

Nos. 19-1054, 19-1090

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

OZBURN-HESSEY LOGISTICS, LLC

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**UNITED STEEL, PAPER AND FORESTRY, RUBBER,
MANUFACTURING, ENERGY, ALLIED INDUSTRIAL & SERVICE
WORKERS INTERNATIONAL UNION, AFL-CIO/CLC**

Intervenor

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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ORAL ARGUMENT STATEMENT

The Board believes that this case involves the straightforward application of well-settled law to the facts. However, to the extent the Court believes that oral argument would be helpful or grants Ozburn-Hessey's request for oral argument, the Board requests the opportunity to participate.

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JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Ozburn-Hessey Logistics, LLC to review, and the cross-application of the National Labor Relations Board to

enforce, a Board Order issued against Ozburn-Hessey on August 27, 2018, reported at 366 NLRB No. 177. (JA 2-22.)¹ The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, ALF-CIO (the Union) has intervened on the Board’s behalf. The Board had subject-matter jurisdiction under Section 10(a) of the National Labor Relations Act (the Act), 29 U.S.C. § 160(a), which authorizes the Board to prevent unfair labor practices affecting commerce.

The Court has jurisdiction over this appeal because the Board’s Order is final under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f). Venue is proper under Section 10(e) and (f) because the unfair labor practices occurred in Tennessee. Ozburn-Hessey’s petition and the Board’s cross-application were timely because the Act does not impose time limits on those filings.

ISSUES PRESENTED

(1) Is the Board entitled to summary enforcement of the unchallenged portions of its Order?

(2) Does substantial evidence support the Board’s findings that Ozburn-Hessey violated Section 8(a)(5) and (1) of the Act by unilaterally changing its

¹ “JA” refers to the parties’ joint appendix, “SA” refers to the Board’s supplemental appendix, and “Br.” refers to Ozburn-Hessey’s opening brief. References preceding a semicolon are to the Board’s findings; those following are to supporting evidence.

timekeeping system and by discharging Lauren Keele as a consequence of that change?

(3) Does substantial evidence support the Board's findings that Ozburn-Hessey violated Section 8(a)(3) and (1) of the Act by terminating employees Nannette French, Shawn Wade, Jerry Smith Sr., and Stacey Williams for their union or other protected, concerted activities?

(4) Do the Board's enhanced remedies fit within its broad remedial discretion?

STATEMENT OF THE CASE

For the past decade, Ozburn-Hessey has engaged in an extraordinary pattern of violating its Memphis employees' rights under the Act. The decision under review is the seventh Board decision issued against it during that period, all of which involve unlawful conduct intended to undermine the Union during its organizing drive and subsequent first-contract bargaining. Five Board orders were enforced in full by the D.C. Circuit. *See Ozburn-Hessey Logistics, LLC*, 362 NLRB 1532 (2015), *enforced mem.*, 689 Fed. Appx. 639 (D.C. Cir. 2016); *Ozburn-Hessey Logistics, LLC*, 362 NLRB 977 (2015), *enforced*, 833 F.3d 210 (D.C. Cir. 2016); *Ozburn-Hessey Logistics, LLC*, 361 NLRB 921 (2014), *incorporating by reference* 359 NLRB 1025 (2013), *enforced*, 833 F.3d 210 (D.C. Cir. 2016); *Ozburn-Hessey Logistics, LLC*, 357 NLRB 1632 (2011), *enforced mem.*, 609 Fed.

Appx. 656 (D.C. Cir. 2015); and *Ozburn-Hessey Logistics, LLC*, 357 NLRB 1456 (2011), *enforced mem.*, 605 Fed. Appx. 1 (D.C. Cir. 2015). A sixth Board order is currently under review in this Court in Case Nos. 18-2103 and 18-2217, which is fully briefed and pending oral argument.

This case primarily involves conduct that occurred immediately after May 14, 2013, when the Union learned that it had won a 2011 election and resumed organizing employees to re-establish its presence after litigation over the election. The Board found that Ozburn-Hessey committed 22 separate violations of the Act. Of those, Ozburn-Hessey challenges only 6 in its opening brief. The Board's findings of fact and conclusions of law as to the contested violations are described below; the uncontested violations are discussed under the Argument heading.

I. THE BOARD'S FINDINGS OF FACT

A. Ozburn-Hessey Changes Its Timekeeping System Without Notifying the Union, then Discharges Lauren Keele for Being 1 Minute Late Clocking In

Before 2013, Ozburn-Hessey used timeclocks with physical buttons to record employees' start and end times. (JA 10; 342.) Those timeclocks had separate buttons for each recordable event, including signing in and out for shifts and lunch. (JA 10; 342.) If employees pushed the wrong button on those systems when clocking in, they did not have to wait for a new screen before pushing the correct button to fix the issue. (JA 10; 355.) On April 22, 2013, Ozburn-Hessey

replaced its timekeeping equipment with a system called Kronos. Unlike the previous system, Kronos had a touchscreen and had more functions, such as requesting leave and job transfers. (JA 10; 345, 591-93.) The Kronos system came with a 50-page manual describing its different functions and Ozburn-Hessey's managers anticipated that employees could initially have some difficulties clocking in. (JA 10; 540-89, 591.)

Before the change to Kronos, employees requested time off by submitting paper forms to a manager, who hand-returned those requests the same or the next day. (JA 11; 347-48.) After the change, employees were initially required to use the Kronos system to submit leave requests and would find out if their requests had been granted by later checking Kronos. (JA 11; 348-49, 351.) It is undisputed that Ozburn-Hessey did not notify the Union before changing its timekeeping equipment. (JA 11.)

On April 30, employee Lauren Keele attempted to sign in via the Kronos system after lunch. (JA 11; 352.) When she hit the wrong button on the touchscreen, she was directed to a new page. (JA 11; 353-54.) She hit the "home" button to return to the original screen. (JA 11; 354-55.) While she was waiting for the homepage to load, the clock had turned to the next minute, rendering her one minute late. (JA 11; 355.) Ozburn-Hessey assessed her an attendance point under its policy, which stated that employees will receive particular forms of discipline

when they accumulate specified numbers of points, culminating in discharge when an employee exceeds 12 points. (JA 8; 525.) Keele's April 30 attendance point brought her total to 13, and Ozburn-Hessey discharged her on May 13. (JA 11; 525.)

B. After the Union's Election Victory is Determined, Employees Solicit Authorization Cards in Parking Lots and Ozburn-Hessey Orders Them To Stop

The Union started organizing Ozburn-Hessey's Memphis, Tennessee warehouse employees in 2009, and on July 27, 2011, the Board held a representation election for a unit of those employees. Due to litigation over challenges to certain employees' ballots, the Board did not issue a final tally of ballots until May 14, 2013. (JA 2.) *See Ozburn-Hessey Logistics, LLC*, 359 NLRB 1025, 1025 (2013), *incorporated by reference, Ozburn-Hessey Logistics*, 361 NLRB at 921. The tally showed that the Union had won the election and the Board certified the Union as the warehouse employees' representative on May 24. (JA 2, 24.)

After attending the ballot count, employees Glenora Whitley and Jerry Smith, Sr. went to several of Ozburn-Hessey's parking lots to tell employees about the result and drum up additional support for the Union. (JA 24; 151-53.) Whitley and Smith Sr. also distributed authorization cards that employees could sign to become union members. (JA 24; 523.) After speaking to employees on the main

campus, they went to the parking lot of the Yazaki building, a nearby warehouse where some unit employees worked. (JA 24; 151-53.) They were joined by several employees who worked at the Yazaki warehouse, including Nannette French. (JA 24-25; SA 625, 628-31.) Two of Ozburn-Hessey's supervisors and a customer saw them there and called Operations Manager Margaret Bonner to tell her that "union people" were in the Yazaki lot. (JA 4; 438.) Bonner immediately interrupted her lunch break to inform Director of Operations Phil Smith, who was in charge of all of the Memphis warehouses. She then went to the parking lot and asked Whitley and Smith Sr. to leave. (JA 27-28; 438-41.) Phil Smith arrived shortly thereafter. (JA 28; 441.)

C. Nannette French Distributes Union Authorization Cards; 3 Days Later, Ozburn-Hessey Discharges Her

French was an open union supporter who wore a union button to work. (JA 8; 196.) On May 14, French met with Whitley and Smith Sr. to help spread news of the Union's victory to employees who worked in the Yazaki building. (JA 24-25, 59; SA 625, 628-31.) French openly distributed union authorization cards to several employees while she was in the parking lot. (JA 8; 184.) French left before Bonner came out to order Whitley and Smith Sr. to leave. (JA 8, 25; 439-41.)

On May 17, French clocked in 1 minute late from her lunch break. (JA 8, 59; SA 633.) French already had 12 points when she returned late from lunch. (JA

8; 511.) Ozburn-Hessey assessed her an additional point for her May 17 infraction, bringing her total to 13, and discharged her. (JA 8; SA 633.)

