Nos. 09-1938(L), 09-2057

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FOLA COAL COMPANY,
d/b/a POWELLTON COAL COMPANY

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

UNITED MINE WORKERS OF AMERICA, AFL-CIO

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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THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of Fola Coal Company, d/b/a Powellton Coal Company ("the Company"), to review an Order issued against it by

the National Labor Relations Board ("the Board") and on the Board's cross-application for enforcement of its Order. United Mine Workers of America, AFL-CIO ("the Union"), has intervened in support of the Board. The Board's Decision and Order was issued on July 31, 2009, and is reported at 354 NLRB No. 60 (A-848-57).[1]

The Board had jurisdiction under Section 10(a) of the National Labor Relations Act, as amended, 29 U.S.C. § 151, 160(a) ("the Act"), which authorizes the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), the unfair labor practices having occurred in West Virginia. The Board's Order is a final order within the meaning of Section 10(e) and (f) of the Act.

In *Narricot Industries, L.P. v. NLRB,* 587 F.3d 654 (4th Cir. 2009), decided after the filing of the Company's brief in this case, this Court held that the plain and unambiguous text of Section 3(b) of the Act (29 U.S.C. § 153(b)) authorized two Board members, acting a quorum of a three-member group to which the Board had delegated all of its authority, to issue a decision and order. *Narricot,* as the law of this circuit, conclusively establishes that those two members (Chairman

[1] "A" references are to the printed appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

Liebman and Member Schaumber) properly issued the Board's decision here, and requires that the Company's contrary contentions (Br 25-32) be rejected.[2]

The Board issued its decision and order on July 31, 2009. The Company filed its petition for review on August 20, 2009. (A 834.) The Board filed its cross-application for enforcement on September 17, 2009 (A 846-47.) Section 10(e) and (f) of the Act place no time limits on such filings.

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board's findings that the Company violated Section 8(a)(1) of the Act by prohibiting distribution of union literature in nonworking areas on nonworking time; prohibiting union solicitation during nonworking time; and discriminatorily prohibiting union-related conversations while permitting other nonwork-related conversations.

2. Whether substantial evidence supports the Board's findings that the Company violated Section 8(a)(3) and (1) of the Act by giving employee Heath Coleman two verbal warnings and a written warning because of his union activities.

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[2] The Supreme Court has granted certiorari in *New Process Steel, L.P. v. NLRB*, 564 F.3d 840 (7th Cir. 2009), *cert. granted*, 78 U.S.L.W. 3245, where the same issue is presented.

STATEMENT OF THE CASE

On unfair labor practice charges filed by the Union, the Board's General Counsel issued a complaint alleging that the Company had violated Section 8(a)(1), (3), and (4) of the Act. (29 U.S.C.§ 158 (a)(1), (3), and 4)). (A 423-28.) After a hearing, Administrative Law Judge George Carson II issued a decision sustaining in part and dismissing in part the allegations of the complaint and recommending that the Company be ordered to cease and desist from the conduct found unlawful, and to take affirmative remedial action. (A 825-33.) The Company filed exceptions, and the Union filed a limited cross-exception.

The Board (Chairman Liebman and Member Schaumber) affirmed the administrative law judge's rulings and findings and adopted his conclusions and recommended order with one modification. (A 843 & n.3, 849.) The Company filed a petition for review (A 834), and the Board filed a cross-application for enforcement. (A 846.)

STATEMENT OF FACTS

I. THE BOARD'S FINDING OF FACT

A. Background

The Company, located in Bickmore, West Virginia, operates an underground coal mine, a strip mine on the surface, and a preparation plant where mined coal is cleaned. (A 849; 18.) In December 2007, employee Heath Coleman contacted the

Union. In January 2008, he placed union stickers on his hard hat and wore union pins on his clothing. (A 850; 36; 40-41.) On March 14, the Union sent a letter to the Company, identifying Coleman and three other employees as members of its in-house organizing committee. (A 850; 19, 458.)

The conduct described in this section was the subject of unfair labor practice charges which were settled. The settlement agreement specifically authorized the Board's General Counsel to "use the evidence obtained in the investigation . . . of [the settled case] for any relevant purpose in the litigation of . . . any other case(s)" and permitted the Board to make findings of fact and conclusions of law with respect to such evidence. (A 823.) In this case, the conduct alleged in the settled charges was not alleged or found to constitute independent violations of the Act, but was relied on as evidence of the Company's union animus. (A 16, 850.)

In mid-March 2008, Company President Gary Patterson told employee Benjamin Fitzwater that "there won't be any future here if this place goes union." (A 850; 193-94.) In late March, Supervisor Charles Hackworth told employee Steven Beard that President Patterson had asked him whether Beard "was a supporter of the Union" and that Hackworth had replied that he did not know. Hackworth told Beard not to mention anything about the Union while on the job. (A 850; 150.) In early April, Foreman Kim Fitzwater told employee Earl McKown that if the employees unionized, there would be layoffs because the Company,

which currently operated on 12-hour shifts, would change to 8-hour shifts. (A 850; 159.) Foreman Eric McGlothlin made a similar statement to employees in the blasting trailer, also in early April. (A 850; 168-69, 171.)

At the strip mine, employees and supervisors communicated over citizens' band ("CB") radios in the trucks they operated. Because employees on the reclamation crew often worked away from their vehicles, they were issued FM radios similar to walkie-talkies. On April 4, Foreman McGlothlin directed Coleman to turn in his FM radio. When Coleman asked why, McGlothlin replied "They say you don't represent the Company [any] more, you represent the Union." (A 850; 49-51.) In the settlement agreement, the Company agreed to return the FM radio to Coleman "for his use when assigned to safety sensitive job duties." (A 824.)

Also in April, Foreman McGlothlin told Coleman that at a supervisors' meeting, an official of the Company's parent corporation had said that if the Company were unionized, there would be a substantial layoff of the more junior employees "because they would go to an eight hour shift." The change would eliminate the need for an entire shift. (A 850; 45.)

B. Restrictions on Solicitation and Distribution

Before 6 a.m. on July 18, 2008, Coleman distributed a union flier to a dozen or so other employees in a company parking lot where employees left their personal vehicles before being taken in company vehicles to the equipment they operated at the strip mine. One of the employees to whom Coleman gave a flier was James Beighle, a former supervisor who was serving as acting foreman of the reclamation crew in the absence of Foreman McGlothlin. (A 851; 55-57).

Beighle reported the incident to Company President Patterson and asked whether distribution of union literature on company property was permitted. Patterson replied that it was not. Beighle asked whether he should say anything to Coleman. Patterson replied that he should. (A 851; 134-35.)

At the end of the shift, when Beighle was driving Coleman back to the parking lot, he said that Coleman had "put him on a spot" by handing out the union flyer, because "you're not allowed to do that." Coleman asked why, and Beighle replied that "they told me that you're not allowed to pass out union literature on Company property." Coleman disagreed, saying that "they probably don't want me to do it, but I'm allowed." Beighle answered that "they told me to tell you that you're not allowed to do that anymore." (A 851; 57-58.)

