

Nos. 09-1972 & 09-2141

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

GALICKS, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**SHEET METAL WORKERS INTERNATIONAL ASSOCIATION,
LOCAL UNION NO. 33**

Intervenor

**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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JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Galicks, Inc. (“the Company”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Decision and Order of the Board

that issued on June 30, 2009, and is reported at 354 NLRB No. 39. (A 10-27.)¹ Sheet Metal Workers International Association, Local Union No. 33 (“the Union”) has intervened on behalf of the Board. The Company filed its petition on July 29, 2009, and the Board filed its cross-application on September 10, 2009. Both filings were timely; the Act imposes no time limit on such filings.

The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”). This Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)) because the unfair labor practices took place in New Philadelphia, Ohio. The Board’s Order is final with respect to all parties under Section 10(e) and (f) of the Act.²

¹ “A” references are to the Appendix filed by the Company and the Board. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

² The Board’s Order was 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)). *See Galicks, Inc.*, 354 NLRB No. 39, slip op. at 1 n.2 (2009). The First, Second, Fourth and Seventh Circuits have upheld the issuance of decisions by the same two-member quorum. *Northeastern Land Servs. v. NLRB*, 560 F.3d 36 (1st Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3098 (U.S. Aug. 18, 2009) (No. 09-213); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3130 (U.S. Sept. 11, 2009) (No. 09-328); *Narricot Industries, L.P. v. NLRB*, ___ F.3d ___, 2009 WL 4016113 (4th Cir. Nov. 29, 2009); *New Process Steel, L.P. v. NLRB*, 564 F.3d 840 (7th Cir. 2009), *cert. granted*, ___ S.Ct. ___, 2009 WL

STATEMENT REGARDING ORAL ARGUMENT

The Board believes that this case involves the application of well-settled principles to straightforward facts and that argument would therefore not be of material assistance to the Court. However, if the Court believes that argument is necessary, the Board requests that it be permitted to participate.

STATEMENT OF THE ISSUES PRESENTED

1. Whether this Court should summarily enforce the Board's uncontested finding that the Company violated Section 8(a)(5) and (1) of the Act by refusing to furnish relevant requested information to the Union in August 2005.
2. Whether substantial evidence supports the Board's finding that the Company's failure to recall its journeymen employees from layoff because of their support for the Union violated Section 8(a)(3) and (1) of the Act.
3. Whether the Board reasonably found that the Company's withdrawal of recognition from the Union and failure and refusal to bargain

1468482 (U.S. Nov. 2, 2009). The D.C. Circuit has issued the only contrary decision. *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3185 (U.S. Sept. 29, 2009) (No. 09-377). The issue has been briefed to this Court in *SPE Utility Contractors, LLC v. NLRB*, Nos. 09-1692 and 09-1730, and *NLRB v. Hartford Head Start Agency, Inc.*, Nos. 09-1741 and 09-1764.

for an agreement as well as its refusal to furnish the Union with necessary and relevant requested information in August 2006 violated Section 8(a)(5) and (1) of the Act.

STATEMENT OF THE CASE

Acting upon charges filed by the Union (A 16; 321-22), the Board's General Counsel issued a complaint alleging in relevant part that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by failing and refusing to recall laid off journeymen because they joined and assisted the Union. (A 10; 323-28.) The complaint further alleged that the Company violated Section 8(a)(5) and (1) of the Act by twice failing and refusing to furnish the Union with requested information relevant to its bargaining duties and by failing and refusing to bargain in good faith with the Union for a collective-bargaining agreement. (A 10; 323-28.) Following a hearing, an administrative law judge found that the Company violated Section 8(a)(5) and (1) of the Act by the conduct alleged, but dismissed the allegation that the Company unlawfully failed to recall its journeymen from layoff. (A 25-26.) The Board's General Counsel and the Company filed exceptions. (A 10; 95-112, 302-19.) The Board found, in agreement with the judge, that the Company violated Section 8(a)(5) and (1) of the Act by twice refusing to provide relevant information and refusing to

bargain. (A 12, 14.) The Board further found that the Company violated Section 8(a)(3) and (1) of the Act by failing to recall any laid-off journeymen. (A 14.)

STATEMENT OF THE FACTS

I. THE BOARD'S FINDINGS OF FACT

A. The Company's Sheet Metal Business; the Company and the Union Enter Into Successive Building Trades Bargaining Agreements; Company Owner Galigher Honors Contract Obligations Until He Hires His Sons

The Company is a sheet metal contractor in New Philadelphia, Ohio, fabricating and installing industrial and architectural sheet metal. (A 10, 18.) Beginning when it opened its doors in 1979, the Company was a signatory to successive multi-employer Building Trades Agreements ("BTAs") with the Union, including an agreement expiring on May 31, 2005. (A 10, 18; 337-38.) The BTAs allocated certain work exclusively to journeymen and apprentice sheet metal workers. (A 10, 18; 128, 344-46, 358.)