Before French's discharge, Ozburn-Hessey typically allowed employees to exceed 13 attendance points. (JA 9.) It often allowed employees to accumulate nearly double or more points than its policy officially allowed before terminating the employee, including employees Davis (27 points), Faulkner (29 points), Shaw (34.5 points), Shipp (24 points), Rhodes (33 points), Watson (46 points), and Blade (23 points). (JA 9; *Ozburn-Hessey*, 362 NLRB at 1554.) The only employee other than French who Ozburn-Hessey has discharged for reaching only 13 points is Keele, discussed above. (JA 8 n.30.)

D. Shawn Wade Signs an Authorization Card; Ozburn-Hessey Discharges Him the Next Day

After hearing about the Union's victory on May 14, employee Shawn Wade met with employee Anita Wells in one of Ozburn-Hessey's parking lots to sign a union authorization card. (JA 7-8; 237, 312.) While Wade was doing so, manager Randall Coleman drove by and saw Wade and Wells in the parking lot but did not directly look at them. (JA 7, 49; 237, 312.) Coleman did not know Wade but knew that Wells was involved in the Union's organizing efforts. (JA 7; 341, 434, SA 632.)

The next day, Wade was running late to work. (JA 49; 244.) He parked in a visitor parking spot, clocked in on time, then left to move his car to the employee

lot. (JA 49; 244-48.) Manager Ken Ball observed Wade moving his car after clocking in and reported it to Wade's manager. (JA 7; 421-23.) At the end of his shift, Wade was asked to report to human resources. (JA 49; 250.) Ozburn-Hessey informed Wade that he had been seen leaving the building to move his car after he had clocked in, that doing so was forbidden, and that he would be terminated. (JA 49; 250-51.) His termination notice states that he was discharged for violating Ozburn-Hessey's time-and-attendance policy. (JA 49; 515.)

Before Wade's discharge, employees regularly left Ozburn-Hessey's buildings for a short period without consequences. According to employees Nelson, Balderrama, Wells, and Jennifer Smith, many or all employees clocked in, then left to move their cars when they were running late. (JA 8; 209, 232, 317-18, 385.) Nelson's supervisor saw him doing so and did not discipline him. (JA 8; 210.) Employee Pressman also briefly left the building to get a box cutter or roll up her windows and was not disciplined for doing so even when her supervisor saw her. (JA 8; 221-23.) Wells left the building to get her asthma pump in front of her supervisor with no repercussions. (JA 8; SA 626-27.) Wells did not know that Ozburn-Hessey had any rule against leaving the building to move a car until after Wade was discharged for doing so. (JA 8; 382.)

Ozburn-Hessey's records reveal that before Wade's discharge, it had not discharged any employees for a first offense of leaving the building for a brief time

during their shifts. After a manager caught employee B. Smith leaving the building to move his car, the manager told him not to do so but did not discipline him. On a subsequent occasion, Smith sought to leave the building to move his car, his manager told him not to, and he did so anyway. Ozburn-Hessey then discharged him for insubordination. (JA 7; 464, 603-04.) When a different manager caught employee Banis leaving the building to move her car, Ozburn-Hessey treated her as arriving late for her shift and assigned her an attendance point under its time-and-attendance policy. (JA 8; 598-601.)

E. Stacey Williams Requests Union Representation at a Disciplinary Meeting and Ozburn-Hessey Discharges Him

On June 20, 2013, managers Sara Wright and David Maxey called employee Stacey Williams into a conference room to issue him a disciplinary warning for a prior incident. (JA 6; 254, 519.) After Maxey started accusing him of misconduct in the prior incident, Williams requested a union representative. (JA 6; 255-56.) Williams knew to request representation because the Union had distributed cards informing employees of their right to union representation in a disciplinary interview and Williams kept his card with his employee identification badge. (JA 292.) When Wright denied his request, Williams left to return to his workstation. (JA 6; 255.)

Both managers then approached Williams at his desk and Wright asked him to return to the conference room. (JA 6, 62; 257-59, 264-65.) Williams requested

union representation, which Wright again denied, and one of the managers asked Williams to return to the conference room a second time. (JA 6; 374.) Williams again requested representation and, this time, Wright told him to clock out. (JA 6; 264-65.) While Williams gathered his things and started to shut down his computer, Maxey unplugged it. (JA 6; 261, 376.) Both Wright's and Maxey's voices were raised during the encounter. Williams was neither loud nor disruptive. (JA 6; 261, 376-77.) Ozburn-Hessey subsequently discharged Williams for his allegedly "[u]nprofessional, inappropriate conduct/insubordination." (JA 6; 521.)

F. Ozburn-Hessey Increases Enforcement of its Rule Against Leaving the Building During a Shift, Distributes Questionnaires to Employees Who Have Done So, and Discharges Primary Union Organizer Jerry Smith, Sr.

In September 2013, Ozburn-Hessey unlawfully increased enforcement of its policy prohibiting employees from leaving their warehouse during working hours. (JA 9, 92; 180-81, 215-16.)² As part of that increased enforcement, Ozburn-Hessey's managers reviewed its security footage to determine which employees had left the warehouse without clocking out and distributed questionnaires to each employee. (JA 9; 395.) The questionnaires asked employees if they had left the facility after clocking in on specific days— days on which, unbeknownst to the

² As discussed below (pp. 18-24), Ozburn-Hessey's opening brief does not challenge the Board's finding that unilaterally increasing the enforcement of its policy violated Section 8(a)(5) and (1) of the Act.

employees, Ozburn-Hessey had caught them on video leaving; if so, whether they had permission; and whether they knew of any other employees who left the building after clocking in. (JA 9; 501-02, 504-05.)

One employee who received questionnaires was Jerry Smith, Sr.³ (JA 9; 501-02, 504-05.) Smith Sr. was one of the two “presumed chairs” of the Union’s organizing campaign, and Ozburn-Hessey had previously unlawfully discharged him for his union activities. *Ozburn-Hessey*, 357 NLRB at 1653-54. When Smith Sr. received his questionnaires, he answered that he had not left the building during his shift. (JA 9; 501, 504.) Ozburn-Hessey subsequently discharged him and his termination notice states that he was discharged for lying on the questionnaires. (JA 9; 507.) There is no evidence of any other employee receiving discipline for providing false information on a questionnaire. (JA 9.)

II. PROCEDURAL HISTORY

Acting on charges filed by the Union, the Board’s General Counsel issued a consolidated complaint alleging that Ozburn-Hessey committed dozens of violations of the Act, including, in relevant part, by changing its timekeeping equipment without notifying or bargaining with the Union and by discharging Keele, French, Wade, Smith Sr., and Williams. (JA 468-86.) After a hearing, an

³ There are two Jerry Smiths in this case. The Board referred to the elder Jerry Smith as “Smith Sr.” and his son as “Smith Jr.” (JA 3 n.7.)

administrative law judge dismissed some allegations and found numerous violations of the Act. More specifically, the judge found, in relevant part, that: (1) Ozburn-Hessey's timekeeping-equipment change was not material and substantial and therefore was lawful; (2) Keele's discharge therefore did not violate the Act; (3) the discharges of French, Wade, and Smith Sr. did not violate the Act; and (4) Ozburn-Hessey unlawfully discharged Williams. (JA 23-100.) The Union, the General Counsel, and Ozburn-Hessey all filed exceptions to the judge's decision. (JA 2 n.1.)

III. THE BOARD'S CONCLUSIONS AND ORDER

The Board (Chairman Ring and Members Pearce and McFerran) unanimously reversed the judge's finding that Wade's discharge did not violate Section 8(a)(3) and (1) the Act. (JA 6-8.) The Board majority (Chairman Ring, dissenting) also affirmed the judge's finding that Williams' discharge violated Section 8(a)(3) and (1), reversed the judge's findings that French's and Smith Sr.'s discharges did not violate the Act, and found that the change to the timekeeping equipment was material and substantial, so that change and the resulting discharge of Keele violated Section 8(a)(5) and (1). (JA 6, 8-11.) The Board also found 16 additional violations of the Act that are not contested. (JA 2-6, 10-12.)

To remedy the violations, the Board ordered Ozburn-Hessey to cease-and-desist from those violations and from violating the Act "in any other manner." (JA

14.) It also ordered Ozburn-Hessey to offer reinstatement to Keele, Wade, French, Smith Sr., and Williams, and to make them whole. (JA 13.) The Board further ordered Ozburn-Hessey to provide requested information it unlawfully withheld from the Union, bargain with the Union before implementing any changes to employees' terms and conditions of employment, make employees who suffered losses as a result of its unilateral changes whole, and, at the Union's request, rescind those changes to employment terms. (JA 15-16.) The Board's Order requires that Ozburn-Hessey post a remedial notice to employees and that either its top-ranking Memphis manager or its top-ranking human resources official read the notice aloud or that a Board agent read the notice in the presence of one of those managers. (JA 16.) Finally, due to Ozburn-Hessey's "extraordinary record of law breaking," the Board ordered it to post the remedial notice for 3 years, publish the notice in two publications of broad circulation and local appeal, and require all supervisors and managers to attend at least one reading of the notice. (JA 14-16.)

SUMMARY OF ARGUMENT

Ozburn-Hessey's change to the Kronos timekeeping system materially affected employees' terms of employment. It required them to submit leave requests electronically rather than in person, thereby extending the time it took to hear back. It also involved more screens and functions that could render employees late if they pressed the wrong button. Indeed, Keele was late to work

because she had to wait for the homepage to load on the Kronos timeclock, which she would not have had to do with the old equipment. Given those circumstances, substantial evidence supports the Board's findings that the change to Kronos and Keele's resulting discharge violated Section 8(a)(5) and (1).

