

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

CHALLENGE MANUFACTURING COMPANY, LLC)	
)	
Petitioner/Cross-Respondent)	
)	Nos. 19-2140
v.)	19-2160
)	
)	Board Case No.
NATIONAL LABOR RELATIONS BOARD)	07-CA-199352
)	
Respondent/Cross-Petitioner)	

**MOTION OF THE NATIONAL LABOR RELATIONS BOARD FOR
PUBLICATION OF AN UNPUBLISHED OPINION**

To the Honorable, the Judges of the United States
Court of Appeals for the Sixth Circuit:

On June 9, 2020, following full briefing, a panel of this Court (Chief Judge Cole and Circuit Judges McKeague and Kethledge) issued an unpublished opinion in the above-captioned case, upholding the Board’s Decision and enforcing its Order issued against Challenge Manufacturing Company, LLC (“the Company”). The Board respectfully requests that the Court publish the opinion, which warrants publication under Sixth Circuit IOP 32.1(b)(1))(C) and (F) because it “[d]iscusses a legal and factual issue of continuing public interest,” and “[a]ddresses a published lower court or agency decision.” In support of its motion, the Board shows:

1. Agreeing with the Board, the deciding panel upheld the Board's finding that the Company violated Section 8(a)(1) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 158(a)(1), by threatening employee Michael Kiliszewski with unspecified reprisals for engaging in protected activity and creating the impression that such activity was under surveillance. The panel further upheld the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by discharging Kiliszewski because of his support for the Union. The Board's findings were published in *Challenge Manufacturing Company, LLC*, 368 NLRB No. 35 (2019).

2. The Court's opinion meets the criteria for publication under Sixth Cir. IOP 32.1(b)(1)(C) because, in upholding the Board's finding that Kiliszewski's discharge was unlawful, the Court comprehensively addressed the burden-shifting framework set forth in *Wright Line*, 251 NLRB 1083 (1980), and approved by the Supreme Court in *Transportation Management Corporation*, 462 U.S. 393 (1983). A published judicial opinion on that subject is of considerable interest to the public because the Court regularly reviews Board cases applying the *Wright Line* framework.

That is particularly true here for two reasons. First, the Court rejected the argument that the Board applied the wrong legal standard by not explicitly requiring the Board's General Counsel to establish, as an additional element, a

causal connection between the Company’s anti-union animus and its discharge of Kiliszewski. In doing so, the Court became the first appellate court to address and rightly reject an assertion that the Board had altered its test by adopting such an additional requirement when it recently clarified the *Wright Line* framework in *Tschiggfrie Properties, LTD*, 368 NLRB 120 (2019). *See* slip op. at 9-10.

Accordingly, in future cases, the Court’s discussion of that issue will provide valuable guidance to parties litigating similar claims and will afford the Court precedent to rely on. *See* 6th Cir. R. 32.1(b) (“Published panel opinions are binding on later panels. A published opinion is overruled only by the court en banc.”)

Second, the Court’s opinion provides a succinct explanation of the standard for reviewing a Board determination that an employer failed to meet its defensive burden of showing under *Wright Line* that it would have taken the same adverse action even in the absence of an unlawful motive. Specifically, the Court, reaffirming its precedent, explained that it reviews the Board’s determination by examining whether it is reasonable in view of the evidence as whole, not whether it is supported by substantial evidence. The Court also explained that a party must show that the Board’s version is unreasonable. Slip op. at 12. Applying that standard, the Court held that “it was reasonable for the Board to have found that

[the Company] did not carry its burden of rebutting an inference of anti-union motive.” Slip op. at 14.

In sum, given the Court’s thorough discussion of those *Wright Line* issues, which are likely to recur in future cases, a published opinion will serve as a useful guide to employers and employees alike in understanding the application of the *Wright Line* framework.

3. Publication is also warranted under Sixth Circuit IOP 32.1(b)(1)(F), because the Court’s opinion addresses a published agency decision interpreting its statute and using its power to make decisions regarding the policy choices that Congress entrusted to the agency. Because the Court’s opinion addresses issues important to the Board’s administration of a key provision of the Act—that is, the Board’s primary test for discriminatory actions prohibited by Section 8(a)(3) of the Act—it is of substantial institutional value to the Board. Publication will also allow the Board to conserve resources in defending against the same or similar arguments when seeking enforcement of future Board orders in this Court.

4. Finally, the issues before the panel were fully briefed by counsel on both sides and involved a thoroughly developed administrative record. *Cf.* Alex Kozinski, *In Opposition to Proposed Federal Rule of Appellate Procedure 32.1*, 51 *Federal Lawyer* 36, 38 (June 2004) (noting that unpublished disposition is appropriate where the issues are “badly briefed” or have a “poorly developed

record[]”). The panel’s resulting opinion provides a complete recitation of the relevant facts and gives a clear and well-articulated ruling on the questions presented. That being so, the opinion would serve as useful precedent for this Court in future cases.

WHEREFORE, the Board respectfully requests that the Court grant its motion to publish its opinion in this case.

Respectfully submitted,

/s/ David Habenstreit

David Habenstreit
Assistant General Counsel
National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570
(202) 273-2960

Dated at Washington, D.C.
this 11th day of June 2020

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 27(d)(2), the Board certifies that its motion contains 926 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 365. This document also complies with the typeface requirements of FRAP 32(a)(5)(A) and the type-style requirements of FRAP 32(a)(6).

/s/David Habenstreit
David Habenstreit
Assistant General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
this 11th day of June 2020

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CERTIFICATE OF SERVICE

I hereby certify that on June 11, 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.

/s/David Habenstreit
David Habenstreit
Assistant General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
this 11th day of June 2020