

CASE NOS. 19-2356 & 19-2397

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

NATIONAL LABOR RELATIONS BOARD

Petitioner/Cross-Respondent

v.

ROEMER INDUSTRIES, INC.

Respondent/Cross-Petitioner

***ON PETITION FOR REVIEW OF A DECISION AND ORDER
OF THE NATIONAL LABOR RELATIONS BOARD
CASE NOS. 08-CA-188055; 08-CA-192702; & 08-CA-204521***

**REPLY BRIEF OF RESPONDENT/CROSS-PETITIONER
ROEMER INDUSTRIES, INC.**

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INTRODUCTION

In its enforcement-seeking brief, the NLRB has strategically elected not to defend the near-endless factual conclusions of the Board's ALJ that are irreconcilable with the black-and-white evidentiary transcript.¹ What's more, the NLRB's appellate arm has elected to double down on the unannounced § 8(a)(3) discriminatory discharge theory unilaterally manufactured by the ALJ that was *not* part of Haas' unfair labor practice charge², nor argued in the General Counsel's briefing to the ALJ³ (NLRB Br.16,20,25,26).

¹ See, Co. Opening Br. at 26-36. The appellate standard of review is "... substantial evidence on the record considered as a whole" (29 U.S.C. § 160(e)), *not* ALJ statements of fact that are barren of record support, or worse yet, irreconcilable with the developed record itself.

² "[T]he Employer failed to use the just cause standard there [sic] within the collective bargaining agreement in issuing discipline and discharging an incumbent with (40) years of service, further, *the discipline coincided with the incumbent's exercising his § 7 rights in the distribution of "No Open Shop" stickers during non-working hours in the parking lot of the facility*" (GCExh.1(a); Appx. 665).

³ Over the forty years Haas worked for Roemer, he received his share of discipline. Although Haas had accumulated enough progressive discipline to be terminated as far back as nine to possibly thirteen years ago, Roemer did not terminate him. (Tr.182, R. 4, p. 027). In fact, even though O'Toole made disparaging remarks about Haas' slowness and attitude on Haas' evaluations, O'Toole never terminated him. *That is, until Haas passed out "No Open Shop" stickers in Roemer's employee parking lot.*

It is Counsel for the General Counsel's contention that Roemer suspended Haas on September 30, 2016 and then converted this

Once the Circuit understands why the ALJ - - and now the appellate branch of the Board - - has so dramatically altered Haas' predicate § 8(a)(3) theory⁴, then it can fully grasp the complete lack of record-based "knowledge" that is indispensable to every § 8(a)(3) analysis and the readily apparent answer to the Board's professed appellate befuddlement.⁵

For the reasons detailed *infra*, as well as those stated in the Company's opening brief, the NLRB's §§ 8(a)(1),(3) decision and order should be reversed.

suspension to a termination on October 11, 2016 in retaliation for Haas passing out those stickers.

(NLRB ALJ Br.4-5 at Appendix "A").

⁴ Roemer indisputably had knowledge of [Haas'] prior protected activities, including his grievances and complaints about working conditions.

Nor does Roemer contest the Board's finding (D&O 15) that Haas engaged in protected activities when he complained about working conditions and the quality of O'Toole's management, and that Roemer knew of his complaints.

(NLRB Br.16, 26).

⁵ It is also unclear why Roemer appears to attach special importance to Haas' uncertainty about whether he had distributed the "No Open Shop" stickers shortly before or after he failed to use a cart to move materials on September 14.

(NLRB Br.32).

ARGUMENT

A. The Standard of Review Principles.

If, as contended, the Board’s ALJ and the Board through its mere “we adopt” affirmation re-packaged Haas’ NLRA discharge-challenging theory, both whether that occurred and its Due Process implications draw plenary review. *NLRB v. Blake Constr.*, 633 F.2d 272, 278 (D.C. Cir. 1981). And if the Board failed to apply the rules of law announced in *Tschiggfrie Prop. Ltd.*, 368 NLRB No. 120 (2019) and *Electrolux Home Products*, 368 NLRB No. 34 (2019), those issues are similarly subject to *de novo* review. *NLRB v. Alternative Ent.* 858 F.3d 393, 400 (6th Cir. 2017) (“[W]e review the NLRB’s legal conclusions *de novo*”).

