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OPINION, U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT (SEPTEMBER 11, 2024)

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

QUICKWAY TRANSPORTATION, INC.,

Petitioner/
Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/
Cross-Petitioner.

GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL UNION NO. 89,

Intervenor.

Nos. 23-1780/1820

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

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

Argued: July 24, 2024
Decided and Filed: September 11, 2024

Before: MOORE, MURPHY,
and BLOOMEKATZ, Circuit Judges.

MOORE, J., delivered the opinion of the court in which BLOOMEKATZ, J., concurred.

MURPHY, J. (pp. 35-43), delivered a separate opinion concurring in the judgment.

OPINION

KAREN NELSON MOORE, Circuit Judge. Quickway Transportation, Inc. ("Quickway") petitions this court for review of a National Labor Relations Board ("Board") order in an unfair labor practice proceeding against Quickway. The Board brings a cross-application for enforcement of its order. Quickway argues that substantial evidence does not support the Board's findings that (1) Quickway's cessation of operations at its Louisville terminal violated the National Labor Relations Act ("NLRA" or "Act"); (2) Quickway failed to bargain over the cessation of operations and the resulting effects in violation of the Act; and (3) Quickway threatened and interrogated its employees in violation of the Act. Quickway further argues that the Board's remedial order imposes an undue burden on it and exceeds the Board's statutory authority. For the following reasons, we **DENY** Quickway's petition for review and **GRANT** the Board's cross-application for enforcement of its order in full.

I. Background

A. Statutory Framework

Section 7 of the NLRA guarantees the right of employees "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." 29 U.S.C. § 157. To effectuate the protection of these rights, Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of" Section 7 rights. *Id.* § 158(a)(1). Section 8(a)(3) makes it an unfair labor practice for an employer to "discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization," and Section 8(a)(4) makes it an unfair labor practice to retaliate against an employee for filing a charge with the Board. *Id.* § 158(a)(3), (4). Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." *Id.* § 158(a)(5). "[T]o 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." *Id.* § 158(d).

B. Factual Background

1. Quickway's Operations

Quickway is a commercial motor carrier affiliated with Paladin Capital, Inc. ("Paladin") and Paladin's Quickway Group ("Quickway Group"). Joint App'x at 2 (Board Dec. at 2). The Quickway Group operates seventeen trucking terminals throughout the country, thirteen of which belong to Quickway. Nine of the Quickway Group's terminals exclusively serve The Kroger Company. *Id.*

In 2014, Quickway entered a contract to service the Kroger Distribution Center (KDC) in Louisville, Kentucky. *Id.* Under this KDC agreement, Quickway drivers at its Louisville terminal delivered outbound bulk grocery items from the KDC to Kroger grocery stores and provided limited inbound delivery services to the KDC. *Id.* at 633 (Hr'g Tr. at 996) (McCurry Direct). Quickway's service of the KDC constituted 96.5% of Quickway's Louisville terminal's annual revenue. *Id.* at 1000 (Hr'g Tr. at 1645) (Cannon Direct). The terminal generated around $900,000 to $1 million in annual profits. *Id.* at 806 (Hr'g Tr. at 1297) (Prevost Direct).

The Louisville terminal employed approximately 62 drivers and included a main terminal in Louisville and two satellite locations in Versailles and Franklin, Kentucky. *Id.* at 1001 (Hr'g Tr. at 1648) (Cannon Direct). In addition to the three locations that made up the Louisville terminal, some Louisville drivers were temporarily assigned to work at other Quickway terminals, including in Hebron, Kentucky. *Id.* at 301-02 (Hr'g Tr. at 294-95) (Cannon Direct). Quickway drivers from other terminals—including from Murf-

reesboro, Tennessee and Indianapolis, Indiana—were also assigned routes that brought them to the KDC. *Id.* at 299 (Hr'g Tr. at 292) (Cannon Direct).

Quickway was the secondary carrier at the KDC. *Id.* at 374 (Hr'g Tr. at 424) (Obermeier Cross).[1] The KDC's primary carrier was Transervice, *id.*, and a third company, Zenith Logistics, operated the warehouse, *id.* at 376 (Hr'g Tr. at 426) (Obermeier Cross). The Transervice and Zenith Logistics employees at the KDC were represented by the General Drivers, Warehousemen & Helpers, Local Union No. 89 ("Local 89" or "Union"). *Id.* at 2 (Board Dec. at 2).

2. Union Organizing

In June 2019, drivers at Quickway's Louisville terminal began to organize with Local 89. Joint App'x at 229 (Hr'g Tr. at 161) (Trafford Direct).[2] At the time, drivers at four of Quickway's other terminals were represented by separate Teamsters' local unions. *See id.* at 2 (Board Dec. at 2 n.7). During the same period, drivers at Quickway's Indianapolis terminal were organizing with Teamster's Local 135; the Indianapolis union campaign ended when Indianapolis drivers voted against unionization in fall 2019. *Id.* at 6 (Board Dec. at 6 n.21).

In July 2019, Kerry Evola, Quickway's Louisville Operations Manager, informed Chris Higgins, Quickway's Terminal Manager, that Louisville employees

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[1] Obermeier was Kroger's Vice President of Supply Chain Operations. *See* Joint App'x at 6 (Board Dec. at 6 n.20).

[2] Trafford was Local 89's lead organizer at the Quickway Louisville terminal. *See* Joint App'x at 38 (Board Dec. at 38).

had approached him about the Union. *Id.* at 2 (Board Dec. at 2). That same month, Evola told pro-union Quickway drivers that "[i]f this place goes union, Bill Prevost will shut it down. He's not going to have another terminal go to the union." *Id.* at 237 (Hr'g Tr. at 177) (Tooley Direct). Bill Prevost was the Chairman of Paladin's Board of Directors and CEO of both Paladin and Quickway. *Id.* at 2 (Board Dec. at 2).

In August, Ed Marcellino, Quickway's Vice President of Operations, asked employee Donald Hendricks about the union campaign and requested a list of employees involved in union organizing. *Id.* at 264-65 (Hr'g Tr. at 208-09) (Hendricks Direct). That same month, Chris Cannon, the Quickway Group's Vice President of Operations, sent an email to other Paladin affiliate officials flagging that they needed to discuss the "union chatter within our driver ranks" in Louisville. *Id.* at 3 (Board Dec. at 3).

In the fall of 2019, Higgins warned a Louisville driver that, if the Louisville terminal unionized, Quickway "would have to raise its prices and would probably lose its contract with Kroger, which would probably result in all employees at the terminal losing their jobs." *Id.*; *see also id.* at 239-40 (Hr'g Tr. at 179-80) (Tooley Direct) (stating that Higgins "brought that to [him] several times").[3] In October, Cannon again emailed other Quickway officials about the need to quickly address the "union talk in [the] Louisville terminal." *Id.* at 2496 (Cannon Email).

On January 22, 2020, Local 89 informed Quickway that a majority of Louisville drivers had signed union

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[3] Tooley was a driver at the Louisville terminal. *See* Joint App'x at 22 (Board Dec. at 22).

authorization cards and requested voluntary recognition of the Union. *Id.* at 230-31 (Hr'g Tr. at 162-63) (Trafford Direct). Quickway declined to voluntarily recognize the Union; the Union then filed an election petition with the Board and a Board election was scheduled for May. *Id.* at 3 (Board Dec. at 3).

Two days after the Union requested recognition, Evola told four Louisville drivers that Quickway would stop contributing to their Quickway stock accounts "the day . . . this comes union." *Id.* at 2477-79 (Audio Recording Tr.). One of the drivers filed an unfair labor practice charge, alleging that Evola's statement was a threat of retaliation in violation of the Act. *See id.* at 3 (Board Dec. at 3 n.10). Evola later approached the driver about the charge, stating that because the driver "went to the Labor Board about it," he'd better "make sure [he's] got an attorney, because I'm coming back." *Id.* Less than two weeks after the Union requested recognition, Higgins sent photographs of drivers' personal vehicles with Local 89 signs to Quickway officials, including Cannon. *See id.* at 2506-11 (Higgins Email). In March, after the Union had filed an election petition but before the election took place, Cannon and Prevost hired consultants they referred to as "union busters," to "help keep our Louisville terminal non-union." *Id.* at 1642 (Cannon Email).

Louisville drivers' representation election took place as a mail-ballot election between May 22 and June 19, 2020. *Id.* at 3 (Board Dec. at 3). On May 28, Cannon ordered the Louisville and Murfreesboro terminals to "disconnect any and all Murfreesboro drivers from picking up loads from the KDC," because "[a]ny Murfreesboro driver that comes on the lot at the KDC is being approached by the union, and we

certainly do not want the union to infect our Murfreesboro fleet." *Id.* at 2536 (Cannon Email). On June 8, Cannon followed up to confirm that Murfreesboro drivers were no longer going to the KDC. *See id.* at 2541 (Cannon Email).

Quickway Louisville drivers voted to be represented by Local 89. *Id.* at 2649 (Ballot Tally). Following the election, Quickway officials quickly began discussing strategies to avoid any future picketing at the KDC; Prevost suggested that Quickway "could ask Kroger to have the loads assigned to [Quickway] shuttled from the KDC to the Louisville terminal by a different carrier or a towing company to prevent the Union from picketing at the KDC." *Id.* at 3 (Board Dec. at 3); *see id.* at 2548 (Prevost Email).

In August 2020, following the Louisville election but before bargaining began, the "union buster[]" that Quickway previously hired emailed Cannon. *Id.* at 1642, 2555 (Cannon Emails). The email alerted Cannon that almost one year had passed since the Indianapolis terminal voted against unionization, and reminded him that the Indianapolis terminal could again start organizing. *Id.* at 2555 (Cannon Email). Cannon sent the email to Paladin's HR Director and asked if they were "[i]nterested in their services?" *Id.* The HR Director declined, noting that they were not "impressed with them in Louisville." *Id.* A few weeks later, on September 16, former Quickway employee Hendricks told Cannon that the Union "is coming for Hebron!", *i.e.*, Quickway's Hebron terminal. *Id.* at 2558 (Hendricks Email). Another Quickway official reacted to Hendricks's statement by saying that Hendricks "needs a cease and desist order sent or we will sue him

for threatening to harm our business." *Id.* (Campbell Email).

On September 18, 2020, the Union held an action in front of the Louisville terminal; the Union "spoke with drivers as they entered and exited the terminal, handed out union shirts and informational packets[,] . . . and solicited signatures from drivers who were not already union members." *Id.* at 4 (Board Dec. at 4). The new Louisville Terminal Manager, Jeff McCurry, informed Cannon about the action. *Id.* Cannon directed McCurry to "photograph any future union activity at the terminal . . . and document any feedback that he received from the drivers regarding what the Union was discussing with them that day." *Id.*

Quickway and the Union met for their first bargaining session on November 19; they exchanged initial proposals and reached tentative agreement on multiple provisions. *Id.* The parties did not discuss economic issues like wages or benefits. *Id.* at 1057 (Hr'g Tr. at 1745) (Cannon Direct). Though economic issues were not formally discussed, Union president Fred Zuckerman did state that "the Union was adamant about maintaining area standards at the KDC." *Id.* at 4 (Board Dec. at 4); *see also id.* at 421 (Hr'g Tr. at 501) (Zuckerman Direct). "Area standards" refers to the standards set out in the Union's contracts with other employers at the KDC. *Id.* at 4 (Board Dec. at 4). Zuckerman was thus indicating that the Union would not offer lower wages for its drivers to Quickway than it accepted from Transervice. *See id.* The parties agreed to meet for a second bargaining session on December 10. *Id.* at 1057 (Hr'g Tr. at 1745) (Cannon Direct).

3. Events of December 2020

On December 6, 2020, the Union held a strike-authorization meeting and Quickway Louisville drivers voted to authorize a strike if the Union deemed it necessary. Joint App'x at 4 (Board Dec. at 4). That same day, former Quickway employee Hendricks—who was not present at the strike-authorization meeting because he was no longer an employee or member of the bargaining unit—emailed at least two television stations about the possibility of a strike. *Id.* at 518-21 (Hr'g Tr. at 713-16) (Hendricks Direct). One of Hendricks's emails to the media stated that Quickway "has not negotiated in good faith and 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 negotiation[] efforts." *Id.* at 1590 (Media Email). The email further asserted that, "[a]t the conclusion of [the December 10 bargaining session,] if company officials refuse to ratify a contract Quickway Carrier Truck Drivers in Louisville will strike," and that "the Teamsters Local 89 Truck Drivers and Warehousemen who work for Transervice and Zenith Logistics . . . will also strike in support of Quickway" drivers. *Id.* Finally, the email asserted that such a strike would shut down the KDC in its entirety. *Id.* At the time, the television stations could not confirm if the email-sender was involved with the Union. *Id.*

On December 7, Kroger informed Quickway that it had received inquiries from two Louisville television stations about a possible strike. *Id.* at 4-5 (Board Dec. at 4-5). Quickway and Kroger began discussing possible ways to mitigate any damage from a strike, including possibly setting up a reserved gate at the

KDC just for Quickway drivers, thus preventing a KDC-wide shut-down. *Id.* at 913-15 (Hr'g Tr. at 1505-07) (Campbell Direct). Quickway ultimately determined that a reserved gate would not be effective because the Union's collective bargaining agreements with Transervice and Zenith protected those workers' right to refuse to cross Quickway's picket line. *Id.* at 4-5 (Board Dec. at 4-5). Quickway did not discuss any alternative mitigation efforts. At no point did Quickway contact Local 89 about the media inquiries. *See id.*

The next day, Quickway officials met to discuss the liability it could face if its Louisville drivers went on strike and shut down the KDC. *Id.* at 5 (Board Dec. at 5). Quickway believed that, under the KDC agreement, it could be held responsible by Kroger for the cost of hiring replacement workers, hiring replacement workers for Transervice and Zenith employees who honored the Quickway drivers' strike, and spoiled cargo. *Id.* On that basis, Quickway estimated that a strike and subsequent shut-down of the KDC would open Quickway up to liability in the amount of $2-4 million the first day of the strike and more than $1 million every day thereafter. *Id.* Such potential liability would quickly exceed Quickway's liquidity, exceed its line of credit, and potentially bankrupt both Quickway and Paladin as a whole. *Id.*

Quickway determined that the only way to prevent a KDC shut-down and protect itself from this potentially ruinous economic situation was to terminate its contract with Kroger and cease operations in Louisville. *Id.*; *id.* at 835-37 (Hr'g Tr. at 1347-49) (Prevost Direct). On December 9, Quickway resigned from the KDC agreement, effective as of 11:00 p.m. that day. *Id.* at 5-6 (Board Dec. at 5-6).

At approximately 1:00 p.m. on December 9, Cannon informed the Louisville terminal manager that the terminal would cease operations at 11:00 p.m. that night. *Id.* at 647 (Hr'g Tr. at 1026) (McCurry Direct). Between 1:00 p.m. and 11:00 p.m., Quickway removed its equipment from the KDC. *Id.* at 649 (Hr'g Tr. at 1029) (McCurry Direct). At 9:56 p.m., Quickway informed the Union that it was closing the Louisville terminal. *Id.* at 2689-91 (Oesterle Email).[4] At 11:00 p.m., Quickway notified Louisville employees of the cessation of operations and directed them not to report for work. *Id.* at 652-53 (Hr'g Tr. at 1032-33) (McCurry Direct). All Louisville terminal drivers, including the Louisville drivers temporarily assigned to the Hebron terminal, were laid off. *Id.* at 2707-08 (Oesterle Letter); *see also id.* at 448-49 (Hr'g Tr. at 540-41) (Trafford Direct).

The next day, Quickway sent drivers from its Indianapolis terminal to both the KDC and to a Louisville parking lot leased by Kroger to remove remaining equipment. *Id.* at 6 (Board Dec. at 6). The Indianapolis drivers assigned to the parking lot for equipment removal were greeted by the Louisville drivers' picket line. *Id.* After one Indianapolis driver, Johnston, who was assigned to collect equipment at the KDC, noticed that there were no Louisville drivers present, he called a Louisville driver; the Louisville driver shared that Quickway had ceased operations at the Louisville terminal. *Id.* at 464-66 (Hr'g Tr. at 581-83) (Johnston Direct). Johnston, who was part of a renewed organizing campaign at the Indianapolis

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[4] Oesterle is Quickway's attorney. *See* Joint App'x at 36 (Board Dec. at 36).

terminal, informed other Indianapolis drivers; they responded that "[t]here goes our campaign." *Id.* at 466-68 (Hr'g Tr. at 583-85) (Johnston Direct). From that point forward, only one Indianapolis driver was willing to speak with the Teamsters organizer. *Id.* at 486 (Hr'g Tr. at 618) (Roach Direct).[5]

On the morning of December 10, Quickway and Local 89 met for their previously scheduled bargaining session. *Id.* at 6 (Board Dec. at 6). Quickway informed Local 89 that it was willing to bargain over the effects of its decision to cease operations at the Louisville terminal; Local 89, however, insisted on continuing negotiations over a collective bargaining agreement and declined to discuss effects of the closure. *Id.* at 1126-29 (Hr'g Tr. at 1828-31) (Cannon Direct). Thereafter, Quickway again offered to bargain over the effects of its closure by letter on December 11. *Id.* at 2707-08 (Oesterle Letter). The parties had no further bargaining sessions. *Id.* at 6 (Board Dec. at 6).

Following the closure of its Louisville terminal, Quickway returned the terminal's 44 rented trucks to Capital City Leasing, another Paladin affiliate. *Id.* Capital City Leasing sold four of the trucks and transferred the rest to other Quickway terminals or Paladin affiliates. *Id.* In 2021, Quickway subleased out the Louisville terminal for the remainder of the lease. *Id.*

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[5] Roach was a Teamsters Local 135 organizer involved in the organizing campaign at the Indianapolis terminal. *See* Joint App'x at 6 (Board Dec. at 6).

C. Procedural History

Both before and after the representation election, several Louisville drivers and Local 89 filed unfair labor practice charges against Quickway, documenting many of the above-referenced facts. *See* Joint App'x at 4 (Board Dec. at 4). In September 2020, the Board approved informal settlement agreements ("September settlement agreements") between the drivers and Quickway, disposing of many of the charges. *Id.* In May 2021, the General Counsel of the National Labor Relations Board issued a consolidated complaint against Quickway. *Id.* at 50 (ALJ Dec. at 1). The consolidated complaint alleged, in relevant part, that Quickway violated (1) Section 8(a)(3) and (1) of the Act by ceasing operations and discharging Louisville employees; (2) Section 8(a)(5) and (1) by failing to bargain over the decision to cease operations and the effects of that decision; and (3) Section 8(a)(1) and (4) by threatening, interrogating, and retaliating against employees because of their union activity. *See id.* at 26 (Board Dec. at 26). The complaint set aside the September settlement agreements based on Quickway's alleged subsequent violations of the Act. *Id.* at 50 (ALJ Dec. at 1).

In August 2023, following an Administrative Law Judge hearing, decision, and subsequent appeal to the Board, a three-member panel of the Board issued a divided decision and order holding, in relevant part, that: Quickway violated Section 8(a)(1), (3), (4), and (5) of the Act when it ceased operations at the Louisville terminal and discharged all the employees, failed to provide the Union notice and an opportunity to bargain over that decision and its effects, conducted threatening and coercive interrogations, and retaliated

against an employee for filing an unfair labor practice charge. *Id.* at 26 (Board Dec. at 26).

In its remedial order, the Board ordered Quickway to cease and desist from the enumerated violations and "to take certain affirmative action designed to effectuate the policies of the Act." *Id.* Specifically, the Board ordered Quickway to "reopen and restore its business operations at the Louisville terminal as they existed on December 9, 2020," and "[r]ecognize and, on request, bargain with" Local 89. *Id.* at 32 (Board Dec. at 32). Additionally, Quickway must offer reinstatement to all unlawfully discharged employees, "to the extent that their services are needed at the Louisville terminal to perform the work that [Quickway] is able to attract and retain from The Kroger Company or new customers after a good-faith effort." *Id.* If there are remaining discharged employees, Quickway must offer "reinstatement to any positions in its existing operations that they are capable of filling, with appropriate moving expenses." *Id.* Furthermore, the Board ordered Quickway to make the unlawfully discharged employees whole for their loss of earnings and benefits, "and for any other direct or foreseeable pecuniary harms suffered as a result of the discrimination against them." *Id.* The Board also ordered Quickway to "[c]ompensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards." *Id.* The Board noted that, "[a]t the compliance stage of these proceedings, [Quickway] will have the opportunity to introduce evidence that was not available at the time of the unfair labor practice hearing to demonstrate that this restoration order would be unduly burdensome." *Id.* at 28 (Board Dec. at 28 n.68).

II. Analysis

A. Standard of Review

Our review of Board decisions "is quite limited." *Caterpillar Logistics, Inc. v. NLRB*, 835 F.3d 536, 542 (6th Cir. 2016) (quoting *Torbitt & Castleman, Inc. v. NLRB*, 123 F.3d 899, 905 (6th Cir. 1997)). We review the Board's factual findings for substantial evidence and thus "uphold the NLRB's factual determinations if they are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, even if we may have reached a different conclusion had the matter been before us de novo." *Charter Commc'ns, Inc. v. NLRB*, 939 F.3d 798, 809 (6th Cir. 2019) (quoting *Airgas USA, LLC v. NLRB*, 916 F.3d 555, 560 (6th Cir. 2019)). The "application of law to the facts is also reviewed for substantial evidence." *Caterpillar*, 835 F.3d at 542. The Board additionally has "broad discretion in fashioning remedies for violations of the Act," *NLRB v. ADT Sec. Servs., Inc.*, 689 F.3d 628, 635 (6th Cir. 2012), and we review remedial orders only for abuse of discretion, *Compuware Corp. v. NLRB*, 134 F.3d 1285, 1291 (6th Cir. 1998).

B. Partial Cessation of Operations

The Board held that Quickway violated Section 8 (a)(3) and (1) of the Act when it ceased operations at the Louisville terminal and discharged all employees. Joint App'x at 26 (Board Dec. at 26). The Board explained that Quickway (1) ceased operations at the Louisville terminal because of anti-union animus; (2) was motivated by a desire to chill unionism at other

Quickway terminals; and (3) reasonably foresaw such chilling effect. *See id.* at 8-17 (Board Dec. at 8-17).

Quickway argues that its decision "was motivated solely by the economic and financial risks and reasons stated, and not by a purpose to chill union activity at other terminals." D. 35 (Quickway Br. at 46). Quickway argues that there is no substantial evidence to support the conclusion that it was motivated by anti-union animus or by a desire to chill unionism. *Id.* at 46-51. Likewise, Quickway argues that there is no substantial evidence to show that any such chill was reasonably foreseeable because "[t]he only purported evidence the [Board] references is the hearsay testimony of an Indianapolis driver *who the ALJ found to be not credible*." *Id.* at 51.

The Supreme Court has repeatedly stated that "an employer has the right to terminate his business." *Textile Workers Union of Am. v. Darlington Mfg. Co.*, 380 U.S. 263, 269 (1965). On that basis, if "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." *Id.* at 274. Stated otherwise, an employer can close-up shop, even for anti-union reasons, without running afoul of the NLRA.

A partial cessation of operations, on the other hand, is only sometimes permitted by the NLRA. An employer is free partially to cease operations for purely economic reasons without violating the Act. *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 686 (1981). If an employer partially closes a business out of anti-union animus, however, that "discriminatory partial closing may have repercussions on what remains of the business, affording employer leverage for dis-

couraging the free exercise of § 7 rights among remaining employees." *Darlington*, 380 U.S. at 274-75. Because partial closings may affect other employees' rights under the NLRA, the Supreme Court has established a test for determining when a partial closing violates the Act:

> If the persons exercising control over a plant that is being closed for antiunion reasons (1) have an interest in another business, whether or not affiliated with or engaged in the same line of commercial activity as the closed plant, of sufficient substantiality to give promise of their reaping a benefit from the discouragement of unionization in that business; (2) act to close their plant with the purpose of producing such a result; and (3) occupy a relationship to the other business which makes it realistically foreseeable that its employees will fear that such business will also be closed down if they persist in organizational activities, we think that an unfair labor practice has been made out.

Id. at 275-76. It is undisputed that Quickway had interests in other businesses sufficient to satisfy element one of the *Darlington* test. *See* D. 35 (Quickway Br. at 46-51); D. 45 (NLRB Br. at 25). As to the remaining elements, when an employer partially closes its business for antiunion reasons, that "partial closing is an unfair labor practice under § 8(a)(3) if motivated by a purpose to chill unionism . . . and if the employer may reasonably have foreseen that such closing would likely have that effect." *Darlington*, 380 U.S. at 275.

1. Anti-Union Animus

As the Board explained, the "threshold element" of the *Darlington* test is "that the employer closed the relevant part of its business for antiunion reasons." Joint App'x at 8 (Board Dec. at 8); *see also Purolator Armored, Inc. v. NLRB*, 764 F.2d 1423, 1429 (11th Cir. 1985). When determining whether an employer acted out of anti-union animus, the Board may consider both direct and circumstantial evidence. *Charter Commc'ns*, 939 F.3d at 815. "Circumstantial evidence inviting an inference of animus includes, among other examples, 'the company's expressed hostility towards union-ization combined with knowledge of the employees' union activities' and 'proximity in time between the employees' union activities and their discharge.'" *Id.* (quoting *FiveCAP, Inc. v. NLRB*, 294 F.3d 768, 778 (6th Cir. 2002)); *see also Purolator*, 764 F.2d at 1429 (noting that "timing of decision, presence of other unfair labor practices, and lack of attempt to solve problems without termination are considered in finding anti-union motivation in violation of section 8 (a)(3)" (citing *NLRB v. Big Three Indus. Gas & Equip. Co.*, 579 F.2d 304, 315 (5th Cir. 1978))).

The Board relied on Quickway's expressed hostility towards the Union, the proximity in time between bargaining and the partial closure, the presence of other unfair labor practices, and Quickway's failure to consider alternatives other than closure in determining that Quickway closed the Louisville terminal out of anti-union animus. The Board explained that, before the representation election, Quickway "subjected employees to numerous instances of coercive conduct in response to the Union's organizing campaign at the Louisville terminal," and "coercively interrogated

drivers about their union activities," following the election. Joint App'x at 8 (Board Dec. at 8). Quickway officials were expressly hostile to the Union, warning drivers that they may lose their jobs if the Louisville terminal unionized. *See id.* at 237-40 (Hr'g Tr. at 177-80) (Tooley Direct). Quickway also surveilled employees' union activity by photographing their personal vehicles with Local 89 signs. *Id.* at 2506-11 (Higgins Email). "Creating an impression of surveillance," or actually surveilling employees' union activity, demonstrates antiunion animus because it insinuates that "'members of management are peering over [employees'] shoulders, taking note of who is involved in union activities, and in what particular ways.'" *Charter Commc'ns*, 939 F.3d at 811-12 (quoting *Caterpillar*, 835 F.3d at 544).

"[T]he timing of [Quickway's] decision to cease operations at the Louisville terminal, which occurred only a few weeks after the parties' first bargaining session," further indicated anti-union animus. Joint App'x at 9 (Board Dec. at 9). The Board explained that the quick turnaround between the beginning of bargaining and the decision partially to cease operations, combined with Quickway officials' statements opposed to the Union and opposed to its bargaining position "support a finding that [Quickway's] decision was made to avoid bargaining with the Union and was thus discriminatorily motivated." *Id.*

As discussed below, much of Quickway's conduct violated the Act. *See infra* Part II, Section D. An employer's unfair labor practices "demonstrate that [an employer] was staunchly opposed to unionization of its employees and was willing to commit a variety of unlawful acts to defeat the Union." *Purolator*, 764

F.2d at 1429. Unfair labor practices thus may "form the background of our evaluation of the alleged section 8(a)(3) violation." *Id.*

Quickway's "lack of attempt to solve" the potential strike problem "without termination" is also evidence of its anti-union motivation. *Purolator*, 764 F.2d at 1429 (citing *Big Three*, 579 F.2d at 315). Following the media inquiries about a possible strike, Quickway considered setting up a reserved gate at the KDC to prevent a KDC-wide shut-down. Joint App'x at 913-15 (Hr'g Tr. at 1505-07) (Campbell Direct). After determining that a reserved gate would not work, Quickway failed to consider any other solutions, failing even to consider a third-party shuttle system that might "prevent the Union from picketing at the KDC," as Quickway officials had discussed mere months prior. *Id.* at 3 (Board Dec. at 3); *see id.* at 2548 (Prevost Email). Stated otherwise, Quickway had previously discussed mitigation efforts in the case of a strike, yet, when the potential arose in December 2020, Quickway did not consider those possibilities, and instead turned to termination. And, despite the anonymity of the media tips, Quickway did not investigate the threats or reach out to the Union to inquire about a possible strike. *See id.* at 4-5 (Board Dec. at 4-5). That "'failure to conduct a meaningful investigation' into allegations leading to discharge may give rise to an inference that anti-union sentiment was the true cause of the employer's actions." *Charter Commc'ns*, 939 F.3d at 817 (quoting *Airgas*, 916 F.3d at 563)).

"[A]nti-union animus need not be the employer's sole motivation in a case of partial closing." *Elec. Prods. Div. of Midland-Ross Corp. v. NLRB*, 617 F.2d 977, 986 (3d Cir. 1980). That Quickway may have *also*

been concerned about the economic risks of a strike does not undermine Quickway's anti-union motivation. *See id.* The Board, agreeing with the ALJ, found that "the possible strike raised in the media inquiries 'presented [Quickway] with the opportunity to do what it preferred to do in any event[:] withdraw its recognition of the Union, terminate its contract with Kroger and lay-off all of its Louisville drivers." Joint App'x at 10 (Board Dec. at 10) (second alteration in original). The Board's conclusion that Quickway was motivated by anti-union animus is supported by substantial evidence.

2. Purpose to Chill Unionization

In evaluating whether an employer had a purpose to chill unionization when it partially closed its business, courts consider "fair inferences arising from the totality of the evidence, considered in the light of then-existing circumstances." *Darlington Mfg. Co.*, 165 NLRB 1074, 1083 (1967). A motivation to chill unionization "may be proved by something less than direct evidence, rarely available in cases of this kind." *Id.* Courts consider "contemporaneous union activity at the employer's remaining facilities, geographic proximity of the employer's facilities to the closed operation, the likelihood that employees will learn of the circumstances surrounding the employer's unlawful conduct through employee interchange or contact, and, of course, representations made by the employer's officials and supervisors to the other employees." *San Luis Trucking, Inc.*, 352 NLRB 211, 236 (2008) (quoting *Bruce Duncan Co.*, 233 NLRB 1243, 1243 (1977)). A showing of anti-union animus as a motivating factor does not "*ipso facto* prove[]" that chilling unionization was likewise a motivating factor. *Darlington Mfg. Co.*,

165 NLRB at 1083. That said, "the existence of one motive may indicate a disposition toward another." *Id.*

In *Purolator Armored, Inc. v. NLRB*, the Eleventh Circuit held that the employer was motivated by a purpose to chill unionization when it closed a division of its company. 764 F.2d at 1431. The court noted that terminated and non-terminated employees worked in the same building, "there was evidence of daily interaction between" the two groups, the same union represented the terminated and non-terminated employees, and "both groups were under the same managerial structure." *Id.* at 1430. Likewise, in *George Lithograph Co.*, the Board held that an employer had a purpose to chill unionization when it closed one division of its business that was located in the same building as, and was under the same management as, other divisions. 204 NLRB 431, 431-32 (1973). The Board explained that, "[g]iven the proximity of the [closed] division and [the employer's] other business operations, as well as the frequency and vehemence with which [the employer] announced its opposition to the . . . Union, we may reasonably infer and find that" the employer intended to chill unionization in other divisions of its business. *Id.*

Here, as in *Purolator* and *George Lithograph*, there was close proximity between the terminated Louisville drivers and Quickway's other drivers. Though not based in the same building, Quickway drivers from the Murfreesboro and Indianapolis terminals were assigned routes that brought them to the KDC and Louisville terminal. Joint App'x at 299-302 (Hr'g Tr. at 292-95) (Cannon Direct). Given the nature of their jobs—driving and delivering bulk groceries—shared destinations at which drivers stop to load

trucks are akin to shared buildings in more stationary professions. Even more on point, the terminated Louisville drivers assigned to the Hebron terminal worked consistently under the same roof as non-terminated employees. *See id.* at 448-49 (Hr'g Tr. at 540-41) (Trafford Direct). Furthermore, Quickway management at the center of this case—Cannon, for example—held direct decisionmaking power and managerial authority over multiple terminals. *See id.* at 2536 (Cannon Email) (directing activity at both the Louisville and Murfreesboro terminals). The management of the terminated and non-terminated drivers was, accordingly, intermingled.

Quickway, additionally, expressly stated its concern about the union activity in Louisville "infect[ing]" other terminals. *Id.* During the Louisville drivers' representation election, just a few months prior to the closure of the Louisville terminal, Cannon ordered the Louisville and Murfreesboro terminals to "disconnect any and all Murfreesboro drivers from picking up loads from the KDC," because "[a]ny Murfreesboro driver that comes on the lot at the KDC is being approached by the union, and we certainly do not want the union to infect our Murfreesboro fleet." *Id.* Additionally, in August 2020, Cannon was alerted to the possibility of the Indianapolis terminal renewing a union campaign; Cannon asked Paladin's HR Director if they were interested in the services of "union busters." *Id.* at 1642, 2555 (Cannon Emails). Later that fall, Quickway employee Hendricks announced that the Union "is coming for Hebron!," *i.e.*, Quickway's Hebron terminal, and Campbell insinuated that he considered the announcement a "threat[] to harm our business." *Id.* at 2558 (Hendricks & Campbell Emails). Consider-

ing the evidence as a whole, there is substantial evidence to support the Board's conclusion that, in closing the Louisville terminal, Quickway was motivated by a desire to chill unionization at its other terminals.

3. Chill is Reasonably Foreseeable

The final inquiry under *Darlington* is whether a chilling effect was reasonably foreseeable. *See* 380 U.S. at 275. Intent to chill and the foreseeability of a chilling effect are closely related; an employer "is held to intend the foreseeable consequences of [its] conduct." *NLRB v. Tenn. Packers, Inc.*, 339 F.2d 203, 205 (6th Cir. 1964) (quoting *Radio Officers' Union v. NLRB*, 347 U.S. 17, 45 (1954)). In *Purolator Armored, Inc. v. NLRB*, the court explained that it is reasonably foreseeable that closing one part of a business out of anti-union animus will chill unionization in other parts of that business if there is close "proximity between terminated and non-terminated employees." 764 F.2d at 1430; *see also George Lithograph*, 204 NLRB at 431-32. Likewise, if non-terminated employees are forced to cross a picket line and see, first-hand, the effects of the union activity, it is reasonably foreseeable that the closure will chill union activity among the non-terminated employees. *See Plastics Transp., Inc.*, 193 NLRB 54, 58 (1971).

Here, non-terminated Murfreesboro and Indianapolis drivers had regularly worked at the KDC with now-terminated Louisville drivers. *See* Joint App'x at 299 (Hr'g Tr. at 292) (Cannon Direct). At least one terminated Louisville driver, moreover, was assigned to the Hebron terminal at the time of the partial closure; that terminated driver had been working side-by-side with non-terminated drivers and then simply did not

show up for work. *See id.* at 301-02 (Hr'g Tr. at 294-95) (Cannon Direct); *id.* at 448-49 (Hr'g Tr. at 540-41) (Trafford Direct).

Like the non-terminated workers in *Plastics Transportation*, non-terminated Quickway drivers were "brought down to cross the picket line and remove the equipment" the day after the closure. 193 NLRB at 58. In order to remove remaining equipment from the Louisville parking lot leased by Kroger, Quickway Indianapolis drivers were forced to cross the Louisville drivers' picket line. *See* Joint App'x at 6 (Board Dec. at 6). Other Quickway Indianapolis drivers were sent to the KDC to collect equipment; they immediately noticed that there were no Louisville drivers present and began inquiring about what happened. *Id.* at 464-66 (Hr'g Tr. at 581-83) (Johnston Direct). By closing the Louisville terminal and then bringing non-terminated employees to the site of the closure to witness it firsthand, it was reasonably foreseeable that the closure would chill other Quickway employees' unionization efforts. *See Plastics Transp.*, 193 NLRB at 58.

Reasonable foreseeability of a chilling effect does not require evidence of actual chilling. *See George Lithograph*, 204 NLRB at 431. Evidence of actual chilling, however, tends to buttress the conclusion that a chilling effect was reasonably foreseeable. Here, after the non-terminated Quickway Indianapolis drivers cleared out the equipment in Louisville, they asserted that "[t]here goes our campaign." Joint App'x at 467, 468 (Hr'g Tr. at 584, 585) (Johnston Direct).[6] Though

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[6] Quickway argues that the ALJ found Johnston not to be credible. *See* D. 35 (Quickway Br. at 51). In fact, the ALJ discredited Johnston's testimony only as to whether he discussed the Indianapolis organizing campaign with a manager. Joint

the Indianapolis drivers had been actively organizing, seeing the Louisville closure chilled their efforts; after seeing the Louisville closure, only one Indianapolis driver was willing to speak with the Teamsters organizer that they had previously been working with. *Id.* at 486 (Hr'g Tr. at 618) (Roach Direct). This evidence of chill strengthens the conclusion that chill was reasonably foreseeable.

Because there is substantial evidence to support the Board's conclusions that Quickway partially ceased operations out of anti-union animus, intended to chill unionization at its remaining terminals, and that such an effect was reasonably foreseeable, there is substantial evidence to support the conclusion that Quickway violated Section 8(a)(3) and (1) of the Act by ceasing operations at the Louisville terminal.

C. Failure to Bargain

The Board next held that Quickway violated Section 8(a)(5) and (1) of the Act by failing to bargain over its decision to cease operations at the Louisville terminal and the effects of that decision. Joint App'x at 26 (Board Dec. at 26).

