

In the
Supreme Court of the United States

QUICKWAY TRANSPORTATION, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD AND THE
GENERAL DRIVERS, WAREHOUSEMEN & HELPERS,
LOCAL UNION NO. 89,

Respondents.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Supreme Court in *Textile Workers Union of America v. Darlington Manufacturing Co.*, 380 U.S. 263, 273-75 (1965) held that an employer's anti-union animus alone is insufficient to render a partial closing unlawful under the National Labor Relations Act (the "Act"). In *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 684 (1981) the Court further held that a partial closing decision is not a mandatory subject of bargaining under the Act. Here, both the Sixth Circuit and the National Labor Relations Board (the "Board") ruled that the Petitioner, Quickway Transportation, Inc. ("Quickway") violated the Act by failing to bargain over a partial closing decision allegedly motivated by anti-union animus. In finding that the closing itself also violated the Act, the Sixth Circuit and the Board relied upon lawful intra-management communications as evidence of anti-union animus and a purpose to chill unionism, despite the congressional command that an employer's non-coercive expressions of "views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice[.]" 29 U.S.C. § 158(c). From these circumstances and the proceedings below arise the following questions:

1. Whether anti-union animus renders an employer's partial closing decision a mandatory subject of bargaining under 29 U.S.C. § 158(a)(5) and (d).
2. Whether 29 U.S.C. § 158(c) precludes consideration of lawful intra-management communications as evidence of anti-union motivation in support of an unfair labor practice.

PARTIES TO THE PROCEEDINGS

Petitioner and Petitioner/Cross-Respondent

- Quickway Transportation, Inc.

Respondent and Respondent/Cross-Petitioner

- National Labor Relations Board

Respondent and Intervenor

- General Drivers, Warehousemen & Helpers, Local Union No. 89

CORPORATE DISCLOSURE STATEMENT

No publicly held company owns 10% or more of Quickway Transportation, Inc.'s stock or its parent company, Paladin Capital, Inc., located at 5200 Maryland Way, Suite 400, Brentwood, Tennessee 37027

LIST OF PROCEEDINGS

U.S. Court of Appeals for the Sixth Circuit
Nos. 23-1780, 23-1820

Quickway Transportation, Inc., *Petitioner/Cross-Respondent*, v. National Labor Relations Board, *Respondent/Cross-Petitioner*. General Drivers, Warehousemen & Helpers, Local Union No. 89, *Intervenor*.

Date of Final Opinion: September 11, 2024

National Labor Relations Board

Nos. 09-CA-251857, 09-CA-254584, 09-CA-255813,
09-CA-257750, 09-CA-257961, 09-CA-270326, and
09-CA-272813

Quickway Transportation, Inc., and Geoffrey
Brummett, Donald Ray Hendricks and Warren Tooley
and Brent Wilson and General Drivers, Warehousemen
and Helpers, Local Union No. 89, affiliated with The
International Brotherhood of Teamsters

Date of Decision and Order: August 25, 2023

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit, dated September 11, 2024, is published at 117 F.4th 789 and reproduced in the appendix at App.1a. The Decision and Order of the National Labor Relations Board, dated August 25, 2023, is reproduced at App.63a. The underlying Decision of the administrative law judge, dated January 4, 2022, is reproduced at App.231a.



JURISDICTION

The Sixth Circuit entered its judgment on September 11, 2024. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).



STATUTORY PROVISIONS

29 U.S.C. § 158

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

[. . .]

(3) 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[;]

[. . .]

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 159(a) of this title.

[. . .]

(c) Expression of views without threat of reprisal or force or promise of benefit

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . .



STATEMENT OF THE CASE

A. Statutory Background

1. The Duty to Bargain Collectively Under 29 U.S.C. § 158(a)(5) and (d)

The National Labor Relations Act (“NLRA” or the “Act”), 29 U.S.C. §§ 151-169, governs labor relations in the United States. Congress enacted the NLRA in 1935 with the purpose of preventing “obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining” between employers and the representatives of their employees. *See Id.* at § 151. Bargaining obligations are governed by Section 8(d) of the Act as follows:

[T]o bargain collectively is the performance of the mutual obligation of the employer and the representatives of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment[.]

29 U.S.C. § 158(d) (emphasis added). By this language, “Congress has limited the mandate or duty to bargain to matters of ‘wages, hours, and other terms and conditions of employment.’” *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 674 (1981); *see also Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 220 (1964) (Stewart, J., concurring) (“[T]he specification of wages, hours, and other terms and conditions of employment defines a limited category of issues subject to compulsory bargaining.”). “As to other matters, however, each party is free to bargain or not to bargain,

and to agree or not to agree.” *NLRB v. Borg-Warner Corp., Wooster Division*, 356 U.S. 342, 349 (1958).

The distinction between “mandatory” and “non-mandatory” (or, “permissive”) subjects of bargaining provides the necessary context for interpreting Section 8(a)(5), which makes an employer’s refusal “to bargain collectively with the representatives of his employees” an unfair labor practice. 29 U.S.C. § 158(a)(5).¹ This Court has long held that Section 8(a)(5) and Section 8(d) together limit the obligation to bargain to mandatory subjects only:

Read together, these provisions establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to ‘wages, hours, and other terms and conditions of employment’ The duty is limited to those subjects, and within that area neither party is legally obligated to yield.

NLRB v. Borg-Warner Corp., Wooster Division, 356 U.S. 342, 348-49 (1958); *see also Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 164 (1971) (Section 8(a)(5) and Section 8(d) “[t]ogether . . . establish the obligation of the employer to bargain collectively” over mandatory subjects).

The collective bargaining mandate can apply to an employer’s decision, the effects of the decision, or both the decision and its effects. *See, e.g., Voilas v.*

¹ Section 8(b)(3) likewise prohibits labor organizations or their agents from refusing “to bargain collectively with an employer” over mandatory subjects of bargaining. *See* 29 U.S.C. § 158(b)(3).

GMC, 170 F.3d 367, 379 (3d Cir. 1999) (“The decision to close a plant is plainly one that the employer can make and announce unilaterally; that decision is not a mandatory subject of bargaining.”); *Tri-Tech Servs.*, 340 N.L.R.B. 894, 894 (2003) (“It is well established that the layoff of unit employees is a change in terms and conditions of employment over which an employer must bargain.”); *Providence Hosp. v. NLRB*, 93 F.3d 1012, 1018 (1st Cir. 1996) (“[U]nions generally enjoy the right to bargain over the effects of decisions which are not themselves mandatory subjects of collective bargaining.”).²

2. The Exclusion of Non-Coercive Expressions as Evidence of an Unfair Labor Practice Under Section 8(c)

Under Section 8(c) of the NLRA, an employer’s non-coercive expressions of “views, argument, or opinion” cannot be used as evidence of an unfair labor practice:

The expressing of any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

² Generally, “important management decisions, such as choosing a marketing strategy or liquidating lines of business, are not concinnous subjects for mandatory collective bargaining because they ‘are fundamental to the basic direction of [the] corporate enterprise.’” *Providence*, 93 F.3d at 1018 (quoting *Fibreboard*, 379 U.S. at 223 (Stewart, J., concurring)).

