

Nos. 09-1148 & 09-1255

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ALTON H. PIESTER, 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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**BRIEF FOR
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STATEMENT OF JURISDICTION

This case is before the Court on a petition filed by Alton H. Piester, LLC (“the Company”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Board Order issued against the Company. The Board’s Decision and Order issued on September 30, 2008, and is

reported at 353 NLRB No. 33. (A. 234-46.)¹ In its decision, the Board found that the Company violated Section 8(a)(1) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 158(a)(1)) (“the Act”), by impliedly threatening employees with discharge if they engaged in protected concerted activity and by discharging one employee for such activity. (A. 234.)

The Board had subject matter jurisdiction under Section 10(a) of the Act (29 U.S.C. § 160(a)), which empowers the Board to prevent unfair labor practices affecting commerce. The Board submits that this Court has jurisdiction under Section 10(e) of the Act (29 U.S.C. § 160(e)), because the unfair labor practice occurred in Newberry, South Carolina, and because the Board’s Order is a final order issued by a properly-constituted, two-member Board quorum within the meaning of Section 3(b) of the Act (29 U.S.C. § 153(b)).² (*See* A. 234 n.2.)

¹ Record references are to the joint appendix (“A.”) filed with the Company’s opening brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” references are to the Company’s opening brief.

² In 2003, the Board sought an opinion from the United States Department of Justice’s Office of Legal Counsel (“the OLC”) concerning the Board’s authority to issue decisions when only two of its five seats were filled, if the two remaining members constitute a quorum of a three-member group within the meaning of Section 3(b) of the Act. The OLC concluded that the Board had the authority to issue decisions under those circumstances. *See Quorum Requirements*, Department of Justice, OLC, 2003 WL 24166831 (O.L.C., Mar. 4, 2003). The Seventh Circuit and the First Circuit have agreed, upholding the authority of the two-member Board to issue decisions. *New Process Steel, L.P. v. NLRB*, ___ F.3d

The Company filed its petition for review on February 5, 2009. The Board filed its cross-application for enforcement on March 9, 2009. Both of these filings were timely, as the Act places no time limit on the institution of proceedings to review or enforce Board orders.

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by telling employees who complained about a new fuel surcharge that if they did not like it, they could "clean out their truck and move to another job."

2. Whether substantial evidence supports the Board's findings that the Company violated Section 8(a)(1) of the Act by subsequently making a similar "clean out your truck" statement to employee Darrell Chapman, in response to Chapman's complaints about the fuel surcharge, and by discharging Chapman for complaining about the fuel surcharge.

_____, 2009 WL 1162556 (7th Cir. May 1, 2009), *petition for cert. filed*, ____ U.S.L.W. ____ (U.S. May 27, 2009) (No. 08-1457); *Northeastern Land Services, Ltd. v. NLRB*, 560 F.3d 36, 40-42 (1st Cir. 2009), *reh'g denied*, No. 08-1878 (May 20, 2009). The D.C. Circuit has disagreed. *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, ____ F.3d ____, 2009 WL 1162574 (D.C. Cir. May 1, 2009), *petition for reh'g filed*, Nos. 08-1162, 08-1214 (May 27, 2009). The issue has been raised and will be briefed before this Court in *Narricot Industries, L.P. v. NLRB* (4th Cir. Nos. 09-1164 and 09-1280).

STATEMENT OF THE CASE

Acting on a charge filed by employee Darrell Chapman (A. 203-04), the Board's General Counsel issued a complaint (A. 205-09) alleging that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by impliedly threatening employees with discharge if they engaged in protected concerted activity, and by discharging Chapman for engaging in such activity. (A. 206-07.) Following a hearing, an administrative law judge issued a bench decision, certification, and recommended order dismissing the Section 8(a)(1) allegations. (A. 241-46.) The General Counsel filed timely exceptions. (A. 234.) After considering those exceptions and the Company's answering brief, the Board issued a decision reversing the judge and finding that the Company violated Section 8(a)(1) of the Act as alleged in the complaint. (A. 234-40.) The facts supporting the Board's decision, as well as the Board's Conclusions and Order, are summarized below.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACTS

A. Background; the Company Introduces a Fuel Surcharge That Reduces Its Drivers' Net Pay; the Drivers Complain About the Surcharge at a Company Meeting; Company Owner Piester Responds that the Complaining Drivers Could "Clean Out Their Truck and Move to Another Job"

The Company is a trucking operation that transports soil, lime, sand, and other products for over 200 customers in the southeastern part of the United States. (A. 234, 243; 16-17.) The Company uses its own trucks to perform this work, as well as a few trucks owned by individual contractors known as "owner-operators." (A. 234, 243; 17.) As of 2007, the Company employed about nine drivers to operate Company-owned vehicles. (A. 243; 17.) The Company paid each of these drivers a percentage of the revenue earned from his transportation of goods for the Company. (A. 244; 17-18.)

On January 13, 2007, the Company held a meeting of its drivers to inform them of a new fuel surcharge. (A. 234; 19.) At the meeting, Company Owner Alton Piester explained that the new fuel surcharge would reduce the revenue figures used to calculate the drivers' pay. (A. 234, 244; 18-24.) This, in turn, would reduce the drivers' net pay. (A. 234, 244; 18-24, 47.)

When the drivers learned that the fuel surcharge would effectively mean a reduction in their pay, they vigorously objected to the surcharge. (A. 234, 244; A.

25, 28-29, 58-59, 69-70.) Piester responded that his mind was made up and that the surcharge would be instituted whether the drivers liked it or not. (A. 234; 25, 58-59, 70.) Piester further stated that those who did not like the surcharge could “clean out their truck and move to another job.” (A. 234; 25.)

Within the Company, “clean out your truck” is the instruction given to an employee when he is discharged. (A. 234; 38, 128, 176, 197.) The instruction signifies that the employee will no longer be operating his company truck and that he must therefore remove all personal items from that truck. (A. 234; 128.)

B. The Drivers Continue to Complain About the Fuel Surcharge after the Meeting; Driver Darrell Chapman Takes His Complaints to the Company’s Office and Is Again Told that He “Should Clean Out [His] Truck” If He Does Not Like the Surcharge; When Chapman Challenges this Statement, He is Discharged

The drivers continued to complain about the fuel surcharge after the January 13 meeting, and well after the fuel surcharge went into effect in late January. (A. 234; 71, 79-80, 129, 136-38, 172-73.) Initially, the drivers voiced their continuing concerns directly to Piester. (A. 234; 129, 136-38.) After January, however, the drivers most frequently and regularly complained about the surcharge amongst themselves. (A. 234; 71, 79-80.) Several drivers also expressed their ongoing concerns and questions about the surcharge — particularly their concerns and questions surrounding the calculation of the surcharge — to the Company’s two secretaries, Sherry Marntin and Renee Derrick. (A. 234 n.4; 62, 165, 172-73, 184-

85, 189-91.) These concerns eventually led Marntin and Derrick to include information about the fuel surcharge on the weekly pay worksheets (A. 158-59) that were transmitted to the drivers along with their paychecks. (A. 234 n.6; 27-28, 165.)

