**Tschiggfrie Properties, Ltd. *and* Teamsters Local 120, a/w International Brotherhood of Teamsters.** Case 25–CA–161304

November 22, 2019

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

On February 13, 2017, the National Labor Relations Board issued a Decision and Order in this proceeding,[1] in which it found that Tschiggfrie Properties, Ltd. (the Respondent) independently violated both Section 8(a)(1) and (3) of the National Labor Relations Act by issuing a warning to employee Darryl Galle, violated Section 8(a)(3) and (1) by discharging Galle, and violated Section 8(a)(1) by coercively interrogating employee Bill Kane during two prehearing interviews. Thereafter, the Respondent petitioned the United States Court of Appeals for the Eighth Circuit for review of the Board's Order, and the General Counsel cross-applied for enforcement of the Order. On July 24, 2018,[2] the court granted enforcement in part, denied enforcement in part, and remanded the case to the Board. Specifically, the court enforced the Board's uncontested findings that the Respondent's warning to Galle violated the Act but denied enforcement of the Board's findings that the Respondent's prehearing interviews of Kane and discharge of Galle were unlawful. As to the discharge, the court concluded that it could not enforce the Board's order because, as discussed in more detail below, the Board did not hold the General Counsel to the proper burden under the *Wright Line* burden-shifting framework for allegedly unlawful conduct under the Act where motive is at issue.[3] The court remanded the case to the Board to apply *Wright Line* consistent with its opinion to determine whether the Respondent unlawfully discharged Galle.

On November 9, 2018, the Board notified the parties to this proceeding that it had accepted the court's remand and invited them to file statements of position. The General Counsel and the Respondent each filed a statement of position.

We have carefully reviewed the record and the parties' statements of position in light of the court's opinion, which we accept as the law of the case. Applying *Wright Line* consistent with the court's opinion, we find, for the reasons discussed below, that the Respondent violated Section 8(a)(3) and (1) by discharging Galle. Additionally, we take this opportunity to clarify the General Counsel's initial burden under *Wright Line*. As discussed in more detail below, *Wright Line* is inherently a causation test. More often than not, the focus in litigation under this test is on whether circumstantial evidence of employer animus is "sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." Id. at 1089. Recent precedent permits the General Counsel to meet the initial burden of proof with circumstantial evidence of *any* animus or hostility toward union or other protected activity. In our view, the *Wright Line* causation test, properly applied, requires more. To meet the General Counsel's initial burden, the evidence of animus must support finding that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee.

## I. FACTUAL BACKGROUND

The Respondent employs between five and eight employees to repair and maintain trucks and equipment for a related business, Tschiggfrie Excavating. In the spring of 2015,[4] employee Galle contacted Teamsters Local 120, a/w International Brotherhood of Teamsters (the Union), which commenced an organizing drive among the Respondent's employees. On April 22, the Union filed a representation petition. Galle spoke to employees about the Union and the upcoming election. At the May 13 election, Galle was the Union's observer. The Union won the election, and the Board certified it as the employees' exclusive collective-bargaining representative.

After the election, employees complained to the Respondent's General Manager, Rodney "Rod" Tschiggfrie, who is the son of the Respondent's owner and President, Ed Tschiggfrie, that Galle was talking to them about the Union during work time. On Rod Tschiggfrie's instructions, the Respondent's attorney, Denis Reed, raised these complaints to the Union's Business Agent, Kevin Saylor, first in a telephone conversation and then in a May 20 email, which stated, "Please speak

[1] *Tschiggfrie Properties, Ltd*, 365 NLRB No. 34 (2017).

[2] *Tschiggfrie Properties, Ltd. v. NLRB*, 896 F.3d 880 (8th Cir. 2018).

[3] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under *Wright Line*, the General Counsel bears an initial burden of establishing that an employee's union or other protected concerted activity was a motivating factor in the Respondent's adverse employment action at issue. Id. at 1089. The burden then shifts to the Respondent to establish by a preponderance of the evidence that it would have taken the same action even in the absence of the employee's union or other protected concerted activity. Ibid.

[4] All dates hereinafter are in 2015 unless otherwise indicated.

to Darryl Galle as he continues to harass other employees on company time. If it doesn't stop I will recommend steps be taken."

According to Rod Tschiggfrie, employees continued to make similar complaints about Galle. Ed Tschiggfrie met and discussed the matter with Rod Tschiggfrie and Reed and ultimately decided to give Galle a written warning, which was issued on August 17. The warning stated the following: "This is an official notice of written warning for discussing union organizational viewpoints with fellow employees during work. This matter will stop immediately." Ed Tschiggfrie signed the August 17 warning. Then, in an August 18 email to Saylor, copied to Rod Tschiggfrie, Reed wrote, "Rod has had other employees unhappy about [Galle's] constant diatribe. If he can't get it out of his system and stop bothering people at work I believe he will be subject to termination." Reed testified that this email was in response to employees' continued complaints that Galle was talking to them about the Union.[5]

Meanwhile, in June or July, employees informed Rod Tschiggfrie that Galle was sleeping on the job. Rod Tschiggfrie saw Galle sleeping on the job on one occasion, and Galle admitted at the hearing that he "dozed off" maybe once a week during that summer. When confronted by Rod Tschiggfrie, Galle explained that he was taking medication that made him drowsy. At Rod Tschiggfrie's request, Galle produced a prescription slip from his doctor. Rod Tschiggfrie told Galle that the prescription slip was not sufficient, and Galle replied that his doctor would forward additional documentation to the Respondent. The Respondent never received the additional documentation but also never followed up with Galle about it.

On October 1, at about 9:30 a.m., Rod Tschiggfrie went to Galle's normal work area looking for him. Galle was not there because he was on break, but his personal laptop's internet browser had five tabs open.[6] One of those tabs, "QuickFunnels.com,"[7] was displayed on the screen. The other tabs were open to "GoGoDropShip.com," "Thunderball Marketing, Inc.," "Traffic Authority - Email Prof," and "allstategear.com." Galle testified that besides "allstategear.com," the websites were related to his internet-based sales business. Rod Tschiggfrie took a picture of the screen of Galle's laptop.

Later that morning, Rod Tschiggfrie confronted Galle and recorded their conversation. Galle admitted that he was using his laptop before going on break but disagreed that he had been using it for a nonwork purpose during work time. Galle said that he was instead using his laptop to find information about the transmission on which he was working. Rod Tschiggfrie read aloud part of the "QuickFunnels.com" tab and said that it did not sound related to Galle's work for the Respondent. Galle reiterated that he was using his laptop to research information about a transmission. Rod Tschiggfrie told Galle, "[A]s of this moment, you are terminated." He then tried to take Galle's laptop, but Galle resisted. Rod Tschiggfrie said that Galle could wait while a computer forensic technician inspected the laptop. Galle responded, "You already said I was terminated." Rod Tschiggfrie affirmed that Galle was already terminated. Galle ultimately left the Respondent's facility without allowing the Respondent to inspect his laptop.

After Galle's discharge, the Respondent asked Victor Mowery, an outside IT engineer, to determine whether Galle's laptop had accessed "QuickFunnels.com" on October 1. Mowery reviewed the Respondent's firewall logs and generated a report of all of the network activity that Galle's laptop had generated on the Respondent's Wi-Fi network from 5 p.m. on September 30 to 10 a.m. on October 1. Mowery concluded that Galle had accessed "QuickFunnels.com" and other nonwork-related websites.