1. Partial Cessation of Operations

Quickway argues that its closure of the Louisville terminal was an "entrepreneurial decision to cease operations," and thus "not subject to a bargaining obligation under the Supreme Court's *First National Maintenance* decision and its progeny." D. 35 (Quick-

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App'x at 55 (ALJ Dec. at 6). An ALJ however, "can credit parts of a given witness's testimony, while discrediting other parts." *NLRB v. Norbar, Inc.*, 752 F.2d 235, 240 (6th Cir. 1985).

way Br. at 34). 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. *See Delta Carbonate, Inc.*, 307 NLRB 118, 122 (1992) ("Where, as here, such a decision is motivated by anti-union reasons, an employer is not exempt from a bargaining obligation under *First National Maintenance*."); *NLRB v. Joy Recovery Tech. Corp.*, 134 F.3d 1307, 1316 (7th Cir. 1998) ("[A] finding [of anti-union motivation] prevents the application of *First National Maintenance* and also sustains a finding that the company violated Section 8(a)(3)."); *cf. NLRB v. Gibraltar Indus., Inc.*, 653 F.2d 1091, 1096 (6th Cir. 1981) (holding that the *First National Maintenance* exception applies because "the record does not support the Board's finding that Gibraltar was motivated by anti-union animus when it closed its Olive Hill plant").

As discussed above, Quickway's decision to cease operations at its Louisville terminal was born out of anti-union animus. *See supra* Part II, Section B.1. Because that partial-closure decision was discriminatorily motivated in violation of Section 8(a)(3), Quickway's failure to bargain over that decision violated Section 8(a)(5). Quickway argues that its decision was motivated by economic necessity. *See, e.g.*, D. 35 (Quickway Br. at 36). That may be so. Even if Quickway were motivated by economic necessity, however, there is substantial evidence to support the Board's conclusion that it was also motivated by anti-union animus. *See supra* Part II, Section B.1. And "[d]iscrimination on the basis of union animus cannot constitute a lawful entrepreneurial decision." *Delta Carbonate*, 307 NLRB at 122.

2. Effects

Under Section 8(a)(5) of the Act, Quickway was also obligated to bargain with the Union over the effects of its decision partially to cease operations. *See First Nat'l*, 452 U.S. at 681-82. To meet its effects-bargaining obligation, an employer must bargain "in a meaningful manner and at a meaningful time." *Id.* at 682. "A concomitant element of 'meaningful' bargaining is timely notice to the union of the decision to close, so that good faith bargaining does not become futile or impossible." *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18, 26 (1st Cir. 1983); *see also NLRB v. Emsing's Supermarket, Inc.*, 872 F.2d 1279, 1286 (7th Cir. 1989).

Here, on the morning of December 10, Quickway informed Local 89 that it was willing to bargain over the effects of its decision to close the Louisville terminal. Joint App'x at 1126-29 (Hr'g Tr. at 1828-31)

(Cannon Direct). Local 89, however, insisted on continuing negotiations over a collective bargaining agreement and declined to discuss effects of the closure. *Id.* Quickway does not dispute that it had an obligation to bargain over the effects of its decision to close the Louisville terminal. *See* D. 35 (Quickway Br. at 45). Quickway simply argues that "effects bargaining was offered at a meaningful time and in a meaningful manner," and it was "[t]he Union's conduct and refusal to cooperate [that] thwarted Quickway's efforts." *Id.* at 46.

The Board held that Quickway failed to meet its effects-bargaining obligation despite its offer to bargain over the effects of the partial closure. Joint App'x at 21 (Board Dec. at 21 n.55). The Board explained that, "[w]here, as here, a union is entitled to bargain over both the decision and its effects, the employer must provide the union a prior or contemporaneous opportunity to bargain over the former to fully satisfy its obligation to bargain over the latter." *Id.* (quoting *DuPont Specialty Prods. USA, LLC*, 369 NLRB No. 117, slip op. at 18 (July 8, 2020)).

In *Dupont Specialty Products USA,* an employer unilaterally decided to subcontract bargaining unit work without bargaining with the union over its decision or the effects therein. 369 NLRB No. 117, slip op. at 18. The employer in *Dupont* "repeatedly offered and tried to" bargain over effects, "but . . . the Union refused." *Id.* Because the employer's "offer to bargain the effects was at all times made in the context of its unlawful refusal to bargain over the subcontracting decision," however, the Board held that the offers were "'insufficient to satisfy its [bargaining] obligations.'" *Id.* (quoting *Solutia, Inc.*, 357 NLRB 58, 65

(2011)). The employer's failure to bargain over effects violated Section 8(a)(5) and (1) of the Act. *Id.* at 19.

Dupont is directly on point. Quickway was obligated to bargain over its decision to cease operations at the Louisville terminal. *See supra* Part II, Section C.1. In order to satisfy its effects-bargaining obligation, Quickway must therefore bargain over both the decision and its effects. *DuPont Specialty*, 369 NLRB No. 117, slip op. at 18. "Given [Quickway's] unlawful failure to bargain over the [partial closure] decision, [Quickway] failed to satisfy its duty to bargain over the effects of that decision." *Id.* Just like in *Dupont*, no amount of offering to bargain over the effects of a decision satisfies Quickway's obligation to bargain over both the decision itself and its effects.

D. Threats and Interrogations

The Board found that Quickway violated the Act when (1) Evola threatened drivers that Quickway "would close the Louisville terminal if the drivers selected the Union as their collective-bargaining representative," Joint App'x at 21 (Board Dec. at 21); (2) "Marcellino instructed employee Hendricks to create a list of union supporters," *id.* at 22 (Board Dec. at 22); (3) Higgins told a Louisville driver "that if the terminal went union, [Quickway] would have to raise its prices and would probably lose its contract with Kroger, which would probably result in all employees at the terminal losing their jobs," *id.*; (4) Evola told Louisville drivers that Quickway "would no longer contribute new shares to the drivers' [stock] accounts if they selected the Union as their representative," *id.*; (5) Evola threatened to take legal action against a Louisville driver who filed an unfair labor practice

charge with the Board, *id.* at 23 (Board Dec. at 23); and (6) McCurry interrogated Louisville drivers during the Union's job action, *id.* at 25 (Board Dec. at 25). Quickway violated Section 8(a)(4) of the Act when it engaged in charge (5); the remaining charges fall under Section 8(a)(1). *See id.* at 26 (Board Dec. at 26).

1. Charges Covered by the September Settlement Agreements

Charges (1) through (5), above, were all covered by the September settlement agreements. *See* Joint App'x at 21-24 (Board Dec. at 21-24). Quickway argues that the Board erred when it found that the General Counsel was justified in setting aside the September settlement agreements. D. 35 (Quickway Br. at 55). According to Quickway, "[b]ecause Quickway's Decision and the closure were lawful under *First National Maintenance* and *Darlington*, the settlement agreements should be reinstated, and the settled Section 8(a)(1) and allegations dismissed." *Id.*

Contrary to Quickway's argument, Quickway's decision to cease operations at the Louisville terminal and subsequent failure to bargain over that decision and its effects violated Section (8)(a)(1), (3), and (5) of the NLRA. *See supra* Part II, Section B, C. As the Board correctly noted, "a settlement agreement may be set aside and unfair labor practices found based on presettlement conduct if there has been a failure to comply with the provisions of the settlement agreement or if post-settlement unfair labor practices are committed." Joint App'x at 21 (Board Dec. at 21) (quoting *Twin City Concrete*, 317 NLRB 1313, 1313 (1995)). Because there is substantial evidence to support the Board's findings that Quickway violated

Section 8(a)(1), (3), and (5) of the Act when it partially ceased operations and failed to bargain, it was proper for the General Counsel to set aside the September settlement agreements.

"Quickway does not dispute any of the underlying facts or challenge the Board's findings that the conduct would violate Section 8(a)(1) but for the settlement" agreements. D. 45 (NLRB Br. at 48); *see* D. 35 (Quickway Br. at 55). We have previously explained that if an "employer fails to challenge a portion of the Board's findings on appeal, [we] may 'summarily enforce the Board's order with regard to those issues.'" *Vanguard Fire & Supply Co. v. NLRB*, 468 F.3d 952, 956 (6th Cir. 2006) (quoting *NLRB v. Talsol Corp.*, 155 F.3d 785, 793 (6th Cir. 1998)). Because the September settlement agreements were properly set aside, we summarily enforce the Board's order as it relates to the unfair labor practices covered by the September settlement agreements.

2. McCurry Interrogation

The last charge—that McCurry interrogated Louisville drivers during the Union's job action in violation of the Act, Joint App'x at 25 (Board Dec. at 25)—was not covered by the September settlement agreements. Quickway argues that the Board's "conclusion that McCurry's communications with drivers violated Section 8(a)(1) is not supported by substantial evidence" because there is no evidence "that any employee was threatened, coerced, or promised anything" by McCurry on the day of the Union's job action. D. 35 (Quickway Br. at 65).

In its decision, the Board stated that, "[d]uring the job action, Terminal Manager McCurry emailed a

photograph of [the action] to Cannon . . . , noting that he was going to try to find out what the Union was discussing with the drivers." Joint App'x at 25 (Board Dec. at 25). "[L]ater that day, McCurry stated that all the drivers to whom he had spoken responded that they shut down the union representatives and were not interested in speaking to the Union." *Id.*

An employer violates Section 8(a)(1) "when substantial evidence demonstrates that the employer's [actions], considered from the employees' point of view, had a reasonable tendency to coerce." *Caterpillar*, 835 F.3d at 543 (alteration in original) (quoting *Dayton Newspapers, Inc. v. NLRB*, 402 F.3d 651, 659 (6th Cir. 2005)). "A finding of 'actual coercion' is not required." *Id.* (quoting *Dayton Newspapers*, 402 F.3d at 659). "When assessing the coercive tendency of an interrogation, the [Board] looks at, among other things, the background, the nature of the information sought, the questioner's identity, and the place and method of interrogation." *Id.* (alteration in original) (quoting *Dayton Typographic Serv., Inc. v. NLRB*, 778 F.2d 1188, 1194 (6th Cir. 1985)).

Here, "McCurry was the highest-ranking management official at the Louisville terminal at that time," he "approached drivers while the job action was occurring and asked them about their discussions with the union representatives conducting the job action," and he did so "almost immediately" following those discussions. Joint App'x at 26 (Board Dec. at 26). From the employees' point of view, McCurry's role as the "highest-ranking onsite manager" increases the likelihood of a reasonable tendency to coerce. *Bannum Place of Saginaw, LLC*, 370 NLRB No. 117, 2021 WL 1751769, at *7 (Apr. 30, 2021), *enforced*, 41 F.4th 518

(6th Cir. 2022). Likewise, "the background of the exchange, in that" a union job action was ongoing and employees' "union support was private," further supports the Board's conclusion that McCurry's questioning "amounted to coercive interrogation in violation of the Act." *Caterpillar*, 835 F.3d at 543. McCurry himself stated that he was attempting to find out from drivers what Local 89 was "discussing with drivers." Joint App'x at 2563 (McCurry Email). McCurry also reported back to other management what the drivers thought of the union. *See id.* "[T]he nature of the information sought" was thus clearly related to the drivers' "position on the union." *Caterpillar*, 835 F.3d at 543. Based on this evidence together, "[t]he Board reasonably concluded that this encounter had a reasonable tendency to coerce." *Id.* There is substantial evidence to support the Board's conclusion that McCurry's interrogations violated Section 8(a)(1).

E. Procedural Rulings

Quickway argues that the Board erred when it adopted the ALJ's determination that Obermeier was credible, D. 35 (Quickway Br. at 60); upheld the ALJ's revocation of subpoenas and preclusion of certain testimony, *id.* at 61-62; failed "to require the General Counsel to produce exculpatory evidence," *id.* at 62; and rejected Quickway's affirmative defense that the Union was engaged in unlawful secondary conduct, *id.* at 64. Quickway's procedural arguments are meritless.

We will overturn a credibility determination only if the determination "overstep[s] the bounds of reason," *Caterpillar*, 835 F.3d at 542 (quoting *Kusan Mfg. Co. v. NLRB*, 749 F.2d 362, 366 (6th Cir. 1984)

(per curiam)), or is "inherently unreasonable or self-contradictory," *id.* (quoting *Tel Data Corp. v. NLRB*, 90 F.3d 1195, 1199 (6th Cir. 1996)). Though Quickway calls the ALJ's determination of Obermeier's credibility "inherently unreasonable," it fails to demonstrate what was inherently unreasonable about that determination. D. 35 (Quickway Br. at 61). Quickway thus cannot overcome our deferential review of credibility determinations.

Quickway next argues that the Board erred in upholding the ALJ's revocation of subpoenas and exclusion of evidence. *Id.* at 61-62. The Board held that Quickway did "not show[] why the excluded evidence was relevant or how it was prejudiced by the exclusion of that evidence, nor has it alleged that the [ALJ's] evidentiary rulings demonstrate bias or prejudice against it." Joint App'x at 1 (Board Dec. at 1 n.1). We review evidentiary rulings for abuse of discretion, *NLRB v. Jackson Hosp. Corp.*, 557 F.3d 301, 306 (6th Cir. 2009); *cf. Veritas Health Servs., Inc. v. NLRB*, 895 F.3d 69, 78 (D.C. Cir. 2018), and reverse only when we are "firmly convinced that a mistake has been made," *Romstadt v. Allstate Ins. Co.*, 59 F.3d 608, 615 (6th Cir. 1995). Quickway presents no evidence that firmly convinces us that a mistake has been made.

Quickway next asks this court to apply the principles of *Brady v. Maryland*, 373 U.S. 83 (1963), to administrative proceedings and hold that the Board erred by not requiring the General Counsel to produce exculpatory evidence. *See* D. 35 (Quickway Br. at 62-63). Quickway identifies no federal court that has imported the *Brady* standard to administrative proceedings. *Id.* In contrast, the Board notes that several of our sibling circuits "have rejected this argument as a

misplaced analogy that would interfere with the Board's enforcement proceedings." D. 45 (NLRB Br. at 42) (listing cases). Quickway, moreover, fails to identify any exculpatory evidence that the General Counsel suppressed. *See* D. 35 (Quickway Br. at 63) (noting only that "by not calling certain witnesses, . . . as the General Counsel did here, potential exculpatory evidence remains suppressed"). The Board, accordingly, did not abuse its discretion by failing to import a new rule that would require the General Counsel to produce this unnamed "potential exculpatory evidence." *Id.*

Finally, the Board did not abuse its discretion as it relates to Quickway's affirmative defense. The Board found "it unnecessary to pass on [Quickway's] argument" because, "[e]ven assuming the message contained in the media inquiries would have constituted an unprotected threat . . . the record evidence does not establish that [Quickway] had a reasonable belief that the Union was the source of the information in the media inquiries or that [Quickway] decided to cease operations at the Louisville terminal to avoid potentially catastrophic liability and damages that it feared could have resulted from a strike." Joint App'x at 14 (Board Dec. at 14 n.38). Stated otherwise, because the Board found that Quickway was motivated by anti-union animus and a desire to chill unionization, and not purely economic reasons, Quickway's affirmative defense would not save it. Because the Board's determination that Quickway was not motivated purely by economic reasons was supported by substantial evidence, *see supra* Part II, Section B, the Board's decision not to address this affirmative defense was not an abuse of discretion.

F. Remedies

As noted, the Board has "broad discretion in fashioning remedies for violations of the Act." *ADT Sec. Servs.*, 689 F.3d at 635. "[T]he Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969). We will disturb the Board's remedial orders only when "it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *ADT Sec. Servs.*, 689 F.3d at 635 (quoting *Va. Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943)).

When an employer unlawfully closes a section of its business and discharges all employees in that section, the Board should issue an "order [that] as nearly as possible restore[s] the parties to the status quo which existed before the unfair practices occurred." *Decaturville Sportswear Co. v. NLRB*, 406 F.2d 886, 889 (6th Cir. 1969); *see Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 215-17 (1964). On that basis, "a restoration order 'typically is the appropriate remedy for a discriminatorily motivated change in operations.'" *NLRB v. Taylor Mach. Prods., Inc.*, 136 F.3d 507, 516 (6th Cir. 1998) (quoting *Adair Standish Corp. v. NLRB*, 912 F.2d 854, 867 (6th Cir. 1990)); *see also Mid-South Bottling Co. v. NLRB*, 876 F.2d 458, 460-61 (5th Cir. 1989).

A restoration order is thus appropriate here, "unless the employer can show that such a remedy would be unduly burdensome." *Int'l Shipping Agency, Inc.*, 369 NLRB No. 79, slip op. at 7 (May 20, 2020); *see also Fibreboard Paper*, 379 U.S. at 216. It is the

employer's burden to demonstrate that a restoration order is unduly burdensome, and "[t]he threshold to establishing its burden is high." *Mid-South Bottling*, 876 F.2d at 461.

Quickway argues that the Board "erroneously found [that] the evidence did not establish restoration of the Louisville terminal operations would be unduly burdensome." D. 35 (Quickway Br. at 57). In support of its argument, Quickway notes that it "almost exclusively serviced Kroger out of its Louisville terminal" and its contract with Kroger was terminated, it "subleased the terminal after the termination of the" Kroger contract, it "would have to spend millions of dollars to restore the necessary equipment alone," and "[r]estoration would be unprofitable since [it] has no Louisville business and would likely result in an unsustainable financial burden." *Id.* at 57-58.

In *Westchester Lace, Inc.*, an employer subcontracted the work at one of its facilities and laid off the employees at that facility. 326 NLRB 1227, 1227 (1998). After finding that this violated Section 8(a)(3) and (1) of the Act, the Board ordered the employer to "[r]eestablish and resume" operations at the facility. *Id.* at 1246. The Board found that the employer "failed to meet its burden to establish that restoration is unduly economically burdensome." *Id.* at 1245 (citation omitted). There, the employer "still owned at close of hearing all equipment and machinery . . . necessary to reestablish its . . . operation," though most of the machinery was "in a disassembled state." *Id.* "[T]he cost of reassembling and [starting up] the operation was estimated by [the] owner . . . at $100,000 to $200,000." *Id.* And though the employer had since sold the facility, the ALJ and Board held that, because

it was sold "at a time when [the employer] was on notice from the complaint that closing was unlawful and General Counsel would seek its restoration, [the employer] should not be able to knowingly benefit from its unlawful conduct." *Id.*

Here, like in *Westchester Lace*, restoring operations may be costly. That said, like the employer in *Westchester Lace*, Quickway and its affiliates still own nearly all the equipment from the Louisville terminal. *See* Joint App'x at 6 (Board Dec. at 6) (explaining that Quickway and its affiliates still own 40 of the 44 trucks used at the Louisville terminal); *see also Mid-South Bottling*, 876 F.2d at 461 (upholding a restoration order where "much of the equipment was simply sent to other . . . [affiliated] facilities"). As the Board explained, Quickway "has not shown that it would be unduly burdensome for it to reacquire a sufficient number of trucks to restore its operations at the Louisville terminal." Joint App'x at 27 (Board Dec. at 27). Further, Quickway leased the Louisville terminal "at a time when [it] was on notice" that the General Counsel was seeking the restoration of the terminal. *Westchester Lace*, 326 NLRB at 1245; *see* Joint App'x at 27-28 (Board Dec. at 27-28). Quickway "should not be able to knowingly benefit from its unlawful conduct." *Westchester Lace*, 326 NLRB at 1245.

Quickway's argument that restoration is an undue burden because its Louisville terminal would not be profitable given the loss of the Kroger contract is similarly unavailing. Loss of clients does not alone demonstrate that restoration is unduly burdensome because "[w]hen the Board orders the restoration of the status quo ante, it is understood that the order

means 'as far as possible, given the economic realities faced by the employer at the time of compliance.'" *We Can, Inc.*, 315 NLRB 170, 175 (1994).

This background principle is reinforced in this case because the Board ordered both a "good-faith effort" and a tiered remedy. Joint App'x at 32 (Board Order at 32). The Board ordered Quickway to restore operations and "offer the unlawfully discharged unit employees full reinstatement to their former jobs," but "if those jobs no longer exist," Quickway must reinstate them to "substantially equivalent positions . . . to the extent that their services are needed at the Louisville terminal to perform the work that [Quickway] is able to attract and retain from The Kroger Company or new customers after a good-faith effort." *Id.* The Board continued that, if there are remaining unlawfully terminated employees, Quickway must reinstate them "to any positions in its existing operations that they are capable of filling." *Id.* If there remain unlawfully terminated employees at that point, Quickway must place them "on a preferential hiring list" for future vacancies. *Id.*

Crucially, the Board order requires Quickway to make a "good-faith effort" to attract and retain business upon its restoration of operations. *Id.*; *see also id.* at 28 (Board Dec. at 28) (recognizing that an employer complies with a restoration order if it makes "a good-faith effort" to attract clients and restore business, even if it ultimately cannot "attract enough clients to restore" operations in full (citing *We Can, Inc.*, 315 NLRB at 175)). The Board's tiered reinstatement and "good-faith" requirement for restoration demonstrates sensitivity to the "economic realities" of re-opening a facility and rehiring staff. *We Can, Inc.*, 315 NLRB at

175. The Board's order provides Quickway subsequent steps to take if its initial efforts do not return all workers to the status quo, and reasonably demands a "good-faith effort" by Quickway. Joint App'x at 28 (Board Dec. at 28). This cabined remedy is, accordingly, not an undue burden. The Board, furthermore, made clear that, "[a]t the compliance stage of these proceedings, [Quickway] will have the opportunity to introduce evidence that was not available at the time of the unfair labor practice hearing to demonstrate that this restoration order would be unduly burdensome." *Id.* at 28 (Board Dec. at 28 n.68); *see also Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902 (1984) (explaining that "compliance proceedings provide the appropriate forum" to "tailor[] the remedy to suit the individual circumstances").

Finally, Quickway's argument is bare: Quickway offers no evidence of the actual costs it will incur if ordered to reopen. *See* D. 35 (Quickway Br. at 56-60). Quickway's "bare statements about the economic costs of [reopening] fail to meet [the] 'undue burden' test." *Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 315 (D.C. Cir. 2003). Given the "special respect" owed to the Board's "choice of remedy," the Board's tiered remedy, as well as the compliance proceedings available to Quickway before the Board, we will not disturb the Board's restoration and reinstatement order. *Gissel Packing*, 395 U.S. at 612 n.32. Quickway has not shown that the Board abused its discretion in ordering restoration of operations and reinstatement of employees.

Quickway additionally argues that the Board's "backpay award is punitive and unreasonable under the circumstances," and that the Board erred when it

imposed "make whole remedies for any loss of earnings or other benefits; . . . other foreseeable pecuniary harms suffered; and . . . compensation for affected laid off employees for adverse tax payments of recovering 'lump sum' payments." D. 35 (Quickway Br. at 59-60). Contrary to Quickway's assertion, an award of backpay and reinstatement is explicitly contemplated by the Act. The Act expressly directs the Board, upon a finding of a violation, "to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of" the Act. 29 U.S.C. § 160(c). "[T]he Board did not abuse its discretion in ordering the traditional remedy of reinstatement, employment, and backpay for the discriminatees," and Quickway presents no evidence to the contrary. *Ky. Gen., Inc. v. NLRB*, 177 F.3d 430, 439 (6th Cir. 1999).

The General Counsel argues that we do not have jurisdiction to consider Quickway's argument on the make-whole remedy because Quickway did not raise it before the Board. D. 45 (NLRB Br. at 56). In response, Quickway argues that "Section 10(e) functions as a claim-processing rule, not a jurisdictional" one, so we can, nonetheless, address the argument. D. 53 (Reply at 25). We agree with the Board, and every other circuit to reach this issue, that the provision in § 10(e) barring our consideration of objections not raised before the Board should be considered jurisdictional, not merely a claim-processing rule. The Supreme Court, starting with *Arbaugh v. Y&H Corp.* in 2006, established a presumption against reading statutory requirements as jurisdictional unless Congress clearly states otherwise. 546 U.S. 500, 515 (2006). This approach has brought "some discipline to

the use of the term 'jurisdictional.'" *Santos-Zacaria v. Garland*, 598 U.S. 411, 421 (2023) (quoting *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011)). And the Court has "repeatedly warned lower courts against confusing 'claim-processing rules . . . ' with true 'jurisdictional limitations.'" *Pub. Serv. Co. v. NLRB*, 692 F.3d 1068, 1076 (10th Cir. 2012) (quoting *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010)). We don't take this direction "lightly." *Wilkins v. United States*, 598 U.S. 152, 158 (2023). Yet § 10(e) satisfies this clear-statement rule through its text, context, and function.[7]

The language of § 10(e) itself indicates a jurisdictional rule. It states that no unraised objections "shall be considered by the court," using mandatory language that limits the court's power to act. 29 U.S.C. § 160(e). This phrasing focuses on the court's authority rather than imposing procedural obligations on litigants, which is characteristic of jurisdictional rules as opposed to claim-processing requirements. *See Arbaugh*, 546 U.S. at 515 (citing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982)); *Reed Elsevier*, 559 U.S. at 161 (reasoning that a statute imposes a jurisdictional limit on the courts when it "speak[s] to the power of the court rather than to the rights or obligations of the parties." (citation omitted)).

The statutory context reinforces this interpretation. *See* 29 U.S.C. § 160(e). The sentence directly

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[7] In *Woelke & Romero Framing, Inc. v. NLRB*, the Supreme Court held that, under Section 10(e) of the Act, courts "lack[] jurisdiction to review objections that were not urged before the Board." 456 U.S. 645, 665-66 (1982). We have long followed *Woelke & Romero Framing*. *See S. Moldings, Inc. v. NLRB*, 728 F.2d 805, 806 (6th Cir. 1984) (en banc). We explain in text why this is still applicable law.

preceding the relevant clause states that upon filing a petition, the court "shall have *jurisdiction* of the proceeding and of the question determined therein." *Id.* (emphasis added). It then immediately states that no unraised objections "shall be considered by the court," making clear that reviewing issues that have not been brought before the Board is beyond a court's jurisdiction. The direct reference to jurisdiction in the adjacent text provides a clear indication of the provision's jurisdictional character.

We join our sister circuits in determining that § 10(e) creates a jurisdictional rule. *Pub. Serv. Co.*, 692 F.3d at 1076 (Gorsuch, J.); *Chevron Mining, Inc. v. NLRB*, 684 F.3d 1318, 1328 (D.C. Cir. 2012); *New Concepts for Living, Inc. v. NLRB*, 94 F.4th 272, 280 (3d Cir. 2024). Ruling otherwise would create a circuit split where none currently exists. As these circuits recognized, following *Arbaugh*, we must "distinguish carefully" between jurisdictional and claim-processing rules. *Chevron Mining*, 684 F.3d at 403. Taking these warnings seriously, each circuit to examine § 10(e)'s text, structure, and history in the wake of *Arbaugh* has concluded that it is jurisdictional. Likewise heeding these warnings, we do the same.

The dissent primarily relies on the Supreme Court's opinion in *Santos-Zacaria v. Garland* to show that the exhaustion rule here is not jurisdictional. 598 U.S. at 417. That case involved a statutory provision in the Immigration and Nationality Act ("INA") requiring noncitizens to raise all issues before the Board of Immigration Appeals to preserve them for judicial review—a classic administrative-exhaustion requirement. *Id.* at 416. The Court called an exhaustion requirement a "quintessential claim-processing rule" but

noted it could be jurisdictional if it contained a clear statement from Congress "on par with express language addressing the court's jurisdiction." *Id.* at 417-20. The Court ultimately concluded that the INA exhaustion rule was not jurisdictional given the text and structure of that statute. It emphasized that the relevant provision stated that the petitioner must "exhaust[] all administrative remedies available" before seeking judicial review and did not speak in jurisdictional terms. *Id.* at 416 (quoting 8 U.S.C. § 1252(d)(1)). That was particularly telling given that neighboring provisions were "plainly jurisdictional" and explicitly spoke in jurisdictional terms. *Id.* at 419 & nn.5-6. As the dissent highlights, the INA does speak to the court's power, stating "[a] court may review a final removal order only" after exhaustion of administrative remedies; and the Supreme Court did not read this focus on the court's review sufficient to deem the exhaustion requirement jurisdictional. *Id.* at 420. That's because, the Court explained, the statute is not "focused solely on the court," and "requires that '*the alien* has exhausted' certain remedies"—so it "speaks to a party's procedural obligations as well, just like a nonjurisdictional claim-processing rule." *Id.* (internal quotation marks and alterations omitted). Given that the INA's exhaustion requirement did not use jurisdictional language as in its adjacent provisions, and the statute directly obligated the petitioner to exhaust as would a typical claim-processing rule, the Court concluded that the government could not overcome the presumption against jurisdictional treatment. *Id.* at 419.

The provision in § 10(e), however, is markedly different. Consider the key distinctions. The INA

provision examined in *Santos-Zacaria* used the word "exhaustion" and did not mention jurisdiction (as the statute did in other provisions). *Id.* at 419. In contrast, § 10(e) does not mention "exhaustion" and is framed in explicitly jurisdictional terms. The INA's exhaustion requirement directly imposed procedural obligations on the petitioner. Section 10(e), however, is "focused solely on the court" and the court's power to consider certain matters. *See id.* at 420.

Furthermore, the structure of § 10(e) differs significantly from provisions found to be non-jurisdictional in other cases. For instance, in *Henderson v. Shinseki*, the Court determined that the 120-day filing deadline for Department of Veterans Affairs benefits was not jurisdictional. 562 U.S. at 431. The Court's reasoning hinged largely on two factors: first, the "provision does not speak in jurisdictional terms or refer in any way to the jurisdiction of the Veterans Court"; second, the provision's placement within the "Procedure" subchapter reinforced its non-jurisdictional nature. *Id.* at 438-39 (cleaned up); *see Zipes*, 455 U.S. at 394 (reasoning that the a provision that requires litigants to file a timely charge with the EEOC before filing in court was not jurisdictional in part because "[t]he provision specifying the time for filing charges with the EEOC appears as an entirely separate provision, and it does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts")). Unlike in *Henderson*, the relevant clause in § 10(e) is directly linked to the jurisdictional grant, which is contained within the same statutory section. *See* 29 U.S.C. § 160(e) ("Upon the filing of [a] petition [by the Board to enforce its order], the court shall . . . have jurisdiction of the proceeding and of the question

determined therein [.]"). This strongly suggests that Congress intended the provision to be jurisdictional in nature.

Although § 10(e) includes an exception—allowing courts to review new issues in "extraordinary circumstances,"—that does not negate its jurisdictional character. In *Bowles v. Russell*, decided one year after *Arbaugh*, the Supreme Court held that the notice of appeal filing deadline was jurisdictional despite recognizing limited exceptions. 551 U.S. 205, 214 (2007); Fed. R. App. P. 4(a)(5)(A)(ii) (allowing a district court to extend the time for appeal upon a showing of "excusable neglect or good cause"). Similarly, the narrow exception in § 10(e) can coexist with the statute's jurisdictional nature. While courts have become more cautious about labeling requirements as jurisdictional post-*Arbaugh*, § 10(e) meets the higher bar. Its placement within a jurisdictional section, its direct limitation on court power, and its focus on the court's authority rather than litigant obligations all point to a clear congressional intent to make this provision jurisdictional, distinguishing it from the non-jurisdictional provision in *Santos-Zacaria*.

Because Quickway did not raise any argument about the make-whole remedy before the Board—either prior to the Board's decision or in a motion for reconsideration, we do not have jurisdiction to consider the argument.

III. Conclusion

For the foregoing reasons, we **DENY** Quickway's petition for review and **GRANT** the Board's cross-application for enforcement of its order in full.

CONCURRING IN THE JUDGMENT, JUDGE MURPHY (SEPTEMBER 11, 2024)

MURPHY, Circuit Judge, concurring in the judgment. I agree with my colleagues that we must reject Quickway Transportation's many challenges to the order of the National Labor Relations Board in this case. The Board held that Quickway violated 29 U.S.C. § 158(a)(1), (a)(3), and (a)(5) when defending against unionization efforts at its Louisville terminal and when later closing that terminal. *See Quickway Transp., Inc.*, 372 N.L.R.B. No. 127, 2023 WL 5528976, at *30-31 (Aug. 25, 2023). In our court, Quickway chose to argue primarily over the facts. Yet these arguments trigger a deferential standard of review. We must treat as "conclusive" the Board's findings of historical fact "if supported by substantial evidence on the record considered as a whole[.]" 29 U.S.C. § 160(e); *see NLRB v. Wehr Constr., Inc.*, 159 F.3d 946, 950 (6th Cir. 1998). With this fact-bound briefing strategy, Quickway simply accepted the validity of the Board's legal views about what the relevant statutes require. I write to make clear that we need only *assume* these legal views to resolve this case. That is true for the following challenges.

1. *Duty to Bargain over Closure*. The National Labor Relations Act prohibits several "unfair labor practices" by employers. 29 U.S.C. § 158(a). Quickway's decision to close its Louisville terminal implicated two of § 158(a)'s prohibitions that the Supreme Court interpreted in a pair of decisions: *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), and *Textile Workers Union of America v. Darlington*

Manufacturing Co., 380 U.S. 263 (1965). *Darlington* first addressed § 158(a)(3). This paragraph makes it an "unfair labor practice for an employer" "to encourage or discourage membership in any labor organization" "by discrimination in regard to hire or tenure of employment or any term or condition of employment[.]" 29 U.S.C. § 158(a)(3). The employer in *Darlington* closed a plant in response to its workers' decision to unionize the plant. 380 U.S. at 265-66. The Court initially held that an employer's decision to "go completely out of business" in response to a unionization effort did not violate § 158(a)(3). *Id.* at 269-74. But uncertainty existed over whether the employer operating this plant formed part of a broader entity that ran several other plants. So the Court next asked whether a *partial* closure could violate § 158(a)(3). It held that such a closure could amount to "discrimination in regard to . . . tenure of employment" in specific circumstances. 29 U.S.C. § 158(a)(3); *see Darlington*, 380 U.S. at 274-76. In particular, a closure of a plant violates § 158(a)(3) if: the employer has a sufficient interest in other businesses that remain open; the employer closed the plant with the intent to discourage unionization at these other businesses; and it was "realistically foreseeable" that the plant closure would lead employees in the other businesses to fear that the employer would also close those businesses if they attempted to unionize. *See Darlington*, 380 U.S. at 275-76.

First National Maintenance next addressed § 158 (a)(5). That paragraph makes it an "unfair labor practice for an employer" "to refuse to bargain collectively with the representatives of his employees[.]" 29 U.S.C. § 158(a)(5). But the statute clarifies that an

employer's duty to bargain exists only "with respect to wages, hours, and other terms and conditions of employment" for its employees. *Id.* § 158(d). The employer in *First National Maintenance* terminated a maintenance-services contract with a nursing-home customer (and laid off the employees who worked for this customer) without negotiating with the union. 452 U.S. at 668-70. The Court asked whether the refusal to negotiate over this decision violated § 158 (a)(5). After balancing the interests on both sides, it held that the employer's closure of part of the business did not fall within the "terms and conditions" of employment that triggered a duty to bargain. *Id.* at 686 (quoting 29 U.S.C. § 158(d)). When discussing the "limits of [its] holding," though, the Court flagged that the union did *not* allege that the employer had acted with any "antiunion animus." *Id.* at 687.

The combination of *Darlington* and *First National Maintenance* leaves one legal question unanswered: Suppose an employer *does* close part of its business and terminate employees out of antiunion animus. Would this fact establish *only* a violation of § 158(a)(3)'s antidiscrimination rule under *Darlington*? Or might the antiunion animus also suffice to distinguish *First National Maintenance* and trigger a duty to negotiate over the partial closure under § 158(a)(5)? The Court has not decided this question. The Board, by contrast, has long held that § 158(a)(5) requires employers to bargain over partial closures driven by antiunion animus. *See Delta Carbonate, Inc.*, 307 N.L.R.B. 118, 122 (1992); *Strawsine Mfg. Co.*, 280 N.L.R.B. 553, 553 (1986).

This backdrop sets the stage for this case. The Board held that Quickway decided to close its Louisville

terminal on prohibited antiunion grounds. Based on that factual finding, the Board invoked *Darlington* to conclude that Quickway violated § 158(a)(3) by discriminating against its employees for their unionization efforts. *See Quickway Transp.*, 2023 WL 5528976, at *8-22. And the Board invoked its reading of *First National Maintenance* to conclude that Quickway violated § 158 (a)(5) by failing to negotiate with the union over the closure. *See id.* at *22.

Yet I view the Board's reading of *First National Maintenance* as open to serious question. According to *First National Maintenance*, a partial closure is not a "term" or "condition" of employment subject to bargaining under § 158(a)(5) and (d). According to the Board, the closure becomes such a term or condition if the employer bases it on antiunion animus. As a textual matter, how can the motive for a partial closure make the closure a "term" or "condition" of employment? In my view, the closure should qualify as such a "term" or "condition" or it should not. I do not see how this text could be read to make the employer's intent relevant. As a precedential matter, *First National Maintenance* recognized the possibility of antiunion animus and protected against it in other ways. An employer does have a duty to bargain over the "effects" of a partial closure under § 158(a)(5). *See First Nat'l Maint.*, 452 U.S. at 681-82. And if the employer made the closure decision out of "antiunion animus," the decision might violate *Darlington*'s reading of § 158(a)(3)'s antidiscrimination rule. *See id.* at 682. So I see no need to turn § 158(a)(5) into a chameleon to achieve the policy goal of protecting against this antiunion animus. The Fourth Circuit agrees. While highlighting these other protections, it recog-

nized that "the phrase 'terms and conditions of employment' does not magically change meaning with the infusion of anti-union animus." *Dorsey Trailers, Inc. v. NLRB*, 233 F.3d 831, 844 (4th Cir. 2000). And although the Seventh Circuit seems to have accepted the Board's view, it did so with almost no analysis on this issue. *See NLRB v. Joy Recovery Tech. Corp.*, 134 F.3d 1307, 1315-16 (7th Cir. 1998).

At day's end, though, I would not decide this legal question (and enter a circuit split) without briefing from the parties. Quickway's briefing chose *not* to challenge the Board's legal interpretation of *First National Maintenance*. The company instead challenged only the Board's factual finding that it closed the Louisville terminal for antiunion reasons. Petitioner's Br. 34-44, 46-55. I agree that substantial evidence supported the Board's animus finding under our deferential standard of review. That conclusion suffices to resolve this case. We can save the validity of the Board's reading of *First National Maintenance* for another time.

