

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

CHALLENGE MANUFACTURING COMPANY, LLC
Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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STATEMENT REGARDING ORAL ARGUMENT

This case involves the application of established legal principles to factual findings that are well supported by credited record evidence. Accordingly, the Board believes that oral argument is unnecessary. If, however, the Court wishes to hear argument, the Board asks to participate.

JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Challenge Manufacturing Company, LLC, to review a Decision and Order issued by the National Labor Relations Board against the Company, and the Board's cross-application to enforce its order. The Decision and Order, which issued on August 1, 2019, is reported at 368 NLRB No. 35. (A. 1-15.)¹

The Board had jurisdiction over the proceedings below under Section 10(a) of the Act, 29 U.S.C. § 151, 160(a) of the National Labor Relations Act, as amended, ("the Act"), which empowers the Board to prevent unfair labor practices affecting commerce. The Board's Order is final with respect to all parties. The Court has jurisdiction over this appeal pursuant to Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f). Venue is proper because the Company transacts business in this Circuit. The petition and application were both timely, as the Act imposes no time limits on such filings.

STATEMENT OF THE ISSUES PRESENTED

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

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

8(a)(1) of the Act by threatening employee Kiliszewski with unspecified reprisals for engaging in union activity and by creating the impression that his union activity was under surveillance.

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

3. Whether the Board acted within its broad remedial discretion by ordering the Company to reimburse Kiliszewski for reasonable interim employment expenses.

STATEMENT OF THE CASE

Acting on an unfair-labor-practice charge filed by Michael Kiliszewski, the Board's General Counsel issued a complaint alleging that the Company violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by threatening him with reprisals for his union activity and by creating the impression that it was under surveillance. The complaint also alleged that the Company violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1), by discharging him for his union activity. (A. 538-48.) Following a hearing, an administrative law judge issued a decision and recommended order finding that the Company committed the alleged unfair labor practices. (A. 3-15.) After considering that decision, as well as the record, the Company's exceptions, and the parties' briefs, the Board issued a Decision and

Order affirming the judge’s rulings, findings, and conclusions, and adopting the recommended Order, as modified. (A. 1-2.) Thereafter, the Board denied the Company’s motion for reconsideration. (A. 16.)

I. THE BOARD’S FINDINGS OF FACT

A. In 2013, 2015, and 2017, Kiliszewski Leads Union Organizing Drives; Upon Learning About His Role in the 2017 Campaign, the Company Threatens Him With Reprisals and Creates the Impression That His Activity Is Under Surveillance

The Company manufactures structural metal components for the automotive industry. (A. 3; 34, 299.) It operates eight plants, including one in Holland, Michigan, that has over 700 employees. In 2008, the Company hired Kiliszewski as a maintenance mechanic at the Holland plant. (A. 3; 34-35, 101, 545, 556.) Over the next eight-plus years, he did not receive a single disciplinary action. (A. 3; 62-63.) His supervisor, Larry Boyer, described him as “one of my better if not best employees” who worked without rest at a speed of “go, go, go.” (A. 3; 573.) Boyer regarded Kiliszewski as “an asset to the [C]ompany with his work ethic, knowledge and ability,” and added that he had a “long future” with the Company. (A. 3; 573.)

In 2013 and again in 2015, Kiliszewski contacted the United Automobile, Aerospace and Agricultural Implement Workers of America (“the Union”) to initiate union campaigns at the Holland plant. (A. 4, 11; 35-36.) During the 2015 campaign, Kiliszewski talked to hundreds of employees about the Union, obtained

employee signatures on union authorization cards, and wore union shirts, stickers, and hats. (A. 4, 11; 35-37, 170.) He was also the first signature on a letter sent to the Company identifying employee members of the Union's "Volunteer Organizing Committee." (A. 4; 37-38, 170-71, 562.)

At one point during the 2015 campaign, Kiliszewski was talking with another employee when he observed Plant Manager Drew Ferris photographing him from behind a piece of equipment. (A. 4; 41-42, 171-72.) During the campaign, the Company also distributed flyers that stated it was "100 [percent] opposed to a unionized plant," suggested that unionization was involved in "closures and bankruptcies" of other facilities, and accused the Union of making "[e]mpty promises." (A. 4; 39-40, 584.)

The 2013 and 2015 campaigns ultimately failed. Accordingly, in April 2017, Kiliszewski began anew to solicit employees' signatures on union authorization cards and to discuss the Union with colleagues, including Carl Leadingham, a supervisor. (A. 4 and n.2, 11; 26-27, 43-45, 151-52, 173, 200, 741.) At the time, the Company and the Union were negotiating an initial bargaining agreement at the Company's recently organized Pontiac, Michigan facility. Although the parties had a neutrality agreement requiring the Union to refrain from campaigning to represent employees at the Holland facility until an agreement was reached at Pontiac, the agreement did not preclude individual

employees like Kiliszewski from engaging in organizing activities. (A. 4 and n.1; 300-03, 313-16, 318, 695-96.)²

After Kiliszewski began his organizing activity, Maintenance Supervisor Craig Ridder informed company officials, including Human Resources Manager Darlene Compeau, that Kiliszewski and Leadingham were involved in a union campaign and had attended a meeting at a local hotel. Ridder also reported, in writing, that they were circulating union authorization cards at the facility and offsite. (A. 4, 11; 291-92, 317-18, 611-12.)

When Vice-President of Human Resources Mike Tomko received the information about these organizing efforts, he contacted the Union, asserting that “it was a very clear breach” of its neutrality agreement with the Company. (A. 4; 304-05.) On April 24, Tomko and Compeau called Leadingham to a meeting where they asked him to identify the employees who were engaging in union activity; they also suspended him for five days. (A. 4, 6 and n.6, 11; 151-54.) Thereafter, Shift Supervisor Craig Ritter told Leadingham to avoid Kiliszewski because the Company was watching him. (A. 153, 162-63.)

² The neutrality agreement required the Company to voluntarily recognize the Union upon a majority of the bargaining unit employees signing union authorization cards. In turn, the agreement required the Union to refrain from commencing an organizing campaign at any of the Company’s remaining non-union facilities until a collective-bargaining agreement was ratified at the previously organized facility. (A. 4; 695-96.)

Leadingham later informed Kiliszewski that he had been suspended for discussing the Union with him and attending an organizing meeting. Leadingham also warned Kiliszewski to watch his back, adding that company managers were after him and anyone else who was talking about the Union. (A. 4; 45, 48-50, 154-55, 173-74.)

B. Kiliszewski Has a Tense Exchange with Supervisor Sanchez, Who Repeatedly Demands That He Perform Work Before His Shift Starts, Contrary to Company Policy

On May 5, Kiliszewski arrived at 10:00 p.m. for his regular assignment on the Company's third shift, which started at 10:30 p.m. (A. 2, 4; 51-52, 81-83, 585.) Like his coworkers, he usually arrived early to prepare his area, make coffee, and obtain information from the mechanics on the prior shift who were ending their day's work. (A. 4; 52, 489.) Under company policy, however, employees were not permitted to actually be on the production floor prior to their shift and were not paid until their shift started. In other words, they could not perform work and were not compensated until they were "on the clock." (A. 4 and n.4, 12-13; 91, 130, 175, 381, 419, 489.)

After arriving, but before his shift started, Joe Maynard, a second-shift production supervisor, asked him to look at a piece of equipment that was in high demand and required repairs. Kiliszewski assured Maynard that he would "go right over there" once he was "on the clock." (A. 5; 51, 83.)