Although the NLRA affords “... substantial evidence on the record considered as a whole”⁶ fact-finding review, that assumes the neutral arbiter engaged in “honest and legitimate adjudication”. *Allentown Mack Sales & Srvc. v. NLRB*, 552 U.S. 359, 377, 118 S. Ct. 818 (1998).

On-the-record agency factfinding, however, is also governed by a provision that requires the agency action to be set aside if it is “unsupported by substantial evidence”, § 706(2)(E) - - which is the very specific requirement at issue here.

When the Board purports to be engaged in simple factfinding, unconstrained by substantive presumptions or evidentiary rules of

⁶ 29 U.S.C. § 160(e).

exclusions it is not free to prescribe what inferences from the evidence it will accept and reject, but must draw all those inferences that the evidence fairly demands. “Substantial evidence” review exists precisely to ensure that the Board achieves minimal compliance with this obligation which is the foundation for all honest and legitimate adjudication.

Id. at 377, 378-379.

Also, “[t]he ‘substantial evidence’ standard does not leave factual questions wholly to the Board; to the contrary, it requires us to take account of the evidence that undermines the Board’s conclusions”. *NLRB v. Gen. Svcs.*, 162 F.3d 437, 445 (6th Cir. 1998).

B. The ALJ Impermissibly Changed Haas’ Stated § 8(a)(3) NLRA Protected Conduct.

Haas’ pre-hearing charge alleged only that his termination was spawned by his “...distribution of ‘No Open Shop’ stickers during non-working hours in the parking lot of the facility” (GCExh.1(a); Appx. 665). After the evidentiary hearing closed, the Board’s General Counsel stuck to that discharge-challenging theory:

Over the forty years Haas worked for Roemer, he received his share of discipline. Although Haas had accumulated enough progressive discipline to be terminated as far back as nine to possibly thirteen years ago, Roemer did not terminate him. (Tr.182, R. 4, p. 027). In fact, even though O’Toole made disparaging remarks about Haas’ slowness and attitude on Haas’ evaluations, O’Toole never terminated him. That is, until Haas passed out “No Open Shop” stickers in Roemer’s employee parking lot.

It is Counsel for the General Counsel’s contention that Roemer suspended Haas on September 30, 2016 and then converted this

suspension to a termination on October 11, 2016 in retaliation for Haas passing out those stickers.

(NLRB ALJ Br.4-5).

The ALJ, understanding full-well that the General Counsel could not credibly ascribe “knowledge” to decision-maker O’Toole, invented an altogether different

NLRA shield for Haas:

Haas engaged in a number of union activities. He invoked the collective-bargaining agreement by filing grievances. One of his grievances was the underlying issue in *Roemer*, [362 NLRB 828 (2015)] *supra*, so it would be difficult for Respondent to deny knowledge of the grievances.

Some of Haas’ complaints, however, were about working conditions and O’Toole himself.

O’Toole and the management staff knew of Haas’ union sympathies and views. In August 2016, O’Toole also took great offense when Haas asked Shinkovich about any stress level in the office due to the negotiations. O’Toole made him repeat the question to him and the management staff, and then directed Bistarky to take Haas to each and every member of the office staff to ask the same question. It is this event that demonstrates both Respondent’s knowledge of Haas’ union sympathies and, as seen below, its antipathy to his position.