2. *Duty to Bargain over "Effects" of Closure*. Given *First National Maintenance*, Quickway concedes that § 158(a)(5) required it to bargain over the "effects" of its decision to close the Louisville terminal (which resulted in layoffs). *See* 452 U.S. at 681-82. Quickway claimed that it met this duty by offering to bargain over these effects on the day of the closure. The Board rejected this argument based in part on the following legal rule: an employer's failure to bargain over a decision on which it had a duty to bargain (here, the closure of the terminal) *automatically* shows that the employer violated its duty to bargain over the effects of that decision. *See Quickway Transp.*, 2023 WL

5528976, at *22 n.55. Although the Board's order relied on this legal rule, Quickway did not challenge the rule in its opening brief. Petitioner's Br. 45-46. Nor did Quickway dispute the rule in its reply brief after the Board cited it in this court. Reply Br. 23-24. Without any briefing on this rule, I would not opine on its validity. I instead would hold that Quickway forfeited any challenge to the rule. And the (unchallenged) rule suffices to reject Quickway's argument that it engaged in adequate "effects" bargaining. *Cf. Blick v. Ann Arbor Pub. Sch. Dist.*, 105 F.4th 868, 884 (6th Cir. 2024).

3. *Revocation of Settlement Agreements*. Before closing the terminal, Quickway entered into settlement agreements with the Board over alleged unfair labor practices that occurred during the unionization efforts. But the Board later upheld its General Counsel's decision to set aside these settlements on the ground that Quickway committed new unfair labor practices after the settlements. *See Quickway Transp.*, 2023 WL 5528976, at *23 (quoting *Twin City Concrete*, 317 N.L.R.B. 1313, 1313 (1995)). If the settlement agreements made this post-settlement compliance a contractual term between the parties, this holding would enforce the agreements as written. But the Board's rule suggests that it may set aside agreements for post-settlement violations even if an agreement did *not* include such a term. It is not clear to me what law gives the Board this power.

Yet again, we need not reach this legal question. Quickway devotes six lines of text to challenge the General Counsel's decision to set aside the settlement agreements. Petitioner's Br. 55. Because the company argues *only* that it did not commit a post-settlement

violation, we may assume the Board's general authority to set aside settlement agreements. And because we have rejected Quickway's fact-based argument that it did not commit post-settlement violations, I would deny its challenge to the General Counsel's decision on that basis alone.

4. *McCurry's Interrogation*. Section 158 also makes it "an unfair labor practice for an employer" "to interfere with, restrain, or coerce employees in the exercise of" their rights to join a union. 29 U.S.C. § 158 (a)(1). The Board held that Jeff McCurry, the Louisville terminal's manager, violated § 158(a)(1) when he "interrogated" employees about what they discussed with union representatives during a "job action" in front of the terminal. *Quickway Transp.*, 2023 WL 5528976, at *29-30. In the abstract, I find the Board's ultimate "coercion" conclusion debatable. As the dissent at the Board noted, the record contains no testimony from McCurry or employees about the nature of his questioning. *See id.* at *43 (Kaplan, J., dissenting). Was it, for example, hostile or friendly? And our cases have long held that questioning employees alone does not violate § 158(a)(1). *See NLRB v. Homemaker Shops, Inc.*, 724 F.2d 535, 548 (6th Cir. 1984); *NLRB v. Paschall Truck Lines, Inc.*, 469 F.2d 74, 76 (6th Cir. 1972) (per curiam).

I thus would resolve this claim on narrower grounds. In its page of briefing on this subject, Quickway specifically challenges only the Board's subsidiary findings about the historical facts (not its ultimate "coercion" conclusion). The company argues that we must accept McCurry's "uncontradicted testimony" that he did not approach any employees *on his own* and discussed the issue only with those "who approached

him." Petitioner's Br. 65. Quickway adds that "no direct evidence" shows what he "asked or said" to these employees. *Id.* at 65-66. Yet substantial evidence supported the Board's contrary views. *See Quickway Transp.*, 2023 WL 5528976, at *29-30. McCurry's own internal email noted that he would "try to find out what the discussion [is]." *Id.* at *5. The Board could rely on this email to find that McCurry initiated the conversations. And a later email showed that McCurry discussed the employees' conversations with the union representatives during the job action. *Id.* The Board could rely on this email to find that he asked about the unionization efforts. We need not say more to reject Quickway's conclusory challenge.

5. *Quickway's "Secondary" Conduct Defense*. Quickway argued to the Board that the union threatened a strike in the media to harm Kroger (not just Quickway) and that this threat to Kroger qualified as illegal "secondary" conduct. *See* 29 U.S.C. § 158(b)(4)(ii)(B). The company then cited Board precedent for the rule that an employer may escape liability for unlawful activity if it undertook the activity in *response* to the union's illegal secondary conduct. *See Preferred Building Servs.*, 366 NLRB No. 159, 2018 WL 4106356, at *4-6 (Aug. 28, 2018), *rev'd and remanded Serv. Emps. Loc. 87 v. NLRB*, 995 F.3d 1032 (9th Cir. 2021); *see also Nat'l Packing Co. v. NLRB*, 352 F.2d 482, 485 (10th Cir. 1965). I agree that substantial evidence supports the Board's rejection of this defense because Quickway lacked a reasonable basis to believe that the union made the illegal threat in the media. *See Quickway Transp.*, 2023 WL 5528976, at *15 n.38. I thus would leave open the legal question whether Quickway could have avoided liability for its unlawful

conduct if it had engaged in that conduct in response to the union's own illegal activity.

6. *Remedies*. Quickway lastly criticizes two aspects of the Board's required remedies. *First*, Quickway challenges the Board's order requiring the company to restore its operations at the Louisville terminal by breaching its lease with the current tenant, reacquiring trucks, and seeking new business from Kroger. *See Quickway Transp.*, 2023 WL 5528976, at *31-34. The National Labor Relations Act allows the Board to issue orders directing an employer that commits an unfair labor practice "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of" the Act. 29 U.S.C. § 160(c). If the Fourth Circuit correctly held that the Act (in particular, § 158(a)(5)) gives Quickway the sole authority to decide whether to close part of its business free from any union input, I find it hard to see how the restoration of that business would comport with the "policies" of the Act. *Id.* § 160(c); *see Dorsey Trailers*, 233 F.3d at 841-44. And while such a closure might violate § 158(a)(3) if it leads to layoffs based on antiunion animus, *see Darlington*, 380 U.S. at 275-76, that paragraph bars "discrimination in regard to *hire or tenure* of employment or any *term or condition* of employment," 29 U.S.C. § 158(a)(3) (emphasis added). So how could the paragraph justify anything more than the "reinstatement" and "backpay" that the Board separately ordered for the affected employees? *Id.* § 160(c); *see Quickway*, 2023 WL 5528976, at *34. I am not sure.

As I read Quickway's brief, though, it does not question the Board's authority to impose this restoration order. Rather, it makes one last fact-bound attack:

that restoration of the terminal would be "unduly burdensome." Petitioner's Br. 57. But, as my colleagues recognize, Quickway raises bare-bones factual arguments to support this undue-burden claim. Those arguments cannot overcome our deferential standard of review for this type of claim.

Second, Quickway argues that the Board granted illegal "consequential damages" to the laid-off employees. *Id.* at 59. I agree that the statutory exhaustion requirement prohibits us from considering this claim. The statute provides: "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e). Yet Quickway did not challenge this aspect of the Board's remedy in a motion for reconsideration, which our cases seemingly require. *See Van Dorn Plastic Mach. Co. v. NLRB*, 881 F.2d 302, 306 (6th Cir. 1989). And because the Board raised Quickway's failure to exhaust, this requirement would bar Quickway's claim whether we characterize it as a jurisdictional rule or as a claim-processing rule. *Cf. Saleh v. Barr*, 795 F. App'x 410, 424 (6th Cir. 2019) (Murphy, J., concurring). So I see no need to decide whether it is jurisdictional.

Since my colleagues answer this question, though, I will do so as well: I would not read the exhaustion mandate as jurisdictional. The Supreme Court just recently called "an exhaustion requirement" in the immigration context the "quintessential claim-processing rule." *SantosZacaria v. Garland*, 598 U.S. 411, 417 (2023). Courts thus should identify "unmistakable evidence" in the statutory scheme before they treat this

type of requirement as one that limits our jurisdiction. *Id.* at 418. And like Judge Krause, I do not see such evidence in § 160(e). *See New Concepts for Living, Inc. v. NLRB*, 94 F.4th 272, 296-99 (3d Cir. 2024) (Krause, J., concurring).

If anything, the statutory language makes the exhaustion requirement a claim-processing rule. Section 160(e) grants jurisdiction to a court when the Board seeks to enforce its order, while § 160(f) grants jurisdiction to a court when a person aggrieved seeks review of that order. I read both subsections to grant a court jurisdiction as long as one requirement has been met: the filing of a petition for review. Under either subsection, "*[u]pon the filing of such petition*, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein[.]" 29 U.S.C. § 160(e) (emphasis added); *see id.* § 160 (f). And while § 160(e) then imposes the exhaustion requirement, I would not view that requirement as jurisdictional simply because it falls within the same subsection as this jurisdictional grant. After all, § 160 (e) also imposes other procedural requirements on courts (such as the requirement to treat the Board's factual findings as "conclusive" "if supported by substantial evidence") that nobody would treat as jurisdictional. I would read the exhaustion requirement the same way. At the least, this reading strikes me as "plausible"—all that is required to make it a claim-processing rule. *Santos-Zacaria*, 598 U.S. at 416 (citation omitted).

As additional support for my reading, jurisdictional rules typically lack "equitable exceptions" to their requirements. *Id.* But § 160(e)'s exhaustion requirement

comes with a built-in equitable exception: Courts may consider unexhausted claims if they identify "extraordinary circumstances" for a petitioner's failure to raise a claim. 29 U.S.C. § 160(e). I would not have interpreted Congress to have tied a jurisdictional mandate to such a vague standard. After all, the Court presumes that Congress imposes "clear boundaries" in its "jurisdictional statutes." *Direct Mktg. Ass'n v. Brohl*, 575 U.S. 1, 11-12 (2015); *see Sysco Grand Rapids, LLC v. NLRB*, 825 F. App'x 348, 357 (6th Cir. 2020).

My colleagues' responses do not convince me otherwise. They point out that § 160(e)'s exhaustion text ("[n]o objection . . . shall be considered by the court") imposes a limit on the *court*—rather than a condition on a *petitioner*. Yet the Supreme Court rejected the same argument when finding the exhaustion requirement in the immigration context nonjurisdictional. *See Santos-Zacaria*, 598 U.S. at 420. And while one of the Court's older decisions described this requirement as jurisdictional, *see Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982), earlier cases in the immigration context likewise called a (predecessor) exhaustion requirement jurisdictional, *see Santos-Zacaria*, 598 U.S. at 421. Like these earlier immigration cases, *Woelke* did not distinguish "between 'jurisdictional' rules (as we understand them today) and nonjurisdictional but mandatory ones." *Santos-Zacaria*, 598 U.S. at 421. So the Court's modern cases "portend[] a different outcome" from *Woelke*. *New Concepts for Living*, 94 F.4th at 299 (Krause, J., concurring).

For the foregoing reasons, I concur in the judgment.

JUDGMENT, U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT (SEPTEMBER 11, 2024)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

QUICKWAY TRANSPORTATION, INC.,

Petitioner/
Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/
Cross-Petitioner.

GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL UNION NO. 89,

Intervenor.

Nos. 23-1780/1820

Before: MOORE, MURPHY, and BLOOMEKATZ, Circuit Judges.

JUDGMENT

THIS MATTER came before the court upon the petition for review and cross-application for enforcement of an order of the National Labor Relations Board.

UPON FULL REVIEW of the record and the briefs and arguments of counsel,

IT IS ORDERED that the petition for review is DENIED and the Board's cross-application for enforcement is GRANTED.

ENTERED BY ORDER OF THE COURT

/s/ Kelly L. Stephens
Clerk

**DECISION AND ORDER,
NATIONAL LABOR RELATIONS BOARD
(AUGUST 25, 2023)**

NATIONAL LABOR RELATIONS BOARD

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,

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

Before: KAPLAN, WILCOX, AND PROUTY, Members.

On January 4, 2022, Administrative Law Judge Arthur J. Amchan issued the attached decision. The General Counsel and Charging Party General Drivers, Warehousemen and Helpers, Local Union No. 89, affiliated with the International Brotherhood of Teamsters (the Union) filed exceptions and supporting briefs, Quickway Transportation, Inc. (the Respondent) filed answering briefs, and the General Counsel and the Union filed reply briefs. Additionally, the Res-

pondent filed cross-exceptions and a supporting brief, the General Counsel and the Union filed answering briefs, and the Respondent filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has

decided to affirm the judge's rulings,[1] findings,[2] and conclusions only to the extent consistent with this Decision and Order.[3]

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[1] The Respondent has excepted to several of the judge's rulings excluding testimony and other evidence offered by the Respondent and argues that the judge hampered the development of its defense. However, the Respondent has not shown why the excluded evidence was relevant or how it was prejudiced by the exclusion of that evidence, nor has it alleged that the judge's evidentiary rulings demonstrate bias or prejudice against it. We therefore reject the Respondent's exceptions to the judge's evidentiary rulings. For the same reasons, we also reject the Respondent's exception to the judge's failure to allow the Respondent to subpoena certain evidence from the Union and the other Charging Parties. Finally, we reject the Respondent's exception to the judge's denial of its motion to compel the General Counsel to disclose all exculpatory evidence in her possession because "both the Board and reviewing courts have held that the General Counsel is under no general obligation to disclose any exculpatory evidence uncovered during the pretrial investigation." *Caterpillar, Inc.*, 313 NLRB 626, 627 fn. 4 (1994).

Member Prouty joins in rejecting the Respondent's evidentiary exceptions for the reasons stated above. In addition, he agrees with the judge that evidence regarding if/when a strike authorized by the Respondent's drivers on December 6, 2020, was to occur, what was discussed during the December 6 strike-authorization meeting, and what the Union knew about the media inquiries that raised the possibility of a strike is irrelevant because the Respondent was not aware of such information when it made the decision to cease operations at its Louisville, Kentucky terminal. *See Philips Industries*, 295 NLRB 717, 718 (1989) ("The issue here turns on employer motivation. An employer cannot be motivated by facts of which it is not aware."); *Levingston Shipbuilding Co.*, 249 NLRB 1, 10 (1980) ("[A] determination of the employer's actual motive can only be based upon facts known to the employer at the time that the decision was made and not upon facts which were later brought to the employer's attention, but had not been taken into consideration in arriving at that decision." (internal quotations omitted)).

The primary issue in this case is whether the Respondent violated Section 8(a)(5), (3), and (1) of the National Labor Relations Act on December 9, 2020, when it ceased operations at its Louisville, Kentucky terminal and discharged all its drivers at that terminal without bargaining with the Union over the decision. The judge dismissed the allegations that the Respondent's conduct violated the Act because he found that the General Counsel failed to establish that the cessation of operations at the Louisville terminal was an unlawful partial closure under *Textile Workers Union of America v. Darlington Mfg. Co.*, 380 U.S. 263 (1965). For the reasons discussed below, we reverse the judge and find that the Respondent 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. Because these unfair labor

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2 The General Counsel, the Union, and the Respondent have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). The judge based his credibility findings on the weight of the evidence, established or admitted facts, inherent probabilities, and reasoned inferences drawn from the record as a whole. We have carefully examined the record and find no basis for reversing these findings.

3 We shall amend the judge's conclusions of law consistent with our findings herein. We shall amend the remedy and modify the judge's recommended order to conform to our findings and legal conclusions herein and to the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified.

practices occurred shortly after the Respondent had entered into two informal settlement agreements, we find, contrary to the judge, that the General Counsel properly vacated and set aside those settlement agreements, and, for the reasons discussed below, we find that the Respondent committed a number of unfair labor practices by engaging in conduct covered by those settlement agreements. Finally, for the reasons discussed below, we reverse the judge's finding that the Respondent violated Section 8(a)(1) by condoning prior surveillance of employees' union activities and sanctioning further surveillance, but we affirm the judge's finding that the Respondent violated Section 8 (a)(1) by interrogating employees about their union activities.

I. Background

A. The Respondent's Operations

The Respondent is a commercial motor carrier that is owned as part of an employee stock ownership plan (ESOP). Paladin Capital, Inc. (Paladin) is the holding company for all the business entities that are part of the ESOP. The Respondent is thus an affiliate of Paladin. All employees of Paladin and its affiliates, including the Respondent, are members of the ESOP, which functions as a retirement trust, and those employees receive annual stock distributions to their ESOP accounts. William Prevost is the Chairman of Paladin's Board of Directors and its Chief Executive Officer (CEO). Prevost also serves as the CEO of all of Paladin's affiliates, including the Respondent. Joe Campbell is Paladin's President and Chief Operating Officer (COO).

The Respondent is part of Paladin's Quickway Group of trucking companies, which also includes Paladin affiliates Quickway Services, Inc. and Quickway Carriers, Inc. Chris Cannon is the Vice President of Operations for the Quickway Group. The Quickway Group operates 17 terminals nationwide, 13 of which belong to the Respondent. Approximately 75 to 80 percent of the revenue generated by the Quickway Group comes from services provided to The Kroger Company (Kroger), and nine of the Quickway Group terminals service Kroger exclusively. At some terminals, the Quickway Group affiliates service Kroger without a formal contract.

In 2014, Quickway Logistics, Inc., which is a Paladin affiliate that functions as a third-party logistics service provider, entered into a dedicated contract carrier services agreement with Kroger to provide services at the Kroger Distribution Center in Louisville (the KDC), which supplies 242 Kroger-owned grocery stores in Illinois, Indiana, Kentucky, and Tennessee.[4] Quickway Logistics contracted with the Respondent to perform the services required by the KDC agreement. Pursuant to the KDC agreement, the Respondent, through drivers at its Louisville terminal,[5] primarily delivered bulk grocery items from the KDC to Kroger grocery stores but also provided limited inbound

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[4] The term of the most recent KDC agreement was from February 4, 2018, to February 3, 2021.

[5] In early December 2020, the Respondent employed 62 drivers at the Louisville terminal and at that terminal's satellite locations in Versailles and Franklin, Kentucky. References to the Louisville terminal include the satellite locations, and references to the Louisville drivers include the drivers at the satellite locations.

delivery services to the KDC. Transervice, whose drivers are represented by the Union, and the Respondent were the primary and secondary dedicated carriers, respectively, at the KDC. Zenith Logistics, whose employees are also represented by the Union, performs the warehouse operations at the KDC. Approximately 96.5 percent of the Respondent's total revenue generated at the Louisville terminal came from the KDC agreement, as that terminal exclusively serviced Kroger.

The Respondent leased the tractors and trailers that it used at the Louisville terminal from fellow Paladin affiliate Capital City Leasing (CCL). CCL maintained a shop of mechanics at the Louisville terminal to perform maintenance and repair work on the equipment leased by the Respondent as well as for the public. The Respondent and CCL shared the cost for leasing the Louisville terminal. That lease expires on August 31, 2024.

B. The Union's Organizing Drive

In June 2019, the Union began an organizing campaign at the Louisville terminal by soliciting drivers to sign union authorization cards. The Respondent learned of this campaign shortly thereafter. Over the next several months, the Respondent's managers began discussing the campaign amongst themselves and with employees. In a July 26, 2019 email, Louisville Operations Manager Kerry Evola informed Terminal Manager Chris Higgins and Edwin Marcellino, Vice President of Operations for that terminal and three other terminals, that three employees had separately approached him about the Union within

the last week.[6] The next day, Evola told prounion driver Warren Tooley and two other drivers, "If this place goes union, Bill Prevost will shut it down. He's not going to have another terminal go to the union."[7] In August 2019, Marcellino asked dispatcher Donald Hendricks if he knew anything about the Union's campaign and for a list of anyone whom Hendricks knew was involved in the union organizing or was a union supporter. Hendricks declined Marcellino's request, noting that he did not think that Marcellino could request such a list.[8] In an August 15, 2019 email to Harris, Quickway Group Vice President of Operations Cannon wrote that they needed to discuss with

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[6] The Respondent terminated Marcellino in January 2020 and terminated Higgins in June 2020. Evola resigned in June 2020.

[7] Employees at Quickway Service's terminal in Livonia, Michigan are represented by Teamsters Local 614. Employees at Quickway Carriers' terminals in Lynchburg, Virginia and Shelbyville, Indiana are represented by Teamsters Local 171 and Teamsters Local 135, respectively. Those three terminals were organized prior to Prevost assuming his current position in 2004. In 2006, employees at the Respondent's terminal in Landover, Maryland selected Teamsters Local 639 as their representative in a Board-conducted election. There are currently collective-bargaining agreements in effect at all four of the unionized terminals mentioned above.

Teamsters Local 135 previously represented employees at the Respondent's terminal in Indianapolis, Indiana, but those employees decertified Teamsters Local 135 in 2008.

[8] In a December 10, 2019 email explaining to Cannon, Higgins, and Paladin's Human Resources Director, Randy Harris, that Louisville management wanted to terminate Hendricks, Marcellino reminded them that the Respondent thought that Hendricks was behind "all the union talk" when it started. By email sent to Prevost on March 18, 2020, Harris referred to Hendricks as "the Louisville Dispatcher who is working with the Union."

Marcellino, Higgins, and Evola the "union chatter within our driver ranks" at the Louisville terminal. In September 2019, Higgins told Tooley that if the Louisville terminal went union, the Respondent would have to raise its prices and would probably lose its contract with Kroger, which would probably result in all employees at the terminal losing their jobs. In October 2019, Cannon again emailed other managers that the Respondent needed to address the union talk at the Louisville terminal.

On January 22, 2020,[9] the Union informed the Respondent that a majority of the Louisville drivers had signed union authorization cards and requested voluntary recognition. The Respondent refused and insisted that the Union file an election petition with the Board.

Over the next few weeks, the Respondent reacted to the Union's request for voluntary recognition. On January 24, Evola told driver Brent Wilson, three other drivers, and a dispatcher that the Respondent would no longer contribute new shares to the drivers' ESOP accounts if they selected the Union as their collective-bargaining representative.[10] On January 31,

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[9] Hereafter, dates are in 2020 unless otherwise noted.

[10] In response to this statement, Wilson filed an unfair labor practice charge with the Board on February 14 alleging that the Respondent, through Evola, violated Sec. 8(a)(1) by threatening to retaliate against employees if they joined or supported a union. On March 9, Wilson recorded a conversation that he had with Evola, which occurred in the presence of two other employees. During this conversation, Evola stated, "You said I was gonna, uh, retaliate against you if you said something to the Union, you went to the Labor Board about it, yeah you did, so, when its all over, make sure you've got an attorney, because I'm

Higgins attached photographs of employees' personal vehicles with union signs and stickers to an email that he sent to Cannon and other managers.

On March 5, the Union filed with the Board an election petition to represent a unit of drivers and dispatchers at the Respondent's Louisville terminal.[11] In response, on March 11, Cannon sent an email to Prevost requesting permission to use Labor Relations Institute and/or National Labor Relations Advocates—whom he described as "'union busters'"—to "help keep our Louisville terminal nonunion." Cannon explained, "The advantage of using these companies is they have the legal right to say what our company cannot say during a union campaign." Prevost approved Cannon's request. The Respondent used National Labor Relations Advocates only for a short time but used Labor Relations Institute for the entire campaign. On March 18, Louisville office manager Lori Brown[12] sent an email to Higgins summarizing a conversation about the Union that she had with three drivers. Higgins forwarded Brown's email to Cannon, who responded, "Let Lori know to observe and take notes of the conver-

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coming back. . . . You could've got me fired for what you said." On March 10, the Region dismissed Wilson's initial charge because Wilson failed to cooperate in the investigation.

[11] The Respondent and the Union subsequently stipulated to a unit of only drivers. On May 6, the Union filed a second petition to represent a separate unit of dispatchers, but a majority of the dispatchers did not vote for union representation in the ensuing election.

[12] No party has specifically alleged that Brown is a Sec. 2(11) supervisor, and there is no evidence in the record of her job duties. Thus, we will treat her as an employee.

sations. She does not need to engage and ask questions as she did."

On May 15, the Acting Regional Director for Region 9 directed a mail-ballot election in the stipulated unit of drivers, with the ballots to be mailed on May 22 and returned by June 19. In a May 28 email, Cannon instructed managers at the Louisville and Murfreesboro, Tennessee terminals to "disconnect any and all Murfreesboro drivers from picking up loads from the KDC" by the following week because "[a]ny Murfreesboro driver that comes on the lot at the KDC is being approached by the union, and we certainly do not want the union to infect our Murfreesboro fleet."[13] Louisville and Murfreesboro managers exchanged a series of emails addressing the logistics of transferring to Louisville drivers the KDC loads normally transported by Murfreesboro drivers. By follow-up email on June 8, Cannon requested confirmation from the managers that the Respondent no longer had Murfreesboro drivers going to the KDC.

C. Election Results and Postelection Developments

On June 22, the mail ballots returned by the drivers were counted, and the tally of ballots showed that out of the approximately 69 eligible voters, 25 votes were cast for the Union, and 17 votes were cast against the Union, with 1 challenged ballot, an insufficient number to affect the results of the election.

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[13] Drivers from the Respondent's Murfreesboro and Indianapolis terminals regularly picked up loads from and/or delivered loads to the KDC.

That same day, Paladin's President and COO Campbell told Harris and Prevost that the results were a "[t]ough blow" and that he was "[s]urprised and disappointed by the margin of defeat"—which he attributed to "weak leadership at the local level" and lack of attention by higher-level managers. A day later, Prevost sent an email to Cannon and Harris suggesting that the Respondent could ask Kroger to have the loads assigned to the Respondent shuttled from the KDC to the Louisville terminal by a different carrier or a towing company to prevent the Union from picketing at the KDC.

On June 26, the Respondent filed objections to the election. On July 10, the Regional Director for Region 9 overruled the Respondent's objections and certified the Union as the representative of the unit of drivers at the Louisville terminal. On July 23, the Respondent filed a request for review with the Board.

Prior to the election, Charging Parties Geoffrey Brummett, Donald Ray Hendricks, Warren Tooley, and Brent Wilson filed a series of charges and amended charges against the Respondent alleging, among other things, that the Respondent committed several unfair labor practices during the Union's campaign based on conduct described above. On September 16, the Regional Director approved a bilateral informal settlement agreement between the Respondent and Brummett, Tooley, and Wilson, which settled the allegations in Cases 09-CA-251857, 09-CA-255813, 09-CA-257750, 09-CA-257961, and a unilateral informal settlement agreement, which settled the allegations in Case 09-CA-254584 (collectively, the September 16 settlement agreements).

Also on September 16, Hendricks, who had resigned from his dispatcher position in August, sent an email with the subject "Teamsters is coming for Hebron!" to Cannon, Harris, the new Louisville Terminal Manager Jeff McCurry,[14] and another manager. Hebron, Kentucky, was the location of a new terminal that the Respondent was planning to open in October. Hendricks' email stated that Marcellino had targeted Hendricks for termination because Marcellino mistakenly believed that he was involved with the Union's campaign at the Louisville terminal and that while he was not responsible for that campaign, he was "damn well responsible for Hebron." Harris forwarded Hendricks' email to Prevost and Campbell, and Campbell responded that "[Hendricks] needs a cease and desist order sent or we will sue him for threatening to harm our business."[15]

On September 18, while the Respondent's request for review was still pending before the Board, the Union held a "job action" in front of the Louisville terminal. The Union set up a 12-foot inflatable "Fat Cat," spoke with drivers as they entered and exited the terminal, handed out union shirts and informational packets about the status of the Respondent's request for review, and solicited signatures from drivers who

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[14] McCurry replaced Higgins as the terminal manager following Higgins' June termination.

[15] The Hebron terminal opened in October. The Respondent temporarily assigned at least two Louisville drivers to that terminal to help get the operations started. One of the two Louisville drivers, Will Arms, was still working out of the Hebron terminal when the Respondent ceased operations at the Louisville terminal, but he was discharged at that time along with the rest of the Louisville drivers.

were not already union members. McCurry emailed a photograph of the Union's job action to Cannon and other managers, noting that the Union was talking to drivers and that he would "try to find out what the discussion [was]." Cannon responded that McCurry should also photograph any future union activity at the terminal to document and memorialize it and document any feedback that he received from the drivers regarding what the Union was discussing with them that day. In a follow-up email sent later that day, McCurry wrote, "As far as what [the Union was] discussing with drivers, all of the drivers I spoke with shut them down. The drivers that were coming in this morning were not interested in talking with the [U]nion."

On October 26, the Board denied the Respondent's request for review. The next day, the Union sent a letter to the Respondent requesting available bargaining dates. On November 6, the Respondent agreed to begin bargaining. At their first bargaining session on November 19, the parties exchanged proposals and reached several tentative agreements. They did not discuss economics, but the Union's President and lead negotiator, Fred Zuckerman, informed the Respondent that the Union was adamant about maintaining area standards at the KDC, *i.e.*, the standards set by the Union's collective-bargaining agreement with Transervice. Both parties agreed that this session went well, and they scheduled a second bargaining session for December 10.

D. The Respondent Ceases Operations at the Louisville Terminal

At a December 6 meeting with unit employees to conduct a strike-authorization vote, the Union stated that, if it were to call a strike, Transervice's and Zenith's union-represented employees at the KDC would honor a picket line. A majority of the Louisville drivers present voted to authorize a strike, if the Union deemed it necessary. The Union stated that it had authorized strike benefits for the unit employees of the Respondent, Transervice, and Zenith working at the KDC in the event of a strike by the Respondent's drivers.

On the morning of December 7, Kroger informed the Respondent that it had received an inquiry from a local Louisville television station, WHAS11, about a possible strike by the Respondent's Louisville drivers later in the week.[16] That afternoon, Cannon and Campbell participated in a conference call with five Kroger officials and Zenith's Operations Manager at the KDC, Eddie Byers. They discussed potential mitigation measures, including establishment of a reserved gate or dedicated lane for the Respondent's drivers, and Kroger requested that Byers reach out to the Union about the possible strike. After the conference call, Kroger forwarded to Cannon an inquiry from another local Louisville television station, WDRB, which included the following email that WDRB had received:

> On October 26, 2020 truck drivers for Quickway Carriers, a contract carrier for Kroger

16 The WHAS11 inquiry did not contain any additional details about the strike.

grocery stores, located at 2827 S. English Station Rd., Louisville, KY had their majority vote to unionize with Teamsters local 89 as their representative was formally recognized. This was after a nearly a year of stalling and retaliatory practice implemented by Quick-way Carriers against their employees.

To date the company has not negotiated in good faith and 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.

The next meeting between Teamsters Local 89, Drivers and company officials will be held at the Hilton Garden Inn 2735 Crittenden Dr. Louisville, Ky starting at 0800 on December 10, 2020. At the conclusion of this meeting if company officials refuse to ratify a contract Quickway Carrier Truck Drivers in Louisville will strike.

In recognition, the Teamsters Local 89 Truck Drivers and Warehousemen who work for Transervice and Zenith Logistics which are responsible for the majority of the Kroger Transportation and 100% of warehouse operations will also strike in support of Quickway Carrier drivers.

THIS WILL SHUT DOWN KROGER DISTRIBUTION OPERATIONS IN THEIR ENTIRETY.

(Emphasis and errors in original.) WDRB stated in the inquiry that it could not confirm if the individual who sent this email was involved with the Union.[17]

Cannon and the Respondent's attorney, Michael Oesterle, reviewed the Union's collective-bargaining agreement with Transervice and concluded that a reserved gate would not be effective because of the following "Protection of Rights" provision therein:

> It shall not be a violation of this Agreement, and it shall not be cause for discharge, disciplinary action or permanent replacement in the event an employee refuses to enter upon any property involved in a primary labor dispute, or refuses to go through or work behind any primary picket line, including the primary picket lines at the Employer's places of business.
>
> It shall not be a violation of this Agreement and it shall not be cause for discharge, disciplinary action or permanent replacement if any employee refuses to perform any service which his/her Employer undertakes to perform as an ally of an Employer or person whose employees are on strike and which service, but for such strikes, would be performed by the employees of the Employer or

[17] Prior to ceasing operations at the Louisville terminal, the Respondent never learned who alerted WHAS11 and WDRB about a possible strike. At the hearing, Hendricks testified that he sent emails that were substantially similar to the email above to several media outlets and that he based those emails on information that he received from drivers, as he neither attended the December 6 strike-authorization meeting nor received any strike information directly from the Union's representatives.

person on strike.

Cannon shared this conclusion with Kroger and confirmed that the collective-bargaining agreement between the Union and Zenith contained similar language.

On the morning of December 8, Prevost, Campbell, and Cannon met to discuss the liability that the Respondent could face if the KDC were shut down because of a strike by its drivers. They discussed their beliefs that under the KDC agreement, the Respondent would be responsible for replacing not only its own striking drivers but also any Transervice and Zenith employees who refused to cross a picket line at the KDC—*i.e.*, potentially more than 800 employees among the three employers—and that the Respondent would relatedly be liable for not only any spoiled cargo that may result from its own drivers abandoning loads but also any spoiled cargo resulting from Transervice drivers doing the same or Zenith warehouse workers failing to unload trailers.[18] Based on those beliefs, they estimated that the Respondent potentially could face liability of between $2-4 million the first day of the strike and more than $1 million per day thereafter. Prevost and Campbell expressed concern that this potential liability could exceed Paladin's available line of credit and could bankrupt not just the Respondent but also Paladin and all of its other affiliates. Thus, also on December 8, the Respondent requested that

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[18] They claim to have held these beliefs despite that the KDC agreement obligated the Respondent to receive, transport, and deliver only the loads of goods assigned to it and that, according to Campbell, Kroger never indicated that the Respondent would be responsible for the entire KDC operation in the event of a strike by its drivers.

Kroger terminate the KDC agreement.[19] Kroger initially refused and said that it expected the Respondent to continue to fulfill its obligations under the KDC agreement. However, on December 9, after a series of back-and-forth telephone calls and emails, Kroger accepted the Respondent's resignation from the KDC agreement, effective as of 11 p.m. that day.[20]

In a December 9 email sent at 9:56 p.m., the Respondent informed the Union that it was ending the KDC agreement and would "cease all operations associated with [the KDC] at 11:00 p.m. today." Around the same time, the Respondent informed the Louisville drivers, via email and text message, of the cessation of operations and that they should not report to work. Nonetheless, on December 10, the Respondent and the Union met for their previously scheduled second bargaining session. The Respondent informed the Union that because of its decision to cease operations at the Louisville terminal, it had permanently laid off all the Louisville drivers as of 11

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[19] Prevost, Campbell, and Cannon were the only management officials involved in the decision to make this request.

[20] Kroger's Vice President of Supply Chain Operations, Joe Obermeier, testified that during discussions regarding the possible strike, Cannon stated that he was worried that the Union would insist on terms similar to the Transervice collective-bargaining agreement, as it would have been a problem for the Respondent to agree to such terms. According to Obermeier, in August, Prevost and Cannon similarly informed him that they did not think that the Respondent could agree to terms substantially similar to the Transervice collective-bargaining agreement. Obermeier also testified that at one point after the election, Cannon suggested having a different Paladin affiliate put in a bid for the Respondent's work at the KDC, but Obermeier rejected this idea.

p.m. the previous day and that it was willing to bargain over only the effects of its decision. The Union insisted on continuing to bargain for a collective-bargaining agreement. Thereafter, the parties had no further bargaining sessions.

Also on December 10, the Respondent dispatched drivers from its Indianapolis terminal to retrieve trailers that it had failed to remove from the KDC the previous day. Two Indianapolis drivers retrieved trailers from a parking lot leased by Kroger at the Kentucky State Fairgrounds, and they were temporarily blocked from exiting that parking lot by Louisville drivers who were picketing there. Indianapolis driver Lewis Johnston retrieved a trailer from the KDC and, after noticing that no Louisville drivers were present there, contacted a Louisville driver, who told him that the Respondent had ceased operations at the Louisville terminal.[21] At that time, Johnston and two other Indianapolis drivers were working with Teamsters Local 135 organizer Dustin Roach to start a new organizing campaign at the Indianapolis terminal. When Johnston informed those drivers that the Respondent had ceased operations at the Louisville terminal, they both responded, "'There goes our campaign.'" Thereafter, Johnston was the only Indianapolis driver willing to speak with Roach.

Shortly after the cessation of operations, the Respondent returned the 44 trucks that it used at the Louisville terminal to CCL, who sold four of them and

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[21] Johnston had been the lead employee organizer in Teamsters Local 135's recent campaign to organize the Respondent's Indianapolis drivers, which culminated in a November 2019 election loss for Teamsters Local 135.

transferred the rest to terminals operated by the Respondent or other Paladin affiliates. CCL closed its mechanic shop at the Louisville terminal in February 2021 because it failed to replace the business that it had lost from the Respondent. Thereafter, the Respondent began an effort to sublease the Louisville terminal building, and on September 30, 2021, it entered into an agreement to sublease that building for the remainder of the term of the lease.

II. Cessation of Operations at the Louisville Terminal-8(A)(3) Allegation

A. The Judge's Decision

The judge dismissed the allegation that the Respondent violated Section 8(a)(3) and (1) by ceasing operations at its Louisville terminal and discharging all its Louisville drivers. The judge found that although the Respondent's decision to cease operations at the Louisville terminal was motivated by a desire to stop recognizing the Union and to avoid further bargaining and would have had a chilling effect on employees at other Paladin affiliates, the General Counsel failed to establish that the Respondent's decision was motivated by a desire to chill unionization at other locations, as required for a partial closure to be unlawful under *Textile Workers Union of America v. Darlington Mfg. Co.*, 380 U.S. 263 (1965). The judge stated that were it not for *Darlington*, he would have found that the Respondent unlawfully ceased its Louisville operations under *Wright Line*, 251 NLRB 1083 (1980) (subsequent history omitted).