Thereafter, Norma Sanchez, another second-shift production supervisor, told Kiliszewski to repair some equipment. Kiliszewski replied that he was not on the clock yet and that Sanchez should ask the second-shift maintenance mechanics – who were still on the clock – to do the work. (A. 5; 52-53.) Sanchez left, but soon returned and told Kiliszewski to fix the equipment immediately. Kiliszewski reiterated that he was not on the clock. Reminding her that he was not even supposed to be on the production floor prior to the start of his shift, he asked her to “[g]o see [the second] shift crew.” (A. 5; 53.) Sanchez left and returned for a third time to tell Kiliszewski and a coworker, third-shift maintenance mechanic James Mathews, to fix the machine. Mathews repeated, as Kiliszewski had stated earlier, that they would address the problem once they were “on the clock.” Sanchez left, but returned for a fourth time about five minutes later. She pointed at the two mechanics and yelled at them to fix her machine “right now.” (A. 5; 54.) Both mechanics again stated that they were not “on the clock” yet. In response, Sanchez yelled, “[y]ou’ll do as I say, when I say.” Kiliszewski, who had become very upset because she was yelling and demanding that he work on the production floor before his shift started, yelled back at Sanchez to “go see your fucking second shift maintenance crew,” and to get the “hell” or “fuck” out of his face. Sanchez replied that she was going to talk to Kiliszewski’s supervisor, and he encouraged her to do so. (A. 5; 54-55, 143, 146-47, 175-76.)

C. After Receiving an Email From Sanchez, the Company Meets with Kiliszewski, Who Notes That His Shift Had Not Started When Sanchez Repeatedly Demanded He Perform Work

Sanchez sent an email about her encounter with Kiliszewski to Human Resources Manager Compeau and Maintenance Manager Jeff Glover. (A. 5; 545, 557, 564.) Sanchez also sent copies to Vice President and Plant Manager Keith O'Brien, Plant Manager Ferris, Second-Shift Production Supervisor Maynard, and Supervisor Boyer. (A. 5; 545, 557, 564.) In her email, Sanchez wrote that "around 10:00 p.m." on May 5, Kiliszewski was in the "maintenance area talking with another [employee]" when she asked him to restart a machine. (A. 5; 564.) She added that about ten minutes later, the machine was still down, and she told Kiliszewski, who was "still in the maintenance area talking," that she needed him to go fix the machine. (A. 6; 564.) According to Sanchez, Kiliszewski replied by asking where her "fucking [second] shift maintenance guy" was, and she responded that "they were working on other [equipment]." (A. 6; 564.) In her email, she added that Kiliszewski then said, "You're not my boss, you don't tell me what to do . . . [and] to get the fuck out of his face." (A. 6; 564.) Sanchez also claimed that the encounter ended with her stating that she was going to tell his boss, and that as she walked away Kiliszewski yelled "fuck you bitch." (A. 6; 564.)

Shortly after receiving the email, Supervisor Boyer gave Kiliszewski a copy and told him to “steer clear” of Sanchez. (A. 6; 56-57, 85-86, 101.) On May 9, the Company called Kiliszewski to a meeting about the email with Human Resources Manager Compeau, Maintenance Manager Glover, and Plant Manager O’Brien. Compeau and O’Brien rejected Kiliszewski’s request to audiotape the meeting. (A. 6; 58-59.) Kiliszewski then asked that Mathews attend as a witness but was told that he had left for the day. O’Brien added that if he delayed the meeting until Mathews was available the Company would suspend him in the interim because “we make the rules here not you; you just work here.” Kiliszewski then agreed to proceed with the meeting. (A. 6; 59.)

During the meeting, Kiliszewski expressed the view that the Company was targeting him because of his union activity. (A. 6; 416-17.) Regarding the May 5 encounter with Sanchez, Kiliszewski shared the written notes he had prepared on the copy of her email that Supervisor Boyer had given him and proceeded to respond mainly by tracking his notes. (A. 6; 60-61, 85-86, 101, 144.) Kiliszewski stated that Sanchez had demanded that he perform work prior to the start of his shift, and that he and Mathews repeatedly told Sanchez that they were not “on the clock” yet and finally asked her “not to bother us until we’re on the clock.” (A. 6; 83, 89-92, 98, 147, 564.) He disputed Sanchez’s statement that second-shift mechanics were unavailable, noting that he had directed Sanchez’s attention to a

second shift mechanic who was “still on the clock doing nothing.” (A. 6; 100, 564.) Kiliszewski also complained that Sanchez had not “asked” him to make the repair prior to the start of his shift, but had “demanded,” that he do so, yelling and screaming at him, “You’ll do as I say, when I say.” (A. 6; 54-55, 93, 95, 97, 142-47, 420, 491, 564.) Kiliszewski recounted that, in response, he and Mathews explained to Sanchez that they did not “take orders from [her], only requests” since she was not their supervisor, and to “get the hell away” and not bother them. (A. 6; 95, 564.) Kiliszewski admitted to swearing during the encounter by referring to the “fucking” second-shift maintenance crew and telling Sanchez to get the “hell” out of his face. (A. 6; 54-56, 93-94, 96, 100, 143, 564.) Kiliszewski, however, denied saying “fuck you bitch” as she walked away. (A. 6; 59, 98-99, 565.) He also identified five witnesses who were present and would tell Compeau that Sanchez had yelled at him, “was the aggressor[,] and was out of line.” (A. 6; 100, 565.)

D. Human Resources Manager Compeau Interviews Employees Who Confirm Kiliszewski's Account That Sanchez Repeatedly Demanded He Perform Work Before His Shift; the Employees Fail To Corroborate Her Claim That He Called Her a Bitch

Human Resources Manager Compeau investigated the incident between Sanchez and Kiliszewski by interviewing five employees and preparing statements based on the interviews. (A. 7, 8; 187, 370, 727-32, 737-40.) In his interview, employee Gerald DeCheney stated that at 10:20 p.m., Sanchez approached Kiliszewski and “yell[ed] at him about a machine being down.” (A. 7; 727.) According to DeCheney, Kiliszewski responded by asking “where were the four maintenance people on [Sanchez’s] shift.” (A. 7; 727.) Sanchez replied that she did not know. (A. 7; 727.) Kiliszewski said, “OK, as soon as I get my ear plugs in and unlock my tool box[,]” but his response “was not fast enough for [Sanchez] and she went off on [Kiliszewski].” (A. 7; 727.)

In her interview, employee Lilianna Guajardo emphasized that Sanchez had been laughing and joking with some other employees immediately before she approached Kiliszewski and Mathews in an “aggressive” manner and began “yelling” at them. (A. 7; 737-38.) After Kiliszewski and Sanchez started screaming back and forth, Sanchez pointed her finger at Kiliszewski and Mathews and yelled that she was going to get their supervisor. (A. 7; 737.) Kiliszewski replied, “that’s fine[,] go get him.” (A. 7; 737.) Guajardo also stated that at some point she heard Mathews say something to Sanchez. (A. 7-8; 737.)

In her interview, employee Stacey Karsten reported that when Sanchez told Kiliszewski to fix a machine, he reminded her that “he wasn’t on the floor yet and to leave the area.” (A. 8; 739.) Sanchez walked away but returned a few minutes later to repeat her demand. (A. 8; 739.) In response, Kiliszewski told “her again that he’s not on the floor yet and to leave his fucking area.” (A. 8; 739.) According to Karsten, Sanchez then “got more aggressive and said she would go to his boss.” (A. 8; 739.) Karsten added that Kiliszewski did not say “fucking bitch” as Sanchez was walking away. (A. 8; 740.)

