Case Nos. 19-2033 and 19-2168

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LOCAL 600, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner,

and

LLOYD STONER,

Intervenor.

On Petition for Review and Cross-Application for Enforcement of a Decision and Order of the National Labor Relations Board

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INTERVENOR'S PETITION FOR REHEARING

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STATEMENT

Intervenor Lloyd Stoner ("Stoner") petitions the Court for rehearing pursuant to Federal Rule of Appellate Procedure 40. The Court's April 13, 2020 Opinion ("Opinion") contains errors of law the Court should reconsider. Stoner contends that Section III.A of the Opinion, which grants a portion of Local 600, United Automobile, Aerospace and Agricultural Implement Workers of America's ("Local 600") petition for review and denies a portion of the National Labor Relations Board's ("Board") cross-application for enforcement of the Board's August 28, 2019 Order, contains material inconsistencies and errors of law requiring the Court's attention. Specifically, the Opinion contains the following errors:

1. The Court's analysis and conclusion in Section III.A are contrary to law. In particular, Section III.A is inconsistent with the Supreme Court's and this Court's precedent, is unsupported by the cases cited therein, and fails to give proper deference to the Board's Order.

2. The Court erred in Section III.A by prematurely granting Local 600's petition in part and denying enforcement of the Board's Order in part, without a determination of whether Local 600's conduct violated Section 8(b)(1)(A).

The Court should rehear the case to correct these errors.

ARGUMENT

I. The Court's Conclusion in Section III.A Is Contrary to Law.

The Court's conclusion that the Board exceeded the reach of the Act by finding a Section 8(b)(1)(A)[1] violation irrespective of Local 600's intent or motivation is erroneous for three reasons. 29 U.S.C. § 158(b)(1)(A). First, the Court's conclusion that *every* Section 8(b)(1)(A) violation requires intent is unsupported by the cases it cites. Second, that conclusion is inconsistent with the Supreme Court's and this Court's precedent. Third, the Court failed to apply the appropriate standard of review and improperly substituted its judgment for that of the Board in its application of Board precedent.

A. The Court's conclusion in Section III.A is unsupported by cited precedent.

The Court found that the "Board's ruling that inadvertent error can constitute an unfair labor practice under Section 8(b)(1)(A) exceed[s] the reach of the Act and has no reasonable basis in law." Opinion at 9 (internal citations and quotation marks omitted). This conclusion is based, in large part, on its contention that: "This court has repeatedly held that knowledge of an employee's protected activities and an

[1] For purposes of this petition, the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, will be referred to as "Act." All references to specific provisions, such as Section 8(b)(1)(A), will refer to sections of the Act.

action motivated by that knowledge are essential elements of a Section 8(b)(1)(A) claim or the analogous Section 8(a)(1) claim against an employer." *Id.* at 8 (footnote omitted); *see* 29 U.S.C. § 158(a)(1). While the first half of the statement is accurate—this Court has held numerous times that motivation is a material element of certain Section 8(b)(1)(A) and Section 8(a)(1) violations—it simply does not follow that conduct can *never* violate Section 8(b)(1)(A) or Section 8(a)(1) without a finding of animus, intent, or motivation.

None of the three cases the Court cites in the Opinion supports its conclusion that animus or intent is a required element of every unfair labor practice under Section 8(b)(1)(A). Opinion at 8–9. The only Section 8(b)(1)(A) case cited is *NLRB v. IBEW, Local 429*, 514 F.3d 646, 649 (6th Cir. 2008), which is a discrimination case. Discrimination is a specific kind of Section 8(b)(1)(A) violation, in which the individual must allege (and therefore prove) the union's conduct was unlawfully motivated by his or her protected activity. An intent requirement in these types of cases does not support a global requirement that intent be established in *all* Section 8(b)(1)(A) cases. Further, the Court specifically distinguished these types of cases here, noting, "[d]iscrimination is not at issue." Opinion at 9, n.4.

Neither Section 8(a)(1) case the Court cites, *Meijer, Inc. v. NLRB*, 463 F.3d 534, 542 (6th Cir. 2006) or *Jim Causley Pontiac v. NLRB*, 675 F.2d 125, 127 (6th Cir. 1982), supports a conclusion that a Section 8(a)(1) violation always requires the

employer's conduct be motivated by the protected activity. In fact, *Meijer, Inc.* specifically notes that employer motivation was not an issue in *United Parcel Service v. NLRB*, 41 F.3d 1068 (6th Cir. 1994), and recognizes certain employer conduct presumptively violates Section 8(a)(1). *Meijer, Inc.*, 463 F.3d at 542.