Substantial evidence also supports the Board's findings that Ozburn-Hessey violated Section 8(a)(3) and (1) by discharging French and Wade. French's open union activity at a time and place when at least two supervisors were observing such activity reasonably led the Board to infer that Ozburn-Hessey knew of her actions. Moreover, the timing of her discharge and Ozburn-Hessey's disparate treatment of her also supports the Board's finding. The disparate treatment—discharging her for reaching 13 attendance points when it rarely did so—also supports the Board's finding that Ozburn-Hessey did not carry its burden of proving it would have discharged her absent her union activity. As to Wade, similarly, the timing of his discharge just a day after he signed a union card, Ozburn-Hessey's opportunity to view his open union activity, and his disparate treatment—discharging him for briefly leaving the building during his shift when it did not discharge other employees—supports the Board's finding that Ozburn-Hessey knew of his union activity.

As to Smith Sr.'s discharge, the Board reasonably rejected Ozburn-Hessey's defense that it discharged him for lying on a questionnaire. It had never done so

with any other employees despite widespread use of investigatory questionnaires. Smith Sr.'s status as the primary union organizer, whom Ozburn-Hessey had unlawfully discharged in the past, indicates that Ozburn-Hessey had a high hurdle to overcome to carry its burden of proof. In such circumstances, substantial evidence supports the Board's finding that Smith Sr.'s discharge violated Section 8(a)(3) and (1).

Both substantial evidence and extant precedent support the Board's finding that Williams' discharge violated Section 8(a)(3) and (1). As the Board found, whether Williams was entitled to a union representative and whether Ozburn-Hessey could discharge him simply for requesting one are separate questions. As to the latter, the Board reasonably found that the Act protected Williams' attempt to further the Union's campaign to notify employees of their representational rights and his enlistment of Smith Sr. in doing so. Because his activity was protected, Ozburn-Hessey could not lawfully discharge him for it absent opprobrious conduct. The Board reasonably found that Williams' alleged insubordination in the course of his protected activity did not constitute such opprobrious conduct, so his discharge violated Section 8(a)(3) and (1).

The Board acted within its discretion by ordering Ozburn-Hessey to post the notice for 3 years, require supervisors and managers to attend its reading, and publish it in two publications. Ozburn-Hessey's extraordinary record of

lawbreaking requires extraordinary remedial measures. All three measures chosen by the Board are aimed at informing current, past, and future employees, supervisors, and managers of employees' rights under the Act, which Ozburn-Hessey has now failed to respect for the seventh time. As such, the Board reasonably exercised its broad remedial discretion.

STANDARD OF REVIEW

The Court must uphold the Board's factual findings if they are supported by substantial evidence, even if the reviewing court could justifiably make different findings if it considered the matter de novo. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951); *NLRB v. Gen. Fabrications Corp.*, 222 F.3d 218, 225 (6th Cir. 2000). "The Board's application of the law to the facts is also reviewed under the substantial evidence standard, and the Board's reasonable inferences may not be displaced on review." *Indiana Cal-Pro, Inc. v. NLRB*, 863 F.2d 1292, 1297 (6th Cir. 1988). Such findings of fact include determining an employer's motive for taking adverse employment actions against employees. *Airgas USA, LLC v. NLRB*, 916 F.3d 555, 560 (6th Cir. 2019).

Contrary to Ozburn-Hessey's claimed standard of review (Br. 15), unless the Board overturns the administrative law judge's credibility determinations, this Court does not treat Board decisions overruling an administrative law judge's decision differently from those that agree with the administrative law judge. *NLRB*

v. Galicks, Inc., 671 F. 3d 602, 607 (6th Cir. 2012) (“When the Board does not overturn the ALJ’s credibility findings, the sole question for us on appeal is whether substantial evidence supports the Board’s findings. Whether the record also supports the ALJ’s conclusions is irrelevant to the inquiry.”). This Court thus examines all Board decisions equally carefully, “regardless of whether the Board and ALJ reached opposite inferences and conclusions.” *Id.*

With respect to legal findings, “this Court is deferential to the Board’s interpretation” of the Act and, as “long as the [Board]’s interpretation of the statute is reasonably defensible, this Court will not disturb such interpretation.” *Vanguard Fire & Supply Co. v. NLRB*, 468 F.3d 952, 957 (6th Cir. 2006) (internal quotation omitted). The Court “may not reject the Board’s interpretation ‘merely because the courts might prefer another view of the statute.’” *Kindred Nursing Ctrs. E., LLC v. NLRB*, 727 F.3d 552, 559 (6th Cir. 2013) (quoting *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979)).

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THE UNCONTESTED PORTIONS OF ITS ORDER

Ozburn-Hessey does not contest most of the violations the Board found.

The uncontested violations include the Board's findings that Ozburn-Hessey violated Section 8(a)(1) by:

- Operations Manager Margaret Bonner ordering Smith Sr. and Whitley to leave Ozburn-Hessey's premises while they were soliciting union support on May 14, 2013 (JA 2-3, 26-28; 445-49);
- Director of Operations Phil Smith removing union literature from the employee break room on May 15 (JA 3, 29-31; 293-302);
- Bonner telling employees that they should quit on May 17 (JA 3, 34-35; 435, 443);
- Human Resources Manager Sara Wright telling employees they did not have representational rights on September 5 (JA 4-6, 36-38; 171); and,
- Manager Ken Ball removing union literature from an employee break room on two occasions. (JA 11-12; 432-33.)

Similarly uncontested are the Board's findings that Ozburn-Hessey violated Section 8(a)(5) and (1) by:

- Unilaterally increasing its match to employees' 401(k) contributions (JA 10, 82; 476, 491);
- Unilaterally implementing a mandatory exercise program (JA 3, 83-84; 216-17);
- Unilaterally implementing an advance-notice requirement for requesting leave (JA 3, 87-89; 168-69, 303-05);
- Unilaterally changing its policy of allowing employees to use leave for early dismissal (JA 3, 89-90; 183, 308-11);
- Unilaterally changing shift times for two employees (JA 11; 323-24);
- Unilaterally changing the Shipping Department employees' schedules from 4 days to 3 days (JA 3, 90-91; 217-220, 224-28, 327-29, 425-28);
- Unilaterally splitting the Shipping Department employees into two teams (JA 3, 90-91; 217-220, 224-28, 327-29, 425-28);
- Unilaterally cutting Shipping Department hours (JA 3, 90-91; 217-220, 224-28, 327-29, 425-28);
- Unilaterally changing the start time in the Inventory Department (JA 3, 91-92; 327, 428-29);
- Unilaterally increasing enforcement of its policy against leaving the warehouse during work hours (JA 3, 92; 210-15, 318-21); and,

- Refusing to provide the Union with information relevant to its duties as bargaining representative. (JA 3, 93; 478-79, 492.)

Because Ozburn-Hessey did not contest those violations in its opening brief, it has waived any challenge to those findings. *See Conley v. NLRB*, 520 F.3d 629, 638 (6th Cir. 2008) (where employer “does not argue in its appellate brief against the validity of the Board’s rulings . . . [a]ny challenges to those rulings have thus been waived”). The Board is therefore entitled to summary enforcement of the portions of its Order corresponding to the uncontested violations. *Hyatt Corp. v. NLRB*, 939 F.2d 361, 368 (6th Cir. 1991). Moreover, the uncontested violations “do not disappear altogether,” but “lend[]” their aroma to the context in which the contested issues are considered.” *Gen. Fabrications*, 222 F. 3d at 232.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT OZBURN-HESSEY VIOLATED SECTION 8(a)(5) AND (1) BY UNILATERALLY CHANGING ITS TIMEKEEPING EQUIPMENT AND DISCHARGING LAUREN KEELE

Section 8(a)(5) of the Act requires employers to bargain with their employees’ unions over mandatory subjects. 29 U.S.C. § 158(a)(5); *see also Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 209-10 (1964); *Vanguard Fire*, 468 F.3d at 960. Section 8(d) defines those mandatory subjects as “wages, hours, and other terms and conditions of employment.” 29 U.S.C. § 158(d); *see also Fibreboard*, 379 U.S. at 210. An employer who violates Section 8(a)(5) also commits a “derivative” violation of Section 8(a)(1), which makes it unlawful for an

employer “to interfere with, restrain, or coerce employees in the exercise” of their rights under the Act, 29 U.S.C. § 158(a)(1). *Galicks*, 671 F.3d at 608 n.2.

An employer thus violates its bargaining obligation if it unilaterally changes its employees’ terms or conditions of employment. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991) (citing *NLRB v. Katz*, 369 U.S. 736, 743 (1962)); *Loral Def. Sys.-Akron v. NLRB*, 200 F.3d 436, 449 (6th Cir. 1999) (“If an employer changes wages or other terms without affording the Union an opportunity for adequate consultation,” it violates the Act). An employer’s obligation to bargain before changing employees’ terms and conditions of employment commences on the date of the union’s election, not the date of the union’s eventual certification. *Alta Vista Regional Hosp.*, 357 NLRB 326, 326-27 (2011), *enforced sub nom.*, *San Miguel Hosp. Corp. v. NLRB*, 697 F.3d 1181 (D.C. Cir. 2012).