## II. THE UNDERLYING DECISION AND THE COURT'S OPINION

Pursuant to a charge filed by the Union, the General Counsel issued a complaint alleging, among other things, that the Respondent discharged Galle in violation of the Act. The judge applied *Wright Line* to determine whether the Respondent's discharge of Galle was unlawful. The judge characterized the General Counsel's initial burden under *Wright Line* as requiring the General Counsel to establish "union activity on the part of employees, employer knowledge of that activity, and antiunion animus on the part of the employer," and later specified that "to prove animus sufficient to carry the government's initial burden, the General Counsel does not have to prove a connection between the antiunion animus and the specific adverse employment action." *Tschiggfrie*, supra, 365 NLRB No. 34, slip op. at 8 & fn. 2. The judge ultimately found that the General Counsel satisfied his initial burden and that the Respondent failed to establish that it

[5] According to Rod Tschiggfrie, the Respondent does not have a rule about "what employees can discuss while they are at work," and former employee Kim Melancon testified without contradiction that employees talk about "[a]nything and everything" during work time.

[6] The Respondent allows employees to use their personal laptops for work and to access its Wi-Fi network for personal use during nonwork time. It does not have a rule prohibiting nonwork-related use of its Wi-Fi network during work time.

[7] The transcript and the judge refer to this website as "QuickFunnels.com," but R. Exhs. 2 and 5 suggest that this website is actually "clickfunnels.com." We will use "QuickFunnels.com" to be consistent with the transcript and the judge.

would have discharged Galle even in the absence of his union activity. Id., slip op. at 8–11.

The Board unanimously adopted the judge's finding that the Respondent's discharge of Galle violated Section 8(a)(3) and (1), but the members of the panel differed as to the appropriate characterization of the General Counsel's *Wright Line* burden. The majority of the panel stated, "[W]e agree with the judge's statement of the General Counsel's initial *Wright Line* burden. See *Mesker Door, Inc.*, 357 NLRB 591, 592 & fn. 5 (2011) (General Counsel establishes antiunion motivation of employer's conduct in the first instance by showing 'union activity by the [affected] employee, employer knowledge of the activity, and antiunion animus by the employer'; the General Counsel's initial burden does not include a fourth 'nexus' element)." Id., slip op. at 1 fn. 1. Former Acting Chairman Miscimarra, concurring, disagreed with the judge's statement of the General Counsel's *Wright Line* burden and expressed his belief that the General Counsel "must establish a link or nexus between the employee's protected activity and the employer's decision to take the employment action alleged to be unlawful"; even so, he found that the General Counsel met that burden here. Ibid.

On review, the court found merit in the Respondent's argument that the Board misapplied *Wright Line* by failing to require the General Counsel to establish a connection or nexus between the Respondent's antiunion animus and its decision to discharge Galle. The court described the General Counsel's burden as follows:

> In order to meet this burden, proving "[s]imple animus toward the union is not enough." [*Nichols Aluminum, LLC v. NLRB*, 797 F.3d 548, 554 (8th Cir. 2015)] (internal quotation marks omitted). Contrary to the standard the Board applied here, the General Counsel must prove a connection or nexus between the animus and the firing—*i.e.*, that the "discriminatory animus toward [the employee's] 'protected conduct was a substantial or motivating factor in' [the employer's] decision to discharge him . . . ." *Id.*, *quoting* [*NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393, 401 (1983)]. *See* [*NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 783 (8th Cir. 2013)] (the General Counsel meets its burden by proving that "the termination was motivated by anti-union animus"); *NLRB v. Rockline Industries, Inc.*, 412 F.3d 962, 966 (8th Cir. 2005) (the General Counsel meets its burden by proving that "the employer acted as it did on the basis of anti-union animus"). "While hostility to [a] union is a proper and highly significant factor for the Board to consider when assessing whether the employer's motive was discriminatory, . . . general hostility toward the union does not itself supply the element of unlawful motive." *Nichols Aluminum*, 797 F.3d at 554-55 (alterations in original).

*Tschiggfrie*, supra, 896 F.3d at 886–887. The court concluded that "'[b]ecause the Board did not hold the General Counsel to its burden of proving discriminatory animus toward [Galle's] protected conduct was a substantial or motivating factor in [Tschiggfrie's] decision to discharge him, . . . we are unable to enforce the Board's order' as to the firing." Id. at 887 (quoting *Nichols Aluminum, LLC v. NLRB*, 797 F.3d 548, 555 (8th Cir. 2015)). The court remanded the case to the Board to "apply *Wright Line* consistent with [its] opinion to determine whether [the Respondent] violated the Act in terminating Galle." *Tschiggfrie*, supra, 896 F.3d at 887, 889.

## III. UNLAWFUL DISCHARGE OF GALLE

Because we have accepted the court's opinion as the law of the case, we will, as directed, apply *Wright Line* consistent with that opinion to determine whether the Respondent unlawfully discharged Galle. As explained by the court, under *Wright Line*, the General Counsel must initially show that Galle's union activity was a substantial or motivating factor in the Respondent's decision to discharge him. *Tschiggfrie*, supra, 896 F.3d at 885. "Motivation is a question of fact that may be inferred from both direct and circumstantial evidence." *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 780 (8th Cir. 2013) (internal quotations omitted). Consistent with the court's opinion, to prove that Galle's union activity was a motivating factor in the Respondent's discharge decision, the General Counsel must establish a connection or nexus between the Respondent's antiunion animus and the discharge; evidence of the Respondent's general hostility toward the Union is not sufficient, on its own, to prove discriminatory motivation. *Tschiggfrie*, supra, 896 F.3d at 886–887. If, and only if, the General Counsel makes this initial showing, the burden shifts to the Respondent to establish that it would have discharged Galle for a legitimate, nondiscriminatory reason regardless of Galle's union activity. Id. at 885.

Initially, we find that the General Counsel has satisfied his *Wright Line* burden. Galle undisputedly engaged in union activity, as he initiated the union campaign, served as the Union's election observer, and frequently discussed the Union with other employees. The Respondent also does not dispute that it had knowledge of Galle's union activity: several employees complained to the Respondent about Galle's union discussions, the Respondent emailed the Union that "steps [could] be taken" if Galle did not stop the discussions, and ultimately the

Respondent issued the August 17 warning to Galle "for discussing union organizational viewpoints."

Consistent with the court's opinion, the General Counsel has, quite convincingly, established a connection or nexus between the Respondent's animus toward Galle's union activity and its decision to discharge him. The Respondent's unlawful discipline of Galle on August 17 for his protected union discussions with his coworkers establishes that the Respondent harbored animus toward Galle's specific union activity.[8] Because the August 17 warning specifically targeted Galle's union activity, it does not—as the Respondent suggests—merely represent evidence of the Respondent's general hostility toward the Union. Further, the Respondent issued the unlawful August 17 warning to Galle only about 6 weeks before it discharged him. See *Charter Communications, LLC*, 366 NLRB No. 46, slip op. at 7 (2018) (employer's discharge of an employee within 3 months of committing other violations against him because of his union activity supported a finding that the discharge was also motivated by his union activity).[9] The August 17 warning, on its own, is strong evidence that Galle's union activity was a motivating factor in the Respondent's decision to discharge him.

However, the August 17 warning is not the only evidence that supports a finding of discriminatory motivation. Only one day after issuing that warning to Galle, the Respondent stated in an email to the Union's Business Agent that Galle could be subject to termination if he did not stop "bothering" other employees about the Union. Additionally, the Respondent argues that it discharged Galle, in part, because it believed that he had accessed a nonwork-related website during work time, but it did not investigate Galle's use of its Wi-Fi network to verify that Galle had in fact engaged in that conduct until *after* it had discharged him. See *Midnight Rose Hotel & Casino, Inc. v. NLRB*, 198 Fed. Appx. 752, 757–758 (10th Cir. 2006) (employer's failure to conduct a meaningful investigation was evidence of discriminatory intent); *Airgas USA, LLC*, 366 NLRB No. 104, slip op. at 3 fn. 12 (2018) (same), enfd. 916 F.3d 555 (6th Cir. 2019). Further, Rod Tschiggfrie claimed for the first time at the hearing that the Respondent discharged Galle, in part, for sleeping on the job. See *RELCO Locomotives*, supra, 734 F.3d at 782 (employer's shifting explanations for why it discharged an employee evinced unlawful motivation); *Lucky Cab Co.*, 360 NLRB 271, 274 (2014) (same). For all these reasons, we find that the General Counsel established a connection or nexus between the Respondent's animus and its decision to discharge Galle and that Galle's union activity was therefore a motivating factor in the Respondent's decision to discharge him.