The Company honored its obligations under this contractual work provision and only employed journeymen to perform architectural sheet metal work until 1991, when its owner, Gregory Galigher, hired his nonjourneyman son, Ed, and assigned him journeyman work. (A 10, 18; 381-82, 389.) Galigher expanded this practice in 1996, when he hired

another nonjourneyman son, Jake, and again in 1999, when he hired a third nonjourneyman, Randy Gray. (A 10, 18; 280, 383-84, 393.) All three employees have performed journeyman sheet metal work throughout their tenure at the Company. (A 10-11, 19-20; 249, 265, 276-77, 285.)

B. Although the Parties Enter Into Successive Production Agreements Permitting Production Workers To Perform Some Sheet Metal Work, Journeymen Continue To Do All Types of Sheet Metal Work

In 1996, Union Business Agent Tom Caruthers asked Galigher to sign an agreement covering the Company's nonjourneymen employees, who would be known under the contract as production workers. (A 10, 19; 245, 384.) Caruthers did not mention any restrictions on the work that the production workers could perform, saying only that he wanted to have Galigher's sons signed up with the Union and paying dues. (A 10, 19; 245.) Galigher signed the agreement as well as a successor production agreement in 2000, which ran concurrent with the BTA, leaving both agreements set to expire on May 31, 2005. (A 10, 19; 113-19.)

Under the written terms of the production agreement, the Company's production workers could perform some, but not all, BTA journeyman work and were paid lower wages and benefits than journeymen. (A 10, 19; 113-19, 341-44, 358.) Production workers were contractually permitted to fabricate some items in the Company's shop, but in-shop fabrication of other

items and on-site installation work continued to be restricted to journeymen and apprentices. (A 10, 19; 113-19, 341-45.)

From 2000 to 2005, the Company employed journeymen and production employees Ed, Jake, and Gray, all of whom regularly performed journeymen-only work. (A 10, 19; 278-79, 379, 381-84.) The limited exception to this arrangement was from August 2002 to December 2003, when no journeymen were working at the Company. (A 11; 167-200.) Following that period, the Company again hired journeymen to work alongside its production employees. (A 11; 242, 278-79, 379.)

C. The Production Workers No Longer Want Union Representation; the Company Withdraws From Multi-employer Bargaining; the Company's Journeymen Employees Sign Cards; the Company Declines To Voluntarily Recognize the Union

In January 2005, Ed, Jake, and Gray gave the Company a petition stating they no longer wished to be represented by the Union. (A 11; 121.) The Company notified the Union of the petition and its intent to withdraw recognition from the production employee unit after the contract expired June 1. (A 11; 120-21.) In February, confirming its intent to withdraw recognition for the production employees, the Company also notified the Union that it was withdrawing authorization from the Akron/Canton/

Mansfield Roofing and Sheet Metal Contractors' Association ("the Association") to act as the Company's bargaining agent with respect to negotiations for the multi-employer BTA. (A 11; 332.)

Following this second notification, the Union contacted journeyman employee Russell Cottis and three other journeymen whom the Company laid off in May and July 2004. (A 11, 21; 348-51.) All four employees signed union authorization cards, which the Union presented to the Company on April 7, 2005, along with a request for voluntary recognition. (A 11, 21; 352-54.) The Company declined. (A 11; 353.) Galigher told the union representatives that he was looking at retiring and turning the business over to his sons, and added that neither he nor they were interested in being union. (A 11; 353.)

D. The Day that the Union Petitions for an Election To Represent Journeymen, the Company Lays Off Its Sole Remaining Journeyman; the Parties Enter Into a Stipulated Election Agreement; the Company's Laid Off Journeymen Unanimously Vote for Union Representation

Subsequently, on April 13, the Union filed a petition for an election in a journeyman/apprentice unit. (A 11; 335.) On that same day, the Company laid off employee Cottis, its lone remaining journeyman. (A 11; 253.) Prior to his layoff, Cottis had been continuously employed at the Company without a layoff for 11 months. (A 11; 385.)

Later in April, the Company and the Union stipulated to an election in a journeyman/apprentice unit, excluding production employees, with “temporarily laid off” employees eligible to vote. (A 11, 21; 201-04.) At the election on May 23, the four laid off journeymen were the only voters, and they voted unanimously for representation by the Union, which was certified as the exclusive bargaining representative of the journeymen on June 3. (A 11, 21; 122-23.)

E. The Union Tells the Company that It Is Bound by the New BTA, Which Took Effect on June 1; the Company Rejects that Assertion and Denies the Union’s August 2005 Information Request; the Union Files Unfair Labor Practice Charges

Meanwhile, the Union and the Association entered into a successor BTA effective June 1. (A 11; 357, 359.) On June 9, the Union told the Company via letter that it viewed the June 3 certification as having converted the successor BTA into a Section 9(a) collective-bargaining agreement binding on the Company.³ (A 11, 21; 336.) The Company

³ Section 9(a) provides for exclusive representation by a designated representative “for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment....” 29 U.S.C. § 159(a). A Section 9(a) agreement requires evidence of majority support for a union among employees in the bargaining unit and bars an employer from filing a petition for an election during its term. *See Eng’g Steel Concepts*, 352 NLRB 589, 600 (2008); *Madison Indus.*, 349 NLRB 1306, 1308-09 (2007). In contrast, while the Company was part of the Association, the BTA was a Section 8(f), rather than Section 9(a),

acknowledged its duty to bargain with the Union, but rejected the Union's Section 9(a) conversion claim as to the BTA and instead sent the Union an alternate proposed agreement. (A 11, 21; 205.)