In his interview, employee Mathews recounted that, when Sanchez approached them, he told her that they would get to the machine when their shift started. (A. 8; 722.) A few minutes later, Sanchez approached them again and began “pointing and shouting” at them, and “demanding” that they “fix her down machine now!” (A. 8; 722.) Sanchez added that she would go to their supervisor. She also refused to accept their explanation that they were not on the clock yet and that second shift maintenance employees should perform the work. Mathews added that Sanchez “kept coming at [Kiliszewski],” insisting that he fix her machine, and not letting him walk away. (A. 8; 722.) Mathews acknowledged that when Kiliszewski was talking about the second-shift maintenance crew, he used the f-word, but added that he did not curse otherwise. (A. 8; 577, 723.) Mathews

concluded that Sanchez “was climbing all [up] our back” and “tempers flared.” (A. 8; 723.)

In his interview, employee Ian Pershing recounted that he heard Sanchez and Kiliszewski yelling at one another. Pershing stated that the equipment “had been down for an hour and . . . that [Sanchez] was taking it out on the guy who just got there” – Kiliszewski – instead of the second-shift mechanic “who was supposed to be working and wasn’t.” (A. 8; 730-31.) Pershing said he thought he heard both Sanchez and Kiliszewski use the f-word. (A. 8; 730.) Pershing also stated that he had prior problems with Sanchez yelling at him. (A. 731.)

E. The Company Discharges Kiliszewski Despite His Otherwise Unblemished Work Record, Without Giving Him a Reason

In a May 12 meeting also attended by Plant Manager Ferris and Maintenance Manager Glover, Human Resources Manager Compeau informed Kiliszewski that he was discharged. The Company did not state the reason for its decision. (A. 8; 62, 353-54.) As noted above, prior to Kiliszewski’s discharge, the Company had never disciplined him, and his direct supervisor, Boyer, thought very highly of him.

When Kiliszewski applied for unemployment benefits, Human Resources Manager Compeau responded to the claim by stating that the Company had discharged him based, in part, on his employment history. Compeau, however,

provided no evidence of any prior discipline or past workplace issues. (A. 76-77, 569.)

F. In Discharging Kiliszewski, the Company Skips the First Three Steps of Its Progressive Disciplinary Policy and Treats Him in a Disparately Harsh Manner

The Company's handbook contains a policy stating that employees are subject to progressive discipline for various types of misconduct, including "[f]ailing or refusing to follow clear instructions of a supervisor, undermining supervisory authority or other insubordination," and "[d]irecting abusive or profane language toward a fellow Team Member, supervisor or manager." (A. 8; 670.) The handbook policy sets forth four levels of discipline: a "verbal written warning" for the first offense; a "written warning" for the second offense; a "written warning and two day suspension" for the third offense; and "discharge" for the fourth offense. (A. 8; 670.) The policy also states that these steps may be "accelerated" based on the "seriousness" of the offense and for "just cause." (A. 8; 670.)

On numerous occasions involving many other employees, the Company responded to similar or more egregious incidents involving insubordination/refusal to perform work by taking disciplinary measures well short of discharge. For example, between May 2016 and May 2018, the Company:

- Issued a “first written verbal” warning to an employee for refusing to follow a supervisor’s instructions, then yelling and throwing something before walking away from his work station. Two days later, the Company simply gave him a “first written warning” for another incident involving his refusal to follow instructions to work on a piece of equipment. (A. 9; 632.)
- Issued a “verbal written warning” to an employee for failing to follow clear instructions regarding safety, and thereafter a second written warning for failing to follow clear instructions about which job to perform. (A. 9; 633.)
- Issued a team leader a “warning” for “bec[oming] hostile,” repeatedly refusing to follow directions over a period of days, and “loafing on the job too many times.” (A. 9; 644.)
- Issued a “verbal written warning” to an employee for refusing a manager’s direction to help pack parts. (A. 9; 642.)
- Issued a second written warning and two-day suspension to an employee for “insubordination, including refusal to perform work assigned.” (A. 9; 634.)

Similarly, on numerous occasions the Company responded to employees' use of profane language and worse by imposing disciplinary measures well short of discharge. For instance, between May 2016 and March 2018, the Company:

- Sent a male employee “home pending investigation” for using profane language after two female employees complained that he had commented on their breast size, said he wanted to ride them, and engaged in unsolicited and unwelcome touching of one woman’s breasts. (A. 9; 613-16.)
- Issued “verbal written warnings” to six employees in separate incidents for conduct that included using profanity over the radio and swearing at a shift supervisor, which was not a first offense (A. 9; 393-94, 606); “directing profane language toward a shift lead” (A. 9; 599); using “abusive language at a manager” (A. 9; 598); “using profane language toward a co-worker” and cursing and yelling at human resources staff (A. 9; 392, 605); sending a coworker a text with “profane language” (A. 9; 600); and using “profane language/causing a scene in front of [a] customer” (A. 9; 601).
- Issued a “first written warning” to an employee for “abusive or profane language toward a fellow team member” (A. 9; 608), and a “written

warning” to an employee for “undermining supervisory authority” and using “abusive language towards fellow team members” (A. 9; 603).

- Issued “warnings” to one employee for “creat[ing] a hostile environment by yelling profane comments on several occasions” (A. 9; 607); to another employee for “abusive language towards a team leader” (A. 9; 602); and to a third employee for “using profane language towards another team member” (A. 9; 604).

Moreover, the Company continues to employ a worker who received discipline on at least 10 separate occasions. Misconduct by that employee includes performance and/or attendance issues, swearing and yelling at team leaders and operators, disrespecting supervisors and refusing to follow clear instructions, sleeping on the job, taking unscheduled smoking breaks, smoking in non-smoking areas, causing damage to equipment, deliberately violating a safety rule to lock equipment, and using another employee’s log-in information. (A. 9-10; 387-88, 625-31, 648.)

II. THE BOARD’S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Members McFerran, Kaplan, and Emanuel) issued its Decision and Order finding, in agreement with the administrative law judge, that the Company violated Section 8(a)(1) of the Act by threatening Kiliszewski with reprisals and by creating the impression of

surveillance. (A. 1, 10-11, 14.) The Board also found, in further agreement with the judge, that the Company violated Section 8(a)(3) and (1) of the Act by discharging him for engaging in union activity. (A. 1, 11-14.)

The Board's Order requires the Company to cease and desist from the unfair labor practices found, and in any like or related manner interfering with, restraining, or coercing employees in the exercise of their statutory rights. (A. 1.) Affirmatively, the Order directs the Company to offer reinstatement to Kiliszewski and to make him whole for any loss of earnings as a result of his unlawful termination, including by reimbursing his search-for-work and interim employment expenses. (A. 1-2 & n.4.) The Order also requires the Company, among the Board's other typical remedies, to post a remedial notice. (A. 2.)

SUMMARY OF ARGUMENT

1. The Board is entitled to summary enforcement of the portions of its Order remedying its uncontested findings that the Company violated Section 8(a)(1) of the Act by threatening Kiliszewski with unspecified reprisals for engaging in union activity and by creating the impression that his union activity was under surveillance. Given the Company's failure to contest those findings in its opening brief, it has waived any challenge to them.
2. Substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by discharging Kiliszewski because of his union

activity. It is undisputed that he engaged in that activity, and the record plainly shows the Company knew about his status as the union instigator. Moreover, circumstantial evidence strongly supports the Board's finding that the Company had an unlawful motive for discharging him. To begin, the timing of his discharge – shortly after company officials learned of his renewed union activity – makes their motive readily apparent. In addition, the Board appropriately relied on the Company's unlawful threat of reprisal against Kiliszewski for initiating the union campaign, as well as its creating an impression of surveilling his union activity. Finally, the Board reasonably relied on overwhelming evidence that by immediately discharging Kiliszewski instead of following its progressive disciplinary policy, the Company treated him in a disparately harsh manner compared with other employees.