Although we do not interpret the court's remand to require us to revisit the Respondent's *Wright Line* defense burden—as the court did not take issue with the Board's statement or application of that burden in the underlying decision—we agree with the Board's finding in the underlying decision that the Respondent failed to establish that, even absent Galle's union activity, it would have discharged him for sleeping on the job and for visiting a nonwork-related website during work time.

With regard to Galle sleeping on the job, Rod Tschiggfrie did not reference that conduct when he discharged Galle on October 1. He claimed for the first time at the hearing that he relied on that conduct in discharging Galle. For months, the Respondent had known that Galle had been falling asleep at work, but it never disciplined him for it prior to his discharge. The Respondent claims that it was awaiting additional documentation from Galle's doctor to verify whether he had a medical condition that was causing him to fall asleep at work, but it never followed up with Galle even after not receiving that documentation. Further, the Respondent has not explained why it was suddenly willing to discipline Galle for sleeping on the job on October 1 when it still had not received the additional documentation. This evidence leads us to agree with the judge's observation in the underlying decision that the Respondent was more concerned about Galle discussing the Union with other employees than sleeping on the job because it actually disciplined him for the union discussions.

As to Galle accessing a nonwork-related website during work time, we initially note that the Respondent allows its employees to use their personal laptops at work and does not have a rule prohibiting employees from visiting nonwork-related websites. Rod Tschiggfrie did not suspect that Galle conducted his internet-based sales business on work time before he saw Galle's laptop on October 1. When confronted by Rod Tschiggfrie, Galle said that he was using his laptop to get information about a transmission. Rod Tschiggfrie admitted that the "allstategear.com" website, which was open in a tab in Gal-

[8] As discussed above, the Board found in the underlying decision that the August 17 warning independently violated both Sec. 8(a)(1) and (3), and the court enforced those uncontested findings. Therefore, the unlawfulness of the August 17 warning has been established and is not at issue on remand.

[9] On exceptions, the Respondent argued that the General Counsel failed to establish that Rod Tschiggfrie, who made the decision to discharge Galle, had animus toward Galle's union activity because Ed Tschiggfrie signed the August 17 warning. However, Rod Tschiggfrie took part in the meeting in which the Respondent decided to issue that warning and had previously instructed the Respondent's attorney to ask the Union's Business Agent to stop Galle from talking to employees about the Union.

le's browser, may have been related to the Respondent's business, but he did not attempt to verify Galle's claim that he was researching information about a transmission or his own suspicion that Galle had accessed a nonwork-related website on work time. Instead, Rod Tschiggfrie immediately discharged Galle, and only subsequently asked outside IT engineer Mowery to investigate Galle's use of the Respondent's Wi-Fi network. Moreover, although Rod Tschiggfrie testified that the Respondent regards accessing nonwork-related websites on work time as "theft of company time" and does not tolerate such conduct, the Respondent failed to present any evidence that it has previously disciplined an employee for accessing a nonwork-related website during work time or for engaging in any comparable conduct. Indeed, the only other example of "theft of company time" identified in the record is Galle sleeping on the job, conduct for which the Respondent did not discipline Galle until belatedly trying to use it to justify Galle's discharge. Overall, the Respondent simply did not show that, absent Galle's union activity, it would have discharged him for sleeping on the job and accessing a nonwork-related website during work time.

In sum, we find, in agreement with the Board's underlying decision, that the Respondent violated Section 8(a)(3) and (1) by discharging Galle.

## IV. CLARIFICATION OF *WRIGHT LINE*

The General Counsel argues that the Board's formulation of the General Counsel's *Wright Line* burden in the underlying decision (and in other recent cases) does not comport with *Wright Line*'s requirement that the General Counsel initially establish that an employee's protected activity was a "motivating factor" in the employer's decision to take an adverse action against the employee. The General Counsel claims that the Board's failure to properly articulate this burden has created difficulties in securing enforcement of Board orders in United States courts of appeals. To remedy this situation, the General Counsel "urges the Board to clarify that [under *Wright Line*] there must be a showing of a nexus between the employee's protected activity and the adverse employment action and that a generalized hostility toward a union does not itself supply the element of unlawful motive." GC Statement of Position at 3.[10] As discussed in more detail below, this case is the second instance in which the Eighth Circuit has refused to enforce the Board's finding of a violation simply because it concluded that the Board misstated the General Counsel's initial burden under *Wright Line*. Therefore, we take this opportunity to clarify the General Counsel's *Wright Line* burden.

To begin, in *Wright Line*, the Board established the following analytical framework for alleged motive-based violations of the Act:

> First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

*Wright Line*, supra, 251 NLRB at 1089.[11] The Board referred to this framework as a "causation test" and explained that "our task in resolving cases alleging violations which turn on motivation is to determine whether a causal relationship existed between employees engaging in union or other protected activities and actions on the part of their employer which detrimentally affect such employees' employment." *Wright Line*, supra, 251 NLRB at 1089.[12] In subsequent

[10] More specifically, the General Counsel asks the Board to "take this opportunity to clearly state that, in addition to establishing protected employee activity and employer knowledge of that protected activity, the General Counsel must also demonstrate that an employer's animus to that specific activity, rather than hostility to unions or protected activity generally, contributed to the employer's decision to take an adverse action against the employee and therefore was a motivating factor in the decision." GC Statement of Position at 5–6.

[11] The Board stated that it would apply this framework in "cases alleging violation of Sec[.] 8(a)(3) or violations of Sec[.] 8(a)(1) turning on employer motivation." Ibid. The Board has subsequently also applied *Wright Line* in cases involving alleged violations of Sec. 8(a)(4) where the employer's motive was at issue. See, e.g., *Airgas USA*, supra, 366 NLRB No. 104, slip op. at 1 fn. 2, 2–3; *McKesson Drug Co.*, 337 NLRB 935, 936 (2002); *Haynes-Trane Service Agency*, 259 NLRB 83, 83 fn. 2 (1981).

[12] In *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the United States Supreme Court held that the Board's *Wright Line* framework is a permissible construction of the Act. See id. at 402–403. The Supreme Court described the General Counsel's initial burden as requiring the General Counsel to prove that "the employee's protected conduct was a substantial or motivating factor in the adverse action." Id. at 401. In *Director, Office of Workers' Compensation Programs, Department of Labor v. Greenwich Collieries*, 512 U.S. 267, 276–278 (1994), the Supreme Court clarified that the General Counsel's initial burden under Sec. 7(c) of the Administrative Procedure Act is a burden of persuasion, not merely of production, as described in *Transportation Management*. Consequently, it is not appropriate to refer to this initial burden as requiring only a prima facie showing, contrary to the Board's formulation in *Wright Line*. However, the Board subsequently observed, "This change in phraseology does not represent a substantive change in the *Wright Line* test. Under that test, the Board has always first required the General Counsel to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity." *Manno Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996) (citing *Greenwich Collieries*, supra, 512 U.S. at 278 ("The NLRB's approach in *Transportation Management* is consistent with § 7(c) be-

cases applying *Wright Line*, the Board has most often summarized the elements commonly required to support the General Counsel's initial burden as (1) union or other protected activity by the employee, (2) employer knowledge of that activity, and (3) antiunion animus, or animus against protected activity, on the part of the employer.[13]