(Appx. 1059)

The NLRB’s appeals division has apparently decided to support the ALJ’s championing of an altogether new § 8(a)(3) legal predicate for Haas:

Specifically, the Board found that Haas engaged in union activities with Roemer's knowledge when he distributed and openly displayed bumper-stickers that protested Roemer's demand for an open shop. *And Roemer indisputably had knowledge of [Haas'] prior protected activities, including his grievances and complaints about working conditions.*

In any event, in addition to his sticker distribution, substantial evidence supports the Board's findings (D&O 15) that *Haas engaged in other protected activities* - - and that Roemer was well aware of those specific activities and Haas' union sympathies in general.

Nor does Roemer contest the Board's finding (D&O 15) that *Haas engaged in protected activities when he complained about working conditions and the quality of O'Toole's management*, and that Roemer knew of his complaints.

(NLRB Br.16,25-26) (emphasis added).

Haas' charge identified legal theory - - distribution of "No Open Shop" bumper-stickers - - and the General Counsel's advocacy of that singular theory, when juxtaposed against the ALJ's new-found legal theory poses both jurisdictional and Constitutional Due Process concerns here:

"[A] basic tenant of administrative law [is] that each party to a formal adjudication must have a full and fair opportunity to litigate the issues to be decided by the agency", *Trident Seafoods*, 101 F.3d at 116, because otherwise, "the record developed with regard to that issue will usually be inadequate to support a substantive finding in [the proponent's] favor."

Collective Concrete, Inc. v. NLRB, 786 F. Appx. 266, *268 (D.C. Cir. 2019) (quoting, *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111 (D.C. Cir. 1996)). “[A] significant issue’ not raised before the ALJ is therefore forfeited”. *Id.* This basic notice-providing law is settled:

The applicable law is clearcut. Both the Administrative Procedure Act and the Board’s own rules⁷ require that the complaint inform the Company of the violations asserted. The Board may not make findings or order remedies on violations not charged in the General Counsel’s complaint or litigated in the subsequent hearing. [citations omitted]. Even where the record contains evidence supporting a remedial order, the court will not grant enforcement in the absence of either a supporting allegation in the complaint or a meaningful opportunity to litigate the underlying issue in the hearing itself.

NLRB v. Blake Const., 663 F.2d 272, 279 (D.C. Cir. 1981) (citing, 5 U.S.C. § 554(b)(3) and 29 C.F.R. § 102.15). A NLRB-defending litigant has the right to rely on “... what the General Counsel did say on several occasions and from what, on other occasions, inexplicably, he did not say” so as to comfortably assume that the theory presented and argued is the theory in need of defense. *Id.* at 280.

Whether Haas “invoked the collective-bargaining agreement by filing grievances” (Appx. 1059); whether “[one] of his grievances was the underlying issue in *Roemer* [362 NLRB 828 (2015), *enf’d*, 688 F. Appx. 240 (6th Cir. 2017)] (Appx.

⁷ “A clear and concise description of the acts which are claimed to constitute unfair labor practices, including when known, the approximate dates and places of such acts and the names of Respondent’s agents or other representatives who committed the acts” shall comprise the Board’s complaint. 29 C.F.R. § 102.15(b).

1059); whether “Haas often ‘complained’” (Appx. 1059); whether “[s]ome of Haas’ complaints, however, were about working conditions and O’Toole himself” (Appx. 1059); and whether “Haas asked [Amanda] Shinkovich about any stress level in the office staff due to the [labor] negotiations” and was then marched in front of Roemer’s staff for doing so (Appx. 1059), were never asserted, *or even argued*, by the General Counsel as possible theories to overturn Haas’ discharge. “It is counsel for the General Counsel’s contention that Roemer suspended Haas on September 30, 2016 and then converted the suspension to a termination on October 11, 2016 in retaliation for Haas’ passing out those stickers” (NLRB ALJ Br.5), available at:

<https://apps.nlr.gov/link/document.aspx/0931d458281026c>

Both the Board and this Court have historically recognized the Due Process implications of post-trial shifting strategies: “To satisfy the requirements of due process, an administrative agent must give the party charged a clear statement of the theory on which the agency will proceed with the case”. *Lamar Advertising of Hartford*, 343 NLRB 261, 265 (2004) (quoting, *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992)).