To be unlawful, a unilateral change must be material and substantial. *See NLRB v. Brown-Graves Lumber Co.*, 949 F.2d 194, 197 (6th Cir. 1991); *Indian River Mem’l Hosp., Inc.*, 340 NLRB 467, 473 (2003). Here, Ozburn-Hessey admits that it changed its timekeeping equipment and that it failed to notify and bargain with the Union. The only issues are whether the change was material and substantial, and, if so, whether Keele’s discharge was a result of the unilateral change. As shown below, substantial evidence supports the Board’s findings that they were.

A. The Change to the Kronos Timekeeping System Substantially and Materially Affected Employees' Terms and Conditions of Employment

The bar to show that a unilateral change materially affected employees' terms and conditions of employment is not particularly high. Indeed, the Board has characterized a change as material and significant so long as it is not de minimis. *See Rangaire Co.*, 309 NLRB 1043, 1043 (1992), *enforced*, 360 F.3d 206 (D.C. Cir. 2004) (unilateral withdrawal of an extra 15-minute lunch break once per year violated Section 8(a)(5)). Even minor increases in the burdens that employees face, such as eliminating employees' ability to donate blood while on the clock twice per year, violate Section 8(a)(5). *Verizon New York, Inc.*, 339 NLRB 30, 37-38 (2003), *enforced*, 360 F.3d 206 (D.C. Cir. 2004). The change to Kronos meets that undemanding standard.

As the Board found, one significant aspect of the new system was that it changed employees' process for requesting leave. (JA 11.) Before Kronos, employees physically submitted leave requests to their supervisors and could discuss that leave with those supervisors. If their supervisors had problems with the leave request or intended to deny it, employees heard about those problems immediately. With the Kronos system, employees had to wait up to a day to find out if their leave requests would be granted because the managers had to log into

the system to do so. Although managers had the option to wait to sign a leave request under the old system, Kronos rendered that option a necessity.

Delays in granting leave requests can cause employees to either prematurely rearrange their affairs or can force them to wait until the last minute to do so. Such delays have far more than a de minimis effect on employees who have to arrange child care or call out from a second job. Indeed, Ozburn-Hessey does not dispute the Board's finding that it violated Section 8(a)(5) by implementing an advance-notice requirement for requesting leave, and that requirement may have affected at least one employee who testified at the hearing. (JA 87-89.) A system that takes longer to grant leave requests affects employee interests as much as a formal rule imposing a waiting time.

In addition, Kronos is a sophisticated system with more functions than a simple three-button timeclock. Employees who accidentally hit the wrong button on the touchscreen have to navigate a menu of options to return to the home screen, while waiting for each separate page to load. (JA 10.) Manual clocks impose no such burden; there is no loading time or complicated menu. As the Board pointed out, Kronos "came with a 50-page instruction manual" to describe its various functions. (JA 10.) Employees used that sophisticated system at least four times per day. Thus, the increased burdens on employees constitute more than a minimal change in their terms and conditions of employment.

Ozburn-Hessey’s reliance (Br. 18) on *Rust Craft Broadcasting of New York, Inc.*, 225 NLRB 327 (1976), is misplaced. As the Board pointed out, that case solely involved a change from handwritten timecards to a timeclock, two technologies that “accomplish the same task of recording an employee’s start and stop times” and “place approximately the same burdens on employees.” (JA 10 n.36.) By contrast, Kronos included a significant additional function—submitting leave requests—and came with an increased risk of delays due to mistakenly hitting the wrong button. The penalty for such delays could be severe, as in Keele’s case. For that reason, *Weather Tec Corp.*, 238 NLRB 1535, 1536 (1978), and *Berkshire Nursing Home, LLC*, 345 NLRB 220, 220-21 (2005), are also distinguishable; an employer’s decision to cease providing coffee to employees or make a minor change to the location and surface of the parking lot that employees use cannot lead to an employee’s discharge the way changes to timekeeping equipment can.

There is no merit to Ozburn-Hessey’s contention (Br. 18) that the only aspect of its unilateral change to Kronos that matters is its change to the touchscreen. The change to how employees request leave was just as much part of the change to Kronos as the change to touchscreen buttons. It is irrelevant that Keele’s discharge had nothing to do with the change to leave requests; the questions of whether the change itself violated the Act and whether Keele’s

discharge resulted from the change are separate. The Board appropriately considered all circumstances of the change to Kronos rather than the touchscreen alone.

Far from displaying a “remarkable lack of confidence in [Ozburn-Hessey’s] employees’ ability to deal with 21st century technology” (Br. 20), the Board’s decision appropriately relies on its expertise in determining the effect of changes in the workplace. Employees who are familiar with touchscreens are also doubtlessly familiar with how pressing a button on a sensitive screen can lead to more mistakes than doing so on a clock with physical buttons. Moreover, the Board is particularly suited to determining whether a change from interacting with a supervisor in person to interacting solely through a virtual timeclock imposes additional burdens on employees. *See Adair Standish Corp. v. NLRB*, 912 F.2d 854, 863 (6th Cir. 1990) (Board’s determination of what constitutes a change to conditions of employment “is entitled to considerable deference”) (internal quotation omitted). Ozburn-Hessey has provided no convincing reason to displace the Board’s judgment.

Nor does it matter that the change to Kronos did not cause a “lasting” change to employees’ work. (Br. 20). Simply because a change may have a greater effect at first does not mean it does not affect employees’ terms and conditions of employment at all. Changes to employee schedules, for instance, can

cause far greater disruption in the short term than later, when employees have had time to adjust to the change. And although there was some record testimony that Ozburn-Hessey reversed part of the change and allowed employees to use paper leave slips again (JA 372), neither the judge nor the Board found that the change had been fully rescinded. In such circumstances, the Board reasonably concluded that the change to Kronos was material and substantial and that Ozburn-Hessey therefore violated Section 8(a)(5) by implementing it without notifying or bargaining with the Union.

B. The Change to Kronos Was a Factor in Keele's Additional Attendance Point and Subsequent Termination

If an unlawful unilateral change is “a factor” causing an employee’s discharge, the discharge violates the Act. *See Behnke, Inc.*, 313 NLRB 1132, 1139 (1994), *enforced*, 67 F.3d 299 (6th Cir. 1995). Ozburn-Hessey does not dispute that proposition but contends that Keele was not discharged as a result of the change to Kronos. Substantial evidence supports the Board’s finding that she was. (JA 11.)

It is undisputed that Keele had accumulated 12 attendance points before April 30, 2013. Keele testified, without contradiction, that she was on time when returning from lunch on that day. (JA 352.) She attempted to clock in, hit the wrong button, and needed to press the “home” button to return to the original screen. (JA 353-54.) But while she was waiting for the home screen to load, the

clock turned to the next minute, rendering her one minute late. (JA 355.) Ozburn-Hessey gives no reason why the Board should not have relied on her testimony.

Thus, the record evidence establishes that Keele became late when she was waiting for the home screen to load. It takes no great inferential leap for the Board to find that if she had not been late to her shift, she would not have received an additional attendance point, and would not have been discharged for accumulating 13 points.

Although Ozburn-Hessey labels the Board's conclusion as "pure speculation" (Br. 22), its argument that Keele could have hit the wrong button on the old timeclock is far more speculative than the Board's finding. Keele's testimony establishes that hitting the wrong button on the old clock would not have mattered, because the old clocks did not cause extra pages to take time to load when employees hit the wrong button. That she had successfully hit the correct button on the new timeclock at other times (Br. 23) does not erase her failure to do so on April 30. Nor does it matter that she cut it close that day (Br. 23); she was not running late enough to preclude clocking in on time if she did not have to wait for the homepage to load. Thus, it was eminently reasonable for the Board to conclude that Keele would not have been late if she had used the old timeclock. (JA 11.) Particularly given that the change need only be *a* factor in her discharge, not *the only* factor, Keele's testimony is dispositive.

Finally, Ozburn-Hessey's argument (Br. 22-23) that the change to touchscreen buttons from physical buttons should be analyzed separately from the other aspects of the change to Kronos is meritless. The question is whether the change Ozburn-Hessey actually implemented was a factor in Keele's discharge, not whether it could have lawfully implemented a less material or substantial unilateral change that also would have resulted in her discharge. Here, the record provides uncontroverted evidence that the change to Kronos was a factor in Keele's discharge. The Board therefore reasonably concluded that her discharge violated Section 8(a)(5) and (1).

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT OZBURN-HESSEY VIOLATED SECTION 8(a)(3) AND (1) BY DISCHARGING EMPLOYEES FRENCH, WADE, SMITH SR., AND WILLIAMS FOR THEIR UNION OR PROTECTED, CONCERTED ACTIVITY

A. Discharging Employees for Their Union Activities Violates Section 8(a)(3) of the Act

An employer violates Section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1), by taking adverse action against an employee for engaging in union activity. A violation of Section 8(a)(3) creates a derivative violation of Section 8(a)(1). *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *Architectural Glass & Metal Co. v. NLRB*, 107 F.3d 426, 430-31 (6th Cir. 1997). In most discrimination cases, the critical inquiry is whether the employer's actions were motivated by union animus. Courts are particularly "deferential when

reviewing the Board’s conclusions regarding discriminatory motive.” *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 734 (D.C. Cir. 2000). “Simply showing that the evidence supports an alternative story is not enough; [the employer] must show that the Board’s story is unreasonable.” *Galicks, Inc.*, 671 F.3d at 608.