In addition, truck owner-operator Adger McAlister took up the drivers' cause with Piester on several occasions between January and August 2007.³ (A. 234 & n.5; 83, 138.) On these occasions, McAlister informed Piester that the drivers continued to complain about the unfairness of the fuel surcharge. (A. 234; 82-84.) Piester responded by refusing to discuss the drivers' complaints with McAlister, stating that they were none of McAlister's business. (A. 234 n.5; 82-84, 138.)

On April 2, 2007, driver Darrell Chapman took his complaints about the fuel surcharge to the Company's office, where Piester, Derrick, and Marntin were all working. (A. 234; 166, 180.) Chapman first approached Marntin and Derrick and conveyed, as he had before (A. 189-91), that he did not understand how the fuel surcharge was being computed, and that he thought the Company was deducting too much from his pay. (A. 234; 30, 166, 180, 189-91.) Chapman loudly asked for

³ As an "owner-operator," McAlister owned his own truck and worked for the Company under terms that were different from those of the drivers. (A. 78-79.) Nonetheless, like the drivers, McAlister was subject to a company fuel surcharge during the relevant time period. (A. 81.)

the specific fuel surcharge amounts to be shown on his paycheck stubs. (A. 234; 166, 180.) In response, Derrick attempted to explain to Chapman how the fuel surcharge was calculated and why the surcharge-related deductions could not be shown on his paycheck stub. (A. 30, 180-81, 189-91.) However, Chapman still did not understand. (A. 181.) Derrick accordingly referred Chapman to Piester. (A. 234; 30, 126-27, 166, 180.)

Chapman proceeded to Piester's nearby office, and Derrick followed. (A. 234; 167, 181.) Once there, Chapman reiterated his complaints about the fuel surcharge to Piester. (A. 234; 30, 126-27, 167, 181.) Derrick interjected and told Chapman: "If you don't like it, maybe you should clean out your truck." (A. 234; 197.) Chapman loudly protested that Derrick did not have the authority to discharge him. (A. 234; 37-38, 194.) As Chapman said this, he got up from the chair in which he had been sitting and took a step toward Derrick. (A. 234; 181, 194-95.) Derrick, at this point, walked around Chapman and left Piester's office. (A. 196.)

While Derrick and Chapman were involved in the above exchange, Piester looked on and remained silent about Derrick's authority to tell Chapman to "clean out [his] truck." (A. 236 n.18, 242; 181, 196.) However, after Chapman stepped toward Derrick and directly challenged her authority, Piester himself told Chapman

to go and clean out his truck.⁴ (A. 234-35; 128, 176, 181, 194-95.) Chapman complied with this order, understanding that he (Chapman) had been discharged. (A. 234-35; 38, 73.) Prior to April 2, Chapman had never been disciplined at work. (A. 235 n.8; 43, 135-36.)

On April 25, 2007, Piester filed a form with the South Carolina Employment Security Commission, providing information regarding Chapman's discharge.⁵ (A. 235; 41-42, 216.) In the section of the form calling for a "specific reason" for the discharge, Piester cited the January 13 meeting, at which the fuel surcharge was introduced, and Chapman's "disorderly conduct" in the Company's office on April 2. (A. 235; 41-42, 216.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board found that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by impliedly threatening employees with discharge for engaging in protected concerted activity on January 13 and April 2, 2007, and by discharging employee Chapman for engaging in such activity on April 2. (A. 236, 239.)

⁴ The Board inadvertently stated, in its discussion of the facts (A. 234), that "Piester told Derrick to clean out his truck." As the rest of the Board's decision makes clear, Piester gave this instruction to *Chapman*, not Derrick. (A. 236; 128, 176, 181, 194-95.)

⁵ Piester had never given Chapman any specific reason for his discharge. (A. 41, 142, 197-98.)

The Board's Order requires the Company to cease and desist from the unfair labor practices found, and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their statutory rights. (A. 240.) Affirmatively, the Board's Order requires the Company to: offer Chapman full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position; make Chapman whole for lost earnings and other benefits; remove from the Company's files any reference to the unlawful discharge of Chapman, and notify Chapman that this has been done and that the discharge will not be used against him in any way; and post a remedial notice. (*Id.*)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's findings that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by twice impliedly threatening its employees with discharge for engaging in protected concerted activities, and by thereafter discharging employee Chapman for such activities. Under Section 7 of the Act (29 U.S.C. § 157), employees have a right to engage in "concerted activities" for "mutual aid or protection." Section 8(a)(1) of the Act gives effect to this right by making it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7."

As the Board reasonably found, the Company first impliedly threatened its employees with discharge at a January 13, 2007 meeting held to announce a new fuel surcharge to employees. When the employees complained about the surcharge and its negative impact on employee pay, Company Owner Piester told the employees that they could “clean out their truck[s] and move to another job,” if they did not like the surcharge. The record evidence fully supports the Board’s finding that the expression “clean out your truck” is used to signify that an employee is discharged. Accordingly, the Board reasonably found, Piester’s statement effectively threatened employees with discharge for exercising their protected right to voice employment-related complaints.

The Board further properly found that even if Piester’s January 13 statement merely invited employees to leave if they did not like the surcharge, such an invitation would still be unlawful. Under well-established law, it is unlawfully coercive for an employer to suggest that employees should leave or quit rather than continue protected concerted activities.

In arguing that Piester’s January 13 statement was lawful, the Company misapprehends the legal standard applied in assessing the coerciveness of employer conduct: the conduct is unlawful if it has a “reasonable tendency” to coerce. It accordingly does not matter that Piester did not intend to coerce the

gathered employees, that his statement might be susceptible to an innocent interpretation, or that the listening employees were not, in fact, coerced.

Ample evidence also supports the Board's finding that, on April 2, 2007, a company secretary made a second unlawful "clean out your truck" statement in response to employee Chapman's protected complaints about the fuel surcharge. The Board reasonably found, given the evidence of ongoing protected concerted activity surrounding the fuel surcharge, that Chapman's individual complaints were a continuation of the employees' earlier concerted complaints and their concerted efforts to understand and monitor how the fuel surcharge was being applied to their pay. Accordingly, Derrick's statement suggesting that Chapman should "clean out his truck," rather than continue with his complaints and questions, violated Section 8(a)(1) of the Act.

Finally, substantial evidence also supports the Board's finding that the Company violated Section 8(a)(1) of the Act by discharging Chapman just moments after impliedly threatening him with discharge. Applying the test of employer motivation set forth in *Wright Line*, 251 NLRB 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 445 U.S. 989 (1982), the Board reasonably found that Chapman was discharged for his protected activity, and not for some other lawful reason. The Company's claim that Chapman's conduct was so egregious that it caused him to lose the protection of the Act is not properly

before the Court. In any event, the Board properly found that Chapman did nothing to forfeit the Act's protections.