Faced with this strong evidence of unlawful motive, it was incumbent on the Company to carry its burden of proving its affirmative defense that it would have taken the same disciplinary action Kiliszewski even absent his union activity. The Company failed to make the requisite showing. Although Human Relations Manager Compeau asserted at the unfair-labor-practice hearing that he was guilty of racial and gender harassment (she claimed that he called Supervisor Sanchez a “dumb . . . Hispanic woman,” and said “fuck you bitch”), the administrative law judge discredited that testimony and the Company does not challenge his ruling.

(A. 7, 12.) On review, the Company tries to circumvent that credibility determination by asserting that its officials at least had a good-faith belief he made one of the two statements. The Board, however, reasonably rejected that claim, given the numerous employee interviews conducted by the Company that showed that there was no witness who heard him utter the offensive phrase. The Company fails to meet its heavy burden of showing why that ruling should be disturbed.

The Board also reasonably rejected the Company's further claim that even absent Kiliszewski's union activity, it would have discharged him for using two other vulgarities (telling Sanchez to see the "fucking 2nd shift" and get the "hell" or "fuck" out of his face) and refusing her demand that he perform work before his shift began, which Compeau characterized as insubordination, even though company policy prohibited employees from entering the production floor prior to the start of their shift. As the Board noted, by disregarding its progressive disciplinary system and immediately imposing the ultimate penalty of discharge for that incident, the Company treated Kiliszewski in a disparately harsh manner compared to many other employees who received far milder discipline for similar and even more egregious conduct.

3. The Board acted well within its broad remedial discretion by ordering the Company to reimburse Kiliszewski for his search-for-work and interim employment expenses, even if they exceeded his interim earnings. In *Lou's*

Transport, Inc. v. NLRB, 945 F.3d 1012, 1024-25 (6th Cir. 2019), and *Erickson Trucking Service, Inc. v. NLRB*, 929 F.3d 393, 398 (6th Cir. 2019), this Court recognized that requiring reimbursement for such interim expenses is fully consistent with the remedial purpose of the Board’s backpay order.

STANDARD OF REVIEW

The Court must uphold the Board’s factual findings if they are supported by substantial evidence, even if the reviewing court could justifiably make different findings if it considered the matter de novo. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951); *Airgas USA, LLC, v. NLRB*, 916 F.3d 555, 560-61 (6th Cir. 2019). Such findings of fact include determining an employer’s motive for taking adverse employment actions against employees. *Airgas USA*, 916 F.3d at 560-61; *Birch Run Welding & Fabricating, Inc. v. NLRB*, 761 F.2d 1175, 1179 (6th Cir. 1985).

“The Board’s application of the law to the facts is also reviewed under the substantial evidence standard, and the Board’s reasonable inferences may not be displaced on review.” *Indiana Cal-Pro, Inc. v. NLRB*, 863 F.2d 1292, 1297 (6th Cir. 1988). “Deference to the Board’s factual findings is particularly appropriate where the record is fraught with conflicting testimony and essential credibility determinations have been made.” *Conley v. NLRB*, 520 F.3d 629, 638 (6th Cir. 2008) (quotation marks and citation omitted); *accord NLRB v. Gen. Fabrications*

Corp., 222 F.3d 218, 225 (6th Cir. 2000). In such cases, this Court’s review is “severely limit[ed],” and the Board’s credibility determinations should be affirmed “unless they have no rational basis.” *Fluor Daniel, Inc. v. NLRB*, 332 F.3d 961, 967 (6th Cir. 2003); *see also Charter Commc’ns, Inc. v. NLRB*, 939 F.3d 798, 809 (6th Cir. 2019) (the Court may overturn the Board’s credibility findings “only if they overstep the bounds of reason or are inherently unreasonable or self-contradictory” (quotation marks and citation omitted)).

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

As shown, the Board found that the Company violated Section 8(a)(1) of the Act by unlawfully threatening Kiliszewski and by creating the impression that his union activity was under surveillance. Specifically, in late April 2017, Supervisor Leadingham told Kiliszewski to “watch his back” because the Company was after him and anyone else who was talking about the Union, and that he himself had been suspended for discussing the Union with Kiliszewski. (A. 1, 4, 11-14; 45, 48-50, 154-55, 173-74.)³

³ The Board has long found such employer comments in response to union activity unlawful. *See Jordan Marsh Stores Corp.*, 317 NLRB 460, 462-63 (1995) (“[w]atch your back”); *Trover Clinic*, 280 NLRB 6, 6 n.1 (1986) (“keep a low

Because the Company did not contest those findings in its opening brief, it has waived any challenge to them here. *See Conley*, 520 F.3d at 638 (where employer “does not argue in its appellate brief against the validity of the Board's rulings . . . [a]ny challenges to those rulings have thus been waived”); *Hyatt Corp. v. NLRB*, 939 F.2d 361, 368 (6th Cir. 1991) (when an employer “fails to address or take issue with the Board’s findings and conclusions with regard to violations of the Act, then the [employer] has effectively abandoned the right to object to those determinations”); *see generally Wu v. Tyson Foods Inc.*, 189 F. App’x 375, 381 (6th Cir. 2006) (“This court has consistently held that arguments not raised in a party’s opening brief, as well as arguments adverted to in only a perfunctory manner, are waived.”)

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

profile” and “be quiet”); *Union National Bank*, 276 NLRB 84, 86, 88 (1985) (“watch yourself”).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCHARGING KILISZEWSKI FOR HIS UNION ACTIVITY

A. An Employer Violates Section 8(a)(3) and (1) of the Act by Discharging an Employee for Union Activity

An employer violates Section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1), by taking adverse action against an employee for engaging in union activity. *Charter Commc'ns*, 939 F.3d at 808-09.⁴ In determining whether an employer has taken an adverse employment action against an employee because of the employee's protected union activity, the Board applies the test of motivation set forth in *Wright Line*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981), and approved by the Supreme Court in *NLRB v. Transportation Management*, 462 U.S. 393, 404 (1983).

Under that test, if substantial evidence supports the Board's finding that an employee's protected activity was "a motivating factor" in an employer's decision to take adverse action against him, the action is unlawful unless the record as a whole compelled the Board to accept the employer's affirmative defense that it would have taken the same action even in the absence of union activity. *Transp.*

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

Mgmt. Corp., 462 U.S at 397, 401-03; *Airgas USA*, 916 F.3d at 560-61. 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 has not met its burden, and the inquiry is logically at an end with respect to that reason. *Airgas*, 916 F.3d at 561, 565-66; *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981), *enforced mem.*, 705 F.2d 799 (6th Cir. 1982).

Unlawful motivation is a factual question that the Board may base on circumstantial as well as direct evidence. *NLRB v. Link-Belt Co.*, 311 U.S. 584, 602 (1941); *Charter Commc'ns*, 939 F.3d at 815. In doing so, the Board can rely on a variety of factors, including the employer's expressed hostility towards union or other protected activity, its knowledge of that activity, the proximity in time between the activity and the adverse action, inconsistencies between the proffered reason for the employer's action and other actions it has previously taken, and its disparately harsh treatment of the targeted employee. *Charter Commc'ns*, 939 F.3d at 815, 819-20; *Airgas*, 916 F.3d at 561; *W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 871 (6th Cir. 1995). In addition, the Board can rely on an employer's commission of other unfair labor practices, including Section 8(a)(1) violations, such as threats and surveillance. *Charter Commc'ns*, 939 F.3d at 819; *Gen. Fabrications Corp.*, 222 F.3d at 231-32; *NLRB v. Tasol Corp.*, 155 F.3d 785, 794 (6th Cir. 1998).