By letter dated August 12, the Union requested certain information "because of the current bargaining relationship and to ensure a smooth transition from the production agreement to the BTA." (A 11, 22; 124-25.)

The Union requested (1) a list of all work performed since June 1; (2) a current list of employees; (3) copies of all timecards and/or job sheets for these employees, and copies of all payroll checks paid to employees since June 1; and (4) a list of all current and future projects. (A 11, 22; 124-25.)

The Company refused the request the same day. (A 11, 22; 333.)

On August 22, the Union filed unfair labor practice charges with the Board, including an allegation that the Company had unlawfully repudiated the BTA. (A 11, 22; 320.) While those charges were pending, first before the Board's Regional Director and then on appeal, the Union did not seek to

agreement. Section 8(f) of the Act (29 U.S.C. § 158(f)) is applicable only to "an employer engaged primarily in the building and construction industry." Section 8(f) agreements are pre-hire agreements requiring no proof that the Union enjoys majority support within the bargaining unit. Thus, upon expiration of a Section 8(f) agreement, a union enjoys no presumption of majority status amongst the unit employees. *See John Deklewa & Sons*, 282 NLRB 1375 (1987), *enforced sub. nom.*, *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988).

bargain with the Company for a new contract. (A 11; 357.) The Union's claim that the Company was bound to the new BTA was denied on appeal on July 25, 2006. (A 11, 22; 229-30.)

F. The Union Seeks Bargaining and Requests Information in August 2006; the Company Refuses To Provide the Information and Withdraws Recognition from the Union; the Company Continues To Perform All Types of Sheet Metal Work Without Recalling Any Journeymen from Layoff But Hires a New Employee

Following the denial of its appeal, the Union proposed, on August 23, 2006, to meet and bargain. (A 11, 22; 126-27.) The Union requested certain information to facilitate negotiations: (1) a list of current employees; (2) a copy of all current company personnel policies, practices, or procedures; (3) a statement and description of all such policies, practices, or procedures other than those mentioned in item 2; (4) a copy of all company fringe benefit plans not sponsored by the Union; (5) copies of company wage or salary plans; (6) a list of current projects, including shop and field work; (7) a list of all work completed since June 1, 2005; and (8) a list of all future projects. (A 22; 126-27.) In response, on September 7, the Company refused to provide the requested information, stating that it no longer recognized the Union as the journeymen's bargaining representative. (A 11-12, 22; 231.)

Since June 2005, the Company has continued to perform all types of sheet metal fabricating and installation. (A 12, 23; 251-54, 261.) Following its layoff of journeyman Cottis on April 13, 2005, the Company did not recall any of its journeymen employees to perform any of this work. (A 12; 386.) However, a couple months later, on June 6, 2005, the Company hired nonjourneyman Curt Paternoster. (A 12; 387.) Paternoster has performed journeyman work for the Company. (A 12, 23; 388.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On June 30, 2009, the Board (Members Liebman and Schaumber) issued its Decision and Order finding, in agreement with the administrative law judge, that the Company violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union and failing and refusing to meet and bargain with the Union over the terms of a collective-bargaining agreement. (A 15.) The Board also agreed with the judge that the Company violated Section 8(a)(5) and (1) by failing to bargain in good faith by failing and refusing to furnish the Union with requested information that is necessary and relevant to the Union's performance of its function as bargaining representative. (A 15.) The Board further found, reversing the judge's dismissal, that the Company violated Section 8(a)(3) and (1) of the

Act by failing to recall journeymen employees from layoff because of their activities on behalf of or support for the Union. (A 15.)

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 15.) Affirmatively, the Board's Order directs the Company to offer recall to one laid-off journeyman and to make whole that individual for losses suffered by the Company's discrimination against him. (A 15.) The Order further requires the Company to recognize and, on request, bargain with the Union as the exclusive representative of the journeymen employees and to furnish the Union with the information it requested in August 2005 and August 2006. (A 15.) The Board's Order also requires the Company to post a remedial notice at its facility. (A 15.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that the Company took several unlawful steps in order to avoid recognizing the union that its journeymen had just selected in a Board-conducted election. As the Board reasonably found, the Company—attempting to sidestep bargaining by emptying the unit entirely—refused to recall any journeymen from layoff on pretextual grounds, falsely claiming it had no work for them. Based on that

discriminatory action, which contravened Section 8(a)(3) and (1) of the Act, the Company withdrew recognition from and refused to bargain with and provide information to the Union, all in violation of Section 8(a)(5) and (1) of the Act.