To satisfy the requirement of due process, an administrative agency must give the party charged a clear statement of the theory on which the agency will proceed with the case. *Bendix Corp. v. FTC*, 450 F.2d 534, 542 (6th Cir. 1971). Additionally, “an agency may not change theories in midstream without giving respondents reasonable notice of the change”.

The fundamental fairness inherent in administrative due process cannot permit the [government] to plead a certain charge, insist at hearing that only that charge is being litigated, and then raise a related, but more onerous charge only after the hearing record is closed.

Yellow Freight System, Inc. v. Martin, 954 F.2d 353, 357-358 (6th Cir. 1992).

For the Board, this is one of those “what’s good for the goose ...” issues. “[T]he Board has often held that the respondent in an unfair labor practice case may not raise a significant issue for the first time in its post-hearing brief”. *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 116 (D.C. Cir. 1996) (citing, *Anthony Motor Co.*, 314 NLRB 443 (1994); *Union Elec.*, 196 NLRB 830 (1972); *Local 594 UAW v. NLRB*, 776 F.2d 1310 (6th Cir. 1985)).

Aside from the Board’s Due Process notice and opportunity-to-respond problem, NLRB ALJs should not be in the business of advancing new-found discharge-protecting theories against responding employers:

In our adversarial system of adjudication, we follow the principle of party presentation. As this Court stated in *Greenlaw v. United States*, 554 U.S. 237 (2008), “in both civil and criminal cases, in the first instance and on appeal ... we rely in the parties to frame the issue for decision and assign to courts the role of neutral arbiter of matters the parties present”. *Id.* at 243.

[A]s a general rule, our system “is designed around the premise that [parties represented by competent counsel] know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief”. (*Id.* at 386 Scalia, J., concurring in part and concurring in judgment).

In short, “[C]ourts are essentially passive instruments of government”. [citation omitted]. They “do not, or should not, sally forth each day looking for wrongs to right. [They] wait for cases to come to [them], and when [cases arise, courts] normally decide only questions presented by the parties”.

United States v. Sineneng-Smith, 590 U.S. _____, _____ 2020 WL 2200834, *3 (May 7, 2020).

Two other points need addressing. First, the NLRB’s appellate claim that Roemer did not raise its Due Process “... arguments before the Board [and therefore], the Court lacks jurisdiction to consider them”⁸ is both legally and factually inaccurate. First, Roemer expressly excepted to all of the ALJ’s new-found protected concerted activity attributable to Haas as the substitute for his claimed distribution of “No Open Shop” bumper-stickers (Appx. 1092, Exception Nos. 12-16). Those exceptions included specific references to the ALJ’s findings that Haas: “‘complained’; ‘Haas’ complaints ... about working conditions and O’Toole himself”; “Haas’ employment history is pocked with O’Toole complaining about Haas’ complaints about management (usually O’Toole) and working conditions”; and the ALJ’s conclusion: “even without the ‘No Open Shop’ stickers, Respondent

⁸ NLRB Br.17.

displayed significant animus towards Haas in August 2016, within two months of such activity” (Appx. 1092).⁹

“The crucial question in a [NLRB] § 160(e) [waiver] analysis is whether the Board ‘received adequate notice of the basis for the objection’”. *NLRB v. FedEx Freight, Inc.*, 832 F.3d 432, 437 (3rd Cir. 2016) (quoting, *Nathan Katz Realty, LLC v. NLRB*, 251 F.3d 981, 987 (D.C. Cir. 2001)). Thus, a footnoted argument that one of the Board’s cases “was decided erroneously” is sufficient to hurdle 29 U.S.C. § 160(e).¹⁰ *Id.* And the mere statement that: “the judge drew inferences from often conflicting testimony which were unfairly made or misapplied to the situation at hand” is enough to bypass § 160(e). *NLRB v. Triec, Inc.*, 946 F.2d 895, *6 (6th Cir. 1991).¹¹

⁹ In its exceptions to the Board, Roemer cited both specific line and page numbers, and the Company excepted to nearly the entirety of page 24 of the AJL’s decision (Appx. 1092).