29 U.S.C. § 158(c). The Court has “acknowledge[d] that the enactment of § 8(c) manifests a congressional intent to encourage free debate on issues dividing labor and management.” *Linn v. United Plant Guard Workers*, 383 U.S. 53, 62 (1966); *see also Chamber of Commerce of the United States v. Brown*, 554 U.S. 60, 67 (2008) (“From one vantage, § 8(c) ‘merely implements the First Amendment[.]’”) (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969)). Section 8(c) provides protection in this regard similar to “the express protection given union members to criticize the management of their unions” under 29 U.S.C. § 411(a)(2). 383 U.S. at 62 n.5. However, the Court has found that Section 8(c) “was primarily intended ‘to prevent the Board from attributing anti-union motive to an employer on the basis of his past statements.’” *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 276 (1974) (emphasis added) (quoting *Linn*, 383 U.S. at 62 n.5).

As the Second Circuit has observed, “the Court has not considered the precise meaning of section 8(c)’s prohibition against relying on non-coercive statements as ‘evidence of an unfair labor practice.’” *Holo-Krome Co. v. NLRB*, 907 F.2d 1343, 1345 (2d Cir. 1990) (hereinafter “*Holo-Krome II*”). Nonetheless, a “plain meaning” interpretation of Section 8(c) which precludes reliance on lawful expressions even as “background” evidence is strongly supported by both the legislative history and circuit court precedent, as discussed *infra*.

B. Factual Background

Quickway Transportation, Inc. (“Quickway”) is a commercial motor carrier affiliated with Paladin Capital, Inc. (“Paladin”), and is employee-owned through Paladin’s Employee Stock Ownership Plan (“ESOP”). App.67a. Quickway, along with certain other affiliates, form Paladin’s “Quickway group.” App.4a. The Quickway group operated a total of seventeen trucking terminals across the country, thirteen of which belonged to Quickway, including a terminal in Louisville, Kentucky. App.4a. Quickway employed between sixty and seventy drivers dispatched out of the Louisville terminal and two satellite locations. App.4a. Four of the seventeen terminals operated by the Quickway group maintain good and longstanding relations with the local unions affiliated with The International Brotherhood of Teamsters (“Teamsters”) and which represent employees of Quickway and other Quickway group companies. App.178a.

The majority of Quickway’s terminals are dedicated to servicing The Kroger Company (“Kroger”), as was the Louisville terminal. App.4a. The Kroger Distribution Center (“KDC”) in Louisville was serviced by Quickway pursuant to a 2018 Dedicated Contract Carrier Services Agreement (“CSA”). App.68a. The KDC accounted for roughly ninety-six percent of Quickway’s Louisville terminal business. App.4a. The KDC supplies two hundred and forty-two Kroger grocery stores across a four-state area. App.68a. Transervice was the primary dedicated motor carrier for the KDC, while Quickway was the secondary motor carrier. App.69a. Zenith Logistics performed all KDC warehouse operations. App.69a. Transervice and Zenith employees were repre-

sented by Local Union No. 89 (the “Union”), affiliated with the Teamsters. App.5a, 69a.

The Union began organizing efforts at the Louisville terminal in June of 2019 and prevailed in a mail-ballot election conducted in May and June of 2020. App.5a, 8a. Quickway and the Union subsequently agreed to meet for bargaining on November 19, 2020. App.9a. The first meeting proved productive as the parties reached good faith tentative agreements on nineteen separate provisions, including union security and dues checkoff, although economics were not discussed. App.9a. The parties scheduled a second contract bargaining meeting for December 10, 2020. App.9a.

Unbeknownst to Quickway, the Union held a strike-authorization meeting on December 6, 2020. App.10a. The Union had already sought and received authorization from the Teamsters for strike benefits for Quickway, Transervice, and Zenith employees in the event of a strike by Quickway’s drivers. App.77a. A former Quickway employee, Donald Hendricks, promptly notified local media outlets of the strike authorization vote, including Louisville television stations WHAS11 and WDRB. App.10a. In a detailed announcement to WDRB, Hendricks wrote that “today a strike authorization was held with a unanimous decision of drivers present to strike on December 10th, 2020 if the company does not concede to the drivers negotiations efforts.” App.10a. This announcement also stated Transervice and Zenith employees would engage in a sympathy strike causing a “shut down” of “Kroger distribution operations in their entirety.” App.185a-186a.

On December 7, 2020, Kroger informed Quickway of media inquiries regarding a planned strike. App.185a. By telephone, Quickway and Kroger officials discussed

potential mitigation measures, including the establishment of a reserved gate. App.10a-11a. However, it became evident to Quickway that a reserved gate would be ineffective to prevent a complete shutdown of the KDC upon review of the Protection of Rights language in Article 17, Section 17.2 of the Union's contract with Transervice. App.11a, 79a-80a.

By telephone on the morning of December 8, 2020, Joe Obermeier, Vice President of Supply Chain Operations for Kroger, stated that the KDC could not be shut down and that the situation must be resolved by Quickway. App.186a-187a. Chris Cannon, Vice President of Operations for the Quickway group, advised that Kroger may need to terminate the CSA it maintained with Quickway to avoid a shutdown. App.187a. Following the call, Cannon and two other executives, Joe Campbell, President of Paladin, and William Prevost, Chief Executive Officer of Paladin, met to discuss Quickway's potential liability to Kroger under the CSA in the event of a December 10, 2020 strike. App.187a. Reviewing the CSA, the three executives determined that Quickway could be held responsible for two to four million dollars in damages to Kroger the first day of the strike, and more than one million dollars in damages every day thereafter, accounting for more than eight hundred replacement workers among the three KDC employers, spoiled cargo, depleted store inventories, and other potential costs. App.11a, 80a, 187a. Such liability would financially ruin Quickway, the entire Paladin enterprise, and the ESOP. App.11a. Considering the potential catastrophic financial consequences of the planned strike and KDC shutdown, Quickway made a business decision to seek early term-

ination of the CSA and close the Louisville terminal. App.11a.