Courts are particularly “deferential when reviewing the Board’s conclusions regarding discriminatory motive.” *Inova Health Sys. v. NLRB*, 795 F.3d 68, 80 (D.C. Cir. 2015). “Simply showing that the evidence supports an alternative story is not enough; [the employer] must show that the Board’s story is unreasonable.” *Charter Commc’ns*, 939 F.3d at 816 (quoting *NLRB v. Galick’s, Inc.*, 671 F.3d 602, 608 (6th Cir. 2012).)

B. Kiliszewski’s Protected Activity Was a Motivating Factor in the Company’s Decision To Discharge Him

Ample evidence supports the Board’s finding that the Company’s discharge of Kiliszewski, a long-term employee with an unblemished work record, was unlawfully motivated. It is undisputed that he was the union instigator, and the record fully supports the Board’s finding that the Company was well aware of his activity. Moreover, the Board reasonably inferred unlawful motivation from the obvious timing of his discharge (shortly after he initiated the union campaign), the uncontested unfair labor practices that the Company directed at him upon learning about his union activity, and compelling evidence that the Company treated him in a disparately harsh manner.

1. Kiliszewski engaged in union activity and the Company knew about it

As an initial matter, there is no dispute, as the Board found, that “Kiliszewski had a history as leader of union organizing efforts at the Holland

facility.” (A. 11.) He instigated the 2013 and 2015 campaigns, distributing union authorization cards, wearing pro-union paraphernalia, and discussing unionization with hundreds of employees during the latter campaign. In 2015, he also identified himself to the Company as member of the union organizing committee.

In April 2017, just a few weeks before his discharge, Kiliszewski again exercised his right to engage in union activity by soliciting employees to sign union authorization cards and discussing unionization with them. And as the Board found, there is ample evidence that the Company was “aware that Kiliszewski had resumed his union activity in the weeks leading up to his discharge.” (A. 11.) Thus, in April Supervisor Ridder informed the Company that Kiliszewski and Leadingham had been circulating union authorization cards and conducting off-site union meetings. Later that month, Human Resources Manager Compeau – who was primarily responsible for Kiliszewski’s discharge – demanded that Leadingham identify the union activists, which included Kiliszewski. In addition, during Kiliszewski’s May 9 interview with Compeau, Plant Manager O’Brien, and Maintenance Manager Glover, he “notified those three officials of his union activity by accusing them of singling him out because of his support for the Union.” (A. 11.) Thus, the record fully supports the Board’s finding (A. 11) that the Company knew about Kiliszewski’s recently resumed

union activity when it investigated the Sanchez incident and acted on Compeau's recommendation to discharge him.

The Company errs in asserting (Br. 7, 26-27, 30-31, 36-38, 45-53) that Plant Manager O'Brien, who made the final decision to discharge Kiliszewski, was in the dark about his union activity. The Company ignores testimony by its own witness, Maintenance Manager Glover, who acknowledged that Kiliszewski mentioned his union activity during the May 9 meeting that O'Brien attended. (A. 6 and n.7; 416-17.) As the Board also noted, it was "unlikely" that O'Brien remained ignorant of Kiliszewski's extensive history of union organizing, and oblivious to the fact that the Company had recently suspended Leadingham based on Kidder's report that the pair were engaged in that activity. (A. 6 n.7.) In these circumstances, the judge reasonably discredited O'Brien's professed ignorance of Kiliszewski's union activity. (A. 6 n.7.)

In any event, as the Board noted, it was not necessary to show that O'Brien personally knew about Kiliszewski's union activity because Human Resources Manager Compeau, who recommended his discharge, indisputably did, and O'Brien relied on her recommendation. (A. 11.) As the Board noted, O'Brien never conducted an "independent investigation before approving Compeau's recommendation." (A. 11.) Rather, as O'Brien conceded, he did not have "a lot" of involvement in the investigation, but instead "left that to [Compeau.]" (A. 435.)

In these circumstances, “[a]t a minimum, the [Company’s] knowledge of Kiliszewski’s union activity was connected to the discharge decision by way of Compeau and her significant part in the decisional process.” (A. 11.)

2. The Company had an unlawful motive for discharging Kiliszewski

a. The timing of the discharge and the uncontested violations

With regard to timing, the events could hardly be more proximate. As the Board noted, the Company had not previously disciplined Kiliszewski in eight-plus years of employment. (A. 12-13.) Yet, just a few weeks “after the [Company] first received a report that Kiliszewski was behind a 2017 organizing effort, [it] not only disciplined him, but imposed the ultimate discipline of discharge.” (A. 12.) It is well settled that the close proximity between union activity and an employer’s adverse action supports a finding of unlawful motivation. *See Charter Commc’ns*, 939 F.3d at 815 (three months); *Airgas*, 916 F.3d at 563 (less than one month); *NLRB v. E.I DuPont De Nemours*, 750 F.2d 524, 529 (6th Cir. 1984) (three weeks); *JMC Transp., Inc. v. NLRB*, 776 F.2d 612, 615-16, 620 (6th Cir. 1985) (approximately one month).⁵

⁵ The Company gains no ground in asserting (Br. 45-47) that the timing of Kiliszewski’s discharge is merely a function of his May 5 encounter with Sanchez. Because the Company seized on that incident to generate a basis for his discharge, it does not sever the temporal link between his renewed activity and discharge.

The circumstances surrounding the Company's uncontested violations targeting Kiliszewski also support the Board's inference of unlawful motive. Thus, it is undisputed that upon learning he was again engaging in organizing activity, which Vice President Mike Tomko incorrectly labelled a "very clear breach of the neutrality agreement" (A. 12; 304-05), the Company "reacted aggressively" by interrogating Leadingham about the identities of union activists and suspending him (A. 12). In turn, Leadingham – a statutory supervisor and agent of the Company – unlawfully threatened Kiliszewski that he faced reprisals for his renewed union activity. Leadingham also unlawfully created the impression that the Company was surveilling his activity. As this Court has held, when an employer's representative announces an intent to "retaliate against an employee for engaging in protected activity, the Board has before it especially persuasive evidence that a subsequent discharge of the employee is unlawfully motivated." *Charter Commc'ns*, 939 F.3d at 815-16 (quoting *Turnbull Cone Baking Co. v. NLRB*, 778 F.2d 292, 297 (6th Cir. 1985)). *Accord WXON-TV, Inc.*, 289 NLRB 615, 625 (1988) (inferring anti-union animus from other unfair labor practices), *enforced*, 876 F.2d 105 (6th Cir. 1989).

The Company cites no authority for its bald claim (Br. 27, 48-49) that the uncontested Section 8(a)(1) violations it directed at Kiliszewski do not constitute evidence of animus because they are not based on motive. As shown above, it is

well settled that contemporaneous unfair labor practices, such as threats, support a finding of unlawful motivation. That is particularly true where, as here, the violations were directed at Kiliszewski in response to his renewed union activity.

b. Disparate treatment

Finally, ample evidence that the Company treated Kiliszewski in a disparately harsh manner provides strong support for the Board's finding that his discharge was unlawfully motivated. During Compeau's investigation, Kiliszewski freely acknowledged refusing Supervisor Sanchez's demand that he repair equipment before his shift started, reminding her that he was not even supposed to enter the production floor until his shift began. (A. 6; 83, 89-92, 98, 147.) He also admitted that when their exchange became heated, he told her to see "the fucking 2nd shift maintenance crew" about performing the work, and to "get the hell" or "fuck" out of his face. (A. 6; 54-56, 93, 94, 96, 100, 143, 564.) At the unfair-labor-practice hearing, Compeau and Plant Manager O'Brien claimed that the Company appropriately discharged him for this conduct because it involved vulgar language and insubordination. (A. 12.)