In a very few instances, the Board has included as a fourth element that the General Counsel must establish a motivational link, or nexus, between the employee's protected activity and the adverse employment action,[14] but it has not done so since at least 2003.[15] However, certain administrative law judges continued to refer to the four-element test in subsequent *Wright Line* analyses. In *Mesker Door, Inc.*, 357 NLRB 591 (2011), the Board expressly stated that the judge in that case erred by "describ[ing] the General Counsel's initial burden as including a fourth 'nexus' element." Id. at 592 fn. 5. After *Mesker Door*, the Board repeatedly admonished judges if they included a fourth "nexus" element.[16] In the process of doing so, it became clear that the real target of criticism was the suggestion that, regardless of whether the General Counsel's initial burden was summarized as a three-part or four-part test, the General Counsel was obligated to do more than introduce *some* evidence of animus against union or other protected concerted activity. The Board made this crystal clear in *Libertyville Toyota*, 360 NLRB 1298 (2014), enfd. sub nom. *AutoNation, Inc. v. NLRB*, 801 F.3d 767 (7th Cir. 2015), where it stated that "[c]ontrary to the suggestions of the judge and our dissenting colleague, proving that an employee's protected activity was a motivating factor in the employer's action does *not* require the General Counsel to make some additional showing of particularized motivating animus towards the employee's own protected activity or to further demonstrate some additional, undefined 'nexus' between the employee's protected activity and the adverse action." Id. at 1301 fn. 10 (emphasis in original).[17] The Board has applied this formulation of the General Counsel's *Wright Line* burden[18] in many subsequent cases, including in the underlying decision in this case.[19]

Although appellate courts have questioned the *Libertyville Toyota* formulation, the Eighth Circuit has been most critical of it, as that court will not even consider the merits of the Board's finding of a violation under *Wright Line* if the Board has applied that formulation. The Eighth Circuit first considered the *Libertyville Toyota* formulation in *Nichols Aluminum, LLC v. NLRB*, 797 F.3d 548 (8th Cir. 2015), denying enf. 361 NLRB 216 (2014). The court denied enforcement of the Board's finding of an unlawful discharge, noting that the Board "misapplied the *Wright Line* standard and failed to analyze causation properly." Id. at 555. The court explained that under *Wright Line* the General Counsel must establish that a causal relationship exists between the employer's animus toward the employee's protected activity and the employer's adverse action against the employee, and that evidence of the employer's general animus or hostility toward the union is not enough on its own to satisfy the General Counsel's burden. Id. at 554–555.[20] As discussed in more detail above, in the present case the Eighth Circuit relied on *Nichols Aluminum* to conclude that it could not enforce the Board's order as to the discharge of Galle because the Board once again misapplied *Wright Line* by applying the *Libertyville Toyota* formulation. At the General Counsel's request, instead of simply denying enforcement as in *Nichols Aluminum*, the court

cause the NLRB first required the employee to persuade it that antiunion sentiment contributed to the employer's decision.")), enfd. mem. per curiam 127 F.3d 34 (5th Cir. 1997).

[13] See, e.g., *Consolidated Bus Transit*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009); *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004).

[14] See, e.g., *American Gardens Management Co.*, 338 NLRB 644, 645 (2002); *Tracker Marine*, 337 NLRB 644, 646 (2002); *Addicts Rehabilitation Center Fund*, 330 NLRB 733, 742 (2000).

[15] See *Shearer's Foods, Inc.*, 340 NLRB 1093, 1094 fn. 4 (2003).

[16] See, e.g., *Encino Hospital Medical Center*, 360 NLRB 335, 336 fn. 6 (2014); *TM Group, Inc.*, 357 NLRB 1186, 1186 fn. 2 (2011).

[17] The majority was responding to former Member Miscimarra, who argued that "[t]he General Counsel *is* required . . . to prove the existence of a nexus between protected activity and the particular decision alleged to be unlawful," and that "generalized antiunion animus does not satisfy the initial *Wright Line* burden absent evidence that the challenged adverse action was motivated by antiunion animus." Id. at 1306 fn. 5 (Member Miscimarra, dissenting) (emphasis in original); see also *Tschiggfrie*, supra, 365 NLRB No. 34, slip op at 1 fn. 1 (Acting Chairman Miscimarra, concurring).

[18] We will refer to this formulation of the General Counsel's *Wright Line* burden—which began with the Board's admonishment of the judge in *Mesker Door* but was articulated in more detail in *Libertyville Toyota*—as the *Libertyville Toyota* formulation.

[19] See, e.g., *Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98, slip op. at 11 & fn. 25 (2018); *Advanced Masonry Assoc., LLC d/b/a Advanced Masonry Systems*, 366 NLRB No. 57, slip op. at 3 fn. 8 (2018); *Neises Construction Corp.*, 365 NLRB No. 129, slip op. at 1 fn. 6 (2017); *Rainbow Medical Transportation, LLC*, 365 NLRB No. 80, slip op. at 1 fn. 1 (2017); *Tschiggfrie*, supra, 365 NLRB No. 34, slip op. at 1 fn. 1, 8 & fn. 2; *Michigan State Employees Assn. d/b/a American Federation of State County 5 MI Loc Michigan State Employees Assn., AFL—CIO*, 364 NLRB No. 65, slip op. at 5 fn. 17 (2016); *Dish Network, LLC*, 363 NLRB No. 141, slip op. at 1 fn. 1 (2016), enfd. mem. 725 Fed. Appx. 682 (10th Cir. 2018); *Commercial Air, Inc.*, 362 NLRB 379, 379 fn. 1 (2015); *Nichols Aluminum, LLC*, 361 NLRB 216, 218 & fn. 7 (2014), enf. denied 797 F.3d 548 (8th Cir. 2015).

[20] Circuit Judge Melloy, concurring, further explained that although there may have been substantial evidence on the record to establish the required causal relationship, "[the Board's] failure to engage in a proper legal analysis precludes our Court from enforcing the order." Id. at 555.

remanded the discharge issue to the Board with instructions to properly apply *Wright Line*.

Although the United States Court of Appeals for the Seventh Circuit has not refused to enforce Board orders simply because the Board applied the *Libertyville Toyota* formulation, it has criticized that formulation of the General Counsel's *Wright Line* burden. In *AutoNation, Inc. v. NLRB*, 801 F.3d 767 (7th Cir. 2015), enfg. *Libertyville Toyota*, 360 NLRB 1298 (2014), the court enforced the Board's finding of a violation under *Wright Line* but stated that it "do[es] not endorse all of the Board's language in its opinion." Id. at 769. The court agreed with the employer that under *Wright Line* the General Counsel must establish "a causal connection between the employer's anti-union animus and the specific adverse employment action on the part of the decisionmaker." Id. at 775 ("The rule that union activities must motivate a particular adverse employment action in order to make out a Sec[.] 8(a)(3) violation is well established; an abstract dislike of unions is insufficient."). However, it rejected the employer's argument that it should deny enforcement because the Board did not properly apply *Wright Line*, concluding that "[t]o the extent that the [*Libertyville Toyota* formulation] may have deviated from *Wright Line* or introduced imprecision, that is regrettable but not fatal to the outcome in this case." Id. at 776.[21]