The Court cites *Jim Causley Pontiac* for the proposition that "[t]he Board cannot predicate liability on a negligence standard since the purpose of the Act is to protect concerted activity not punish employer ignorance." Opinion at 9 (quoting *Jim Causley Pontiac*, 675 F.2d at 127). The negligence the Court referred to in *Jim Causley Pontiac* was not negligent conduct. Instead, it referred to the Board's finding that the employer was "negligent" in not *knowing* the employee was engaged in protected conduct. *Jim Causley Pontiac*, 675 F.2d at 127. The Court outlined the important considerations in determining a violation, which do not include intent: "[it] is the employer's knowledge of an employee's protected activity and his subsequent discharge . . . which violates the Act." *Id.* at 126 (quoting *Jim Causley Pontiac v. NLRB*, 620 F.2d 122, 125 (6th Cir. 1980)). Here, of course, there is no dispute that the Union had knowledge that Stoner was engaging in protected activity. *See* Opinion at 3.

None of these cases supports the proposition that the Board must *always* prove the employee's protected activity was a motivating factor in a union's conduct to establish a Section 8(b)(1)(A) violation. *Meijer, Inc.* and *Jim Causley Pontiac*

support the proposition that the Board could be required to show a respondent had knowledge that an employee was engaging in a protected activity in order to create an unfair labor practice out of otherwise lawful conduct. But knowledge of the protected activity is distinct from a respondent's animus or intent based on its knowledge of the protected activity.

In this case, the Court found that Local 600 had knowledge of Stoner's protected activity in attempting to resign his membership and revoke his dues authorization. *See* Opinion at 3 (Local 600 official received Stoner's letter and drafted a notification letter). Its failure to immediately accept Stoner's checkoff revocation and its continued acceptance of dues after having knowledge of Stoner's Section 7 activity violates the Act under this standard. *See* 29 U.S.C. § 157.

B. The Court's conclusion in Section III.A is inconsistent with the Supreme Court's and this Court's precedent.

The Opinion states: "The Board's ruling that inadvertent conduct can amount to 'restraint' or 'coercion' under Section 8(b)(1)(A) is also inconsistent with this court's interpretations of the Act." Opinion at 8. This statement is simply incorrect. The Supreme Court and this Court do not always require proof of intentional conduct to establish a violation of Section 8(b)(1)(A) or Section 8(a)(1). In cases like this one, where intent is not an element of the alleged unlawful activity, the Supreme Court and this Court apply employee-focused standards, which do not require a finding of intent, and under which inadvertent or mistaken conduct can violate the Act.

The Supreme Court has specifically stated Section (8)(b)(1)(A) does not always require a finding of union intent. In *International Ladies' Garment Workers' Union*, 366 U.S. 731 (1961), the Supreme Court found that a minority union's acceptance of exclusive representative status violated Section 8(b)(1)(A), regardless of the union's good faith belief that it had properly achieved majority status. In that case, the union argued that its mistaken, but good faith belief that it had majority status was a "complete defense" to its conduct. *Id.* at 738. In finding a violation of the Act, including a violation of Section 8(b)(1)(A), the Supreme Court stated:

> We find nothing in the statutory language prescribing scienter as an element of the unfair labor practices are involved. The act made unlawful by § 8(a)(2) is employer support of a minority union. Here that support is an accomplished fact. *More need not be shown, for, even if mistakenly, the employees' rights have been invaded*. It follows that prohibited conduct cannot be excused by a showing of good faith.

Id. at 739 (footnote omitted) (emphasis added); *see also Pattern Makers' League v. NLRB*, 473 U.S. 95 (1985) (union constitutional restrictions on resignation violate Section 8(b)(1)(A)); *NLRB v. Indus. Union of Marine & Shipbuilding Workers of Am., Local 22*, 391 U.S. 418 (1968) (holding a union violated Section 8(b)(1)(A) by requiring an employee to exhaust internal union procedures before filing a charge with the Board).

In analogous Section 8(a)(1) cases, the Supreme Court has held: "Defeat of [Section 7] rights by employer action does not necessarily depend on the existence of an anti-union bias." *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 22–23 (1964). In

Burnup & Sims, the Supreme Court recognized the singular problem with requiring respondent intent: protected activity would "acquire[] a precarious status" if an employee's rights could be lawfully infringed by good faith conduct. *Id.* at 23; *see also Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 795, 805 (1945) (no-solicitation rule violated Section 8(a)(1), despite an explicit finding that the rule was uniformly applied to all solicitors and not discriminatorily applied toward protected activity); *Radio Officers' Union of Commercial Telegraphers Union v. NLRB*, 347 U.S. 17, 48–49 (1954) (reaffirming *Republic Aviation Corp.*).