By immediately discharging Kiliszewski for this first-time incident, however, the Company completely disregarded its progressive disciplinary policy, which starts with a verbal written warning. As the Board found, under the policy other employees who committed a first-time offense of profanity or refusing to

perform work “had almost always received verbal warnings or other lesser discipline” well short of discharge. (A. 13.) By contrast, the Company immediately discharged Kiliszewski, weeks after he initiated a union campaign.

Indeed, the record is replete with instances where employees merely received verbal or written warnings for directing, even yelling, abusive or profane language at managers, supervisors, and team leads. Likewise, the record includes numerous instances where employees received discipline well short of discharge for undermining supervisory authority or engaging in insubordination by repeatedly refusing to follow work directions, angrily throwing an object in the work area, walking off the job, and even using profane language after telling female coworkers he wanted to “ride them” and groping their breasts. (A. 13, See pp. 16-18 above.) Moreover, the Company continued to employ an individual who received ten separate citations for misconduct, which included swearing at team leaders, disrespecting supervisors, sleeping on the job, taking unscheduled breaks, damaging equipment, and deliberately violating safety rules. (A. 13.)

In stark contrast with its lenient treatment of those employees for profanity and/or insubordination, the Company skipped the first three steps of its progressive disciplinary system and swiftly discharged Kiliszewski for a first-time offense. As the Board noted, “[i]nstead of allowing Kiliszewski 10 second chances . . . the [Company’s] first disciplinary response for Kiliszewski was to discharge him.”

(A. 13.) In these circumstances, the Board was fully warranted in finding that the Company's disparately harsh treatment of Kiliszewski, in conjunction with the other evidence discussed above, supported an inference that the Company had an unlawful motive for discharging him. *See, e.g., Charter Commc'ns*, 939 F.3d at 819-20 (employer discharged employee who had no prior discipline for an offense where the record was "replete with employees who were not fired" for similar or more serious offenses); *Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 222 (D.C. Cir. 2016) (employer who discharged employee for racial epithets and other profane language treated employee "far more severe[ly] than the discipline the [employer] imposed on other similar offenders"); *see also Airgas*, 916 F.3d at 564 (affirming that anti-union motivation can be inferred from "disparate treatment of certain employees compared to other employees with similar work records or offenses").

3. The Company errs in asserting that its neutrality agreement with the Union negates the evidence of its unlawful motive, and that the Board failed to establish a causal link between Kiliszewski's union activity and his discharge

Contrary to the Company's claim (Br. 7-13, 26-27, 40-42), its neutrality agreement with the Union does not trump the strong evidence of unlawful motive discussed above. Although his union activity occurred at a time when the Union itself had agreed to temporarily refrain from organizing the Holland facility, as the Company conceded at the hearing (A. 4 and n.1; 315-16), and does not dispute

here (Br. 42), Kiliszewski himself was not precluded from engaging in union activity.

As the Board held in *Parc Fifty One Hotel*, 306 NLRB 1002, 1002 (1992), although neutrality agreements may be commendable, they cannot negate the right of employees to engage in union activity. Moreover, contrary to the Company's suggestion (Br. 41), the Board in *Parc Fifty One* did not hold that a neutrality agreement precludes a finding of unlawful motive. Rather, in that case, the Board found that the employee's union activity was a motivating factor in his discharge, but that the employer met its burden of showing it would have discharged him even absent his activity for reasons unrelated to the neutrality agreement. *Id.* at 1002-03.

Finally, the Company does not help itself by erroneously claiming (Br. 25-26, 34-36) that, before the Board, the General Counsel's burden of proving an unlawful motive under *Wright Line* should have included a separate fourth requirement that a "casual connection" be established between the employee's union activity and the employer's adverse action. The Company's assertion is misguided. After all, in the *Wright Line* decision itself, the Board explained that the test, as a whole, is inherently a causation test, and that its "task in resolving cases alleging violations which turn on motivation is to determine whether a causal relationship existed" between the union activity and the adverse action.

Line, 251 NLRB at 1089)); *see NLRB v. Disciplinary Advantage, Inc.*, 312 F. App'x 737, 750 (6th Cir. 2008) (noting that *Wright Line* establishes a causation test).

Moreover, consistent with the Board's *Wright Line* test this Court has repeatedly explained that the General Counsel's burden of proving an unlawful motive typically contains only three elements: "(1) that the employee was engaged in protected activity; (2) that the employer knew of the employee's protected activity; and (3) that the employer acted as it did on the basis of anti-union animus." *Charter Commc'ns*, 939 F.3d at 815; *accord Airgas SA, LLC v. NLRB*, 760 F. App'x 413, 419 n.2 (6th Cir. 2019) (collecting cases).

Contrary to the Company's further contention (Br. 36), the Board did not impose a separate fourth "causation" requirement in *Tschiggfrie Properties, LTD*, 368 NLRB No. 120, 2019 WL 6320585 (2019). Rather, in that case, the Board confirmed that it "neither take[s] issue with the [] long-time use of a three-element formulation of the General Counsel's *Wright Line* burden, nor seeks to add a fourth 'nexus' element to that formulation." Slip op. at 8, 2019 WL 6320585, at *11. The Board then proceeded to reiterate that *Wright Line* "is inherently a causation test" under which "[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." *Id.* (quoting *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003)).

Here, as shown, ample circumstantial evidence supports the Board's finding that Kiliszewski's union activity was a motivating factor in the Company's decision to discharge him.

C. The Company Failed To Carry Its Burden of Showing That It Would Have Discharged Kiliszewski Absent His Union Activity

Faced with this strong evidence of its unlawful motive for discharging Kiliszewski, the Company needed to prove, as an affirmative defense, that it would have taken the same action even absent his union activity. As shown below, the Board reasonably found that the Company failed to meet its burden.

1. The Company has waived any challenge to the Board's discrediting of its official's testimony that Kiliszewski used racially and sexually offensive language warranting his immediate discharge

Although the Company never gave Kiliszewski a reason for his discharge, at the unfair-labor-practice hearing Human Resources Manager Compeau testified that she recommended his removal because during the May 5 incident, he called Supervisor Sanchez a "dumb . . . Hispanic woman" and said "fuck you bitch" as she walked away. (A. 7, 8; 341, 350-51.) As the administrative law judge noted, Compeau made this claim in an apparent effort to characterize his alleged utterances as racial and gender harassment warranting immediate discharge under the Company's policy on national origin and sexual harassment. (A. 9, 12; 669.) The Board, however, reasonably adopted the judge's decision to discredit her

testimony, finding that she invented from “whole cloth” her claim that he commented about Sanchez’s national origin, and that the claim about him uttering the b-word was “unreliable on its face.” (A. 1 n.2, 3, 5, 7.) On review, the Company does not contest these credibility determinations and has therefore waived any challenge to them. *See* cases cited above p. 24.

In any event, the record amply supports the administrative law judge’s credibility determinations, which the Board reviewed and adopted. As the judge explained, Compeau had an unfavorable demeanor and “was an unusually biased witness” who “exaggerate[d] and fabricate[d] in an effort to justify Kiliszewski’s termination.” (A. 7.) Indeed, neither Plant Manger O’Brien nor Maintenance Manager Glover, who were present when Compeau met with Kiliszewski to discuss his encounter with Sanchez, claimed that he made remarks about Sanchez’s national origin. (A. 7.) Moreover, Compeau, when pressed on cross-examination about whether Kiliszewski made racist statements, “became evasive” and did not answer the question, but instead criticized his attitude toward management. (A. 7; 379-80.)