In mid-October, the Company distributed a document to employees saying that, in order to clear up "confusion" concerning employees' solicitation rights, it

was setting forth a "list of facts concerning the law and solicitation." The document stated that employees had the right to engage in union solicitation during nonwork time and to distribute union literature in nonworking areas during non-working time. It did not mention Beighle's statement to Coleman or similar statements by Foreman McGlothlin, discussed below, in early September. (A 851; 703-04.)

C. Coleman's Warnings

The Board found that the Company unlawfully issued three warnings to Coleman. The first was a verbal warning on September 4, 2008, allegedly for violating the Company's no-solicitation rules. The second, a verbal warning dated February 29 but not made known to Coleman until September 15, and the third, a written warning also issued on September 15, were allegedly for failing to maintain adequate berms.

1. The warning for alleged work time solicitation

The Company's employee handbook stated that "work time is for work. Nonwork activity (including solicitation [or] distribution of written materials) should not be conducted during working time." (A 537.) Nevertheless, employees regularly and without penalty discussed nonwork-related subjects, including race cars, families, and trips to the beach, during working time on the CB radios they used for communication at the strip mine. (A 852; 64.)

On September 3, Coleman and employee Robert Rapp worked together on a task that required them to leave their bulldozers. As they were returning to their bulldozers, Rapp asked when the Union was going to seek a Board election. Coleman replied that the Union was in no hurry and that it would have a meeting to discuss employee benefits. He said that if Rapp wanted to sign an authorization card for the Union or needed any information, he could call Coleman at home, and Coleman could provide him with anything he needed. (A 852; 60-61.) Coleman did not offer Rapp a union authorization card at that time. (A852; 62, 94, 391.) He also did not give Rapp any union literature at that time, but gave him a copy of the Union's National Wage Agreement that evening. (A 852; 62, 94, 387.)

Rapp informed employee Jeff DeMoss of his conversation with Coleman. (A 852; 390.) DeMoss told Foreman McGlothlin that Rapp had said that Coleman had asked him whether he wanted to sign a union authorization card and had offered him a copy of a union contract. (A 852; 358-59.) McGlothlin decided to issue a verbal warning to Coleman. In making that decision, he relied solely on DeMoss' report. (A 852; 368.) He did not speak with Rapp about the incident until 4 days after he issued the warning. (A 852; 367.)

On the morning of September 5, Foreman McGlothlin came to where Coleman was operating his bulldozer and asked him to get in McGlothlin's pickup truck. Coleman did so. McGlothlin said that "because of those charges that you

filed . . . you can pass out union literature before and after work . . . but not on Company time."[3] Coleman said, "[D]uring lunch times . . . when we're not expected to be working, I can do it, right?" McGlothlin said he could not, because the Company was paying him for that time. He added that "they just wanted me to . . . tell you that you could do that now and you picked the wrong time to talk to Robert Rapp." Coleman asked what he meant. McGlothlin replied that "word got back that you were soliciting Mr. Rapp and offered him a Union card." He added that Coleman could consider this conversation to be a warning. (A 852; 62-63.)

2. The warnings related to berms

Employees drive large trucks on unpaved roads at the strip mine. Berms made of dirt, rock or GOB (solid waste material removed from coal in the cleaning process) protect employees in much the same way as metal guard rails on a highway. They serve as a visual guide to the road and as a barrier to prevent trucks from running off the road. (A 850, 22, 35.) On any given road, the berm must be at least as high as the middle of the axle of the largest truck using that road. (A 850; 73-74, 299.) All employees, including drivers, are responsible for safety, and

[3] Coleman had not, in fact, filed unfair labor practice charges. However, the Union had filed several such charges, at least one of which specifically alleged discrimination against Coleman. (A 463.) The settlement agreement for that charge, which was executed before September 4, provided specific remedial relief for Colelman. (A 823-24.)

if a driver sees that a berm is too low or otherwise unsafe, he is expected to stop his truck, not continue driving toward the berm. (A 850; 236-37.)

On February 29, 2008, Coleman was building a new road to a mine. As he worked on the road, he was operating a bulldozer and constructing the berm. (A 853; 70-71.) The height of the berm was concededly adequate for the trucks that initially brought materials to Coleman. (A 854; 316, 319.) However, after the breakdown of a piece of equipment elsewhere, Foreman Fitzwater sent larger trucks, which had been working with the equipment, to deliver materials to Coleman. (A 854; 316.) He then watched Coleman from the top of the hill for 15 minutes and, when Coleman called him on the CB radio, said "your berm isn't high enough." However, he said nothing about a verbal warning. (A 853-54; 71-72.) When informed that the berms were too low, Coleman immediately increased their height. (A 854; 309, 312.)

On September 10, Coleman was working on the construction of another road adjacent to new slurry cells. He was operating a bulldozer, and trucks were bringing him materials from the construction of the road. To increase the area for the trucks to turn around, he tore down an existing berm and constructed a new one. Foreman McGlothlin, who was observing Coleman's actions, spoke to him on the CB radio, asking, "[are] you going to fix that inadequate berm right here?" Coleman replied that he would fix it when a needed load of material arrived. (A

855; 79-80.) McGlothlin did not tell Coleman to change the way he was constructing the road, nor did he say, at that time, that Coleman would receive a disciplinary warning. (A 855; 353, 379.) Company policy did not require Coleman to obtain advance permission from a supervisor before knocking down an existing berm and replacing it with a new one. (A 855; 125.)

On September 15, McGlothlin and Superintendent Kenneth Gilliland drove a pickup truck to Coleman's work site and directed him to get into the truck. After he did so, McGlothlin asked him, "Do you remember [my] mentioning a berm to you last week?" When Coleman said he did, McGlothlin replied, "I'm writing you up for it." He gave Coleman a written warning dated September 11, which said that Coleman had been operating in a dump area without adequate berms on September 10, and that he had previously received verbal warnings on February 29 and July 21. Coleman refused to sign the warning, saying, "[i]t's a fabricated lie and you know it is." Gilliland signed the warning and asked whether Coleman had any questions. Coleman asked whether anyone else had been written up in connection with the September 10 incident. Gilliland replied, "yes." (A 855; 65-67, 462.) At the end of the workday, McGlothlin said to Coleman, "I just wanted to tell you that I didn't have [any] choice in that stuff a little while ago." (A 856; 69.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board found, in agreement with the administrative law judge, that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by prohibiting distribution of union literature anywhere on company property, including nonworking areas on nonworking time. (A 851.) The Board further found that Foreman McGlothlin, by telling Coleman on September 4 that he could not distribute union literature, or talk about or solicit for the Union, at any time for which the Company was paying him, violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)). As the Board found, the Company, by making these statements, was prohibiting distribution of union literature in nonworking areas during nonworking time; prohibiting union solicitation during nonworking time; and discriminatorily prohibiting union-related conversations while permitting other nonwork-related conversations. (A 852-53.)