B. The Parties' Contentions

The General Counsel and the Union argue that the judge erred by finding that *Darlington* applies here. Specifically, the General Counsel claims that the Respondent merely "chose to cease doing business at the Louisville KDC and discharge its unit employees, not to close the Louisville terminal" (emphasis in original) and points to *Associated Constructors*, 325 NLRB 998 (1998), enfd. sub nom. *O'Dovero v. NLRB*, 193 F.3d 532 (D.C. Cir. 1999), as instructive given the circumstances here. The Union contends that the present case is akin to a "runaway shop" situation. The General Counsel and the Union urge the Board to apply *Wright Line* and/or *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967), and find the Respondent's decision to cease operations at the Louisville terminal unlawful. Alternatively, the General Counsel and the Union assert that even if *Darlington* applies, the judge erred by failing to find that the Respondent's decision was motivated at least in part by a desire to chill unionization at its remaining facilities and at other Paladin affiliates.

The Respondent agrees with the judge that its decision to cease operations at the Louisville terminal was not motivated by a desire to chill unionism at its other terminals and was therefore lawful under *Darlington*.[22] However, the Respondent cross-excepts

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[22] The Respondent also asserts that the issue of whether it intended to chill union activity at other terminals is not properly before the Board because the complaint does not allege that the Respondent's decision to cease operations at its Louisville terminal was intended to achieve that end. However, "[t]he complaint need not plead a specific legal theory, as long as it contains 'a clear and concise description of the acts which are claimed to

to the judge's findings that it ceased operations for antiunion reasons and that it was foreseeable that this action would have a chilling effect at other locations. The Respondent argues that it decided to cease operations at the Louisville terminal solely because of the potentially catastrophic financial liability and damages that it could have faced under the KDC agreement if the possible strike, raised in the media inquiries that Kroger provided to the Respondent, occurred.

C. Darlington Applies to the Present Case

We agree with the judge that the Supreme Court's decision in *Darlington* applies here. In *Darlington*, the Supreme Court held 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 273-274. The Court held further that when an employer closes part of its business for antiunion reasons, such a partial closing violates Section 8(a)(3) only "if [it was] 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. The Court distinguished complete and partial closings from situations where an employer who has closed a plant or department for antiunion reasons transfers the work to a new or existing

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constitute unfair labor practices.'" *Hawaiian Dredging Construction Co.*, 362 NLRB 81, 82 fn. 6 (2015) (citing Board's Rules and Regulations, Sec. 102.15), enf. denied and remanded on other grounds 857 F.3d 877 (D.C. Cir. 2017). We find that the complaint here clearly satisfies this requirement.

employer facility (*i.e.*, a "runaway shop" situation) or begins to use independent contractors to perform the work. *See id.* at 272-273 & fn. 16. Thus, "[b]oth discriminatory relocation of work—the 'runaway shop' gambit—and discriminatory subcontracting . . . have been found consistently to violate Section 8(a)(3) when motivated by antiunion animus," without the need for an analysis under *Darlington*. *Lear Siegler, Inc.*, 295 NLRB 857, 860 (1989).

The judge correctly found that the Respondent's cessation of operations at the Louisville terminal constituted a partial closing governed by *Darlington*.[23] Contrary to the assertions of the General Counsel and the Union, the Respondent took steps to permanently close the Louisville terminal. As discussed above, the Respondent's operations at the Louisville terminal were dedicated exclusively to servicing Kroger under the KDC agreement, and approximately 96.5 percent of the revenue it generated at that terminal came from the KDC agreement. Thus, the Respondent has not performed any work out of the Louisville terminal since it resigned from the KDC agreement. Further, the Respondent returned its 44 leased trucks at the Louisville terminal to CCL, and CCL transferred most of those trucks to terminals operated by the Respondent or other Paladin affiliates and sold the rest. Finally, after CCL ceased its operations at the Louisville terminal in February 2021, the Respondent began

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[23] The Respondent does not claim that its cessation of operations at the Louisville terminal constituted a complete closing under *Darlington*, as it and other Paladin affiliates still operate numerous terminals across the United States.

to attempt to sublease the terminal building and succeeded in doing so in September 2021.

This case clearly does not, as the Union claims, present a "runaway shop" situation. The Respondent has not transferred or relocated the work that it previously performed out of the Louisville terminal to a new or existing terminal. Neither the Respondent nor any other Paladin affiliate currently performs any of the work previously covered by the KDC agreement.[24]

Contrary to the General Counsel's claim, the present case is not analogous to *Associated Constructors*, 325 NLRB 998. That case involved two construction companies—one union and one nonunion—that were a single employer and were intertwined to such an extent that "it [was] not entirely clear what it mean[t] to say that one of them, but not the other, ha[d] ceased operations." *Id.* at 999. Moreover, one of the owners testified that the union company "was still in existence and could do a project immediately." *Id.* The Board found that after unlawfully diverting work from the union company to the nonunion company, the companies "temporarily stopped doing the kind of

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[24] The Union also asserts that the Board's decision in *Real Foods Co.*, 350 NLRB 309 (2007), supports applying *Wright Line* here. In *Real Foods*, the Board applied *Wright Line* to an employer decision to close one of its stores, allegedly for remodeling, while the employees at that store were in the midst of a union organizing campaign. *See id.* at 311-312. The remodeling was expected to take 6 months to complete, and the employer planned to reopen the store after its completion. *See id.* at 311. Unlike in *Real Foods*, there is no evidence in the present case that the Respondent closed the Louisville terminal with the understanding that it planned to reopen the terminal at some point in the future. Thus, *Real Foods* does not support applying *Wright Line*, rather than *Darlington*, in the present case.

work traditionally performed by [the union company's] employees," and that the record merely established "a hiatus between projects, not a complete cessation of [the union company's] operations." *Id.* at 1000. As discussed above, the record in the present case establishes that the Respondent took steps to permanently close the Louisville terminal. The Respondent is not simply experiencing a temporary hiatus between projects at the Louisville terminal, and it would not be able to immediately resume operations there, as it does not currently have trucks at that location and has subleased the facility.

D. The Respondent Violated Section 8(a)(3) and (1) under Darlington

As stated above, under *Darlington*, a partial closure violates Section 8(a)(3) if it was motivated by a purpose to chill unionism in any of the remaining parts of the employer's business and such a chilling effect was reasonably foreseeable. 380 U.S. at 275. In explaining the standard to be applied for partial closings, the Supreme Court stated as follows:

> If the persons exercising control over a plant that is being closed for antiunion reasons (1) have an interest in another business, whether or not affiliated with or engaged in the same line of commercial activity as the closed plant, of sufficient substantiality to give promise of their reaping a benefit from the discouragement of unionization in that business; (2) act to close their plant with the purpose of producing such a result; and (3) occupy a relationship to the other business which makes it realistically foreseeable that

> its employees will fear that such business will also be closed down if they persist in organizational activities, we think that an unfair labor practice has been made out.

Id. at 275-276. Thus, the General Counsel must satisfy the foregoing elements to establish that a partial closing violated Section 8(a)(3) under *Darlington*, with the threshold element being that the employer closed the relevant part of its business for antiunion reasons. *See RAV Truck & Trailer Repairs, Inc. and Concrete Express of NY, LLC*, 372 NLRB No. 25, slip op. at 2-3 (2022). The Board will also consider any legitimate, nondiscriminatory reason for the partial closing offered by the employer. *See*, *e.g.*, *San Luis Trucking, Inc.*, 352 NLRB 211, 236 (2008) (rejecting the employer's claim that a partial closure occurred because of financial losses), reaffd. and incorporated by reference 356 NLRB 168 (2010), enfd. mem. 479 F. App'x 743 (9th Cir. 2012); *Chariot Marine Fabricators*, 335 NLRB 339, 354-357 (2001) (rejecting the employer's claims that it closed a plant for economic reasons, because it had no work, and because its lease was not going to be extended); *Spring City Knitting Co.*, 285 NLRB 426, 429 (1987) (finding that the employer lawfully closed a plant for economic reasons).

For the reasons discussed below, we find that the General Counsel has established that the Respondent's decision to cease operations at the Louisville terminal and discharge all the Louisville drivers violated Section 8(a)(3) and (1) under *Darlington*.

1. The Respondent Ceased Operations at the Louisville Terminal for Antiunion Reasons

We agree with the judge that the Respondent's decision to cease operations at the Louisville terminal was motivated by union animus. The Respondent subjected employees to numerous instances of coercive conduct in response to the Union's organizing campaign at the Louisville terminal, including threatening that if the employees unionized, it would close the Louisville Terminal, lose its contract with Kroger, and stop contributing shares to the employees' ESOP accounts; asking an employee to make a list of union supporters; and threatening legal action against an employee for filing an unfair labor practice charge with the Board.[25]

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[25] The September 16 settlement agreements resolved the allegations that the Respondent violated the Act by engaging in the conduct described above. However, in the complaint, the General Counsel vacated and set aside the September 16 settlement agreements based on the Respondent's alleged postsettlement unfair labor practices and alleged that the conduct described above violated the Act. "[T]he Board has long held that 'evidence involved in a settled case may properly be considered as background evidence in determining the motive or object of a respondent in activities occurring either before or after the settlement, which are [currently] in litigation.'" *St. Mary's Nursing Home*, 342 NLRB 979, 980 (2004) (quoting *Black Entertainment Television*, 324 NLRB 1161, 1163 (1997)) (alteration in original), affd. mem. sub nom. *St. Mary's Acquisition Co.*, 240 F. App'x 8 (6th Cir. 2007). Thus, at this stage in our analysis, we consider the conduct described above as background evidence in determining the Respondent's motive in ceasing operations at the Louisville terminal. We will address whether the General Counsel properly set aside the September 16 settlement agreements after we determine if the Respondent committed the alleged postsettlement unfair labor practices on which the General Counsel relied to set them aside. *See YMCA of Pikes Peak*

The Respondent's coercive conduct did not cease after the election. As discussed in more detail below, while the Respondent's request for review was pending before the Board, it coercively interrogated drivers about their union activities in violation of Section 8(a)(1).[26]

Additionally, the record contains evidence of other conduct by the Respondent that exhibited union animus. "It is well settled that conduct that exhibits animus but that is not independently alleged or found to violate the Act may be used to shed light on the motive for other conduct that is alleged to be unlawful." *Meritor Automotive, Inc.*, 328 NLRB 813, 813 (1999). Shortly after the Union requested voluntary

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Region, 291 NLRB 998, 1010 (1988) (explaining that the alleged postsettlement unfair labor practices must first be considered before determining whether the settlement agreement was properly set aside but that "presettlement conduct may be considered as background evidence in determining the motive for postsettlement conduct"), enfd. 914 F.2d 1442 (10th Cir. 1990), cert. denied 500 U.S. 904 (1991).

[26] The Respondent's coercive conduct in response to the Union's organizing campaign at the Louisville terminal was consistent with the Respondent's conduct in response to an earlier organizing campaign at its terminal in Landover, Maryland. *See Quickway Transportation, Inc.*, 354 NLRB 560 (2009) (finding that both before and after Teamsters Local 639's successful organizing campaign at the Landover terminal, the Respondent committed numerous unfair labor practices—many of which involved Cannon and/or Prevost—including surveilling employees because of their union activities, creating the impression of surveillance of an employee's union activities, coercively interrogating an employee, transferring unit work to nonunit owner operators without bargaining with the union, refusing to reinstate former unfair labor practice strikers, and engaging in a retaliatory lockout), reaffd. and incorporated by reference 355 NLRB 678 (2010).

recognition, Louisville Terminal Manager Higgins took photographs of employees' personal vehicles that displayed union stickers and signs and emailed those photographs to Quickway Group Vice President of Operations Cannon and other managers. *See The Independent*, 319 NLRB 349, 350 (1995) (finding that by taking photographs of cars that were parked near a union rally, the employer intended to identify union supporters and "reasonably tended to coerce and intimidate employees in the exercise of their right to show their union support"). Soon after the Union filed the election petition to represent the unit of drivers, the Respondent engaged in conduct that signaled its willingness to violate the Act to thwart the drivers' union activities. Specifically, in a March 11 email to Paladin's and the Respondent's CEO, Prevost, requesting permission to hire "union busters," Cannon expressed his mistaken belief that those "union busters" would be able to engage in conduct that the Act prohibits the Respondent from engaging in itself. Also, around the same time, Cannon directed Higgins to instruct Louisville employee Brown to observe and take notes of employees' conversations about the Union.[27]

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[27] As discussed in more detail in Sec. V below, the General Counsel amended the complaint at the hearing to allege that Cannon's instruction to Higgins violated Sec. 8(a)(1), and the judge found the violation. While, for the reasons discussed below, we reverse the judge's finding of a violation, we find that this conduct evidenced the Respondent's willingness to violate the Act to thwart the drivers' union activities—*see*, *e.g.*, *ABC Liquors, Inc.*, 263 NLRB 1271, 1278 (1982) (finding that an employer unlawfully "instructed an employee to surveil the union activities of its other employees and to submit reports on the same")—and thus exhibited union animus on the Respondent's part.

Finally, the timing of the Respondent's decision to cease operations at the Louisville terminal, which occurred only a few weeks after the parties' first bargaining session, supports a finding that the decision was motivated by union animus. *See Lucky Cab Co.*, 360 NLRB 271, 274 (2014) (finding that the timing of an employer's adverse action shortly after union activity has occurred may raise an inference of animus and unlawful motivation), enfd. mem. per curiam 621 F. App'x 9 (D.C. Cir. 2015). While the parties agreed that the first bargaining session went well, the Union informed the Respondent during that session that it was adamant about maintaining at the KDC the area standards set by its collective-bargaining agreement with Transervice. Both in August and during discussions regarding the potential strike in December, the Respondent indicated to Kroger that it would have been a problem for it to agree to terms like those in the Union's collective-bargaining agreement with Transervice. Cannon admitted that the Transervice collective-bargaining agreement "did not fit [the Respondent's] business model." Furthermore, Prevost and Paladin's President and COO, Campbell, both testified that the Respondent's goal in bargaining was to reach a contract that would allow the Respondent to use its business model to grow its business at the KDC and potentially become the primary carrier there.[28] The Respondent would have viewed the Union's insistence on maintaining area standards at the KDC as having the potential to prevent it from achieving this goal by disrupting its preferred business model.

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28 The Respondent acted as the primary carrier at all of its terminals that serviced Kroger except at Louisville and Indianapolis.

Thus, the timing of the Respondent's decision to cease operations at the Louisville terminal just a few weeks after the Union insisted on maintaining area standards, combined with high-level managers' statements regarding the Transervice collective-bargaining agreement and the Respondent's business model, support a finding that the Respondent's decision was made to avoid bargaining with the Union and was thus discriminatorily motivated. *See*, *e.g.*, *M. Yoseph Bag Co.*, 128 NLRB 211, 213-217 (1960) (finding that the "real motivation" for an employer's decision to close its plant "was to evade dealing with the [union]" and that the decision was thus discriminatorily motivated where the employer told the union and its employees that it was unable "to meet the wage rates that [the union] would demand") enf. denied and remanded on other grounds sub nom. *Retail, Wholesale & Department Store Union District 65 v. NLRB*, 294 F.3d 364 (3d Cir. 1961), reaffd. sub nom. *M. Yoseph Bag Co.*, 139 NLRB 1310 (1962).[29]

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[29] Our dissenting colleague claims that we misunderstand the impact of the "area standards" statement made by the Union's President, Zuckerman, at the parties' lone bargaining session. Specifically, he argues that "the *compelling* inference to be drawn from Zuckerman's insistence on maintaining area standards and Quickway's unwillingness to agree to those terms is that Quickway—and Kroger—knew that Quickway and Local 89 would not conclude a collective-bargaining agreement at their December 10 meeting, and therefore the threatened strike and shutdown of the KDC *was almost certainly going to happen*" (emphasis in original). This "compelling inference" is part of a novel personal theory that our dissenting colleague has concocted to justify the Respondent's decision to cease operations at the Louisville terminal—which we will address below. At this juncture, it is sufficient to point out that this "compelling inference" regarding how the Respondent interpreted Zuckerman's "area standards" statement is contrary to both the record and the Res-

Overall, we agree with the judge, for the reasons discussed above, that the possible strike raised in the media inquiries "presented [the Respondent] with the opportunity to do what it preferred to do in any event[:] withdraw its recognition of the Union, terminate its contract with Kroger and lay-off all of its Louisville drivers." Accordingly, we find that the General Counsel has established that the Respondent

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pondent's arguments on exceptions. Paladin's President and COO, Campbell, testified that the Respondent's negotiations with the Union were not "a factor at all" in its decision to cease operations at the Louisville terminal, and the Chairman of Paladin's Board of Directors and Paladin's and the Respondent's CEO, Prevost, along with the Quickway Group's Vice President of Operations, Cannon, testified that they never told Kroger's Vice President of Supply Chain Operations, Obermeier, that the Respondent could not agree to terms similar to those in the Union's collective-bargaining agreement with Transervice. Consistent with this testimony by its top management officials, who made the decision to cease operations at the Louisville terminal, the Respondent argues vociferously that this decision could not have been influenced by a fear that the Union would insist on maintaining the areas standards set by its collective-bargaining agreement with Transervice. The Respondent's dogged insistence that such a fear could not have influenced its decision demonstrates that our dissenting colleague's preferred inference is anything but compelling. Our colleague's observation that the judge credited Obermeier's testimony that Prevost and Cannon told him that the Respondent could not agree to terms similar to those in the Union's agreement with Transervice misses the mark. The point is that the Respondent is arguing (and its top management officials testified) that this did not happen and that the decision to cease operations was not influenced by concerns about the Union's bargaining demands. Accordingly, we simply cannot reasonably draw an inference that Obermeier's credited testimony supports a finding that the Respondent decided to cease operations at the Louisville terminal for a nondiscriminatory reason.

decided to cease operations at the Louisville terminal for antiunion reasons.[30]

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[30] Our dissenting colleague disagrees with our reliance on the evidence of extensive union animus exhibited by the Respondent prior to the election to find that the Respondent decided to cease operations at the Louisville terminal for antiunion reasons. Our dissenting colleague's arguments are not persuasive.

First, our dissenting colleague argues that the Respondent's "*post*election statements and conduct demonstrate that it had turned the page after the Union's win and was intent on negotiating in good faith for an initial collective-bargaining agreement" (emphasis in original). In support, he relies significantly on statements made by Cannon and Campbell immediately after the election that suggested that the Respondent's next step would be to begin bargaining with the Union. However, the Respondent did not immediately recognize the Union and begin to bargain; instead, it filed objections to the election, and, after the Regional Director overruled those objections, it filed a request for review with the Board. The Respondent was well within its rights to take both actions, but we cannot find, as our dissenting colleague does, any support in the record that the Respondent had "turned the page" and embraced its duty to bargain in good faith when it was challenging the Union's certification. To the contrary, as discussed in more detail below, while the request for review was pending, the Respondent continued to violate the Act, when, during a "job action" outside the Louisville terminal, Terminal Manager McCurry coercively interrogated employees about their interactions with the Union. Cannon was not only aware of McCurry's unlawful conduct, but he approved it and encouraged McCurry to document any similar future union activity at the terminal. As a result, Cannon's and Campbell's statements immediately after the election do not show that the Respondent had "turned the page" on its animus toward the union at that time. The earliest that it can be said that the Respondent displayed an intent to bargain with the Union was when the Respondent agreed to begin bargaining a little over a month before it decided to cease operations at the Louisville terminal. We simply cannot find that in that short period of time the extensive union animus demonstrated by the Respondent's

2. Persons Exercising Control Over the Louisville Terminal Had Interests in Other Businesses

As required by *Darlington*, the General Counsel has established that "the persons exercising control over" the Louisville terminal had "an interest in another business . . . of sufficient substantiality to give promise of their reaping a benefit from the discouragement of unionization in that business." 380 U.S. at 275. The Respondent operates several other terminals nationwide. Additionally, the Respondent's CEO, Prevost, is also the CEO of Paladin and each of the other Paladin affiliates. Further, Cannon, as Vice

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conduct discussed above dissipated and that the Respondent "turned the page" on its contempt for the Union's presence at the Louisville terminal, particularly in light of the Union's insistence on maintaining area standards during the parties' lone bargaining session.

Second, our dissenting colleague asserts that the events that unfolded in December "severed any linkage" between the extensive union animus demonstrated by the Respondent's preelection conduct and its decision to cease operations at the Louisville terminal. We will analyze separately the Respondent's purported nondiscriminatory reason for deciding to cease operations at the Louisville terminal in Sec. II.D.5 below. It is enough for us to note at this point that the events in December did not sever the link between the Respondent's union animus and its decision to cease operations at the Louisville terminal because, as discussed in detail below, the Respondent's claim that it ceased operations at the Louisville terminal to avoid catastrophic financial liability and damages under the KDC agreement that it feared could have resulted from a potential strike by the Union in December is false and pretextual, which further supports our finding that the Respondent's decision to cease operations at the Louisville terminal was discriminatorily motivated. *See*, *e.g.*, *Lucky Cab*, 360 NLRB at 274-275 (explaining that evidence of pretext supports a finding of discriminatory motivation).

President of Operations for the Quickway Group, is responsible for not only the Respondent but also Quickway Carriers and Quickway Services.

3. The Respondent was Motivated by a Desire to Chill Unionism at Other Locations

We disagree with the judge that the General Counsel failed to establish a violation under *Darlington* because she did not show that the Respondent's decision to cease operations at the Louisville terminal was motivated, at least in part, by a purpose to chill unionism at the Respondent's other terminals and at other Paladin affiliates.

The Board has specified that an employer's desire to chill unionism at other plants or locations need only be a partial motive—not its "'primary' or 'predominant' motive." *Darlington Mfg. Co.*, 165 NLRB 1074, 1084 & fn. 19 (1967), enfd. 397 F.2d 760 (4th Cir. 1968), cert. denied 393 U.S. 1023 (1969). The Board has also specified that while proof of one antiunion motive for a partial closing does not ipso facto establish the existence of a second antiunion purpose to chill unionism at the employer's other plants or locations, "depending on all the facts and circumstances, it would indicate a disposition toward the other and be sufficient to support a logical inference." *George Lithograph Co.*, 204 NLRB 431, 431 (1973) (citing *Darlington*, 165 NLRB 1074). Additionally, "in determining whether or not the proscribed 'chilling' motivation and its reasonably foreseeable effect can be inferred" in the absence of direct evidence, the Board considers "the presence or absence of several factors including, *inter alia*, contemporaneous union activity at the employer's

remaining facilities, geographic proximity of the employer's facilities to the closed operation, the likelihood that employees will learn of the circumstances surrounding the employer's unlawful conduct through employee interchange or contact, and, of course, representations made by the employer's officials and supervisors to the other employees." *Bruce Duncan Co.*, 233 NLRB 1243, 1243 (1977), enf. denied in part on other grounds 590 F.2d 1304 (4th Cir. 1979).

As discussed above, the General Counsel has convincingly established that the Respondent decided to cease operations at the Louisville terminal for anti-union reasons. We find that this discriminatory motive indicates a disposition toward a second anti-union purpose to chill unionism at its other terminals and at other Paladin affiliates and supports a logical inference of the existence of that second purpose in light of the circumstances discussed below.

We recognize that there is no credited evidence that the Respondent had actual knowledge of an active union campaign at any of its other terminals or at any other Paladin affiliate when it decided to cease operations at the Louisville terminal.[31] However, the Board has explained that just as an employer's knowledge of actual union activity aimed at employees in other parts of its operations can provide a basis for inferring an intention to chill those employees, so can an employer's belief that such union activity may be

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[31] The judge did not credit the testimony of Indianapolis driver Johnston that he had told the Indianapolis terminal manager about the renewed organizing campaign there. As stated above, we have found no basis for reversing the judge's credibility findings.

imminent. *Darlington*, 165 NLRB at 1084 ("If employer knowledge of actual union activity aimed at other employees can provide a legitimate foundation for inferring an intention to chill those employees, it would seem that the inference would be no less warranted where the evidence establishes a strong employer belief that the union is intending imminently to organize the employees in his other operations. Since our central concern is with the employer's motive, the fact of impending organization is not significant; his belief in the existence of that fact is what matters." (emphasis in original)). At the time that the Respondent decided to cease operations at the Louisville terminal, it was aware that drivers at its Indianapolis terminal had tried to unionize a little over a year earlier, and it was on notice that those drivers could petition for a new election.[32] Additionally, less than 3 months before the Respondent ceased operations at the Louisville terminal, former Louisville dispatcher Hendricks sent an email to the Respondent warning that the Union was "coming for" the Respondent's Hebron terminal and that he would be responsible for the Union initiating a campaign there. The record shows that the Respondent suspected that Hendricks was behind the Union's summer 2019 campaign activity at the Louisville terminal and later identified

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[32] In August, Labor Relations Institute emailed the Respondent to inquire whether the Respondent was interested in its services at the Indianapolis terminal since the "union [could] come knocking again" in November. Quickway Group Vice President of Operations Cannon forwarded that email to Paladin's HR Director, Harris, who responded that he was not impressed with Labor Relations Institute's performance in Louisville but did not indicate that he was unconcerned about a renewed organizing drive at the Indianapolis terminal.

him as "the Louisville Dispatcher who is working with the Union."[33] Thus, we find that the Respondent would have treated Hendricks' warning as credible.

More importantly, the General Counsel has shown that the Respondent feared that the union organizing campaign at the Louisville terminal would "infect" its drivers at other terminals and was determined to prevent the spread of the union "infect[ion]." Specifically, in May, this fear prompted Cannon to order that the Respondent's Murfreesboro terminal drivers stop picking up loads at the KDC. The Union had been approaching Murfreesboro drivers at the KDC, and according to Cannon, the Respondent "certainly [did] not want the [U]nion to infect [its] Murfreesboro fleet." Cannon was so concerned about the union "infect[ion]" spreading to the Murfreesboro terminal that he instructed the managers at the Louisville and Murfreesboro terminals to work out the logistics of transferring to Louisville drivers the loads normally picked up from the KDC by Murfreesboro drivers by the following week—in other words, within only a few days, as Cannon gave this instruction on a Thursday. Cannon followed up a little over a week later to make sure that Murfreesboro drivers were no longer going to the KDC.

Nothing in the record suggests that the Respondent's desire to prevent the spread of the union activity beyond the Louisville terminal abated by December. To the contrary, the record evidence suggests that the

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[33] The Respondent describes Hendricks as "an ardent union supporter . . . who remained actively involved in Local 89's ongoing activity with Respondent's employees" in its Brief in Support of Cross-Exceptions.

Respondent's awareness that the Indianapolis drivers could file a new election petition and its receipt of Hendricks' warning that the Union was "coming for" the Hebron terminal would have strengthened its resolve to stop the spread of the union activity. The Respondent was clearly not happy about the election results at the Louisville terminal, as evidenced by Paladin's President and COO, Campbell, describing those results as a "[t]ough blow" and stating that he was "[s]urprised and disappointed." The Respondent continued to commit unfair labor practices following the election, as Louisville Terminal Manager McCurry coercively interrogated drivers about their union activities in September when the Union conducted a job action outside the Louisville terminal. Cannon did not discourage those coercive interrogations; he instead endorsed McCurry's unlawful conduct by instructing him to document what he learned about the drivers' interactions with the Union during the job action and encouraged him to document any similar union activity in the future. The Respondent was also displeased with Hendricks' warning about organizing the Hebron terminal, as Campbell suggested that in response the Respondent should threaten to sue Hendricks for harming its business.[34]

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[34] We note that the Board's decision in *Darlington*, 165 NLRB 1074, does not require a showing that the Respondent believed that the Union was targeting a specific terminal in order to establish a basis for inferring that the Respondent's closing of the Louisville terminal was intended to chill employees in other parts of its operations. In *Darlington*, the Board found that the General Counsel established a basis to infer that the employer intended to chill employees in other parts of its operations where the employer's owner's speeches and written messages established his belief that, as a general matter, "the unions were in

As to geographic proximity, the Respondent's Louisville terminal was only 90 to 110 miles away from the Hebron and Indianapolis terminals. More significantly, Paladin affiliate CCL, whose CEO is also Prevost, maintained a mechanic shop in the Louisville terminal building and performed maintenance and repair work on the trucks and other equipment used by the Louisville drivers. In *George Lithograph*, the Board found that it could reasonably infer that an employer's closure of its mailing division for the purpose of blocking a union from organizing the division was also intended to chill its remaining employees particularly because "the mailing division was located in the same building as [the employer's]

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the process of mounting a 'tremendous' campaign throughout the Southern area, and his grave concern about that campaign." *Id.* at 1080, 1084. There was no indication in the Board's decision that the employer's owner believed that any union was targeting a specific textile factory in his operations or was even targeting his operations in particular, as opposed to the textile industry in the southern United States in general. Here, Cannon's statements in May establish that the Respondent feared that unionization would spread beyond the Louisville terminal and "infect" its other terminals and that it intended to prevent union activity from spreading beyond the Louisville terminal. As discussed above, nothing in the record suggests that the Respondent's desire to prevent its feared spread of union "infect[ion]" beyond Louisville abated by December. Instead, the Respondent's awareness that the Indianapolis drivers could file a new election petition, along with its receipt of Hendricks' warning that the Hebron terminal would also be organized, reinforced its resolve to prevent this spread. The decision to cease operations at the Louisville terminal presented the Respondent with the opportunity to not only extinguish its obligation to bargain with the Union at that terminal but to also rid itself of the fear of union activity spreading beyond Louisville by clearly displaying to its nonunion terminals the consequences of unionization. The Respondent seized that opportunity.

other business operations, was serviced by several other departments, and was operated under the same immediate management." 204 NLRB at 431. The fact that CCL's Louisville mechanic shop was located in the Louisville terminal, combined with the proximity of that terminal to other terminals, similarly supports such a reasonable inference here.[35]

Finally, the Respondent would have known that employees at its other terminals would learn of its

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[35] Our dissenting colleague suggests that "were Quickway to file a petition for review" in the United States Court of Appeals for the District of Columbia Circuit, "it is hard to fathom that the court would infer a purpose to chill unionism among CCL's employees based on nothing more than the fact that CCL and Quickway shared the same facility" given its decision in *RAV Truck & Trailer Repairs, Inc. v. NLRB*, 997 F.3d 314 (D.C. Cir. 2021). But the issue of what conclusion can be drawn from nothing more than the sharing of a facility was not an issue the court opined on in *RAV*, nor will it be at issue here in the event of enforcement proceedings. In *RAV*, the D.C. Circuit merely remanded for further explanation of the Board's determination that the employer violated Sec. 8(a)(3) under *Darlington* by closing a portion of its business. *See id.* at 327. On remand, the Board, including our dissenting colleague, reaffirmed its conclusion that the employer violated Sec. 8(a)(3) under *Darlington* by closing a portion of its business, and the Board relied, in part, on the fact that the employees in the closed portion of its business shared a facility with employees in another part of the employer's business in finding that the employer was motivated by a purpose to chill unionism among its remaining employees—just as we do here. *See RAV Truck & Trailer Repairs, Inc. and Concrete Express of NY, LLC*, 372 NLRB No. 25, slip op. at 3-5 (2022). We rely on the fact that the Respondent and CCL shared the Louisville terminal, along with all of the other evidence discussed in this subsection of our decision, to find that the Respondent's decision to cease operations at the Louisville terminal was motivated by a purpose to chill unionism among the remaining employees of the Respondent and Paladin.

cessation of operations at the Louisville terminal. On the day after its closure of the Louisville terminal, the Respondent sent at least three Indianapolis drivers—one of whom was the lead employee organizer and Teamsters Local 135's election observer during the 2019 organizing campaign at the Indianapolis terminal—to Louisville to pick up trailers. The drivers who retrieved trailers from the Kentucky State Fairgrounds had to cross the Union's picket line there. *See Plastics Transport Inc.*, 193 NLRB 54, 58 (1971) (finding that "by the closure of the Waterman plant [the employers] must have succeeded in 'chilling' unionism among the Portage drivers it brought down to cross the picket line and remove the equipment"). Moreover, Indianapolis drivers regularly delivered and picked up loads at the KDC, and nothing in the record suggests that they stopped doing so after the Respondent ceased operations at the Louisville terminal. Those drivers would have noticed that Louisville drivers were no longer picking up loads at the KDC and likely would have inquired to find out why. Accordingly, the Respondent clearly would have known that drivers from the Indianapolis terminal—including Johnston, the most prominent union supporter at that terminal—would learn of the closure of the Louisville terminal.[36] In addition, a Louisville

[36] In arguing that there was little likelihood that drivers at the Indianapolis terminal would learn of the circumstances of the closure of the Louisville terminal, our dissenting colleague primarily focuses on what the Indianapolis drivers, whom the Respondent sent to pick up trailers, actually learned while in Louisville on December 10. We do not find that evidence to be particularly relevant to this inquiry, as the Respondent was not aware of what the drivers learned when they travelled to Louisville on December 10. In our view, by simply sending Indianapolis drivers to Louisville to pick up trailers the day after

driver was temporarily working at the Hebron terminal in December, so the Respondent would have been aware that the Hebron drivers would learn of the cessation of operations at the Louisville terminal when that Louisville driver abruptly stopped reporting to work at the Hebron terminal. Because the Respondent knew that employees at its other terminals would learn of its cessation of operations at the Louisville terminal, the chilling effect of that conduct on those employees was entirely foreseeable, which further supports an inference that this chilling effect was an intended consequence of its actions. *See George Lithograph*, 204 NLRB at 431-432 (inferring that the chilling effect of the employer's closure of its mailing division on its remaining employees was "an intended consequence of that conduct" where the chilling effect was "entirely foreseeable").

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ceasing operations at the Louisville terminal, the Respondent would have known that those drivers were likely to learn what had happened there. In any event, the record does indeed establish that Indianapolis drivers learned what happened at the Louisville terminal as a result of the Respondent sending certain drivers to Louisville to pick up trailers. Our dissenting colleague asserts that "Johnston learned nothing about the 'circumstances surrounding' the terminal's closure" from the "bare news" that it had closed. However, he concedes, as he must, that "Johnston learned more during a subsequent conference call." After calling a Louisville driver to inquire why no Louisville drivers were present at the KDC, Johnston joined a conference call with six or seven Louisville drivers and their union business agent to discuss the situation. Johnston relayed what he learned to two of his Indianapolis colleagues who were working with him to start a new union campaign at their terminal. The record establishes that Johnston and those two drivers understood all too well the circumstances surrounding the closure of the Louisville terminal, as only Johnston was willing to speak to the Teamsters Local 135 organizer after December 10.

For all the reasons discussed above, we find that the General Counsel established that the Respondent's decision to cease operations at the Louisville terminal was motivated, at least in part, by a desire to chill unionism at its other terminals and at other Paladin affiliates.

4. Chilling Effect at Other Locations was Reasonably Foreseeable

We agree with the judge that it was foreseeable that the Respondent's decision to cease operations at the Louisville terminal would have had the effect of chilling unionism at the Respondent's other terminals and at other Paladin affiliates. Although the Board does not require evidence of an actual chilling effect on the remaining employees to establish this element,[37] in fact, the closure of the Louisville terminal extinguished the renewed organizing campaign at the Indianapolis terminal. As discussed above, a few Indianapolis drivers were working with a Teamsters Local 135 organizer to start a new campaign at the Indianapolis terminal. However, after the Respondent ceased operations at the Louisville terminal, two of the three Indianapolis drivers involved in this budding unionization effort dejectedly concluded that "[t]here goes our campaign," and Johnston was the only driver willing to continue speaking to the organizer.

Additionally, as explained above, it was not just reasonably foreseeable but entirely foreseeable that the drivers at the Indianapolis and Hebron terminals would learn of the cessation of operations at the Louisville terminal and be chilled by it. Further, the fact

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37 *See George Lithograph*, 204 NLRB at 431.

that the Respondent and CCL's Louisville mechanic shop shared the Louisville terminal building would have made the chilling effect on CCL's mechanics reasonably foreseeable as well. *See Chariot Marine Fabricators*, 335 NLRB at 353-354 (finding that a chilling effect was reasonably foreseeable where the closed business shared a facility with a closely related business); *George Lithograph*, 204 NLRB at 431-432 (finding that a chilling effect was reasonably foreseeable where the closed mailing division was in the same building as the employer's other business operations).

5. The Respondent Did Not Cease Operations at the Louisville Terminal for a Nondiscriminatory Reason

The Respondent claims that its decision to cease operations at the Louisville terminal had nothing to do with union activity at that terminal or at any other facility under the Paladin umbrella. The Respondent claims instead that this decision was the only way to ensure that it would not face the potentially catastrophic financial liability and damages under the KDC agreement that it feared could have resulted from the strike raised in the media inquiries that Kroger received from two local television stations in Louisville.[38] As

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38 [38] The Respondent argues that the media inquiries contained a threat to strike by the Union that was designed to achieve a secondary objective proscribed by Sec. 8(b)(4) and that was therefore unprotected by the Act. *See Teamsters Local 126 (Ready Mixed Concrete)*, 200 NLRB 253, 253 fn. 2 (1972) ("A threat to an employer to picket is itself coercive, whether or not the picketing is subsequently instituted, and if the threat is intended to achieve an object prohibited by Sec[.] 8(b)(4)(B), . . . it is violative of Sec[.] 8(b)(4)(ii)(B)."). We find it unnecessary to pass

explained below, we find that the record evidence does not establish that the Respondent decided to cease operations at the Louisville terminal for this reason.

As an initial matter, the Respondent did not have a reasonable belief based solely on the media inquiries that the Union had threatened that the Respondent's Louisville drivers would strike on December 10 if the Respondent did not agree to the Union's bargaining proposal. Neither of the media inquiries indicated from whom the local Louisville television stations received the information about the possible strike, and the WDRB inquiry specifically stated that WDRB could not confirm if the person who provided the information was involved with the Union. In fact, Paladin's and the Respondent's CEO, Prevost, admitted that he did not know where the information in the media inquiries came from. The Respondent did not contact the Union to determine if the Union was the source of the information in the media inquiries or to verify if the information was accurate, nor did the Respondent attempt to verify the accuracy of the information in any other manner.[39] Thus, the Respondent did nothing to

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on the Respondent's argument. Even assuming the message contained in the media inquiries would have constituted an unprotected threat, for the reasons discussed below, the record evidence does not establish that the Respondent had a reasonable belief that the Union was the source of the information in the media inquiries or that the Respondent decided to cease operations at the Louisville terminal to avoid potentially catastrophic liability and damages that it feared could have resulted from a strike.