Because the *Libertyville Toyota* formulation can easily be interpreted as inconsistent with *Wright Line* and has, for that reason, created difficulties in securing enforcement of Board orders—particularly in the Eighth Circuit, as demonstrated by the present case—we take this opportunity to remedy any confusion caused and to clarify the General Counsel's initial burden under *Wright Line* as follows.[22] The framework established by the Board in *Wright Line* is inherently a causation test. See *Wright Line*, supra, 251 NLRB at 1089 ("[The Board's] task in resolving cases alleging violations which turn on motivation is to determine whether a causal relationship existed between employees engaging in union or other protected activities and actions on the part of their employer which detrimentally affect such employees' employment."). Thus, identification of a causal nexus as a separate element that the General Counsel must establish to sustain his burden of proof is superfluous because "[t]he ultimate inquiry" is whether there is a nexus between the employee's protected activity and the challenged adverse employment action. *Chevron Mining, Inc. v. NLRB*, 684 F.3d 1318, 1327–1328 (D.C. Cir. 2012).[23] The General Counsel does not *invariably* sustain his burden of proof under *Wright Line* whenever, in addition to protected activity and knowledge thereof, the record contains *any* evidence of the employer's animus or hostility toward union or other protected activity. See, e.g., *Roadway Express*, 347 NLRB 1419, 1419 fn. 2 (2006) (finding that, although there was some evidence of animus in the record, it was insufficient to sustain the General Counsel's initial *Wright Line* burden of proof); *Atlantic Veal & Lamb, Inc.*, 342 NLRB 418, 418–419 (2004) (finding insufficient facts to show that the respondent's animus against employee Rosario's union activity was a motivating factor in the decision not to recall him), enfd. mem. 156 Fed. Appx. 330 (D.C. Cir. 2005).[24] We therefore overrule *Mesker Door*, *Libertyville Toyota*, and their progeny to the extent that they suggest that the General Counsel necessarily satisfies his burden of proof under *Wright Line* by simply producing *any* evidence of the employer's animus or hostility toward union or other protected activity.[25]

[21] In an unpublished decision, the United States Court of Appeals for the Tenth Circuit considered and rejected an employer's argument that by applying the *Libertyville Toyota* formulation, the Board omitted the causation requirement and thus misapplied *Wright Line*. See *Dish Network, LLC v. NLRB*, 725 Fed. Appx. 682, 693–695 (10th Cir. 2018), enfg. mem. 363 NLRB No. 141 (2016).

[22] In general, we agree with the views expressed by former Member Johnson in *St. Bernard Hospital & Health Care Center*, 360 NLRB 53, 53 fn. 2 (2013) (Member Johnson, concurring) (emphasizing that *Wright Line* is inherently a causation test and that the ultimate inquiry is whether there is a nexus between the employee's protected activity and the employer's decision to take an adverse action against the employee). See also *Kitsap*, supra, 366 NLRB No. 98, slip op. at 11 fn. 25 (Chairman Ring, concurring); *Advanced Masonry*, supra, 366 NLRB No. 57, slip op. at 3 fn. 8 (then-Chairman Kaplan, concurring).

[23] See also *Airgas USA, LLC v. NLRB*, 916 F.3d 555, 561 (6th Cir. 2019) ("To establish a prima facie case of discrimination under *Wright Line*, the General Counsel must demonstrate . . . that the employer acted as it did on the basis of anti-union animus." (internal quotations omitted)); *Tschiggfrie*, supra, 896 F.3d at 886 ("[T]he General Counsel must prove a connection or nexus between the animus and the firing."); *AutoNation*, supra, 801 F.3d at 775 ("[T]here must be a showing of a causal connection between the employer's anti-union animus and the specific adverse employment action on the part of the decisionmaker.").

[24] See also *AutoNation*, supra, 801 F.3d at 775 ("[A]n abstract dislike of unions is insufficient."); *Florida Steel Corp. v. NLRB*, 587 F.2d 735, 744 (5th Cir. 1979) ("An unlawful motivation in the discharge of an employee cannot be based solely on the general bias or anti-union attitude of the employer.").

[25] More specifically, we overrule the statement in *Libertyville Toyota*, which has been cited in many subsequent cases, that "proving that an employee's protected activity was a motivating factor in the employer's action does *not* require the General Counsel to make some additional showing of particularized motivating animus towards the employee's own protected activity or to further demonstrate some additional, undefined 'nexus' between the employee's protected activity and the adverse action." *Libertyville Toyota*, supra, 360 NLRB at 1301 fn. 10 (emphasis in original). This statement can easily be interpreted—and has been interpreted by the Eighth Circuit—as contrary to *Wright Line*'s requirement that the General Counsel prove that an employee's protected conduct was a "motivating factor" in the employer's decision to take an adverse action because it strongly suggests that the General Counsel necessarily satisfies his initial burden through evi-

However, we emphasize that we do not hold today that the General Counsel must produce *direct* evidence of animus against an alleged discriminatee's union or other protected activity to satisfy his initial burden under *Wright Line*. See *Overnite Transportation Co.*, 335 NLRB 372, 375 (2001) ("The Board has long recognized that direct evidence of an unlawful motive, i.e., the proverbial smoking gun, is seldom obtainable. Hence, an unlawful motive may be inferred from all of the surrounding circumstances."); *New Otani Hotel & Garden*, 325 NLRB 928, 928 fn. 2 (1998) ("We do not rely on . . . the judge's suggestion that direct evidence of animus is a requisite element of the General Counsel's case."). We continue to adhere to the Board's longstanding principle that "[p]roof of discriminatory motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole." *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003). However, some kinds of circumstantial evidence are more likely than others to satisfy the General Counsel's initial burden. For example, evidence that an employer has stated it will fire anyone who engages in union activities, while undoubtedly "general" in that it is not tied to any particular employee, may nevertheless be sufficient, under the circumstances of a particular case, to give rise to a reasonable inference that a causal relationship exists between the employee's protected activity and the employer's adverse action. In contrast, other types of circumstantial evidence—for example, an isolated, one-on-one threat or interrogation directed at someone other than the alleged discriminatee and involving someone else's protected activity—may not be sufficient to give rise to such an inference.

Today's decision does not mark a radical shift in the Board's interpretation or application of the General Counsel's initial burden under *Wright Line*. We neither take issue with the Board's long-time use of a three-element formulation of the General Counsel's *Wright Line* burden nor seek to add a fourth "nexus" element to that formulation. Instead, in light of the confusion created by the *Libertyville Toyota* formulation, we simply clarify, consistent with *Wright Line* itself and years of Board and court precedent applying it, that *Wright Line* is inherently a causation test. Thus, the General Counsel does not *invariably* sustain his burden by producing—in addition to evidence of the employee's protected activity and the employer's knowledge thereof—*any* evidence of the employer's animus or hostility toward union or other protected activity. Instead, the evidence must be sufficient to establish that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee.[26]

dence of general animus or hostility toward union or other protected activity alone. Further, this statement is in tension, if not in actual conflict, with the Supreme Court's clarification that the *Wright Line* initial burden is not simply a prima facie burden of production. It is a burden to *persuade* "that antiunion sentiment *contributed to* the employer's decision." *Greenwich Collieries*, supra, 512 U.S. at 278 (emphasis added).

[26] Our concurring colleague contends that the principles stated above, in particular that the General Counsel, to sustain his initial *Wright Line* burden, must establish a causal relationship between the employee's protected activity and the employer's adverse action against the employee, "are already embedded in the *Wright Line* framework and reflected in the Board's body of *Wright Line* cases." We agree. We disagree, however, with her claim that clarifying the General Counsel's *Wright Line* burden is unnecessary. Contrary to our colleague's claim, *Libertyville Toyota* was not "just another case in which the Board affirmed that there is no separate 'nexus' element as part of the General Counsel's initial burden." Rather, the Board stated that "proving that an employee's protected activity was a motivating factor in the employer's action does *not* require the General Counsel to make some additional showing of particularized motivating animus towards the employee's own protected activity or to further demonstrate some additional, undefined 'nexus' between the employee's protected activity and the adverse action." *Libertyville Toyota*, supra, 360 NLRB at 1301 fn. 10 (emphasis in original). As previously explained, this description of the General Counsel's burden can easily be interpreted as inconsistent with *Wright Line*. Further adding to the confusion, the Board in subsequent cases has simply recited the *Libertyville Toyota* formulation without explaining how that formulation is consistent with *Wright Line* principles. See, e.g., *Dish Network*, supra, 363 NLRB No. 141, slip op. at 1 fn. 1, 4 fn. 9 (citing the *Libertyville Toyota* formulation in response to Member Miscimarra's concurrence that "generalized animus towards union activity is insufficient to satisfy" the General Counsel's *Wright Line* burden and that "[t]he Board's task in all cases that turn on motivation is to determine whether a causal relationship existed between employees engaging in union or other protected activities and actions on the part of the employer which detrimentally affect their employment" (internal quotations omitted)); *Nichols Aluminum*, supra, 361 NLRB at 218 fn. 7, 222 (citing the *Libertyville Toyota* formulation in response to Member Johnson's dissenting argument that "*Wright Line* is inherently a causation test").