The record likewise supports the Board’s finding, which is grounded in the judge’s unchallenged credibility determination, that Kiliszewski did not call Sanchez a “‘bitch,’ or, in fact, ma[k]e any statement to Sanchez as she was walking away.” (A. 5.) In so finding, the Board relied on Kiliszewski’s “emphatic and

consistent denial that he made the statement,” as well as the corroborating testimony of his coworker, Mathews, who spoke “in a calm and cooperative manner and did not appear to be going out of his way to embellish or shade his testimony to favor either side.” (A. 5; 59, 98-99, 176, 565.)

Likewise, the Board reasonably discredited Sanchez’s testimony that Kiliszewski used the b-word. (A. 5.) As the Board explained, she had her back to him and “therefore could not have seen him make the statement.” (A. 5.) Moreover, Sanchez “did not even claim that she had recognized his voice” in the noisy plant environment. (A. 5.) And significantly, “not a single one of the [five] other witnesses who Human Resources Manager Compeau interviewed as part of her investigation” reported hearing Kiliszewski use the b-word. (A. 5.)⁶

2. The Board reasonably rejected the Company’s assertion that it discharged Kiliszewski based on a good-faith belief he uttered the b-word

On review, the Company tries to circumvent the Board’s rock-solid, uncontested credibility determinations by asserting (Br. 29-34) that it was nevertheless warranted in discharging Kiliszewski because its officials purportedly had a “reasonable, good-faith belief” that he uttered one of the offending phrases

⁶ Contrary to the Company (Br. 31), the Board implicitly declined to credit employee Napier’s assertion, in a written statement provided to Compeau, that he heard Kiliszewski use the b-word. (A. 720-21.) Compeau never interviewed him. She also admitted that the production floor was very loud and that she was unsure how close Napier was to the encounter. (A. 330-32, 372-74, 376.)

(“fuck you bitch”). The Board, however, appropriately rejected that argument, finding that the company managers “did not have a reasonable basis for concluding that Kiliszewski had done so.” (A. 8.) As noted above, not a single employee witness who was interviewed by Human Resources Manager Compeau corroborated Sanchez’s claim that he used sexually (or racially) offensive language, and employee Karsten “expressly denied” that he did so. (A. 8; 740.) As the Board also noted, even Sanchez acknowledged that she did not see who allegedly uttered the b-word. (A. 8.) Given these well-supported findings, the Company errs in asserting (Br. 7, 26, 28-34, 39, 51) that the Board “made[] no effort to address” its professed belief.⁷

In light of the Board’s finding that Kiliszewski did not make comments about Sanchez’s gender or national origin, and that the Company did not have a reasonable basis for believing he used the b-word, the Company is in no position to

⁷ Given the Board’s finding that company officials lacked a reasonable belief he uttered the offensive phrase, the Company errs in relying on *Sutter East Bay Hospitals v. NLRB*, 687 F.3d 424 (D.C. Cir. 2012) (Br. 29, 33-34), where the Court held that an employer could meet its burden if it reasonably believed that an employee’s actions occurred, and the disciplinary action taken was consistent with its policies and practice. As the D.C. Circuit subsequently held, *Sutter East Bay* “is of little aid” where the Board found the employer’s purported belief that an employee used a racial slur “not reasonable.” *Ozburn-Hessey Logistics*, 833 F.3d at 221. See also *Charter Commc’ns*, 939 F.3d at 816 (employer failed to carry its burden of showing that it reasonably believed employee committed the alleged offense and that it acted on its belief in discharging him).

claim (Br. 31-32) that it had to discharge him right away to meet its obligations under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. In any event, contrary to the Company’s suggestion (Br. 31), it is settled that the isolated utterance of a single epithet does not create a hostile work environment under Title VII.⁸

3. The Board reasonably found that the Company failed to meet its burden of proving that it would have discharged Kiliszewski for a first-time use of other vulgar language and insubordination

Because the Company had no basis for claiming that Kiliszewski actually made either of the remarks discussed above, it is left to defend its action based on further testimony by company officials that he was appropriately discharged for “refus[ing] to perform work” before his shift started on May 5, and for using other “vulgar language” (namely, telling Sanchez to see her “fucking 2nd shift” and get the “hell” or “fuck” out of his face). (A. 8, 12; 350-51.) Before the Court, however, the Company offers little if any resistance to the Board’s finding that it failed to carry its burden of proving it would have jumped straight to discharging

⁸ See, e.g., *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986) (to violate Title VII, harassment must be so “severe or pervasive” as to “alter the conditions of employment and create an abusive work environment.”) *Id.* (internal citation omitted). The Company errs (Br. 31) in relying on *Hawkins v. Anheuser-Bush, Inc.*, 517 F.3d 321, 332-33 (6th Cir. 2008), which actually holds, consistent with *Meritor Savings Bank*, that to be actionable, the offensive conduct must be severe or pervasive and consist of more than words that have sexual content or connotations.

him for that conduct absent his union activity. Indeed, the Company does not seriously dispute the Board's finding that its "handbook and the comparator evidence show that discharging Kiliszewski for the first instance of such an offense was a profound departure from [its] own guidelines and usual practice." (A. 12.)

As shown above (pp. 32-34), the evidence amply supports the Board's finding (A. 12) that under the Company's progressive disciplinary policy, employees other than Kiliszewski who were disciplined for a first-time offense of directing profanity at supervisors and coworkers and/or refusing to perform work routinely received verbal warnings or other discipline well short of discharge. Thus, on numerous occasions, the Company meted out only a verbal warning to employees for abusive or profane language. Conduct that the Company deemed appropriate for discipline well short of discharge has also included instances where employees directed profane language at managers, supervisors, and team leads, and responding angrily while refusing work directions. Similarly, on numerous occasions the Company meted out mere verbal warnings to employees who refused to perform work. Conduct that the Company deemed appropriate for discipline well short of discharge has included instances where an employee became "hostile" and repeatedly refused to follow directions, and where another refused to follow directions and proceeded to yell and throw an object.

Moreover, the Company offers no evidence that Sanchez – who was a supervisor on the prior shift and did not oversee Kiliszewski – even had authority to order him to perform work. Nor does the Company dispute the Board’s finding that Sanchez made her demand at a time when he would not be paid and was prohibited by company policy from entering onto the production floor for the purpose of performing work. (A. 5 n.4, 12-13; 361, 403-04, 419.) As the Board found, in these circumstances “even a verbal warning would have been hard to justify,” and “Compeau’s decision to bypass the first three disciplinary steps and recommend Kiliszewski’s immediate discharge is inexplicably draconian and . . . highly suspicious.” (A. 13.) Notably, the Company did not even discipline Mathews who, like Kiliszewski, also refused Sanchez’s demand that he perform work prior the start of his shift. (A 9; 176.)

In sum, the Company’s disparately harsh treatment of Kiliszewski provides persuasive evidence for the Board’s finding that it failed to carry its burden of showing it would have discharged him absent his union activity.⁹ *See Charter Commc’ns*, 939 F.3d at 819-20 (employer unlawfully discharged union supporters

⁹ At the hearing, Compeau admitted that employees use profanity, but sought to distinguish the general use of profanity with words directed at another person. (A. 363.) Before the Court, the Company does not rely on that distinction. Nor could it, given the litany of examples where employees directed profanities at others but were not discharged.

with no prior disciplinary history for offenses where similarly situated employees were not discharged); *Ozburn-Hessey Logistics*, 833 F.3d at 224 (same).