[39] The Respondent asserts that the Union should have reached out to the Respondent if the information in the media inquiries was inaccurate. However, the Respondent did not know if the television stations had sent inquiries to the Union. Moreover, the

verify the source or accuracy of the information on which it allegedly relied to close a profitable terminal. In these circumstances—even considering the level of specificity in the WDRB inquiry—the Respondent did not have a reasonable belief that the Union made the threat to strike raised in the media inquiries. *See Alstyle Apparel*, 351 NLRB 1287, 1287-1288 (2007) (finding that the employer "did not discharge the employees based on a reasonable belief of misconduct" where it conducted only a limited investigation and did not give the discharged employees an opportunity to explain the allegations against them); *Midnight Rose Hotel & Casino*, 343 NLRB 1003, 1005 (2004) (rejecting the employer's reasonable-belief defense

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Union had no obligation to reach out to the Respondent about the inquiries.

Our dissenting colleague argues that the Respondent was correct to assume that the television stations contacted the Union because they could not have run news stories about the potential strike unless they sought confirmation from the Union. However, there is no evidence that either WDRB or WHAS11 ran news stories about the potential strike prior to the Respondent ceasing operations at the Louisville terminal or that the Respondent was aware of such news stories. The only evidence of contemporaneous news coverage of the events in this case is a transcript of WHAS11's news broadcast at 5:30 p.m., on December 10, which discussed the Respondent's decision to cease operations at the Louisville terminal.

The Respondent also claims that it was concerned that if it contacted the Union about the media inquiries, the Union may have initiated the strike sooner. Putting aside the doubtful idea that the Respondent believed that the Union announced the strike to local television stations but was trying to keep it secret from the Respondent, the Respondent knew of, but did not take issue with, Kroger asking Zenith to reach out to the Union about the possible strike.

where the employer did not conduct a fair investigation or give the employee the opportunity to explain her actions), enfd. mem. 198 F. App'x 752 (10th Cir. 2006).[40]

Regardless, even assuming arguendo the Respondent had a reasonable belief that the Union made the threat to strike raised in the media inquiries, the record evidence does not establish that the Respondent decided to cease operations at the Louisville terminal to avoid the potential liability and damages that it feared could have resulted from that possible strike.

The Respondent claims that it resigned from the KDC agreement and removed itself completely from

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[40] Our dissenting colleague argues that these cases are inapposite because employees facing discharge have an incentive to exculpate themselves, while the Union had an incentive to maintain the element of surprise. We find this argument unpersuasive because our dissenting colleague simply has not explained how the Respondent could have reasonably believed that the Union informed local Louisville news media of its plan to strike while it simultaneously sought to maintain the element of surprise. If the Respondent did not believe that the Union provided this information to the local news media, then it was even more imperative that the Respondent contact the Union to verify if the Union had indeed threatened to strike in a manner designed to achieve a secondary objective proscribed by Sec. 8(b)(4). Our colleague calls it "naïve" to believe that the Respondent could have expected to get a truthful answer if it had asked the Union about the media's strike inquiries, and contends that the Respondent reasonably believed that the failure of the Union to reach out and deny that there was going to be a strike suggested to the Respondent "that a strike was indeed imminent." We do not agree. To the contrary, we believe it naïve to accept that an employer closed down a profitable facility employing 62 drivers to avoid a potential strike that it heard about through media inquiries without making any effort to contact the union in order to assess the secondhand reports.

the KDC premises because that was the only way to avoid the catastrophic liability and damages that it feared could have resulted from the possible strike. The Respondent asserts that it considered using a reserved gate but concluded that a reserved gate would not have prevented the Union from shutting down the KDC because the "Protection of Rights" provisions in the Union's collective-bargaining agreements with Transervice and Zenith gave the Transervice and Zenith employees working out of the KDC the right to refuse to cross or work behind a picket line. However, on June 23, Prevost sent an email to Quickway Group Vice President of Operations Cannon and Paladin HR Director Harris suggesting that the Respondent could ask Kroger to have the loads assigned to the Respondent shuttled from the KDC to the Louisville terminal by a different carrier or a towing company to prevent the Union from picketing at the KDC. However, the Respondent did not even consider this earlier suggestion by Prevost after it became aware of the media inquiries in December.[41]

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[41] Cannon and Paladin's President and COO, Campbell, testified that they discussed mitigation measures, including the possibility of setting up a reserved gate at the KDC, with Kroger and Zenith officials during a conference call on December 7, and Cannon testified that he discussed the possibility of a reserved gate with the Respondent's attorney throughout the day on December 7. However, neither of them indicated that they ever considered Prevost's earlier suggestion to have Kroger arrange for a third party to shuttle the Respondent's loads from the KDC to the Louisville terminal to prevent the Union from picketing at the KDC. Additionally, Prevost testified that on the morning of December 8, Cannon informed him that a reserved gate would not work at the KDC and that the only option was, therefore, to terminate the KDC agreement, but Prevost did not indicate that they considered his earlier suggestion for preventing the Union from picketing at the KDC. Overall, the record evidence shows

Thus, the Respondent decided to completely cease operations at its profitable Louisville terminal without even considering an alternative course of action that less than 6 months earlier its highest ranking official suggested would have prevented the Union from picketing at the KDC—and therefore would have prevented the Union from shutting down the KDC.[42]

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that the Respondent reached the conclusion that the only way to prevent the Union from shutting down the KDC was to terminate the KDC agreement merely because it believed that a reserved gate would not work and that it reached that conclusion without considering any other alternatives.

[42] The Respondent asserts in its brief in support of cross-exceptions that Prevost's suggestion would not have prevented the Union from shutting down the KDC because the entity shuttling the Respondent's loads from the KDC to the Louisville terminal would have been considered the Respondent's "ally" and thus would have been subject to primary picketing. However, the Respondent failed to provide any support for this assertion. Our dissenting colleague has attempted to remedy this deficiency in the Respondent's argument by providing a rationale in support of this unsupported assertion. Unlike our dissenting colleague, we will not engage in a hypothetical analysis of factual circumstances that are not before the Board in this case. It is beside the point whether a third party shuttling the loads assigned to the Respondent from the KDC to the Louisville terminal would have qualified as an "ally" under relevant Board precedent. As discussed above, what is important is that, in June, Prevost—who oversaw the entire Paladin enterprise and was ultimately responsible for making the decision to cease operations at the Louisville terminal—believed that the Respondent could prevent the Union from picketing at the KDC by asking Kroger to have a third party shuttle the loads assigned to the Respondent from the KDC to the Louisville terminal. When the Respondent was actually presented with the possibility of the Union picketing at the KDC less than 6 months later and had discussions about how to mitigate the potential effects if it were to occur, there is no evidence that Prevost or any other Paladin or Respondent official even considered this option, let alone concluded that this option

Accordingly, the Respondent's claim that it believed that its decision to cease operations at the Louisville terminal was the only way to ensure that it would avoid the potential liability and damages that it feared could have resulted from the strike raised in the media inquiries is simply inconsistent with the record before us.

More importantly, the record evidence does not show that the feared catastrophic liability and damages—which the Respondent claims would have jeopardized the viability of the whole Paladin enterprise and thus motivated it to close the Louisville terminal—could have resulted from the potential strike raised in the media inquiries. In estimating the possible liability and damages, the Respondent made a number of assumptions, including (1) that all of its drivers and all of the Transervice and Zenith employees at the KDC would have refused to work as a result of the strike; (2) that those employees would have abandoned loads of cargo, causing them to spoil on the first day of the strike; and (3) that the Respondent would have been responsible for replacing all of its employees and all Transervice and Zenith employees that refused to work at the KDC and for any losses suffered by Kroger as a result of those employees refusing to work. The judge found these assumptions to be unreasonable and unwarranted, but the Respondent argues

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would not have prevented the Union from picketing at the KDC. Contrary to our dissenting colleague, given those circumstances, we find the lack of such evidence relevant to assessing the veracity of the Respondent's claim that it resigned from the KDC agreement because it believed that this was the only way to avoid the liability and damages that it claimed could have resulted from a strike.

that it was simply considering the downside risks of the strike. In a worst-case scenario, the first two assumptions could have possibly come to pass—even if such a scenario was highly unlikely. However, the Respondent has failed to show how it could have been responsible for replacing any Transervice or Zenith employees who refused to work or for any losses that Kroger would have suffered because of their refusal to work.

During the discussions regarding the possible strike raised in the media inquiries, Kroger Vice President of Supply Chain Operations Obermeier told the Respondent that Kroger expected the Respondent to uphold the KDC agreement and continue to service Kroger's stores. In a December 8 letter that was emailed to Prevost, Obermeier similarly stated that "Kroger is requesting that you immediately provide assurances that [the Respondent] can and will meet all of its contractual commitments and obligations for any assignments Kroger may choose to make under the [KDC] agreement." The KDC agreement obligated the Respondent to receive, transport, and deliver the loads of goods assigned to it. The Respondent has not identified any provision in the KDC agreement that would have made it liable for the failure of Transervice and Zenith to satisfy their obligations at the KDC. Further, there is no evidence that the Respondent would have been obligated to hire replacements if Transervice's or Zenith's employees refused to work because of a strike by the Respondent's drivers. To the contrary, Obermeier testified that in the event of a strike, it would have been up to the providers to continue servicing Kroger's stores and to hire replacements; he did not single out the Respondent. In fact, Paladin's President and COO,

Campbell, admitted that Obermeier never said that the Respondent would be responsible for the entire KDC operation if a strike by the Respondent's drivers prompted all of Transervice's and Zenith's employees at the KDC to refuse to work.

While our dissenting colleague implicitly acknowledges that the Respondent may have overestimated its predicted losses, he nonetheless puts forward several arguments in an attempt to show that the Respondent's fears that it could have been liable for Transervice's and Zenith's failures to perform their obligations at the KDC were not completely unfounded. We find his arguments unpersuasive for the following reasons.

First, our dissenting colleague speculates that if Transervice's drivers had refused to cross a picket line initiated by the Respondent's drivers, Transervice likely would have assigned as many loads as possible to the Respondent, with the apparent implication that the Respondent would have been overwhelmed by the number of loads assigned to it in those circumstances. As an initial matter, the Respondent does not argue that it feared being overwhelmed if Transervice were to assign loads to the Respondent that Transervice normally would have delivered itself. The Respondent instead argues, without support, that it would have been responsible for replacing Transervice's drivers and for any losses suffered by Kroger as a result of those employees refusing to work. We are unsurprised that the Respondent has failed to advance our dissenting colleague's implicit argument, as the terms of the KDC agreement foreclose that argument.

Paragraph 3.1 of the KDC agreement obligated the Respondent to "transport and deliver" loads of

goods "to and between those points designated by [Kroger]," as required by Kroger, and specified that the Respondent would perform those services in accordance with the service standards set forth in Schedule B, which was attached to the KDC agreement. Schedule B did state, under the "Dispatch and backhaul" heading, that "[e]very load is assigned by Transervice" at the KDC. However, Schedule B stated further, under the "Capacity commitment" heading, that the Respondent "is required to accept all shipments up to the forecasted volume" provided by Kroger 1-2 weeks prior to the ship date (with an accompanying chart displaying the average loads and miles per day) and that "[f]or all shipments over the [Respondent's] driver commitment, [the Respondent] will receive the surge premium laid out in the rate sheet." Thus, while the Respondent could transport loads in excess of its capacity limit and receive a surge premium for doing so, it was only required to accept all assigned loads up to its capacity limit. Kroger's delegation of the assignment function at the KDC to Transervice did not give Transervice authority to require the Respondent to accept loads in excess of its capacity limit because the "Capacity commitment" section of Schedule B would have otherwise been rendered superfluous. Further, Kroger could not have delegated to Transervice assignment authority that the KDC agreement did not reserve to Kroger in the first place.

That our interpretation of the KDC agreement is the only reasonable one is reinforced by Schedule A of the agreement, which stated, under the "Capacity guarantee" heading, that the Respondent "will guarantee capacity . . . to meet forecasted volume up to the agreed capacity limit," which was a percentage of

average daily volume, and that the Respondent was responsible for any additional costs incurred by Kroger if it failed to meet the forecasted demand. Schedule A stated further that "[s]hipments tendered in excess of the forecast or beyond the capacity limit may still be moved by [the Respondent] but no penalties will apply." Accordingly, the Respondent was liable for any loads assigned to it up to its capacity limit, and, while it was able to deliver loads in excess of its capacity limit, it was not liable for any costs incurred by Kroger if it could not deliver the over-capacity loads. Logically then, Transervice could not have simply pushed its loads onto the Respondent to absolve itself of liability in the event that its drivers refused to cross a picket line.

Second, our dissenting colleague speculates that if Zenith did not hire replacement workers, then the Respondent may have had to staff the KDC itself because otherwise there would have been no one to load the trailers assigned to the Respondent. The fatal flaw in this speculation is that the KDC agreement did not require the Respondent to ensure that the trailers were loaded for delivery. In fact, paragraph 3.5 of the KDC agreement specified that the Respondent's "duties and responsibilities under this Agreement will commence when [the Respondent] takes possession or control of [Kroger's], or a third party's, property, or upon the execution of a shipping document by [the Respondent], whichever occurs first." The Respondent would not have been able to take possession of Kroger's property if Zenith's warehouse employees did not load the trailers, and, as a result, the Respondent's duties and responsibilities under the KDC agreement would not have commenced in those circumstances.

Schedule B of the KDC agreement indicates even more clearly that it was not the Respondent's obligation to load the trailers, as it states, under the "Pickup and delivery" heading, that a "Kroger representative pre-loads and braces all cargo at the [KDC] prior to driver arrival for pickup."

Our dissenting colleague argues that "[i]n estimating its potential losses, Quickway could have reasonably decided that paragraph 3.5 might not provide it a winning defense" (emphasis in original), and that the Respondent would not have risked its overall relationship with Kroger "in doubtful reliance on paragraph 3.5." The Respondent has not raised either of those arguments, however. The Respondent claims that it would have been directly liable for any losses that Kroger suffered as a result of Zenith's KDC employees refusing to cross a picket line, not that it would have had to staff the KDC itself simply to ensure that it could deliver its assigned loads. Moreover, the Respondent has not asserted that its decision to close the Louisville terminal was influenced in any respect by a fear of putting its overall relationship with Kroger in jeopardy. We are, once again, unsurprised that the Respondent has not put forward the speculative arguments raised by our dissenting colleague, as our interpretation of paragraph 3.5 of the KDC agreement is far from doubtful, particularly when read in tandem with Schedule B of the agreement.

Finally, our dissenting colleague argues that the Respondent's drivers could have abandoned their loads on the first day of the strike, and the Respondent would have been liable under the KDC agreement for any spoiled cargo. We do not dispute this premise.

However, the Respondent claims that it would have been liable under the KDC agreement for not only any loads abandoned by its drivers but also any loads abandoned by Transervice's or Zenith's employees. This claim is unsupported by the record.

Overall, the record shows that the Respondent would have been responsible only for the replacement of any of its own drivers that struck and any losses that Kroger suffered due to the Respondent failing to meet its obligations under the KDC agreement. The Respondent does not claim that it would have closed the Louisville terminal to avoid this more limited liability. Because the record does not establish that the feared catastrophic liability and damages could have resulted from the potential strike raised in the media inquiries, we find that the Respondent's purported nondiscriminatory reason for deciding to cease operations at the Louisville terminal is false and pretextual. *See San Luis Trucking*, 352 NLRB at 236 (finding that an employer's claim that it closed part of its business because of financial losses was not proven and was therefore false and pretextual).

6. Response to the Dissent's Personal Theory

As briefly mentioned above, our dissenting colleague has concocted a personal theory, not advanced by the Respondent, in an attempt to show that the Respondent resigned from the KDC agreement and thereafter ceased operations at the Louisville terminal for nondiscriminatory reasons. In his estimation, the Respondent took those actions because "the ultimatum issued to it by Kroger, its main customer, left it no other choice, especially in light of its reasonable fear

that a strike and resulting shutdown of the KDC could impose unacceptable costs as well as its likely fear of risking its relationship with Kroger, which was the source of 75 to 80 percent of the Respondent's revenue." What our dissenting colleague refers to as Kroger's "ultimatum" is a letter that Kroger Vice President of Supply Chain Operations Obermeier emailed to Paladin's and the Respondent's CEO, Prevost, at 2:03 p.m. on December 8—which our dissenting colleague describes as requiring the Respondent to "either provide assurances that it would fulfill all its obligations under the [KDC agreement], even if the Union struck, or terminate that agreement."[43]

The primary, but far from the only, flaw in our dissenting colleague's theory is, as our dissenting colleague himself acknowledges, that the Respondent has not claimed that it resigned from the KDC agreement and ceased operations at the Louisville terminal because of any ultimatum posed by Kroger. Instead, the Respondent has specifically cross-excepted to the judge's "failure to find that Respondent's sole motivation for the modification and early termination of the [KDC

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[43] We will refer to this letter as Obermeier's December 8 letter. The letter stated that due to the "doubts and concerns" expressed by the Respondent regarding its ability to fulfill its obligations under the KDC agreement, Kroger was "willing to consider waiving any applicable notice provisions for [the Respondent] to terminate [the KDC agreement]," and that Kroger was otherwise requesting that the Respondent "immediately provide assurances that [it] can and will meet all of its contractual commitments and obligations for any assignments Kroger may choose to make under the [KDC] agreement." The letter ended by requesting that the Respondent "advise on whether [it] wishes to end the agreement or provide the requested assurances" by 5 p.m. that day.

agreement] was to avoid damages and liability under the [KDC agreement]" (emphasis added). In its Brief in Support of Cross-Exceptions, the Respondent similarly argues that its "decision to cease operations, close its Louisville terminal, and lay-off all of its employees on December 9, 2020, to avoid catastrophic and ruinous damages and financial ruin for breaching its [KDC agreement] with Kroger were the sole motivating reasons for its decision" (emphasis added).[44] At no point in its Brief in Support of Cross-Exceptions did the Respondent refer to, or even characterize, Obermeier's December 8 letter as an ultimatum, let alone argue that it resigned from the KDC agreement and ceased operations at the Louisville terminal because of any ultimatum posed by Kroger. Nor has the Respondent ever suggested that it feared that its overall relationship with Kroger was at risk or that its decision to cease operations at the Louisville terminal was motivated by such a fear. Because the Respondent has never advanced, either before the judge or on exceptions, our dissenting colleague's theory for why it resigned from the KDC agreement and ceased operations at the Louisville terminal, it is not before us.[45] *See Hilton*

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[44] As discussed above, the record does not establish that the "catastrophic and ruinous damages" that the Respondent claims motivated its decision to cease operations at the Louisville terminal could have resulted from the potential strike raised in the media inquiries.

[45] We further note that the Respondent, having failed to argue this theory in its cross-exceptions, would be barred from raising it to a circuit court on a petition for review. *See* 29 U.S.C. § 160 (e) ("No objection that has not been urged before the Board . . . shall be considered by the court. . . . "); *see also* Board's Rules and Regulations, Sec. 102.46(f) ("Matters not included in exceptions or

Hotel Employer LLC d/b/a Hilton Hawaiian Village Waikiki Beach Resort, 372 NLRB No. 61, slip op. at 6 (2023); *CP Anchorage Hotel 2 d/b/a Hilton Anchorage*, 371 NLRB No. 151, slip op. at 3 fn. 9 (2022); *IMI South, LLC d/b/a Irving Materials*, 364 NLRB 1373, 1377 (2016); *Avne Systems, Inc.*, 331 NLRB 1352, 1354 (2000). As the United States Court of Appeals for the Fifth Circuit recently observed, "our 'adversarial system of adjudication. . . . is designed around the premise that parties represented by competent counsel know what is best for them, and are responsible for advancing the facts and argument[s] entitling them to relief.'" *United Natural Foods, Inc. v. NLRB*, 66 F.4th 536, 546 (5th Cir. 2023) (quoting *United States v. Sineneng-Smith*, 140 S.Ct. 1575, 1579 (2020)) (alterations in original). Unlike our dissenting colleague, we decline to "cross the bench to counsel's table and litigate the case for" the Respondent. *Id.*[46]

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cross-exceptions may not thereafter be urged before the Board, or in any further proceeding.").

[46] Our dissenting colleague's citation to *Local 58, International Brotherhood of Electrical Workers (IBEW), AFL-CIO (Paramount Industries, Inc.)*, 365 NLRB No. 30 (2017), enfd. 888 F.3d 1313 (D.C. Cir. 2018), is misplaced. In that case, the Board reaffirmed that "where all of the underlying facts are undisputed[,] [t]he Board, with court approval, has repeatedly found violations for different reasons and on different *theories* from those of administrative law judges or the General Counsel, even in the absence of exceptions, where the unlawful conduct was alleged in the complaint." *Id.*, slip op. at 4 fn. 17 (emphasis in original). As the Board has previously explained, "[t]hat limited license to find alleged violations based on undisputed facts is far removed from the dissent's effort here to conjure arguments to dismiss allegations on grounds never advanced by the Respondent." *Hilton Anchorage*, 371 NLRB No. 151, slip op. at 3 fn. 9. Moreover, the underlying facts are certainly not undisputed here, as the parties

Even if our dissenting colleague's theory for why the Respondent resigned from the KDC agreement and ceased operations at the Louisville terminal were properly before us, it is contrary to the record in this case in two important ways that completely undermine its validity.

First, a key premise of our dissenting colleague's theory that the Respondent ceased operations at the

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are emphatically contesting the Respondent's motive for ceasing operations at the Louisville terminal.

We note that our dissenting colleague's pursuit of his personal theory for why the Respondent ceased operations at the Louisville terminal is particularly inappropriate in the context of a *Darlington* analysis, which turns on employer motivation. In the *Darlington* context, when an employer argues that it closed part of its business for legitimate, nondiscriminatory reasons—similar to a respondent's rebuttal burden under *Wright Line*—the question is not whether the employer could have closed part of its business for legitimate reasons but is, instead, whether the employer actually would have closed part of its business for the legitimate reasons that it claims it did, rather than for antiunion reasons and to chill unionism in other parts of its operations, where the employer may reasonably have foreseen that such closing would likely have that effect. *See Darlington*, 380 U.S. at 275-276; *cf. Dish Network, LLC*, 363 NLRB 1307, 1307 fn. 1 (2016) ("Under *Wright Line*, if the General Counsel sustains his initial burden, the burden shifts to the employer to persuade by a preponderance of the evidence, not merely that it could have taken the same action for legitimate reasons, but that it actually would have done so in the absence of the protected conduct."), enfd. mem. 725 F. App'x 682 (10th Cir. 2018). Our dissenting colleague's theory is in reality no more than an expression of his belief that the Respondent could have ceased operations at the Louisville terminal for legitimate reasons. But the Board cannot, as he would have it, substitute legitimate reasons that he believes the Respondent could have relied upon to decide to cease operations at the Louisville terminal for the actual reasons that the Respondent claims it decided to cease operations.

Louisville terminal for nondiscriminatory reasons is that the initiative for terminating the KDC agreement came from Kroger. However, he fails to acknowledge the judge's finding that "[i]t is uncontroverted that the initiative for cancellation of Respondent's contract at the KDC came from Respondent, not Kroger," and no party has excepted to that finding.[47] In any event, this finding is supported by Obermeier's testimony that the Respondent sought to have Kroger cancel the KDC agreement. No further support is necessary because the judge credited Obermeier's testimony, and, as discussed above, we have found no basis for reversing the judge's credibility determinations.[48]

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[47] See Board's Rules and Regulations, Sec. 102.46(a)(1)(ii) ("Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged will be deemed to have been waived.").

[48] Although our dissenting colleague has not taken issue with the judge's decision to credit Obermeier, he has failed to acknowledge that Obermeier repeatedly testified that, during a conversation on December 8, the Respondent sought to have Kroger terminate the KDC agreement and that this conversation prompted him to send his December 8 letter. Specifically, Obermeier testified that the Respondent "sought out us, Kroger, to relieve them of their duties," "sought out Kroger to cancel the [KDC] agreement," and "requested to cancel the agreement." Our dissenting colleague misleadingly cites only Obermeier's testimony when he was asked if the Respondent requested that he write his December 8 letter, to which he responded, "No, sir." However, immediately following the testimony cited by our dissenting colleague, Obermeier reaffirmed that the Respondent had sought to have "Kroger terminat[e] the agreement." Accordingly, Obermeier's credited testimony, on its own, provides sufficient support for the judge's finding that the initiative for terminating the KDC agreement originally came from the Respondent.

However, we note that the judge's finding is also consistent with the testimony of the Respondent's highest-ranking management officials, as we agree with the judge that the differences between their testimony and Obermeier's testimony on this point are "for the most part inconsequential." Both Paladin President and COO Campbell and Quickway Group Vice President of Operations Cannon testified that during the conference call with Kroger at 9 a.m. on December 8, Cannon told Obermeier that the only way to prevent a complete shutdown of the KDC was for Kroger to terminate the KDC agreement immediately.[49] Prevost testified that immediately after he received Obermeier's December 8 letter, Obermeier called and asked him to confirm Cannon's statement during the December 8 conference call that "the only solution was for [the Respondent] to be removed" from the KDC, which Prevost confirmed. Accordingly, the Respondent could not have viewed Obermeier's December 8 letter as an ultimatum when it merely expressed openness to finding a way to achieve the ultimate outcome that the Respondent had requested—or, at the very least, suggested.[50]

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[49] Specifically, Campbell testified that when asked by Obermeier for the Respondent's plan, Cannon responded that "the only thing I know as a plan is that you've got to fire us and we've got to get our stuff off the lot to keep from shutting down your operation," while Cannon similarly testified that he "told Mr. Obermeier the only way to avoid a complete shutdown of the KDC is you're going to have to get [the Respondent's] equipment off the KDC lot and you're going to have to terminate [the Respondent]."

[50] Our dissenting colleague asserts that when Cannon suggested that Kroger terminate the KDC agreement during the December 8 conference call, "[i]t is abundantly clear . . . that he did so in

Second, the testimony of the Respondent's management officials who were involved in the decision to cease operations at the Louisville terminal—*i.e.*, Prevost, Campbell, and Cannon—establishes that the Respondent decided to seek the termination of the KDC agreement prior to Obermeier sending his December 8 letter. Prevost, Campbell, and Cannon all testified that they had a meeting immediately following the December 8 conference call, during which they estimated the liability that the Respondent could have faced if the KDC were shut down as a result of a strike by its drivers and concluded that the Respondent needed to seek the termination of the KDC agreement

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response to Obermeier's mandate that under no circumstances could the KDC be shut down." Our dissenting colleague has once again ignored Obermeier's credited testimony. Obermeier did not testify that he told the Respondent that the KDC could not be shut down under any circumstances. Instead, Obermeier testified that when the Respondent sought to have Kroger terminate the KDC agreement on December 8, he initially refused and stated that Kroger expected the Respondent to uphold the KDC agreement and continue to service Kroger's stores.

Our dissenting colleague has apparently relied on Campbell's testimony that Obermeier began the December 8 conference call by stating to Cannon, "You've got a contract, and you can't shut us down. What's your plan?" This difference between Obermeier's and Campbell's testimony is ultimately inconsequential, however, because Prevost testified that prior to the December 8 conference call, Cannon told Prevost that he planned to discuss with Kroger that the only way to avoid the KDC being shut down was to cancel the KDC agreement—to which Prevost responded, "[T]his is our Pearl Harbor moment. We've just been bombed." Thus, even if the testimony of the Respondent's top management officials on this point were to be credited, their testimony establishes that the Respondent would have proposed the termination of the KDC agreement on December 8 regardless of what Obermeier said.

to avoid that potential liability.[51] Moreover, they did not testify that the Respondent viewed Obermeier's December 8 letter as an ultimatum or that the letter forced the Respondent to seek to terminate the KDC agreement because it was left with no other choice. To the contrary, Campbell testified that he was "encouraged" by Obermeier's December 8 letter and viewed it as a "potential opening" because Kroger had expressed a willingness to waive provisions in the KDC agreement to allow for the termination of that agreement. Campbell further stated that in crafting the Respondent's response to Obermeier's December 8 letter, he, Prevost, and Cannon focused on "ensuring the proper wording, and references to the modification section in the [KDC] agreement" so that the termination of the KDC agreement would comply with the express terms of the agreement itself.[52] Thus, while the Respondent

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[51] Specifically, Prevost testified that during this meeting, he, Campbell, and Cannon "decided then we had to get out of the [KDC agreement]" because the potential liability "was quickly becoming a number we could not afford," that they determined that the Respondent "had no choice but to end the relationship with Kroger and get off the Kroger property and prevent a shutdown of the KDC," and that "[t]he whole focus became get out of the [KDC agreement]." Campbell similarly testified, "[T]he decision was made, we've got to get out. We have to get out of [the KDC agreement]. We have to mitigate this liability, because it would have bankrupted us." Cannon, who was the Respondent's representative during the hearing, testified that Prevost's and Campbell's testimony regarding this meeting and the reasons the Respondent resigned from the KDC agreement was consistent with his recollection.

[52] Prevost testified similarly that the Respondent's response to Obermeier's December 8 letter was "trying to accomplish a mutual agreement to where we could resign from the [KDC agreement], and modify [the KDC agreement], where we could

believed that some technical changes needed to be made to Obermeier's proposal for terminating the KDC agreement, it otherwise viewed Obermeier's December 8 letter as a positive development that made what it had already determined to be its desired outcome more likely to occur. Finally, when asked why the Respondent ultimately accepted the mutual agreement for it to resign from the KDC agreement and be released from its obligations under that agreement, Prevost testified, "[I]t was an economic decision. We could not afford the liability of the KDC being shut down." He did not mention any perceived ultimatum posed by Kroger.[53] Accordingly, our dissenting col-

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mutually agree in writing to modify the [KDC agreement], resign and not expose [the] KDC to the shutdown."

We note that Kroger could not have immediately terminated the KDC agreement without cause because the KDC agreement required that Kroger give the Respondent written notice 30 days prior to doing so. Thus, consistent with the KDC agreement's "Modifications" clause, the Respondent and Kroger had to reach a mutual agreement to terminate the KDC agreement immediately.

[53] Our dissenting colleague's bold proclamation that "Obermeier was the real decision-maker" is completely unfounded. As discussed above, Kroger did not have authority under the KDC agreement to terminate that agreement on its own immediately after receiving the media inquiries in December. Instead, the parties had to reach a mutual agreement to terminate the KDC agreement at that time. Moreover, the Respondent decided to seek the termination of the KDC agreement prior to receiving Obermeier's December 8 letter and viewed that letter as a positive development, rather than an ultimatum, since Kroger had expressed openness to the Respondent's preferred outcome for the first time. Thus, based on the record before us, the Respondent made the decision to resign from the KDC agreement on its own accord, and much to the Respondent's satisfaction, Kroger accepted its resignation.

league's theory is totally inconsistent with the testimony of Prevost, Campbell, and Cannon.[54]

In sum, for all the reasons discussed above, we reverse the judge and find that the General Counsel has established under *Darlington* that the Respondent violated Section 8(a)(3) and (1) by ceasing operations at its Louisville terminal and discharging all its Louisville drivers.

III. Cessation of Operations at Louisville Terminal-8(a)(5) Allegation

The judge dismissed the allegation that the Respondent violated Section 8(a)(5) and (1) by failing to notify and bargain with the Union about its decision to cease operations at the Louisville terminal and discharge all the Louisville drivers because, as discussed above, he found that the Respondent's decision did not violate the Act under *Darlington*. The General Counsel and the Union except.

The Respondent is correct that pursuant to *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), "[i]t is well established that an employer's deci-

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[54] We decline to directly address our dissenting colleague's musings on why the Respondent may not have advanced his personal theory for why it resigned from the KDC agreement and ceased operations at the Louisville terminal. We think that the much more straightforward and reasonable explanation for why the Respondent did not advance his theory is that, as demonstrated above, his theory is contrary to the testimony of the Respondent's highest-ranking management officials, and "[w]here . . . an employer provides inconsistent or shifting reasons for its actions, a reasonable inference can be drawn that the reasons proffered are mere pretexts designed to mask an unlawful motive." *GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997), enfd. 160 F.3d 353 (7th Cir. 1998).

sion to close part of its business for purely economic reasons is not a mandatory subject of bargaining." *BC Industries*, 307 NLRB 1275, 1275 fn. 2 (1992); *see also First National Maintenance*, 452 U.S. at 686 ("We conclude 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. . . . "). However, as demonstrated above, the Respondent did not decide to cease operations at the Louisville terminal for purely economic reasons. Indeed, we have found that the Respondent's purported nondiscriminatory reason for that decision was false and pretextual. Instead, the General Counsel has established that the Respondent ceased operations at the Louisville terminal for antiunion reasons and to chill unionism at its other terminals and at other Paladin affiliates and therefore violated Section 8(a)(3) and (1) by doing so. The Board has held that "[d]iscrimination on the basis of union animus cannot constitute a lawful entrepreneurial decision." *Delta Carbonate*, 307 NLRB 118, 122 (1992), enfd. mem. 989 F.2d 486 (3d Cir. 1993); *see also Central Transport*, 306 NLRB 166, 167 (1992), enfd. in part 997 F.2d 1180 (7th Cir. 1993). Thus, where an employer's purported entrepreneurial decision is motivated by antiunion reasons in violation of Section 8(a)(3), that decision is not exempt from a bargaining obligation under *First National Maintenance*, and an employer's failure to bargain about that decision violates Section 8(a)(5). *See*, *e.g.*, *Delta Carbonate*, 307 NLRB at 122 ("[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).");

Strawsine Mfg. Co., 280 NLRB 553, 553 (1986) (finding that an employer "violated Section 8(a)(5) and (1) by failing to bargain about its decision to close the Corunna facility and relocate its operations" because that decision was "motivated by antiunion reasons" in violation of Section 8(a)(3)); *see also Associated Constructors*, 325 NLRB 998, 999 fn. 4 (1998) ("[A]lthough an employer may close a portion of its business for purely economic reasons without bargaining over the decision, it violates both Sec[tion] 8(a)(3) and (5) if the decision is motivated by antiunion considerations."). Accordingly, because the Respondent's decision to cease operations at the Louisville terminal and discharge all the Louisville drivers was discriminatorily motivated in violation of Section 8(a)(3), we find that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to bargain with the Union about that decision.[55]

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[55] We find that the Respondent also violated Sec. 8(a)(5) and (1) by failing to give the Union notice and an opportunity to bargain over the effects of its decision to cease operations at the Louisville terminal and discharge all the Louisville drivers. The Respondent did not give the Union notice of its decision to cease all operations associated with the KDC until approximately an hour before it implemented that decision and did not inform the Union that all the Louisville drivers had been discharged as a result until the previously scheduled bargaining session the next day. Thus, the Respondent did not give the Union sufficient preimplementation notice to allow for meaningful effects bargaining. *See*, *e.g.*, *Los Angeles Soap Co.*, 300 NLRB 289, 289 fn. 1, 295-296 (1990) (finding that an employer "fail[ed] to give timely notice to the [u]nion of the sale of its business, thereby making impossible effects bargaining with the [u]nion, in a meaningful manner and at a meaningful time" where the employer gave the union notice on the day that the sale occurred); *Willamette Tug & Barge Co.*, 300 NLRB 282, 282-283 (1990) (finding that an employer "fail[ed] to provide any meaningful prior notice to the [u]nion that it was

IV. Allegations Covered by September 16 Settlement Agreements

As mentioned above, the complaint alleges that the Respondent violated the Act by engaging in certain conduct that is covered by the September 16 settlement agreements, including threatening that it would close the Louisville Terminal if the employees unionized; asking an employee to make a list of union supporters; and threatening that it would lose its contract with Kroger and stop contributing shares to the employees' ESOP accounts if they unionized, and would take legal action against an employee for filing an unfair labor practice charge with the Board. In the complaint, the General Counsel vacated and set aside the September 16 settlement agreements because the Respondent violated certain terms of those settlements by subsequently ceasing operations at the

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ceasing business and terminating employees" where it informed the union of its decision to sell its business on the day that it implemented that decision). As discussed above, the Respondent's purported nondiscriminatory reason for having to immediately implement its decision to cease operations at the Louisville terminal on December 9 was false and pretextual, and its decision was instead discriminatorily motivated in violation of Sec. 8 (a)(3). Moreover, during the December 10 bargaining session, when the Respondent offered to bargain over the effects of its decision to cease operations at the Louisville terminal and discharge all the Louisville drivers, it unlawfully failed to bargain over the decision itself. "Where, as here, a union is entitled to bargain over both the decision and its effects, the employer must provide the union a prior or contemporaneous opportunity to bargain over the former to fully satisfy its obligation to bargain over the latter." *DuPont Specialty Products USA, LLC*, 369 NLRB No. 117, slip op. at 18 (2020) (internal quotations omitted), enfd. mem. Nos. 20-3179 & 20-3480, 2021 U.S. App. LEXIS 24170 (3d Cir. Aug. 13, 2021).

Louisville terminal and discharging all the Louisville drivers in violation of Section 8(a)(5), (3), and (1). The judge found that the General Counsel did not properly set aside the September 16 settlement agreements because he found that the Respondent's decision to cease operations at the Louisville terminal and to discharge all the Louisville drivers did not violate the Act. He thus dismissed the allegations related to the September 16 settlement agreements.[56]

"The Board has long held that 'a settlement agreement may be set aside and unfair labor practices found based on presettlement conduct if there has been a failure to comply with the provisions of the settlement agreement or if post-settlement unfair labor practices are committed.'" *Twin City Concrete*, 317 NLRB 1313, 1313 (1995) (quoting *YMCA of Pikes Peak Region*, 291 NLRB 998, 1010 (1988)). As discussed above, the Respondent violated Section 8(a)(3) and (1) by ceasing operations at the Louisville terminal and discharging all the Louisville drivers and violated Section 8(a)(5) and (1) by failing to bargain with the Union about its decision to do so. We find that those postsettlement unfair labor practices warrant setting aside the September 16 settlement agreements. Therefore, the General Counsel properly vacated and set aside the September 16 settlement agreements in the complaint, and unfair labor practices may be found based on the presettlement conduct that the September 16 settlement agreements were meant to resolve.

