

**Nos. 19-1025 & 19-1064**

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

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**NAPLETON 1050, INC.  
D/B/A NAPLETON CADILLAC OF LIBERTYVILLE**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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## **CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

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

### **A. Parties and Amici**

Napleton 1050, Inc., d/b/a Napleton Cadillac of Libertyville (“Napleton”), was the Respondent before the Board and is Petitioner/Cross-Respondent before the Court. The Board is the Respondent/Cross-Petitioner before the Court; its General Counsel was a party before the Board. William Russell and Local Lodge 701, International Association of Machinists and Aerospace Workers, AFL-CIO, were the charging parties before the Board. There were no intervenors or amici before the Board, and there are none before the Court.

### **B. Ruling Under Review**

The ruling under review is a Decision and Order of the Board in *Napleton 1050, Inc., d/b/a Napleton Cadillac of Libertyville*, 367 NLRB No. 6 (Sept. 28, 2018).

### **C. Related Cases**

This case has not previously been before this or any other court. Board counsel is not aware of any related cases.

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## GLOSSARY

A.	The deferred appendix
Br.	Napleton's opening brief
Napleton	Napleton 1050, Inc., d/b/a Napleton Cadillac of Libertyville
The Act	National Labor Relations Act, 29 U.S.C. § 151, et seq.
The Board	National Labor Relations Board
The Order	<i>Napleton 1050, Inc., d/b/a Napleton Cadillac of Libertyville</i> , 367 NLRB No. 6 (Sept. 28, 2018)
The Union	Local Lodge 701, International Association of Machinists and Aerospace Workers, AFL-CIO
Tr.	Transcript of the hearing

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**STATEMENT OF SUBJECT MATTER AND  
APPELLATE JURISDICTION**

This case is before the Court on the petition of Napleton 1050, Inc., d/b/a Napleton Cadillac of Libertyville (“Napleton”) for review, and the cross-application of the National Labor Relations Board (“the Board”) for enforcement,

of a Board Decision and Order issued against Napleton on September 28, 2018, and reported at 367 NLRB No. 6. (A. 55-78.)<sup>1</sup>

The Board had jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act, as amended (“the Act”). 29 U.S.C. § 151, 160(a). The Court has jurisdiction over this proceeding under Section 10(e) and (f) of the Act, which provides for the filing of petitions for review and cross-applications for enforcement of final Board orders in this Circuit. 29 U.S.C. § 160(e) and (f). The Board’s Order is final with respect to Napleton. The petition and cross-application were timely because the Act places no time limit on the initiation of review or enforcement proceedings.

### **STATEMENT OF THE ISSUES**

1. Whether the Board is entitled to summary enforcement of its uncontested finding that Napleton violated Section 8(a)(1) of the Act by telling David Geisler he was being laid off because employees voted for the Union.

2. Whether substantial evidence supports the Board’s finding that Napleton violated Section 8(a)(3) and (1) of the Act by laying off Geisler and

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<sup>1</sup> “A.” references are to the deferred appendix. “Tr.” refers to the hearing transcript. “Br.” references are to Napleton’s opening brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

discharging William Russell in retaliation for employees selecting the Union as their representative.

3. Whether substantial evidence supports the Board's finding that Napleton violated Section 8(a)(1) of the Act by creating the impression employees' union activities were under surveillance.

4. Whether substantial evidence supports the Board's finding that Napleton violated Section 8(a)(1) of the Act by ordering the removal of, and removing, employees' toolboxes in retaliation for employees engaging in protected strike activity.

5. Whether the Board acted within its discretion in affirming the administrative law judge's procedural rulings.

## **RELEVANT STATUTORY AND REGULATORY PROVISIONS**

Relevant sections of the Act and Board regulations are reproduced in the Addendum to this brief.

## **STATEMENT OF THE CASE**

### **I. PROCEDURAL HISTORY**

After investigating charges and amended charges filed by William Russell and Local Lodge 701, International Association of Machinists and Aerospace Workers, AFL-CIO ("the Union"), the Board's General Counsel issued a second consolidated complaint, subsequently amended, alleging in relevant part that

Napleton had committed multiple violations of Section 8(a)(1) and (3) of the Act. (A. 60; A. 274-80.) Following a hearing, an administrative law judge found Napleton violated Section 8(a)(3) and (1) by laying off David Geisler and discharging Russell in retaliation for employees selecting union representation. (A. 67-72, 75.) The judge further found Napleton violated Section 8(a)(1) by: telling Geisler he was being laid off because employees had voted for the Union; creating the impression employees' union activities were under surveillance; and removing employees' toolboxes from its premises in retaliation for engaging in protected strike activity. (A. 70 & n.24, 72-75.) On review, the Board affirmed the judge's rulings, findings, and conclusions to the extent consistent with its Decision, amended the remedy, and adopted the recommended Order with modifications. (A. 55-58.)

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

### **A. Napleton Purchases the Dealership, Retaining All Service Technicians; from June to October, Napleton Treats William Russell as an Employee on Disability Leave**

In mid-June 2016, Napleton purchased the assets of Weil Cadillac, a car dealership, and began operating it as Napleton Cadillac of Libertyville. (A. 55; A. 234-35.) Napleton is one of more than a dozen dealerships that comprise the holdings of Napleton Auto Group, several of which are unionized. (A. 61; A. 211, 233-34, 236, 242.) Upon acquisition, Napleton retained most of the existing

workforce, including Service Manager Walter Inman and Office Manager Pam Griffin, and all of the approximately 12 automotive service technicians, ranging from low-skilled lube technicians to highly skilled journeymen technicians.

(A. 61; A. 87-90, 183, 196-97, 208-10, 212, 235, 246-47, 256-57.) The technicians' employment transferred to Napleton without them having to interview or apply. (A. 61; A. 88-89.)

Russell, a journeyman technician, started working for Weil Cadillac in 1988. In February 2016, he suffered a work-related injury and went on workers' compensation; he was still on disability leave when Napleton acquired the dealership. (A. 61; A. 105-07.) Starting in June and continuing to October, Napleton paid for Russell's and his family's health insurance each month—totaling more than \$7,000—as part of the benefits it provided to employees. (A. 61, 63; A. 120, 206, 248-51, 308, 334-353.) Napleton also included Russell on its weekly logs tracking technicians' booked hours, with "Disabled" handwritten across each week's log where his hours otherwise would have been listed. (A. 61-62; A. 316-21.)

During his recovery period, Russell visited the dealership almost every month to deliver status reports from his physician, which discussed his work restrictions. From June through October, after Napleton purchased the dealership, Russel typically delivered his reports to Shannon Lindgren, who worked in human

resources. (A. 62; A. 109-12, 126, 288-98.) During his visits, Russell routinely spoke with Service Manager Inman about when he could return to work. (A. 62; A. 110-11, 113-15, 122-27.) During Russell's late June visit, Inman asked when he might return because the dealership was "really busy. We could use you." (A. 62; A. 114.)

During Russell's July visit, Lindgren instructed and Inman invited him to attend an August meeting where Napleton would discuss potential changes to employees' health insurance. As instructed, Russell attended the meeting with Napleton's other technicians, along with Office Manager Griffin. At the meeting, an insurance representative distributed enrollment evaluation forms to the employees, which Russell completed at home and faxed to Lindgren. The representative subsequently contacted Russell and asked for additional information, which he provided. (A. 62; A. 114-18, 299-304.)

**B. The Technicians Conduct an Organizing Campaign; Russell and Geisler Participate in Union Activity; Inman Questions Why Technicians Could Not Wait Before Unionizing and Napleton Urges Technicians To Vote No; Technicians Vote for Union Representation**

In early August 2016, Napleton's technicians commenced an organizing campaign with the Union. (A. 55, 61; A. 91, 103, 120-21.) Russell and David Geisler, another journeyman technician, supported the Union. (A. 62, 64; A. 91, 121.) During the campaign, the Union held several meetings at local restaurants;

Russell attended two and Geisler three. (A. 55, 62, 64; A. 91-92, 121, 135-39.)

During the campaign, the technicians did not openly express support for the Union or discuss it while at work. (A. 61; A. 92-93.)

On August 23, Russell delivered his work status report to Lindgren. (A. 62; A. 122, 296.) He then spoke with Inman, who said “I don’t know why you guys couldn’t have waited to see how things played out before you bring the union in.” (A. 62; A. 123.) Russell mentioned Napleton’s changes to employees’ benefits and Inman reiterated, “I just don’t know why you guys couldn’t have waited.” (A. 62; A. 123-24.) They then discussed when Russell could return to work. (A. 62; A. 124.)

Russell next visited on September 20 and, after delivering his status report to Lindgren, he discussed returning to work with Inman. (A. 62; A. 124-25, 297.) During their conversation, Inman again brought up the Union, asking “[w]hy couldn’t you just wait and see how things played out?” Inman also noted that with a union, Napleton would now write up employees if they came in late. (A. 62; A. 125.)