The Board further found, in agreement with the judge, that the verbal warning to Coleman on September 4, being based on the discriminatory prohibition against union-related conversations, violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158 (a)(3) and (1) (A 853).[4] Finally, the Board found that the verbal warning purportedly issued on February 29 but not made known to Coleman

[4] The Board found it unnecessary to determine whether this verbal warning also violated Section 8(a)(4) of the Act (29 U.S.C. § 158(a)(4)), since such a finding would not have materially affected the Board's remedial order. (A 848 n.3.)

until September 15, and the written warning dated September 11 but issued on September 15, were motivated by Coleman's union activity and therefore further violated Section 8(a)(3) and (1) of the Act.[5] (A 854, 856.)

The Board ordered the Company to cease and desist from the conduct found unlawful and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their statutory rights. Affirmatively, the Board ordered the Company to rescind the discriminatory warnings issued to Coleman, expunge them from his employment record, remove any references to them from its files, and notify him in writing that it has done so and that the warnings will not be used against him in any way; and to post copies of an appropriate remedial notice. (A 848-49, 856-57.)

STANDARD OF REVIEW

The Board's findings of fact are "conclusive" under Section 10(e) of the Act (29 U.S.C. § 160(e)), if supported by substantial evidence on the record considered as whole. *See Consol. Diesel Co. v. NLRB*, 263 F.3d 345, 351 (4th Cir. 2001). Thus, a reviewing court "may [not] displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. NLRB*,

[5] The Board found that an additional verbal warning, issued on July 21, 2008, did not violate Section 8(a)(3) and (1). (A 855.) This finding is not in issue in this Court.

340 U.S. 474, 488 (1951). *Accord Grinnell Fire Prot. Sys. Co. v. NLRB*, 236 F.3d 187, 195 (4th Cir. 2000).

Further, this Court will not disturb credibility determinations absent "extraordinary circumstances." *WXGI, Inc. v. NLRB*, 243 F.3d 833, 842 (4th Cir. 2001). Those circumstances are limited to rare instances in which "a credibility determination is unreasonable, contradicts other findings of fact, or is based on an inadequate reason or no reason at all." *Id.* (citations and quotation marks omitted). Under that standard, an agency's fact findings should be reversed only if the record "compels" a contrary conclusion. *INS v. Elias Zacharias*, 502 U.S. 478, 481 n.1, 483-84 (1992).

Finally, the Board's legal determination is "entitled to considerable deference" and must be upheld if it is reasonable and consistent with the policies of the Act. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495 (1979); *accord Anheuser-Busch, Inc. v. NLRB*, 338 F.3d 267, 273 (4th Cir. 2003). The Board's construction of the Act "should not be rejected merely because the courts might prefer another view of the statue." *Ford Motor*, 441 U.S. at 497.

SUMMARY OF ARGUMENT

1. The Company violated Section 8(a)(1) of the Act when Acting Foreman Beighle told employee Coleman on July 18 that he could not distribute union literature anywhere on company property. Such a broad ban on distribution, even

in nonworking areas on nonworking time, is unlawful absent special circumstances such as a need to avoid interference with production or discipline, which the Company failed to show here. In announcing the ban, Beighle was acting as the Company's agent, for Company President Patterson expressly authorized Beighle to say what he said to Coleman.

2. The Company also violated Section 8(a)(1) when Foreman McGlothlin told Coleman on September 4 that he could not solicit or distribute union literature even during lunch and break periods. Such a broad prohibition is unlawful absent special circumstances, which the Company did not show.

3. The Company further violated Section 8(a)(1) when Foreman McGlothlin told Coleman on September 4 that he could not talk to other employees about the Union during working time. Since employees freely discussed numerous other nonwork-related matters during working time, the prohibition against union-related discussions was discriminatory and therefore unlawful.

4. The verbal warning that Foreman McGlothlin gave Coleman on September 4 violated Section 8(a)(3) and (1) of the Act. The warning was concededly based on Coleman's conversation with a fellow employee about the Union, which was protected activity. The conversation did not violate the Company's valid rules on solicitation and distribution, for Coleman did not give

union literature to the other employee, or ask him to sign a union authorization card, during working time.

Even if the Company had reasonably believed that Coleman had violated its valid rules, the September 4 warning would have been unlawful. An employer's reasonable belief that an employee has engaged in misconduct in the course of protected activity is not a defense where it is shown that the misconduct did not occur. Moreover, the Company's issuance of the warning without attempting to get either Coleman's version of the facts or that of the employee he allegedly solicited is inconsistent with a reasonable belief that he was guilty of wrongdoing.

5. The Company also violated Section 8(a)(3) and (1) of the Act by giving Coleman warnings on September 15 that were dated February 29 and September 11, allegedly for failing to maintain adequate berms. The Board reasonably found that this stated reason was a pretext to mask the Company's true motive, which was Coleman's union activity. The Company's earlier coercive statements and actions, some of which were directed at Coleman, show union animus which continued until the Company got its chance to impose additional punishment against Coleman.

The Board was warranted in finding, given Coleman's open display of union insignia on his clothing, that the Company knew of his union activity before February 29. Moreover, the Board properly found that the warning dated February

29 was not issued on that date, but was fabricated on a later date when the Company clearly knew of Coleman's union activity. Coleman was not told on February 29 that he was being warned, whereas on other occasions when he received verbal warnings, he was specifically informed of them. Since he was not on notice until September, only 2 months before the filing of the charge, that he had received a warning, Section 10(b) does not bar a finding that the warning was unlawful.

The Board was also warranted in finding that the warning was pretextual. The undisputed evidence shows no wrongdoing by Coleman that could arguably justify disciplining him. The berms were concededly adequate for the trucks initially coming to Coleman's work site, and when he was advised that the berms were no longer adequate, because larger trucks were coming, he promptly raised them. There is no evidence that any other employees received warnings under similar circumstances. The pretextual nature of the stated reason for the warning supports both an inference that the Company was aware of Coleman's union activity and a finding that such activity was the real reason for the warning.

The written warning dated September 11 and handed to Coleman on September 15 was likewise motivated by his union activity. Foreman McGlothlin's prior coercive statements and promulgation of unlawful restrictions on union solicitation and distribution, and prior threats by Company President

Patterson, show their union animus. The timing of the written warning, which occurred soon after an unlawful verbal warning to Coleman for discussing the Union with another employee, supports the finding of unlawful motivation.

The Board properly found that the alleged legitimate reason for the warning—a violation of safety rules—was pretextual. The temporary knocking down of the berm violated no safety rule; Coleman was not required to notify his foreman in advance before doing this, and he promptly rebuilt the berm when Foreman McGlothlin told him to do so.