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[56] The judge went on, however, to analyze certain of the allegations covered by the September 16 settlement agreements and stated that he would have found that the Respondent violated the Act by engaging in the conduct alleged if the September 16 settlement agreements had been properly set aside.

Accordingly, we shall analyze the complaint allegations covered by the September 16 settlement agreements to the extent that they have been raised on exceptions.

A. Threat to Close the Louisville Terminal

On July 26, 2019, Operations Manager Evola told several drivers: "If this place goes union, Bill Prevost will shut it down. He's not going to have another terminal go to the union." Evola's statement constituted a threat that the Respondent would close the Louisville terminal if the drivers selected the Union as their collective-bargaining representative and thus clearly violated Section 8(a)(1). *See*, *e.g.*, *Atlantic Veal & Lamb, Inc.*, 342 NLRB 418, 427 (2004) (finding that an employer violated Section 8(a)(1) where a supervisor told employees that if the union "came in" the employer's owner would close the business and move to Indiana), enfd. mem. per curiam 156 F. App'x 330 (D.C. Cir. 2005); *Tellepsen Pipeline Services Co.*, 335 NLRB 1232, 1232 (2001) (finding that a supervisor's statement that the employer's owner and president "would shut the doors before he would go union" violated Section 8(a)(1)), enfd. in relevant part 320 F.3d 554 (5th Cir. 2003).

B. Instruction to Provide a List of Union Supporters

In August 2019, Vice President of Operations Marcellino instructed employee Hendricks to create a list of union supporters. The Board has held generally that "plac[ing] an employee in the position of acting as an informer regarding the union activity of his fellow-employees is coercive." *Abex Corp.*, 162 NLRB 328,

329 (1966). The Board has found specifically that an employer violated Section 8(a)(1) by asking an employee to "compose a list of employees sympathetic to the [u]nion." *Stafford Construction Co.*, 250 NLRB 1469, 1469, 1474 (1980); *see also Tidelands Marine Service*, 140 NLRB 288, 290 (1962) (finding that an employer violated Section 8(a)(1) by showing an employee a list of employees' names and asking him to pick out the union supporters), enfd. 338 F.2d 44 (5th Cir. 1964). Accordingly, we find that the Respondent, through Marcellino, violated Section 8(a)(1) by instructing Hendricks to provide it with a list of employees who were involved in the Union's organizing campaign or who supported the Union.

C. Threat that the Respondent Would Lose Its Contract with Kroger

In September 2019, Louisville Terminal Manager Higgins told driver Tooley that if the terminal went union, the Respondent would have to raise its prices and would probably lose its contract with Kroger, which would probably result in all employees at the terminal losing their jobs. The Supreme Court held long ago that if an employer chooses to communicate to its employees a prediction regarding the consequences of unionization, "the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). Consistent with *Gissel*, "[i]t is well settled that an employer's predictions of adverse consequences of unionization arising from sources outside the employer's control—including the future actions of other employers—violate Section 8(a)(1) if they lack an objective factual basis."

Wake Electric Membership Corp., 338 NLRB 298, 299 (2002). As a result, the Board has found that an employer violates Section 8(a)(1) by predicting that unionization may lead to the loss of customers, which could result in loss of jobs and/or plant closure, without providing an objective factual basis to support such a prediction. *See*, *e.g.*, *Contempora Fabrics, Inc.*, 344 NLRB 851, 851 (2005) (finding that an employer "unlawfully predicted that unionization would cause the [employer] to lose customers and risk plant closure" where it failed to provide any objective basis for that prediction).

Here, Higgins did not provide any objective factual basis for why the Respondent necessarily would have had to raise its prices to such an extent if the employees unionized that it would have probably lost its contract with Kroger and had to discharge all the employees at the Louisville terminal. *See Pincus Elevator & Electric Co.*, 308 NLRB 684, 691-692 (1992) (finding that an employer's prediction that the higher costs imposed by a union contract would lead to the loss of customers and plant closure was unlawful where it "produced no evidence, as it was [its] burden to do, to support the claim that higher wages would lead inevitably to the loss of customers"), enfd. mem. 998 F.2d 1004 (3d Cir. 1993); *Crown Cork & Seal Co.*, 255 NLRB 14, 14 (1981) (finding unlawful an employer's prediction that a union victory would cause it to lose Pepsi as a customer and close down "because it does not necessarily follow that a union election victory *per se* would increase [the employer's] labor costs disproportionally to Pepsi's willingness to pay increased costs if passed on"), enfd. mem. 691 F.2d 506 (9th Cir. 1982). In fact, Higgins did not even provide a

reason, let alone an objective factual basis, for why the Respondent would have had to raise its prices at all if the drivers unionized. That Higgins qualified his prediction by stating that job loss would probably occur if the employees unionized did not render his statement noncoercive. "A prediction of adverse consequences of unionization, however it is formulated, must have an objective basis." *Tellepsen Pipeline Services*, 335 NLRB at 1233. Thus, regardless of whether Higgins portrayed his prediction "as a possibility, a probability, or a certainty," he was required to provide an objective factual basis to support it, and he did not do so here. *Id*. at 1234. Accordingly, we find that the Respondent, through Higgins, violated Section 8(a)(1) by threatening employees with job loss if they selected the Union as their representative.

D. Threat that the Respondent Would Cease Contributions to Drivers' ESOP Accounts

On January 24, Operations Manager Evola told driver Wilson, three other drivers, and a dispatcher that the Respondent would no longer contribute new shares to the drivers' ESOP accounts if they selected the Union as their representative. As discussed above, the ESOP functions as a retirement trust, and all the Respondent's employees are members of the ESOP and receive annual stock distributions to their ESOP accounts. It is well established that "[a]n employer's preelection statement to employees that, should they choose union representation, they will automatically lose a fringe benefit, such as a profit-sharing program or an ESOP, violates Section 8(a)(1)." *DynCorp*, 343 NLRB 1197, 1199 (2004), enfd. mem. 233 F. App'x 419 (6th Cir. 2007). In *DynCorp*, the Board found that an employer violated Section 8(a)(1) when a supervisor

stated that "if the [u]nion were elected the employees would immediately lose the [employer's] 30-cent-an-hour contribution to the Employee Stock Ownership Plan (ESOP)." *Id.* at 1198-1199. We find that, similar to the employer in *DynCorp*, the Respondent violated Section 8(a)(1) here by threatening to cease making contributions to the drivers' ESOP accounts if they selected the Union as their representative.

E. Threat to Take Legal Action for Filing a Charge

In response to Evola's statement regarding ESOP contributions discussed above, driver Wilson filed an unfair labor practice charge with the Board on February 14 alleging that the Respondent, through Evola, violated Section 8(a)(1) by threatening to retaliate against employees if they joined or supported a union. On March 9, Evola told Wilson, "You said I was gonna, uh, retaliate against you if you said something to the Union, you went to the Labor Board about it, yeah you did, so, when its all over, make sure you've got an attorney, because I'm coming back. . . . You could've got me fired for what you said." Evola did not actually pursue any legal action against Wilson.[57]

Based on those facts, we find that Evola's statement would have been reasonably interpreted as an implied threat to pursue some unspecified legal action against Wilson—which he would need to hire an attor-

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[57] The Respondent has not argued that Evola's threat was merely "incidental" to a lawsuit, as such an argument would clearly lack merit where no lawsuit was filed. *See Security Walls, LLC*, 371 NLRB No. 74, slip op. at 5 (2022); *DHL Express, Inc.*, 355 NLRB 680, 680 fn. 3 (2010); *Postal Service*, 350 NLRB 125, 125-126 (2007), enfd. per curiam 526 F.3d 729 (11th Cir. 2008).

ney to defend against—in retaliation for the unfair labor practice charge that he had filed. For the reasons discussed below, we find that Evola's statement independently violated both Section 8(a)(1) and 8 (a)(4).

The Board has consistently found that threats to take legal action against employees for filing unfair labor practice charges reasonably tend to restrain employees in the exercise of their right to file charges with Board under the Act and therefore violate Section 8(a)(1). *See*, *e.g.*, *Postal Service*, 350 NLRB at 125-126 (finding that an employer violated Section 8 (a)(1) by its remark to an employee about an unfair labor practice charge filed by the employee, stating that the employee "had better get a good attorney, because he [the supervisor] was going to sue [the employee]" (internal quotations omitted)); *Carborundum Materials Corp.*, 286 NLRB 1321, 1321-1322 (1987) (finding that an employer violated Section 8(a) (1) by threatening an employee for filing an unfair labor practice charge where a department foreman stated that "he would get [the employee] and would sue her personally for jeopardizing his job because of her involvement with the unfair labor practice charge" (internal quotations omitted)).

Accordingly, we find that the Respondent, through Evola, violated Section 8(a)(1) by impliedly threatening to take legal action against Wilson for filing an unfair labor practice charge. *See Clyde Taylor Co.*, 127 NLRB 103, 108 (1960) ("[A] threat [to sue for filing unfair labor practice charges], express or implied, is of a harassing nature [and] . . . would normally tend to intimidate an individual contemplating filing a

charge, from doing so, or one, who has filed a charge, to withdraw it.").

Additionally, we find that Evola's implicit threat to take legal action against Wilson for filing an unfair labor practice charge independently violated Section 8(a)(4). Pursuant to Section 10(b) of the Act, the Board cannot initiate unfair labor practice proceedings in the absence of the filing of a charge alleging a violation of the Act. Thus, "[i]mplementation of the Act is dependent upon the initiative of individual persons who must . . . invoke its sanctions through filing an unfair labor practice charge." *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238 (1967). Section 7 protects employees' right to access the Board's processes, including their right to file unfair labor practice charges. *See Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 740 (1983). Section 8(a)(4) specifically makes it an unfair labor practice "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under [the] Act." 29 U.S.C. § 158(a)(4). The Supreme Court has long recognized that Congress, through its adoption of Section 8(a)(4), "made it clear that it wishes all persons with information about [unfair labor] practices to be completely free from coercion against reporting them to the Board." *Nash*, 389 U.S. at 238; *see also Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10, slip op. at 5 (2019) ("Congress intended employees to be completely free to file charges with the Board, to participate in Board investigations, and to testify at Board hearings."). The Court has deemed "[t]his complete freedom [] necessary . . . 'to prevent the Board's channels of information from being dried up by employer intimidation of prospective complain-

ants and witnesses.'" *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972) (quoting *John Hancock Mutual Life Insurance Co. v. NLRB*, 191 F.2d 483, 485 (D.C. Cir. 1951)); *see also Metro Networks, Inc.*, 336 NLRB 63, 67 (2001) (explaining that Board investigations "often rely heavily on the voluntary assistance of individuals in providing information" and that "[a]n individual's refusal voluntarily to provide information in an investigation may result in an otherwise meritorious charge being dismissed"). Accordingly, Section 8(a)(4) "is a fundamental guarantee to employees that they may invoke or participate in the investigative procedures of this Board without fear of reprisal and is clearly required in order to safeguard the integrity of the Board's processes." *Filmation Associates, Inc.*, 227 NLRB 1721, 1721 (1977); *see also Airgas USA, LLC v. NLRB*, 916 F.3d 555, 560 (6th Cir. 2019) ("This anti-retaliation provision is central to the purposes of the NLRA because, without some protection for employees attempting to access the Act's protections, the Board cannot assure an effective administration of the Act." (internal quotations omitted)).

The Supreme Court has interpreted the use of "to discharge or otherwise discriminate"—particularly the word "otherwise"—in Section 8(a)(4) to reveal "an intent on the part of Congress to afford broad rather than narrow protection to the employee" and has approved of a liberal approach to Section 8(a)(4) "in order fully to effectuate the section's remedial purpose." *Scrivener*, 405 U.S. at 122, 124. Unlike Section 8(a)(3), the language of Section 8(a)(4) does not limit the prohibited discrimination to "discrimination in regard to hire or tenure of employment or any term or condition of employment." 29 U.S.C. § 158(a)(3). The United

States Court of Appeals for the District of Columbia Circuit has held that "[t]he very lack of specificity in [Section 8(a)(4)] points to a congressional intent to make it even more all-embracing than [Section] 8(a)(3)" and that Congress' use of "the broadest language it could find"—*i.e.*, "otherwise discriminate"—"indicates clearly that Congress sought to extend Board scrutiny to all forms of discrimination." *John Hancock*, 191 F.2d at 485-486. In *Fuqua Homes (Ohio), Inc.*, 211 NLRB 399 (1974), the Board expressed agreement with this interpretation of Section 8(a)(4)—stating that "'discrimination' under Sec[tion] 8(a)(4) embraces 'all forms of discrimination' including threats of discharge"—and found that an employer violated Section 8(a)(4) by threatening employees with discharge for appearing as union witnesses at a Board representation hearing. *Id.* at 400 & fn. 7 (quoting *John Hancock*, 191 F.2d at 486); *see also Titus Electric Contracting, Inc.*, 355 NLRB 1357, 1386 (2010); *Success Village Apartments*, 348 NLRB 579, 579-580, 594-595 (2006). The Board has also found that employers violated Section 8(a)(4) by threatening employees with retaliatory actions other than discharge for filing unfair labor practice charges, giving testimony at a Board hearing, or otherwise participating in the Board's processes. *See*, *e.g.*, *Cardinal Home Products*, 338 NLRB 1004, 1004-1005, 1026 (2003) (threatening an employee with disciplinary action in retaliation for giving testimony at a Board hearing); *Postal Service*, 266 NLRB 467, 472, 473-474 (1983) (threatening an employee with arrest to discourage him from cooperating with the Board's investigation of an unfair labor practice charge); *Shirt Shed, Inc.*, 252 NLRB 292, 301 (1980) (interrogating an employee about her filing of an unfair labor practice charge and communication with a Board agent and

threatening her with unspecified reprisals if she did not withdraw the charge).

By singling Wilson out and implicitly threatening to bring legal action against him because he filed an unfair labor practice charge, the Respondent "otherwise discriminate[d]" against Wilson in a manner that falls within the broad scope of Section 8(a)(4)'s prohibition. Like a threat of discharge, a threat to take legal action against an employee presents the potential for serious economic harm, as the employee is faced with both the financial liability that could result from the legal action and the costs to hire an attorney to defend against it. Thus, threats to take legal action against employees because they filed charges with the Board, gave testimony in a Board hearing, or otherwise participated in the Board's processes are exactly the type of employer discrimination that would likely "dry up" the Board's channels of information. Individuals would not feel completely free to report information about unfair labor practices in the face of such threats, which could lead to the Board having to dismiss otherwise meritorious charges.[58] As discussed above in detail, Section 8(a)(4)'s purpose is to prevent such employer discrimination in order to ensure the effective administration of the Act. Accordingly, we find that the Respondent's implicit threat to take legal action against Wilson because he filed an unfair labor prac-

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[58] Indeed, in the present case, the Region had to dismiss Wilson's initial charge alleging that Evola's ESOP threat violated the Act because of Wilson's lack of cooperation. Wilson testified that he did not participate in the investigation of his initial charge because he feared retaliation by the Respondent and did not want to cause problems.

tice charge independently violated both Section 8(a)(4) and 8(a)(1).[59]

V. Allegations Added to the Complaint at the Hearing

At the end of the General Counsel's case-in-chief, the General Counsel moved to amend the complaint to allege that on March 18, the Respondent, through Quickway Group Vice President of Operations Cannon, engaged in surveillance, and that on September 18, the Respondent, through Cannon and Louisville Terminal Manager McCurry, engaged in surveillance of union activities and interrogation of employees. The judge granted the motion to amend the complaint. Based on those allegations, the judge found that the Respondent, through Cannon, violated Section 8(a)(1) in March by condoning prior surveillance of employees' union activities and sanctioning further surveillance and, through McCurry, violated Section 8(a)(1) on

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[59] In *Florida Ambulance Service*, 255 NLRB 286 (1981), an administrative law judge found that an employer did not violate Sec. 8(a)(4) by threatening an employee with a lawsuit for giving a statement to the Board because "no evidence was offered showing that [the employer] discharged or otherwise discriminated against [the employee]." *Id.* at 290 & fn. 10. However, the Board never reviewed that finding because neither the General Counsel nor the charging party filed any exceptions in that case. *See id.* at 286. Accordingly, in the absence of relevant exceptions, the dismissal of that Sec. 8(a)(4) allegation in *Florida Ambulance Service* has no precedential value. *See Watsonville Register-Pajaronian*, 327 NLRB 957, 959 & fn. 4 (1999) ("It is a well-established practice of the Board to adopt, as a matter of course, an administrative law judge's findings to which no exceptions are filed. Findings adopted under such circumstances are not, however, considered precedent for any other case."); *see also Anniston Yarn Mills, Inc.*, 103 NLRB 1495, 1495 (1953).

September 18 by interrogating employees about their union activities.[60] For the reasons discussed below, we reverse the judge's finding of the March surveillance violation but affirm his finding of the September 18 interrogation violation.

A. Instruction to Surveil Employees

On March 18, Louisville employee Brown sent an email to Terminal Manager Higgins summarizing a conversation about the Union that she had with three drivers. Higgins forwarded Brown's email to Cannon, who responded, "Let [Brown] know to observe and take notes of the conversations. She does not need to engage and ask questions as she did." There is no evidence that Higgins, or anyone else, relayed Cannon's instruction to Brown or disclosed Cannon's instruction to any other employees. There is also no evidence that Brown engaged in further surveillance of the drivers' union activities after March 18.

While an employer violates Section 8(a)(1) by instructing an employee to surveil their coworkers' union activities,[61] the Board has held that an employer does not violate the Act by instructing its managers or supervisors to engage in unlawful conduct. *See Resistance Technology*, 280 NLRB 1004, 1006-1007 (1986) ("The mere issuance of instructions, even if to

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60 Neither the General Counsel nor the Union has excepted to the judge's failure to address the September 18 surveillance allegation.

61 *See*, *e.g.*, *ABC Liquors, Inc.*, 263 NLRB 1271, 1278 (1982) (finding that an employer violated Sec. 8(a)(1) where it "instructed an employee to surveil the union activities of its other employees and to submit reports on the same").

perform unlawful acts, to supervisors to find out the identity of union supporters and the union sympathies of employees cannot in itself interfere with, restrain, and coerce employees in the exercise of their statutory rights where those instructions are neither carried out nor disclosed to the employees."), affd. mem. 830 F.2d 1188 (D.C. Cir. 1987). Accordingly, applying *Resistance Technology* as binding precedent, Cannon's instruction to his fellow manager and an undisputed Section 2(11) supervisor, Higgins, to instruct Brown to surveil the drivers' union activities did not violate the Act.[62] We therefore reverse the judge and dismiss the allegation that on March 18, the Respondent, through Cannon, unlawfully engaged in surveillance.[63]

B. Interrogation

On September 18, the Union held a job action in front of the Louisville terminal, during which its representatives set up a 12-foot inflatable "Fat Cat," spoke with drivers as they entered and exited the terminal, distributed union shirts and informational packets about the status of the Respondent's request for review, and solicited signatures from drivers who

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[62] In dismissing the surveillance allegation, Member Wilcox and Member Prouty apply *Resistance Technology* for institutional reasons. They note that *Resistance Technology* reversed prior caselaw that would have found an employer's instructions to its supervisors to engage in unlawful conduct was itself an unfair labor practice. *See Cannon Electric Co.*, 151 NLRB 1465, 1468-1469 (1965). In their view, the principles in *Cannon Electric* bear considering, and they would be open to reconsidering *Resistance Technology* in a future appropriate case.

[63] Because we dismiss this allegation on the merits, we find it unnecessary to address the Respondent's argument that this allegation is barred by Sec. 10(b).

were not already union members. During the job action, Terminal Manager McCurry emailed a photograph of it to Cannon and other managers, noting that he was going to try to find out what the Union was discussing with the drivers. In a follow-up email sent later that day, McCurry stated that all the drivers to whom he had spoken responded that they shut down the union representatives and were not interested in speaking to the Union.[64]

To determine the lawfulness of an employer's interrogation, the Board evaluates whether, under all the circumstances, the interrogation reasonably tended to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *See Rossmore House*, 269 NLRB 1176, 1177 (1984), affd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). "Circumstantial factors relevant to the analysis include the background against which the questioning occurred, the nature of the information sought, the identity of the questioner, the place and method of interrogation, the truthfulness of the employee's reply, and whether the employee involved was an open and active union supporter." *Kumho Tires Georgia*, 370 NLRB No. 32, slip op. at 5 fn. 14 (2020).

For the reasons discussed below, we find that McCurry coercively interrogated drivers about their union activities on September 18. McCurry was the highest-ranking management official at the Louisville terminal at that time. *See Bannum Place of Saginaw,*

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64 The judge discredited McCurry's testimony that he spoke only to drivers who approached him first. As stated above, we have found no basis for reversing the judge's credibility findings.

LLC, 370 NLRB No. 117, slip op. at 2 (2021) (finding that the fact that the interrogator was the highest-ranking individual at the facility weighed in favor of finding the interrogation unlawful), enfd. 41 F.4th 518 (6th Cir. 2022). The evidence establishes that McCurry approached drivers while the job action was occurring and asked them about their discussions with the union representatives conducting the job action. Since union Business Agent McCutcheon testified that a job action is intended to build support for the Union, McCurry not only questioned employees about their discussions with the Union almost immediately after those discussions occurred but interrogated them in a manner that would have required them to reveal their union sympathies if they answered truthfully. The coercive nature of these interrogations is undeniable given the background atmosphere of hostility toward the Union created by the Respondent's unfair labor practices during the union campaign and its other conduct that exhibited union animus. *See Seton Co.*, 332 NLRB 979, 982 (2000) (finding an interrogation unlawful where it "occurred against a background of numerous other unfair labor practices"), enfd. mem. 276 F.3d 579 (3d Cir. 2001). Accordingly, we affirm the judge's finding that the Respondent, through McCurry, violated Section 8(a)(1) on September 18 by interrogating employees about their union activities.

AMENDED CONCLUSIONS OF LAW

1. The Respondent, Quickway Transportation, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, General Drivers, Warehousemen and Helpers, Local Union No. 89, affiliated with the International Brotherhood of Teamsters, is a labor organization within the meaning of Section 2(5) of the Act.

3. Since July 10, 2020, the Union has been the exclusive collective-bargaining representative of the following appropriate unit:

> All full-time and regular part-time drivers employed by the Respondent at its 2827 S. English Station Road, Louisville, Kentucky facility and its sub-terminals located in Versailles and Franklin, Kentucky, excluding all office clerical employees, temporary employees, professional employees, guards and supervisors, as defined by the National Labor Relations Act (Act).

4. The Respondent violated Section 8(a)(1) of the Act by engaging in the following conduct:

(a) Threatening employees with closure of the Louisville terminal if they selected the Union as their representative.

(b) Instructing employee Donald Hendricks to provide it with a list of employees who were involved in the Union's organizing campaign or who supported the Union.

(c) Threatening employees that it would lose its contract with The Kroger Company and be forced to discharge all the employees at the Louisville terminal if they selected the Union as their representative.

(d) Threatening to cease making contributions to employees' ESOP accounts if they selected the Union as their representative.

(e) Threatening to take legal action against employee Brent Wilson because he filed an unfair labor practice charge.

(f) Coercively interrogating employees about their union activities.

5. The Respondent violated Section 8(a)(3) and (1) of the Act by ceasing operations at the Louisville terminal and discharging all the employees in the bargaining unit described above for antiunion reasons and to chill unionism at its other terminals and at other affiliates of Paladin Capital, Inc. in circumstances where such a chilling effect was reasonably foreseeable.

6. The Respondent violated Section 8(a)(4) of the Act by threatening to take legal action against driver Brent Wilson because he filed an unfair labor practice charge.

7. The Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide the Union notice and an opportunity to bargain regarding its decision to cease operations at the Louisville terminal and discharge all the unit employees and the effects of that decision.

8. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

AMENDED REMEDY

Having found that the Respondent engaged in certain unfair labor practices, we shall order it to

cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

When an employer has unlawfully closed one of its facilities and discharged all its employees at that facility for discriminatory reasons, "the Board's usual practice in such circumstances is to order a return to the status quo ante—that is, to require the employer to restore the operations as they existed before the discrimination, unless the employer can show that such a remedy would be unduly burdensome, and to reinstate the employees." *International Shipping Agency, Inc.*, 369 NLRB No. 79, slip op. at 7 (2020); *see also Lear Siegler, Inc.*, 295 NLRB 857, 861 (1989). As the Fifth Circuit Court of Appeals has recognized, "[t]he threshold to establishing [the employer's] burden is high." *Mid-South Bottling Co. v. NLRB*, 876 F.2d 458, 461 (5th Cir. 1989). This heavy burden on the employer in these circumstances is consistent with the Board's policy that "the wrongdoer, rather than the innocent victim, should bear the hardships of the unlawful action." *Mashkin Freight Lines, Inc.*, 272 NLRB 427, 428 (1984). In the present case, the Respondent has not argued in any of its briefs on exceptions that an order requiring it to restore its operations at the Louisville terminal would be unduly burdensome.[65] For the reasons discussed below, we find that the evidence before us does not establish that an order requiring the Respondent to restore its operations at the Louisville terminal would be unduly burdensome.

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65 Nor did the Respondent make such an argument in its posthearing brief to the judge.

Initially, we note that the Respondent's operations at the Louisville terminal were profitable. Thus, ordering the Respondent to restore its operations at the Louisville terminal would not "force the reestablishment of an unprofitable operation," which the Board has been reluctant to do in the past. *Great Chinese American Sewing Co.*, 227 NLRB 1670, 1670 (1977), enfd. 578 F.2d 251 (9th Cir. 1978); *see also Purolator Armored, Inc.*, 268 NLRB 1268, 1269 & fn. 5 (1984), enfd. 764 F.2d 1423 (11th Cir. 1985).

Although the Respondent returned all the leased trucks at the Louisville terminal to fellow Paladin affiliate CCL after ceasing operations there, the Respondent has not shown that it would be unduly burdensome for it to reacquire a sufficient number of trucks to restore its operations at the Louisville terminal. CCL transferred most of those trucks (40 of 44) to the Respondent's other terminals or other Paladin affiliates and can therefore transfer those trucks back to the Louisville terminal. The Board has previously found that restoration orders were not unduly burdensome in similar circumstances. *See, e.g.*, *Joy Recovery Technology Corp.*, 320 NLRB 356, 356 fn. 4, 370 (1995) (restoration of an unlawfully closed transportation department was not unduly burdensome where the employer could "readily reacquire its leased out equipment"), enfd. 134 F.3d 1307 (7th Cir. 1998); *Electronic Data Systems Corp.*, 305 NLRB 219, 263 (1991) (restoration of an unlawfully closed courier operation was not unduly burdensome where the employer could direct its wholly owned subsidiary to whom it had leased the vehicles previously used by the courier operation "to return the remaining vehicles . . . plus the additional vehicles [the subsidiary]

ha[d] acquired"), remanded in relevant part on other grounds 985 F.2d 801 (5th Cir. 1993); *Mid-South Bottling Co.*, 287 NLRB 1333, 1349 (1988) (restoration of the unlawfully closed distribution facility was not unduly burdensome where "much of the equipment, including trucks . . . ha[d] been sent to other facilities and could be transferred back to the [unlawfully closed facility]"), enfd. 876 F.2d 458 (5th Cir. 1989); *see also B & P Trucking*, 279 NLRB 693, 703 (1986) (restoration of an unlawfully closed trucking operation was not unduly burdensome where the employer "had leased its tractors before and could do so again"), affd. mem. sub nom. *NLRB v. Strassburger*, 815 F.2d 713 (8th Cir. 1987). Moreover, the Respondent has not shown, or even asserted, what expenses it would incur if the trucks were transferred back to the Louisville terminal. *See Ferragon Corp.*, 318 NLRB 359, 362 fn. 16 (1995) (rejecting an employer's argument that restoration of an unlawfully closed operation would be unduly burdensome because the employer "introduced no evidence as to the amounts of [income from rent and referrals] that it would lose if the [unlawfully closed] operation were restored and whether those amounts would be significant"), enfd. mem. 88 F.3d 1278 (D.C. Cir. 1996); *see also Power Inc. v. NLRB*, 40 F.3d 409, 425 (D.C. Cir. 1994) (finding that the employer did not establish that restoration of its drilling operations would have been unduly burdensome where it failed to "cite evidence of the cost of leasing or purchasing drills, or show that the cost, whatever it may be, would require a disproportionate capital outlay or cause undue financial hardship").[66]

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66 The Respondent entered into evidence a 2021 capital expenditures budget that it had prepared prior to the closure of

Likewise, the Respondent has not shown that a restoration order would be unduly burdensome here because it has subleased the Louisville terminal building. When the Respondent subleased the building in September 2021, it was on notice from both the April 15, 2021 consolidated complaint and the May 25, 2021 second consolidated complaint that the General Counsel was seeking restoration of the Respondent's operations at the Louisville terminal as they existed on December 9, 2020, to remedy the unfair labor practices alleged in the complaint. The Board has previously ordered restoration of an employer's operations at an unlawfully closed facility where the employer was on notice that the General Counsel was seeking a

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the Louisville terminal. This budget projected that Paladin would be able to defer almost $5 million in capital expenditures through the transfer of equipment from the Louisville terminal to other Paladin facilities if Kroger did not renew the KDC agreement. Even assuming that this projection was ultimately accurate, the Respondent has not shown that such an investment in equipment resulting from a restoration order here would be out of line with Paladin's typical capital expenditures, as Paladin budgeted more than $31 million for capital expenditures in 2021. *See Mid-South Bottling*, 876 F.2d at 462 (finding that the cost to rehabilitate the unlawfully closed facility did not make a restoration order unduly burdensome where "[t]he investment involved . . . [was] not shown to be out of line with the typical capital investments that the [employer made] for its facilities"). And, in any event, Paladin would not have been able to defer those capital expenditures if the Respondent had not unlawfully ceased operations at the Louisville terminal. *See Ferragon*, 318 NLRB at 362 fn. 16 (rejecting an employer's claim that "it would be unduly burdensome to restore [its unlawfully closed] operation because it would have to hire a new manager and support staff, renew longterm leases, and redeposit $30,000 with [the company from whom it leased trucks]," given that the employer "took these steps when it started up [that] operation and, but for its unlawful conduct, would not be required to repeat them now").

restoration order at the time that the employer entered into an agreement to sell the unlawfully closed facility because an employer "should not be able to knowingly benefit from its unlawful conduct." *Westchester Lace, Inc.*, 326 NLRB 1227, 1245 (1998); *see also Mid-South Bottling*, 876 F.2d at 462 fn. 5 (finding that where an unlawfully closed facility has deteriorated because of an employer's neglect, the employer "should not be allowed to profit from its failure to prevent further destruction during the delay brought about by its unsuccessful appeal"). We find that the same principle applies where, as here, an employer subleases an unlawfully closed facility when it is on notice that the General Counsel is seeking a restoration order. Moreover, the Respondent has not shown what the cost would be for it to break the sublease agreement or to lease a new facility. *See Ferragon Corp.*, 318 NLRB at 362 fn. 16.

In sum, while we do not claim that restoration of the operations at the Louisville terminal will be cost free, we find that the Respondent—which, as discussed above, has not specifically addressed this issue at any point in these proceedings—has simply failed to meet its burden of proving that those costs would be unduly burdensome. Thus, a restoration order is appropriate here, as "it is not inconsistent with the Respondent's burden to remedy the unfair labor practices found in this case for it to bear the cost or any hardship resulting from the restoration of the status quo, as long as the hardship is not unduly burdensome." *Joy Recovery Technology*, 320 NLRB at 356 fn. 4.

Aside from the potential costs to the Respondent associated with a restoration order, we recognize that the Louisville terminal exclusively serviced Kroger pur-

suant to the KDC agreement and that the Respondent has resigned from that agreement. We obviously cannot require Kroger to return to the Respondent the work that the Respondent previously performed under the KDC agreement. However, the Board has found that the loss of clients does not preclude a restoration order because "[w]hen the Board orders the restoration of the status quo ante, it is understood that the order means as far as possible, given the economic realities faced by the employer at the time of compliance." *We Can, Inc.*, 315 NLRB 170, 175 (1994) (internal quotations omitted). In *We Can*, the Board recognized that, even after a good-faith effort, the employer might not have been able to attract enough clients to restore its collection network to its size before the employer unlawfully reduced it. *See id.* Thus, the Board specified that the employer would "be in compliance with [the] reinstatement order if it reinstate[d] as many of the discharged employees . . . as [were] needed to serve the clients it ha[d] been able to attract and retain." *Id.* For the sake of clarity during the compliance stage of these proceedings, we will similarly qualify the Respondent's reinstatement obligation below.[67]

Accordingly, having found that the Respondent violated Section 8(a)(3) and (1) by ceasing operations

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[67] We do not think that it is unrealistic that the Respondent will be able to attract and retain at least some of the work that it previously performed at the KDC. The relationship between Kroger and the Respondent was not limited to the KDC, as the Quickway Group generates approximately 75 to 80 percent of its revenue from services provided to Kroger and uses nine of its terminals to service Kroger exclusively. Further, at some terminals, Quickway Group affiliates service Kroger without a formal contract.

at its Louisville terminal and discharging all its unit employees and violated Section 8(a)(5) and (1) by failing to give the Union notice and an opportunity to bargain regarding its decision to do so, we shall order the Respondent to, within a reasonable period of time, reopen and restore its business operations at the Louisville terminal as they existed on December 9, 2020.[68] Further, we shall order the Respondent to offer full reinstatement to the unlawfully discharged unit employees to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, to the extent that their services are needed at the Louisville terminal to perform the work that the Respondent is able to attract and retain from Kroger or new customers after a good-faith effort, giving preference to the unit employees in order of seniority. We shall require the Respondent to offer reinstatement to any remaining unit employees to any positions in its existing operations that they are capable of filling, with appropriate moving expenses, giving preference to the remaining unit employees in order of seniority. In the event of the unavailability of jobs sufficient to permit the reinstatement of all unit employees, the Respondent shall place any unit employees for whom jobs are not now available on a preferential hiring list for any future vacancies that may occur in positions in its existing operations that they are capable of filling.

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[68] At the compliance stage of these proceedings, the Respondent will have the opportunity to introduce evidence that was not available at the time of the unfair labor practice hearing to demonstrate that this restoration order would be unduly burdensome. *See Lear Siegler*, 295 NLRB at 861-862.

Additionally, we shall order the Respondent to make the unlawfully discharged unit employees whole for any loss of earnings and other benefits suffered as a result of their discharges. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with our decision in *Thryv, Inc.*, 372 NLRB No. 22 (2022), the Respondent shall also compensate these employees for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful discharges, including reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceed interim earnings. Compensation for these harms shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, *supra.* Further, we shall order the Respondent to compensate the unlawfully discharged unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards and to file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s). *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016). In accordance with our decision in *Cascades Containerboard Packaging—Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021), we shall order the Respondent to file with the Regional Director for Region 9 copies of the unlawfully discharged unit employees' corresponding W-2 form(s) reflecting the backpay awards. We shall also

order the Respondent to remove from its files any references to the unlawful discharges and to notify the employees in writing that this has been done and that the unlawful discharges will not be used against them in any way.

Because the Respondent closed the Louisville terminal before appropriate bargaining occurred with the newly certified Union and in order to ensure that the unit employees will be accorded the statutorily prescribed services of their selected bargaining agent for the period provided by law, we shall order a 12-month extension of the certification year from the time that the Respondent begins to bargain in good faith pursuant to *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962). *See Lear Siegler*, 295 NLRB at 872 (ordering a 12-month extension of the certification year as part of a restoration order where an employer violated Section 8(a)(3) by ceasing production operations at one plant, transferring those operations to another plant, and laying off all its production employees); *Mid-South Bottling*, 287 NLRB at 1350 (ordering a 12-month extension of the certification year as part of a restoration order where an employer violated Section 8(a)(3) by closing a facility and transferring that facility's operations elsewhere and Section 8(a)(5) by failing to bargain over that decision). "An extension of the certification year is warranted where an employer 'has refused to bargain with the elected bargaining representative during part or all of the year immediately following the certification' and as a result 'has taken from the Union the opportunity to bargain during the period when [u]nions are generally at their greatest strength.'" *Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98, slip op. at 23 (2018) (quoting

Northwest Graphics, Inc., 342 NLRB 1288, 1289 (2004), enfd. mem. per curiam 156 F. App'x 331 (D.C. Cir. 2005)) (alteration in original), enfd. mem. No. 18-1187 consolidated with 18-1217, 2019 U.S. App. LEXIS 13055 (D.C. Cir. Apr. 30, 2019). Given the circumstances here—where the Respondent recognized the Union as the Louisville drivers' exclusive collective-bargaining representative for less than 5 weeks before it unlawfully ceased operations at the Louisville terminal and had only one bargaining session with the Union—we find that a 12-month extension of the certification year is necessary to ensure that the Union receives the 1-year period of good-faith bargaining to which it is entitled. The parties simply did not have the opportunity to make meaningful progress toward a collective-bargaining agreement before the Respondent unlawfully closed the Louisville terminal and discharged the entire bargaining unit. *See Sunbelt Rentals, Inc.*, 370 NLRB No. 102, slip op. at 5 (2021) (ordering a 12-month extension of the certification year where the employer "effectively denied the [u]nion its full opportunity to bargain during the entirety of the certification year" even though "the parties seemed to make progress in negotiations during three meetings"); *Fallbrook Hospital*, 360 NLRB 644, 645 (2014) (ordering a 12-month extension of the certification year where an employer "effectively precluded any meaningful bargaining for virtually the entire certification year"), enfd. 785 F.3d 729 (D.C. Cir. 2015); *see also Glomac Plastics, Inc.*, 234 NLRB 1309, 1309 fn. 4 (1978) (holding that the Board may "order, under proper circumstances, a complete renewal of a certification year, even in cases where there has been good-faith bargaining in the prior certification year"), enfd. 592 F.2d 94 (2d Cir. 1979).