As the Board found, within months of the Union's certification as the journeymen's bargaining representative, the Company unlawfully refused to provide information to the Union. Because the Company does not challenge that finding on review, the Court should summarily enforce that aspect of the Board's order.

Substantial evidence supports the Board's further finding that the Company violated Section 8(a)(3) and (1) of the Act by failing to recall any journeymen from layoff after they voted for union representation. As evidence of the Company's unlawful motive, the Board reasonably relied on its obvious knowledge of the journeymen's union activity and the timing of its decision to lay off the sole remaining journeyman on the very day that the Union filed an election petition. The Company also demonstrated its unlawful motive by altering its employment practices after the election. As the Board noted, pre-election the Company employed journeymen and production workers side-by-side; by contrast, post-election, the Company

relied exclusively on production employees—who had not voted for union representation—to do journeyman work.

In addition, the Board's inference of unlawful motive is cemented by unchallenged evidence of the Company's false and therefore pretextual rationale for not recalling any journeymen from layoff. The judge reasonably discredited the company president's testimony that he did not recall any journeymen because his business allegedly had suffered a downturn and he had no work for them. As the judge noted, documentary evidence firmly established that the Company still had sheet metal work for them to do—work that they would have performed if the Company had followed its pre-election practices. Indeed, the Board found that the Company's business actually increased in 2005 and 2006, but that instead of recalling any journeymen, it hired a nonjourneyman employee in June 2005, and paid him and other non-unit employees overtime.

On review, the Company does not challenge the Board's finding that its stated reason for not recalling any journeyman employees—a purported lack of work—was false. This unchallenged finding of pretext is powerful evidence of the Company's unlawful motive. The Board therefore reasonably found that the Company violated Section 8(a)(3) and (1) of the Act by failing to recall any journeymen from layoff.

Finally, substantial evidence supports the Board's finding that the Company unlawfully withdrew recognition from the Union, failed to bargain with it, and refused its second information request. As the Board explained, the Company's purported reason for these actions—that the journeymen bargaining unit no longer contained any employees—was a product of its own unlawful refusal to recall any of them to work. Noting that an employer should not be allowed to profit from its unlawful conduct, the Board reasonably found that the Company violated Section 8(a)(5) and (1) of the Act by withdrawing recognition, and by refusing to bargain with and provide information to the Union. The Board further rejected the Company's alternate rationale—that it would have recalled at most one journeyman, leaving a one-man unit from which it was privileged to withdraw recognition. As the Board found, even assuming *arguendo* that the Company's refusal to recall its journeymen was not motivated by union animus, it failed to sustain its burden of proving a stable one-man unit.

STANDARD OF REVIEW

The findings of fact underlying the Board's decision are “conclusive” if they are supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e). Evidence is substantial “when it is adequate, in a reasonable mind, to uphold the [Board's] decision.” *NLRB v. V&S Schuler*

Eng'g, 309 F.3d 362, 367 (6th Cir. 2002). The Board's application of the law to the facts is also reviewed under the substantial evidence standard. *NLRB v. Dole Fresh Vegetables, Inc.*, 334 F.3d 478, 484 (6th Cir. 2003). Additionally, "the Board's reasonable inferences may not be displaced on review even though the court might justifiably have reached a different conclusion had the matter been before it *de novo*." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951). *Accord V&S Schuler*, 309 F.3d at 367. The Board's credibility findings, in particular, must be accepted unless it is clear that there is "no rational basis" for them. *Dole Fresh Vegetables*, 334 F.3d at 484.

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO FURNISH REQUESTED INFORMATION TO THE UNION IN AUGUST 2005

The Company does not challenge the Board's conclusion that it violated Section 8(a)(5) and (1) of the Act by refusing to provide to the Union relevant information that it requested in August 2005. Accordingly, under well-settled law, the Company has essentially "admitted the truth of th[at] finding[]." *FiveCAP Inc. v. NLRB*, 294 F.3d 768, 791 (6th Cir. 2002). The Court is obliged to summarily enforce the Board's order as to that finding. *FiveCAP*, 294 F.3d at 791; *see also Vanguard Fire & Supply Co. v. NLRB*, 468 F.3d 952, 956 (6th Cir. 2006) (summarily enforcing finding that employer failed to provide requested information where employer failed to challenge that particular adverse finding).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY'S FAILURE TO RECALL ITS JOURNEYMEN EMPLOYEES FROM LAYOFF BECAUSE OF THEIR SUPPORT FOR THE UNION VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT

A. Principles of Discriminatory Failure To Recall

"An employer generally commits an unfair labor practice by making an employment decision that discourages union membership or interferes

with an employee’s right to organize.” *Kamtech, Inc. v. NLRB*, 314 F.3d 800, 806 (6th Cir. 2002). Specifically, Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) bans “discrimination in regard to hire or tenure or any term or condition of employment to encourage or discourage membership in any labor organization.” Accordingly, an employer violates Section 8(a)(3) and (1) of the Act⁴ by refusing to recall laid-off employees in order to discourage, or in retaliation for, union activities or membership. *See FiveCAP*, 294 F.3d at 785; *Extreme Bldg. Servs. Corp.*, 349 NLRB 914, 914 (2007).