¹⁰ No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.

29 U.S.C. § 160(e).

¹¹ In addition to its page-specific and line-specific cited exceptions (Appx.1092), Roemer lodged this broad-based exception:

The Respondent takes exception to the ALJD “Conclusions Of Law” at 27 as follows: line 15 through line 16 beginning: “5. Respondent

Moreover, reviewing circuit courts have found it ironic (and impermissible) for the NLRB to have the temerity to raise § 160(e) waiver where, as here, its ALJ flagrantly violated the Due Process clause, 29 C.F.R. § 102.15, and Administrative Procedure Act by varying the announced theory of liability. *NLRB v. Blake Const. Co.*, 663 F.2d 272, 283 (D.D. Cir. 1981) (“In short, the Board ironically says that even if it did not provide the Company with notice or an opportunity to litigate every violation found against the Company, the Board itself must have notice and an opportunity in the first instance to consider any resulting challenge to the fairness of its decision”) (*denying enforcement in relevant part*).

The NLRB’s related waiver claim that “in its opening [Circuit] brief, Roemer failed to challenge the Board’s findings that Haas engaged in additional protected activities, or that Roemer had knowledge of them”¹² is not true. Roemer spent three full pages of detailed text pointing out the ALJ’s improper unilateral amendment of Haas’ NLRA protected conduct, and bolstered that textual argument with Due Process authorities from this Court and others (Co. Opening Br.47-50).

violated Section 8(a)(3) and (1) of the Act ...” as not being supported by the facts and the record as a whole.

(Appx. 1093).

¹² NLRB Br.25.

C. The Absence of § 8(a)(3) “Knowledge”.

Why did the ALJ alter her role from neutral arbiter to theory-creator/litigator? Because if this dispute were limited to what was charged, pled, and argued - - that Haas supposedly created and distributed “No Open Shop” bumper-stickers as his legally protected conduct - - the requisite “knowledge” for a § 8(a)(3) violation could not possibly be proven up.

The General Counsel’s theory of how discharge decision-maker O’Toole purportedly knew of Haas’ “No Open Shop” bumper-sticker creation and distribution went something like this: Even though O’Toole rarely parked his arriving vehicle in the rear employee parking lot (Appx. 141,237-238); and even though O’Toole was not likely to even be at Roemer for months on end (Appx. 141); and even though the security cameras pointed at the rear parking lot would not have captured Haas’ rear windshield, and were too blurred and grainy in any event to make out any words on any poster or signage (Appx. 56,123,136-137,242; GCExh.4 at Appx. 699); and even though Haas allegedly distributed “No Open Shop” bumper-stickers on just one day (Appx. 138-140), there was a hypothetical chance “... when going between his car and the building, O’Toole would have walked right past Haas’ car with the stickers displayed in their rear side window and on the driver’s seat in plain view” (NLRB Br.22). That is a lot of speculative leaps and assumptions,

particularly where Haas himself testified that he never saw O'Toole around his vehicle (Appx. 137,239-240,242).

“To satisfy this [knowledge] element, the general Counsel had to show that decision maker(s) responsible for firing Iaci knew that he was involved in union activities”. *Sears, Roebuck & Co. v. NLRB*, 349 F.3d 493, 503 (7th Cir. 2003) (citing, *Air Surrey Corp. v. NLRB*, 601 F.2d 256 (6th Cir. 1979) (vacating the Board’s order because substantial evidence did not show that the employee’s supervisor knew of his protected activity)). The requisite *Wright Line* “knowledge” cannot be “sheer speculation”. *Carry Co. of Ill. v. NLRB*, 30 F.3d 922, 928 (7th Cir. 1994).