Moreover, as discussed in detail above, the Eighth Circuit has interpreted *Libertyville Toyota* to erroneously allow the General Counsel to satisfy his initial *Wright Line* burden by simply producing evidence of an employer's general hostility or animus toward the union, and the court will not enforce a violation under *Wright Line* if the Board applies that *Libertyville Toyota* standard. The Eighth Circuit's rejection of the *Libertyville Toyota* formulation, on its own, shows that we are not "reaching out to solve a nonexistent problem," as our colleague claims. Additionally, although our concurring colleague is correct that the Seventh Circuit has not denied enforcement simply because the Board applied the *Libertyville Toyota* formulation, that court has been critical of the *Libertyville Toyota* formulation and has expressly declined to endorse it. See *AutoNation*, supra, 801 F.3d at 769, 776. We need not wait for other Federal circuit courts to reject the *Libertyville Toyota* formulation before acting to remedy its ill effects.

In sum, while we do not question the sincerity of our concurring colleague's belief that the *Libertyville Toyota* formulation is not contrary to the principles stated above—which we and our colleague agree are consistent with *Wright Line* itself and years of Board precedent applying it—the *Libertyville Toyota* formulation has caused more than enough confusion, disagreement, and, perhaps most importantly, diffi-

## REMEDY

Having found that the Respondent engaged in an unfair labor practice, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(3) and (1) by discharging employee Darryl Galle, we shall order the Respondent to offer him full reinstatement to his former job or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), we shall also order the Respondent to compensate Galle for his search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. Additionally, we shall order the Respondent to compensate Galle for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and to file with the Regional Director for Region 25, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). Finally, we shall order the Respondent to remove from its files any reference to Galle's unlawful discharge and to notify him in writing that this has been done and that the unlawful discharge will not be used against him in any way.[27]

culty in securing enforcement of Board orders to warrant today's clarification of the General Counsel's initial burden under *Wright Line*.

[27] As discussed in the underlying decision, we will allow the Respondent to establish in compliance, based on evidence acquired through its post-discharge investigation of Galle's use of its Wi-Fi network on work time, that Galle is not entitled to reinstatement and/or that his backpay should be limited because Galle engaged in misconduct for which the Respondent would have lawfully discharged any employee. See *Tschiggfrie*, supra, 365 NLRB No. 34, slip op. at 2–3 (citing *Berkshire Farm Center*, 333 NLRB 367, 367 (2001)).

## ORDER

The National Labor Relations Board orders that the Respondent, Tschiggfrie Properties, Ltd., Dubuque, Iowa, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees for supporting Teamsters Local 120, a/w International Brotherhood of Teamsters or any other labor organization.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Darryl Galle full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Darryl Galle whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section in this decision.

(c) Compensate Darryl Galle for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 25, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter, notify Darryl Galle in writing that this has been done and that the discharge will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Dubuque, Iowa facility copies of the attached notice marked "Appendix."[28] Copies of the notice, on forms

[28] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 1, 2015.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 25 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 22, 2019

_____
John F. Ring, Chairman

_____
Marvin E. Kaplan, Member

_____
William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, concurring in the result.

The Board's nearly 40-year old decision in *Wright Line*[1] sets out the now well-established test for alleged violations of Section 8(a)(3) or Section 8(a)(1) of the Act turning on employer motivation. It was, and remains, one of the Board's most important precedents. The United States Court of Appeals for the Eighth Circuit remanded this case because the court was concerned that the Board, in its original decision, had misapplied *Wright Line* in finding that the General Counsel had carried his initial burden to show that employee Darryl Galle's union activity was "a substantial or motivating factor" in the Respondent's decision to discharge him. I join my colleagues in reaffirming the Board's finding that the General Counsel made his initial showing. Indeed, as my colleagues observe, the General Counsel's evidence "quite convincingly" established that Galle's union activity *was* a motivating factor. And, as the Board previously found, the Respondent clearly failed to prove that it would have discharged Galle absent that activity. That should be the end of this case.

Instead, the majority seizes on the court's remand to "clarify" the General Counsel's initial *Wright Line* burden. First, my colleagues emphasize that the *Wright Line* framework "is inherently a causation test." Second, they emphasize that the General Counsel "does not *invariably* sustain his [initial] burden by producing—in addition to evidence of the employee's protected activity and the employer's knowledge thereof—*any* evidence of the employer's animus or hostility toward union or other protected activity." "Instead," my colleagues conclude, "the evidence must be sufficient to establish that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee." But these clarifications are unnecessary—these concepts are already embedded in the *Wright Line* framework and reflected in the Board's body of *Wright Line* cases.

My colleagues claim that their clarifications are necessitated by recent Board decisions that supposedly relaxed the General Counsel's initial burden, which they say has hampered the Board's ability to secure judicial enforcement of its *Wright Line*-based orders, including by the Eighth Circuit in this case. In fact, the Board has been remarkably consistent over the years in its articulation and application of the General Counsel's initial burden. And, not surprisingly, the Board has enjoyed remarkable success in the courts of appeals in *Wright Line* cases. Even in the present case it appears that the Eighth Circuit's concern has more to do with what the Board said, rather than what it did.

My colleagues do make clear that they, correctly, are not adopting either the Eighth Circuit's formulation of the General Counsel's initial burden, which suggests there must be direct evidence linking the employer's animus to its decision, or the version advocated by the General Counsel, who (curiously) would impose upon himself a fourth "nexus" element. I join them in rejecting these alternatives. They also emphasize that today's decision "does not mark a radical shift in the Board's interpretation or application of the General Counsel's initial burden under *Wright Line*." I hope that is the case. Of course, only time will tell if the "clarifications" my

[1] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

colleagues make today actually portend something more, such as a significant raising of the bar on the General Counsel in future *Wright Line* cases.

I.

It is useful to begin with a brief review of *Wright Line* itself. As stated above, in *Wright Line* the Board adopted a two-part "causation test" for alleged violations of Section 8(a)(3) or Section 8(a)(1) turning on employer motivation. The Supreme Court approved this test, after the Circuit courts had split.[2] Under the *Wright Line* framework, the General Counsel bears the initial burden to establish that protected activity was a "motivating factor" in the employer's adverse employment action. If the General Counsel makes that showing, then the burden shifts to the employer to prove that it would have taken the same action even in the absence of the employee's protected activity. On the facts presented in *Wright Line*, the Board found that the General Counsel had carried his initial burden, given that he had established that the alleged discriminatee had engaged in union activity, that the respondent was aware of that activity, and that the respondent harbored animus toward the union generally and toward the discriminatee's union activities in particular. The *Wright Line* Board did not expressly identify employee protected activity, employer knowledge, and employer antiunion animus as separate elements of the General Counsel's initial burden to show that an employee's protected activity was a "motivating factor" in the employer's decision making, but those elements eventually became the standard prerequisites to making that finding.[3]

II.