The Board found, on the basis of credibility resolutions, that the height of the berm was adequate. However, if Coleman violated the safety rules by not maintaining an adequate berm, at least one truck driver also violated the safety rules by driving a large truck toward the allegedly inadequate berm. By giving Coleman a written warning, while not disciplining the truck driver at all, the Company treated Coleman in a disparately harsh manner. This disparate treatment warranted an inference of antiunion motivation.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY PROMULGATING OVERBROAD PROHIBITIONS AGAINST UNION DISTRIBUTION AND SOLICITATION, AND BY DISCRIMINATORILY PROHIBITING UNION-RELATED CONVERSATIONS

A. Applicable Principles

One of the most basic rights that employees enjoy under the Act is the right to communicate with their coworkers about issues concerning collective bargaining. *See Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797-99, 803-04 & n.10 (1945). Thus, Section 7 of the Act (29 U.S.C. § 157) protects employees' right to "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 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 these Section 7 rights.

Where, as here, an employee is lawfully present on his employer's property pursuant to his employment, the employer cannot restrict protected Section 7 communication without showing that "special circumstances" render the restriction "necessary to maintain production or discipline." *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 492-93 (1978). "Managerial rights decisions make clear that any

restriction of employees' on-premises communication in nonworking areas during nonworking hours 'must be presumed to be an unreasonable impediment to self-organization . . . in the absence of evidence that special circumstances make the rule necessary.''' *District Lodge 91, Machinists v. NLRB*, 814 F.2d 876, 880 (2d Cir. 1987) (quoting *Republic Aviation Corp.*, 324 U.S. at 803-04 & n.10).

Employee distribution of union literature, like employee solicitation, is "among the core activities safeguarded by [Section] 7." *Consolidated Diesel Co. v. NLRB*, 263 F.3d 345, 352 (4th Cir. 2001). Thus, although an employer may prohibit the distribution of all literature, including union literature, in working areas at all times, it may not, absent special circumstances, prohibit such distribution in nonworking areas during nonworking time. *NLRB v. Southern Maryland Hosp. Center*, 916 F.2d 932, 935-36 (4th Cir. 1990); *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 620-23 (1964). Similarly, although an employer may prohibit union solicitation during working time if it acts in a nondiscriminatory manner, it may not, absent special circumstances, prohibit union solicitation outside working time. *Republic Aviation Corp.*, 324 U.S. at 803-04 & n.10; *accord NLRB v. Beverage-Air Co.*, 402 F.2d 411, 418-19 (4th Cir. 1998).

Moreover, the enforcement of even a facially valid restriction is unlawful if the employer discriminatorily applies it to prohibit only union-related communications while permitting similar distribution or solicitation unrelated to

unions. *ITT Industries, Inc. v NLRB*, 251 F.3d 995, 1006 (D.C. Cir. 2001). For this purpose, other distribution or solicitation is deemed to be similar to union-related communications if it interferes with production or discipline—the employer interests that may justify restrictions on otherwise protected distribution or communication in the first place—to at least as great an extent as the union-related communications that the employer seeks to prohibit. *Southern Maryland Hosp. Center*, 916 F.2d at 937; *Restaurant Corp. of America v. NLRB*, 827 F.2d 799, 804-06 (D.C. Cir. 1987).

B. The Company's Restrictions on Distribution and Solicitation Were Overbroad and Discriminatory

The no-solicitation rule in the Company's employee handbook, which prohibited distribution of written material and solicitation only "during working time" (A 537), was not alleged or found to be unlawful in this case. However, the Board found (A 851, 853) that in conversations with employee Coleman on July 18 and September 4, officials of the Company announced further restrictions on union distribution and solicitation which were unlawfully overbroad and, in one case, unlawfully discriminatory. As shown below, the record amply supports these findings.

1. The Company violated Section 8(a)(1) of the Act by telling Coleman that he could not distribute union literature before work in the parking lot

The first incident occurred on July 18, 2008. It undisputed that, on that day, Coleman distributed union literature only during nonworking time (before his shift began) and only in a nonworking area (a parking lot). (A 55, 132.) However, later that day, Acting Foreman Beighle told him, "you're not allowed to do that" and, more specifically, "you're not allowed to pass out [u]nion literature on Company property." (A 58.)[6] This statement, on its face, imposed a ban on distribution of union literature that extended beyond working areas to areas such as parking lots—a natural congregating area for off-duty employees, and a protected forum for employee expression. *See, e.g., Beverly Farm Foundation, Inc.*, 323 NLRB 787, 795-96 (1997) (unlawful to prohibit employees from distributing union literature in parking lots), *enforced*, 144 F.3d 877 (7th Cir. 1998). The Company does not offer any legitimate reason, such as avoiding interference with production or discipline, that would justify such a broad ban, and the Board therefore properly held it unlawful. *See NLRB v. Southern Maryland Hospital Center*, 916 F.2d 932, 939-40

[6] The Company's assertion (Br 7, 33-34) that Beighle only told Coleman not to distribute literature during working time necessarily rests on Beighle's testimony, which the administrative law judge expressly discredited. (A 851.) The judge found it implausible that Beighle, who admittedly reported the distribution of literature to Company President Patterson (A 134), would have said or implied to Patterson that such distribution occurred during working time, since such a statement would have been patently false, and Beighle, when asked why he had referred to working time, was unable to answer. (A 136.)

(4th Cir. 1990); *Lafayette Park Hotel*, 326 NLRB 824, 828-29 (1998), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999).

The Company contends (Br 35-39) that Beighle was not acting as its agent in announcing this broad no-distribution rule. Although under Section 2(13)) of the Act (29 U.S.C.§ 152 (13)), proof of actual authority is not required to establish agency, the Board found here (A 848 n.2) that the Company's president did actually authorize Beighle's statement to Coleman. This finding rendered it unnecessary to consider other possible grounds for attributing Beighle's statement to the Company, for proof of actual authority to make such a statement is enough to make the Company liable for it. *See Albertson's, Inc.*, 307 NLRB 787, 787 (1992), *enforcement denied on other grounds*, 8 F.3d 20 (5th Cir. 1993) (table).

The record amply supports the Board's finding of actual authority. Beighle himself credibly testified that when he informed Company President Patterson of Coleman's distribution of union literature, and Patterson said it was not allowed, he asked Patterson whether he should say anything to Coleman about it, and Coleman said yes. (A 134-35.) Patterson's denial of this was expressly discredited. (A 851.) His instruction to Beighle to speak to Coleman about distribution of union literature was enough to make the Company liable for Beighle's statement to Coleman on that subject, whether or not Beighle was instructed to make the specific statements he made. *See Fleming Cos. v. NLRB*,

349 F.3d 968, 971, 973 (7th Cir. 2003); *Poly-America, Inc. v. NLRB*, 260 F.3d 465, 483 (5th Cir. 2001); *Facchina Construction Co.*, 343 NLRB 886, 886-87 (2004), *enforced mem.*, 180 Fed. Appx. 178 (D.C. Cir. 2006).