STANDARD OF REVIEW

The scope of this Court's inquiry in reviewing a Board order is quite limited. *Medeco Sec. Locks, Inc. v. NLRB*, 142 F.3d 733, 742 (4th Cir. 1998). The Court will enforce a Board order where "the Board's interpretations of the [Act] . . . are rational and consistent with the Act," and where "the Board's factual findings . . . are supported by substantial evidence considered on the record as a whole." *Id.* (internal citations omitted).

"Substantial evidence," for purposes of this Court's review of factual findings, consists of "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); accord *Consolidated Diesel Co. v. NLRB*, 263 F.3d 345, 351 (4th Cir. 2001). The Court must canvass "the whole record" to determine whether such substantial evidence exists. *Universal Camera Corp.*, 340 U.S. at 488. In that process, however, the Court may not displace the Board's choice between two fairly conflicting views of the evidence. *NLRB v. Grand Canyon Mining Co.*, 116 F.3d 1039, 1044 (4th Cir. 1997). Indeed, as this Court has stated, "[i]f the findings of the Board have substantial support in the record as a whole, our inquiry ends and [the Board's] order must be enforced even though we might have reached a

different result had we heard the evidence in the first instance.” *NLRB v. Daniel Constr. Co.*, 731 F.2d 191, 193 (4th Cir. 1984).

The substantial evidence standard is not altered where, as here, “the Board drew different inferences and legal conclusions from the evidence than did the ALJ.” *American Thread Co. v. NLRB*, 631 F.2d 316, 320 (4th Cir. 1980). It is, after all, “[t]he Board, not the ALJ, [that] is ultimately vested with the responsibility for determining whether an unfair labor practice has been committed.” *Id. See also NLRB v. Frigid Storage, Inc.*, 934 F.2d 506, 509 (4th Cir. 1991).

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY TELLING EMPLOYEES WHO COMPLAINED ABOUT A NEW FUEL SURCHARGE THAT IF THEY DID NOT LIKE IT, THEY COULD “CLEAN OUT THEIR TRUCK[S]”

A. Applicable Principles

Section 7 of the Act (29 U.S.C. § 157) guarantees to employees not only the “right to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively,” but also the right to “engage in other concerted activities for the purpose of . . . mutual aid or protection” Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) implements these guarantees by making it an unfair labor

practice for an employer to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7.”

Where employer conduct affects activity protected by Section 7 of the Act, “the well-settled test for a [Section] 8(a)(1) violation is whether, under all the circumstances, the employer’s conduct may reasonably tend to coerce or intimidate employees.” *Medeco Sec. Locks*, 142 F.3d at 745 (internal quotation marks omitted); *accord NLRB v. Air Contact Transp. Inc.*, 403 F.3d 206, 212 (4th Cir. 2005). Under this objective test, “[i]t does not matter whether the particular conduct by the employer was actually coercive,”⁶ or whether the employer had an intention to coerce.⁷ Rather, the salient inquiry is “whether the conduct had a *reasonable tendency* in the totality of the circumstances to [coerce or] intimidate.” *Medeco Sec. Locks*, 142 F.3d at 745 (emphasis added).

As this Court has acknowledged, assessments regarding the tendency to coerce are “essentially for the specialized experience of the [Board].” *Grand Canyon Mining Co.*, 116 F.3d at 1044 (citing *Daniel Constr. Co. v. NLRB*, 341 F.2d 805, 811 (4th Cir. 1965)). The Court accordingly grants “considerable

⁶ *NLRB v. Transpersonnel, Inc.*, 349 F.3d 175, 180 (4th Cir. 2003); *accord Consolidated Diesel Co.*, 263 F.3d at 352.

⁷ *Consolidated Diesel Co.*, 263 F.3d at 352; *Medeco Sec. Locks*, 142 F.3d at 747-48.

deference” to the Board’s determinations on such matters. *Medeco Sec. Locks*, 142 F.3d at 745; *accord Consolidated Diesel Co.*, 263 F.3d at 352.

Acting within its acknowledged expertise, the Board has consistently found that it is unlawfully coercive for an employer to suggest to employees who are engaged in protected Section 7 activity that those employees can or should leave their employment if they want to continue their protected activity.⁸ An employer’s suggestion to leave or quit, in such circumstances, is coercive because it reasonably tends to imply that protected activity is incompatible with continued employment, and that employees may accordingly be discharged for their protected activity. *Rogers Electric, Inc.*, 346 NLRB 508, 515 (2006); *accord Air Contact*

⁸ See, e.g., *Datwyler Rubber & Plastics, Inc.*, 350 NLRB 669 n.2 (2007) (employer violated Section 8(a)(1) by telling employee who relayed employee complaints about working conditions that if she did not like the situation, she could go “flip burgers”); *Conley Trucking*, 349 NLRB 308, 319 (2007) (employer violated Section 8(a)(1) by telling employees that if they “wanted to work for a Union trucking company . . . he preferred that they go work somewhere else rather than unionize his facility”), *enforced*, 520 F.3d 629, 638-39 (6th Cir. 2008); *Rogers Electric, Inc.*, 346 NLRB 508, 515 (2006) (employer violated Section 8(a)(1) by telling employees, following their concerted complaints, that those who were discontented with the way the business was run “can just exit”); *Stoody Co.*, 312 NLRB 1175, 1181 (1993) (employer violated Section 8(a)(1) by telling employees who complained about working conditions that if they were going to be “so nitpicking, maybe this wasn’t the place” for them); *House Calls, Inc.*, 304 NLRB 311, 313 (1991) (employer violated Section 8(a)(1) by telling employees who protested their late paychecks that they could quit if they did not like it); *The Korea News, Inc.*, 297 NLRB 537, 540 (1990) (employer violated Section 8(a)(1) by asking employees who had signed petition requesting improved working conditions why they did not quit if they had complaints), *enforced*, 916 F.2d 708 (2d Cir. 1990).

Transp. Inc., 403 F.3d at 213 (affirming Board finding that employer violated Section 8(a)(1) by telling employee who had made protected complaints about pay and benefits that he should “survey other companies” because “[i]t is possible that there is something better or more attractive”).

B. The Company Violated Section 8(a)(1) of the Act by Telling Employees That If They Did Not Like the Surcharge They Could “Clean Out Their Truck[s]”

Substantial evidence supports the Board’s finding that, on January 13, 2007, Company Owner Piester violated Section 8(a)(1) of the Act by telling a group of employees who objected to the Company’s new fuel surcharge that they could “clean out their truck[s]” if they did not like it. Although the Company argues that Piester’s statement was not unlawfully coercive, this argument is entirely without merit.