On September 23, the Union filed a petition with the Board seeking to represent Napleton’s technicians. (A. 61 & n.4; A. 245.) Napleton subsequently held three lunch meetings with technicians to discuss the downsides of a union, which were led by Inman and Tony Renello, a Corporate Operations Director for

Napleton Auto Group. (A. 61; A. 94-96, 211, 259-61, 264.) Napleton also mailed a letter from Inman to technicians' homes urging them to vote no. (A. 62; A. 96-97, 281-84.) A Board-conducted election was held on October 18, and the Union won. (A. 55, 61; A. 98, 125.) Russell voted without challenge. (A. 62, 70; A. 125.)

**C. Days After Technicians Vote in Favor of Union Representation, Napleton Lays Off Geisler, Saying It Was Because of the Union Vote, and Discharges Russell, Identifying a Coworker as the Instigator of the Union Campaign**

On Friday October 21, Michael Jopes, Chief Financial Officer for Napleton Auto Group (A. 233), telephoned James Hendricks, Napleton's attorney (A. 267), to advise that Napleton needed to lay off at least one technician, saying it was because the dealership's productivity did not justify the current number of technicians. (A. 55, 64; A. 268-69, 313.) The following Monday, October 24, Jopes sent Hendricks weekly logs of technicians' bookings and a spreadsheet summary. (A. 64; A. 313-25.)

On October 26, Hendricks contacted a representative for the Union to say that Napleton intended to lay off its least productive journeyman technician. (A. 55 & n.4, 64; A. 140, 143, 270, 313.) The union representative maintained that the normal course was to use seniority for layoffs, but Hendricks said no. (A. 55-56, 64; A. 143, 270.) Later that day, Hendricks sent the representative documents showing technicians' productivity. (A. 64; A. 144-46, 271, 313-25.)

On the afternoon of October 27, Hendricks notified the Union that Napleton was laying off Geisler, saying it was because he had been the least productive technician over the preceding 10 weeks. (A. 56, 64; A. 310.) Near the end of the day, Service Manager Inman informed Geisler that he was being laid off for “lack of hours.” (A. 64; A. 98, 101, 104.) As Geisler prepared to leave his office, however, Inman said that he had “asked [the technicians] not to vote that way.” (A. 64; A. 99.) At the time of his layoff, Geisler, who had worked at Weil Cadillac for 22 years, was one of Napleton’s most highly trained employees, a General Motors “world-class technician.” (A. 56 & n.5, 64; A. 88, 100, 132-33.)

Meanwhile, on October 25 Russell visited the dealership to deliver his latest work status report. (A. 62; A. 126, 298.) He also spoke with Inman, who remarked: “it looks like you guys had your way. You got the vote in. You got the union in.” (A. 62; A. 126-27.) Inman also said it was “sneaky” of Russell to have voted at the dealership without saying hello. They then discussed when Russell would return to work. (A. 62; A. 127.)

Several days later, however, Russell received a certified letter from Napleton, dated October 27, instructing him to remove his toolbox from the dealership and complete a form which provided that, “as an employee whose employment has been terminated,” Russell could elect continued insurance coverage at his own expense. (A. 63; A. 285-87.) Russell returned the completed

form to Napleton but changed his mind and asked for a new form. Napleton provided a second form, which listed October 27 as Russell's termination date.

(A. 63; A. 131, 307.)

On November 4, Russell went to retrieve his toolbox from the dealership and spoke with Inman, who said he was "sorry this happened" and "it wasn't up to him, but with everything that happened, he was just sorry about it." (A. 56, 63; A. 130.) Inman was referring to the employees' recent decision to unionize. (A. 69.) While they were speaking William Oberg walked past, and Inman remarked "[t]hat's the guy who started all this." (A. 56, 63; A. 129-30.) Russell responded others were responsible for bringing in the Union, not Oberg, and Napleton would be pursuing the wrong person if it went after him. Inman asked "[r]eally?" and Russell said "yes." (A. 63; A. 130.)

**D. After the Technicians Strike, Napleton Orders Them To Remove Their Toolboxes, Contrary to Its Practice; Before the Technicians Could Hire Tow Trucks To Transport Their Toolboxes, Napleton Rolls Them Outdoors**

Although Napleton and the Union commenced bargaining in December 2016, by August 2017 negotiations had stalled. (A. 56, 66; A. 142, 147, 149.) Concurrently, the Union planned an August 1 strike against 129 Chicago-area dealerships that were members of a multiemployer bargaining association. (A. 56, 66; A. 147, 177, 180, 267-68.) Napleton was not a member, but Napleton Auto

Group owned several dealerships that were members. (A. 56, 66; A. 180, 229, 236.)

On the morning of August 1, Napleton's technicians joined the citywide strike. (A. 56, 66; A. 147, 150, 174, 183, 197.) That same day, Napleton distributed a letter on Napleton Auto Group letterhead to the technicians stating "[t]his is to let you know the consequences of your strike." In the letter, Napleton told the striking technicians to "[m]ake arrangements to have your toolboxes removed from the shop, as we do not want to be responsible for your tools when you are not working." (A. 66; A. 328.) As is common in the industry, the technicians owned their own tools and toolboxes, which were up to 15 feet long and 6 or 7 feet high and weighed thousands of pounds; a flatbed tow truck was required to transport them. (A. 56 & n.7, 61; A. 148.) Napleton concluded the letter by emphasizing "[i]t is unfortunate that you have chosen to strike, but that is the choice you have made." (A. 66; A. 328.) Contemporaneously, attorney Hendricks contacted the Union to advise that Napleton wanted the technicians' toolboxes removed from its premises. (A. 56, 67; Tr. 121.)

On August 2, a representative for the Union and Hendricks agreed that technicians would have until the end of August 4 to remove the toolboxes. (A. 56, 67; A. 153, 168, 173, 176.) On the morning of August 3, Hendricks contacted the union representative and said his client was upset with him for agreeing to the

August 4 date. (A. 56, 67; A. 178, 243-44.) The representative maintained it was not possible to remove the toolboxes that day; Hendricks replied, “do your best.” (A. 56, 67; A. 178.) That same morning, Jopes, Inman, and Renello rolled technicians’ toolboxes outside and onto a service driveway where they were left uncovered. (A. 56, 67; A. 154-56, 184-85, 198-99, 219, 330-33.) In the early afternoon, there was a 30-minute downpour. (A. 56, 67; A. 184, 199-200, 202.) Napleton pushed the toolboxes back inside, but those belonging to two employees—Oberg and Joseph Schubkegel—sustained water damage, one of which sat unprotected the entire time it rained. (A. 56, 67; A. 156, 184-85, 188-89, 201, 333, 354-418.) On August 4, the Union and technicians hired a towing service to move the toolboxes. (A. 56, 67; A. 189-90.)

Napleton Auto Group did not demand the removal of, or take steps to remove, toolboxes at its other dealerships where employees were on strike because it believed those employees, unlike the Napleton technicians, had not wanted to strike. (A. 56, 67, 73; A. 229, 328.) Napleton’s demand was also contrary to its practice. For instance, Napleton let Russell and Geisler keep their toolboxes at the dealership during the months Russell was on workers’ compensation and for almost two weeks after Geisler’s layoff. (A. 56; A. 101, 129, 265-66.)

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

Based on the foregoing facts, the Board (Chairman Ring and Members McFerran and Emanuel) found that Napleton violated Section 8(a)(3) and (1) of the Act by laying off Geisler and discharging Russell in retaliation for employees selecting the Union as their representative. (A. 55 & n.4, 67-72, 75.) The Board further found that Napleton violated Section 8(a)(1) of the Act by ordering the removal of, and removing, employee toolboxes or other property from its facility in retaliation for employees striking, and to discourage them from engaging in strikes or other protected concerted activities, and by creating the impression employees' union activities were under surveillance. (A. 55-58, 72-75.) Lastly, in the absence of exceptions, the Board adopted the administrative law judge's finding that Napleton also violated Section 8(a)(1) by telling Geisler he was being laid off because employees had voted in favor of the Union. (A. 55 & n.2, 70 & n.24, 75.)

The Board's Order requires Napleton to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act. (A. 55, 76-77.) Affirmatively, the Order requires Napleton to offer Geisler and Russell full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, and to make them whole for

any loss of earnings and other benefits suffered as a result of the discrimination against them. Napleton must also remove from its files any reference to the unlawful layoff of Geisler and discharge of Russell, notifying them in writing of the expungement and that the layoff and discharge will not be used against them in any way. (A. 77.) In addition, Napleton must make Osberg, Schubkegel, and other employees whole for the costs of repairing and/or towing their toolboxes incurred as a result of the discrimination against them. (A. 58.) Finally, Napleton must post a remedial notice. (A. 77.)

### **SUMMARY OF ARGUMENT**

This case presents a classic example of an employer, having failed to persuade employees not to unionize, retaliating against them and seeking to discourage further union activity. Notably, much of the evidence and analysis supporting the Board's findings are entirely undisputed.

1. Before the Board and in its opening brief, Napleton failed to challenge the Board's finding that it violated Section 8(a)(1) of the Act by telling Geisler he was being laid off because employees voted for the Union. Accordingly, the Court should summarily enforce the portion of the Order addressing that violation, which also serves as a veritable admission Napleton laid off Geisler for that unlawful reason.