The Company contends (Br 39-41) that it cured any illegality in Beighle's statement by distributing to all employees and posting, in October, a notice correctly setting forth the law concerning distribution and solicitation, including the right of employees to distribute union literature in nonworking areas during nonworking time and to engage in union solicitation during nonworking time. (A 277, 703-04.) To be effective, a repudiation of prior unlawful conduct "must be 'timely,' 'unambiguous,' 'specific in nature to the coercive conduct,' and 'free from other . . . illegal conduct.'" *Passavant Memorial Area Hosp.*, 237 NLRB 138, 138 (1978) (citations omitted). *Accord Cintas Corp. v. NLRB*, ___F.3d___, 2009 WL 479827*8 (8th Cir., Dec., 15, 2009); *Evergreen America Corp.*, 348 NLRB 178, 181 (2006), *enforced*, 531 F.3d 321 (4th Cir. 2008). The Board properly found here (A 848 n.2, 851) that the October notice failed in several respects to meet these requirements.

First, the alleged repudiation, occurring 3 months after Beighle's unlawful remarks, was untimely. In *Passavant*, 238 NLRB at 139, a purported disavowal 7 weeks after the unlawful threat was held untimely.

Moreover, the alleged repudiation was not "'specific in nature to the coercive conduct.''' *Passavant*, 237 NLRB at 138 (citation omitted). It did not mention Beighle or his unlawful statement, but merely asserted that it was designed to clear up "confusion" about employees' solicitation rights, without indicating what the source of the "confusion" was. As the Board found (A 851), it "[did] not repudiate anything."

Finally, the notice was not "'free from other . . . illegal conduct.''' *Id.* As shown below, pp. 26-28, between Beighle's July announcement of an unlawful ban on distribution of union literature and the October notice, the Company committed similar violations when Foreman McGlothlin announced unlawfully broad no-distribution and no-solicitation rules. These rules, also not mentioned in the October notice, reinforced the likely coercive effect of Beighle's statement.

2. The Company violated Section 8(a)(1) of the Act by telling Coleman that he could not distribute union literature on "company time," including nonwork time, and by prohibiting him from engaging in union-related conversations while letting employees discuss other topics

As shown in the Statement of Facts, on September 4, Foremen McGlothlin told Coleman that he could not distribute union literature on "Company time." (A 63.) Absent clarification, this phrase is ambiguous and therefore unlawful. *See M.J. Mechanical Services, Inc.*, 324 NLRB 812, 813 (1997). Coleman asked for such clarification, saying, "[D]uring lunch and times . . . when we're not expected

to be working, I can do it, right?" McGlothlin replied that he could not "because the Company . . . [was] paying him for that time." (A 63.) In light of Coleman's questions, McGlothlin's answer clearly, and unlawfully, conveyed the message that union solicitation and distribution were prohibited during lunch and break periods, as well as during working time. *See* cases cited above, pp. 20-21. The Board therefore reasonably found (A 853) that the Company, by announcing this prohibition against distribution of union literature during nonworking time, violated Section 8(a)(1) of the Act.

The Company also violated Section 8(a)(1) of the Act when Foreman McGlothlin went on to warn Coleman that he had "picked the wrong time to *talk* to [employee] Robert Rapp." (A 63; emphasis added.) Coleman had only talked to Rapp about the Union, not solicited him during working time. Accordingly, the Board was warranted in finding (A 852-53) that McGlothlin's announcement amounted to a prohibition of all discussion of the Union during working time. Not every employee conversation relating to unions can be equated with solicitation. Rather, only those statements that require an immediate responsive action, such as a request that an employee sign a union authorization card, constitute "solicitation" which may be prohibited during working time. *See, e.g., W.W. Grainger, Inc.*, 229

NLRB 161, 166 (1977), *enforced*, 582 F.2d 1118, 1121 (7th Cir. 1978).[7] In contrast, merely discussing the pros and cons of unionism—all that Coleman did here—is no more disruptive of work than discussing any other subject, for employees can continue working while they are talking.

Moreover, the Board reasonably found that the restriction on union discussion which McGlothlin announced was discriminatory. The record shows that employees freely discussed nonwork-related matters such as their families, race cars, or trips to the beach during working time with impunity. (A 64.) It is settled that although an employer may prohibit all nonwork-related conversation among employees during working time, it may not selectively ban talk about unionization while permitting discussion of other subjects unrelated to work. *See ITT Industries, Inc. v. NLRB*, 251 F.3d 995, 998-99, 1006 (D.C. Cir. 2001); *Industrial Wire Products, Inc.*, 317 NLRB 190, 190 (1995); *Orval Kent Food Co.*, 278 NLRB 402, 407 (1986). "If an employer sacrifices [its] interest in discipline and efficiency to allow disruption of the workplace by non-union solicitations, at least equivalent disruption by union solicitation must be permitted." *Restaurant Corp. of America v. NLRB*, 827 F.2d 799, 806 n.3 (D.C. Cir.1987). As the Company did not show that the discussions about the Union which occurred here

[7] This is so because asking an employee to sign a union authorization card could prompt him to stop working to receive the card; read it; ask questions about its meaning; sign it; and return it to the solicitor, thus substantially disrupting his work. *Id.*

interfered more with production or discipline than the permitted discussions on other topics, its prohibition of only union-related conversations was discriminatory and therefore unlawful.[8]

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY GIVING COLEMAN TWO VERBAL WARNINGS AND A WRITTEN WARNING BECAUSE OF HIS UNION ACTIVITIES

An employer violates Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by disciplining an employee because of his union activities.[9] *See, e.g., Beverly California Corp. v. NLRB*, 227 F.3d 817, 841 (7th Cir. 2000) (disciplinary warnings motivated by desire to interfere with union organizing); *Palace Sports & Entertainment v. NLRB*, 411 F.3d 212, 220-22 (D.C. Cir. 2005). The Board found here that the Company gave Coleman three unlawful warnings: a verbal warning, purportedly for violating the Company's valid no-solicitation rule; and another verbal warning as well as a written one, both purportedly for failing to maintain berms at the proper height. The Board found (A 853-56) that all three

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[8] The Board's further finding that the Company violated Section 8(a)(3) and (1) of the Act by giving Coleman a verbal warning for breaching this unlawful prohibition is discussed below, pp. 29-33.

[9] Section 8(a)(3) makes it unlawful for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ." A Section 8(a)(3) violation results in a "derivative" violation of Section 8(a)(1) of the Act. *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

warnings violated Section 8(a)(3) and (1) of the Act. As shown below, the record amply supports these findings.

A. The September 4 Warning

The Company first unlawfully warned Coleman on September 4; this warning was for conversing with employee Rapp on September 3. The Board found (A 852), on the basis of Coleman's credited testimony, that the conversation, insofar as it concerned unions, was limited to his responding to Rapp's question about when the Union would seek an election and explaining the benefits of unionization. Rapp conceded that Coleman did not offer him a union authorization card (A 391), and initially testified that Coleman did not give him a copy of the Union's contract until that evening (A 387); the Board discredited his later testimony (*id*.) that Coleman did so during working time, as well as his testimony (A 385) that Coleman asked him to sign a union authorization card.