Later on December 8, 2020, Obermeier sent a letter to Prevost demanding assurances that “Quickway can and will meet all of its contractual commitments and obligations for any assignments Kroger may choose to make under the [CSA].” App.188a. However, following a series of telephone and written correspondence, Kroger agreed on the morning of December 9, 2020 “to release Quickway immediately from the Carrier Services Agreement[.]” App.190a. The manager of the Louisville terminal was subsequently informed that operations would cease at 11:00 p.m. that night. App.12a. Quickway immediately began removing its equipment from the KDC and the Union and drivers were informed of the closing that evening. App.12a.

Quickway and the Union met that morning as scheduled, and Quickway offered to bargain over the effects of the closing decision and resulting layoffs. App.13a. The Union refused to engage in effects bargaining. App.13a. Quickway drivers struck and picketed on December 10, 2020, consistent with the strike announcement. App.190a-191a. By letter on December 11, 2020, Quickway made an additional offer to meet in effects bargaining, which the Union never accepted. App.13a.

Subsequently, Quickway returned the forty-three trucks it leased from Capital City Leasing (“CCL”), a separate Paladin company, used to service the KDC after which these trucks were either sold or leased by CCL to other Paladin affiliates. App.13a. The Louisville terminal was subleased for the remainder of Quickway’s lease term. App.13a. Quickway has no business in

Louisville and no work has been performed in Louisville since closing on December 9, 2020.

C. Procedural Background

The Regional Director for NLRB Region 9 issued a complaint against Quickway alleging violations of Section 8(a)(1), (3), and (5) over of the terminal closing.³ App.232a. The case proceeded to trial before an Administrative Law Judge (“ALJ”). App.231a. On January 4, 2022, the ALJ dismissed the allegations related to the closing. App.232a.⁴ The ALJ observed that *Textile Workers Union of America v. Darlington Manufacturing Co.*, 380 U.S. 263 (1965) “allows an employer to close part of its business even if motivated by anti-union animus” and found that Quickway’s “withdrawal from the [CSA]” and closing of the Louisville terminal “did not violate the Act[.]” App.257a. Despite his comment that Quickway made the decision to close the Louisville terminal in order “to avoid collective bargaining[,]” the ALJ found that the record is insufficient to establish the closing was also motivated “by a desire to chill unionization in any remaining part” of Quickway’s business. App.257a-258a. Because the closing was therefore lawful under *Darlington*, the ALJ also found that Quickway did not violate Section 8(a)(1) or (5) “by not negotiating with the Union to impasse.” App.258a. Quickway has denied any anti-union motivation or

³ Based on the closing, the Regional Director also set aside previous settlements of unrelated charges, which the ALJ found was not justified. App.233a.

⁴ The ALJ held that the Regional Director “was not justified in setting aside” the previous settlement agreements, but also found that Quickway violated Section 8(a)(1) by other conduct not covered by the settlement agreements. App.233a.

animus associated with the closing of the terminal and specifically excepted to the ALJ's findings of anti-union animus. App.296a, 300a, 304a, 310a, 312a.

By its August 25, 2023 Decision and Order, a two-member majority of the Board reversed the ALJ and held that Quickway "violated Section 8(a)(3) and (1) by ceasing operations at the Louisville terminal and discharging the drivers and violated Section 8(a)(5) and (1) by failing to bargain with the Union over its decision to do so and the effects of that decision." App.66a. The Board agreed with the ALJ that the "cessation of operations at the Louisville terminal constituted a partial closing governed by *Darlington*[,]" but found that the partial closing was motivated in part "by a purpose to chill unionism at [Quickway]'s other terminals and at other Paladin affiliates" and that a chilling effect was foreseeable. App.86a, 98a. The Board thus held that the closing decision was not lawful under *Darlington*. Notably, the Board's findings of anti-union animus and a purpose to chill were largely based on communications solely among Quickway management and executives which did not independently violate the Act. App.92a, 101a. The Board also concluded that "because [Quickway]'s decision . . . was discriminatorily motivated in violation of section 8(a)(3)," Quickway was not excused under *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981) from bargaining about the decision with the Union.⁵ App. 131a-132a. The Board's Decision and Order requires Quickway to "reopen and restore its business opera-

⁵ Quickway has at all times maintained that the closing decision was non-bargainable under *First National Maintenance* regardless of motivation. App.299a, 304a, 308a.

tions at the Louisville terminal as they existed on December 9, 2020.” App.169a.

The Sixth Circuit granted “the Board’s cross-application for enforcement of its order in full.” App.48a. The Sixth Circuit found that the “substantial evidence” standard of 29 U.S.C. § 160(e) (“Section 10(e)”) was satisfied as to the Board’s findings of anti-union animus and a purpose to chill unionization. App.27a. In so holding, the court failed to address Quickway’s argument that the Board was precluded by Section 8(c) of the Act from relying upon lawful intra-management communications as evidence of an unfair labor practice. App.324a-328a. Rather, the court relied on the same lawful communications as “substantial evidence” in support of the Board’s factual findings. App.19a-25a. The Sixth Circuit also adopted the Board’s mistaken interpretation of *First National Maintenance*, holding that “Quickway’s failure to bargain over [the partial closing] decision violated Section 8(a)(5).” App.28a-29a. However, as Judge Murphy rightly noted in his opinion concurring in the judgment, and as discussed further *infra*, the interpretation of *First National Maintenance* as requiring bargaining over partial closing decisions motivated by anti-union animus is “open to serious question.” App.52a.



REASONS FOR GRANTING THE PETITION

This case involves the application of two seminal decisions of this Court: *Textile Workers Union of America v. Darlington Manufacturing Co.*, 380 U.S. 263 (1965) and *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). This Court in *Darlington* held “that when an employer closes his entire business, even if . . . motivated by vindictiveness toward the union, such action is not an unfair labor practice” under Section 8(a)(3) of the Act. 380 U.S. at 273-74. A partial closing is unlawful only if it is also motivated by a purpose of chilling unionization at the employer’s other plants, and such chilling effect is reasonably foreseeable. *Id.* at 275. Consistent with *Darlington*, the Court later held in *First National Maintenance* that a partial closing decision “itself is not part of § 8(d)’s ‘terms and conditions’” over which an employer must bargain with the union, regardless of motivation. 452 U.S. at 684. Here, the Sixth Circuit and the Board held contrary to this Court’s clear precedent by finding that Quickway’s alleged anti-union animus created an obligation to bargain over its decision to close the Louisville terminal. App.28a-29a, 130a-132a. This standard imposes a bargaining obligation which this Court has not found exists under the Act.