2. Substantial—and frequently undisputed—evidence supports the Board’s finding that Napleton unlawfully laid off Geisler and discharged Russell in retaliation for employees selecting the Union as their representative. In finding that Napleton had an unlawful motive for taking those actions, the Board relied on compelling direct evidence—Napleton’s admission, noted above, that it laid off Geisler because employees voted for the Union, and its statements connecting Russell’s discharge to employees’ union activity. The Board also reasonably inferred unlawful motivation from the suspect timing of both actions and the plainly pretextual reason given by Napleton in its failed attempt to justify Russell’s discharge. There is no basis for Napleton’s argument the Board misapplied precedent in finding it had the requisite knowledge of union activity.

Further, Napleton utterly failed to meet its burden of proving that it would have laid off Geisler and discharged Russell in the absence of employees’ union activity. After all, Napleton directly told Geisler he was being laid off because of the union vote. Moreover, the administrative law judge, affirmed by the Board, reasonably discredited company officials’ claims that the layoff decision was long in the making and unconnected to the union election, and Napleton has waived any challenge to that credibility ruling. As for Russell, although Napleton asserted that it discharged him because he was not an employee, abundant evidence establishes

his employee status. Accordingly, the Board reasonably rejected Napleton's claim as pretextual.

3. Substantial—and uncontroverted—evidence supports the Board's finding that, under all the relevant circumstances, Napleton unlawfully created an impression of surveillance. Service Manager Inman squarely told Russell that a coworker instigated the union campaign, without explaining the basis for his allegation, and in circumstances where employees had not openly campaigned at work. Napleton's defense—that Russell could not be coerced because he was no longer an employee, having been discharged—is jurisdictionally barred because it never raised the claim before the Board. In any event, it is contrary to the Act, which protects unlawfully discharged employees.

4. Substantial evidence supports the Board's finding that Napleton ordered the removal of, and removed, technicians' toolboxes in retaliation for employees engaging in protected strike activity. Napleton does not dispute that the strike constituted protected activity. Moreover, ample evidence—a letter to strikers and the testimony of a company official—establishes that employees' choice to exercise their right to strike prompted Napleton's adverse action. The Board reasonably found that Napleton failed to provide a legitimate justification for its actions, specifically discrediting the contention that its insurance policy would not cover tools during the strike. Napleton does not dispute that credibility

determination and its remaining claims are contrary to the record or rely on an inapplicable case that would not mandate a different outcome.

5. Napleton gains no ground in asserting that the administrative law judge abused his discretion by sequestering an attorney who Napleton planned to call as a witness, preventing its counsel from retaining witness affidavits, and declining to sanction a witness for not complying with a subpoena that would have required him to tow a toolbox weighing thousands of pounds to the hearing room. On review, Napleton does not even attempt to make the required showing that it was prejudiced by the judge's eminently reasonable rulings, which the Board, acting well within its discretion, properly affirmed.

### **STANDARD OF REVIEW**

This Court's "role in reviewing an NLRB decision is limited." *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 348 (D.C. Cir. 2011). The Court upholds the Board's construction of the Act and its determination as to the appropriate legal analysis if they are "reasonably defensible." *Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 307, 308-11 (D.C. Cir. 2003). The Court also "accord[s] a very high degree of deference to administrative adjudications by the [Board] and reverse[s] its findings only when the record is so compelling that no reasonable factfinder could fail to find to the contrary." *Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 217 (D.C. Cir. 2016) (internal quotation marks omitted). Thus, the

Board's findings of fact are "conclusive" when supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Kiewit Power Constructors Co. v. NLRB*, 652 F.3d 22, 25 (D.C. Cir. 2011). Evidence is substantial when "a reasonable mind might accept [it] as adequate to support a conclusion." *Universal Camera*, 340 U.S. at 477.

The Court also applies the substantial evidence test to the Board's "application of law to the facts, and accords due deference to the reasonable inferences that the Board draws from the evidence, regardless of whether the court might have reached a different conclusion *de novo*." *United States Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998) (internal citations omitted). Moreover, determining an employer's motivation "invokes the expertise of the Board, and consequently, the [C]ourt gives substantial deference to inferences the Board has drawn from the facts, including inferences of impermissible motive." *Laro Maint. Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1995) (internal quotation marks omitted). Thus, the Court's "review of the Board's conclusions as to discriminatory motive is even more deferential [than the substantial-evidence standard], because most evidence of motive is circumstantial." *Fort Dearborn Co. v. NLRB*, 827 F.3d 1067, 1072 (D.C. Cir. 2016) (internal quotation marks omitted).

The question on review, moreover, is not “whether record evidence could support the [employer’s] view of the issue, but whether it supports the [Board’s] ultimate decision.” *Bruce Packing Co. v. NLRB*, 795 F.3d 18, 22 (D.C. Cir. 2015). Accordingly, “a decision of the NLRB will be overturned only if the Board’s factual findings are not supported by substantial evidence, or the Board acted arbitrarily or otherwise erred in applying established law to the facts of the case.” *Pirlott v. NLRB*, 522 F.3d 423, 432 (D.C. Cir. 2008) (internal quotation marks omitted).

## ARGUMENT

### **I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THE UNCONTESTED PORTIONS OF ITS ORDER REMEDYING ITS FINDING THAT NAPLETON VIOLATED SECTION 8(a)(1) OF THE ACT BY TELLING GEISLER HE WAS BEING LAID OFF BECAUSE EMPLOYEES SELECTED THE UNION**

Based on substantial evidence, the administrative law judge found that Napleton violated Section 8(a)(1) of the Act by telling Geisler that he was being laid off because employees had voted in favor of the Union. (A. 55 n.2, 64 n.10, 70 n.24; A. 99.) Napleton did not file exceptions to that finding before the Board (A. 55 n.2; A. 47-52), and therefore this Court is jurisdictionally barred from addressing any challenge to the finding. *See* 29 U.S.C. § 160(e) (“[n]o objection that has not been urged before the Board . . . shall be considered by the court,” absent extraordinary circumstances); *accord Ozburn-Hessey*, 833 F.3d at 224 n.4.

And, indeed, Napleton has foregone any such challenge in its opening brief.

(Br. 19-21, 23-43.) Accordingly, the Board is also entitled to summary enforcement of those portions of its Order remedying that uncontested violation. *See CCI Ltd. P'ship v. NLRB*, 898 F.3d 26, 35 (D.C. Cir. 2018) (granting summary enforcement where party failed to challenge finding in opening brief; doing so in reply brief was too late).

The uncontested violation, however, does not disappear from the case. It remains, lending its “aroma” to the context in which Napleton’s remaining unfair labor practices are considered. *See, e.g., NLRB v. Gen. Fabrications Corp.*, 222 F.3d 218, 232 (6th Cir. 2000); *Torrington Extend-A-Care Emps. Ass’n v. NLRB*, 17 F.3d 580, 590 (2d Cir. 1994); *U.S. Marine Corp. v. NLRB*, 944 F.2d 1305, 1314-15 (7th Cir. 1991). In particular, as shown below (p. 27), this unlawful statement serves as a veritable admission of Napleton’s unlawful motive for laying off Geisler.

**II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT NAPLETON VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY LAYING OFF GEISLER AND DISCHARGING RUSSELL IN RETALIATION FOR EMPLOYEES SELECTING THE UNION AS THEIR BARGAINING REPRESENTATIVE**

**A. The Act Prohibits Employers from Taking an Adverse Action Against an Employee in Retaliation for Employees’ Union Activity**

Among other rights, Section 7 of the Act guarantees employees “the right to self-organization, to form, join, or assist labor organizations.” 29 U.S.C. § 157.

To protect that right, Section 8(a)(3) of the Act makes it an unfair labor practice for an employer to discriminate “in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” 29 U.S.C. § 158(a)(3).

Consistent with that statutory prohibition, it is well established that an employer violates Section 8(a)(3) and (1) of the Act by taking an adverse employment action against an employee, such as a discharge or layoff, that is motivated by union animus.<sup>2</sup> *Ozburn-Hessey*, 833 F.3d at 217; *Power, Inc. v. NLRB*, 40 F.3d 409, 417 (D.C. Cir. 1994). In particular, as relevant here, the Act

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<sup>2</sup> Because a violation of Section 8(a)(3) interferes with employee rights, it derivatively violates Section 8(a)(1) of the Act. *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983). Section 8(a)(1) makes it an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7.” 29 U.S.C. § 158(a)(1).

prohibits an employer from taking adverse actions against employees “in order to punish the employees as a group to discourage union activity or in retaliation for the protected activity of some.” *Electro-Voice, Inc.*, 320 NLRB 1094, 1095 n.4 (1996) (citing cases). *See also Guille Steel Prod. Co.*, 303 NLRB 537, 537 n.1 (1991) (same); *Birch Run Welding*, 269 NLRB 756, 764-67 (1984) (same), *enforced*, 761 F.2d 1175 (6th Cir. 1985). The decisive inquiry in this type of discrimination case, as in most others, is whether the employer’s actions were motivated by union animus.