Under the Board's findings, the conversation was clearly protected activity which could not be a lawful ground for discipline. *See Palace Sports & Entertainment*, 411 F.3d at 222. It did not interfere with Coleman's or Rapp's work, since it occurred while they were walking back to their bulldozers from a remote work area. Nor did it violate any valid company rule. The Company had no general rule against nonwork-related conversations, even during working time. No distribution of literature occurred during the conversation, and it was not

solicitation, since nothing Coleman said required an immediate response from Rapp. *See W.W. Grainger, Inc. v. NLRB*, 582 F.2d 1118, 1121 (7th Cir. 1978); *Wal-Mart Stores, Inc. v. NLRB*, 400 F.3d 1093, 1099 (8th Cir. 2005).

It is clear that the September 4 warning was motivated by the union-related subject matter of Coleman's conversation with Rapp. Foreman McGlothlin, in issuing the warning, told Coleman that he had "picked the wrong time to talk to Robert Rapp" (A 63), and his notation on his daily calendar (A 701-02) attributed the warning to "union talk on pay time" without mentioning solicitation, distribution, or interruption of work. Thus, Coleman was warned for merely discussing the Union with Rapp during working time. That warning was necessarily unlawful, since Coleman had violated no valid company rule by such discussion. As shown above, p. 28, the Company had no general rule against nonwork-related discussions during working time; the rule announced by McGlothlin when he issued the warning applied only to discussion of unions and accordingly was discriminatory and unlawful; and discipline based on such an unlawful rule is itself unlawful. *See Medeco Security Locks, Inc. v. NLRB*, 142 F.3d 733, 748 (4th Cir. 1998).

Because, as shown above, p. 30, Coleman's conversation with Rapp was protected activity, a warning based on that activity would be unlawful even if the Company had reasonably believed that Coleman had solicited Rapp in violation of

its valid no-solicitation rule. It is settled that an employer's reasonable belief that an employee has engaged in misconduct in the course of protected activity does not make discipline of the employee lawful where it is shown that the misconduct did not, in fact, occur. *See NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 23 (1964).[10] A contrary rule would cause the protected activity to "'lose some of its immunity'" and "'acquire [ ] a precarious status . . . .'" *Medeco Security Locks, Inc.*, 142 F.3d at 748 (quoting *Burnup & Sims*, 379 U.S. at 23-24). Here, as shown above, the Board found, on the basis of credibility resolutions, that Coleman did not, in fact, solicit Rapp or distribute union literature to him. Accordingly, even if the Company had reasonably believed that Coleman had done so, its reliance on that belief would not have made his September 4 warning lawful.

The Board also found (A 853) that the Company did not reasonably believe that Coleman had violated its valid no-solicitation rule. The Company, in issuing the September 4 warning, relied solely on the hearsay report of employee Jeff DeMoss, who had not heard the conversation between Coleman and Rapp, that

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[10] In *DTR Industries, Inc.*, 350 NLRB 1132, 1135-36 (2007), relied on by the Company (Br 43), the employer acted on a reasonable belief that the discharged employee had engaged in misconduct unrelated to his protected activity, a situation expressly distinguished in *Burnup & Sims*, 379 U.S. at 24. In that situation, the Board found the discharge lawful under a *Wright Line* analysis (*see* below, p. 34). However, *Wright Line* does not apply where, as here, the discipline is concededly based on protected activity and the only question is whether the employee's misconduct removed that activity's protected status. *See NLRB v. Air Contact Transport, Inc.*, 403 F.3d 206, 215 (4th Cir. 2005). The Board thus properly declined (A 853) to apply a *Wright Line* analysis to the September 4 warning.

Rapp had told DeMoss that Coleman had asked him to sign a union authorization card and offered him a union contract. Not only did the Company not attempt to get Coleman's side of the story before issuing the warning; it did not even attempt to get Rapp's version of events until after it gave Coleman the warning. (A 367.) In addition, in giving Coleman the warning, Foreman McGlothlin did not even follow DeMoss' version; he did not mention a union contract, but accused Coleman of actually giving Rapp a union authorization card (A 63), something which DeMoss had not mentioned (A 358-59) and which Rapp, in his testimony (A 391), conceded had not occurred. The Company's lack of investigation and its reliance on false reasons are less consistent with a reasonable belief that Coleman was guilty of wrongdoing than with a determination to discipline him, regardless of the facts, based on the one fact of which the Company was certain—namely, that Coleman was an active supporter of the Union. *See American Thread Co. v. NLRB*, 631 F.2d 316, 322 (4th Cir. 1980); *W.W. Grainger, Inc. v. NLRB*, 582 F.2d 1118, 1121 (7th Cir. 1978).

B. The Warnings for Inadequate Berms

Each of the two remaining warnings was allegedly based on Coleman's failure to maintain berms at an adequate height. The Board found (A 854, 856) that in each case, this reason was a pretext, and that the real reason for the

warnings was Coleman's union activity. Accordingly, the Board concluded that both warnings violated Section 8(a)(3) and (1) of the Act.

In evaluating these warnings, the Board applied the test for determining motive articulated in *Wright Line*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981). Under that test, if the Board finds that protected activity was a "motivating factor" in the employer's action, the employer may avoid liability only by proving as an affirmative defense that it would have taken the same action in the absence of the employee's protected activity. *See NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393, 395, 397-403 (1983). *Accord RGC (USA) Mineral Sands, Inc. v. NLRB*, 281 F.3d 442, 448 (4th Cir. 2002). However, a finding that the stated ground for discipline was a pretext means that such ground either did not exist or was not relied on, and necessarily implies that the employer has not shown that it would have imposed the same discipline absent the employee's union activity. *See Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981), *enforced by default*, 705 F.2d 799 (6th Cir. 1982); *USF Red Star, Inc. v. NLRB*, 230 F.3d 102, 106 (4th Cir. 2000).

In proving a discriminatory motive, the General Counsel "may rely on either direct or circumstantial evidence." *RGC (USA) Mineral Sands, Inc. v. NLRB*, 281 F.3d at 449. Motive is "'a factual issue which the expertise of the Board is peculiarly suited to determine . . . .'" *FPC Holdings, Inc. v. NLRB*, 64 F.3d 935,

942 (4th Cir. 1995) (citation omitted). Accordingly, the Board's findings as to motive are conclusive if supported by substantial evidence on the record as a whole. *Id.*

Union animus is a significant factor in determining an employer's motivation. *See RGC (USA) Mineral Sands, Inc. v. NLRB*, 281 F.3d at 449. The Board here found animus (A 850-51) based on uncontroverted evidence of several threats by company supervisors, including threats on at least three occasions that the Company would respond to unionization by reducing shifts and laying off employees (A 45, 159, 168); a warning to an employee not to mention the Union while he was on the job (A 150); and a statement by the Company's president that there would be no future for the Company if it went union. (A 193-94.) The Company also took away the FM radio it had issued to Coleman and told him it was doing so because he now represented the Union rather than the Company. (A 51.) This conduct is ample evidence of the Company's union animus.[11]

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[11] The Board did not find the foregoing conduct to be substantively unlawful because it was the subject of a prior settlement agreement between the Company and the Board's General Counsel. However, the settlement agreement expressly authorized the General Counsel to use such conduct as evidence in the future litigation of other cases (A 465), and that was done here. This background use of conduct in settled allegations is analogous to the use of conduct, which cannot be found unlawful because it occurred more than 6 months before the filing of a charge, as evidence that conduct that is not time-barred was motivated by union animus and therefore unlawful. *See Machinists Local1424 v. NLRB*, 362 U.S. 411, 416 (1960); *NLRB v. Instrument Corp.*, 714 F.2d 324, 329 n.7 (4th Cir. 1983).