Similarly, this Court has found violations of Section 8(b)(1)(A) and Section 8(a)(1) without an independent finding of union intent.[2] For example, in *Armco, Inc.*

[2] Other circuits have also found Section 8(b)(1)(A) violations without a finding of union intent. *See Tamosiunas v. NLRB*, 892 F.3d 422, 429 (D.C. Cir. 2018) ("Section 8's protective cloak sweeps . . . broadly, proscribing any action by an employer or union that 'has a reasonable tendency' to coerce or restrain employees in the exercise of their Section 7 rights."); *NLRB v. Atlanta Printing Specialties & Paper Prods. Union 527*, 523 F.2d 783, 784–85 (5th Cir. 1975) (citations omitted) ("If a union causes the employer to deduct and remit dues after valid revocation by the employee of his dues authorization, it violates Sections 8(b)(1)(A) and (2)."); *see, e.g.*, *Local 58, IBEW v. NLRB*, 888 F.3d 1313, 1317 (D.C. Cir. 2018) (citations omitted) (affirming a decision to "prohibit categorically union policies that 'delay or otherwise impede' a member's right to resign or revoke" regardless of the Union's justification for its policy); *Quick v. NLRB*, 245 F.3d 231, 249 (3d Cir. 2001) (union violated Section 8(b)(1)(A) by attempting to collect dues after the employee resigned); *NLRB v. Local 54, Hotel Emps. & Rest. Emps. Int'l Union*, 887 F.2d 28, 31, 34 (3d Cir. 1989) (union violated Section 8(b)(1)(A) by rejecting employees' resignation letters because the union constitution did not provide for "financial core" membership); *Peninsula Shipbuilders' Ass'n v. NLRB*, 663 F.2d 488, 493 (4th Cir. 1981) (in-person checkoff revocation submission policy violated Sections 8(a)(1) and 8(b)(1)(A)).

v. NLRB, 832 F.2d 357, 364–65 (6th Cir. 1987), the Court affirmed the Board's determination that requiring employees to sign dues checkoff authorizations as a condition of employment violated Sections 8(a)(1) and 8(b)(1)(A). In its analysis, the Court did not rely on the respondents' intent behind such a practice. *See id; see also, e.g.*, *UAW v. NLRB*, 865 F.2d 791, 796–97 (6th Cir. 1989) (union restrictions on resignation violated Section 8(b)(1)(A)); *Local 620, Allied Indus. Workers of Am. v. NLRB*, 375 F.2d 707, 710 (6th Cir. 1967) (finding an accretion of employees into the bargaining unit infringed on the employees' right to choose their representative in violation of Section 8(b)(1)(A) without a finding that the union's conduct was motivated by any protected activity); *Pattern Makers' Ass'n v. NLRB*, 622 F.2d 267, 268 (6th Cir. 1980) (union violated Section 8(b)(1)(A) by granting union executive committee members a referral preference benefit with no showing that the motivating factor behind such a benefit was to harm or discriminate against employees engaged in protected activity).

With respect to Section 8(a)(1), this Court explicitly held intent is not a required element of a violation:

> [I]t has been held that the absence of an anti-union animus does not of itself afford a defense to an employer's interference with protected activity, and that it is the tendency of an employer's conduct to interfere with the rights of his employees protected by Section 8(a)(1), rather than his motives, that is controlling . . . .

Nat'l Cash Register Co. v. NLRB, 466 F.2d 945, 962 (6th Cir. 1972) (internal citations and quotation marks omitted). In *NLRB v. Jay Metals, Inc.*, 12 F.3d 213, 1992 WL 202523, at *5 (6th Cir. 1993), a panel of this Court rejected the premise of this Court's decision: "Respondent mistakenly argues that General Counsel must prove anti-union animus to establish a violation of section 8(a)(1)." To establish such a violation, "an improper motive need not be proven unless the employer demonstrates an important business justification for the interference." *Id.* (citations omitted).[3]

In cases where, as here, the allegations do not involve discrimination or retaliation, this Court routinely applies an employee-focused standard: "The proper inquiry is whether the evidence 'demonstrate[s] that, *taken from the point of view of the*