The United States Court of Appeals for the District of Columbia Circuit has recognized that an extension of the certification year is "a standard remedy when an employer's refusal to bargain has consumed all or a substantial part of the original post-election certification year." *Veritas Health Services v. NLRB*, 895 F.3d 69, 80 (D.C. Cir. 2018); *see also Electrical Workers Local 2338 v. NLRB*, 499 F.2d 542, 544 (D.C. Cir. 1974) (explaining that an extension of the certification year "is designed to make up to the union any opportunity lost by it to reach agreement during the certification year by reason of dilatory tactics on the part of the employer . . . and [has been] recognized by the courts as an appropriate addition to the Board's arsenal of remedies"). However, another line of D.C. Circuit cases requires the Board to justify, on the facts of each case, the imposition of an affirmative bargaining order, which the D.C. Circuit views as an extraordinary remedy and has defined as an order to bargain for a reasonable period of time that is accompanied by a decertification bar. *See*, *e.g.*, *Vincent Industrial Plastics, Inc. v. NLRB*, 209 F.3d 727, 738-739 (D.C. Cir. 2000); *Lee Lumber & Building Material Corp. v. NLRB*, 117 F.3d 1454, 1460-1462 (D.C. Cir. 1997); *Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243, 1248-1249 (D.C. Cir. 1994). In *Vincent Industrial*, the court summarized its requirement that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' § 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act." 209 F.3d at 738. Although we do not believe that this latter line of cases

is applicable when the Board orders an extension of the certification year—and although we disagree with the D.C. Circuit's requirement to justify, on the facts of each case, the imposition of an affirmative bargaining order for the reasons set forth in *Caterair International*, 322 NLRB 64 (1996)—we nevertheless have examined the particular facts of this case and find that a balancing of the three factors warrants extending the certification year by 12 months, which carries with it a decertification bar for that limited period.

(1) The 12-month extension of the certification year and its accompanying 12-month decertification bar in this case vindicate the Section 7 rights of the unit employees who were denied the benefits of collective bargaining during the initial certification year because of the Respondent's unlawful cessation of operations at the Louisville terminal. As discussed above, the Respondent unlawfully closed the Louisville terminal and discharged all the unit employees less than 5 weeks after it first recognized the Union as the unit employees' representative, and the parties held only one bargaining session during that brief period of recognition. By this unlawful conduct, the Respondent denied the Union the opportunity to bargain on behalf of the unit employees for most of the period during which unions are generally at their greatest strength and prevented the parties from making meaningful progress toward reaching a collective-bargaining agreement. The Respondent's unlawful conduct completely undermined the collective-bargaining process, defeating the policy behind the special status given to the Union during the certification year, a status meant to ensure that the parties' bargaining relationship will

be allowed to function free from distraction for the full certification year. Moreover, because of the ensuing litigation over the Respondent's unfair labor practices—which to date has lasted more than 2 years—it would be unrealistic to think that the parties could pick up exactly where they left off when the Respondent ceased operations at the Louisville terminal in December 2020. Rather, the Union needs time to reestablish its representative status with the unit employees. Because the Union did not receive a 12-month opportunity to reach an overall collective-bargaining agreement with the Respondent, it is only by requiring the Respondent to bargain with the Union for 12 months—without the threat of decertification hanging over the Union—that the unit employees will be afforded the benefits of the 12 months of bargaining to which they were entitled by virtue of exercising their Section 7 rights to select the Union as their exclusive collective-bargaining representative.

At the same time, extending the certification year by 12 months, with its accompanying 12-month bar to raising a question concerning the Union's continuing majority status, does not unduly prejudice the Section 7 rights of employees who may oppose continued representation by the Union because the duration of the order is no longer than is reasonably necessary to remedy the ill effects of the Respondent's unfair labor practices. Indeed, if the Respondent had abided by the Act and refrained from committing any unfair labor practices, any employee who wished to remove the Union would have had to wait until after the expiration of the certification year to do so. Accordingly, the 12-month decertification bar that accompanies the 12-month extension of the certification year in this case

does not put the employees in any worse position than they would have occupied had the Respondent not violated the Act. Moreover, it is only by restoring the status quo ante and requiring the Respondent to bargain in good faith with the Union for 12 months that the employees will be able to fairly assess the Union's effectiveness as a bargaining representative in an atmosphere free of the Respondent's unlawful conduct. The employees can then determine whether continued representation by the Union is in their best interest.

(2) The 12-month extension of the certification year and its accompanying 12-month decertification bar serve the purposes and policies of the Act by fostering meaningful collective bargaining and industrial peace and by removing the Respondent's incentive to delay bargaining in the hope of discouraging support for the Union. Such an order ensures that the Union will be afforded the full 12-month period to bargain to which it was entitled and will not be pressured by the prospect of a decertification petition or an imminent withdrawal of recognition to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charges and issuance of a cease-and-desist order. Without the 12-month extension of the certification year and its accompanying 12-month decertification bar, the Respondent's unlawful conduct will be rewarded and the purposes and policies underlying the certification-year rule will be undermined.

(3) A cease-and-desist order alone would be inadequate to remedy the Respondent's violations because it would not return the parties to the status quo. While a cease-and-desist order requires the offending

employer to bargain, it does so in a context outside the protective range of the 1-year conclusive presumption afforded to the certified representative. Had the Respondent not unlawfully ceased operations at the Louisville terminal and discharged all the unit employees, it would have been precluded from questioning the Union's majority status and withdrawing recognition for 12 full months even if every unit employee had signed a disaffection petition. The 12-month decertification bar accompanying the extension of the certification year here simply affords the Union the same protection it should have rightfully enjoyed during its first year following certification. In other words, if we were to refrain from imposing the limited decertification bar, we would permit the Respondent to frustrate the core purpose of the protected period by ceasing operations at the Louisville terminal and discharging the entire unit. And this could encourage similar violations by employers that wish to rid themselves of the very unions that their employees have chosen to represent them for the purposes of collective bargaining through the congressionally sanctioned process of a secret-ballot election. Moreover, a cease-and-desist order alone would allow for a challenge to the Union's majority status before the taint of the Respondent's unlawful conduct has dissipated and before the unit employees have had a reasonable time to regroup and bargain through their chosen representative to reach an initial collective-bargaining agreement. The Respondent's unlawful cessation of operations at the Louisville terminal will likely have a continuing effect, thereby tainting any employee disaffection from the Union arising immediately following the Respondent's restoration of operations there. We find that these circumstances outweigh the

temporary impact that the 12-month extension of the certification year and its accompanying 12-month decertification bar will have on the rights of employees who oppose continued union representation.

For all the foregoing reasons, we find that the 12-month extension of the certification year with its accompanying 12-month decertification bar is necessary to fully remedy the violations in this case.

Finally, to inform the affected employees of the outcome of these proceedings in a timely manner, we shall order that the Respondent, in addition to posting copies of the attached notice after the restoration of its operations at the Louisville terminal, mail a copy of that notice to the last known addresses of its former employees at the Louisville terminal who were employed by the Respondent at any time since July 27, 2019.

ORDER

The National Labor Relations Board orders that the Respondent, Quickway Transportation, Inc., Louisville, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with closure of its terminal in Louisville, Kentucky (Louisville terminal) if they select General Drivers, Warehousemen and Helpers, Local Union No. 89, affiliated with the International Brotherhood of Teamsters (the Union) as their representative.

(b) Instructing employees to provide it with a list of employees who are involved in the Union's organizing campaign or who support the Union.

(c) Threatening employees that it will lose its contract with The Kroger Company and be forced to discharge all the employees at the Louisville terminal if employees select the Union as their representative.

(d) Threatening employees that it will cease making contributions to employees' ESOP accounts if they select the Union as their representative.

(e) Threatening employees with legal action because they file unfair labor practice charges.

(f) Coercively interrogating employees about their union activities.

(g) Ceasing operations at the Louisville terminal and discharging all the employees in the bargaining unit for antiunion reasons and to chill unionism at its other terminals and at other affiliates of Paladin Capital, Inc. in circumstances where such a chilling effect is reasonably foreseeable.

(h) Failing and refusing to provide the Union notice and an opportunity to bargain regarding its decision to cease operations at the Louisville terminal and discharge all the unit employees and the effects of that decision.

(i) In any like or related manner interfering with, restraining, or coercing employees in

the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within a reasonable period of time, reopen and restore its business operations at the Louisville terminal as they existed on December 9, 2020.

(b) Following the restoration of its operations at the Louisville terminal, offer the unlawfully discharged unit employees full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, to the extent that their services are needed at the Louisville terminal to perform the work that the Respondent is able to attract and retain from The Kroger Company or new customers after a good-faith effort, giving preference to the unit employees in order of seniority. Offer remaining unit employees reinstatement to any positions in its existing operations that they are capable of filling, with appropriate moving expenses, giving preference to the remaining unit employees in order of seniority. In the event of the unavailability of jobs sufficient to permit the reinstatement of all unit employees, place unit employees for whom jobs are not now available on a preferential hiring list for any future vacancies that may occur in positions in its existing operations that they are capable of filling.

(c) Make the unlawfully discharged unit employees whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms suffered as a result of the discrimination against them, in the manner set forth in the amended remedy section of this decision.

(d) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s) for each employee.

(e) File with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter, notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(g) Recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the follow-

ing appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time drivers employed by the Respondent at its 2827 S. English Station Road, Louisville, Kentucky facility and its subterminals located in Versailles and Franklin, Kentucky, excluding all office clerical employees, temporary employees, professional employees, guards and supervisors, as defined by the National Labor Relations Act (Act).

The certification year is extended for an additional 12 months from the date that the Respondent begins to bargain in good faith.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, duplicate and mail, at its own expense and after being signed by the Respondent's authorized representative, copies of the attached

notice marked "Appendix"[69] to the last known addresses of all employees who were employed by the Respondent at the Louisville terminal at any time since July 27, 2019. In addition to the mailing of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.

(j) Following the restoration of its operations at the Louisville terminal, post at the Louisville terminal copies of the attached notice marked "Appendix."[70] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Res-

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[69] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Mailed and Posted by Order of the National Labor Relations Board" shall read "Mailed and Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[70] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notice must be posted within 14 days after the restoration of operations at the Louisville terminal. If the facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]."

pondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(k) Within 21 days after service by the Region, file with the Regional Director for Region 9 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Gwynne A. Wilcox
Member

David M. Prouty
Member

(SEAL)

Dated, Washington, D.C. August 25, 2023

DISSENTING IN PART
MEMBER KAPLAN
(AUGUST 25, 2023)

NATIONAL LABOR RELATIONS BOARD

MEMBER KAPLAN, dissenting in part.

The Respondent operates trucking terminals. At the time of the events in this case, the Respondent operated a terminal in Louisville, Kentucky, that serviced only one customer: Kroger. Under its Carrier Services Agreement with Kroger, the Respondent transported bulk groceries and perishable items from a large warehouse in Louisville—the Kroger Distribution Center—to hundreds of Kroger grocery stores across four states. In 2020, the Respondent's Louisville drivers chose Teamsters Local 89 (Local 89 or the Union) as their collective-bargaining representative. Local 89 also represents drivers employed by Transervice Logistics, which also transports goods from the Kroger Distribution Center to Kroger stores, as well as the warehouse workers, employed by Zenith Logistics, who staff the Kroger Distribution Center. The collective-bargaining agreements covering Transervice Logistics' drivers and Zenith Logistics' warehouse workers give those employees the right to engage in sympathy strikes.

While negotiating in good faith with Local 89 for an initial collective-bargaining agreement covering its Louisville drivers, the Respondent received credible reports that Local 89 was planning to strike in three days if the Respondent did not accept its bargaining demands. One such report disclosed that if Local 89

struck the Respondent, Transervice Logistics' drivers and Zenith Logistics' warehouse workers would also strike, shutting down the Kroger Distribution Center. Kroger informed the Respondent that under no circumstances could the distribution center be shut down, and it issued the Respondent an ultimatum: either provide assurances that it would fulfill all its obligations under the Carrier Services Agreement, even if the Union struck, or terminate that agreement. Kroger gave the Respondent just 3 hours to respond. Because the Respondent could not provide Kroger those assurances, and because it had no choice, it asked Kroger to release it from the Carrier Services Agreement, and Kroger complied.[1] With no work for its Louisville drivers to perform, the Respondent closed its Louisville terminal and laid off the drivers.

The General Counsel alleged that by this conduct, the Respondent violated Section 8(a)(3), (5), and (1) of the Act. The administrative law judge dismissed the 8 (a)(3) allegation, finding that the Respondent's conduct was lawful under *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965). The judge also dismissed the 8(a)(5) allegation, as well as several 8(a)(1) allegations and an 8(a)(4) allegation that had been settled but were reinstated by the General Counsel on

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[1] Kroger demanded that the Respondent terminate the Carrier Services Agreement if it could not provide assurances of full performance, but that agreement did not give the Respondent the right to terminate it (except under contractually specified circumstances absent here). Only Kroger had the right to terminate the Carrier Services Agreement. Accordingly, the Respondent needed Kroger's cooperation to end their contractual relationship at the Kroger Distribution Center.

the basis of the alleged violations of Section 8(a)(3) and (5).

Under *Darlington*, an employer that closes part of its business for antiunion reasons violates Section 8(a)(3) if it is "motivated by a purpose to chill unionism in any of [its] remaining plants . . . and . . . the employer may reasonably have foreseen that such closing would likely have that effect." 380 U.S. at 275. Accordingly, the threshold issue in this case under *Darlington* is whether the Respondent closed the Louisville terminal for antiunion reasons. It did not. The Respondent closed the terminal because it had no work for its Louisville drivers to perform once the Carrier Services Agreement had been terminated, and the Carrier Services Agreement was terminated because the Respondent could not assure Kroger that it would be able to meet its obligations under that agreement if the Union struck, and Kroger's ultimatum left it no other choice. Accordingly, the Section 8(a)(3) claim fails at the very first step of the *Darlington* analysis. Although that analysis need proceed no further, I will also show that the closure of the Louisville terminal was not motivated by a purpose to chill unionism in any of the Respondent's remaining terminals. It was not so motivated because the Respondent was unaware of ongoing union activity at any other terminal, nor did it believe that union organizing at any other terminal was imminently intended.[2] Furthermore,

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[2] *See Darlington Mfg. Co.*, 165 NLRB 1074, 1084 (1967) (inferring a purpose to chill unionism at other plants absent ongoing union activity based on "a strong employer belief that the union [was] intending imminently to organize the employees in his other operations"), enfd. 397 F.2d 760 (4th Cir. 1968), cert. denied 393 U.S. 1023 (1969).

the Respondent's decisions to terminate the Carrier Services Agreement and close the Louisville terminal were exempt from bargaining under *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), and therefore the Respondent did not violate Section 8(a)(5) by making those decisions unilaterally. And because the Respondent did not violate Section 8(a)(3) or (5), the settlement agreements that resolved the earlier 8(a)(1) and (4) allegations should not have been set aside and must be reinstated.

My colleagues reach opposite conclusions on each of these issues. They find that the Respondent violated Section 8(a)(3) under *Darlington* and also Section 8(a)(5). They uphold the General Counsel's decision to set aside the settlement agreements, and they find merit in the previously settled 8(a)(1) and (4) allegations. They also find that the Respondent coercively interrogated employees about their union activities, even though the record is silent regarding what the Respondent asked those employees and the circumstances under which the allegedly unlawful questioning occurred. Because my colleagues' findings are neither supported by the record nor based on settled law, I respectfully dissent in relevant part.[3]

Facts

Respondent Quickway Transportation, Inc. (the Respondent or Quickway) is a commercial motor

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[3] I join my colleagues in reversing the judge's finding that the Respondent violated Sec. 8(a)(1) by condoning prior surveillance of employees' union activities and sanctioning further surveillance. In doing so, however, I do not join them in questioning the soundness of *Resistance Technology*, 280 NLRB 1004 (1986), affd. mem. 830 F.2d 1188 (D.C. Cir. 1987).

carrier. It is one of three trucking companies that together comprise the Quickway Group, the other two being Quickway Services, Inc. and Quickway Carriers, Inc. The Quickway Group operated 17 terminals nationwide, 13 of which—including the now-closed Louisville terminal—were operated by the Respondent. Seven of those 13 terminals serviced Kroger exclusively, and 75 to 80 percent of the Respondent's revenue is generated by its business with Kroger. The Quickway Group companies are affiliated with Paladin Capital, Inc. (Paladin). William Prevost is the chief executive officer of Paladin and each of its affiliates, including the Respondent. Joe Campbell is Paladin's president and chief operating officer. Chris Cannon is vice president of operations for Quickway Group.

Various Teamsters locals represent drivers at four Quickway Group terminals: Quickway Services' terminal in Livonia, Michigan (Teamsters Local 164), Quickway Carriers' terminals in Lynchburg, Virginia (Teamsters Local 171), and Shelbyville, Indiana (Teamsters Local 135), and the Respondent's terminal in Landover, Maryland (Teamsters Local 639). At one time, the drivers at the Respondent's Indianapolis, Indiana terminal were represented by Teamsters Local 135, but the Indianapolis drivers decertified Local 135 in 2008. Local 135 subsequently mounted another organizing campaign among Quickway's Indianapolis drivers. That campaign culminated in a November 2019 election, which Local 135 lost.

The Respondent employed 60-70 drivers at its Louisville terminal. It leased trucks from Capital City Leasing (CCL), also a Paladin affiliate, with which it shared the Louisville terminal. The Respondent and

CCL jointly leased the Louisville terminal from a third party. The lease has a 10-year term, ending August 31, 2024. CCL employed several mechanics, who maintained and repaired Quickway's leased trucks and performed similar services for other customers. As described more fully below, the Respondent ceased doing business at its Louisville terminal on December 9, 2020, and CCL closed its truck-repair business soon after.[4] The terminal was sublet in September 2021.

Before it closed the Louisville terminal, Quickway provided outbound delivery of bulk grocery items, including frozen foods and perishable groceries, from the Kroger Distribution Center (KDC) in Louisville to 242 Kroger grocery stores across four states.[5] It did so under the terms of the Dedicated Contract Carrier Services Agreement (CSA) by and between Kroger Limited Partnership I and Quickway Logistics, Inc., effective February 3, 2018, through February 3, 2021.[6] The CSA obligated the Respondent to "transport and deliver" goods "to and between those points designated by" Kroger "as required by" Kroger. Under its terms, the Respondent guaranteed its capacity to meet Kroger's forecasted demand up to the Respondent's capacity limit, but the CSA permitted Kroger to order

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[4] All dates hereafter are in 2020 unless stated otherwise.

[5] Quickway also provided limited inbound service to the KDC from Empire Meat Packing in Mason, Ohio.

[6] Quickway Logistics is not part of the Quickway Group. It is a separate entity that brokers freight to various carriers. The Respondent contracts with Quickway Logistics, and through that contract it was bound to the CSA.

shipments in excess of that capacity limit.[7] Quickway was Kroger's secondary dedicated carrier at the KDC. Transervice Logistics (Transervice) was Kroger's primary dedicated carrier, and an addendum to the CSA provided that "[e]very load" to be transported by Quick-way from the Louisville KDC "is assigned by Transervice." Accordingly, Kroger directed its shipment orders to Transervice, which kept some for itself and assigned others to Quickway. Nothing in the CSA expressly limited the number of loads Transervice could assign to Quickway up to its capacity limit. The CSA made Quick-way "responsible and liable for equipment security and cargo integrity at all times when cargo [was] in [Quickway's] possession." The CSA contained a *force majeure* clause, which released the parties from liability for any failure to meet contractual obligations resulting from causes beyond their control, such as "wars" or "civil disturbances," but the clause excluded from such causes "labor unrest or strikes." The CSA permitted Kroger to terminate the CSA without cause on 30 days' notice, but it allowed termination by Quickway only for certain stated causes, none of which was present during the events at issue here.

Zenith Logistics (Zenith) staffs the warehouse operations at the KDC. Teamsters Local 89 represents Transervice's drivers and Zenith's warehouse employees. Transervice and Zenith have separate collective-bargaining agreements with Local 89, covering approx-

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[7] An addendum to the CSA provided that "[s]hipments tendered in excess of the forecast or beyond the capacity limit may still be moved by the Carrier," *i.e.*, by Quickway. Accordingly, the CSA contemplated that Kroger could place shipment orders that would exceed Quickway's capacity limit.

imately 120-140 drivers and approximately 600 warehouse employees, respectively. These agreements preserve the unit employees' right to engage in sympathy strikes. In June 2019, Local 89 began a campaign to organize the Respondent's Louisville drivers as well.

The Respondent operates a terminal in Murfreesboro, Tennessee, and its Murfreesboro drivers occasionally picked up loads at the KDC. On May 28, Quickway Group Vice President Cannon instructed several managers to "disconnect any and all Murfreesboro drivers from picking up loads from the KDC" because "[a]ny Murfreesboro driver that comes on the lot at the KDC is being approached by the union, and we certainly do not want the union to infect our Murfreesboro fleet." Local 89's geographical jurisdiction does not include Tennessee or any portion of Tennessee. The Respondent's Murfreesboro terminal is within the geographical jurisdiction of Teamsters Local 480, which is headquartered in Nashville.[8]

Local 89's campaign among the Respondent's Louisville drivers culminated in a mail-ballot election that began in May and concluded in June. The ballots were opened and counted on June 22. That day, Kroger Vice President for Supply Chain Operations

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[8] I take administrative notice of this fact and of the fact that Murfreesboro is 35 miles from Nashville.

Charges were filed alleging that the Respondent violated Sec. 8 (a)(1) and (4) during Local 89's organizing campaign among the Respondent's Louisville drivers. Those charges were settled, and the settlement agreements contained non-admission clauses, which stated that the Respondent did not admit that it had violated the Act in any way. Because the settlement agreements contained non-admission clauses and should be reinstated, I will not repeat these 8(a)(1) and (4) allegations.

Joe Obermeier emailed Cannon to ask if there was "[a]ny news yet." Cannon replied: "We just finished the [teleconference] and the counting of the votes. There were 42 ballots cast. 17 NO votes and 25 YES votes. Our Louisville drivers have voted the union in." Obermeier asked Cannon about "potential next steps." Cannon answered: "The board agent (NLRB) will mail out the certifications within a week and either side has one week to challenge. Beyond that I will need to get with my counsel to address the next steps which should be nothing more than scheduling a time to start negotiations with local 89." Also on June 22, Paladin President and COO Campbell emailed CEO Prevost and Paladin Director of Human Resources Randy Harris concerning the results of the election. Campbell called the results a "[t]ough blow" and expressed surprise and disappointment at Local 89's margin of victory, but he went on to say that the Respondent would "establish the right process and engagement with the [Louisville] Teamsters/team members as we negotiate the contract." Anticipating the risk of a strike, Prevost emailed Cannon and Harris on June 23 to suggest the possibility of "get[ting] Kroger" to contract with a towing company to "shuttle our loads to our yard," *i.e.*, from the KDC to the Louisville terminal. "That should prevent the ponies"— *i.e.*, Teamsters Local 89—"from picketing at the [K]DC," Prevost opined.

The Respondent opened a new terminal in Hebron, Kentucky, in October.[9] One month earlier, Donald Hendricks, a disgruntled former dispatcher at the

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[9] I take administrative notice that Hebron, Kentucky, is 95 miles from Louisville.

Louisville terminal, sent an email to Cannon and two other managers with the subject line, "Teamsters is coming for Hebron!" in which he claimed that he would be "responsible for Hebron," *i.e.*, for organizing Hebron's drivers. Hendricks was not employed by Local 89, and there is no evidence that he was acting as its agent when he sent this email.

Postelection Board proceedings in the representation case ended on October 26, when the Board denied the Respondent's request for review of the Regional Director's decision overruling Quickway's election objections. On October 27, the Union asked Quickway for available dates for collective bargaining. On November 6, Quickway responded with proposed dates. The Respondent and Local 89 held their first bargaining session on November 19, during which they reached tentative agreement on a number of issues. Although neither party presented a proposal on economics at their initial meeting, Local 89 President Fred Zuckerman said at that meeting that the Union intended to maintain the area standards already in place at the KDC. Specifically, Zuckerman told the Respondent's negotiators that he was "very adamant about the area standards." Previously, in August, CEO Prevost and Quickway Group Vice President Cannon told Kroger that they did not think the Respondent could agree to terms similar to those in Local 89's contract with Transervice. The next bargaining session between the Respondent and Local 89 was scheduled for December 10. In advance of that session, Local 89 requested certain information, which the Respondent promptly furnished.

While the Respondent was preparing for the December 10 bargaining session, Local 89—unbe-

knownst to the Respondent—was obtaining approval from the International Union to provide strike benefits, both for the Respondent's drivers and for Transervice drivers and Zenith warehouse employees who would choose to exercise their contractually protected right to engage in a sympathy strike in the event Quickway's drivers struck. On December 6, Local 89 convened a meeting of Quickway member drivers to hold a strike-authorization vote. The Union told the members that if there was a strike, Transervice's drivers and Zenith's warehouse workers would refuse to cross the picket line. All drivers present at the December 6 meeting voted to authorize Local 89 to call a strike. That same day, ex-dispatcher Hendricks sent emails to several media outlets, including Louisville television stations WHAS11 and WDRB, concerning a planned strike by the Respondent's Louisville drivers and a sympathy strike by Transervice's drivers and Zenith's warehouse employees.

The next morning, December 7, Cannon received a phone call from Tony Bruce, Kroger's Louisville supply chain manager. Bruce informed Cannon that Kroger had received a media inquiry regarding a planned strike by Quickway's Louisville drivers. After the call, Kroger forwarded to Cannon the email it had received from WHAS Channel 11 News, in which the TV station asked Kroger for a statement on a possible strike later that week if Quickway failed to reach a collective-bargaining agreement with Local 89. Cannon contacted Quickway's attorney, Michael Oesterle, and they discussed the possibility of establishing a reserved gate in case Quickway's drivers struck so that Transervice drivers and Zenith warehouse employees would still have access to the KDC.

At that time, Cannon and Oesterle had not yet seen the message that Hendricks had sent to the television stations, so they were unaware that the message also threatened a sympathy strike by Transervice and Zenith employees.

Early in the afternoon of December 7, Louisville TV station WDRB shared with Kroger the message it had received from Hendricks the day before, which is reproduced here verbatim:

> On October 26, 2020, truck drivers for Quickway Carriers, a contract carrier for Kroger grocery stores, located at 2827 S. English Station Rd., Louisville, KY had their majority vote to unionize with Teamsters local 89 as their representative was formally recognized. This was after a nearly a year of stalling and retaliatory practice implemented by Quickway Carriers against their employees.
>
> To date the company has not negotiated in good faith and 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.
>
> The next meeting between Teamsters Local 89, Drivers and company officials will be held at the Hilton Garden Inn 2735 Crittenden Dr. Louisville, KY staring at 0800 on December 10, 2020. At the conclusion of this meeting if company officials refuse to ratify a contract Quickway Carrier Truck Drivers in Louisville will strike.
>
> In recognition, the Teamsters Local 89 Truck

> Drivers and Warehousemen who work for Transervice and Zenith Logistics which are responsible for the majority of the Kroger Transportation and 100% of warehouse operations will also strike in support of Quickway Carrier drivers.
>
> THIS WILL SHUT DOWN KROGER DISTRIBUTION OPERATIONS IN THEIR ENTIRETY.

During a conference call involving, among others, Cannon, Paladin President and COO Campbell, and Kroger personnel, the participants discussed various mitigation measures in the event the Union struck on December 10. After this call, Kroger forwarded to Cannon a copy of the message it had received from WDRB, and Cannon shared it with Attorney Oesterle. Alarmed by specific and accurate details contained in the message, Cannon and Oesterle reviewed Local 89's contract with Transervice to determine whether there was a genuine risk of a sympathy strike. They learned that there was: the contract preserved Transervice drivers' right to refuse to cross a picket line. Cannon suspected and subsequently confirmed that workers staffing the KDC had the same right under Local 89's contract with Zenith. Given these realities, Cannon and Oesterle concluded that it would be pointless to establish a reserved gate. Cannon then informed Prevost, Campbell, and Tony Bruce that the Union could shut down the KDC entirely, as the message sent by WDRB portended.

Another conference call with Kroger took place at 9 a.m. on December 8. This time, the discussion was led by Kroger Vice President of Supply Chain Operations Obermeier. Obermeier said that under no cir-

cumstances could the KDC be shut down, and that the situation was Quickway's problem and Quickway had to fix it. Cannon voiced his doubts about the effectiveness of any mitigation measures and suggested that an early termination of the CSA might be the only viable alternative. Obermeier replied that he did not expect to hear that. Someone on the call from Kroger said, "That might bring up joint employer."

After this call, Cannon and Campbell met with Prevost and discussed the Respondent's potential liabilities if the Louisville drivers struck and Transervice's drivers and Zenith's employees struck in sympathy, shutting down the KDC. They estimated that if those events transpired and Quickway remained bound to the CSA, it would incur losses running into the millions of dollars. Meanwhile, Paladin's line of credit with its then-current lender, Regions Bank, was expiring on December 31. Campbell and Prevost were working to secure a new and substantially larger line of credit to cover the day-to-day operating costs of Paladin and its affiliates and to do so by the end of December. Paladin had a tentative agreement with Truist Bank for that new line of credit, but the agreement had not been finalized. Campbell and Prevost believed that if the Respondent remained bound to the CSA and the threatened strike and KDC shutdown came to pass, the losses this would inflict on Quickway and Paladin would complicate if not doom Paladin's chances of finalizing that line-of-credit agreement. All things considered, the Respondent concluded that an early termination of the CSA was its best option.

What happened next forced the Respondent's hand. At 2:03 p.m. on December 8, Obermeier emailed Prevost the following letter:

Bill,

On December 8, 2020 you informed Kroger Limited Partnership I that Quickway Logistics has serious doubts and concerns about Quickway's ability to meet its requirements and obligations under our non-exclusive February 3, 2018 carrier services [agreement] for any assignments of work made by Kroger in connection with the Louisville terminal.

As you know, continued supply and support operations are vital to Kroger. In the event that Quickway has not resolved its doubts and concerns, and to ensure continued support operations, Kroger is willing to consider waiving any applicable notice provisions for Quickway to terminate its carrier services agreement and Kroger can move forward. Please advise if you wish to pursue this alternative.

Otherwise, given the information you have provided us, Kroger is requesting that you immediately provide assurances that Quickway can and will meet all of its contractual commitments and obligations for any assignments Kroger may choose to make under the agreement.

Please advise on whether Quickway wishes to end the agreement or provide the requested assurances in writing by December 8, 2020 at 5:00 pm.

Sincerely,

Joe Obermeier

VP, Supply Chain Operations[10]

At the same time he emailed Prevost this letter, Obermeier telephoned Prevost. During their conversation, Prevost made it clear that the Respondent could not provide the assurances Obermeier was seeking. But Prevost also told Obermeier that the alternative Obermeier was proposing—that Kroger "waiv[e] any applicable notice provisions for Quickway to terminate" the CSA—was also impossible because the CSA did not give Quickway the right to terminate. Only Kroger could do so.[11] According to Prevost, Obermeier replied, "I'm not going to terminate you. You have to figure a way out."[12] Prevost asked why, and Obermeier said: "I don't want to be accused of being a joint employer in this situation."[13] Prevost reiterated that Kroger needed to help Quickway find a solution.

The next day, Prevost and Obermeier continued to search for a way to reach the conclusion both desired: termination of the CSA. At 7:50 a.m., Cannon emailed Obermeier a letter from Prevost "confirm[ing]" that Kroger had decided not to renew the CSA expiring February 3, 2021, and requesting, "[u]nder the circumstances," to be released from the CSA effective

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[10] At the unfair labor practice hearing, counsel for the Respondent asked Obermeier whether Quickway had asked him to write this letter. "No, sir," Obermeier answered.

[11] As noted above, the CSA permitted termination by Quickway only for specified causes, none of which existed in December 2020. Only Kroger had the right to terminate the CSA without cause on 30 days' notice (which Quickway could agree to waive).

[12] Obermeier also testified that he refused to terminate the CSA.

[13] Obermeier did not dispute Prevost's testimony in this regard.

December 9 at 11 p.m. At 10:07 a.m., Obermeier emailed a letter in reply. The letter contradicted Prevost's representation that Kroger had decided not to renew the CSA. "However," Obermeier continued, "Kroger is willing to accept your resignation effective today (December 9) at 23:00 as stated in your letter, and Kroger agrees to release Quickway immediately from the Carrier Services Agreement currently in place."[14]

That afternoon, Cannon informed Louisville Terminal Manager Jeff McCurry about the termination of the CSA and asked him to remove the Respondent's equipment from the KDC property. At 10 p.m., the Respondent notified the Union that it was terminating the CSA and would "cease all operations associated with [the KDC] at 11:00 p.m. today." The Respondent also emailed and texted the drivers that Louisville operations were ceasing.

The next day, December 10, the Respondent met with the Union as scheduled and informed it that, because operations had ceased at the Louisville terminal, it had permanently laid off the Louisville drivers as of 11 p.m. the evening before. The Respondent offered to bargain over the effects of its decision, but the Union declined and demanded that the parties continue negotiating a collective-bargaining agreement.

That same day, the Respondent dispatched a few drivers from its Indianapolis terminal to retrieve trailers from the KDC and from an overflow parking

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[14] Although Quickway could not and did not terminate the CSA, this was, in effect, what happened. Accordingly, for ease of reference, I will refer to what happened at 11 p.m. on December 9 as Quickway's termination of the CSA.

lot leased by Kroger at the Kentucky State Fairgrounds. Some of the laid-off Louisville drivers and a representative of Local 89 were picketing at the overflow lot. The picketers carried signs reading "Quickway on strike, Local 89." One of the Indianapolis drivers asked, "What is going on?" A picketer replied, "We are on strike."

One of the drivers dispatched from Indianapolis to the KDC was Lewis Johnston, a leader in Teamsters Local 135's 2019 Indianapolis campaign.[15] As noted above, that effort ended in a November 2019 election, which Local 135 lost. More than a year had passed since the 2019 election, and Johnston and a few other Indianapolis drivers were exploring the possibility of trying again. The credited evidence establishes that the Respondent was unaware of this nascent union activity at its Indianapolis terminal. Noticing that there were no Louisville drivers at the KDC, Johnston contacted one of them, who told him that Quickway had ceased operations in Louisville.

Also on December 10, Hendricks—the individual who had sent the KDC-shutdown threat to Louisville media outlets—exchanged text messages with Bryan Trafford, Local 89's lead organizer at Quickway's Louisville terminal. In the course of that exchange, Hendricks wrote Trafford: "I had already been in contact with the reporter when you asked me not to

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[15] Again, Local 135 used to represent Quickway's Indianapolis drivers, but it was decertified in 2008.

talk with them. The story was happening at that point. . . . "[16]

The Respondent returned its trucks to CCL. CCL sold four of them and leased the rest to other Paladin affiliates. CCL attempted but was unable to find sufficient customers to sustain its truck-repair business at the Louisville terminal. Consequently, it ceased operations at the Louisville terminal on February 12, 2021. On September 30, 2021, the Louisville terminal was sublet to another entity for the remainder of the lease term.

Discussion

A. The Respondent's Closing of the Louisville Terminal Was Lawful Under Darlington.

The General Counsel alleges, and my colleagues find, that the Respondent violated Section 8(a)(3) and (1) of the Act by closing the Louisville terminal. They are mistaken. To violate Section 8(a)(3) and (1) under *Darlington*, a partial closing must be undertaken for antiunion reasons. Because the record establishes that the Respondent did not close the Louisville terminal for antiunion reasons, the *Darlington* analysis ends there. But even where an employer closes part of its business for antiunion reasons, it does not violate Section 8(a)(3) unless it is "motivated by a purpose to chill unionism in any of [its] remaining plants" and it "may reasonably have foreseen that such closing would likely have that effect." *Darlington*, 380 U.S. at 275. Even assuming, however, that it were necessary to

16 Hendricks was apparently referencing the "story" that Local 89 was planning to shut down the KDC.

proceed beyond the first step of the *Darlington* analysis, I would still find that the Respondent did not violate Section 8(a)(3) because the evidence fails to support a reasonable inference that its decision to close the Louisville terminal was motivated by a purpose to chill unionism at any of its remaining terminals. Accordingly, the allegation that the Respondent violated Section 8(a)(3) must be dismissed.

1. The Louisville Terminal Was Closed for Nondiscriminatory Reasons, Not for Antiunion Reasons[17]

In *Darlington*, the Supreme Court set forth the following standard for determining whether an employer violates Section 8(a)(3) by closing part of its business:

> If the persons exercising control over a plant that is being closed for antiunion reasons (1) have an interest in another business, whether or not affiliated with or engaged in the same line of commercial activity as the closed plant, of sufficient substantiality to give promise of their reaping a benefit from the discouragement of unionization in that business; (2) act to close their plant with the purpose of producing such a result; and (3) occupy a relationship to the other business which makes it realistically foreseeable that

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17 In one section of their decision, my colleagues contend that the Louisville terminal was closed for antiunion reasons. In another section, they contend that the terminal was not closed for nondiscriminatory reasons. Because these arguments are closely related, I will address them together in this section. As I will show, both arguments are meritless.

> its employees will fear that such business will also be closed down if they persist in organizational activities, we think that an unfair labor practice has been made out.

380 U.S. at 275-276. Accordingly, as a threshold matter, a partial closing does not violate Section 8(a)(3) of the Act under *Darlington* if it is not undertaken for "anti-union reasons."

The Respondent did not close its Louisville terminal for antiunion reasons. As the facts set forth above plainly show, the decision to close the terminal was the inevitable consequence of its decision to terminate the CSA. And that decision, in turn, was driven by rapidly evolving events over the course of a few days in early December, beginning with a strike threat that portended a total shutdown of the KDC and culminating in an ultimatum from Kroger that left the Respondent no other viable choice.