In *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Supreme Court approved the Board’s test for determining motivation in unlawful discrimination cases as articulated in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981). Consistent with that test, if substantial evidence supports the Board’s finding that protected activity was a “motivating factor” in the employer’s adverse employment action, it is unlawful unless the record as a whole compels acceptance of the employer’s affirmative defense that it would have taken the same action in the absence of protected activity. *Transp. Mgmt.*, 462 U.S. at 395, 401-04; *see also Ozburn-Hessey*, 833 F.3d at 217-20 (applying *Wright Line* to union-activity discharge); *Power*, 40 F.3d at 417-18 (applying *Wright Line* to union-activity layoffs). If the reasons advanced by the employer for its actions are pretextual—

that is, if they either did not exist or were not in fact relied upon—the employer necessarily fails to meet its burden, and the inquiry is logically at an end. *Ozburn-Hessey*, 833 F.3d at 219; *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981), *enforced mem.*, 705 F.2d 799 (6th Cir. 1982).

“Motive is a question of fact that may be inferred from direct or circumstantial evidence.” *Laro*, 56 F.3d at 229. Where an employer—expressly or by virtual admission—concedes that it took adverse actions for the purpose of retaliating against employees’ protected activity, “further analysis of its motive for the action is unnecessary.” *Tito Contractors, Inc.*, 366 NLRB No. 47, 2018 WL 1559885, at \*4 n.11 (Mar. 29, 2018), *enforced mem.*, \_\_\_ F. App’x \_\_\_, 2019 WL 2563139 (D.C. Cir. May 24, 2019). *Accord United Servs. Auto. Ass’n v. NLRB*, 387 F.3d 908, 916 (D.C. Cir. 2004); *L’Eggs Prod., Inc. v. NLRB*, 619 F.2d 1337, 1343 (9th Cir. 1980).

The Board also appropriately relies on circumstantial evidence because direct evidence of motivation is often unavailable. *Ozburn-Hessey*, 833 F.3d at 217; *Laro*, 56 F.3d at 229; *Power*, 40 F.3d at 418. Thus, the Board, with this Court’s approval, has found that factors such as the expression of hostility towards protected union activity, the timing between the protected activity and the adverse action, and the pretextual nature of an employer’s asserted justification for its action, among others, provide circumstantial evidence of unlawful motivation.

*Fort Dearborn*, 827 F.3d at 1075; *Inova Health Sys. v. NLRB*, 795 F.3d 68, 82 (D.C. Cir. 2015).

**B. Napleton Unlawfully Laid Off Geisler and Discharged Russell in Retaliation for Employees Selecting the Union as Their Representative**

Substantial evidence supports the Board’s finding that Napleton unlawfully laid off Geisler and discharged Russell—both convenient scapegoats—in retaliation for employees selecting the Union as their representative. (A. 55 & n.2, 69-72.) As shown below, the Board’s finding that Napleton had an unlawful motive for those actions is amply supported by the record. Napleton plainly knew about its employees’ union activity, as they had just voted for union representation. In addition, the timing of both actions (within days of the election), together with Napleton’s veritable admission of its unlawful motive for laying off Geisler, its statements directly connecting Russell’s discharge to employees’ union activity, and the plainly pretextual nature of its asserted reason for discharging Russell, establish that Napleton took both adverse actions because employees voted for the Union as their representative.<sup>3</sup>

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<sup>3</sup> To the extent Napleton asserts the Board found Geisler’s layoff and Russell’s discharge unlawful “based solely on . . . timing,” it ignores the Board’s reliance on this other evidence, much of which is undisputed. (Br. 37.)

### 1. Napleton knew about employees' union activity

To begin, the Board found—and Napleton does not dispute (Br. 33-40)—Napleton knew that “[c]ollectively the employees chose to engage in union activity.” (A. 69.) After all, the technicians as a unit openly petitioned for a representation election and then voted for the Union. (A. 69; A. 98, 245.) In addition, both Geisler and Russell personally engaged in union activity, attending meetings and voting. (A. 62, 64, 70, 16; A. 91-92, 121, 125, 135-39.) Thus, Service Manager Inman knew of employees’ organizing efforts by August 23 when he mentioned them to Russell. Moreover, after the petition was filed on September 20, Napleton conducted meetings to discourage employees from voting for the Union, and the October 18 election was held at the dealership. (A. 69; A. 94-96, 123-24, 127, 259-61, 264.)

Napleton’s challenge to these findings misses the mark. (Br. 33-36.) The overarching purpose of a *Wright Line* analysis is to ascertain whether protected activity was a motivating factor in an employer’s decision to take an adverse action against an employee. As shown below (pp. 27, 33-35), the overwhelming and mostly uncontested evidence—including Napleton’s own statements—establishes that employees electing union representation motivated Napleton’s retaliatory layoff of Geisler and discharge of Russell. For all intents and purposes, both men were scapegoats, easy targets for Napleton’s ire. Given that specific motivation,

the pertinent question before the Board under *Wright Line* was whether Napleton knew about *employees'* union activity, not Geisler's or Russell's.

In relying on the foregoing evidence of knowledge, the Board appropriately invoked the settled principle that an employer violates the Act by taking an adverse action against an employee where it is intended as retaliation for some employees' union activity, or to punish employees as a group so as to discourage union activity. (A. 68-69 & n.20 (citing cases).) *See* cases cited p. 22. Although that principle also underlays the Board's *Wright Line* analysis in mass discharge or layoff cases, it is not logically cabined to cases involving numerous discriminatees, and Napleton presents no basis for disturbing the Board's reasonable application of that principle here. Simply put, Napleton's argument that the Board incorrectly applied a mass discharge or layoff "exception" reflects a misunderstanding of the Board's reasoning. (Br. 34-36.)

## **2. Napleton unlawfully laid off Geisler**

### **a. Napleton's admission and the timing of its action establish its unlawful motive for laying off Geisler**

In finding that Napleton had an unlawful motive for laying off Geisler, the Board reasonably relied on a contemporaneous admission and the layoff's suspicious timing. In its opening brief, Napleton raises no challenge to that finding or to the Board's underlying analysis. (Br. 33-40.) Thus, Napleton has waived any challenge to this aspect of the decision. *See NY Rehab. Care Mgmt., LLC v. NLRB*,

506 F.3d 1070, 1076 (D.C. Cir. 2007) (arguments not made in opening brief are waived).

In any event, the record amply supports the Board's reliance on compelling, uncontested evidence that Napleton "specifically linked Geisler's layoff to the union vote." (A. 70.) Thus, it is undisputed that near the end of their meeting on October 27, Service Manager Inman "abruptly told Geisler . . . that he asked the employees 'not to vote that way,'" in other words, for union representation. (A. 70 & n.24; A. 99.) As the Board reasoned, Inman's candid statement, made in the context of laying off Geisler, was "a veritable admission that 'vot[ing] that way' motivated the layoff, at least in part." (A. 70.)

Although a showing of a direct linkage is not required, the Board regularly finds that comparable statements plainly linking protected activity to an adverse employment action establish the employer's unlawful motive. *See, e.g., Tito Contractors*, 2018 WL 1559885, at \*3-4 (management's statements linking new, stricter overtime policy to employees' protected activity); *Print Fulfillment Servs.*, 361 NLRB 1243, 1245 & n.13 (2014) (manager's statements linking employee's discipline to union winning election). Napleton's veritable admission it laid off Geisler because of employees' union activities "eliminate[s] any question" concerning its unlawful motive, rendering superfluous additional evidence and analysis. *L'Eggs*, 619 F.2d at 1343. *See cases cited p. 23.*

Even so, as the Board also found, the timing of Geisler's layoff was "highly suspect" and further established Napleton's unlawful motive. (A. 70.) Napleton decided to lay off a technician on October 21, just three days after the technicians voted in favor of the Union, and it carried out the action on October 27. (A. 71; A. 101, 268-69, 310, 313.) The Board, with Court approval, has often relied on similarly suspicious timing to infer unlawful motivate. *See, e.g., Inova*, 795 F.3d at 82-83 (employee suspended two days after engaging in protected activity); *Ark Las Vegas Rest. Corp. v. NLRB*, 334 F.3d 99, 105 (D.C. Cir. 2003) (two employees discharged "just weeks" after engaging in protected activity); *NLRB v. Am. Geri-Care, Inc.*, 697 F.2d 56, 60 (2d Cir. 1982) ("An inference of anti-union animus is proper when the timing of the employer's actions is 'stunningly obvious.'") (internal citation omitted).

Moreover, as the Board reiterated, when Napleton laid off Geisler days after the just-concluded election, it did so "with a reproof from the service manager [Inman] that he had asked the employees 'not to vote that way.'" (A. 71.) "The Board and this [C]ourt have long recognized that the close proximity of protected conduct, expressions of animus, and disciplinary action can support an inference of improper motivation." *Inova*, 795 F.3d at 82. All three factors are present here. Accordingly, the Board reasonably found Napleton's retaliatory layoff of Geisler was unlawfully motivated.