As the Company concedes (Br. 8, 16), the employees at the January 13 meeting were engaged in protected concerted activity under the Act: they were complaining about Piester’s decision to institute a fuel surcharge that would negatively affect employee pay. *See Joanna Cotton Mills Co. v. NLRB*, 176 F.2d 749, 752 (4th Cir. 1949) (employees’ protest against employer hiring decision that would affect their earnings protected). As the Company further concedes (Br. 16), Piester ultimately responded to the employees’ complaints by stating that “if they didn’t like it or it didn’t work for them, they could clean out their truck.” (A. 25.)

The Board properly found (A. 234) that, within the Company, “clean out your truck” is the instruction given to an employee to signify that he is discharged. Accordingly, when Piester said that those who “didn’t like” the fuel surcharge “could clean out their truck[s],” he effectively conveyed that those who continued to complain about the surcharge could be discharged. (A. 235-36.) The Board properly found (A. 235-36) that Piester’s statement was thus an implied threat of discharge, in violation of Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)). *See, e.g., Datwyler Rubber & Plastics, Inc.*, 350 NLRB 669, 669 n.2 (2007) (finding that employer unlawfully threatened employee who had engaged in protected concerted activity by telling her that if she did not like the situation, she could go “flip burgers”).

The Board further properly found (A. 236) that even if Piester’s statement did not threaten discharge, but simply invited employees to leave if they were dissatisfied with the fuel surcharge, such a statement would still be unlawful. As indicated above, under well-established Board precedent, it is unlawfully coercive for an employer to invite employees to leave or quit rather than continue a protected protest of working conditions. *See* p. 16 n.8, above. Thus, Piester’s statement was coercive, under Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)), even if it stopped short of threatening employees with discharge, and only

suggested that those who were intent on continuing their protected activity could leave the Company.

In its brief to this Court, the Company contends (Br. 16-18) that the Board's findings in regard to Piester's statement should be overturned because Piester did not mean to threaten anyone, nor did the employees feel threatened. As this Court has recognized, however, such considerations are irrelevant. It does not matter what the employer's motive was in undertaking a course of allegedly coercive conduct. *Consolidated Diesel Co.*, 263 F.3d at 352; *Medeco Sec. Locks*, 142 F.3d at 747-48. "It [also] does not matter whether the particular conduct by the employer was actually coercive." *Transpersonnel, Inc.*, 349 F.3d at 180; *accord Consolidated Diesel Co.*, 263 F.3d at 352. Rather, the sole relevant inquiry is "whether, under all the circumstances, the employer's conduct may reasonably tend to coerce or intimidate employees" in their Section 7 activity. *Medeco Sec. Locks*, 142 F.3d at 745 (internal quotation marks omitted).⁹

⁹ Although this Court considers an employer's "substantial and legitimate" business justifications in assessing the coerciveness of employer conduct under Section 8(a)(1) of the Act, no such business justifications have been offered for Piester's statement in this case. *Medeco Sec. Locks*, 142 F.3d at 745 (observing that the Court's Section 8(a)(1) analysis "does not end" with a finding of coercive conduct, as the Court "must balance the employee's protected right against any substantial and legitimate business justification that the employer may give for the infringement").

In complete disregard of this standard, the Company attempts (Br. 17) to distinguish Piester's January 13 statement from the unlawful statements at issue in the cases cited by the Board. The Company argues (Br. 17) that Piester's statement admits of an innocent interpretation — Piester just wanted to convey that he “had made up his mind” about the surcharge — whereas, in the cited cases, “[t]he only interpretation of the employer's remarks was as a threat.” However, the Company cites no case to support the proposition that, for an employer statement to be unlawful, the only reasonable interpretation of that statement must be a coercive one.

As shown above (p. 15), the appropriate inquiry here is not whether Piester's statement is *only* susceptible to a coercive interpretation; rather, the appropriate inquiry is whether Piester's statement, in all the circumstances, “had a reasonable tendency” to “coerce or intimidate” employees in their choice to engage in a protected protest of the Company's new fuel surcharge. *Medeco Sec. Locks*, 142 F.3d at 745. Under that standard, the Board's finding that Piester's “clean out [your] truck” statement was coercive is reasonable, and the Board's finding of a Section 8(a)(1) violation based on that statement is, thus, entitled to enforcement.

Finally, the Company claims (Br. 14-15) that Chapman committed perjury at the underlying unfair-labor-practice hearing, thereby tainting the Board's finding with respect to this violation, as well as the violations discussed below. This

argument is entirely frivolous. The Board did not rely on Chapman’s testimony concerning the events at issue. Rather, the Board relied on the credited testimony of the Company’s own witnesses, Company Owner Piester and secretaries Marntin and Derrick, as well as other witnesses whose credibility the Company does not challenge, to establish the violations it found. (A. 234 & nn.4-6, 237, 238; 25, 142, 144, 180-81, 193, 195, 197.) *See ABF Freight Sys., Inc. v. NLRB*, 510 U.S. 317, 323-25 (1994) (upholding Board’s authority to provide a remedy for unfair labor practice, notwithstanding fact that victim of unfair labor practice gave false testimony at unfair-labor-practice hearing).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY MAKING A SIMILAR “CLEAN OUT YOUR TRUCK” STATEMENT TO EMPLOYEE CHAPMAN, IN RESPONSE TO CHAPMAN’S COMPLAINTS ABOUT THE FUEL SURCHARGE, AND BY DISCHARGING CHAPMAN FOR COMPLAINING ABOUT THE FUEL SURCHARGE

A. The Board Reasonably Found That Chapman Was Engaged in Protected Activity When He Complained About the Fuel Surcharge to Company Officials on April 2, 2007

1. An individual’s conduct is statutorily protected where it is “concerted” in nature and has as its purpose the “mutual aid or protection” of employees

As indicated above, Section 7 of the Act (29 U.S.C. § 157) gives employees the right to engage in concerted activities “not only for self-organization but also ‘for the purpose of . . . mutual aid or protection’” *Citizens Inv. Servs. Corp. v.*

NLRB, 430 F.3d 1195, 1197 (D.C. Cir. 2005) (quoting 29 U.S.C. § 157). Thus, concerted employee activity may be protected by the Act even if unconnected with union activity or collective bargaining. *Medeco Sec. Locks*, 142 F.3d at 745-46. And, indeed, “[t]he broad protection of Section 7 applies with particular force to unorganized employees who, because they have no designated bargaining representative, must ‘speak for themselves as best they [can].’” *Citizens Inv. Servs.*, 430 F.3d at 1198 (quoting *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962)).