In *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Supreme Court approved the Board’s test for determining motivation in unlawful discrimination cases first articulated in *Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981). Under that test, courts will enforce the Board’s finding of an unlawful discharge if substantial evidence supports the Board’s finding that an employee’s protected activity was “a motivating factor” in the employer’s decision to discharge the employee, unless the record as a whole compelled the Board to accept the employer’s affirmative defense that the adverse action would have been taken even in the absence of protected activity. *Transp. Mgmt. Corp.*, 462 U.S. at 395. In accordance with *Wright Line*, to establish its initial burden before the Board, the General Counsel “must demonstrate that (1) the employee was engaged in protected activity; (2) that the employer knew of the employee’s protected activity; and (3) that the employer acted as it did on the basis of anti-union animus.” *Airgas*, 916 F.3d at 560-61. If the lawful reasons advanced by the employer for its actions are a pretext—that is,

if the reason either did not exist or was not in fact relied upon—the employer has not met its burden, and the inquiry is logically at an end. *Airgas*, 916 F.3d at 561, 565; *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981), *enforced mem.*, 705 F.2d 799 (6th Cir. 1982).

Unlawful motivation is a factual question that the Board may find established on circumstantial as well as direct evidence. *NLRB v. Link-Belt Co.*, 311 U.S. 584, 602 (1941). In doing so, the Board may rely on a variety of factors, including the questionable timing of the adverse action, inconsistencies between the proffered reason for the adverse action and other actions of the employer, and the disparate treatment of certain employees. *See W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 871 (6th Cir. 1995).

Ozburn-Hessey does not challenge the Board’s finding that it bore animus against its employees’ union activities. It evinced that animus immediately after the May 14, 2013 vote count when the Union re-established its presence after protracted litigation over the election and years of Ozburn-Hessey unlawfully undermining it, including by discharging key union supporters. Ozburn-Hessey unlawfully ordered employees engaged in union activity to leave one of its parking lots that day, and later that week, it unlawfully removed union literature and told employees they should quit rather than support the Union. The Board appropriately considered that backdrop in analyzing Ozburn-Hessey’s discharges

of French and Wade immediately after they participated in the renewed union activity, as well as the subsequent discharges of Williams and Smith Sr., the primary union supporter. As shown below, the Board reasonably concluded that all four discharges violated the Act.

B. Ozburn-Hessey Knew of French’s Union Activity and Discharged Her Because of It

i. The Board reasonably inferred that Ozburn-Hessey knew of French’s open union activity in its parking lot

Just 3 days after French’s May 13 pro-union solicitation in the Yazaki parking lot, Ozburn-Hessey discharged her, purportedly for being late returning from lunch and accumulating 13 attendance points. Ozburn-Hessey challenges the Board’s findings that the General Counsel established that it knew of French’s union activity and that it did not prove its defense that it discharged her for attendance reasons. The Board “may rely on circumstantial evidence and all relevant facts surrounding an employer’s action to establish knowledge of employees’ pro-union activities[.]” *NLRB v. Health Care Logistics, Inc.*, 784 F.2d 232, 236 (6th Cir. 1986). Such knowledge may be inferred from “the timing of the alleged discriminatory actions; the [employer]’s general knowledge of its employees’ union activities; the [employer]’s animus against the [u]nion; and the pretextual reasons given for the adverse personnel actions.” *N. Atlantic Med. Serv.*, 329 NLRB 85, 85 (1999), *enforced*, 237 F.3d 62 (1st Cir. 2001). Indeed, the

Board, with court approval, has inferred that an employer knew of an employee's open union activity in parking lots shared by employees and managers absent direct evidence that particular managers saw that activity. *See Holsum De P.R., Inc. v. NLRB*, 456 F.3d 265, 270 (1st Cir. 2006) (Board could infer knowledge of employee's union activities where employee openly solicited in employer's parking lot, "in plain view of those entering or leaving"). Here, circumstantial evidence—the reporting of the solicitation, how Ozburn-Hessey reacted to it and similar instances, timing, and the disparate treatment of French—strongly supports the Board's finding that one or more supervisors observed French distributing union cards. (JA 8-9.)

French openly distributed union authorization cards in Ozburn-Hessey's Yazaki parking lot with Smith Sr. and Glenora Whitley. At some point while Smith Sr. and Whitley were distributing cards, two different supervisors called Bonner, French's manager, to tell her of their actions. Bonner identified Smith Sr. and Whitley, whom she and the supervisors reporting to her had no reason to know, as "two union people." (JA 4; 438.) French was an employee the supervisors who reported the solicitation knew. Thus, French's solicitation occurred both where and when managers knew such solicitation was taking place, which strongly supports the Board's inference that Ozburn-Hessey knew of her activity.

As the Board found, other circumstantial evidence also indicates that Ozburn-Hessey knew of her activity. It unlawfully ordered other employees to cease doing the exact activity French had done, then discharged her just 3 days after reports of solicitation the same day in the same location as hers. (JA 8.) *See Abbey's Transp. Servs., Inc. v. NLRB*, 837 F.2d 575, 580 (2d Cir. 1988) (upholding Board's inference of knowledge from, in part, "the timing of the discharges" and "the employer's manifestation of hostility as adduced from [Section] 8(a)(1) violations"). And, as shown below, Ozburn-Hessey treated French far differently from most employees who accrued 13 attendance points. That disparate treatment further supports the Board's inference; the record reveals no reason to treat French differently except for her recent union activity. In short, Ozburn-Hessey's general knowledge of union activity in its parking lots, its animus against that activity, and its disparate treatment of French all indicate that it knew of her union activity. *See Health Care Logistics*, 784 F.2d at 236 (evidence permitting an inference of employer knowledge includes, *inter alia*, "(1) open discussions about the union on the premises during work hours; (2) the timing of the discharge; [and] (3) adequacy of the employer's reasons for discharge").

Although Ozburn-Hessey strenuously contends that the Board rejected the judge's credibility determinations in inferring knowledge (Br. 36), it fails to identify any specific credibility-based factual finding that the Board overturned.

Ozburn-Hessey misreads the judge's factual findings in contending (Br. 34-35) that the Board gave no reason to distinguish its finding that Osburn-Hessey had no knowledge of Nate Jones' union activities from its finding that knowledge was established with respect to French's union activity. Jones' only protected activity was a comment he made about employee wages at a meeting 4 months before his discharge for leaving equipment running. (JA 77.) The judge specifically credited the testimony of the manager who discharged Jones that she did not know about those comments or any other protected activity and the Board adopted the judge's credibility resolutions. (JA 2 n.2, 3 n.9, 77.) In contrast, the judge did not specifically credit French's managers' similar denials; instead, he based his analysis solely on the lack of credited direct evidence of knowledge. (JA 48-49, 59-60.)

Ozburn-Hessey's claim (Br. 36) that Whitley's testimony contradicts the Board's finding that supervisors likely knew of French's activity is similarly meritless. Bonner testified that two different supervisors reported union activity in the parking lot to her. Whitley testified that after French, who openly wore union buttons, stopped handbilling and returned to the warehouse, some unknown person—who was not shown to be one of the two supervisors who reported the handbilling to Bonner—approached Whitley and Smith Sr. to tell them to move. (JA 26.) Whitley's testimony does not, nor does any other evidence, preclude the

Board's inference that one of the reporting supervisors or someone else saw French, especially given the other circumstantial evidence of knowledge. Thus, the record does not support Ozburn-Hessey's claim that it had "no other potential source" (Br. 37, quoting JA 17) of information about French's union activity.

ii. The Board reasonably rejected Ozburn-Hessey's affirmative defense that, absent her union activity, it would have discharged French for her poor attendance

The Board also reasonably rejected Ozburn-Hessey's contention that it carried its burden of proving that it discharged French because she had accumulated too many attendance points. (JA 8-9.) An employer does not carry that burden merely by showing that—in addition to the existence of its unlawful reason—it also had a legitimate reason for its action. Rather, the employer must demonstrate by a preponderance of the evidence that it would have taken the same action even in the absence of the protected activity. *See Transp. Mgmt.*, 462 U.S. at 395; *NLRB v. Ky. May Coal Co.*, 89 F.3d 1235, 1241-42 (6th Cir. 1996); *W.F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), *enforced*, 99 F.3d 1139 (6th Cir. 1996). Here, although Ozburn-Hessey's written policy stated that it could discharge employees who reached 13 attendance points, it rarely did so. The Board relied on seven examples of employees who had not been discharged after exceeding 13 attendance points. (JA 9.) Against those seven, Ozburn-Hessey's only example of any other employee it had discharged for accumulating only 13 points is Keele,

whose discharge was unlawful for the reasons discussed above, pp. 27-29. Given those circumstances, it was reasonable for the Board to find that the single example of enforcing the attendance policy, given the history of non-enforcement, was insufficient to carry Ozburn-Hessey's burden of proof.