[3] Even in situations where intent is relevant to an allegation, the Supreme Court and this Court have not always required a specific finding of intent. Instead, courts apply the "well recognized rule in labor relations law that 'a man is held to intend the foreseeable consequences of his conduct.'" *NLRB v. Tenn. Packers, Inc.*, 339 F.2d 203, 204–05 (6th Cir. 1964) (quoting *Radio Officers' Union of Commercial Telegraphers Union*, 347 U.S. at 45); *see NLRB v. IBEW, Local 575*, 773 F.2d 746, 749–50 (6th Cir. 1985) (citations omitted) (holding specific evidence of intent not required because the party is presumed to intend "natural, foreseeable consequences of its acts"); *Local Union No. 948, IBEW v. NLRB*, 697 F.2d 113, 116–17 (6th Cir. 1982) (same); *Dura Corp. v. NLRB*, 380 F.2d 970, 972 (6th Cir. 1967) (citations omitted) (finding a profit sharing plan "by its own language, was a per se violation of the Act in that the natural consequence of Dura's action was the discouragement of union membership."); *see also Fred Meyer Stores, Inc. v. NLRB*, 865 F.3d 630, 640 (D.C. Cir. 2017) (Rodgers Brown, J.) (citations and internal quotations omitted) ("[T]he NLRA, like all federal statutes, should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.").

employees, the reasonable tendency of the employer's conduct or statements is coercive in effect.'" *Beverly Health & Rehab. Servs., Inc. v. NLRB*, 297 F.3d 468, 476 (6th Cir. 2002) (emphasis added) (quoting *ITT Auto. v. NLRB*, 188 F.3d 375, 384 (1999)); *see also United Parcel Serv.*, 41 F.3d at 1071-72 (quotation omitted) ("The test for determining whether an employer has violated section 8(a)(1) is whether the employer's conduct tends to be coercive or tends to interfere with the employees' exercise of their rights."); *see, e.g.*, *Dayton Newspapers, Inc. v. NLRB*, 402 F.3d 651, 659 (6th Cir. 2005) (applying standard); *NLRB v. Main St. Terrace Care Ctr.*, 218 F.3d 531, 537 (6th Cir. 2000) (same); *Uforma/Shelby Bus. Forms, Inc. v. NLRB*, 111 F.3d 1284, 1294 (6th Cir. 1997) (same); *NLRB v. Okun Bros. Shoe Store, Inc.*, 825 F.2d 102, 105 (6th Cir. 1987) (same).[4] Such an inquiry does not require intent on the part of the employer. Rather, the focus is properly on the effect of the conduct on employee rights.

In this Court's most analogous case, *Mohat v. NLRB*, 1 Fed. App'x 258 (6th Cir. 2001), this Court found a Section 8(a)(1) violation without any finding of employer intent. In that case, an employee revoked his dues checkoff authorization, but the employer continued to deduct dues from his wages. The Court simply held that the

[4] Other courts apply this standard to Section 8(b)(1)(A) cases. *See Tamosiunas*, 892 F.3d at 429 (applying a "reasonable tendency to coerce" standard to determine whether union conduct violated the Act); *NLRB v. SEIU, Local 254*, 535 F.2d 1335, 1337–38 (1st Cir. 1976) (same).

employer "did not have [the employee's] voluntary consent to continue the dues-checkoff assignment for membership dues once he notified the company of . . . his intent to revoke the authorization. By enforcing a void dues-checkoff authorization, [the employer] committed an unfair labor practice in violation of § 8[(a)](1) . . . ." *Id.* at 262. The violation was the effect on the employee's right to revoke his checkoff. Such a finding was not based on the employer's motivation or animus against employee rights when it rejected the checkoff revocation. In other words, once an employer or union has knowledge of a timely revocation, its excuse for not complying simply does not matter.

Thus, the Court's conclusion that inadvertent conduct can *never* violate Section 8(b)(1)(A) is incorrect as a matter of law and this Court's precedent. The Court should grant this Petition in order to correct these inconsistencies and apply the proper Section 8(b)(1)(A) standard. In particular, the Court should address the distinction between the standards applied in retaliation and discrimination cases, where union or employer motivation is at issue and is often an element of the claim, and other types of Sections 8(b)(1)(A) and 8(a)(1) violations, where, as here, motivation is not an element.

In a rehearing, the Court should apply an employee-focused standard and determine whether Local 600's conduct was reasonably coercive or tended to interfere with Section 7 rights from Stoner's point of view. This case clearly satisfies

the standard. Stoner exercised his Section 7 rights to resign his union membership and revoke his checkoff authorization, yet dues continued to be deducted from his wages. *See* Opinion at 3. This restrained his right to refrain from financially supporting Local 600. From Stoner's point of view, his Section 7 rights were violated by the delay, and Local 600's motivations are irrelevant to its actual infringement of Stoner's Section 7 rights.

C. Section III.A fails to accord the proper deference to the Board's interpretation of its own precedent.

The Court also declined full enforcement of the Board's Order because it disagreed with the Board's interpretation of Board precedent. The Court erred in its analysis by failing to apply the appropriate, deferential standard of review.