Whether an adverse action taken against an employee by an employer violates the Act typically depends upon the employer’s motive. *Kamtech*, 314 F.3d at 806. In *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397, 401-03 (1983), the Supreme Court approved the test for determining motivation in unlawful discrimination cases first articulated by the Board in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980) (“*Wright Line*”), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981). Under that test, if substantial evidence supports the Board’s finding

⁴ Section 8(a)(1) of the Act (29 U.S.C. §158(a)(1)) makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise” of their statutory rights. A violation of Section 8(a)(3) therefore results in a “derivative” violation of Section 8(a)(1). *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

that antiunion considerations were a “motivating factor” in the employer’s adverse action, the Board’s conclusion that the action was unlawful must be affirmed unless the record, considered as a whole, compels acceptance of the employer’s affirmative defense that the same action would have been taken even in the absence of union activity. *Transportation Management*, 462 U.S. at 395, 397-403. *Accord Kamtech*, 314 F.3d at 811; *FiveCAP*, 294 F.3d at 777-78.

Motive is a question of fact, and the Board may rely on circumstantial as well as direct evidence to determine the employer’s motive. *Kamtech*, 314 F.3d at 811. Factors relevant to a finding of unlawful motivation include the employer’s expressed hostility to a union, knowledge of the employees’ union activity, the timing and abruptness of the adverse action in relation to employees’ union activity, inconsistencies between the proffered reason for the discharge and other actions of the employer, and the contemporaneous commission of other violations of the Act. *See W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 871 (6th Cir. 1995); *NLRB v. A & T Mfg. Co.*, 738 F.2d 148, 150 (6th Cir. 1984).

If the record shows that an asserted legitimate reason advanced by the employer for the adverse action was a pretext, that is, the reason did not exist or was not in fact relied upon, the inquiry ends; there is no remaining

basis for finding that the employer would have taken the adverse action even in the absence of the employee's union activity. *Wright Line*, 251 NLRB at 1084. *Accord NLRB v. Talsol Corporation*, 155 F.3d 785, 797 (6th Cir. 1998); *Republic Tool & Die Co. v. NLRB*, 680 F.2d 463, 465 (6th Cir. 1982).

The Board is under no obligation to accept at face value the explanation advanced by the employer, "if there is a reasonable basis for believing it furnished the excuse rather than the reason for [its] retaliatory action."

Justak Bros. and Co. v. NLRB, 664 F.2d 1074, 1077 (7th Cir. 1981).

B. The Company Failed To Recall Any Journeymen From Layoff Because They Supported the Union

The Board reasonably relied on a number of factors to find that the Company refused to recall journeymen employees because they supported the Union. As we now show, the Company's undisputed knowledge of the journeymen's union activity, the timing of its actions, the Company's post-election change in longstanding employment practices, and the false and therefore pretextual nature of the Company's assertedly neutral reason for not recalling them from layoff, all establish that the Company's motive was an unlawful one.

In the first instance, there is no dispute, as the Board found (A 13), that the Company's journeymen engaged in union activity and that the Company knew as much. The four journeymen signed authorization cards

that were presented to the Company, and they unanimously cast votes for union representation. (A 11; 122-23.) Against this backdrop, the Board reasonably found that the Company acted out of union animus when it failed to recall any of them from layoff following the May 2005 election.

In finding that the Company harbored union animus, the Board also relied (A 13) on the “striking” timing of journeyman Cottis’ layoff. The exact day that the Union filed its election petition, the Company laid off Cottis, the sole remaining journeyman. As the Board noted, the Company’s assertion that it based the timing of the layoff on a supposed lack of work rings false, given its subsequent hiring of a non-journeyman employee who admittedly performed journeyman work. (A 13; 387-88.)

There is no merit to the Company’s claim (Br 27) that the Board erred in relying on Cottis’ layoff as evidence of the Company’s unlawful motivation for failing to recall any journeymen. The Board can rely, as evidence of motive, on an employer action that is not alleged as a separate unfair labor practice. *American Packaging Corp.*, 311 NLRB 482 n.1 (1993) (“The law is well-settled that conduct that exhibits animus but that is not independently alleged to violate the Act may be used to shed light on the motive for, or the underlying character of, other conduct alleged to violate the Act.”). Here, the suspicious timing of a layoff that the Company carried

out for a pretextual reason—a supposed downtick in work that did not exist—sheds light on its true motive for refusing to recall any journeymen.