The decisions of the Sixth Circuit and the Board are also contrary to the clear language of Section 8(c) of the Act, which prohibits reliance upon lawful expressions as “evidence of an unfair labor practice[.]” 29 U.S.C. § 158(c). The Sixth Circuit and the Board based their findings of anti-union animus and an intent to chill primarily upon lawful, intra-management communica-

tions which did not violate Section 8(c) or any other provision of the Act. This contradicts the congressional purpose of preventing “the Board from attributing anti-union motive to an employer on the basis of his past statements.” *Linn*, 383 U.S. at 62 n.5. Moreover, to infer a chilling purpose from lawful statements that do not violate Section 8(c) renders the distinction in *Darlington* between animus and a purpose to chill meaningless, as a purpose to chill could always be inferred from statements of a non-neutral employer.

This case presents a clean vehicle for the Court to consider the questions presented, both of which require immediate review and resolution by this Court. The first question is significant to all employers in this country who are subject to the NLRA and have more than one operation. The second question presents an opportunity for this Court to reiterate the clear congressional intent of a provision of the Act which has been interpreted and applied inconsistently by the Board and circuit courts at various times.

I. The Sixth Circuit’s Finding that Quickway Was Obligated to Bargain Over Its Partial Closing Decision Is Inconsistent With *Darlington* and Contrary to *First National Maintenance*.

The Sixth Circuit held that Quickway was obligated to bargain with the Union over its decision to close the Louisville terminal because the partial closing was allegedly motivated by anti-union animus. App.28a. (“A partial-closing decision motivated by anti-union animus is . . . subject to an obligation to bargain.”). The Sixth Circuit found that “Quickway’s failure to bargain over that decision violated Section 8(a)(5)” even if Quickway’s decision was also “motivated by economic

necessity.” App.29a. Quickway steadfastly maintained throughout the administrative and judicial proceedings below that its partial closing decision was an entrepreneurial decision motivated solely by the substantial and existential financial risk it faced at the time the decision was made. App.296a, 300a, 310a-311a, 316a-317a. Nonetheless, the Sixth Circuit’s holding that anti-union animus renders a partial closing decision a mandatory subject of bargaining is predicated on a significant misreading of this Court’s precedent. Under *Darlington*, anti-union animus alone is insufficient to render a partial closing unlawful. Additionally, the conclusion that anti-union animus renders a partial closing decision a mandatory subject of bargaining requires reading into *First National Maintenance* an exception to this Court’s holding which it did not create.

A. *Darlington* Imposed No Mandatory Bargaining Obligation Over Complete or Partial Closing Decisions.

At issue in *Textile Workers Union v. Darlington Manufacturing Co.*, 380 U.S. 263 (1965) was the closing of a textile mill in South Carolina, which was the sole business operation of the Darlington Manufacturing Company (“Darlington”). 380 U.S. at 265. The Board found that the complete closing of Darlington was motivated by anti-union animus, and therefore violated Section 8(a)(3), which prohibits an employer from discouraging membership in a labor organization “by discrimination in regard to hire or tenure of employment or any term or condition of employment[.]” *Id.* at 267; 29 U.S.C. § 158(a)(3). The Board found in the alternative that an unlawful partial closing had occurred, as Darlington was part of the larger Deering Milliken enterprise. 380 U.S. at 268.

The Fourth Circuit denied enforcement and held that “[t]o go out of business *in toto* or to discontinue in part permanently at any time, we think was Darlington’s absolute prerogative.” *Darlington Manufacturing Co. v. NLRB*, 325 F.2d 682, 685 (4th Cir. 1963). This Court agreed with the Fourth Circuit that “an employer has the absolute right to terminate his entire business for any reason he pleases,” including anti-union animus. 380 U.S. at 268, 274. As the Fourth Circuit correctly observed, the NLRA “does not compel one to become or remain an employer.” *Id.* at 271 (quoting 325 F.2d at 685). Nothing in the NLRA prohibits an employer from going out of business entirely:

A proposition that a single businessman cannot choose to go out of business if he wants to would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent so construing the Labor Relations Act. We find neither.

Id. at 270. The Court therefore rejected the contention that an employer commits an unfair labor practice by closing to avoid unionization, holding that “when an employer closes his entire business, even if the liquidation is motivated by vindictiveness toward the union, such action is not an unfair labor practice.” 380 U.S. at 274 (emphasis added).

However, the Court in *Darlington* was careful to distinguish partial closings from complete closings, recognizing that a “partial closing may have repercussions on what remains of the business, affording employer leverage for discouraging the free exercise of § 7 rights among the remaining employees[.]” *Id.* at 274-75. An employer may violate Section 8(a)(3) by

closing part of his business with the purpose of chilling unionization at his other plants, while “a complete liquidation of a business yields no such future benefit for the employer[.]” *Id.* at 272. The employer’s motivation is therefore relevant in the context of a partial closing but not in a complete closing.

To determine whether a partial closing violates the Act, the *Darlington* Court established a standard consisting of two elements: “a partial closing is an unfair labor practice under § 8(a)(3) if motivated by a purpose to chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such closing would likely have that effect.” *Id.* at 275 (emphasis added). Anti-union animus alone does not render a partial closing unlawful. *See, e.g., Weather Tamer, Inc. v. NLRB*, 676 F.2d 483, 490 (11th Cir. 1982) (“A partial closing motivated by anti-union purposes is also not an unfair labor practice unless . . . the employer uses the closing to chill unionism in his other businesses.” (citing *Darlington*, 380 U.S. at 272-73, 275-76)). Rather, the standard presupposes that the partial closing is “for antiunion reasons” by requiring the additional showing of (1) a purpose to chill, and (2) reasonable foreseeability of a chilling effect. 380 U.S. at 275.

While *Darlington* did not directly address an employer’s bargaining obligations under Section 8(a)(5), circuit courts have applied *Darlington* to resolve related questions of bargaining obligations as to decisions in both contexts of complete and partial closings. The Fifth Circuit has observed that, where a complete closing is at issue, “[t]he Court [in *Darlington*] imposed no obligation on an employer to bargain about the decision . . . even if that decision arose from the employer’s

vindictive refusal to deal with a union.” *Local 2179, United Steelworkers of Am. v. NLRB*, 822 F.2d 559, 569 (5th Cir. 1987). Likewise, the Eighth Circuit declined to enforce a Board order requiring the employer to bargain over a partial closing decision, even though the decision was motivated by anti-union animus. *See Morrison Cafeterias Consol., Inc. v. NLRB*, 431 F.2d 254, 256, 258 (8th Cir. 1970). In *Morrison*, the “closure constituted a partial closing of a business for the objective of avoiding collective bargaining but was not violative of § 8(a)(3) under the teachings of *Darlington*.” 431 F.2d at 256 (emphasis added). Even though the decision did not violate Section 8(a)(3), both the trial examiner and the NLRB found that the employer was required under Section 8(a)(5) to bargain about the decision. *Id.* The Eighth Circuit disagreed, finding that “*Darlington* requires that we hold that the petitioners were not obligated to bargain with the Union with respect to its decision[.]” *Id.* at 257.⁶