The Company contends (Br 51) that, in the absence of any unlawful conduct between April and September, it cannot be found to have had union animus at the time of the September warnings. The Board properly found (A 851) that the animus demonstrated by the earlier statements continued to exist in September, even though no overt acts during the previous 5 months manifested its presence. The animus can remain hidden until an opportunity arises to take action against an employee on some pretextual ground, and lead the employer to take such action then. *See American Thread Co. v. NLRB*, 631 F.2d 316, 322-23 (4th Cir. 1980) (discharge of employee 8 months after his last known union activity found discriminatory, where employer could reasonably fear renewed union activity in the future, and it discharged employee the first time it had even a pretextual reason for doing so).

We now show that the circumstances surrounding each of the warnings involving berms support the Board's findings that each was discriminatory and therefore unlawful.

1. The warning based on the February 29 incident

It is undisputed that the berms constructed by Coleman on February 29 were high enough for the trucks initially using the road to his work site; Foreman Fitzwater conceded this. (A 319.) Fitzwater also conceded (A 312) that when he told Coleman that the berms were no longer adequate, because larger trucks were

now coming, Coleman promptly raised the berms. As the Board found (A 854), the foregoing facts show no plausible ground for disciplining Coleman, and the administrative law judge credited his testimony (A 72) that Fitzwater said nothing to him then about a warning. However, in September, when giving Coleman a written warning (discussed below, pp.42-45), the Company asserted (A 462) that on February 29, Fitzwater had verbally warned him for having inadequate berms. The Board found (A 854) that the belated verbal warning was pretextual and motivated by Coleman's union activity. The record amply supports the Board's finding.

Foreman Fitzwater's April threat to another employee that unionization would lead to layoffs (A 159) establishes his union animus. The Board found (A 854), contrary to the Company's contention (Br 17, 49, 51), that Fitzwater knew of Coleman's union activity before February 29—an inference reasonably drawn from Coleman's open display of union insignia on his clothing every day for nearly 2 months before that date (A 40-41) and his uncontroverted testimony (A 71-72) that he and Fitzwater were longtime friends. *See WXGI, Inc. v. NLRB*, 243 F.3d 833, 841 (4th Cir. 2001); *Clark & Wilkins Industries, Inc*., 290 NLRB 106, 115 (1988), *enforced*, 887 F.2d 308, 312-13 n.10 (D.C. Cir. 1989).

The Board also found (A 854) that Fitzwater did not give Coleman a verbal warning on February 29, and that his notation on his daily calendar that he had

done so (A 685-86) was not made until much later, probably in September. It follows that the true date of the issuance of the verbal warning was after the Company had unquestionably become aware of Coleman's union activity. That was in mid-March, as the Union sent a letter dated March 13 to the president of the Company and its parent corporation, advising them of Coleman's support for the Union. (A 636.)

The Board was justified in finding that Coleman did not receive a verbal warning on February 29. The administrative law judge credited his testimony (A 72) that Fitzwater said nothing to him about a warning that day, and discredited the contrary testimony of Fitzwater. All that Fitzwater said, according to Coleman (A 72), was "'your berms [are] too low.'" This was merely "the giving of instructions . . . or needed corrections of work techniques," which, as the Board has recognized in another context, is not equivalent to discipline or a threat thereof. *See Quality Mfg. Co.*, 195 NLRB 197, 199 (1972), *enforced*, 420 U.S. 276 (1975). On two other occasions when Coleman received verbal warnings—July 21 (found lawful by the Board) and September 4 (found unlawful by the Board)—he was specifically told that he was being warned. (A 63, 341.) The absence of similar language at the time of the February 29 incident supports the Board's finding that no warning occurred then.

The Board reasonably inferred (A 854) that, since there was no verbal warning on February 29, Fitzwater's notation that there had been one was a subsequent fabrication designed to strengthen the justification for giving Coleman a written warning in September. Indeed, when two supervisors gave Coleman the written warning, with its reference to a February 29 verbal warning, he refused to sign it, saying, "[I]t's a fabricated lie and you know it is." (A 67.) Neither supervisor contradicted him. To the contrary, McGlothlin, the only one of the two to testify, specifically tied the "lie" remark to the alleged February 29 warning, saying that Coleman had called Fitzwater a "fucking liar." (A 354.)[12]

The Board also found (A 854) that the alleged warning, whenever it was given, was wholly pretexual because Coleman had done nothing wrong. Even Fitzwater conceded that the berms were originally adequate (A 316, 319), and that as soon as Coleman was advised that they were no longer adequate due to changed circumstances (larger trucks using the road), he promptly repaired them (A 305, 321). Although the Company notes (Br 46) that other employees were warned for inadequate berms, it offered no evidence that any were warned under circumstances similar to those existing on February 29. One employee was warned in 2002 when he operated a bulldozer where "ther[e] was *no* berm." (A 647; emphasis added.) Coleman's own subsequent warning on July 21, found lawful by

[12] McGlothlin expressly disclaimed reliance on this language as a basis for disciplining Coleman. (A 354.)

the Board (A 854-55), followed an admitted failure on his part to raise berms after being told to do so (A 341-42). There is no evidence of issuance of a verbal warning where, as on February 29, there was neither a failure to carry out instructions nor a berm that was inadequate *ab initio*.

The falsity of an employer's stated reasons for taking adverse action against an employee suggests that the true reason was an unlawful one. *See NLRB v. Frigid Storage, Inc.*, 934 F.2d 506, 510 (4th Cir. 1991); *Alpo Petfoods, Inc. v. NLRB*, 126 F.3d 246, 253-54 (4th Cir. 1991). This is so because employers do not normally make employment decisions "without any reason at all." *Neptune Water Meter Co. v. NLRB*, 551 F.2d 568, 570 (4th Cir. 1977). The pretextual nature of the stated grounds for discipline also supports an inference of employer knowledge of union activity. *See Montgomery Ward & Co.*, 316 NLRB 1248, 1253, 1254-55 (1995), *enforced mem.*, 97 F.3d 1448 (4th Cir. 1996). Especially in light of the other surrounding circumstances discussed above pp. 37-39, the unconvincing nature of the reasons given by the Company for the alleged February 29 warning supports both the Board's finding that the Company was aware of Coleman's union activity prior to issuing the warning and its finding that such activity was the real reason for the warning.