As further evidence of the Company’s real reason for not recalling any journeymen, the Board also relied on the Company’s post-election changes to its longstanding employment practices. The Board reasonably inferred that the Company made this change to avoid recalling any journeymen, and thereby avoid recognizing the Union. As the Board found (A 20), prior to the election, the Company employed journeymen and production workers working together on in-shop fabrication and off-site installation projects. Journeymen and production workers performed both types of tasks for at least some of their working hours. While the Board acknowledged (A 13) that the Company had assigned some journeyman work to its production employees prior to June 2005, the Company’s decision to assign *all* of its journeyman work to the production employees was a clear change from its past practice of at least 14 years’ duration.

As the Board found (A 13), “preelection, when Galigher had more journeyman work on his hands than could be done by Ed, Jake, and Gray, he hired journeymen. Postelection, he hired nonjourneyman Paternoster.” For example, when its business picked up after December 2003, the Company hired journeymen for the additional sheet metal work. By contrast, after the

May 2005 election, when it had more work than the three production employees could handle, the Company still did not recall a journeyman—a change to its longstanding practice that the Company was unable to explain under any neutral rationale. Thus, the Board reasonably concluded that the Company’s motive was an unlawful one. Additionally, the Company’s deviation from its past practice of hiring journeymen when it had more sheet metal work than its production employees could handle links that union animus as a motivating factor to its failure to recall any journeymen employees from layoff. *See W.F. Bolin Co.*, 70 F.3d at 871.

Finally, unchallenged evidence of pretext cements the Board’s finding that the Company refused to recall any journeymen because they had voted for union representation. Although Company President Galigher testified that the Company did not recall any journeymen due to lack of work, the judge—after assessing Galigher’s demeanor and considering significant documentary evidence undermining his claims—reasonably discredited his testimony. (A 14, 23.) As the judge noted, Galigher “seemed to strain to distinguish the work he had done since June 2005 from prior work, in an effort to minimize the amount that would be classified as journeyman” (A 23.) The judge therefore gave Galigher’s testimony “limited weight,” and accorded “more credence” to the Company’s records. (A 23.) Those

records, which include stipulated summaries of customer invoices (Joint Exhibits 35-37), firmly establish that the Company's business, far from decreasing as Galigher alleged, actually increased in 2005 and 2006.

These findings establishing pretext are unchallenged. As the Board noted (A 13), the Company did not except to the judge's credibility-driven finding that Galigher "'strain[ed] to . . . minimize' the amount of journeyman work the Company continued to perform" when in fact it continued "to do a 'substantial quantum' of such work after June 2005." Nor does the Company challenge on review the Board's finding (A 14) that the Company's claim of insufficient work was "discredited and thus is pretextual." By failing to present any argument on the issue in its opening brief to this Court, it has waived any challenge to the Board's finding of pretext. *See Radvansky v. City of Olmstead Falls*, 395 F.3d 291, 311 (6th Cir. 2005) ("failure to raise an argument in . . . [an] appellate brief constitutes a waiver of the argument on appeal").

As the Board found (A 14), the analysis ends there because the Company's "purported rebuttal" to its decision not to recall the union-represented journeymen—that it had insufficient work—was discredited by the judge. The Company's failure to challenge this finding is fatal to its case. Where, as here, an employer's proffered basis for an adverse action is

found to be pretextual, the Board reasonably infers that its true motive is one it desires to conceal—an unlawful one. *See, e.g., Temp-Masters, Inc. v. NLRB*, 460 F.3d 684, 693 (6th Cir. 2006); *Talsol Corp.*, 155 F.3d at 797; *Wright Line*, 251 NLRB at 1084.

In sum, based on all of the factors addressed above—the Company’s knowledge of the journeymen’s support for the Union, the timing of the Company’s actions, the Company’s change to its employment practices pre-versus post-election, and, above all, the pretextual nature of the Company’s stated reason for not recalling any journeymen—the Board reasonably found that the Company violated Section 8(a)(3) and (1) of the Act by failing to recall any of its journeymen from layoff after the union election.

C. The Company’s Attempts To Refute the Board’s Finding that It Was Motivated By Union Animus Are Without Merit

First, the Company makes (Br 17-18, 27) much ado about the Board’s allegedly reversing credibility findings of the judge. However, the Board did *not* disturb any of the judge’s credibility-based determinations. The Board accorded the judge deference on his credibility rulings, and its determination (A 13) that the Company unlawfully failed to recall its journeymen does not rest on contrary findings. Rather, the Board—as it is permitted to do—drew a different inference from the facts, reasonably inferring that the Company’s motive for not recalling any journeymen was to

avoid recognizing the Union. *See Center Constr. Co. v. NLRB*, 482 F.3d 425, 441 (6th Cir. 2007) (“The Board gets to focus where it wants, as long as there is substantial evidence to support its conclusions . . . [the Court’s] deference is to the Board and not the [judge].”).