The Sixth Circuit’s conclusion that anti-union animus obligated Quickway to engage in mandatory decision bargaining under Section 8(a)(5) and Section 8(d) is thus inconsistent with the Court’s *Darlington* teaching that because animus does not render a partial

⁶ The Eighth Circuit reiterated that while *Darlington* does not require bargaining over a partial closing decision, “an employer is required to bargain with respect to the effects of a permanent closing of a plant or an identifiable unit thereof.” 431 F.2d at 257 (emphasis added). As discussed in Part I.C, the existing obligation to engage in effects bargaining was part of the Court’s rationale in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981) for not also requiring decision bargaining over partial closings.

closing unlawful, neither does animus create an obligation to engage in decision bargaining.

B. *First National Maintenance* Excluded Partial Closing Decisions from Mandatory Bargaining Without Exception.

This Court in *First National Maintenance* considered the question not explicitly addressed in *Darlington*: whether Sections 8(d) and 8(a)(5) require an employer to bargain “over its decision to close a part of its business[.]” 452 U.S. at 667. That case arose out of a decision by First National Maintenance Corporation (“First National”) to discontinue its cleaning service operations at a nursing home due to a payment dispute with the nursing home. *Id.* at 668-69. Just prior to this decision, an AFL-CIO union was elected as the bargaining agent of First National’s employees working at the nursing home. *Id.* at 669. Both the ALJ and the Board found that First National violated Section 8(a)(5) by failing to bargain over its decision and the effects of that decision. *Id.* at 670-71.

The Second Circuit enforced the Board’s order, finding a rebuttable presumption exists in favor of mandatory bargaining over partial closing decisions pursuant to Section 8(d). 452 U.S. at 672. However, the Supreme Court reversed, describing the “presumption analysis adopted by the Court of Appeals” as “ill-suited to advance harmonious relations between employer and employee” and ultimately finding “that the [partial closing] decision itself is not part of § 8(d)’s ‘terms and conditions[.]’” *Id.* at 684 (emphasis in original).

The Court began with an acknowledgment of collective bargaining as the means prescribed by Congress for “defusing and channeling conflict between labor

and management.” 452 U.S. at 674. Congress did not specifically or exhaustively list the items subject to the bargaining mandate of Section 8(d). However, while “Congress deliberately left the words ‘wages, hours, and other terms and conditions of employment’ without further definition[,]” it “had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union’s members are employed.” *Id.* at 675-76.

The Court found that a partial closing decision “touches on a matter of central and pressing concern to the union and its member employees[,]” namely “the retention of the employees’ very jobs[,]” but is also “akin to the decision whether to be in business at all, ‘not in [itself] primarily about the conditions of employment, though the effect of the decision may be necessarily to terminate employment.’” *Id.* at 677 (quoting *Fibreboard*, 379 U.S. at 223 (Stewart, J., concurring)). Therefore, a partial closing decision is not like those decisions which “have only an indirect and attenuated impact on the employment relationship[,]” nor is it like those decisions which pertain “almost exclusively [to] ‘an aspect of the relationship’ between employer and employee.” 452 U.S. at 677 (quoting *Allied Chemical*, 404 U.S. at 178). Accordingly, the Court found it necessary to weigh the potential benefit of mandated bargaining over partial closing decisions against the comparative burden:

[I]n view of an employer’s need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the

benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.

452 U.S. at 678-79.

The Court noted that it had “implicitly engaged in this analysis” in its prior *Fibreboard* opinion where it held a certain subcontracting decision was a mandatory subject of bargaining. *Id.* at 679. However, the Court found that a partial closing decision lacks the qualities which would make a subcontracting decision like that in *Fibrebaord* a mandatory subject. Unlike a partial closing, subcontracting does not necessarily “alter the [c]ompany’s basic operation.” *Id.* (quoting 379 U.S. at 213). Additionally, subcontracting ordinarily involves “a desire to reduce labor costs[,]” which the Court has found “peculiarly suitable for resolution within the collective bargaining framework[.]” *Id.* at 680 (quoting 379 U.S. at 214).

Furthermore, “[t]he prevalence of bargaining over [subcontracting]” demonstrates “the ‘amenability of such subjects to the collective bargaining process.’” *Id.* at 680 (quoting 379 U.S. at 211). By contrast, “provisions giving unions a right to participate in the decisionmaking process concerning alteration of the scope of an enterprise [are] relatively rare.” *Id.* at 684. Though this “evidence of current labor practice is . . . not a binding guide[,]” the Court nonetheless found that it “supports the apparent imbalance weighing against mandatory bargaining” over partial closing decisions. *Id.* The Court also noted that the “practical purpose” of a union’s participation in a partial closing decision will uniformly be to “seek to delay or halt the closing.” 452 U.S. at 681. Compared

to a union's interest in the decision, an employer's interest is "much more complex and varies with the particular circumstances." *Id.* at 682. "[M]anagement may have great need for speed, flexibility, and secrecy in meeting business opportunities and exigencies." *Id.* at 682-83. In some instances, "[t]he employer also may have no feasible alternative to the closing, and even good-faith bargaining over it may both be futile and cause the employer additional loss." *Id.* at 683 (emphasis added).

Thus, after careful and thorough consideration, *First National Maintenance* held that a partial closing decision is, categorically and irrespective of motive, not a mandatory subject of bargaining. *Id.* at 686. Indeed, the Court's primary critique of the Second Circuit's decision, under which a partial closing decision may or may not be a mandatory subject of bargaining, was the resultant uncertainty created by such a standard:

An employer would have difficulty determining beforehand whether it was faced with a situation requiring bargaining or one that involved economic necessity sufficiently compelling to obviate the duty to bargain.

452 U.S. at 684.⁷

⁷ The Third Circuit also applied a rebuttable presumption in favor of mandatory bargaining prior to *First National Maintenance*. See *ABC Trans-National Transp., Inc. v. NLRB*, 642 F.2d 675, 682 (3d Cir. 1981). But see *Voilas v. GMC*, 170 F.3d 367, 379 (3d Cir. 1999) (closing of GMC's Trenton, New Jersey plant was not a mandatory subject of bargaining under *First National Maintenance* and the duty to bargain applied only to effects of the decision).

The Sixth Circuit's finding that Quickway was required to bargain over its partial closing decision is thus contrary to the *per se* rule of *First National Maintenance* that a partial closing decision is not a mandatory subject of bargaining.