Applying Section 7 of the Act (29 U.S.C. § 157), the Supreme Court has indicated that “mutual aid or protection” should be liberally construed to protect concerted activities directed at a broad range of employee concerns. *See Eastex, Inc. v. NLRB*, 437 U.S. 556, 563-68 and 567 n.17 (1978). These include employee complaints to their employer regarding their wages and other compensation. *See Citizens Inv. Servs. Corp.*, 430 F.3d at 1199, 1203 (employee “engaged in protected concerted activity when he persistently complained about the structure of [the employer’s new] compensation plan and the manner in which compensation was actually being paid under that plan,” specifically “the accuracy of the [employer’s] calculation of commission payments”). *See also Air Contact Transp. Inc.*, 403 F.3d at 208 (employee’s questions about pay and benefits protected);

Joanna Cotton Mills Co., 176 F.2d at 752 (employees’ protest against employer hiring decision that would affect their earnings protected).

The term “concerted activities,” as used in Section 7 of the Act (29 U.S.C. § 157), embraces “the activities of employees who have joined together in order to achieve common goals.” *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 830 (1984). An individual employee’s action qualifies as “concerted” if it bears some relationship to actual or planned group activity. *See Myers Industries*, 281 NLRB 882, 887 (1986), *enforced sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987).

As the Third Circuit has explained:

It is not questioned that a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees.

Mushroom Transp. Co. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1964). *Accord Krispy Kreme Doughnut Corp. v. NLRB*, 635 F.2d 304, 308 (4th Cir. 1980) (stating that *Mushroom Transp.* and similar cases set down “the requirements . . . for a finding of ‘concerted activity’ in the instance of a complaint by a single employee”); *Myers Industries*, 281 NLRB at 887 (adopting the analyses of concerted activity set forth in *Krispy Kreme* and *Mushroom Transp.*).

Thus, an individual employee engages in concerted activity when he “brings a group complaint to the attention of management . . . even though he was not

designated or authorized to be a spokesman by the group.” *Citizens Inv. Servs. Corp.*, 430 F.3d at 1198-99 (D.C. Cir. 2005) (citations omitted). Similarly, an individual engages in concerted activity when he brings to the attention of management complaints that arose from, or are a continuation of, earlier group activity. See *Mike Yurosek & Son, Inc.*, 310 NLRB 831, 831 (1993) (individual employee protests were a “logical outgrowth” of earlier group protests), *enforced*, 53 F.3d 261 (9th Cir. 1995); *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1038-39 (1992) (same); *JMC Transport*, 272 NLRB 545, 546 n.2 (1984) (employee complaint about pay discrepancy in his paycheck was continuation of earlier employee protests over employer’s change in the way wage payments were calculated), *enforced*, 776 F.2d 612 (6th Cir. 1985).

2. Chapman’s conduct on April 2 constituted protected concerted activity for mutual aid or protection

Substantial evidence supports the Board’s finding (A. 237) that Chapman’s conduct on April 2, 2007 was protected by Section 7 of the Act (29 U.S.C. § 157) because it was “a continuation of the earlier concerted employee complaints” — “on January 13, and thereafter” — about the fuel surcharge. Although the Company attempts (Br. 20-24) to cast Chapman as a lone voice on April 2, and to characterize his complaints as separate, and different in kind, from the employees’ earlier concerted complaints, these attempts fail. Chapman’s questions regarding the calculation of the surcharge, as well as his request to see how the surcharge

was affecting his pay, were well within the category of protected concerns expressed by employees before April 2. The Board's finding that Chapman was engaged in protected concerted activity on April 2 is, thus, entirely reasonable.

As discussed above (p. 17), the Company concedes (Br. 16) that the employees engaged in protected concerted activity on January 13, when they initially voiced their complaints about the fuel surcharge. After January 13, as the Board found (A. 234, 237), the drivers continued to "concertedly voice[]" (A. 237) their complaints about the surcharge, not only to Company Owner Piester, but also to Company Secretaries Marntin and Derrick. The drivers were so persistent in their questioning of Marntin and Derrick, in particular, that the two decided to begin printing information about the fuel surcharge on the drivers' weekly pay worksheets, so that the drivers could understand exactly how the surcharge affected their pay. (A. 234 n.6, 238; 27-28, 62, 165, 172-73, 184-85, 189-91.) The drivers nonetheless continued to discuss, and complain about, the surcharge amongst themselves. (A. 234, 237; 71, 79-80.)

It was on the heels of this ongoing concerted activity that Chapman went to the Company's office on April 2 and once again complained about the surcharge to Piester, Marntin, and Derrick. (A. 237; 166, 180.) As the Board noted, the fact that Chapman was specifically complaining "about the surcharge" is evident from the testimony (A. 30, 126-27, 166-67, 180-81, 189-91) provided by Company

Officials Piester, Marntin, and Derrick at the unfair-labor-practice hearing.

Considering the totality of the evidence, the Board reasonably concluded (A. 237-38) that Chapman's conduct on April 2 was the continuation of the employees' prior protected concerted complaints about the fuel surcharge.

And, in fact, even "the [Company] understood that the April 2 conduct was an extension of the earlier protected activity." (A. 238.) The Company thus met Chapman's complaints on April 2 with essentially the same rejoinder used to meet employee complaints at the January 13 meeting: "If you don't like [the surcharge], maybe you should clean out your truck." (A. 238; 197.) Moreover, in explaining Chapman's April 2 conduct and resulting discharge¹⁰ to the South Carolina Employment Security Commission, the Company referred to the January 13 meeting about the fuel surcharge. Thus, the Company itself linked Chapman's April 2 conduct to the concerted activity that began at the January 13 meeting. (A. 238; A. 216)

In addition, substantial evidence supports the Board's finding (A. 237-38) that the substance of Chapman's April 2 complaint "was not unique to [him]" (A. 237), but was related to shared employee concerns over the effect of the fuel surcharge on employee pay. The complaining drivers were clearly monitoring their paychecks and asking questions of Derrick and Marntin about how the

¹⁰ Chapman's discharge is discussed at pp. 30-35, below.

surcharge was calculated. *See Citizens Inv. Servs. Corp.*, 430 F.3d at 1199, 1203 (finding questions regarding calculation of pay protected). As an outgrowth of this activity, the complaining drivers requested and received information about the calculation of the surcharge on their weekly pay worksheets. Although Chapman requested something slightly different — that is, notation of the surcharge amounts on his paycheck stub — in the course of his complaints on April 2, the Board reasonably found that this slight difference does not “exclude Chapman’s request from the scope of [the earlier] protected concerted activity.” (A. 238.) Chapman’s request for a notation on his paycheck stub, like the employees’ earlier requests for similar notations on their weekly pay worksheets, grew out of a desire, shared among the complaining employees, to monitor and understand how the surcharge was affecting employee pay and, more specifically, how surcharge-related reductions in employee pay were being calculated. In these circumstances, the Company’s contention (Br. 20) that Chapman raised “[a]t best . . . a personal concern” on April 2 is meritless.¹¹