Secondly, the Company makes several points that are not relevant to the Board’s decision. The Company’s invocation (Br 19-20) of Section 8(c) of the Act (29 U.S.C. § 158(c)) to annul Galigher’s statement that he was not interested in being union is irrelevant because, as the Company notes, a majority of the Board did not rely on that statement as evidence of union animus. Likewise irrelevant is the Company’s misplaced reliance (Br 24) on the stipulated election agreement as evidence that it did not harbor union animus. The Company pointlessly voices its opinion as to why the Union selected the bargaining unit definition set forth in the agreement. The Company forgets that it stipulated to the unit definition, and that, in any event, the Union’s motive in choosing a unit definition is irrelevant to a determination of the Company’s animus. It is the Company’s strategies and motivations that are at issue in this case—not the Union’s.

The Company further errs (Br 22) in asserting that the Board “sidestepped the parties’ decade-long practice” of having production workers perform some work that was contractually mandated as journeyman

work. As the Board recognized (A 13 n.21), while the Company’s diversion of higher-paid work to production employees despite its contractual obligations was time-barred from challenge as a Section 8(a)(5) and (1) violation, the Company’s employment practices “may be utilized to shed light on the true character of matters occurring within the limitations period.” *Local Lodge No. 1424 v. NLRB (Bryan Mfg. Co.)*, 362 U.S. 411, 416 (1960). Here, as shown above at pp. 23-24, irrespective of its contractual obligations, the Company *changed* its practices pre- versus post-election—it stopped using journeymen altogether after the election—and it could not explain the change under any neutral rationale. The Board appropriately focused on this change in practices for the light that it sheds on the Company’s real reason for not recalling any journeymen.

The Company also does not help itself by erroneously (Br 21) suggesting that the Board impliedly found that journeymen had a contractual right of recall to displace production workers. To the contrary, the Board simply found that when the Company had more work than its production employees could handle post-election, it hired another non-journeyman and paid the workers overtime instead of recalling any journeymen—contrary to its pre-election practices. Thus, the Board properly relied (A 13) on the

Company's unexplained change in its employment practices to find that union animus was a motivating factor in the failure to recall the journeymen.

The Company also misses the mark by complaining (Br 26) that the election did not award all of the architectural and sheet metal work "to journeymen and take it away from production workers as a matter of law."⁵

The Board's Order does not rely on such a result and does not require that all of the work defined as journeyman work under the BTA be reassigned to a journeyman. The Board's Order simply requires the Company to recall one journeyman for a time period when the Company's business increased. As the Board found (A 13), the Company did not except to the finding that its business increased in 2005 and 2006. Thus, the work that is at issue here is not work to be taken from production workers but work that would have gone to journeymen but for the Company's union animus.

Finally, the Company's statement (Br 29) that there were "no large installation projects" following the 2005 election adds nothing. As the judge found (A 25), the Company's "own records do not demonstrate that there has been any decline in the volume of its business or significant change in

⁵ The Company's discussion (Br 25-26) of *General Aniline and Film Corporation*, 89 NLRB 467 (1950), and related representation cases is diversionary. This case does not involve the Board's "function in a representation proceeding" nor the "question of the union's 'jurisdiction.'" (Br 25-26.)

the nature of its work” since the journeymen were laid off. The Company failed to challenge the judge’s finding that the Company’s work had not decreased or changed significantly, whether with regard to installation or any other sort of work. The Company was unable to prove that its failure to recall its journeymen was due to lack of work, and it cannot now rely on facts that it was unable to show.

III. THE BOARD REASONABLY FOUND THAT THE COMPANY’S WITHDRAWAL OF RECOGNITION FROM THE UNION AND FAILURE AND REFUSAL TO BARGAIN FOR AN AGREEMENT AS WELL AS ITS REFUSAL TO FURNISH THE UNION WITH REQUESTED INFORMATION IN AUGUST 2006 VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT

A. Principles of Failure To Bargain in Good Faith

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer to “refuse to bargain collectively with the representative of [its] employees.” Section 8(a)(5) requires parties to meet and bargain in good faith as to wages, hours, and other terms and conditions of employment. *Vanguard Fire & Supply Co. v. NLRB*, 468 F.3d 952, 960 (6th Cir. 2006). An employer violates Section 8(a)(5) and (1) of the Act by unilaterally withdrawing recognition from a union that still enjoys majority support among bargaining unit members. *Id.* at 957.

As part of its bargaining obligation under Section 8(a)(5) of the Act, an employer must supply information requested by a collective-bargaining representative that is necessary and relevant to the representative's performance of its responsibilities to the employees it represents. *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967); *United Paperworkers Int'l Union v. NLRB*, 981 F.2d 861, 865 (6th Cir. 1992). Information that relates directly to the terms and conditions of employment of represented employees is presumptively relevant. *Acme Indus.*, 385 U.S. at 437; *General Motors Corp. v. NLRB*, 700 F.2d 1083, 1088 (6th Cir. 1983).

B. The Board Reasonably Found that the Company Failed To Bargain in Good Faith When It Withdrew Recognition From the Union and Refused To Bargain For an Agreement or Provide Relevant Information Requested by the Union in August 2006

The Company admittedly refused to bargain with or provide requested information to the Union when it withdrew recognition from the journeymen unit on September 7, 2006. As shown previously, the Board reasonably found that the Company violated Section 8(a)(3) and (1) of the Act by failing to recall the journeymen from layoff because of their support for the Union. Given the journeymen's selection of the Union as their collective-bargaining representative, the Company therefore violated Section 8(a)(5)

and (1) of the Act by refusing to recognize and bargain with and to provide information to the Union.