C. The Sixth Circuit's Decision Is Based on a Misreading of *First National Maintenance*.

The Sixth Circuit's complete analysis of *First National Maintenance* consisted of the following:

In *First National Maintenance Corporation v. NLRB*, the Supreme Court held that an employer's decision "to shut down part of its business purely for economic reasons . . . is not part of § 8(d)'s 'terms and conditions,'" and thus is not a mandatory subject of bargaining under the NLRA. 452 U.S. at 686. Though a decision partially to cease business operations for purely economic reasons is not a mandatory subject of bargaining, "[a]n employer may not simply shut down part of its business and mask its desire to weaken and circumvent the union by labeling its decision 'purely economic.'" *Id.* at 682.

First National, moreover, is limited to partial closures taken purely for economic reasons. See *id.* at 686-87. "[A] partial closing decision that is motivated by an intent to harm a union," on the other hand, is outside *First National's* reach. *Id.* at 682. A partial-closing decision motivated by anti-union animus is, accordingly, subject to an obligation to bargain.

App.28a. Certain phrases in Part III of the *First National Maintenance* opinion, relied upon by the Sixth Circuit here to find an exception requiring bargaining as to the decision, have resulted in debate as to the precise scope and effect of *First National Maintenance*. For example, the Fourth Circuit has found that “[w]here an employer closes down part of its operation—in this case, by closing a plant—the Court has made clear [in *First National Maintenance*] that bargaining over the decision is not required.” *Arrow Auto. Indus., Inc. v. NLRB*, 853 F.2d 223, 228 (4th Cir. 1988) (emphasis added). The previous year, the Fifth Circuit found that “it is by no means entirely clear that *First National Maintenance* adopted a *per se* rule for *all* partial closings.” *Local 2179, United Steelworkers of Am. v. NLRB*, 822 F.2d 559, 576 (5th Cir. 1987) (emphasis added in underline). Nonetheless, any apparent obscurity in *First National Maintenance* is resolved through context.

Here, the Sixth Circuit relied on the Court’s observation in Part III.A of *First National Maintenance* that labeling a partial closing decision “purely economic” does not immunize an employer from Section 8(a)(3) if the *Darlington* standard of a chilling purpose and reasonable foreseeability is satisfied. 452 U.S. at 258 (“An employer may not simply shut down part of its business and mask its desire to weaken and circumvent the union by labeling its decision ‘purely economic.’”). However, this language simply supports the proposition that anti-union animus alone does not render a partial closing decision a mandatory subject of bargaining.

The Court reasoned that decision bargaining need not be mandatory in light of the existing right of a union under Section 8(a)(5) to engage in effects bargaining,

and the adequate protection against unlawfully motivated partial closings already provided by Section 8(a)(3):

[T]he union's legitimate interest in fair dealing is protected by § 8 (a)(3), which prohibits partial closings motivated by antiunion animus, when done to gain an unfair advantage. *Textile Workers v. Darlington Co.*, 380 U.S. 263 (1965). Under § 8(a)(3) the Board may inquire into the motivations behind a partial closing. An employer may not simply shut down part of its business and mask its desire to weaken and circumvent the union by labeling its decision "purely economic."

Thus, although the union has a natural concern that a partial closing decision not be hastily or unnecessarily entered into, it has some control over the effects of the decision and indirectly may ensure that the decision itself is deliberately considered. It also has direct protection against a partial closing decision that is motivated by an intent to harm a union.

452 U.S. at 682 (emphasis added). While a partial closing may constitute a violation of Section 8(a)(3), this does not logically answer the question of whether such a decision should be classified as a mandatory subject of bargaining under Section 8(a)(5) and 8(d). In fact, that protection is already provided under Section 8(a)(3) weighs against requiring bargaining over partial closing decisions, as determined in *First National Maintenance*. *Id.* at 682.

The Fourth Circuit's articulation of the distinct roles of Section 8(a)(3) and 8(a)(5) in *Dorsey Trailers* is instructive. Relying on *First National Maintenance* and *Darlington*, the Fourth Circuit explained that anti-union animus does not convert a partial closing decision into a mandatory subject of bargaining:

The phrase “terms and conditions of employment” does not magically change meaning with the infusion of anti-union animus. Section 8(a)(5) simply does not cover plant relocations or partial closings. This does not mean, of course, that the union and the General Counsel are without a remedy for anti-union animus. The relevant section to redress this animus is the broader language of Section 8(a)(3), not the more circumscribed text of Section 8(d) and 8(a)(5). See *First National Maintenance*, 452 U.S. at 682 (“The union’s legitimate interest in fair dealing is protected by § 8(a)(3).”); *Darlington*, 380 U.S. at 268-69. Furthermore, the union can certainly protect its interest through bargaining over the effects of the decision to relocate, which is a mandatory subject of bargaining under Section 8(a)(5). See *First National Maintenance*, 452 U.S. at 681-82; *Arrow*, 853 F.2d at 231. And, of course, nothing in the Act prevents permissive bargaining over a closure or relocation decision. What we decline to do, however, is to expand the scope of mandatory or impasse bargaining to matters which the relevant statutory sections do not include.

Dorsey Trailers, Inc. v. NLRB, 233 F.3d 831, 844 (4th Cir. 2000) (emphasis added). Nothing in *First National*

Maintenance can be construed as suggesting that a Section 8(a)(3) violation makes a partial closing decision a mandatory subject of bargaining under Section 8(a)(5) and Section 8(d).

The Sixth Circuit also relied on the Court's concluding observation in Part III.A. that First National's partial closing was "purely for economic reasons[,]" and its final analysis in Part III.B., "illustrat[ing] the limits of" the holding by turning "again to the specific facts of this case[,]" including the fact that "the union made no claim of antiunion animus." 452 U.S. at 687. However, the context again demonstrates that the Court did not by this language create an exception to its rule against requiring mandatory bargaining for partial closing decisions. Rather, the employer's economic justification and the lack of an anti-union animus allegation, along with other facts, were emphasized only to distinguish partial closing decisions from subcontracting decisions which continue the employer's basic operations:

First, we note that when petitioner decided to terminate its Greenpark contract, it had no intention to replace the discharged employees or to move that operation elsewhere. Petitioner's sole purpose was to reduce its economic loss, and the union made no claim of antiunion animus. [. . .]. These facts in particular distinguish this case from the subcontracting issue presented in *Fibreboard*.

452 U.S. at 687-88 (emphasis added). The concluding sentence of the Court's analysis further stresses the difference between partial closing decisions and subcontracting decisions: "The decision to halt work at this specific location represented a significant change

in petitioner's operations, a change not unlike opening a new line of business or going out of business entirely.” 452 U.S. at 688 (emphasis added).