Ozburn-Hessey's claim (Br. 38) that the Board did not analyze the "actual comparability" of the seven employees who exceeded 13 points before being discharged is perplexing. The Board cited the points they received without being discharged, which reached as many as 46, an amount far more than 13. Ozburn-Hessey has not contended that something about French's attendance points made those points any worse than another employee's. Thus, no further examination was necessary to conclude that Ozburn-Hessey disparately enforced its attendance policy.

Contrary to Ozburn-Hessey's argument (Br. 38-39), the Board did not rely on unadmitted evidence. It relied on its own factual findings from a prior proceeding. The Board may properly consider its prior factual findings as substantive evidence. *NLRB v. Harrah's Club*, 403 F.2d 865, 873 (9th Cir. 1968) (citing cases). As this Court has stated, "[t]he findings of agencies made in the course of proceedings which are judicial in nature should be given the same preclusive effect as findings made by a court." *NLRB v. Master Slack*, 773 F. 2d 77, 81 (6th Cir. 1985). Here, the Board found in a prior case that Ozburn-Hessey

allowed employees to receive far more than 13 attendance points without discharging them and that it only met its *Wright Line* defense by showing that the two employees at issue were on pace to “amass more points than any of the comparables.” *Ozburn-Hessey*, 362 NLRB at 1534. In its opening brief, Ozburn-Hessey gives no reason why the Board could not rely on its prior factual findings. (Br. 38.)

Nor does it matter that the cited comparators were from 2011 instead of 2013. (Br. 38.) As the Board found, the attendance policy in place was the same in both years. Moreover, the Board specifically found that Ozburn-Hessey did not prove that it made any decision to start enforcing its attendance policy more strictly in the interim, which would have been unlawful in itself. (JA 9.) Ozburn-Hessey does not challenge that finding in its opening brief. Thus, the Board was left with one more recent example weighed against seven examples that came under the same attendance policy. Substantial evidence thus supports the Board’s judgment that the single example did not meet Ozburn-Hessey’s burden of proving its *Wright Line* defense, so its discharge of French violated Section 8(a)(3) and (1).

C. Ozburn-Hessey Knew of Shawn Wade’s Union Activity and Discharged Him Because of It

Ozburn-Hessey discharged Wade just a day after he signed a union card, claiming he had stolen time despite never before treating briefly leaving the building as stealing time. As with French, circumstantial evidence supports the

Board's finding that Ozburn-Hessey knew of Wade's union activity. In showing knowledge, the Board need not show "that the employer had specific knowledge of an employee's union interest and activities, where other circumstances support an inference that the employer had suspicions or probable information" about those activities. *Martech MDI*, 331 NLRB 487, 488 (2000), *enforced*, 6 F. App'x 14 (D.C. Cir. 2001). Here, based on the circumstances and Ozburn-Hessey's probable information, the Board reasonably inferred that it knew that Wade signed a union card in its parking lot.

As the Board found, after the tally of ballots demonstrated the Union's victory, several pro-union employees, including Anita Wells, openly solicited signatures on authorization cards in Ozburn-Hessey's parking lots. Ozburn-Hessey "witnessed some of this activity and was undoubtedly aware of it." (JA 7.) At the request of Wells, Wade openly signed a union authorization card on May 14 in a parking lot that managers, supervisors, and employees shared. (JA 6-7.) Wells was so well-known as a union supporter that even Randall Coleman, a senior executive who had no reason to work directly with unit employees, knew who she was. (JA 7.) The Board found that Coleman drove by while Wade was signing his card and "likely saw Wells and Wade." (JA 49.)

Thus, Coleman saw Wells and Wade together in a parking lot where Ozburn-Hessey knew that pro-union employees were soliciting authorization cards.

Managers generally recognized Wells as a union supporter who was soliciting such cards. And “[b]oth managers and employees used the parking lot” where Wade signed the card (JA 7). The record shows that managers monitored employees in the parking lot. After all, although there is no evidence that anybody specifically saw manager Ken Ball observing Wade, Ball did see Wade leaving the warehouse to move his car in that same parking lot the next day. Thus, Ozburn-Hessey’s managers had ample opportunity to observe Wade’s union activity.

And as the Board found, the circumstantial evidence here strongly shows that they did observe it. As discussed above (pp. 32-33), the Board may infer employer knowledge through the timing of the discharge, the employer’s general knowledge of union activity, the employer’s animus, and disparate treatment. *See also Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995), *enforced*, 97 F.3d 1448 (4th Cir. 1996). Here, Wade was discharged the day after he signed a union card. Ozburn-Hessey knew that employees were signing union cards on May 14, when Wade signed one, and bore admitted animus against that activity; it had unlawfully ordered Smith Sr. and Whitley to stop soliciting signatures earlier that same day. Thus, timing, general knowledge, and animus all support the Board’s inference that Ozburn-Hessey observed Wade’s union activity on May 14.

Ozburn-Hessey’s disparate treatment of Wade also supports the Board’s finding that it knew of his May 14 union activity. As the Board found, and

Ozburn-Hessey does not contest (Br. 30-35), it treated Wade differently from other employees who left for a few minutes during their shifts. Employees B. Smith and Banis both left their shifts to move their cars. Ozburn-Hessey did not punish Smith the first time he did so and only assessed Banis a single attendance point. (JA 7-8.) Moreover, employees “almost uniformly testified that before Wade’s discharge, employees regularly left the building without consequence, sometimes in full view of supervisors.” (JA 8.) The fact that Ozburn-Hessey treated other employees leaving the building for a short time as, at most, a minor offense, but discharged Wade for a first offense, indicates that his union activity was a reason for his discharge. *See Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1185 (2011) (finding that knowledge can be inferred from, *inter alia*, “disparate treatment”).

Despite Ozburn-Hessey’s claim (Br. 31-32), the Board did not overturn any of the judge’s credibility determinations. The judge found that Coleman likely saw Wade. Wade was the only witness to testify that Coleman saw him, as Wells testified only that Coleman passed the two of them in the parking lot. (JA 48-49.) Accordingly, it was reasonable for the Board to read that finding as crediting Wade’s statement that Coleman saw him. Nor did the Board fail to address the testimony that Coleman did not know who Wade was. The Board specifically noted that testimony (JA 7) but relied on other circumstantial evidence, discussed above, to establish knowledge. Because the Board did not tie that knowledge to

any particular supervisor, Coleman's lack of involvement in Wade's discharge (Br. 33-35) is not relevant. And as discussed above regarding French's discharge (pp. 34-35), that the Board credited a manager's testimony that she did not know of Nate Jones' protected activity did not require the Board to also credit Ozburn-Hessey's managers' testimony that they did not know of Wade's union activity.

Ozburn-Hessey's sole contention before this Court is that it did not know of Wade's union activity. It does not dispute the Board's finding that it failed to meet its *Wright Line* defense of showing it would have discharged him absent that activity. Therefore, because substantial evidence supports the Board's inference that Ozburn-Hessey knew of Wade's union activity, his discharge violated Section 8(a)(3) and (1).

D. Ozburn-Hessey Did Not Prove That It Would Have Discharged Smith Sr. Absent His Union Activity

Ample evidence also supports the Board's finding that Ozburn-Hessey unlawfully discharged Smith Sr. for purportedly lying on questionnaires it distributed to employees after unlawfully increasing enforcement of its policy against leaving the facility during work hours. Ozburn-Hessey had previously unlawfully discharged Smith Sr. *Ozburn-Hessey*, 357 NLRB at 1633. The Board observed at that time that Ozburn-Hessey viewed Smith Sr. was one of the two "presumed chairs" of the Union's organizing campaign. *Id.* at 1643. Smith Sr. had returned to work only as the result of a court order. Moreover, several of the

uncontested violations Ozburn-Hessey committed in this case were aimed specifically at Smith Sr.'s union activity. Indeed, Ozburn-Hessey unlawfully ordered Smith Sr. to cease handbilling in the Yazaki lot and unlawfully removed union literature he distributed from the employee break room. (JA 2-3, 26-31.) Shortly before his discharge, an Ozburn-Hessey manager unlawfully told Smith Sr. that he lacked representational rights. (JA 4-6, 36-38.) Smith Sr. was also the employee Stacey Williams asked to represent him during the incident that led to Williams' unlawful discharge, discussed below (pp. 48-49).

It is undisputed that Ozburn-Hessey knew of Smith Sr.'s union activity and bore animus against it. The only question here is whether Ozburn-Hessey met its burden of "show[ing] by a preponderance of the evidence that it would have taken the same action even if [Smith Sr.] had not engaged in protected activity." *Ky. May Coal Co.*, 89 F.3d at 1241. Showing that it had a different partial motivation "does not erode the substantial evidence that anti-union animus also contributed[.]" *Galicks*, 671 F.3d at 610. Given Ozburn-Hessey's history of severe animus against Smith Sr.'s union activity, the Board reasonably concluded that it did not meet its substantial rebuttal burden. *See Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 936 (D.C. Cir. 2011).