Fast forward to today's decision, and the majority's stated concern that the Board has recently strayed from the causation test set forth in *Wright Line*. My colleagues assert that the Board's 2011 *Mesker Door* and 2014 *Libertyville Toyota* decisions effectively relieved the General Counsel of his initial burden to show that an employee's protected activity was a "motivating factor" in an adverse employment action.[4] They draw this conclusion from passages in those cases rejecting the argument (advanced unsuccessfully by former Member Miscimarra and by other Board members before him) that the General Counsel must always establish a *fourth* "causal nexus" element or make an additional showing of a particularized "nexus" between an employee's protected activity and the adverse action in order to carry his initial burden. Specifically, my colleagues point to the *Libertyville Toyota* Board's statement that, "[c]ontrary to the suggestions of the judge and our dissenting colleague [Member Miscimarra], proving that an employee's protected activity was a motivating factor in the employer's action does *not* require the General Counsel to make some *additional* showing of *particularized* motivating animus towards the employee's own protected activity or to further demonstrate some *additional, undefined* 'nexus' between the employee's protected activity and the adverse action."[5]

But the *Libertyville Toyota* statement (which my colleagues dub the "*Libertyville Toyota* formulation") is unremarkable for at least two reasons. First, the Board's refusal to formally add a fourth "nexus" element to the General Counsel's initial burden was consistent with years of precedent. Thus, long before *Libertyville Toyota* the Board had been adhering to the standard elements of that initial burden—protected activity, employer knowledge, and employer animus—and correcting administrative law judges who had added a fourth "nexus" element.[6] *Libertyville Toyota* was just another case in

[2] See *Transportation Management Corp.*, above, 462 U.S. 393.

[3] Notably, administrative law judges and the Board itself initially applied a variety of three- and four-part tests before settling on these standard three elements. See, e.g., *United Broadcasting Co. of New Hampshire, Inc.*, 253 NLRB 697, 703 (1980) (four-part test requiring showing that adverse action "had the effect of encouraging or discouraging membership in a labor organization"); *North Hills Office Services, Inc.*, 344 NLRB 1083, 1097 (2005) (same); *Bradford Furniture Co.*, 254 NLRB 921, 921 & fn. 3 (1981) (four-part test with requirement to show suspicious timing of adverse action); *Sunbelt Manufacturing, Inc.*, 308 NLRB 780, 786 (1992) (same); *Five Star Air Freight Corp.*, 255 NLRB 275, 278 (1981) (early example of standard formulation). Over time, however, the Board came to adopt the standard formulation. See, e.g., *Regal Recycling, Inc.*, 329 NLRB 355, 356 (1999); *Fivecap, Inc.*, 331 NLRB 1165, 1169 fn. 11 (2000); *Briar Crest Nursing Home*, 333 NLRB 935, 936 (2001); *Willamette Industries, Inc.*, 341 NLRB 560, 562 (2004).

[4] *Mesker Door, Inc.*, 357 NLRB 591 (2011); *Libertyville Toyota*, 360 NLRB 1298 (2014), enfd. sub nom. *AutoNation, Inc. v. NLRB*, 801 F.3d 767 (7th Cir. 2015).

[5] *Libertyville Toyota*, above, 360 NLRB at 1301 fn. 10 (emphasis added). The majority was responding to former Member Miscimarra, who argued that "[t]he General Counsel *is* required . . . to prove the existence of a nexus between protected activity and the particular decision alleged to be unlawful," and that "generalized antiunion animus does not satisfy the initial *Wright Line* burden absent evidence that the challenged adverse action was motivated by antiunion animus." Id. at 1306 fn. 5 (Member Miscimarra, dissenting) (emphasis in original).

[6] To be sure, early post-*Wright Line* cases occasionally referred to a "nexus" between the employee's protected activity and the employer's adverse action, although without it being a formal part of the test. See, e.g., *Master Security Services*, 270 NLRB 543, 554 (1984); *Gencorp*, 294 NLRB 717, 718 fn. 6 (1989). And in other early cases the Board actually used a four-part test that included something arguably akin to a nexus showing. See, e.g., *Evening News Assn.*, 258 NLRB 88, 90 (1981) (four-part test with requirement to show that employee's protected activity "triggered" employer's adverse action); *United Merchants*, 284 NLRB 135, 158 (1987) (same). Eventually, however, the Board settled on the now well-established three-element formulation of the General Counsel's initial burden, rejecting dissenting Board Mem-

which the Board affirmed that there is no separate "nexus" element as part of the General Counsel's initial burden. The *Libertyville Toyota* Board emphasized this point in rejecting the dissent's view, explaining that its statement of the General Counsel's initial burden followed "the overwhelming number of cases in which the Board has stated the *Wright Line* test *precisely as we do here*."[7]

Second, and more important, there is no basis for concluding that the *Libertyville Toyota* Board actually lowered the General Counsel's initial burden to show that protected activity was a "motivating factor" in a challenged adverse employment action. The majority says that the supposed "*Libertyville Toyota* formulation" allows the General Counsel to carry his burden if the record contains "some" or "any" evidence of animus against union or other protected activity, regardless of how attenuated a connection that animus had to the adverse employment action in question. But this assertion is belied by even a cursory review of the relevant cases.

As described, the Board's statement in *Libertyville Toyota* was simply a rejection of former Member Miscimarra's view that the General Counsel's initial burden should be expanded to include an additional, ill-defined "nexus" element. The Board in no way relieved the General Counsel of his initial burden to show that protected activity was a "motivating factor" in the employer's decision to discharge the alleged discriminatee in that case, or otherwise departed from the basic nature of *Wright Line* as a "causation" test. In fact, the Board found that the employer had committed several independent Section 8(a)(1) violations—including threats of "blacklisting or blackballing" union supporters and threats that union organizing would be futile—that, along with the Board's finding that the employer's asserted reasons for discharging the employee were pretextual, sufficiently established that antiunion animus infected its discharge decision. Finally, it is worth noting that the Seventh Circuit, in enforcing the Board's order, expressly recognized that the Board had faithfully adhered to *Wright Line*'s "motivating factor" requirement in finding the employee's discharge unlawful.[8]

That understanding of *Libertyville Toyota* is fully consistent, moreover, with the Board's decisions in *Mesker Door* and in the present case. In *Mesker Door*, the Board found that antiunion animus was a "motivating factor" in the employer's suspension of a prounion employee. In doing so, the Board—as it had done in other cases—first corrected the judge's statement that the General Counsel's initial *Wright Line* burden includes a fourth "nexus" element. But then, on the facts, the Board actually relied on evidence of a link between the employer's demonstrated animus and the employee's suspension; that evidence included the employer's independent violations of Section 8(a)(1), (3), (4), and (5), as well as the timing of the employee's suspension and the employer's disparate treatment of him relative to other employees. In short, the Board held the General Counsel to his initial burden of demonstrating that the employee's protected activity was a "motivating factor" in the employer's decision to suspend him.

Likewise, in the present case the Board, citing *Mesker Door*, again declined to add a fourth "nexus" element to the General Counsel's initial burden, but as in *Mesker Door* the Board nevertheless held the General Counsel to the "motivating factor" requirement. The Board noted that the Respondent, shortly before discharging Galle, had issued him a written warning expressly disciplining him for discussing the Union, which established animus with respect to the activity of Galle himself. So, once more, the Board faithfully adhered to the basic "causation" test articulated in *Wright Line*, notwithstanding its refusal to add a separate "nexus" element to the General Counsel's initial burden.

Further, in none of these cases did the Board question prior cases in which the Board—applying the same traditional statement of the General Counsel's initial burden—had found that the General Counsel had *not* carried his burden because his evidence of animus was too weak, or the animus was too remote from the adverse action in question.[9] Those cases remain good law today.

bers' suggestions to add a fourth "nexus" element. See, e.g., *Alton H. Piester, LLC*, 353 NLRB 369, 373 & fn. 28 (2008), enfd. 591 F.3d 332 (4th Cir. 2010); *Cast-Matic Corp.*, 350 NLRB 1270, 1274 & fn. 17 (2007); *Concrete Form Walls, Inc.*, 346 NLRB 831, 834 & fn. 17 (2006); *Jackson Hospital Corp.*, 355 NLRB 643, 644 fn. 5 (2010); enf. denied on other grounds 647 F.3d 1137 (D.C. Cir. 2011); *Trump Marina Hotel Casino*, 353 NLRB 921, 921 fn. 7 (2009), affd. and incorporated by reference in 355 NLRB 1277 (2010), enfd. mem. 445 Fed. Appx. 362 (D.C. Cir. 2011).