**b. Napleton failed to prove its affirmative defense that it would have laid off Geisler on October 27 absent employees' vote to unionize**

Preliminarily, given Inman's statement that Geisler was laid off because employees voted for the Union, it was unnecessary for the Board to entertain any affirmative defense put forward by Napleton. (A. 71.) Such a veritable—and uncontested—admission of actual unlawful motivation is “fatal” to an employer's *Wright Line* defense. *Print Fulfillment*, 361 NLRB at 1245. *See* cases cited p. 23.

In any event, notwithstanding Inman's admission of unlawful motive, the Board “assume[d] without deciding” Napleton had “a basis rooted in productivity concerns for undertaking a layoff, and specifically for choosing Geisler to lay off.” (A. 71.) “In other words,” the Board clarified, it would “assume this [was] a ‘dual motive’ case and [Napleton] had legitimate grounds for a layoff.”<sup>4</sup> (A. 71.) Even with those generous assumptions, Napleton failed to substantiate its affirmative defense that it would have laid off Geisler on October 27 even in the absence of employees' union activity. Simply put, Napleton failed to establish its claim that the decision to lay off its least productive technician (Geisler) was long in the making and unconnected to the union election. (A. 71-72.)

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<sup>4</sup> Napleton thus gains no ground suggesting the Board gave insufficient weight to the “unrebutted” evidence of its productivity concerns and Geisler's low productivity. (Br. 39, 40.) The Board did more than just “acknowledge[]” these facts (Br. 40)—it assumed those aspects of its defense were true.

It was insufficient for Napleton “simply to produce a legitimate basis for the adverse employment or to show that legitimate reasons factored into its decision.” (A. 71 (citing cases).) *See NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 780 (8th Cir. 2013) (to establish an affirmative defense, “the [employer’s] rationale cannot only be a potential or partial reason for the [adverse action], it must be *the* justification.”) (internal quotation marks omitted). Instead, consistent with its articulated defense, Napleton’s burden was to “prove that it would have taken the same action—i.e., that it would have laid off Geisler on October 27—in the absence of the employees’ union activity.” (A. 71 (citing cases).) *See Fort Dearborn*, 827 F.3d at 1072 (employer bears burden of establishing “it would have taken the same action in the absence of the unlawful motive”). Napleton failed to meet this burden.<sup>5</sup>

As the Board emphasized, the record—including company emails and attorney Hendricks’ credited testimony—demonstrates that Napleton first decided to lay off its least productive technician on October 21, when Chief Financial

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<sup>5</sup> There is no merit to Napleton’s assertion that the Board improperly used “timing” in assessing its affirmative defense. (Br. 37, 38, 40.) As discussed, Napleton was obligated to prove a crucial point—it would have laid off Geisler for a neutral reason *when* it did, notwithstanding employees voting for the Union just days earlier. *See, e.g., Fort Dearborn*, 827 F.3d at 1072; *Cayuga Med. Ctr. at Ithaca, Inc.*, 365 NLRB No. 170, slip op. at 33, 2017 WL 6554389 (Dec. 16, 2017), *enforced mem.*, 748 F. App’x 341 (D.C. Cir. 2018).

Officer Jopes spoke with Hendricks. (A. 71; A. 101, 268-69, 310-13.) There is “no documentation—no notes, no email, no message slips, no report, nothing—that indicates any discussion of layoffs prior” to October 21, a mere three days after technicians voted for the Union. (A. 71.)

Although Inman, Renello, and Jopes testified in support of Napleton’s asserted defense, the administrative law judge reasonably discredited their testimony, finding that they “offer[ed] no credible explanation for when the decision was made or why it was made in the wake of the union election.” (A. 71.) Accordingly, the judge, affirmed by the Board, concluded their testimony failed to substantiate Napleton’s affirmative defense. (A. 55 & n.2, 71.) In its opening brief, Napleton entirely fails to contest these reasoned credibility rulings. (Br. 36-40). It does not even allege, much less prove, that they are “hopelessly incredible, self-contradictory, or patently unsupportable.” *PruittHealth-Va. Park, LLC v. NLRB*, 888 F.3d 1285, 1294 (D.C. Cir. 2018) (internal quotation marks omitted). Consequently, it has waived any challenge on that score. *See NY Rehab.*, 506 F.3d at 1076.

In any event, based on a thorough review of the evidence, the judge reasonably discredited Napleton’s witnesses. As the judge noted, Inman and Renello offered only ambiguous or admittedly speculative testimony, and “neither was able to date when the decision to conduct a layoff was made, or when the

decision to lay off Geisler was made.” (A. 71; A. 214-18, 220-26, 262.) In particular, Renello refused to provide a date for the layoff decision; instead, he simply asserted in a general manner it was “many months in the making” and partly based on productivity records that he conveniently deleted. (A. 71; A. 214-18, 220-26.) His claim that Geisler’s layoff was the impartial culmination of an ongoing evaluation also could not be squared with his actions and other testimony. Thus, although he maintained that a technician should reasonably have six to eight months to improve productivity, he nonetheless laid off Geisler after a four-month assessment. (A. 71; A. 227-28.) Further, his claims, like Inman’s, were also controverted by Hendricks, who testified that Napleton used a 10-week period to evaluate productivity. (A. 71; A. 272-73, 310, 314-15.) The “10-week period,” the Board pointedly observed, “ended on October 14, meaning the decision could not have been made before that time,” which was just four days before the election. (A. 71; A. 314-15.)<sup>6</sup> The Court has been presented with no basis to disturb those reasonable credibility determinations, and the Board’s conclusion that Napleton’s affirmative defense failed on the credited evidence must be upheld.

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<sup>6</sup> As for Jopes, he claimed the layoff decision was made on October 27, which remains suspiciously close to the October 18 election. In any event, his testimony was “flatly contradicted” by Hendricks and company emails. (A. 71; A. 237-40.)

### 3. Napleton unlawfully discharged Russell

#### a. Napleton's own statements, the timing of its action, and the pretextual nature of its defense establish its unlawful motive for discharging Russell

In finding Napleton's decision to discharge Russell unlawfully motivated, the Board reasonably relied on Service Manager Inman's statements, the discharge's suspicious timing (just one week after the election), and the pretextual nature of Napleton's asserted justification for discharging him. In its brief, Napleton disputes only the Board's pretext finding; it does not otherwise challenge the Board's finding of unlawful motivation, or any of the underlying analysis and evidence. (Br. 33-40.) Thus, Napleton has waived any challenge to those aspects of the Board's finding. *See NY Rehab.*, 506 F.3d at 1076.

In any event, substantial evidence supports the Board's findings. As the Board explained, Inman's statements again provide persuasive evidence "directly connect[ing] the employees' union activities to the action being taken against Russell." (A. 69.) The credited evidence shows that Inman told Russell, shortly after he was discharged, that he was "sorry this happened" and added it was not up to him, "but with everything that happened, he was just sorry about it." (A. 69; A. 129-30.) Although Inman did not directly mention the Union, the Board reasonably connected the dots, concluding that Inman was referring to the technicians' decision to unionize ("everything that happened") as the basis for

Russell's discharge. Moreover, given "the remarkably close timing" between the October 18 election and Napleton's letter announcing Russell's discharge the following week, the Board reasonably viewed Inman's statement "referencing the union drive as an explanation for Russell being severed." (A. 69.)

Further, just as Inman was telling Russell that he blamed the discharge on the union drive, another technician, Oberg, walked by, prompting Inman to blurt out: "[t]hat's the guy who started all this." When Russell clarified that others were responsible for bringing in the Union, Inman asked "[r]eally?" (A. 69; A. 129-30.) As the Board aptly noted, this exchange "only adds to the conclusion that when Inman attributed the action against Russell to 'everything that happened,' he was referencing the union drive." (A. 69.)

The Board's conclusion is further reinforced by evidence that Inman repeatedly complained about the union campaign to Russell. Before the election, Inman frequently grumbled to Russell about why employees could not have waited on seeking union representation. (A. 69; A. 122-25.) A week after the election, Inman "expressed open pique with the union drive" when he griped that employees were successful and "got the vote in. You got the union in." (A. 69; A. 126-27.) In these circumstances, the Board reasonably found Inman's "apology to Russell impliedly referenced the union campaign and election as motivating" Napleton's decision to discharge him. (A. 69.) Under established precedent, employer

statements tying protected activity to an adverse employment action provide evidence of its unlawful motive. *See* p. 27.

Additionally, another statement by Inman provided evidence of union animus. In September, Inman warned Russell that with a union, employees “were going to get written up who were coming in late, if you punched in late, you would be written up, so you would be reprimanded that way.” (A. 69; A. 125.) Inman’s statement, the Board found, was “a clearly unlawful threat” and evidence of union animus under *Wright Line* even though not alleged as a standalone violation. (A. 69 (citing cases).) *See, e.g., Brink’s, Inc.*, 360 NLRB 1206, 1206 n.3 (2014) (“[I]t is well established that conduct that exhibits animus but that is not independently alleged or found to violate the Act may nevertheless be used to shed light on the motive for other conduct that is alleged to be unlawful.”).

Lastly, as shown below (pp. 36-38), because Napleton’s asserted reason for discharging Russell—its claim that he was never an employee—was false and therefore pretextual, it “only add[ed] to the weight” of the evidence establishing Napleton’s animus. (A. 70.) *See Fort Dearborn*, 827 F.3d at 1075 (finding of pretext supported Board’s inference of unlawful motivation).