In addition to manufacturing a whole new series of protected, concerted activity about which O'Toole would have knowledge, the ALJ retreated to the Board’s “small plant doctrine” (Appx. 1060), but then recognized that she could not “rely upon [the] small plant doctrine alone” (Appx. 1060). That’s because that legal fiction requires the targeted decision-maker to be “... located in the immediate vicinity of the protected activity” when it occurs (Appx. 1060). Haas, and his union brothers testified uniformly that that was not the case here (Appx. 137,239-240,242).

D. Answering the Board’s Rhetorical Inquiry.

This then leads to an answer to the Board’s professed appellate bewilderment:

It is also unclear why Roemer appears to attach special importance to Haas’ uncertainty about whether he had distributed the “No Open

Shop” stickers before or after he failed to use a cart to move materials on September 14 (Br.24). Either way, the timing of Roemer’s decision to discipline him was suspiciously close to that protected activity.

(NLRB Br.32). If, as the record demonstrates (Appx. 139-140,253), Haas distributed “No Open Shop” bumper-stickers in the employee parking lot *after* he twice thumbed his nose at owner O’Toole and in multiple ways violated The Theory of Constraints, then he has no viable § 8(a)(3) claim. Production Supervisor Fraley cornered Haas immediately after his “I’m not using a cart” event, and on that same day told Haas “he knew better”; that he “wasted time”; and that: “if Joe [O’Toole] told you to do something, why would [you] not just do what [you] were supposed to do” (Appx. 553).¹³ That same September 14, 2016 day, Ms. Fraley informed O’Toole that Haas should be issued the next level of his progressive discipline (Appx. 562). O’Toole agreed (Appx. 563). That next discipline level, as it turns out, happened to be the 5-day suspension/pending discharge level (Appx. 674,693,850; GCEXh.34,p.11). If Haas’ employment fate was already determined (and it was) before he even distributed “No Open Shop” bumper-stickers, then it logically follows that his discharge could not have been causally related to that alleged protected concerted activity.

¹³ Production Supervisor Fraley’s astonishment that Haas would thumb his nose at owner O’Toole (Appx. 553) was exactly the same reaction displayed by Haas’ Union Steward Ron Merrick: “When Joe [O’Toole] tells you to do something, that is how you should do [it]” (Appx. 91-93).

E. Tschiggfrie Properties.

The Board pejoratively calls Roemer’s argument over *Tschiggfrie Properties* “nonsensical”¹⁴ The Board argues that any old “direct or circumstantial evidence”¹⁵ will do under § 8(a)(3), and any old “union animus” will also do.¹⁶ If that is the case, then counsel for Roemer is not the only one who has misread and misapplied *Tschiggfrie*:

The Board, however, has held that some kinds of circumstantial evidence are more likely than others to satisfy the General Counsel’s initial burden. In that connection, the Board stated:

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, 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. *Tschiggfrie Properties, Ltd.*, supra at 8.

Thus, the Board has held that the General Counsel does not invariably sustain his burden by producing - - in addition to evidence of the employee’s protected activity and employer’s knowledge thereof - - any evidence of the employer’s animus or hostility toward union

¹⁴ NLRB Br.45.

¹⁵ NLRB Br.19.

¹⁶ NLRB Br.45.

protected activity. The evidence must instead be sufficient to establish that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee.

Kenny/Obayashi, 2020 WL 1244630 (NLRB ALJ Randazzo, March 12, 2020). In other words: "Circumstantial evidence of any animus or hostility toward union or protected concerted activity is not enough to satisfy the [*Wright Line*] burden". *Id.* (quoting, *Tschiggfrie Properties*).