4. The suspect nature of the investigation also supports the Board’s finding that the Company failed to meet its burden

On review, the Company also turns a blind eye to the Board’s further finding that Compeau’s investigation – the primary basis for Kiliszewski’s discharge – “revealed significant factors that should have mitigated the disciplinary response” to his conduct. (A. 12.) *See Charter Commc’ns*, 939 F.3d at 816 (holding that the Board reasonably considered the content of and omissions from employer’s investigation). Those mitigating factors, completely ignored by the Company in its opening brief, include not only the fact that Sanchez was ordering him to perform pre-shift work for which he would not be paid and at a time when he was not supposed to be working (see p. 43, above), but also her behavior in making that demand.

Thus, the record amply supports the Board’s finding that Compeau’s investigatory interviews showed “Sanchez was the aggressor in the confrontation.” (A. 7, 13.) As employee Pershing reported to Compeau, Sanchez was apparently taking out her frustration on Kiliszewski and Mathews, who had just arrived, instead of the second-shift mechanics who should have performed the repair. (A. 8; 730.) Indeed, employees DeCheney, Guajardo, Karsten, and Mathews all reported to Compeau that Sanchez was the aggressor. Thus, DeCheney said that

Sanchez “yell[ed]” at Kiliszewski and “went off[f]” off on him. (A. 7; 727.) Similarly, Guajardo reported that Sanchez approached Kiliszewski in an “aggressive” manner and began yelling and pointing her finger at him. (A. 7-8; 737-38.) As for Mathews, he reported that Sanchez “shouted” at him and Kiliszewski, and “demanded” that they fix the machine. Moreover, all three witnesses reported that Kiliszewski reminded Sanchez he was not on the clock yet and promised to make the repairs once he started work. But instead of disengaging from the confrontation, Sanchez “got more aggressive,” as Mathews and Karsten reported. (A. 8, 13; 722-23, 739-40.)

In sum, as the Board found, the witnesses’ reports “suggest[ed] that Sanchez was the aggressor and was taking out frustration with her own second-shift mechanics on Kiliszewski – a third-shift mechanic who had just arrived at the facility and whose shift had not started.” (A. 13.)¹⁰ But as the Board explained, “[i]nstead of making a downward adjustment of the discipline based on Sanchez’ part in provoking and prolonging the confrontation, Compeau did just the opposite

¹⁰ Compeau (A. 389-90) and O’Brien (A. 465-66, 469) both acknowledged that if Sanchez yelled at Kiliszewski to perform work, her conduct would warrant discipline. And Compeau admitted that Sanchez did yell at Kiliszewski. She also acknowledged believing in the veracity of the employees she interviewed, who described Sanchez as the aggressor. (A. 7 n.8, 8; 383-84.) Yet, Compeau paradoxically ignored her own admissions, “claiming, incredibly, that there was nothing in the investigation indicating that Sanchez was the aggressor during the exchange.” (A. 7 n.8, 13; 379.)

– accelerating the progressive discipline for Kiliszewski’s first infraction past the recommended verbal warning, past written warning, past suspension, and all the way to the ultimate penalty of discharge.” (A. 13.)

* * * *

In light of the Board’s finding that Kiliszewski did not utter racially or sexually offensive words, that the Company lacked a reasonable belief that he did so, that it treated him in a disparately harsh manner, and that its investigation established mitigating factors, the Board was fully warranted in concluding “that the [Company] failed to meet its responsive burden.” (A. 13.) In so finding, the Board did not, as the Company asserts (Br. 38-40), substitute its business judgment for that of the Company, or act as a “super personnel department” (Br. 38). The Company forgets that it is the party claiming it would have discharged Kiliszewski under its policies even absent his union activity. The Company itself therefore placed its policies at issue. Accordingly, the Board appropriately examined the Company’s application of those policies in finding that the Company treated Kiliszewski in a disparately harsh manner and failed to show it would have discharged him even if he had not instigated the 2017 union campaign.

III. THE BOARD ACTED WITHIN ITS BROAD REMEDIAL DISCRETION BY ORDERING THE COMPANY TO REIMBURSE KILISZEWSKI FOR REASONABLE INTERIM EMPLOYMENT EXPENSES

The Board’s remedial power is “a broad, discretionary one, subject to limited judicial review.” *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964); *accord NLRB v. Jackson Hosp. Corp.*, 669 F.3d 784, 787 (6th Cir. 2012). As the Supreme Court has explained, “[i]n fashioning its remedies . . . , the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts.” *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 612 n.32 (1969); *accord NLRB v. Ryder Sys., Inc.*, 983 F.2d 705, 709 (6th Cir. 1983). Thus, the authority to fashion remedies under the Act “is for the Board to wield, not for the courts.” *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969) (quoting *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953)).

Applying those principles here, the Board properly exercised its discretion by including in the make-whole remedy a requirement that the Company reimburse Kiliszewski for his search-for-work and interim employment expenses, even if they exceeded his interim earnings. (A. 1 n.4.) The Board ordered this relief in accordance with its remedial policy announced in *King Soopers, Inc.*, 364 NLRB No. 93 (2017), which the D.C. Circuit reviewed and upheld on policy grounds in *King Soopers, Inc. v. NLRB*, 859 F.3d 23, 37 (D.C. Cir. 2017) (concluding that “the

Board offered clear, reasonable, and compelling justifications for the new remedial framework”).

The Company’s cursory challenge (Br. 53-54) to this aspect of the Board’s remedial order has been rejected by this Court twice. Most recently, in *Lou’s Transport, Inc. v. NLRB*, 945 F.3d 1012 (6th Cir. 2019), the Court relied on the D.C. Circuit’s ruling in *King Soopers* to squarely hold that the Board did not abuse its discretion by adopting this very remedy. *Id.* at 1025. And in *Erickson Trucking*, 929 F.3d 393 (6th Cir. 2019), the Court readily dispensed with an equally cursory challenge to this remedy. *Id.* at 398.¹¹ Accordingly, the Company has presented the Court with no basis for disturbing a remedy that is entirely consistent with the backpay order’s remedial purpose – that is, to “achieve a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination.” *Phelps Dodge v. NLRB*, 313 U.S. 177, 194 (1941).

Nor does the Company help itself by relying (Br. 54) on General Counsel Memorandum 18-02. As this Court explained in *Erickson Trucking*, 929 F.3d at 398, where the employer unsuccessfully challenged the remedy at issue here on the same ground, “merely citing” an administrative memorandum “that does not bind

¹¹ Under Sixth Circuit Rule 32.1, these holdings bind the Court absent initial en banc consideration, which the Company has not requested. *See Williams v. United States*, 875 F.3d 803, 805 (6th Cir. 2017).

the Board,” is an insufficient basis to challenge its choice of a remedy.

CONCLUSION

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

Respectfully submitted,

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National Labor Relations Board
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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHALLENGE MANUFACTURING COMPANY, LLC)
)
) Petitioner/Cross-Respondent)
) Nos. 19-2140
) v.) 19-2160
)
)
) NATIONAL LABOR RELATIONS BOARD)
)
) Respondent/Cross-Petitioner)

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), the Board certifies that its proof brief contains 11,096 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016. This document also complies with the typeface requirements of FRAP 32(a)(5)(A) and the type-style requirements of FRAP 32(a)(6).

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Dated at Washington, DC
this 31st day of January 2020

UNITED STATES COURT OF APPEALS
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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2020, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system.

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Dated at Washington, DC
this 31st day of January 2020