The Company argues (Br 29) that it lawfully withdrew recognition because there were no journeymen left in the bargaining unit as of September 2006. In response to this rationale, the Board reasonably found (A 14) that the Company could not “unlawfully deny employment to journeymen because of their union status and then profit from its unlawful conduct by withdrawing recognition from the Union, claiming a no-man unit.” The only reason no journeymen were working for the Company at that time was the Company’s discriminatory refusal to recall them from layoff.

The Board further found (A 14) that the Company’s alternative argument, that it would have recalled, at most, one journeyman in place of employee Paternoster and, therefore, could have lawfully withdrawn recognition because this was assertedly a one-man unit, also fails in the face of the Company’s discriminatory conduct. Although an employer does not violate Section 8(a)(5) and (1) of the Act by refusing to bargain with a union if it can prove that it has a stable one-man unit, the Board reasonably found (A 14) that the Company failed to meet its burden of proof. *See McDaniel Electric*, 313 NLRB 126, 127 (1993) (under the “one-man unit” rule, an

employer must prove that “the purportedly single-employee unit is a stable one, not merely a temporary occurrence”). As the Board explained (A 14), “[g]iven the [Company’s] discriminatory motivation for failing to recall journeymen, we cannot be certain how many it would have recalled absent that unlawful motive, particularly in light of the overtime worked by . . . production employees in 2005 and 2006.”

Moreover, the Company does not challenge the Board’s alternative rationale for finding that the Company unlawfully withdrew recognition. The Board further concluded that, even assuming *arguendo* that the failure to recall the journeymen was *not* unlawful, the Company “still failed to sustain its burden to prove a stable one-man unit.” (A 14.) *See id.* (burden of proof lies with the party asserting a stable one-man unit). As the Board noted (A 14), “[t]o prove a stable one-man unit, the Company relied on the 15 months it employed journeyman-substitute Paternoster before withdrawing recognition.” The Company argued that it could have had at most one journeyman working during that period. However, as the Board found (A 14), this evidence fails to prove the stability of a one-man journeyman unit because the Company had in the recent past, from August 2002 to December 2003, gone 16 months without employing a single journeyman before subsequently employing up to as many as three journeymen at one time. (A

14; 167-200.) Before this Court, the Company does not challenge the Board's finding that it failed to prove a stable one-man unit. Therefore, even if the Company had not violated Section 8(a)(3) and (1) of the Act by failing to recall any journeymen from layoff, the Court can rely on the Board's alternate rationale to find that the Company still violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with and provide information to the Union.

C. The Company's Remaining Contentions Are Without Merit

On review, the Company primarily argues (Br 30) that it was entitled to withdraw recognition from the Union because it did not violate the Act by refusing to recall any journeymen from layoff. Beyond that claim, which the Board reasonably rejected (*see* pp. 21-30 above), the Company raises several additional contentions that change nothing about the reasonableness of the Board's conclusions.

First, despite the Company's contrary claim (Br 30), the Board fully addressed the merits of the Company's assertion that it unlawfully withdrew recognition from the Union. As the Company acknowledges (Br 30) in its very next sentence, the Board "rejected" its argument rather than failing to address it. Contrary to the Company's position, the Board did not err in finding it unnecessary to pass on the judge's rationale for finding the

withdrawal of recognition unlawful. As the Board noted (A 14), the judge's rationale was superfluous given the arguments that the Company made in its exceptions.

There is no more merit to the Company's argument (Br 31) that it was entitled to withdraw recognition because it assertedly made a decision to stop bidding on large installation projects and the "prospect for growth looked bleak." The Company's statements are supported in its brief by no citations to the record, and are not consistent with the judge's or Board's findings. In sum, the Board reasonably found that the Company violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from and failing to bargain with and provide information to the Union.

CONCLUSION

For the foregoing reasons, the Board respectfully submits 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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November 2009

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GALICKS, INC.)
)
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)
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) 8-CA-36079
NATIONAL LABOR RELATIONS BOARD) & 8-CA-36766
)
Respondent/Cross-Petitioner)
)
and)
)
SHEET METAL WORKERS INTERNATIONAL)
ASSOCIATION, LOCAL UNION NO. 33)
)
Intervenor)

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 7,698 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

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Dated at Washington, DC
this 30th day of November, 2009

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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and)	
)	
SHEEHY METAL WORKERS)	
INTERNATIONAL ASSOCIATION, LOCAL)	
UNION NO. 33)	
)	
Intervenor)	

CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2009, I electronically filed the Board's brief with the Clerk of the Court by using the CM/ECF system. All participants are registered CM/ECF users and service will be accomplished by the CM/ECF system on the following counsel:

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Dated at Washington, DC
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