Haas' claimed distribution of "No Open Shop" bumper-stickers was quite unremarkable. Everyone in the bargaining unit was displaying "Fair Contract Now" and "No Open Shop" propaganda (Appx. 121,134,137,229,240,265). Contrary to the Board's appellate brief (NLRB Br.39-40), the Board has historically held this unexplained absence of discipline to similarly situated coworkers is compelling. *Music Express East*, 340 NLRB 1063, 1064 (2003) ("Indeed, apart from the allegation regarding Mercho, there are no allegations or findings that the Respondent took any adverse action against those employees who - - actively or otherwise - - supported the Union").

F. Haas' Deplorable Record is NLRA Armor?

The NLRB ruled that "Respondent tolerated for [sic] Haas' alleged poor performance and complaining for years", and thus that Roemer "is ultimately exhausted by an employee's bad behavior" was "pretextual" (Appx. 1170,1171).

This “being bad is good” logic¹⁷ was, however, allegedly rejected by this Court, albeit in the probationary employee setting:

If the company’s motives had been pure, the ALJ thought, the women would have been fired during their initial training period and not a week or two after the training period had been completed.

Consider the message that the ALJ’s ruling would communicate to employers, should we let the ruling stand. “If you hire a union activist”, the ruling teaches, “and if her job performance flags at any point while she is being trained or while she is still on probation, fire her immediately. Do not wait to see if her performance improves, and do not give her a second chance. Fire her at once - - for if you do not, even if her performance deteriorates or fails to get better, you may never be able to fire her at all”. We all have difficulty reconciling such a message with the aims of the nation’s labor laws.

NLRB v. Cook Family Foods, 47 F.3d 809, 817 (6th Cir. 1995). The NLRB continues to extol Haas’ documented poor performance as if it were a NLRA medal of honor by blending it into its *Wright Line* timing argument: “It is a venerable principle of labor law that an employer’s sudden loss of patience with previously tolerated conduct in the aftermath of union activity indicates unlawful motivation” (NLRB Br.33). That Haas reached the 5-day suspension/pending discharge level is not the least bit suspect:

Where, as here, an employee’s discharge purportedly stems from a series of disciplinary incidents or warnings that predate the employee’s union activities, the timing of that discharge rarely if ever constitutes substantial evidence of the employer’s antiunion animus. See *Id.*; see also *NLRB v. Newman-Green, Inc.*, 401 F.2d 1 (7th Cir. 1968) (holding

¹⁷ The NLRB presses that position on appeal (NLRB Br.34-35).

that no substantive evidence supported by the Board's finding of anti-union animus where he employee who had been repeatedly disciplined for coming to work under the influence of alcohol, was fired for drunkenness); 1 The Developing Labor Law 297 (Hardin et al. eds., 4th ed.2001) (reasoning that "the giving of warnings for specific conduct may suggest that a subsequent discharge based upon similar conduct is not discriminatorily motivated").

Sears Roebuck & Co. v. NLRB, 349 F.3d 492, 404 (7th Cir. 2003). Haas admitted that his prior string of disciplines in his progressive disciplinary termination (verbal; written; 1 day suspension; 3 day suspension) had nothing to do with NLRA protected conduct (Appx. 223-226).¹⁸

The Board's championing of *Conley v. NLRB*, 520 F.3d 629 (6th Cir. 2008) (NLRB Br.33-34) is inapposite. First, *Conley* did not involve a discharge that took place under, and pursuant to, progressive discipline steps. *Id.* at 633. Second, while the *Conley* employer terminated the § 8(a)(3) discriminatee because he went to the hospital after his wife suffered a stroke instead of coming to work (*Id.* at 633), the company "... failed to discipline [the employee] for any of the alleged [pre-discharge] workplace infractions at the time they were committed." *Id.* at 635. Thus,

¹⁸ The NLRB, inaccurately, attempts to label Haas' termination a seditious act of "insubordination" (NLRB Br.37-38) that did not follow that misconduct's predictable path of discipline. That's not accurate! Haas' 5-day suspension/pending termination written receipt checked the box "Quality of Work", and purposely left blank the separate box for insubordination (Appx. 701). Even the final "pending termination" form sent to Haas used the progressive discipline jargon (Appx. 817), not immediately terminable language.