The Court concluded the Board's decision in *Teamsters Local 385 (Walt Disney)*, 366 NLRB No. 96 (2018), did not eliminate an intent requirement for a Section 8(b)(1)(A) violation. Opinion at 6–8. This conclusion is not based on a determination that the Board's interpretation of *Walt Disney* is unreasonable or contrary to law. Instead, the Opinion contains a *de novo* review of *Walt Disney* and two other cited cases. On the basis of that review, the Court disagreed with the Board's interpretation. However, the Court is "not free to substitute [its] judgment for that of the Board simply because [it] would have made a different decision had [it] heard the case *de novo* . . . ." *NLRB v. Local 1131, UAW*, 777 F.2d 1131, 1136 (6th Cir. 1985)

(quoting *NLRB v. Pipefitters Union Local No. 120*, 719 F.2d 178, 181 (6th Cir. 1983)).

The Court should reconsider its analysis of the Board's own precedent and apply the required deferential standard. When the proper standard is applied, it is evident that, though the Court may not agree with the Board's interpretation of *Walt Disney*, the Board's interpretation is not unreasonable. Therefore, the Court should defer to the Board's judgment in this regard and enforce its Order.

Based on the foregoing, Section III.A of the Court's Opinion is contrary to applicable law and this Court's precedent. The Court should grant this Petition to address these issues.

II. The Opinion Does Not Apply the Law to the Facts in Section III.A.

Even if the Court decides not to address the issues outlined above in Section A, the Court should grant this Petition to address its failure to resolve the ultimate issue in Section III.A, to wit: did Local 600's conduct violate Section 8(b)(1)(A)? Without an ultimate resolution of this question, the Court's decision to grant Local 600's petition in part and deny enforcement of the Board's Order in part, was premature and in error. Once the Court determined the Board applied the incorrect standard, it should have either applied the correct standard to the facts of the case or remanded the case to the Board for application of the correct standard.

There is a gulf between the Court's decision in Section III.A and its findings of fact. The Court partially denied enforcement of the Board's Order because it found intent to be a required element of a Section 8(b)(1)(A) violation. However, in Section III.B of its Opinion, the Court affirmed the Board's conclusion that Local 600's conduct *was* intentional. *See* Opinion at 10 (affirming the Board's decision that "the Union intentionally ignored Stoner's resignation and revocation requests"); *id.* at 11 ("Together [the Union's comments] create an impression of ill will or intent toward Stoner for exercising his Section 7 rights, and therefore, support the Board's finding that the Union's conduct toward Stoner was in bad faith."). Taken together, the Court's conclusions are incompatible. The Court denied enforcement of the Board's Order on the premise that Local 600 claimed its conduct was inadvertent and therefore not a violation of Stoner's rights, but the Court then affirmed the Board's finding that its conduct was intentional and a violation of the duty of fair representation. Applying the Court's standard to the facts in Section III.A would resolve this apparent inconsistency.

Once the Court determined the Board had applied an incorrect standard, the Court should have applied the standard to the facts or remanded the case to allow the Board to apply the facts to the law. *See, e.g.*, *Browning-Ferris Indus. v. NLRB*, 911 F.3d 1195, 1223 (D.C. Cir. 2018) (overturning aspects of the Board's joint employer test and remanding "for further proceedings consistent with this opinion."); *Stewart v.*

NLRB, 851 F.3d 21 (D.C. Cir. 2017) (remand to Board after Court determined the Board applied the incorrect standard to determine whether a dues deduction card was revocable during a contract hiatus). The Court should grant this Petition to address and resolve the issue of whether Local 600's conduct violated Section 8(b)(1)(A).

CONCLUSION

For the foregoing reasons, Intervenor Lloyd Stoner respectfully requests that the Court grant his Petition for Rehearing.

Respectfully submitted this 28th day of May, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure ("FRAP") 32(g)(1), I hereby certify that the foregoing brief complies with the type limitations, typeface, and type-style requirements provided in FRAP 32(a)(5)–(6) and type-volume limitation provided in FRAP 40. The foregoing brief was prepared using Microsoft Word and contains 3,721 words in 14-point proportionately-spaced Times New Roman font.

s/ Alyssa K. Hazelwood
Alyssa K. Hazelwood

Counsel for Intervenor

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Intervenor's Petition for Rehearing to be served this 28th day of May, 2020 on all counsel of record via the Court's CM/ECF filing system.

s/ Alyssa K. Hazelwood
Alyssa K. Hazelwood

Counsel for Intervenor