**b. Napleton’s reason for discharging Russell was pretextual; thus, it necessarily failed to prove that it would have taken the same action absent employees’ union activity**

The Board reasonably rejected as pretextual Napleton’s asserted reason for discharging Russell just one week after the election. (A. 69-70.) Napleton’s witnesses testified that they were so preoccupied with the dealership’s June acquisition that they did not notice Russell’s name on Napleton’s health insurance plan until October, at which time they formally notified him he was not an employee. (A. 69.) Substantial evidence, however, supports the Board’s finding that this asserted “explanation simply reeks of fabrication.” (A. 69.)

In finding Napleton’s explanation was a pretext to mask its unlawful motive, the Board relied on extensive—and undisputed (Br. 36-40)—evidence demonstrating Napleton consistently treated Russell as an employee, albeit one on disability leave. (A. 69-70.) The evidence included:

- Russell, a longtime Weil employee personally known to Inman and Griffin, regularly visited the dealership after Napleton acquired it, delivering monthly work status reports, including to Griffin, and discussed his ability to return to work with Inman during each visit (A. 109-15, 122-27, 247, 254-55, 263);
- Napleton listed Russell on its weekly booking sheets for technicians but with “Disabled” handwritten across each log where his hours would have been listed (A. 316-21);
- Russell’s toolbox remained at the dealership from the time Napleton acquired it until his discharge (A. 129, 265-66);

- Russell was invited by Inman, and instructed by Lindgren, to attend the August 4 meeting to learn about potential changes to employees' health insurance; Russell attended the meeting with fellow technicians and Griffin was present (A. 114-16);
- After the August 4 meeting, Russell submitted his completed enrollment evaluation form to Lindgren and later provided additional requested information to Napleton's insurance broker (A. 116-18, 299-304);
- Russell voted in the representation election, held at the dealership, without objection (A. 125);
- Russell and his family were listed by name on Napleton's health insurance statements each month from June through September, and Napleton paid for their health insurance each month, totaling more than \$7,000 (A. 120, 206, 248-51, 334-53).

Based on this evidence, the Board reasonably found it "very farfetched" that no one had noticed Napleton's ostensible months-long "mistake" of treating him as an employee until just days after the union election. (A. 70.) As the Board aptly noted, if indeed he was not an employee, then "[s]urely someone [would have] wondered why he was voting in the representation election, or why Inman handwrote 'Disabled' across his name on the employee list?" (A. 70.)

The Board also found "not true" Napleton's assertion that Office Manager Griffin only discovered Russell's presence on the insurance statements when she reviewed the October bill, at which point she brought it to Jopes' attention. (A. 70; A. 247-48.) To the contrary, Griffin "admitted reviewing and paying" each month's insurance bill, which featured Russell's and his family's "costs of

coverage set out in plain sight.” (A. 70; A. 249, 251, 334-53.) Griffin, in fact, conceded Russell’s name was on the insurance statements ever since Napleton acquired the dealership; her delay in addressing that ostensible mistake until October was—incredulously—due to being “busy.” (A. 249.)

Accordingly, the Board reasonably found Napleton’s stated reason for Russell’s discharge was pretextual, “pretermi[ting] the need to perform the second part of the *Wright Line* analysis.” (A. 70 (internal quotation marks omitted).) *See Ozburn-Hessey*, 833 F.3d at 219. And as the Board noted, other than Napleton’s “fantastic claim” that in October it discovered having mistakenly treated Russell as an employee, Napleton offered no defense. (A. 70.)

Napleton’s halfhearted challenge to the Board’s rejection of its defense entirely misses the mark. (Br. 36-40.) It fails to address the ample evidence and analysis discussed above; instead, it mistakenly relies on the Board’s discussion of Geisler’s layoff. (Br. 37 (citing A. 29-30).) Napleton also asserts—for the first time—that it discharged Russell because he was the lowest-producing technician with “no production.” (Br. 40.) Given Napleton’s failure to raise its new claim before the Board (*see* A. 47-52), the Court lacks jurisdiction to consider it. *See* 29 U.S.C. § 160(e) (“[n]o objection that has not been urged before the Board . . . shall be considered by the court,” absent extraordinary circumstances); *accord Ozburn-Hessey*, 833 F.3d at 224 n.4. In any event, Napleton appears not to realize that its

post-hoc claim (that Russell was a low-producing employee) cannot be squared with its assertion, which the Board discredited, that it discharged Russell because he was not an employee at all.

**III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT NAPLETON VIOLATED SECTION 8(a)(1) OF THE ACT BY CREATING THE IMPRESSION EMPLOYEES' UNION ACTIVITIES WERE UNDER SURVEILLANCE**

**A. An Employer's Conduct Violates Section 8(a)(1) of the Act if It Reasonably Tends To Create an Impression that Employees' Protected Activities Are Under Surveillance**

As shown, Section 7 of the Act guarantees employees “the right to self-organization, to form, join, or assist labor organizations.” 29 U.S.C. § 157. In turn, Section 8(a)(1) of the Act makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7.” 29 U.S.C. § 158(a)(1). The test for a Section 8(a)(1) violation is whether, “considering the totality of the circumstances,” an employer’s statement or conduct “has a reasonable tendency to coerce or interfere with” the free exercise of an employee’s Section 7 rights. *Progressive Elec., Inc. v. NLRB*, 453 F.3d 538, 544 (D.C. Cir. 2006) (quoting *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 124 (D.C. Cir. 2001)). Proof of actual coercion is unnecessary. *Avecor, Inc. v. NLRB*, 931 F.2d 924, 932 (D.C. Cir. 1991); *Exterior Sys., Inc.*, 338 NLRB 677, 679 (2002).

In determining whether an employer unlawfully created an impression of surveillance, the Board's established test is "whether, under all the relevant circumstances, reasonable employees would assume from the statement in question that their union or other protected activities had been placed under surveillance." *Frontier Tel. of Rochester, Inc.*, 344 NLRB 1270, 1276 (2005), *enforced*, 181 F. App'x 85 (2d Cir. 2006); *accord MEK Arden, LLC v. NLRB*, 755 F. App'x 12, 18 (D.C. Cir. 2018) (articulating test). In applying that test, "the critical element of reasonableness is analyzed under an objective standard, not the subjective reaction of the individual involved." *Frontier*, 344 NLRB at 1276.

Where an employer's conduct reasonably tended to create an impression of surveillance, it will have violated Section 8(a)(1). *Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 420 (D.C. Cir. 1996). As relevant here, for example, the Board has long held that "when, in comments to its employees, an employer specifically names other employees as having started a union movement or as being among the union leaders, the employer unlawfully creates" an impression of surveillance. *Royal Manor Convalescent Hosp., Inc.*, 322 NLRB 354, 362 (1996), *enforced mem.*, 141 F.3d 1178 (9th Cir. 1998).

**B. Inman's Statement to Russell Created the Impression Employees' Union Activities Were Under Surveillance**

The record amply supports the Board's finding that Napleton violated Section 8(a)(1) of the Act by unlawfully creating the impression it had surveilled

employees' union activities. (A. 55-57, 72.) Specifically, the Board found that "under all of the relevant circumstances," Russell—upon Inman identifying Oberg as "the guy who started all this," i.e., the union campaign—"would have reasonably concluded that the only explanation for Inman's suspected knowledge of employees' union activity was that Inman was surveilling them." (A. 57.)

Significantly, Inman never told Russell the source for that information. (A. 72; A. 130.) *See Charter Commc'ns, LLC*, 366 NLRB No. 46, 2018 WL 1522489, at \*6 (Mar. 27, 2018) (employer creates impression of surveillance by telling employees it is aware of their union activity without identifying source of its knowledge). Moreover, "undisputed record evidence" establishes that employees had not openly discussed the Union or the campaign while at work. (A. 57, 72; A. 92-93.) *See Jewish Home for the Elderly of Fairfield Cty.*, 343 NLRB 1069, 1081 (2004) (among other factors, Board considers extent to which employees were open about union activities and whether they were conducted off the employer's premises). Thus, the Board reasoned, there was no factual basis for an employee like Russell to "believe that Inman had formed an opinion through open means as to who had started or been active in the union drive." (A. 72.)

The Board's finding under these facts is consistent with precedent. *See, e.g., Royal Manor*, 322 NLRB at 362 (two managers created impressions of surveillance by

telling employee they knew a certain coworker had “started” or “caused” the union movement), *enforced mem.*, 141 F.3d 1178 (9th Cir. 1998).

Napleton disputes neither the evidence nor the case law supporting the Board’s finding. (Br. 29-32.) Factually, it does not even contest that Inman’s statement would reasonably tend to coerce an employee under the Board’s objective test. Instead, it asserts that it could not have coerced Russell on November 4 because it (unlawfully) discharged him days earlier. (Br. 32.) Napleton, however, failed to raise that argument before the Board. (*See* A. 47-52.) Thus, the Court lacks jurisdiction to consider it. *See* 29 U.S.C. § 160(e); *accord Ozburn-Hessey*, 833 F.3d at 224 n.4.