what the *Conley* employer claimed to be a deplorable employee was not proven by disciplinary write-ups, and there were coworkers with “less-than-stellar attendance records”, “drivers [who] missed an inordinate number of workloads”, and “drivers involved in accidents resulting in greater vehicle repair costs” who remained employed at the *Conley* employer too boot. *Id.* None of *Conley*’s facts exist here. Haas had 42 documented written disciplines and the General Counsel did not introduce evidence of a single Roemer employee who was in the same universe as Haas as far as his earned and documented disciplines.

G. The NLRB’s Other Missteps And Misstatements.

The Board’s appellate brief posits other errors, misstatements, and legal missteps.

- The repeated suggestion that an employer’s “open shop” negotiating proposal is so sinister so as to forever carry the stench of NLRA unlawfulness¹⁹ is not a correct statement of settled NLRA law. *Smyth Mfg.*, 247 NLRB 1139, 1167 (1980). In fact, several states (27 in total) have passed laws compelling “open shops” in union settings. <https://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx>.
- The Board’s implication that it was nefarious for Roemer to refuse to arbitrate Haas’ discharge-challenging grievance (NLRB Br.9) is again an unsupportable legal position. *Teamsters Local No. 211 v. Pittsburgh Post-Gazette*, 2020 WL 1487692 (3rd Cir. March 25, 2020) (a union grievance/arbitration procedure ends on the contract’s expiration).

¹⁹ NLRB Br.2-3,4,10,12.

- The beaten-to-death claim²⁰ that Haas' seniority somehow entitled him to extra, special consideration under the *Wright Line* analysis is, once again, an incorrect statement of NLRA jurisprudence:

To be sure the discharge of Huff and Jones may strike the outsider as disproportionate to their offense. *Each had worked for the company for a long time; Jones had received one prior warning but that was some years before her discharge.* “Absent a showing of anti-union motivation”, however, “an employer may discharge an employee for a good reason, a bad reason, or no reason at all without running afoul of the labor laws.

MECO Corp. v. NLRB, 986 F.2d 1434, 1438 (7th Cir. 1993) (emphasis added).

- The Board's representation that Haas had previously reached the 5-day/pending termination level only to be met with discipline short of discharge (NLRB Br.6) is misleading. Haas' June 2003 5-day suspension was *not* issued by virtue of progressive discipline but rather was an immediate, one-shot discipline owing to Haas' decision to manufacture an entire order of scrap (Appx. 957). Indeed, that suspension itself states that the “next level” of discipline that Haas should expect to receive is a 5-day/pending discharge discipline consistent with progressive discipline under the labor agreement (*Id.*). The July 2003 discipline of Haas *was* a 5-day suspension/pending termination, but it was amicably resolved through the intervention of Haas' union, which is exactly what the contractual prohibition against peremptory discharges is designed to accomplish (Appx. 953-954). More to the point, nearly all of Haas' 42-separately issued disciplines expressly stated that the next-proceeding discipline would, in fact, follow the progressive discipline path (Appx. 942, 943, 948, 949, 950, 951, 952, 958, 959, 960, 963, 964, 975). Disciplines issued to Haas' coworkers also memorialized that

²⁰ NLRB Br.3,6,15,30.

their next-succeeding discipline would follow the progressive path (Appx. 1004,1005,1006,1007,1008).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

Pursuant to F.R.A.P. R. 32(a)(7), the undersigned certifies that this Brief complies with the type-volume limitations of F.R.A.P. 32(a)(7)(B).

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s/Keith L. Pryatel

Dated 5/19/2019

CERTIFICATE OF SERVICE

I certify that the foregoing Reply Brief of Respondent/Cross-Petitioner Roemer Industries, Inc. was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record:

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