¹¹ Moreover, although the Company emphasizes (Br. 22) that Chapman was motivated by concern over “his personal paycheck” on April 2, Chapman’s motivations are irrelevant to the analysis of protected activity undertaken by this Court. *See TNT Logistics of North America, Inc. v. NLRB*, 413 F.3d 402, 407 (4th Cir. 2005). Rather, what matters, under this Court’s precedent, is Chapman’s *purpose*, which was clearly to address a pay issue of common and continuing interest to all of the drivers. *See id.*

Similarly lacking in merit is the Company's contention (Br. 19) that the Sixth Circuit's decision in *Manimark Corp. v. NLRB*, 7 F.3d 547 (6th Cir. 1993), "is particularly instructive and useful in evaluating the facts in this case." In *Manimark*, the court found that an individual employee's conduct was not "concerted," under Section 7 of the Act, where the employee was simply relaying to management grievances that employees had discussed amongst themselves. In so finding, the court stressed that "while there was evidence that drivers were irritated by working conditions, there is nothing to indicate that they had decided to act upon those annoyances." *Manimark*, 7 F.3d at 551. In the present case, by contrast, there is ample evidence that the drivers had decided to act, and indeed repeatedly had acted, before Chapman raised the drivers' commonly held complaints with management on April 2. Given this critical factual distinction between the situation in *Manimark* and the situation here, the *Manimark* decision cannot control the assessment of Chapman's April 2 conduct.

B. The Board Reasonably Found That the Company Violated Section 8(a)(1) of the Act by Impliedly Threatening Chapman with Discharge for Engaging in Protected Activity on April 2

Substantial evidence also supports the Board's finding (A. 236) that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by telling Chapman on April 2 that if he did not like the fuel surcharge, "maybe [he] should clean out [his] truck." As the Board found (A. 234, 236), Company Secretary

Derrick made this statement to Chapman, in direct response to Chapman's efforts to press his protected complaints about the fuel surcharge with Company Owner Piester. Like Piester's earlier unlawful "clean out your truck" statement, discussed at pp. ___ above, Derrick's April 2 statement was unquestionably coercive: it had a reasonable tendency to convey that protected complaints and inquiries about the fuel surcharge could lead to discharge (that is, a request to "clean out your truck"). *See Medeco Sec. Locks*, 142 F.3d at 745.

The coerciveness of Derrick's statement is all the more apparent from the subsequent course of events on April 2. *See id.* (reasonable tendency of employer conduct is judged by "totality of the circumstances"). Just moments after Derrick suggested that "maybe [Chapman] should clean out [his] truck," Chapman was in fact asked to "clean out [his] truck." At the time of his discharge, Chapman was in the process of contesting Derrick's authority to discharge him for complaining about the fuel surcharge — a protected activity, as discussed above. Chapman's eventual fate underscores that, as the Board found (A. 235-36), the Company's "clean out your truck" statements were not innocent or idle in nature. Rather, the statements were implied threats of discharge that the Company was only too ready to carry out. The Board thus acted entirely reasonably in concluding (A. 236) that Derrick's April 2 "clean out your truck" statement, like Piester's similar statement in January, violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)).

C. The Board Reasonably Found that the Company Violated Section 8(a)(1) of the Act by Discharging Chapman for His Protected Activity on April 2

1. The Board applies the burden-shifting analysis set forth in *Wright Line* to resolve whether a discharge is unlawfully motivated

An employer violates Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) “by discharging an employee for engaging in concerted activities protected by the Act.” *Citizens Inv. Servs. Corp.*, 430 F.3d at 1197. Where there is a question as to an employer’s motivation for undertaking a given discharge — that is, whether the employer discharged the employee for protected activity or for some other reason — the Board applies the burden-shifting test of motivation set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 445 U.S. 989 (1982). *See NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 400-03 (1983) (approving *Wright Line* as test of unlawful motivation); *Air Contact Transp. Inc.*, 403 F.3d at 215 (observing that *Wright Line* “applies in situations where the employer’s motive is at issue”).

Under *Wright Line*, the General Counsel first bears the burden of showing that “protected conduct was a motivating factor in the employer’s decision” to discharge the employee. *Wright Line*, 251 NLRB at 1089; *accord Air Contact Transp. Inc.*, 403 F.3d at 215. Of course, direct evidence constituting an “outright confession of unlawful discrimination . . . eliminate[s] ‘any question concerning

the intrinsic merits” of the discharge. *NLRB v. Globe Prods. Corp.*, 322 F.2d 694, 696 (4th Cir. 1963) (quoting *NLRB v. Ferguson*, 257 F.2d 88, 92 (5th Cir. 1958)); accord *Halstead Metal Prods. v. NLRB*, 940 F.2d 66, 71 (4th Cir. 1998). The Board may also infer discriminatory motive from circumstantial evidence. *WXGI, Inc. v. NLRB*, 243 F.3d 833, 840 (4th Cir. 2001); *FPC Holdings, Inc. v. NLRB*, 64 F.3d 935, 942 (4th Cir. 1995). Such evidence includes the employer’s knowledge of its employees’ protected activities, the employer’s hostility toward those activities, the timing of the discharge or other adverse action, and the implausibility of the employer’s asserted reasons for its action. See *Medeco Sec. Locks*, 142 F.3d at 742; *Grand Canyon Mining Co.*, 116 F.3d at 1048; *FPC Holdings*, 64 F.3d at 943. In general, the question of employer motive “is a factual issue which the expertise of the Board is peculiarly suited to determine.” *FPC Holdings*, 64 F.3d at 942 (internal citations omitted).

Once the General Counsel meets his burden of showing unlawful motivation, the Board will find a violation of the Act, unless the employer proves, as an affirmative defense, that it would have taken the same action even in the absence of the protected activity. *Transp. Mgmt. Corp.*, 462 U.S. at 400-03; accord *RCG (USA) Mineral Sands, Inc. v. NLRB*, 281 F.3d 442, 448 (4th Cir. 2002). If the reasons advanced by the employer for his actions are nonexistent or

pretextual, it follows that the employer has not met his burden, and its defense fails. *Air Contact Transp. Inc.*, 403 F.3d at 215 (citations omitted).

2. The Company failed to carry its *Wright Line* burden of proving that it would have discharged Chapman on April 2 regardless of his protected concerted activity

Substantial evidence supports the Board's finding (A. 238) that the Company unlawfully discharged Chapman because of his protected concerted activity on April 2. As shown below, the Board properly found that the General Counsel met his initial *Wright Line* burden of proving that Chapman's discharge was unlawfully motivated. In its brief, the Company suggests (Br. 32-33) that it has overcome the General Counsel's initial showing of unlawful motivation by proving that Chapman's "manner of presenting his complaints" on April 2 was "the last straw" for the Company, given Chapman's earlier incidents of misconduct. Of course, this defense, rather than showing that Chapman would have been discharged regardless of his protected April 2 activity, proves that Chapman was discharged primarily *because* of that activity. The Board is accordingly entitled to enforcement of its finding (A. 238) that Chapman's discharge was unlawfully motivated.