In any event, Napleton’s defense that Russell could not be coerced because he was no longer an employee is contrary to the Act, which broadly defines—and protects—“employees,” including those unlawfully discharged. *See* 29 U.S.C. § 152 (3) (“The term ‘employee’ shall include any employee, . . . and shall include any individual whose work has ceased . . . because of any unfair labor practice”); *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1177 (D.C. Cir. 1993) (“According to [S]ection 2(3) of the Act, an unlawfully discharged worker retains her status as an “employee.”). Thus, the Board has long found that employers’ post-discharge statements to employees may be coercive and violative of Section 8(a)(1). *See, e.g., First Data Res., Inc.*, 241 NLRB 713, 720 (1979). Napleton’s

attempt to defend Inman's statement by relying on its unlawful discharge of Russell meets "the legal definition of chutzpah." *Harbor Ins. Co. v. Schnabel Found.*, 946 F.2d 930, 937 n. 5 (D.C. Cir. 1991).

Napleton does not advance its cause by citing *Greater Omaha Packing Co. v. NLRB*, 790 F.3d 816 (8th Cir. 2015), where the court rejected a Board finding that an employer created an impression of surveillance by accusing two employees of leading a planned work stoppage. *Id.* at 824. In so ruling, the court relied on the "entire factual context," which differs significantly from the instant case. *Id.* at 824-25. Unlike here, in *Greater Omaha* there was widespread communication about the planned work stoppage, which made it unlikely employees would assume the employer learned of it through surveillance, and the imminent work stoppage itself would have revealed the participants' identities. *Id.*

#### **IV. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT NAPLETON VIOLATED SECTION 8(a)(1) OF THE ACT BY ORDERING THE REMOVAL OF EMPLOYEES' TOOLBOXES AND PUSHING THEM OUTSIDE IN RETALIATION FOR PROTECTED STRIKE ACTIVITY**

It is beyond cavil that employees' right to strike in support of economic demands is protected by Section 7 of the Act; indeed, it is one of the most fundamental forms of protected concerted activity that employees can undertake. *NLRB v. Allis-Chalmers Mfg.*, 388 U.S. 175, 181 (1967); *Johnston Fire Servs., LLC*, 367 NLRB No. 49, slip op. at 11-12, 2019 WL 105602 (Jan. 3, 2019). To

protect that right, Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to take adverse actions against employees because of their participation in a strike. *See CGLM, Inc.*, 350 NLRB 974, 974 n.2, 979 (2007), *enforced mem.*, 280 F. App'x 366 (5th Cir. 2008).

Substantial evidence supports the Board's finding that Napleton unlawfully ordered the removal of, and removed, technicians' toolboxes in retaliation for employees engaging in protected strike activity. (A. 57, 73-74.) Preliminarily, Napleton does not dispute that it knew employees were engaging in protected strike activity. (Br. 40-43.) As shown (pp. 10-12), amid stalled bargaining efforts and in conjunction with the city-wide dealership strike, technicians decided to strike on August 1, overt conduct witnessed firsthand by Napleton's management. In response, Napleton ordered employees to remove their toolboxes, which they were unable to do on short notice because the toolboxes weighed thousands of pounds and required a tow truck to move. Napleton therefore pushed the toolboxes outside, leaving them exposed to an afternoon downpour.<sup>7</sup> These actions were also

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<sup>7</sup> Napleton asserts in passing that the Board erred in ordering it to make two employees (Schubkegel and Oberg) whole for any damages to their toolboxes. (Br. 43 n.6.) By failing to present any argument on this point, Napleton has waived any challenge to the Board's chosen remedy. *United States v. Miller*, 799 F.3d 1097, 1107 (D.C. Cir. 2015); *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 800 (D.C. Cir. 2007).

contrary to its practice of permitting employees to keep their toolboxes onsite when they were not working. *See* p. 12.

Ample evidence supports the Board's finding that "Napleton's insistence on removing the toolboxes" was prompted by employees' decision to exercise their right to strike. (A. 73.) Most conspicuously, Napleton's letter to striking employees directly warned of "the consequences of your strike," which included the order to remove their toolboxes. (A. 73; A. 328.) It also labeled employees' choice to strike as "unfortunate" and stated, "but that is the choice you have made." (A. 328.) Thus, by its own words, Napleton admitted the connection between employees' choice to engage in protected activity and the subsequent adverse action against them. Operations Director Renello acknowledged as much in his testimony: asked whether Napleton Auto Group removed strikers' toolboxes at other stores, he said "[n]o, no. Most of our – the other technicians and the other stores wanted to work through the strike. They just weren't allowed to." (A. 229.) This was, the Board reasoned, "an admission that it was the Napleton technicians' choice to exercise their right to strike—a choice freely made and thus, in Napleton's view, deserving of punishment—that prompted the demand to remove the toolboxes" from the dealership. (A. 73.)

The Board reasonably found Napleton failed to provide "any credible legitimate justification for the demand and removal of the toolboxes." (A. 73.) At

the hearing, Napleton attempted to defend its actions based on Chief Financial Officer Jopes' claim that the dealership's insurance policy would not cover strikers' tools because they were not "working employees." (A. 73; A. 241.) For a litany of reasons, the Board found his claim not credible, "entirely unbelievable," and likely pretext. (A. 73.)

Most significantly, Jopes' claim conflicted with Renello's admission that employees' choice to strike was the reason for Napleton's actions. (A. 73.) Furthermore, his claim was undermined by the insurance policy itself. Citing language that coverage extended "to loss of or damage to tools and equipment owned by your employees and used by them in your business," Jopes contended the tools were not covered because, as strikers, employees were not using them for Napleton's business. (A. 73; A. 244, 419 ¶ B.) That contention, the Board reasoned, made "no more sense than would a claim that the tools are not covered by insurance and must be removed" overnight or on weekends, or when an employee is on vacation or leave—all instances where someone ceases working but, like a striker, remains an employee. (A. 73.)

In its brief, Napleton concedes the judge "was within his discretion to determine the credibility" of its witnesses' testimony regarding its asserted reasons for ordering the toolboxes' removal. (Br. 42.) Following that near-dispositive concession, Napleton mounts barely a halfhearted challenge to the Board's finding.

(Br. 40-43.) Napleton claims the Board’s decision is “illogical and irrational” because if it were “truly” motivated by employees striking, it would have ordered strikers at all dealerships to remove their toolboxes, not just those at Libertyville.

(Br. 43.) Not so. That erroneous claim ignores Napleton’s admission it singled out employees at Libertyville because it viewed their decision to strike as a freely made choice, whereas employees at other dealerships were obligated to strike. *See* pp. 45-46.

Finally, Napleton gains no ground by citing *Concrete Pipe & Products Corp.-Syracuse Division*, 305 NLRB 152, 170 (1991), *enforced*, 983 F.2d 240 (D.C. Cir. 1993), an inapplicable case where the judge addressed complaint allegations that the employer sought to prolong a strike. (Br. 42.) In *Concrete Pipe*, unlike the instant case, there was “no evidence” the employer had an unlawful motive for insisting that strikers remove their personal property. *Id.*

## **V. THE BOARD ACTED WITHIN ITS DISCRETION IN RESOLVING NAPLETON’S PROCEDURAL CLAIMS**

### **A. Napleton’s Challenges Fail Because It Has Not Shown Prejudice**

The Board’s procedural rulings are reviewed under the abuse of discretion standard. *See Tasty Baking*, 254 F.3d at 123; *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1285 n.10 (D.C. Cir. 1999). To prevail, a party must demonstrate not just that the Board abused its discretion, but the “abuse of discretion was prejudicial.” *800 River Rd. Operating Co., LLC v. NLRB*, 846 F.3d 378, 386 (D.C.

Cir. 2017). That requirement comports with the Court's use of the harmless error rule when reviewing challenges to the Board's procedural rulings. *Id.* Under that rule, "error is harmless unless it affected the outcome of the [underlying] proceedings." *Id.* (alteration in original) (internal quotation marks omitted).

Napleton claims the Board, in affirming the judge's rulings (A. 55 n.1), abused its discretion by excluding one of its attorneys under a sequestration order, preventing counsel from retaining witness affidavits, and refusing to issue a subpoena sanction. (Br. 23-28.) Despite the ink spilled, Napleton never makes the required showing it was prejudiced by these ostensible abuses of discretion. (Br. 23-29.) Having failed to do so in its opening brief, it has waived any prejudice argument. *See NY Rehab.*, 506 F.3d at 1076. Accordingly, the Court should reject these procedural challenges because even if the Board had abused its discretion, which it did not, Napleton never demonstrated prejudice.

**B. In Any Event, the Board Did Not Abuse Its Discretion**

As shown below, the Board acted well within its discretion in resolving these procedural issues, and Napleton fails to show otherwise. Thus, there is no merit to its assertion the Board erred in deferring to the judge's regulation of the hearing. (Br. 28-29.)