Ozburn-Hessey ostensibly discharged Smith Sr. for lying on a questionnaire it required employees who had been seen leaving the warehouse during working

time to complete. As the Board reasoned, Ozburn-Hessey “had no need to rely on Smith Sr.’s answer to the questionnaire” because it already had video evidence of his leaving. (JA 9.) Further, as the Board found, there is no record evidence that Ozburn-Hessey had *ever* discharged an employee for giving false information on a questionnaire despite its “widespread use” of such questionnaires. (JA 9-10.)

Rather, as the Board pointed out (JA 9-10), Ozburn-Hessey has concluded that an employee gave false information on a questionnaire without subjecting that employee to discipline. Thus, it did not discipline Jennifer Smith after concluding that she had lied about touching another employee in the bathroom. (JA 10.) The Board reasonably determined that an employer following a nondiscriminatory policy “would have disciplined employees the same regardless of how it had determined untruthfulness.” (JA 10 n.33.) That Jennifer Smith’s situation was not exactly the same as Smith Sr.’s does not mean Ozburn-Hessey carried its burden of proving that it would have discharged Smith Sr. absent his union activity. There is no record evidence that Ozburn-Hessey ever disciplined an employee for falsely answering a questionnaire and it did not discipline the closest comparator to Smith Sr. that the Board was presented with. In that circumstance, the Board could reasonably conclude that Ozburn-Hessey did not meet its burden.

Ozburn-Hessey claims (Br. 41-42) that the Board overruled the judge’s credibility determinations without pointing to any specific credibility finding that

the Board ignored. The facts are undisputed: Smith Sr. gave incorrect information on a questionnaire and Ozburn-Hessey discharged him, purportedly for providing that information. The Board drew different conclusions from the circumstances surrounding Smith Sr.'s discharge, which is not the same as crediting different evidence. *See Galicks*, 671 F.3d at 608 (where Board and judge disagreed, Court's role is not to determine whose "interpretation of the facts is correct, but only whether there is substantial evidence in the record to support the Board's findings").

Ozburn-Hessey also mischaracterizes the Board's findings (Br. 42-43) in contending that the Board incorrectly relied on Smith Sr.'s status as the primary union organizer to heighten the rebuttal burden. The Board did not find that discipline issued to a union organizer always violates the Act. The Board reasoned that where the employer has shown particularly strong animus against an employee's union activity, the employer's reason for discharge should be examined more carefully. (JA 10 n.34.) That proposition is consistent with the Board and reviewing courts' case law. *See Bally's*, 646 F.3d at 936 ("Where, as here, the General Counsel makes a strong showing of discriminatory motivation, the employer's rebuttal burden is substantial."); *NLRB v. Hotel Emps. & Rest. Emps. Int'l Union Local 26*, 446 F.3d 200, 209 (1st Cir. 2006) ("the stronger the

General Counsel’s case,” the harder it is to meet rebuttal burden); *Alternative Energy Applications, Inc.*, 361 NLRB 1203, 1207 (2014) (same).

In short, there is strong evidence that Ozburn-Hessey wanted to discharge Smith Sr. for his union activity. The evidence it offered of a different reason—that Smith Sr. gave false information on a questionnaire—is comparatively weak absent evidence that Ozburn-Hessey ever disciplined anybody else for doing so despite its widespread use of questionnaires. Because Ozburn-Hessey has not “shown that the Board’s story is unreasonable,” *Galicks*, 671 F.3d at 608, its finding that Smith Sr.’s discharge violated Section 8(a)(3) and (1) should be enforced.

E. Ozburn-Hessey Unlawfully Discharged Stacey Williams for His Protected Activity of Requesting a Union Representative

i. The Act protected Williams’ request for a representative

Williams repeatedly requested union representation, first in a conference room when meeting with two managers, then when they followed him to the shop floor. Section 7 of the Act explicitly protects both union activity and concerted activities taken for the purpose of “other mutual aid or protection.” 29 U.S.C. § 157. An individual employee’s action is concerted when “the employee acted with the purpose of furthering group goals.” *Compuware Corp. v. NLRB*, 134 F.3d 1285, 1288 (6th Cir. 1998). This Court gives “great deference” to the Board’s determination of whether Section 7 protects an employee’s activity. *Id.* As shown

below, the Board reasonably concluded that Williams engaged in union and protected, concerted activity.

Unionized employees have the right to representation at investigatory meetings that the employee reasonably believes might result in discipline. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 264-68 (1975). The Board explicitly extended that right to situations where a union has been elected but not yet formally certified. (JA 4-6, citing *Anchortank, Inc. v. NLRB*, 618 F.2d 1153 (5th Cir. 1980).) Ozburn-Hessey has not challenged that finding on appeal. Here, the Union distributed cards to employees to wear with their badges informing them of their rights, including asking for union representation if management questioned them. Williams did exactly that when, as described above (pp. 10-11), Maxey and Wright called him into a conference room to receive discipline.

As the Board pointed out, Williams reasonably believed that he had been called into an investigatory meeting that might result in discipline. (JA 6 n.21.) There is no evidence that either manager told him the purpose of the meeting before calling him into the conference room. Thus, Williams had no reason to know that Ozburn-Hessey had already decided on what discipline to impose. As the Board found, although Ozburn-Hessey “was not obliged to grant the request” for representation, “[t]he protected nature of an employee’s request for a union

representative does not depend on whether the employer is obliged to grant the request.” (JA 64.)

As the Board explained, a contrary rule would make no sense. If an employee does not know that the employer has already decided to impose discipline, the employee has every reason to believe that he has a right to union representation. It would be “a very pernicious innovation” to allow employers to *discharge* employees in such circumstances. (JA 64.) Employers would then have an easy workaround for ignoring their employees’ *Weingarten* rights; it is unlikely that employees would continue to request union representation if they knew that, regardless of the reasonableness of their requests, they could be discharged for doing so.

Moreover, as the Board reasoned, the circumstances here even more strongly support a finding that the Act protected Williams’ requests. His requests for representation “furthered the Union’s efforts to defend its representative status from [Ozburn-Hessey’s] continuing unfair labor practices.” (JA 64.) The record is clear that the Union engaged in a campaign to notify employees of their rights and encourage them to request representation. Williams relied on that campaign in asserting his right to representation. Doing so “constituted action in furtherance of the Union’s effort to assert its continuing presence in the workplace, an effort the Union initiated by giving the employees the ‘Weingarten cards.’” (JA 64.) Thus,

his request constitutes union activity, the heart of what the Act protects. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 575 (1978) (union’s actions to “boost its support and improve its bargaining position” are “closely tied to vital concerns of the Act”).

Even if Williams had requested representation on his own, apart from any concerted union action, it still would have been protected in these circumstances. As the Board found, Williams beckoned to Smith Sr., the primary union organizer, to help represent him. (JA 64.) He was therefore clearly attempting to initiate group activity and “express[] the sentiments of the other employees whose votes had resulted in the Union’s certification.” (JA 65.) To allow Ozburn-Hessey to discharge him solely for doing so would eviscerate Section 7’s protections.

Ozburn-Hessey largely ignores (Br. 24-27) the Board’s actual reasoning in favor of a straw man. At no point does it contest the Board’s reasoning that “whether Section 7 of the Act protects an employee who requests a representative’s presence” and “whether an employer has a legal duty to honor the employee’s request” are separate issues. (JA 64.) Instead, it simply assumes that if it did not have to grant Williams’ request then it must also have had the right to discharge him for making the request. Notably, the Board explicitly found that Williams did not have a right to have a union representative present during his interview. (JA 6 n.21, 64.) Ozburn-Hessey’s strenuous contention that the Board misapplied its precedent is thus mistaken.

Similarly, Ozburn-Hessey's claim that the Board's "*Interboro* doctrine" does not apply where there is no collective-bargaining agreement in place misreads the Board's use of that doctrine. The Board drew an *analogy*. When an employee mistakenly asserts a contractual right, the employer cannot discharge the employee for doing so. *Interboro Contractors, Inc.*, 157 NLRB 1295, 1295 (1966), *enforced*, 388 F.2d 495 (2d Cir. 1967). Thus, where assertion of a reasonable but mistaken belief in a *contractual* right does not warrant discharge, it makes sense that where an employee reasonably but mistakenly asserts a *statutory* right, the employer cannot discharge the employee for doing so. (JA 6 n.21.) The Board did not claim that Williams asserted a contractual right; instead, it reasoned that simply because he was not entitled to a representative did not mean Ozburn-Hessey could discharge him for requesting one. (JA 6 n.21.) That is fully consistent with Board precedent regarding a reasonable mistaken belief in statutory rights. *See Int'l Transp. Serv., Inc.*, 344 NLRB 279, 288 (2005) (employee's picketing to compel employer to recognize her as one-person unit constituted concerted protected activity even though employer had no statutory duty to recognize one-person unit). Ozburn-Hessey has therefore given this Court no reason to overturn the Board's reasonable construction of the Act.⁴

⁴ Ozburn-Hessey's claim (Br. 26) that *Anchortank* shows that "Williams was not entitled to a union representative" misses the Board's point that whether he was entitled to union representative and whether he could be fired for requesting one

ii. Williams did not lose the Act's protection

Employees can lose the Act's protection if, during the course of their protected activity, they engage in sufficiently "opprobrious conduct." *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979). In determining whether an employee's conduct is so egregious that it forfeits the Act's protection, the Board balances two competing policy concerns: allowing employees some latitude for impulsive conduct in the course of protected activity and respecting employers' need to maintain order in the workplace. *DaimlerChrysler Corp.*, 344 NLRB 1324, 1329 (2005); accord *Caterpillar Logistics, Inc. v. NLRB*, 835 F.3d 536, 546-47 (6th Cir. 2016). Accordingly, in striking an appropriate balance, the Board weighs the following *Atlantic Steel* factors: the place of discussion; its subject matter; the nature of the employee's outburst; and whether it was provoked by an employer's unfair labor practice. *Caterpillar*, 835 F.3d at 547; *Atlantic Steel*, 245 NLRB at 816. Applying those factors, the Board reasonably found that Williams did not lose the Act's protection here.

are separate issues. And its claim that this Court has "rejected the *Interboro* doctrine" (Br. 26) relies on a line of cases explicitly overruled in *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984). See *City Disposal Systems v. NLRB*, 766 F. 2d 969, 970 (6th Cir. 1985) (on remand, recognizing Supreme Court's "holding that the *Interboro* doctrine represents a reasonable interpretation of the [Act]'s purposes").