As discussed above (pp. 24-28), the evidence fully establishes that Chapman was involved in ongoing protected activity surrounding a pay issue of common interest to all of the employees — that is, the fuel surcharge — beginning on

January 13 and continuing through April 2. Specifically, the testimony of the Company's witnesses establishes that Chapman participated in employee complaints about the fuel surcharge at the January 13 meeting and continued to complain about the fuel surcharge, like other employees, thereafter. (A. 25, 189-91.) On April 2, Chapman pressed company officials, as others had before, regarding the calculation of the surcharge, and he asked that the surcharge be documented in his paycheck stub. Chapman was, thus, continuously involved in protected complaints and questions about the fuel surcharge through April 2, when he was discharged.

The testimony of company officials establishes, further, that the Company knew of Chapman's protected activity. Indeed, Company Secretary Derrick identified Chapman as one of the "most vocal complainers" about the surcharge. (A. 191.) More importantly, on April 2, as the Board found (A. 238), Company Owner Piester "was present to observe" Chapman's protected complaints about the fuel surcharge. The Company, thus, discharged Chapman with full knowledge of his protected activity.

The Company, moreover, clearly did not view Chapman's protected complaints with a neutral eye. Rather, the Company bore open hostility to that activity, twice impliedly threatening employees with discharge for engaging in such activity. The Company's second such threat, indeed, was directed at

Chapman, on April 2, in response to his persistent protected complaints about the fuel surcharge. And moments after the threat issued, Company Owner Piester discharged Chapman. Given all of these circumstances, the Board properly concluded (A. 238) that the General Counsel showed that Chapman's discharge was unlawfully motivated, in violation of Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)).

The Company's evidence fails to unsettle the General Counsel's circumstantial showings of unlawful motivation. On the contrary, the testimony provided by Company Owner Piester (A. 238; 144) at the unfair-labor-practice hearing only tends to establish unlawful motivation: Piester admitted that Chapman's April 2 conduct "was the big reason" for his discharge. This admission amounts to an "outright confession of unlawful discrimination," as Chapman's April 2 conduct was protected by the Act. *See Globe Prods.*, 322 F.2d at 696. Accordingly, "any question concerning the intrinsic merits" of the discharge is effectively eliminated. *See id.*

Moreover, the Company's other proffered reasons for Chapman's discharge fail to provide an effective defense to the General Counsel's showing of unlawful motivation. The Company refers (Br. 32) to Chapman's alleged misconduct on a few occasions prior to April 2 as contributing to the decision to discharge him on April 2. However, as the Board found (A. 238), the Company "never mentioned

those incidents to Chapman or in its filing with the state unemployment commission.” Indeed, the Company never even issued discipline to Chapman based on those alleged earlier incidents. Given these circumstances, the Board was justified in believing that “the employer’s stated lawful reasons are non-existent or pretextual,” and, accordingly, the Board properly rejected the Company’s defense to the General Counsel’s showing of unlawful motivation. *Transp. Mgmt.*, 462 U.S. at 395, 397-403; *accord RGC (USA) Mineral Sands*, 281 F.3d at 448.

In view of the foregoing, the Board is entitled to enforcement of its finding that the Company’s discharge of Chapman violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)).

D. Chapman Did Not Lose the Protection of the Act by Engaging in Egregious Conduct

Although the administrative law judge concluded (A. 246) that Chapman was not engaged in protected activity on April 2, he found, in the alternative, that, if the Board found that Chapman’s activity was protected, Chapman did not engage in “egregious misconduct” (A. 243) in the course of that activity to cause him to lose the protection of the Act. The Company did not file exceptions to the judge’s adverse alternative finding. (A. 237 n.23, 239 n.31.) In the absence of exceptions, the Board adopted the alternative finding and elaborated on the judge’s rationale. As shown below, because the Company did not except to the judge’s alternative

finding, the Court is without jurisdiction to address the issue. In any event, the Board properly found that Chapman did not lose the protection of the Act.

Under well-settled law, in the absence of exceptions, the question of whether Chapman lost the Act's protection is not before this Court. Section 10(e) of the Act (29 U.S.C. § 160(e)) provides that “no objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” This statutory provision represents “a jurisdictional bar to judicial review of issues not raised before the Board.” *NLRB v. HQM of Bayside, LLC*, 518 F.3d 256, 262 (4th Cir. 2008) (citing *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982)). In a series of regulations,¹² the Board has specified what it means to “urge” an objection before the Board, for purposes of Section 10(e) (29 U.S.C. § 160(e)). Among other things, these regulations provide a mechanism for a party that prevails before an administrative law judge — such as the Company, here — to nonetheless file cross-exceptions to adverse findings set forth in the judge's decision. 29 C.F.R. § 102.46(e).

The Company failed to avail itself of this specified mechanism. Moreover, it has not articulated any “extraordinary circumstances” to justify this failure. In these circumstances, under the Board's regulations as well as the law of this Court,

¹² 29 C.F.R. §§ 102.46(b) & (e), 102.48(a).

the Company is deemed to have waived any objection to the judge's adverse alternative finding. 29 C.F.R. §§ 102.46(b)(2), 102.48(a); *NLRB v. Cast-A-Stone Prods. Co.*, 479 F.2d 396, 397-98 (4th Cir. 1973) (finding that employer, by failing to file cross-exceptions, waived objection to administrative law judge's alternative finding that was eventually relied upon by the Board). *See also NLRB v. R.J. Smith Constr. Co.*, 545 F.2d 187 (D.C. Cir. 1976) ("The mere fact that the Company prevailed before the trial examiner does not constitute 'extraordinary circumstances' justifying us [in] relieving it of its burden.").

Despite these clear rules and precedents, the Company argues (Br. 27-28) that, for Section 10(e) purposes, it should be credited with having contested the judge's alternative finding in the answering brief it filed in response to the General Counsel's exceptions. The Company, however, cites no precedent to support the suggestion (Br. 27) that an answering brief may be treated as timely and proper cross-exceptions. Moreover, the Company provides no explanation as to why it failed to file timely cross-exceptions, making it necessary for the Company's answering brief to double as cross-exceptions. The Company instead simply suggests that the Board's rules may be interpreted to accommodate its needs in this case.

To effectively bend the rules in this way would upset the orderly administrative procedure established by the Board for reviewing a judge's

decisions. More importantly, consideration of unexcepted-to alternative findings in the judge's decision would endanger the settled principle "that administrative decisions should not be overturned 'unless the administrative body not only erred but has erred against objection made at the time appropriate under its practice.'" *Cast-A-Stone Prods.*, 479 F.2d at 397 (quoting *United States v. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)). Accordingly, the Company's suggestion (Br. 27-28) that the Court should treat its answering brief as cross-exceptions should be rejected.

