App’x 362, 364 (D.C. Cir. 2011) (affirming violation, holding that Board “properly concluded that [employer’s] proffered, nondiscriminatory explanation for the [discipline] was mere pretext”).

There is thus no merit to the Company’s wholly unsupported suggestion (Br. 32-33, 35, 37) that the Board could not find pretext in the initiation of Romero’s

investigation without finding that it constituted disparate treatment or a deviation from established practice. It is well settled that pretext may be shown in a variety of circumstances, including where an employer's explanation for its actions is implausible. (*See* pp. 31, 43.) Furthermore, it bears repeating that the Board's finding of pretext in the commencement of the investigation was only one of several bases for the Board's overall pretext determination.

Similarly unavailing is the Company's oft-repeated claim (Br. 34, 36-37, 41-42) that the Board failed to consider its "reasonable beliefs" as to Romero's conduct. The Court cannot address this contention because the Company failed to present it to the Board. 29 U.S.C. § 160(e). (*See* p. 28.) In any event, the contention is meritless. As an initial matter, the Company "shortchanges [its] burden of proof" to the extent it suggests that it could establish its affirmative defense merely by showing that it held a "reasonable belief" that Romero engaged in misconduct. *Inova*, 795 F.3d at 84. Rather, the Company must "show not only that it reasonably believed [Romero] had engaged in [misconduct], but that the nature of that behavior 'would have' caused [his] suspension and termination regardless of [his] protected conduct." *Id.* And as discussed (pp. 30, 50-51), the Company of necessity cannot meet that burden—because the Board reasonably found that its purported justification for taking adverse action against Romero was disingenuous and pretextual.

The Company is also wrong in claiming (Br. 41-42) that the Board erroneously focused on what actually happened rather than on what the Company reasonably believed concerning Romero's usage of the electronic device. To the contrary, as the Board specifically noted (A. 593), and as explained above, the Board found pretext in the Company's stated conclusions concerning the device precisely because they were "not reasonable" and instead constituted "an inflated and distorted interpretation of Romero's recorded conduct." (A. 593.)

Finally, the Company mischaracterizes the Board's decision in claiming that the Board "substitute[d] its business judgment for [the Company's]" and "fail[ed] to grasp" that "accident-related falsification" is a legitimate concern. (Br. 37-38.) "While it is a truism that management makes management decisions, not the Board, it remains the Board's role, subject to [courts'] deferential review, to determine whether management's proffered reasons were its actual ones." *Uniroyal Tech. Corp. v. NLRB*, 151 F.3d 666, 670 (7th Cir. 1998). Thus, contrary to the Company's misguided claims (Br. 39), the Board's decision does not "impose a policy" that would ban the Company from investigating or taking disciplinary action concerning its drivers' accident reports. The Board requires only that the Company comply with the Act in doing so.

CONCLUSION

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

Respectfully submitted,

/s/ Elizabeth Heaney

ELIZABETH HEANEY

Supervisory Attorney

/s/ Michael R. Hickson

MICHAEL R. HICKSON

Attorney

National Labor Relations Board

1015 Half Street SE

Washington, DC 20570

(202) 273-1743

(202) 273-2985

PETER B. ROBB

General Counsel

ALICE B. STOCK

Associate General Counsel

DAVID HABENSTREIT

Acting Deputy Associate General Counsel

National Labor Relations Board

May 2019

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

CON-WAY FREIGHT, INC.)	
)	
Petitioner/Cross-Respondent)	
)	Nos. 18-1247 &
v.)	18-1267
)	
NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent/Cross-Petitioner)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), the Board certifies that its final brief contains 12,769 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016. This document also complies with the typeface requirements of FRAP 32(a)(5)(A) and the type-style requirements of FRAP 32(a)(6).

/s/ David Habenstreit
David Habenstreit
Acting Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 16th day of May, 2019

STATUTORY ADDENDUM

STATUTORY ADDENDUM

TABLE OF CONTENTS

National Labor Relations Act, 29 U.S.C. § 151, et seq.

Section 7.....	ii
Section 8(a)(1).....	ii
Section 8(a)(3).....	ii
Section 8(c)	ii
Section 10(a)	iii
Section 10(e)	iii
Section 10(f).....	iii

THE NATIONAL LABOR RELATIONS ACT

Section 7 of the Act (29 U.S.C. § 157) provides:

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 8(a)(3).

Section 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(3) 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

Section 8(c) of the Act (29 U.S.C. § 158(c)) provides:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

Section 10 of the Act (29 U.S.C. § 160) provides in relevant part:

(a) The Board is empowered . . . to prevent any person from engaging in any unfair labor practice affecting commerce. . . .

* * *

(e) The Board shall have power to petition any court of appeals of the United States . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order . . . and shall file in the court the record in the proceeding 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 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. . . . 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 Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(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 court a written petition praying that the order of the Board be modified or set aside. . . . 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 . . . 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**

CON-WAY FREIGHT, INC.)	
)	
Petitioner/Cross-Respondent)	
)	Nos. 18-1247 &
v.)	18-1267
)	
NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent/Cross-Petitioner)	

CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system.

/s/ David Habenstreit
David Habenstreit
Acting Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
this 16th day of May, 2019