Indeed, Ozburn-Hessey does not dispute that two of the four factors favored protection, one factor is neutral, and one weighs against protection. (JA 66.) The subject-matter of the interaction—Williams’ request for union representation— favors protection although the request to return to the conference room does not. Moreover, there “was no outburst,” as Williams was calm throughout the interaction despite his irate managers, and the interaction was provoked in part by Ozburn-Hessey’s “long history of unfair labor practices,” including repeatedly cutting off the Union from its bargaining role. (JA 66.) In such circumstances, substantial evidence supports the Board’s finding that Williams’ requests for union representation did not lose the Act’s protection.

Ozburn-Hessey does not challenge the Board’s application of the *Atlantic Steel* factors but contends (Br. 27-30) that the Board should have applied the *Wright Line* analysis instead because its motive for discharging Williams is in dispute. That argument slices Williams’ conduct far too finely. This Court has characterized *Atlantic Steel* as applying when an employee engages in misconduct “during otherwise protected activity.” *Caterpillar*, 835 F.3d at 547 (quotation marks omitted). It is undisputed that Williams insisted on union representation and that Ozburn-Hessey discharged him for actions taken while insisting on that representation. Thus, “Williams’ alleged insubordination occurred in the course of [his] protected conduct[.]” (JA 6.)

Indeed, the typical *Atlantic Steel* case involves a confrontation between an employee and management where the employee engages in some conduct that management could point to as a reason for the employee's discharge. For instance, the Board applies *Atlantic Steel* to cases where an employee swears while engaged in protected conduct. *See, e.g., Thor Power & Tool Co.*, 148 NLRB 1379, 1388 (1964), *enforced*, 351 F.2d 584 (7th Cir. 1965) (employee did not lose the Act's protection by telling a coworker, as they were leaving a grievance meeting, that a company official was a "horse's ass"). An employer could claim in such cases that it discharged the employee for swearing and not for the protected conduct, but that does not change the standard the Board applies.

In that regard, the Board aptly noted that it has applied *Atlantic Steel* when an employer has called an employee's protected activity insubordinate. (JA 6 n.24, citing *Omni Commercial Lighting*, 364 NLRB No. 54, slip op. at 18 (2016).) Here, the Board reasonably followed its precedent. Therefore, absent any challenge to the Board's application of the four-factor test, substantial evidence supports the Board's finding that Williams' discharge violated Section 8(a)(3) and (1).

IV. THE BOARD ACTED WITHIN ITS BROAD REMEDIAL DISCRETION BY ORDERING ENHANCED REMEDIES

The Board's remedial power is "a broad, discretionary one, subject to limited judicial review." *Fibreboard*, 379 U.S. at 216; accord *NLRB v. Jackson Hosp. Corp.*, 669 F.3d 784, 787 (6th Cir. 2012). As the Supreme Court has explained, "in fashioning its remedies . . . , the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969); accord *NLRB v. Ryder Sys., Inc.*, 983 F.2d 705, 709 (6th Cir. 1983). Thus, the authority to fashion remedies under the Act "is for the Board to wield, not for the courts." *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969) (quoting *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953)).

This Court has recognized that the Board "may impose sua sponte a remedy different than that suggested by an ALJ[.]" *NLRB v. Americare-New Lexington Health Care*, 124 F. 3d 753, 760 (6th Cir. 1997). The Court will not disturb the Board's remedy unless "is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Adair Standish*, 912 F.2d at 864 (6th Cir.1990). Ozburn-Hessey challenges three of the Board's ordered remedies, all dealing with the remedial notice to employees: that it post the notice for 3 years, that it publish the notice in two publications of broad circulation and local interest, and that it require all supervisors and managers to attend the reading

of the notice. Here, the Board adequately explained the reasons for the remedy ordered, all of which further the policies of the Act.

Extraordinary cases call for extraordinary remedies. As the Board explained in exhaustively cataloguing Ozburn-Hessey's prior violations, "[b]y any measure," Ozburn-Hessey has "an extraordinary record of law breaking[.]" (JA 14.) As noted above (pp. 3-4), the Board's order under review is the *seventh* it has issued against Ozburn-Hessey, and D.C. Circuit has fully enforced the five orders that it considered. Ozburn-Hessey has repeatedly discriminated against the same union supporters and manager Phil Smith has now three times unlawfully removed union literature, including a copy of a judge's order requiring him to cease and desist from doing so. (JA 29-31.) The Board had already ordered enhanced remedies in prior cases (JA 14.), but those remedies have proven ineffective, as Ozburn-Hessey has continued to engage in the same conduct.

The Board reasoned that the "lingering effect" of Ozburn-Hessey's multiple violations over several years required a longer remedial notice period than usual. (JA 14.) As to the publication of the notice, the Board explained that prospective and former employees should be notified of their rights in order to dispel the unlawful effects of Ozburn-Hessey's unfair labor practices. (JA 15.) Finally, the Board noted that Ozburn-Hessey has failed to ensure that its managers and supervisors, who keep repeating the same misconduct, understand employees'

rights under the Act. (JA 15.) Thus, the Board ordered Ozburn-Hessey to have all managers attend the notice reading. All of those reasons directly relate to the Act's purpose of eliminating the effects of unfair labor practices.

Ozburn-Hessey faults the Board for relying on *Pacific Beach Hotel*, 361 NLRB 709, 714 (2014), *enforced in relevant part sub nom., HTH Corp. v. NLRB*, 823 F.3d 668 (D.C. Cir. 2016). But the Board merely relied on *Pacific Beach* to establish that past extraordinary cases warranted an increased notice-posting period and publication of the notice. (JA 14-15.) It did not state that the cases are exactly the same. Every extraordinary case involves a unique set of circumstances. Accordingly, Ozburn-Hessey's complaint (Br. 48) that the Board failed to enunciate specific standards for when it would apply those remedies falls flat. The Board cannot prescribe the exact circumstances under which it will find an employer's conduct so egregious as to require remedies that it applies extremely rarely. Ozburn-Hessey's pattern of law-breaking, requiring seven different Board orders, several injunctions, and involving dozens of violations of its employees' rights, is uniquely outrageous, and the Board is entitled to tailor its remedies to the circumstances. That it did not engage in the exact conduct at issue in *Pacific Beach Hotel* (Br. 46) does not preclude the Board ordering some of the same remedies.

Ozburn-Hessey's claim (Br. 46-47) that because Ken Ball was a new

manager, the Board should not consider his conduct in determining whether to impose extraordinary remedies is similarly meritless. While he may have been new, his conduct was not; it was part of a pattern of Ozburn-Hessey's managers confiscating employees' union materials. The Board's traditional remedies have already proven inadequate to halt that pattern. As the Board found, Ozburn-Hessey has not trained its new managers such as Ball to follow the Board's orders, so the Board reasonably determined that it should require those managers to attend the notice reading. (JA 14.)

Finally, nothing about the Board's ordered remedies are punitive or aimed at embarrassing Ozburn-Hessey or particular managers. Requiring uniform attendance at a notice-reading effectuates the Board's goal of ensuring that all of Ozburn-Hessey's management knows its employees' rights. And requiring publication of the notice ensures that new employees, supervisors, and managers will also understand those rights. Given Ozburn-Hessey's repeated, flagrant disregard for its employees' rights and Board orders, the Board reasonably imposed those enhanced remedies.

CONCLUSION

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

Respectfully submitted,

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National Labor Relations Board
May 2019

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

OZBURN-HESSEY LOGISTICS, LLC	*	
	*	
Petitioner/Cross-Respondent	*	Nos. 19-1054
	*	19-1090
v.	*	
	*	Board Case No.
NATIONAL LABOR RELATIONS BOARD	*	26-CA-092192
	*	
Respondent/Cross-Petitioner	*	
	*	
and	*	
	*	
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL & SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO/CLC	*	
	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 12,962 words of proportionally spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

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Dated at Washington, DC
this 23rd day of May, 2019

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	*	

CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. I certify foregoing document was served on all those parties or their counsel of record through the CM/ECF system.

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