Thus, the Court in *First National Maintenance* “limited” its holding not to partial closings without anti-union animus as opposed to partial closings with anti-union animus, but to partial closings categorically as opposed to other types of management decisions, like certain subcontracting decisions.⁸ This is further supported by the Court’s own subsequent interpretation of *First National Maintenance* as establishing a *per se* rule that partial closing decisions are beyond the scope of the NLRA’s bargaining mandate:

In *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), which, like *Textile Workers v. Darlington Mfg. Co.*, arose under the NLRA, we concluded that “the harm likely to be done to an employer’s need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union’s participation in making the decision.” 452 U.S.

⁸ Footnote 22 in the Court’s *First National Maintenance* opinion further supports this reading: “In this opinion we of course intimate no view as to other types of management decisions, such as plant relocations, sales, other kinds of subcontracting, automation, etc., which are to be considered on their particular facts.” 452 U.S. at 686 n.22 (emphasis added); *see also Arrow Auto. Indus., Inc. v. NLRB*, 853 F.2d 223, 227 (4th Cir. 1988) (“Although the impact of this ‘limiting’ section of the opinion has not been fully defined, a majority of commentators, including those who harshly criticize the *First National Maintenance* result, agree that the decision established a *per se* rule that an employer has no duty to bargain over a decision to close part of its business.”).

at 686. Further, we held that the employer's decision to close down a segment of its business "is not part of § 8(d)'s 'terms and conditions,' . . . over which Congress has mandated bargaining."

Pittsburgh & L. E. R. Co. v. Ry. Labor Executives' Ass'n, 491 U.S. 490, 508 n.17 (1989) (quoting 452 U.S. at 686).

The Sixth Circuit here cited the *NLRB v. Joy Recovery Tech. Corp.*, 134 F.3d 1307 (7th Cir. 1998) and *Delta Carbonate. Inc.*, 307 N.L.R.B. 118 (1992) in support of its interpretation of *First National Maintenance* as including an animus exception. App.28a. These cases are of little persuasive value. The Seventh Circuit stated that *First National Maintenance* does not apply where "hostility toward the union is the motivating force behind the decision." 134 F.3d at 1316. However, as Judge Murphy observed in his concurring opinion here, the Seventh Circuit reached this conclusion "with almost no analysis on [the] issue." App.53a. The NLRB's use of *First National Maintenance* in its *Delta Carbonate* decision was likewise merely conclusory:

[B]ecause the decision to subcontract quarry operations was discriminatorily motivated in violation of Section 8(a)(3), we find that it also violated Section 8(a)(5). Where, as here, such a decision is motivated by antiunion reasons, an employer is not exempt from a bargaining obligation under *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 687-688 (1981).

307 N.L.R.B. at 122. As the Fourth Circuit observed in *Dorsey Trailers*, there is no basis for finding that a Section 8(a)(5) violation necessarily results from a

Section 8(a)(3) violation, as the Board did in *Delta Carbonate*. 233 F.3d at 844. Moreover, as discussed above, *First National Maintenance* did not concern subcontracting decisions (the issue in *Delta Carbonate*), which were distinguished by the Court because subcontracting decisions do not always result in a significant change in an employer's operations. *See First National Maintenance*, 452 U.S. at 679.

Both cases relied upon by the Sixth Circuit are therefore inapposite and do not accurately reflect the holding of *First National Maintenance*. The Court should now clarify that anti-union animus does not result in the reclassification of a partial closing decision from a non-mandatory subject of bargaining under *First National Maintenance* to a mandatory subject of bargaining.

II. The Sixth Circuit's Consideration of Lawful Intra-Management Expressions as Evidence of an Unfair Labor Practice Is Contrary to Section 8(c).

Appellate courts apply a “substantial evidence” standard based on the record as a whole in reviewing the NLRB’s findings of fact. *See* 29 U.S.C. § 160(e); *see also* *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 507 (1978) (“Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals.” (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951))). Here, the Sixth Circuit held that substantial evidence supported the NLRB’s findings that the Louisville terminal closure was motivated by anti-union animus and a purpose of chilling unionization at Quickway’s other terminals. App.24a-25a. However, this conclusion was based upon

consideration of lawful expressions, consisting of email correspondence solely among management, which contained “no threat of reprisal or force or promise of benefit” and therefore cannot “be evidence of an unfair labor practice[.]” *See* 29 U.S.C. § 158(c); App.20a-21a, 24a-25a, 267a-292a. The ALJ found no evidence of an intent to chill or a reasonable belief that the closure would have that effect. Absent its consideration of these lawful expressions, the Sixth Circuit has no substantial evidence under *Darlington* to find a Section 8(a)(3) violation.

A. The Legislative History of Section 8(c) Indicates Congressional Intent to Prohibit the Use of Lawful Expressions as Evidence of Anti-Union Motivation.

The Second Circuit’s *Holo-Krome II* decision is perhaps the most instructive regarding the legislative history of Section 8(c) and demonstrates the Sixth Circuit’s error in failing to apply the statute to preclude consideration of the lawful expressions at issue in this case. In *Holo-Krome II*, the Second Circuit considered whether substantial evidence supported findings of various Section 8(a) violations where the Board relied upon the employer’s expressions of “opposition to unionization [. . .] as part of the basis for attributing anti-union motivation” to the employer’s actions. *Holo-Krome Co. v. NLRB*, 907 F.2d 1343, 1345 (2d Cir. 1990). The Second Circuit noted that the Board had “interpreted [Section 8(c)] to mean that although an employer’s statements opposing union organization but lacking threat or promise cannot, by themselves, constitute an unfair labor practice, they may nonetheless serve as evidence for a finding of unlawful anti-union animus.” *Id.* (emphasis added). Circuit courts,

however, had ruled inconsistently as to whether Section 8(c) permits any use of lawful expressions in marshaling a case against an employer. *Id.*

The Second Circuit determined that the Board's "reliance on protected statements to support a finding of unlawful, anti-union animus violated the congressional command" of Section 8(c). 907 F.2d at 1346. The court considered the legislative history of Section 8(c), particularly noting the more restrictive language of the statute which ultimately prevailed over the less-restrictive alternative. *Id.* at 1346-47. In drafting the 1947 Taft-Hartley Act (amending the NLRA), the House of Representatives and Senate proposed competing language for Section 8(c). *Id.* The Senate's language would have allowed the use of lawful expressions as background evidence in support of an unfair labor practice finding, whereas the language proposed by the House of Representatives, and subsequently enacted by Congress, does not. *Id.* Section 8(c) as proposed by the Senate would have provided as follows:

The Board shall not base any finding of unfair labor practice upon any statement of views or arguments, either written or oral, if such statement contains under all the circumstances no threat, express or implied, of reprisal or force, or offer, express or implied, of benefit: Provided, That no language or provision of this section is intended to nor shall it be construed or administered so as to abridge or interfere with the right of either employers or employees to freedom of speech as guaranteed by the first amendment to the Constitution of the United States.