[7] *Libertyville Toyota*, above, 360 NLRB at 1301 fn. 10 (emphasis added).

[8] See *AutoNation*, above, 801 F.3d at 776 ("[T]he Board referred repeatedly in the text of its opinion to the correct 'motivating factor' requirement of *Wright Line*.").

[9] In *Atlantic Veal & Lamb, Inc.*, 342 NLRB 418, 418–419 (2004), enfd. mem. 156 Fed. Appx. 330 (D.C. Cir. 2005), for example, the Board agreed with the judge that the employer harbored antiunion animus, but nonetheless reversed the judge's finding that the employer had unlawfully failed to recall a laid-off union supporter, precisely because there were "insufficient facts to show that the [employer's] animus against [the employee's] union activity was a motivating factor in the decision not to recall him." Similarly, in *New Otani Hotel & Garden*, 325 NLRB 928, 928 fn. 2 & 939–941 (1998), the Board found insufficient evidence that the employer's discharge of known union

There is no real support, then, for my colleagues' assertion that the *Libertyville Toyota* Board altered *Wright Line* to permit a finding that the General Counsel has carried his initial burden if (in addition to protected activity and employer knowledge) the record contains "any" or "some" evidence of unlawful animus. Significantly, my colleagues have not identified a single post-*Libertyville Toyota* case in which that scenario occurred. To the contrary, the Board has continued to apply the "motivating factor" standard after *Libertyville Toyota*, and has never even addressed the basic "causation" notion unless prompted to do so by a party's argument, by a judge's misstatement of the elements of the General Counsel's initial burden, or by a dissenting Board member.[10]

Nor are my colleagues' "clarifications" necessitated by their overstated claim that *Libertyville Toyota* has frustrated attempts to obtain enforcement of Board orders. My colleagues broadly state that "appellate courts have questioned the *Libertyville Toyota* formulation." But in fact, only three Circuits so far have considered the issue—the Seventh, Eighth, and Tenth Circuits. The Tenth Circuit *rejected* my colleagues' interpretation of *Libertyville Toyota*, and the Seventh Circuit (on review of *Libertyville Toyota* itself) found that the Board's statements responding to former Member Miscimarra did not affect the validity of the Board's order.[11]

That leaves the Eighth Circuit, which is the only court to have taken issue with *Libertyville Toyota* since it was decided, and which has so far refused to enforce two relevant Board orders, including this one.[12] I would respectfully suggest that in the present case the Eighth Circuit misinterpreted the Board's decision in the same way my colleagues do today. In considering the Board's analysis of Galle's discharge, the Eighth Circuit read the Board's decision as stating that under *Wright Line* the General Counsel's "initial burden has no 'nexus element'" at all, and thus that the General Counsel need not prove that antiunion animus was a "motivating factor" in the employer's adverse action.[13] In fact, as described, the Board merely expressed agreement with the judge's statement of the three traditional elements of the General Counsel's initial burden—protected activity, employer knowledge, and employer animus—and reaffirmed that there is no separate "fourth 'nexus' element."[14] And, as also described, the Board actually found that there *was* a connection between Galle's union activity and his discharge, a finding my colleagues and I have reaffirmed today. In sum, then, it appears that the court focused narrowly on the Board's response to former Member Miscimarra rather than on the Board's analysis of the record as a whole.

III.

For all of those reasons, there is no need to "overrule" the Board's statements in *Libertyville Toyota* or to otherwise clarify the General Counsel's initial burden under *Wright Line*. To be sure, the Board should take care to remain consistent in its articulation of the General Counsel's initial burden and should continue to clearly explain in each case the evidentiary basis for its finding that the General Counsel has (or has not) established that protected activity was a "motivating factor" in a challenged employment action. But to seize on this case to clarify *Wright Line* strikes me as yet another example of my colleagues reaching out to solve a nonexistent problem.[15] Indeed, my colleagues' decision to "clarify" *Wright Line* presents its own risk of introducing uncertainty in this area of the law going forward, even though they have not overruled a single Board *decision*, and so the results reached in *Mesker Door*, *Libertyville Toyota*, and their progeny still stand.

---

supporters was motivated by antiunion animus where the General Counsel's arguable evidence of animus was "modest and temporally remote" and overall "far too weak" to warrant the inference that the employees' union activity was a "motivating factor" in the employer's decision.

[10] Compare, e.g., *Burndy, LLC*, 364 NLRB No. 77 (2016) (no discussion of causation); *Gunderson Rail Services, LLC*, 364 NLRB No. 30 (2016) (same); *H&M International Transportation, Inc.*, 363 NLRB No. 139 (2016) (same); with, e.g., *Aliante Gaming, LLC d/b/a Aliante Casino & Hotel*, 364 NLRB No. 78, slip op. at 1 fn. 3 (2016) (causation issue raised by respondent employer); *Dish Network, LLC*, 363 NLRB No. 141, slip op. 1 fn. 1 (2016) (responding to former Member Miscimarra); *HTH Corp.*, 361 NLRB 709, 709 fn. 2 (2014) (correcting judge's recitation of the test); *Nichols Aluminum, LLC*, 361 NLRB 216, 218 fn. 7 (2014) (responding to former Member Johnson).

[11] In *Dish Network, LLC v. NLRB*, the Tenth Circuit disagreed with the notion that *Libertyville Toyota* "effectively eliminate[d] causation" from the General Counsel's burden. 725 Fed. Appx. 682, 694 (10th Cir. 2018) (brackets in original). The court sensibly explained that *Libertyville Toyota* did not alter *Wright Line*'s requirement to prove that an employee's protected activity was a motivating factor in an employer's adverse action, and also noted that Board law has always allowed the General Counsel to rely on circumstantial evidence to sustain his burden. Id. In *AutoNation*, as noted above, the Seventh Circuit found that "[d]espite its discourse on the *Wright Line* factors in footnote 10 of its decision, the Board referred repeatedly in the text of its opinion to the correct 'motivating factor' requirement of *Wright Line*." 801 F.3d at 776. Therefore, the court found, "[t]o the extent that the [Board] may have deviated from *Wright Line* or introduced imprecision [in footnote 10], that is regrettable but not fatal to the outcome in this case. We have no need to wade into an intramural dispute between Board members if it makes no difference to the outcome." Id.

[12] See *Tschiggfrie Properties, Ltd. v. NLRB*, 896 F.3d 880 (8th Cir. 2018); *Nichols Aluminum, LLC v. NLRB*, 797 F.3d 548 (8th Cir. 2015).

[13] See *Tschiggfrie*, above, 896 F.3d at 885–887.

[14] *Tschiggfrie*, above, 365 NLRB No. 34, slip op. at 1 fn. 1.

[15] See *Ridgewood Health Care Center, Inc.*, 367 NLRB No. 110, slip op. at 15 fn. 6 (2019) (Member McFerran, dissenting) (citing cases).

I take at face value my colleagues' assurance that today's decision is not "a radical shift" in the Board's interpretation or application of *Wright Line*. But close observers of the Board's recent decisions may find cause for concern.[16] *Wright Line* is one of the Board's most important decisions, and it would be a great disservice to the Board and those who rely on our decisions to upend its meaning and application without a compelling justification and without opportunity for full public participation.

Dated, Washington, D.C. November 22, 2019

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Teamsters Local 120, a/w International Brotherhood of Teamsters.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Darryl Galle full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Darryl Galle whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest, and WE WILL also make him whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Darryl Galle for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 25, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Darryl Galle, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

TSCHIGGFRIE PROPERTIES, LTD.

The Board's decision can be found at www.nlrb.gov/case/25-CA-161304 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

[16] See, e.g., *Electrolux Home Products*, 368 NLRB No. 34 (2019) (Member McFerran, dissenting) (holding that pretext does not establish unlawful motive under *Wright Line*).