**1. The Board did not abuse its discretion by sequestering one of Napleton's attorneys**

Under the Board's standard sequestration rule, "all persons who are going to testify in this proceeding, with specific exceptions . . . , may only be present in the hearing room when they are giving testimony." *Greyhound Lines, Inc.*, 319 NLRB 554, 554 (1995). Exceptions include "representatives of non-natural parties, and a person who is shown by a party to be essential to the presentation of the party's cause." *Id.* As this Court has acknowledged, in Board hearings, the administrative law judge "retains considerable discretion in determining which witnesses are 'essential.'" *Tasty Baking*, 254 F.3d at 123.

The Board did not abuse its discretion in affirming the administrative law judge's sequestration order, which applied to Hendricks because of his dual status as a witness. (A. 60 n.1; A. 82-86.) Indeed, upon entry of the order, Napleton's other attorney, Michael MacHarg, admitted he anticipated calling co-counsel Hendricks as a witness, thus subjecting Hendricks to the order's broad language. (A. 84-86.) Hendricks ultimately testified and, as the Board found (A. 71), he twice provided testimony in contradiction to that of other company witnesses.

Of the available sequestration exceptions, Napleton failed to avail itself of one or satisfy the other. First, as MacHarg and Hendricks reiterated, Hendricks was not Napleton's designated representative (A. 84-86)—that exception was reserved for Operations Director Renello (A. 80), who remained at counsel table

throughout the hearing and testified. Second, Napleton never “show[ed]” Hendricks was “essential to the presentation of [its] cause.” *Greyhound Lines*, 319 NLRB at 554. Before the judge and later the Board, Napleton argued Hendricks was an attorney and it was permitted two attorneys. (A. 1, 84-86.) However, a person’s status as an attorney, or a party being permitted two attorneys, are not exceptions to the unambiguous rule that “all persons” who will testify must be sequestered, unless otherwise shown to be “essential.” Napleton’s reasoning merely begs the question, and it makes the same insufficient argument in its brief. (See Br. 24.) Finally, attorney MacHarg capably handled the hearing without apparent signs of impediment and, as discussed, Napleton makes no claim it was prejudiced by Hendricks’ sequestration. See *Tasty Baking*, 254 F.3d at 123 (employer failed to show prejudice from allegedly improper sequestration).

**2. The Board did not abuse its discretion by denying counsel’s unexplained request to retain witness affidavits**

Under the Board’s Rules and Regulations, otherwise confidential witness affidavits are provided to a respondent exclusively “for the purpose of cross-examination.” 29 C.F.R. § 102.118(e)(1). See *Wal-Mart Stores, Inc.*, 339 NLRB 64, 64 (2003) (“plain meaning” of regulation “limits the purpose of disclosure to cross-examination”). However, “respondent may be permitted to retain the affidavits until the hearing is closed provided that they are retained for legitimate

trial purposes.” NLRB Casehandling Manual (Part 1) § 10394.9 (2019), *available at* <https://www.nlr.gov/how-we-work/national-labor-relations-act/manuals>.

Consistent with the foregoing, the Board properly exercised its discretion in affirming the judge’s denial of a request by Napleton’s counsel to retain witnesses’ affidavits after cross-examination and throughout the hearing. (*See* A. 134-35, 170-71.) Napleton’s counsel provided no explanation for his request; he did not argue or show that he needed to retain the affidavits throughout the hearing for “legitimate trial purposes.” Instead, he simply asserted a blanket right to retain them. The judge correctly disagreed, and thus did not “see any reason for” exercising his discretion to permit counsel to retain the affidavits after cross-examination ended. (A. 134.) Indeed, in a subsequent case, the Board affirmed a judge’s similar denial of a blanket claim of entitlement to retain witness statements throughout the hearing, where the judge noted the party could have sought renewed access upon request in connection with subsequent cross-examinations. *Cadillac of Naperville, Inc.*, 368 NLRB No. 3, slip op. at 7 n.3, 2019 WL 2475638 (June 12, 2019). In finding no abuse of discretion there, the Board reasoned that the ruling was “consistent with Board precedent and neither unreasonable nor an interference with the [party’s] case.” *Id.* at slip op. 1 n.1 (citing *Wal-Mart*).

Napleton’s abuse-of-discretion argument rests on an incorrect premise: it asserts that the “law” grants it alone the discretion to retain witness statements.

(Br. 25.) Napleton erroneously relies on (Br. 25-26) language in *Wal-Mart*, 339 NLRB at 64 n.3, that addresses a prior version of the Board’s Casehandling Manual, which differs from the version in effect during the hearing in this case. As just noted, the current version grants the Board discretion to grant or deny such requests. Accordingly, even if Napleton had shown it was prejudiced by the Board’s ruling, which it did not, its claim must be rejected because the Board properly exercised its discretion in denying Napleton’s unjustified request to retain witness affidavits throughout the hearing.

**3. The Board did not abuse its discretion by refusing to issue subpoena sanctions**

The Board did not abuse its discretion in affirming the judge’s refusal to issue sanctions over a witness’ noncompliance with an all-but-impossible subpoena duces tecum. (A. 156-59, 162-67, 171-72, 185-88, 191-95.) Napleton’s subpoena would have required a witness, technician Schubkegel, to produce his toolbox and its contents—a large metal cabinet weighing thousands of pounds and requiring a tow truck to transport—at a hearing room located inside a federal building. (A. 79, 148, 330-33, 354-418, 421-24.) Based on the toolbox’s size, weight, and near certainty security would not allow it inside, the judge concluded the subpoena was “not a feasible request” (A. 159), and reasonably declined to issue sanctions for Schubkegel’s understandable noncompliance (A. 157-59, 162).

In addition to these unique facts (which Napleton conveniently fails to mention in its brief), other factors support the Board’s ruling and undermine Napleton’s contention that the lack of sanctions “destroyed” the hearing’s “integrity.” (Br. 26-28.) Thus, Napleton fails to acknowledge that Schubkegel testified on direct examination, with corroborating photographs, about the water damage. (A. 182-90, 354-418.) Napleton has only itself to blame for choosing not to cross-examine him. In addition, the judge—recognizing that compliance with Napleton’s subpoena was not feasible—facilitated the parties reaching an agreement to inspect the toolbox at Schubkegel’s home. (A. 157-59, 186-88, 193-94.)

Finally, a purpose of the unfair-labor-practice hearing was to determine the lawfulness of Napleton demanding and removing strikers’ toolboxes and the existence of any resulting harm (towing expenses, toolboxes rained on), the latter inquiry being necessary for the Board to craft an appropriate remedy. (*See* A. 58.) Consistent with its established practice, the Board left “it to compliance to determine the specific amount” of damages incurred by employees. (A. 58 n.11.) *See Sheet Metal Workers, Local 270 v. NLRB*, 561 F.3d 497, 500 (D.C. Cir. 2009) (describing the Board’s compliance process). Thus, Napleton may litigate the extent of the damages—including to Schubkegel’s equipment—in a subsequent compliance proceeding dedicated to those issues.

## CONCLUSION

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

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National Labor Relations Board

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# Addendum

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**Relevant Provisions of the National Labor Relations Act,  
29 U.S.C. §§ 151-69:**

**Sec. 2 [Sec. 152]** When used in this Act—

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(3) The term “employee” shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

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**Sec. 7 [Sec. 157]** Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

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**Sec. 8(a) [Sec. 158(a)] [Unfair labor practices by employer]** 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 [section 157 of this title];

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(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 . . . .

### **Sec. 10 [Sec. 160]**

(a) [Powers of Board generally] The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

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

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

**(f)** [Review of final order of Board on petition to court] 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. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

**Relevant Provisions of the National Labor Relations Board's  
Rules and Regulations  
29 C.F.R. §§ 101-103**

§ 102.118. Present and former Board employees prohibited from producing documents and testifying; production of witnesses' statements after direct testimony.

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(e) [Production of statement for cross-examination.] Notwithstanding the prohibitions of paragraphs (a) and (b) of this section, after a witness called by the General Counsel or by the Charging Party has testified in a hearing upon a complaint under Section 10(c) of the Act, the Administrative Law Judge must, upon motion of the Respondent, order the production of any statement, as defined in paragraph (g) of this section, of such witness in the possession of the General Counsel which relates to the subject matter as to which the witness has testified.

(1) If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the Administrative Law Judge must order the statement to be delivered directly to the Respondent for examination and use for the purpose of cross-examination.

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

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NAPLETON 1050, INC.		)	
D/B/A NAPLETON CADILLAC OF LIBERTYVILLE		)	
		)	Nos. 19-1025
Petitioner/Cross-Respondent		)	19-1064
		)	
v.		)	Board Case Nos.
		)	13-CA-187272
NATIONAL LABOR RELATIONS BOARD		)	13-CA-196991
		)	13-CA-204377
Respondent/Cross-Petitioner		)	
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**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that the foregoing brief contains 12,057 words of proportionally spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

/s/ David Habenstreit  
David Habenstreit  
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Dated at Washington, DC  
this 23rd day of August 2019

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

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13-CA-204377

**CERTIFICATE OF SERVICE**

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

/s/ David Habenstreit

David Habenstreit

Acting Deputy Associate General Counsel

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Washington, DC 20570-0001

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