The Company contends (Br 47) that Section 10(b) of the Act (29 U.S.C. § 160(b))[13] bars a finding that the alleged February 29, 2008 warning was unlawful, because the charge alleging its illegality was not filed until November 19, 2008. (A 421.) However, the limitations period of Section 10(b) does not begin to run until "an employee receives unequivocal notice of an adverse employment action . . . ." *Taylor Warehouse Corp. v. NLRB*, 98 F.3d 892, 899 (6th Cir.1996) (citation omitted). The burden of proving such notice is on the respondent. *Id.*

The complaint here specifically alleged (A 425, par. 7(d)) that neither Coleman nor the Union was aware of the alleged February 29 warning until September 15, a date well within the 6-month limitations period of Section 10(b). As shown above, pp. 37-38, the Company did not tell Coleman on February 29 that he was receiving a warning because of his actions that day, and it points to no evidence of any other event occurring prior to September 15 that put Coleman or the Union on notice that such a warning had been issued. Accordingly, the Board properly found (A 854) that neither was or should have been aware of the alleged warning until September 15, and that the charge was therefore timely.

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[13] Section 10(b) provides, in pertinent part, that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board . . . ."

2. The written warning dated September 11

On September 15, the Company handed Coleman a written warning (A 462) dated September 11. The Company purportedly based this warning on Coleman's supposed failure to maintain adequate berms at a construction site on September 10 and on the verbal warning he allegedly received on February 29, as well as another verbal warning given on July 21.[14] The Board found (A 856) that the real reason for the September 11 warning was Coleman's union activity. As shown below, the record fully supports this finding.

Foreman McGlothlin's threats of layoffs (A 45, 168-69, 171), and his telling Coleman that his FM radio was being taking away because he "represent[ed] the Union" (A 51), show both his union animus in general and his animus against Coleman's union activity in particular. Although those incidents occurred in April, McGlothlin's animus against Coleman and the Union persisted in September, as shown by his issuing Coleman a warning because of his conversation with Rapp and by his promulgation of unlawful restrictions on union solicitation and distribution. Further, President Patterson, who directed McGlothlin to give Coleman a written warning (A 281, 353), also showed union animus with March

[14] Since, as shown above, the alleged February 29 warning was unlawful, the reliance on it in issuing a written warning was also unlawful. *See Opportunity Homes, Inc. v. NLRB*, 101 F.3d 1515, 1521 (6th Cir. 1996) (discharge for insubordination found unlawful where employee would not have been discharged but for prior suspension which was motivated by union animus); *Dynamics Corp.*, 296 NLRB 1252, 1253-54 (1989), *enforced*, 928 F.2d 609, 613-14 (2d Cir. 1991).

threats similar to those McGlothlin made in April. (A 150, 192-94.)

The timing of the warning is also significant. It is dated September 11, only 8 days after Coleman spoke to Rapp about unionization and 7 days after he was unlawfully warned for doing so. The Board reasonably found (A 856) that the Company, in upping the ante by giving Coleman a written warning, was attempting to send him a message: curtail your union activity or face more serious consequences. *Cf. Care Manor of Farmington, Inc*., 318 NLRB 725, 725-26 (1995) (warning, and discharge a month later, found unlawful where they closely followed other unlawful conduct, including unlawful discipline of same employee).

The Board also found unpersuasive the Company's asserted legitimate reason for disciplining Coleman. (A 856.) The Company contends (Br 18-19, 49-50) that Coleman violated its safety rules in two ways: by failing to maintain the berms at the required height (the middle of the axles on the trucks that were bringing him material); and by tearing down part of an existing berm.[15] The Board found (A 856) that no violation of the safety rules occurred, and that reliance on the first alleged violation involved disparate treatment.

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[15] The Company also contends (Br 18, 49) that Coleman should have blocked the road to his work site so that the trucks would have to dump their materials on higher ground where the berms were a safe height. As the Board pointed out (A 856), this alleged safety violation was not mentioned in Coleman's warning notice. (A 462.)

Coleman testified that he had knocked down the berm to widen the road, so that the trucks bringing material to him would have more room to turn around (A 80); that he intended to rebuild the berm as soon as a truck brought him material to widen the road, and that he so informed Foreman McGlothlin (A 80, 124); that he had blocked the road so that no trucks could go where there was no berm (A 81, 122); and that he was not required to notify his foreman in advance before temporarily knocking down a berm (A 125). McGlothlin conceded (A 352-53) that when he instructed Coleman to rebuild the berm, Coleman promptly did so. The Board was thus warranted in concluding (A 855-56) that the temporary breaking down of the berm was not a safety violation.

The administrative law judge (A 855) credited Coleman's testimony that the berm was adequate, and discredited McGlothlin's contrary testimony. It follows that the safety violations cited in the written warning (A 462) never occurred. However, if Coleman had violated the Company's safety rules, he would not have been alone. Safety Specialist Doug Martin, a witness for the Company, testified that it was *every* employee's responsibility to see that berms were properly constructed (A 211) and, in particular, that a truck driver who brought his truck into an area with an inadequate berm would be committing a serious safety violation and would be disciplined (A 237). Thus, if Coleman's work area had an inadequate berm, any drivers who brought trucks into that area should have been

disciplined. They were not.

Foreman McGlothlin agreed that it would be dangerous for a truck to continue down the road to an area with an inadequate berm, and that he had personally observed at least one large truck heading for the area of Coleman's supposedly inadequate berm. However, while Coleman received a written warning, the driver of the truck did not even get a verbal warning. (A 369-70.) Given McGlothlin's failure to offer any plausible explanation for this gross disparity in treatment, the Board reasonably inferred (A 856) that the true explanation was Coleman's union activity. *See American Thread Co. v. NLRB*, 631 F.3d 316, 322 (4th Cir. 1980); *NLRB v. Rockline Industries, Inc.*, 412 F.3d 962, 968-70 (8th Cir. 2005).

CONCLUSION

For the foregoing reasons, the Board respectfully submits that the Company's petition for review should be denied and that the Board's Order should be enforced in full.

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RESET FORM

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-1938 (L) **Caption:** Fola Cola Company, a/b/a Powellton Coal Company

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(s) David A. Fleischer

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Dated: 1/11/10

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FOLA COAL COMPANY, a/b/a POWELLTON COAL COMPANY	)	
Petitioner/Cross-Respondent	)	Nos. 09-1938(L) 09-2057
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	Board Case No. 09-CA-44608
and	)	
UNITED MINE WORKERS OF AMERICA, AFL-CIO	)	
Intervenor	)	

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I hereby certify that on January 11, 2010, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

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Dated at Washington, DC
this 11th day of January, 2010