In any event, on the merits, the Company's argument that Chapman lost the protection of the Act fails. The Board and this Court have consistently construed the Act to permit employees engaged in protected activity "some leeway for impulsive behavior," so that not every impropriety that occurs in the context of such activity "necessarily places the employee beyond the protection of the statute." *J.P. Stevens & Co. v. NLRB*, 547 F.2d 792, 794 (4th Cir. 1976); accord *Union Carbide Corp.*, 331 NLRB 356, 356, 360 (2000), *enforced*, 25 Fed. Appx. 87 (4th Cir. 2001); *Fairfax Hosp.*, 310 NLRB 299, 300 and n.7 (1993), *enforced mem.*, 14 F.3d 594 (4th Cir. 1993). Thus, as this Court has emphasized, even "imprudent" employee conduct will remain protected unless it is "unlawful, violent, in breach of contract, or indefensible," *NLRB v. Waco Insulation, Inc.*, 567 F.2d 596, 599 (4th Cir. 1977) (citing *NLRB v. Washington Aluminum Co.*, 370 U.S.

9, 17 (1962)), or unless it is “so egregious . . . or of such character as to render the employee unfit for further service.” *Anheuser-Busch, Inc. v. NLRB*, 338 F.3d 267, 280 (4th Cir. 2003) (quoting *Consumers Power Co.*, 282 NLRB 130, 132 (1986)). *Accord NLRB v. Air Contact Transp., Inc.*, 403 F.3d 206, 211 (4th Cir. 2005).

Determining whether an employee’s activity retains the protection of the Act requires the Board to balance the competing interests of the employer and the employee, and to assess the entire context in which the allegedly flagrant conduct took place. *See United States Postal Serv. v. NLRB*, 652 F.2d 409, 412 (5th Cir. 1981). To those ends, the Board looks to four factors laid out in *Atlantic Steel Co.*, 245 NLRB 814 (1979): “(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee’s outburst; and (4) whether the outburst was, in any way, provoked by an employer’s unfair labor practice.” *Id.* at 816. The Board bears primary responsibility for striking the balance among the *Atlantic Steel* factors, “and its determination, unless arbitrary or unreasonable, ought not be disturbed.” *Mobil Exploration & Producing U.S., Inc. v. NLRB*, 200 F.3d 230, 243 (5th Cir. 1999); *cf. Eastern Omni Constructors, Inc. v. NLRB*, 170 F.3d 418, 423 (4th Cir. 1999) (striking the proper balance between the employee’s protected rights and the employer’s interests is a matter that falls “squarely within the specialized expertise of the Board”).

Applying the four-factor analysis set forth in *Atlantic Steel*, the Board properly found that Chapman retained the protection of the Act throughout his conduct in the Company's office on April 2. Indeed, the Board found (A. 239), each of the *Atlantic Steel* factors favors a finding that Chapman retained the protection of the Act.

Chapman's supposedly egregious conduct on April 2 consisted of his speaking loudly, in the course of a heated exchange with company officials about the fuel surcharge, and then rising from his chair and taking a step toward Company Secretary Derrick, after Derrick unlawfully told him to "clean out his truck" if he did not like the fuel surcharge. Applying the first *Atlantic Steel* factor (the place of the discussion), the Board found (A. 239) that the location of Chapman's conduct favors a finding of protection: he was in the Company's administrative office and no unit employees were present. Chapman's outburst, thus, could not have damaged the status of the company officials he confronted — Piester, Marntin, and Derrick — or otherwise have negatively affected employee discipline. See *Stanford Hotel*, 344 NLRB 558, 558 (2005) (finding that location of employee's outburst weighed in favor of protection where outburst occurred away from a work area, in "a relatively secluded room," thus minimizing "the potential that [the employee's] outburst would impair [the employer's] ability to maintain discipline in the workplace"). Cf. *DaimlerChrysler Corp.*, 344 NLRB

1324, 1317 (2005) (finding that location of employee's outburst weighed against protection where outburst occurred on a work floor, with "quite a few" employees present, and would thus "reasonably tend to affect workplace discipline by undermining the authority of the supervisor" at whom outburst was directed).

The second *Atlantic Steel* factor (the subject matter of the discussion) similarly favors protection. As the Board found (A. 239), Chapman was involved in a protected effort to "protest the surcharge change and request[] that the monetary impact of the change be reflected on his paycheck stub." *See NLRB v. Waco Insulation, Inc.* 567 F.2d at 599 (finding employee's request for pay raise protected, despite loud and heated tone in which request was made).

The third *Atlantic Steel* factor (the nature of the outburst) also favors protection. Chapman may have been loud in complaining and asking questions about the fuel surcharge, but the fact that an employee "bec[omes] loud and boisterous" in the course of protected activity is "not enough to make § 7 inapplicable." *Air Contact Transp. Inc.*, 403 F.3d at 211. Moreover, (A. 239) although Chapman took a step towards Derrick, "given the small size of Piester's office, it would have been difficult for Chapman to move without approaching Derrick." In addition, both Derrick and Piester admitted that Chapman never threatened anyone, either before or after getting up from his chair and stepping towards Derrick. (A. 239; 177, 195-96.) Indeed, after Chapman took a step

towards her, Derrick simply walked around him and left the office. All of this evidence suggests that Chapman's "outburst" was not serious in nature.

Finally, the fourth *Atlantic Steel* factor (the provocation, if any, for the outburst) strongly favors a finding that Chapman did not lose the protection of the Act by his conduct. Chapman got up from his chair and took a step towards Derrick only after Derrick unlawfully suggested that he should "clean out his truck" if he did not like the surcharge. As this Court has observed, "[a]n employer cannot provoke an employee to the point where she commits . . . an indiscretion . . . and then rely on this [indiscretion] to terminate her employment." *NLRB v. M&B Headwear Co.*, 349 F.2d 170, 174 (4th Cir. 1965).

Thus, while Chapman's conduct on April 2 was perhaps imprudent, it was not "unlawful, violent, in breach of contract, or indefensible,"¹³ nor was the conduct "of such character as to render [Chapman] unfit for further service."¹⁴ *See Waco Insulation, Inc.*, 567 F.2d at 599. There is accordingly no legal or factual basis on which to overturn the Board's finding that Chapman acted within the broad protection granted him under the Act.

¹³ *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962).

¹⁴ *Anheuser-Busch, Inc. v. NLRB*, 338 F.3d 267, 280 (4th Cir. 2003).

CONCLUSION

The Board respectfully requests that the Court enter a judgment denying the Company's petition for review and enforcing the Board's Order in full.

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

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ALTON H. PIESTER, LLC

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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* Nos. 09-1148 &
* 09-1255
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* Board Case No.
* 11-CA-21531
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by electronically filing and first-class mail the required number of copies of the Board's brief in the above-captioned case, and has served two copies of that brief by e-mail and first-class mail upon the following counsel at the address listed below:

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