907 F.2d at 1346 (quoting H.R. 3020 (as passed by Senate), 80th Cong., 1st Sess. § 8(c) (1947) (emphasis added), *reprinted in* 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 242 (1948) (hereinafter “Legislative History”)). This language would not preclude the Board “from considering such statements as evidence” so long as the unfair labor practice finding was not based on the lawful statements. *Id.* (quoting S. Rep. No. 105 at 24, *reprinted in* Legislative History at 242).

By contrast, the “House bill contained [the] more preclusive language” reflected in Section 8(c) as enacted:

- (d) Notwithstanding any other provision of this section, the following shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act:
 - (1) Expressing any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, if it does not by its own terms threaten force or economic reprisal.

Id. at 1347 (quoting H.R. 3020 (as passed by House of Representatives), 80th Cong., 1st Sess. § 8(d) (1947) (emphasis added), *reprinted in* Legislative History at 183).

The House of Representatives minority report criticized the House’s formulation of Section 8(c) as requiring “the Board and the courts close their eyes to the plain implications of speech and disregard clear and probative evidence.” *Id.* at 1347 n.2 (quoting H.R. Rep. No. 245, 80th Cong., 1st Sess., at 84, *reprinted in* Legislative History at 375). President Truman like-

wise perceived the broad proscriptive effect of this language, stating the following in support of his failed veto:

The bill would introduce a unique handicap, unknown in ordinary law, upon the use of statements as evidence of unfair labor practices. An antiunion statement by an employer, for example, could not be considered as evidence of motive, unless it contained an explicit threat of reprisal or force or promise of benefit.

Id. at 1347 n.3 (quoting 93 Cong. Rec. 7487 (1947)). These objections to Section 8(c) are illustrative of the congressional intent of the statute. Rather than allowing lawful statements to be considered as background evidence, “Congress chose to prevent chilling lawful employer speech by preventing the Board from using anti-union statements, not independently prohibited by the Act, as evidence of unlawful motivation.” 907 F.2d at 1347 (emphasis added).

Therefore, the lawful expressions of Quickway management and officers relied upon by the Sixth Circuit cannot be considered as “substantial evidence” of an unlawful motive in support of the alleged Section 8(a)(3) violation, or any other unfair labor practice. This was plain error by the Sixth Circuit to fail to overturn the Board’s erroneous finding of chilling especially when the ALJ found none.

B. The Sixth Circuit’s Prior Precedent Rejecting the Plain Meaning of Section 8(c) is Without Support.

In 1993, the Sixth Circuit also recognized a circuit “split regarding the evidentiary value of protected

speech” under Section 8(c). *NLRB v. Vemco, Inc.*, 989 F.2d 1468, 1474 (6th Cir. 1993). However, the Sixth Circuit in that case held, contrary to the broad language of the statute, that lawful expressions could be used as “background” evidence of animus to prove an unfair labor practice:

[U]nprotected speech, whether constituting an independent violation of the Act or not, will be considered as direct evidence of animus in the context of the layoff violation; we regard protected speech, however, only as background in our determination of animus.

Id. (emphasis added). In support of this holding, the Sixth Circuit deferred to the NLRB’s interpretation of Section 8(c) in *Holo-Krome Co.*, 293 N.L.R.B. 594 (1989) (hereinafter “*Holo-Krome I*”), allowing “protected speech to be used as background evidence of animus.” 989 F.2d at 1474.⁹ The Sixth Circuit also relied upon *Hendrix Manufacturing Co. v. NLRB*, 321 F.2d 100, 103 (5th Cir. 1963), where management expressions of opposition to a union were considered as background evidence of anti-union animus in the context of a Section 8(a)(1) violation. 989 F.2d at 1474. By contrast, the Sixth Circuit acknowledged *Holo-Krome II* as endorsing the “plain meaning” interpretation of Section 8(c), though it declined to adopt this interpretation:

Some circuits rely on the plain meaning of the statute filtered through a narrow, but plausible, reading of the legislative history to

⁹ The Sixth Circuit found that it had previously enforced an NLRB order which relied on *Holo-Krome I* in an unreported decision. See *Vemco*, 989 F.2d at 1474 n.7.

preclude any use whatsoever of protected speech.

Id. (emphasis added) (citing *Holo-Krome II*, 907 F.2d at 1346). While the Sixth Circuit in *Vemco* found the Second Circuit's reading of Section 8(c) "plausible," it did not provide its own substantive analysis of Section 8(c) in support of its less-restrictive interpretation.

To Quickway's knowledge, the Sixth Circuit has not revisited the question of whether protected expressions can be used as background evidence of anti-union animus since *Vemco* and was therefore asked to do so here. To the extent the Sixth Circuit implicitly applied *Vemco* in this case, it should have reconsidered Section 8(c) in light of Quickway's briefing on the issue. The deference to *Holo-Krome I* rendered by the Sixth Circuit in *Vemco* is no longer permitted. *See Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2261 (2024) (discarding the "Chevron" doctrine and holding that "agency interpretations of statutes—like agency interpretations of the Constitution—are not entitled to deference."). Moreover, the Board in 2020 renounced its practice of relying "upon noncoercive statements of opposition to unions or unionization as evidence of antiunion animus in support of unfair labor practice findings." *United Site Services*, 369 N.L.R.B. No. 137, 14 n.68 (2020). In *United Site Services*, the Board identified the D.C. Circuit, Second Circuit, Fourth Circuit, and Eleventh Circuit as holding that Section 8(c) precludes reliance on lawful expressions in support of "any unfair labor practice finding" and expressly "overruled" all previous Board precedent to the contrary. *Id.* Furthermore, the Fifth Circuit since *Hendrix* has acknowledged the "plain meaning" interpretation of Section 8(c) "to be more

persuasive” and rejected “any reliance on [management]’s statements as evidence of illegal union animus.” *Brown & Root, Inc. v. NLRB*, 333 F.3d 628, 639 n.7 (5th Cir. 2003). Therefore, the bases of the Sixth Circuit’s *Vemco* interpretation of Section 8(c) have been significantly undermined. To the extent the circuits remain divided on this question, and as the Board has changed its position on Section 8(c) over time, this case presents the Court with an ideal vehicle to rule on the scope of Section 8(c)’s proscription.



CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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