Quickway and Local 89 had met for collective bargaining just once and had gotten off to a promising start when Kroger learned, and informed Quickway, that the local media had received a message indicating that unless Quickway accepted Local 89's demands at the parties' next bargaining session on December 10, Quickway's Louisville drivers would strike, Transervice's drivers and Zenith's warehouse workers staffing the KDC would join them, and the KDC would be entirely shut down. The message included specific, accurate details, which suggested that whoever sent the message possessed inside knowledge of Local 89's plans. That suggestion was confirmed by Quickway's discovery that Local 89's labor contracts with Transervice and Zenith gave the former's drivers and the latter's warehouse employees the right to refuse

to cross picket lines. And, in fact, Local 89 had secured authorization from the International Union to provide strike benefits, Quickway's Louisville drivers had voted to authorize a strike, and Local 89 had informed those drivers that Transervice's drivers and Zenith's warehouse employees staffing the KDC would also strike.

Further increasing the likelihood that the threatened strike would take place was Local 89 President Zuckerman's declaration, at the parties' first bargaining session, that Local 89 was "very adamant" about maintaining "area standards." In other words, Zuckerman intended to demand wages for Quickway's Louisville drivers comparable to those Local 89 had secured for Transervice's drivers. Cannon and Prevost had previously informed Kroger that they did not think Quickway could agree to such terms, so it was all but certain that Quickway and Local 89 would not reach a comprehensive agreement at their December 10 bargaining session. A KDC shutdown loomed, and with it, interruption of deliveries to 242 Kroger stores across four states on the very threshold of the holiday season.

This obviously created a significant problem for Kroger, and the crisis was promptly elevated from lower-level Supply Chain Manager Tony Bruce to Kroger Vice President for Supply Chain Operations Obermeier. During a 9 a.m. conference call on December 8, Obermeier told Quickway's principals that under no circumstances could the KDC be shut down and that the problem was Quickway's and Quickway had to solve it. Five hours later, Obermeier gave Quickway CEO Prevost an ultimatum: either provide assurances that Quickway will meet all its contractual obligations under the CSA or terminate that con-

tract. And Obermeier gave Prevost just 3 hours to make up his mind.

Prevost did not need 3 hours. He knew immediately that terminating the CSA was the only viable option because he could not possibly give Obermeier the assurances he was demanding. The reasons why are obvious. If the threatened strike took place, the CSA's *force majeure* clause would not apply. Although the clause released Quickway from liability in the event that certain causes beyond its control resulted in service disruptions, it expressly excluded from such causes "labor unrest or strikes." Hiring a towing company to haul loads from the KDC to the Louisville terminal, as Prevost had casually suggested the day after Local 89's election win, also would have been unavailing. The towing company would have been performing struck work and thus would have sacrificed its neutral status under the ally doctrine, permitting Local 89 to picket the KDC.[18] And hiring replacement drivers would have been pointless if, as was threatened, Zenith's employees refused to cross the picket line. The Respondent could not very well transport freight to Kroger stores without workers at the KDC to load that freight into its trucks. Confronted with these circumstances, Obermeier's ultimatum, and the reality that Quickway could not afford to risk its

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[18] My colleagues do not dispute that hiring a company to tow trailers from the KDC to the Louisville terminal would not have prevented Local 89 from picketing the KDC. They find, however, that Prevost's offhand comment, made in June, was not revisited in December. In support, they note that none of Quickway's principals testified that it was, but nobody testified that it was not. There is no evidence one way or the other, so the record does not support the majority's finding that it was not.

overall business relationship with a client that furnishes 75 to 80 percent of its revenues, Prevost made the only viable choice and asked Obermeier to release Quickway from the CSA. After some resistance prompted by joint-employer fears, Obermeier relented. Since the sole reason for the existence of the Louisville terminal was to service Kroger under the CSA, the closure of that terminal and the layoff of the Louisville drivers followed inevitably from the CSA's termination as a matter of course.

My colleagues nevertheless find that the Respondent closed the Louisville terminal for antiunion reasons. In support, they rely on statements made by low-level Quick-way managers months earlier during Local 89's organizing campaign, plus the timing of the closure decision "just a few weeks after the Union insisted on maintaining area standards." I find their analysis unconvincing.

Turning first to the preelection statements made by Quickway managers during Local 89's campaign, I preliminarily observe that the unfair labor practice charges to which they gave rise were settled by way of agreements that contained non-admission clauses. But even assuming those statements were made and demonstrated antiunion animus during the organizing campaign, the Respondent's *post*election statements and conduct manifested its intention to bargain with Local 89 in good faith.

After the union won the election, the Respondent did not commit any unfair labor practices and it gave every indication that it intended to fulfill its duty

under the Act to bargain in good faith.[19] With regard to the intent to bargain, when Obermeier, upon learning that the Union had won the election, asked Quickway Group Vice President Cannon about "potential next steps," Cannon replied: "The board agent (NLRB) will mail out the certifications within a week and either side has one week to challenge.

Beyond that I will need to get with my counsel to address the next steps which should be nothing more than scheduling a time to start negotiations with local 89" (emphasis added). That same day, although calling the Union's win a "[t]ough blow" and expressing surprise and disappointment at its margin of victory, Paladin COO Campbell said that the Respondent would "establish the right process and engagement with the Lville Teamsters/team members as we negotiate the contract" (emphasis added). Quickway's subsequent actions matched its words. On October 27, Local 89 asked Quickway to propose dates for collective bargaining, and Quickway did so the following week. When the parties met for their first bargaining session on November 19, they quickly reached tentative agreement on a number of issues, and they agreed to meet again for collective bargaining on December 10. The Union requested certain information in advance of the December 10 meeting, and the Respondent promptly provided it.

Minimizing this evidence, my colleagues find that antiunion reasons motivated the Louisville closure decision by reaching back in time to a handful of preelec-

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[19] My colleagues find that Louisville Terminal Manager McCurry coercively interrogated drivers after the election. As explained below, I disagree.

tion statements. Even ignoring what happened in December, Quickway's *post*election statements and conduct demonstrate that it had turned the page after the Union's win and was intent on negotiating in good faith for an initial collective-bargaining agreement.[20] But what happened in December cannot be ignored. The events that rapidly unfolded over the course of a few days that month, beginning with the strike and KDC-shutdown threat and culminating in Obermeier's ultimatum, severed any linkage (if any remained to be severed) between animus expressed in a handful of statements before the election and the closure of the Louisville terminal many months later. Obermeier demanded that Quickway either provide assurances of full performance or terminate the CSA. Quickway could not provide Obermeier, the representative of Quickway's biggest and most important client, those assurances, so it had no choice but to terminate the CSA. And since Kroger was Quickway's only customer in Louisville, closure of the Louisville terminal and layoff of the drivers necessarily followed.[21]

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[20] The majority notes that Quickway did not bargain immediately but filed objections to the election and a request for review from the Regional Director's denial of its objections. Quickway had the right to do so, and the fact that it exercised this right is not evidence of union animus. Moreover, it was eminently reasonable for Quickway to do so. The election had been conducted by mail ballot, which Board law disfavors. *See San Diego Gas & Electric*, 325 NLRB 1143, 1144 (1998) (adhering to "the Board's long-standing policy . . . that representation elections should as a general rule be conducted manually").

[21] The majority attempts to bolster their finding that the Respondent closed the Louisville terminal for antiunion reasons with three emails: one from Cannon to Prevost recommending that Quickway retain the services of a labor relations firm to help

I do not disagree with my colleagues that the initial suggestion about terminating the CSA came from Quickway—specifically, from Quickway Group Vice President Cannon. The majority, however, then places significant weight on this single fact, without any consideration of the context in which the suggestion

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it oppose Local 89's campaign, one from a former Louisville terminal manager to Cannon attaching several photos of vehicles displaying union insignia, and one from Cannon to the terminal manager instructing him to tell a management-friendly employee to observe and take notes of drivers' union-related conversations but not to engage with or question the drivers. The first two emails were not alleged to violate the Act; the third email was, but my colleagues and I agree that it did not. In any event, any antiunion animus expressed in these emails had no bearing on Quickway's decision to close the Louisville terminal. That decision was driven by the events of December 2020, as explained above.

The General Counsel's burden under *Darlington* to prove that Quickway closed the Louisville terminal for antiunion reasons is essentially the same as her burden under *Wright Line*, 251 NLRB 1083 (1980) (subsequent history omitted), to prove that antiunion animus was a motivating factor in an employer's adverse employment action. Accordingly, the Board's decision in *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120 (2019), should inform the determination of whether the General Counsel met her threshold burden under *Darlington*. In *Tschiggfrie Properties*, the Board observed that the General Counsel does not invariably sustain his or her burden of proof under *Wright Line* whenever, in addition to protected activity and employer knowledge thereof, "the record contains <u>any</u> evidence of the employer's animus or hostility toward union or other protected activity." 368 NLRB No. 120, slip op. at 7. Rather, "the evidence must be sufficient to establish that a causal relationship exists between the . . . protected activity and the employer's adverse action. . . . " *Id.*, slip op. at 8. Here, as explained above, the record evidence is insufficient to establish a causal link between the Respondent's antiunion animus during the organizing campaign and its decision to close the Louisville terminal months later.

was made, as evidence that the termination of the CSA was driven by Quickway rather than by Obermeier. The record fails to support that conclusion.

As already mentioned, Cannon suggested the termination of the CSA to Obermeier during the 9 a.m. conference call on the morning of December 8. It is abundantly clear, however, that he did so in response to Obermeier's mandate that under no circumstances could the KDC be shut down. As explained above, it was all but certain that Quickway and Local 89 would not conclude a collective-bargaining agreement when they met (for only the second time) on December 10, and therefore it was also all but certain that the threatened strike and KDC-shutdown would take place—unless, of course, Quickway was removed from the property. Accordingly, when Obermeier announced that under no circumstances could the KDC be shut down, Cannon simply pointed out to him the one obvious way that a shutdown could be averted. Obermeier was initially unwilling to accept this option. "You have to figure a way out," Obermeier told Prevost later that same day, because Obermeier "[didn't] want [Kroger] to be accused of being a joint employer in this situation." But the letter he emailed to Prevost at 2:03 that afternoon—a letter that Quickway did not ask him to send—reflected his acceptance of the fact that Cannon was correct.

It is important to note that when Obermeier announced that under no circumstances could the KDC be shut down, and Cannon responded that an early termination of the CSA was the only way to ensure that would not happen, Quickway's principals had not yet met to estimate the potential economic consequences of a KDC shutdown for Quickway and

Paladin. That meeting took place after the 9 a.m. conference call with Obermeier. My colleagues find that Quickway inflated that estimate, and that finding plays a crucial role in their analysis. But the estimate was arrived at after the conference call with Obermeier, so it could not have informed Cannon's earlier statement to Obermeier. Accordingly, the fact that Cannon was the first to suggest terminating the CSA does not have the significance the majority ascribes to it.

I do not dispute that for reasons of their own—fears that a KDC shutdown would have devastating financial consequences for Quickway and Paladin—Quickway's principals also wanted to be released from the CSA. But there is no evidence that Quickway's financial concerns played any role in Obermeier's decision to offer Prevost an either/or choice between two alternatives, only one of which—termination of the CSA—was viable. There is no evidence that Quickway communicated its financial concerns to Obermeier, and even if it had, there is no reason why Obermeier should care about those concerns. Quickway's potential losses were Quickway's problem, not Kroger's. The record establishes that Obermeier was concerned about one thing and one thing only—averting a shutdown of the KDC—and that concern drove his decision to issue the ultimatum to Prevost. Accordingly, it does not matter whether Quickway inflated its projected losses because even if it did, there is no evidence that this affected Obermeier's decision, and Obermeier was the real decision-maker.

As for the timing of the closure decision, it was obviously driven by the events of December: the all-too-credible strike and KDC-shutdown threat; Obermeier's declaration that the KDC could not be shut

down under any circumstances; Cannon's truthful reply to Obermeier that terminating the CSA and getting Quickway off the property was the only way to ensure that would not happen; Obermeier's grudging acceptance of the fact that Cannon was right and his consequent issuance of the ultimatum.

Moreover, the majority completely misunderstands the impact of Zuckerman's "area standards" statement. They infer that Quickway closed the Louisville terminal "to avoid bargaining with the Union" because Zuckerman said he was adamant about maintaining area standards, and Quickway was unwilling to agree to those terms. This inference, however, ignores the just-summarized evidence that Quickway fully intended to bargain in good faith. Cannon said so. Campbell said so. And the Respondent acted accordingly, quickly agreeing to meet for negotiations, proposing available dates, and bargaining in good faith during the November 19 session and also afterwards by promptly furnishing requested information. There is no evidence—none—that Quickway would not continue to bargain in good faith on December 10 and thereafter; the evidence only suggests that agreement would be harder to come by once negotiations turned to economics. Contrary to my colleagues, the reasonable, indeed, the compelling inference to be drawn from Zuckerman's insistence on maintaining area standards and Quickway's unwillingness to agree to those terms is that Quickway and Kroger—knew that Quickway and Local 89 would not conclude a collective-bargaining agreement at their December 10 meeting, and therefore the threatened strike and shutdown of the KDC was

almost certainly going to happen.[22] Because Kroger could not accept that, Obermeier issued his ultimatum. And because Prevost could not assure Obermeier that Quickway would be able to meet its obligations under the CSA if the Union struck, that left no option but to terminate the CSA, with closure of the Louisville terminal and layoff of the drivers as the unavoidable consequence.[23]

I turn now to the majority's separate set of arguments, which they advance to dispute that the Louisville terminal was closed for nondiscriminatory

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[22] The majority says this inference is contrary to the record, and they point to testimony by Prevost and Cannon that they never told Obermeier that Quickway could not agree to terms similar to those in Local 89's contract with Transervice. The judge, however, credited Obermeier's testimony that they did.

[23] *M. Yoseph Bag Co.*, 128 NLRB 211 (1960), enf. denied sub nom. *Retail, Wholesale & Department Store Union District 65 v. NLRB*, 294 F.3d 364 (3d Cir. 1961), cited by my colleagues, is not remotely similar to this case. There, the employer's owner told his employees that if they chose what he termed "the Philadelphia Union," *i.e.*, the union that represented the employees of his competitors, he could stay in business, but if they selected the charging party union to represent them, he could not. "When . . . an employer 'explains' to his employees that if they select union A he can remain in business, but if they choose union B he cannot remain in business, and requests them to decide what they want to do," the Board said, "we are drawn to the inevitable conclusion that he has thereby threatened to close the plant unless they select union A." *Id.* at 215. Here, the Respondent never said it could not remain in business if Zuckerman demanded area standards. It said it was unlikely that it could agree to those terms. There is no good reason to believe that anything but hard, good-faith bargaining would have ensued on Quickway's side, if it were not for the KDC-shutdown threat and Obermeier's ultimatum.

reasons. These arguments fare no better than the ones I just addressed.

My colleagues disagree that Quickway had no other option but to close the terminal. They say that Quickway did not consider the possibility of hiring a towing company to haul loads from the KDC to the Louisville terminal. But there is no evidence Quickway did not consider this possibility,[24] and they do not dispute that a company performing that work would have sacrificed its neutral status under the ally doctrine and been just as much a primary target of picketing as Quickway itself.

Second, the majority contends that Quickway did not reasonably believe that Local 89 would strike as threatened because the author of the threat was unknown, and Quickway did not ask Local 89 to verify the threat. But the message sent to local TV stations bore its own indicia of reliability. It included accurate details—the date the Board denied review of the Regional Director's postelection decision in the representation case (October 26); the date, time, and location of the parties' next bargaining session—indicating that its author had inside knowledge. In addition, Quickway soon learned that Transervice's drivers and Zenith's warehouse workers enjoyed a contractually protected right to engage in sympathy strikes, making the threat to shut down the KDC credible and further bolstering the message's reliability.

As for not contacting Local 89 to verify the threat, Quickway had at least two good reasons not to do so. First, it would have assumed that the same TV

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[24] *See supra* fn. 19.

stations that had contacted Kroger for comment had also contacted Local 89. An imminent strike that would shut down the KDC was newsworthy in the Louisville media market, but the stations could not run the story without seeking confirmation.[25] Of course Quickway reasonably believed that Local 89 knew of the threat as a result, yet the Union did not reach out to Quickway to deny it, suggesting that a strike was indeed imminent.[26] Second, there was no good reason for Quickway to believe that it would get a truthful answer from the Union even if it asked for one. A strike is a union's ultimate economic weapon, and it is naïve to think that Local 89 would weaken its own leverage by sacrificing the element of surprise.[27] Indeed, there is evidence that Local 89 did want to keep its plans secret. On December 10, Hendricks, who sent the strike threat to the media, texted a message to Local 89 organizer Trafford that reveals Trafford did not want news of the impending strike leaked: "I had

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[25] The majority notes that no station actually ran a story regarding the threatened strike until December 10. That fact, however, is not relevant here; what matters is what Quickway would have assumed on December 7 when it received the message that Hendricks sent to the TV stations.

[26] Record evidence supports inferring that the media had contacted Local 89 about the strike threat. Local 89 organizer Bryan Trafford admitted in his testimony that "we might have received some media inquiries," although he claimed, implausibly, not to recall what they were about. Tr. 947.

[27] *Cf. Royal Packing Co.*, 198 NLRB 1060, 1067 (1972) (finding that employer "had good reason to believe that the union would strike" despite the union's assurances to the contrary), enfd. sub nom. *Amalgamated Meat Cutters & Butcher Workmen v. NLRB*, 495 F.2d 1075 (D.C. Cir. 1974) (per curiam).

already been in contact with the reporter when you asked me not to talk with them" (emphasis added).[28]

Finally, the majority says that Quickway exaggerated the financial losses it would have suffered had the strike taken place and shut down the KDC.[29] As

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[28] The majority says that I "ha[ve] not explained how the Respondent could have reasonably believed that the Union informed local Louisville news media of its plan to strike while it simultaneously sought to maintain the element of surprise." But I do *not* contend that Quickway believed that Local 89 had informed the media of its plan to strike. Quick-way knew that someone had informed the media of the planned strike, and that whoever it was had inside information. It does not follow, however, that Quickway believed that Local 89 had sent the strike threat to the media or had authorized someone to do so. And in fact, Local 89 did not want to publicize the strike in advance, as Hendricks's text message to Trafford reveals.

In support of their opinion that Quickway should have asked Local 89 to verify the strike and KDC-shutdown threat, my colleagues cite inapposite cases—*Alstyle Apparel*, 351 NLRB 1287 (2007), and *Midnight Rose Hotel & Casino*, 343 NLRB 1003 (2004), enfd. mem. 198 Fed. Appx. 752 (10th Cir. 2006)—involving employers that discharged employees without conducting a thorough investigation. Obviously, employees facing discharge have a compelling incentive to avoid that fate by exculpating themselves. Here, in contrast, Local 89's incentive was to keep its plans secret, and Hendricks's text message to Trafford discloses that it intended to do so.

[29] Regardless of whether the predicted losses may have been overestimated, the record establishes that Quickway's and Paladin's top executives had sound reasons to believe that a strike and KDC shutdown posed grave financial risks. An addendum to the CSA provided that "[e]very load" to be transported by Quickway "is assigned by Transervice," and the CSA contained no language limiting the number of loads that Transervice could assign to Quickway up to its capacity limit. Under normal circumstances, this posed no problem for Quickway, since economic self-interest incentivized Transervice to keep as many loads for

itself as it could successfully transport. But if Transervice's drivers refused to cross Quickway's drivers' picket line, the incentives would flip, and Transervice would likely seek to minimize its own liability to Kroger by assigning as many loads as possible to Quickway. Moreover, there would be no one to load Quickway's trucks if Zenith's employees also refused to cross the picket line. If Zenith failed to hire replacements, Quickway might have to staff the KDC itself, adding substantial further costs. In addition, many of the goods Quickway transported to Kroger stores were perishable, and the CSA made it liable for the lost value of spoiled cargos. In the event of a strike, Quickway drivers en route to Kroger stores might abandon their loads or return them to the KDC undelivered, where nobody would be available to unload and refrigerate perishable items if Zenith employees also struck. And all this would be taking place only a few weeks before Paladin's existing line of credit would terminate, just when Paladin was trying to finalize an agreement for a new and substantially larger line of credit with a new bank. Without that line of credit, Paladin would be unable to cover day-to-day operating expenses, putting the very survival of itself and its affiliates at risk. Accordingly, I disagree with the majority that Quickway's concerns about the financial consequences of a KDC shutdown were pretextual.

The majority disputes that Quickway reasonably would have anticipated staffing the KDC itself if Zenith's employees refused to cross the picket line. Pointing to language in paragraph 3.5 of the CSA, they conclude that Quickway would have had no duty to transport goods to Kroger stores if its trucks were not loaded. That conclusion might be correct. In relevant part, CSA paragraph 3.5 states that Quickway's "duties and responsibilities under this Agreement will commence when [it] takes possession or control of [Kroger's] . . . property." On the other hand, the CSA also required Quickway to "transport and deliver" goods "to and between those points designated by" Kroger "as required by" Kroger. In estimating its potential losses, Quickway could have reasonably decided that paragraph 3.5 might not provide it a winning defense. More importantly, given Quickway's economic dependency on Kroger, it strains belief to assume that Quickway would have envisioned a scenario under which it remained bound to the CSA and yet refused to make shipments "required by"

explained above, however, that contention is beside the point because the record evidence overwhelmingly establishes that Quickway closed the Louisville terminal for nondiscriminatory reasons. The record is clear that what drove Quickway's decision to close the Louisville terminal was Obermeier's ultimatum to guarantee full performance of all obligations under the CSA or terminate the contract. Quick-way could not guarantee full performance, so terminating the CSA was its only option, from which closure of the terminal followed as a matter of course.[30]

Kroger, in doubtful reliance on paragraph 3.5. To do so might have risked its entire relationship with Kroger.

Finally, I note that to the extent that this description of Quickway's potential losses could be viewed as speculative, I note that it is no more speculative than the majority's view of Quickway's potential losses.

30 Contrary to the majority's assertion, my position is that the record clearly demonstrates that Quickway did terminate the CSA and close the Louisville terminal for the reasons I have set forth, not that it could have done so for those reasons. The fact that Quickway does not make this argument is of no moment, as the Board's rules do not limit the scope of the Board's analyses to the arguments made by the parties in support of exceptions. *See Hilton Hotel Employer*, 372 NLRB No. 61, slip op. at 12 fn. 12 (2023) (Member Kaplan, dissenting) (discussing text of Board rules 102.46(a)(1)(i) and 102.46(a)(1)(ii) and finding that the rules do not establish that arguments in support of exceptions "may not be considered as part of the Board's analysis when they are not raised by a party"); *cf. Local 58, IBEW, AFL-CIO (Paramount Industries, Inc.)*, 365 NLRB No. 30, slip op at 4 fn. 17 (2017) (collecting cases) ("The Board, with court approval, has repeatedly found violations for different reasons and on different *theories* from those of administrative law judges or the General Counsel, even in the absence of exceptions. . . . "). Furthermore, the facts speak for themselves. The majority notes that Sec. 10 (e) would prevent Quickway from relying on my rationale in a

In sum, the only reasonable conclusion to be drawn from the evidence is that the Respondent closed the Louisville terminal because no work remained for its Louisville drivers once the CSA had been terminated, and the CSA was terminated because Obermeier's ultimatum left it no other option. The General Counsel bears the burden of proving that the terminal was closed for antiunion reasons. As I have shown, however, she failed to sustain this burden and therefore failed to clear the threshold hurdle of proving a

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court of appeals, but courts have recognized that such a bar can be removed through a motion for reconsideration. *See*, *e.g.*, *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-666 (1982) (observing that, where the Board raises an issue *sua sponte*, an aggrieved party must seek reconsideration by the Board before advancing that argument on judicial review); *see also UFCW, Local 400 v. NLRB*, 989 F.3d 1034, 1038 (D.C. Cir. 2021) ("Even after the Board's decision and [dissenting Member's] discussion of a different theory, [the charging party] did not seek reconsideration. It raised the Board dissenter's theory for the first time in this court. That was not enough [to satisfy Sec. 10(e)].").

Although we cannot know with certainty why the Respondent's litigation strategy was not to blame Kroger's ultimatum for closing the Louisville terminal, we can make an educated guess. The record establishes that Obermeier was fearful of exposing Kroger to the risk of becoming a joint employer of Quickway's drivers. He said so, and he acted accordingly by refusing at first to terminate the CSA and demanding that Quick-way do so, even though the CSA's terms made that impossible. Regardless of whether Obermeier's joint-employer fear was well-founded, it was real, and with 75 to 80 percent of its revenue coming from its business with Kroger, Quickway had to take it seriously. Under the circumstances, blaming Kroger for the closure of the Louisville terminal would not have been wise. In any event, that Quickway did not make this argument does not prevent me from drawing inferences the facts of this case fairly compel.

partial-closing violation under *Darlington*. Without more, this mandates dismissal of the 8(a)(3) allegation.

2. The Respondent Did Not Have a Purpose to Chill Unionism Elsewhere

As I have shown, the General Counsel has not met her threshold burden under *Darlington* of proving that the Respondent closed the Louisville terminal for antiunion reasons. Although the 8(a)(3) analysis may end there, I would also find that the General Counsel failed to prove that the decision to close that terminal was "motivated by a purpose to chill unionism in any of [Quickway's] remaining plants." *Darlington*, 380 U.S. at 275. On this ground as well, I would dismiss the 8 (a)(3) allegation.

As the wording of its *Darlington* decision shows, the Supreme Court took it for granted that a finding of purpose to chill unionism elsewhere requires ongoing organizational activity—and, of course, employer awareness of that activity—at the time the partial closing takes place. The Court stated that the employer must "occupy a relationship to the other business which makes it realistically foreseeable that its employees will fear that such business will also be closed down if they persist in organizational activities." 380 U.S. at 276 (emphasis added). On remand following the Court's decision, however, the Board held that a violation under *Darlington* also may lie "where the evidence establishes a strong employer belief that the union is intending imminently to organize the employees in his other operations." *Darlington Mfg. Co.*, 165 NLRB at 1084. The Board also held that proof that a partial closing was undertaken for antiunion reasons

strengthens the probability of a purpose to chill unionism elsewhere. "Where one such directly causative antiunion motive is posited," the Board stated, "the probability of a second antiunion purpose, of wider gauge, becomes stronger." *Id.* Whether an employer, in carrying out a partial closing, had a proscribed chilling purpose, and whether such chilling would have been a reasonably foreseeable effect of the partial closing, depends on several factors, including "contemporaneous union activity at the employer's remaining facilities, geographic proximity of the employer's facilities to the closed operation, the likelihood that employees will learn of the circumstances surrounding the employer's unlawful conduct through employee interchange or contact, and, of course, representations made by the employer's officials and supervisors to the other employees." *Bruce Duncan Co.*, 233 NLRB 1243, 1243 (1977), modified on other grounds 590 F.2d 1304 (4th Cir. 1979). For the following reasons, the evidence here does not support a reasonable inference that in closing the Louisville terminal, Quickway's purpose was to chill unionism at one or more of its remaining terminals—or, for that matter, at any facility operated by a Paladin-affiliated company.

To begin, because Quickway did not close the Louisville terminal for antiunion reasons, there is no basis to infer a strengthened probability of "a second antiunion purpose, of wider gauge." *Darlington Mfg. Co.*, 165 NLRB at 1084. And, as my colleagues acknowledge, there is no credited evidence that the Respondent was aware of ongoing union activity at any other Quickway terminal or at any facility operated by a Paladin-affiliated enterprise. Nevertheless, the majority contends that a purpose to chill unionism may be

inferred because Quickway believed that the Union intended imminently to organize employees at one or more of three other terminals: Indianapolis, Hebron, and Murfreesboro. This contention, however, is not supported by record evidence.

At the time the Respondent closed the Louisville terminal, there were stirrings of union activity at its Indianapolis terminal. Lewis Johnston and a few other drivers were discussing the possibility of launching another campaign, following the unsuccessful effort that culminated in Local 135's November 2019 defeat. But as my colleagues acknowledge, there is no credible evidence that the Respondent was aware of this nascent union activity when it closed the Louisville terminal.[31] Nor does the evidence show that the Respondent believed a renewed organizing effort was imminent at its Indianapolis terminal. At most, it knew, at the time it closed the Louisville terminal, that another election among the Indianapolis drivers was no longer barred by Section 9(c)(3). This meant only that Local 135 could file a petition for another election. There is no evidence that Quickway believed this would happen. If the mere absence of a statutory bar on filing a representation petition were sufficient to infer a purpose to chill unionism elsewhere, the General Counsel's burden to prove a *Darlington* violation would be reduced to a mere speed bump.

Next, the majority points to an email Hendricks sent to Cannon and two other managers in September

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[31] Johnston testified that he told Indianapolis Terminal Manager Eric Rowe about plans for another union campaign and that he did so before the Louisville terminal closed, but Rowe denied this, and the judge discredited Johnston's testimony.

2020 with the subject line, "Teamsters is coming for Hebron!" in which Hendricks claimed that he would be "responsible for Hebron." Donald Hendricks was a disgruntled ex-employee of Quickway.[32] There is no evidence that he was employed by Local 89 in September 2020 (or at any other time) or that Quickway believed he was. Accordingly, Hendricks's email is insufficient to support a reasonable inference that Quickway believed Local 89 intended imminently to organize its Hebron drivers, let alone that it strongly believed as much, as the Board's *Darlington* opinion requires.

In May 2020, Quickway did act to prevent representatives of Local 89 from talking to drivers from its Murfreesboro terminal. There is, however, no evidence that organizing activity was ongoing at the Murfreesboro terminal in December 2020 when the Louisville terminal was closed. Unless the record supports a finding that Quickway strongly believed organizing activity at the Murfreesboro terminal was imminently intended at the time it closed the Louisville terminal, no purpose to chill unionism at Murfreesboro may be inferred. *See Darlington Mfg. Co.*, 165 NLRB at 1084. Since the General Counsel bears the burden to prove each and every element of a *Darlington* violation, she must establish that Quickway so believed.

The General Counsel did not sustain her burden in this regard. She showed only that Quickway acted to prevent representatives of Local 89 from talking to its Murfreesboro drivers. Even if Local 89 could organize a drivers unit in Murfreesboro, the mere fact

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[32] Hendricks's testimony at the unfair labor practice hearing left no doubt of his intractable hostility to the Respondent.

that Local 89 representatives were talking to drivers from that terminal in May falls far short of demonstrating that Quickway strongly believed that an organizing drive in Murfreesboro was imminently intended in December.[33]

Turning to the *Bruce Duncan* factors, first, there was no "contemporaneous union activity at [Quickway's] remaining facilities" except Indianapolis, and Quickway was unaware of that activity. Second, none of Quickway's remaining terminals was geographically proximate to the Louisville terminal. The closest terminals to Louisville were the Hebron, Kentucky and Bloomington, Indiana terminals, each about 90 miles away. The Indianapolis terminal was about 110 miles away. The Louisville terminal was geographically proximate to CCL's truck-repair shop—it housed that shop—but this does not evince a purpose to chill unionism among CCL's Louisville mechanics because there is no evidence that they were engaged in, or intended imminently to engage in, union activity or that the Respondent believed they were or did. Moreover, the judge found that Quickway's Louisville operation was "highly profitable," and

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[33] In fact, Local 89 could not and cannot organize Quickway's Murfreesboro drivers. Local 89's geographic jurisdiction does not include Tennessee or any part of that state. The Murfreesboro terminal is within the geographic jurisdiction of Teamsters Local 480. See Locals Archive-International Brotherhood of Teamsters (last visited Mar. 10, 2023).

As explained above, the General Counsel failed to show that Quick-way believed organizational activity was imminently intended at any of its terminals. And unlike in *Darlington*, there is no evidence that the Teamsters Union was "mounting a 'tremendous' campaign" throughout the region or that Quickway believed it was. 165 NLRB at 1080.

CCL employed just five mechanics. It is utterly implausible that Quickway would close a highly profitable operation to chill five mechanics from organizing.[34]

Third, there was little likelihood that drivers at other terminals would learn of the circumstances surrounding the closure of the Louisville terminal through employee interchange or contact. The Respondent did dispatch drivers from its Indianapolis terminal to pick up trailers from the KDC and the

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[34] The majority relies on the fact that Quickway and CCL shared the same terminal to infer a purpose to chill unionism among CCL's Louisville mechanics. That rationale would face a steep uphill climb—to put it mildly—in the United States Court of Appeals for the District of Columbia Circuit were Quickway to file a petition for review in that court. Recently, the D.C. Circuit was presented with a *Darlington* case involving two related businesses that shared the same space. *See RAV Truck and Trailer Repairs, Inc. and Concrete Express of NY, LLC v. NLRB*, 997 F.3d 314 (D.C. Cir. 2021) (*RAV v. NLRB*). RAV Truck & Trailer Repairs, Inc. (RAV) and Concrete Express of NY, LLC (Concrete Express) were a single employer and shared the same facility. RAV went out of business. It did so for antiunion reasons, so the issue of "purpose to chill" was reached. At the time RAV closed, the employees of Concrete Express had recently voted against representation. However, Concrete Express had committed unfair labor practices prior to the election, including by threatening that it would close if the employees voted for the union, so there was a very real possibility that a rerun election would be held. Nevertheless, the D.C. Circuit concluded that the Board had not adequately explained its finding that the closure of RAV had a purpose to chill unionism among Concrete Express's employees. *RAV v. NLRB*, 997 F.3d at 327-328. If the D.C. Circuit was skeptical of the Board's "chilling purpose" finding in *RAV v. NLRB*, it is hard to fathom that the court would infer a purpose to chill unionism among CCL's employees based on nothing more than the fact that CCL and Quickway shared the same facility.

overflow lot at the Kentucky State Fairgrounds, but there was little likelihood that these drivers would have contact with any Louisville drivers because the Louisville drivers had already been laid off. The only reason Johnston learned that the Louisville terminal had been closed was that he phoned a former Louisville driver when he realized that none of them were at the KDC. Moreover, that driver told Johnston only that the Louisville terminal had been closed. From that bare news, Johnston learned nothing about the "circumstances surrounding" the terminal's closure. *Bruce Duncan*, 233 NLRB at 1243.[35] Neither did the Indianapolis driver who was picketed at the overflow lot. Indeed, he did not even learn that the Louisville terminal had closed. He saw picket signs reading "Quickway on strike, Local 89," and when he asked the picketers what was going on, the reply was simply, "We are on strike." From that statement, the Indianapolis driver would have reasonably assumed that the Louisville terminal remained open, but the drivers were on strike. Moreover, there is no evidence that at the time it dispatched the Indianapolis drivers to Louisville, the Respondent knew that Louisville drivers would be picketing at the overflow lot. Absent that knowledge, the mere fact that an Indianapolis driver had contact with Louisville drivers at the overflow lot does not support an inference that in dispatching the Indianapolis drivers to Louisville, the Respondent's purpose was to chill unionism at the Indianapolis terminal.

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[35] Johnston learned more during a subsequent conference call with several Louisville drivers and a union agent, but there is no basis to infer that this call was likely to occur or that Quickway believed it was.

Finally, there is no evidence that any of the Respondent's managers or supervisors discussed the closure of the Louisville terminal "with other employees or engaged in other unlawful conduct which might have established a coercive context . . . conducive to an inference of chilling intent." *RAV v. NLRB*, 997 F.3d at 327.

Because the General Counsel failed to prove either that Quickway closed the Louisville terminal for antiunion reasons or that the decision to close that terminal was motivated by a purpose to chill unionism elsewhere, I would adopt the judge's dismissal of the allegation that the Respondent violated Section 8(a)(3) by closing the Louisville terminal.

B. The Respondent Did Not Violate Section 8(a)(5) By Unilaterally Deciding to Terminate the CSA

I would also dismiss the General Counsel's allegation that the Respondent violated Section 8(a)(5) of the Act when it decided, unilaterally, to terminate the CSA with Kroger, close the Louisville terminal, and permanently lay off its Louisville drivers. Contrary to my colleagues, the Supreme Court's decision in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), compels a finding that the Respondent did not violate Section 8(a)(5).

In *First National Maintenance*, the employer (FNM) provided housekeeping, maintenance, and related services to customers in the New York City area, including Greenpark Care Center, a nursing home. Dissatisfied with the amount of the fee it was receiving from Greenpark, FNM decided to terminate the Greenpark contract, which resulted in the discharge

of all 35 FNM employees who had worked under the contract. Before FNM terminated the Greenpark contract, its employees working at Greenpark selected a union to represent them. FNM refused to bargain with the union regarding its decision to terminate the contract. The Board found that FNM had thereby violated Section 8(a)(5), and the Second Circuit enforced the Board's order. 452 U.S. at 667-672.

The issue, as defined by the Supreme Court, was whether an employer must "negotiate with the certified representative of its employees over its decision to close a part of its business." 452 U.S. at 667. Observing that "[m]anagement must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business," the Court announced the following standard: "[B]argaining 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." *Id.* at 678-679, 679. With this framework in mind, the Court turned to the question presented: whether an employer has a duty to bargain over "an economically motivated decision to shut down part of a business." *Id.* at 680.

The Court answered that question in the negative. "We conclude," it said, "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, and we hold that the decision itself is <u>not</u> part of § 8 (d)'s 'terms and conditions,'

over which Congress has mandated bargaining." *Id.* at 686 (emphasis in original). In reaching this conclusion, the Court applied its just-announced balancing test, carefully considering the two sides' respective needs and interests. It recognized that the union's interest in participating in the decision "springs from its legitimate concern over job security." *Id.* at 681. Invariably, however, the union's "practical purpose" will be to "seek to delay or halt the closing. No doubt it will be impelled, in seeking these ends, to offer concessions, information, and alternatives that might be helpful to management or forestall or prevent the termination of jobs. It is unlikely, however, that requiring bargaining over the decision itself, as well as its effects, will augment this flow of information and suggestions." *Id.* Moreover, the union will still be able to further the interests of the employees it represents by bargaining over the effects of the closure decision, and Section 8(a)(3) affords the union direct protection against a partial closing motivated by antiunion animus. *Id.* at 681-682. The employer, on the other hand,

> may have great need for speed, flexibility, and secrecy in meeting business opportunities and exigencies. It may face significant tax or securities consequences that hinge on confidentiality, the timing of a plant closing, or a reorganization of the corporate structure. The publicity incident to the normal process of bargaining may injure the possibility of a successful transition or increase the economic damage to the business. The 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 682-683.

The holding of *First National Maintenance v. NLRB* dictates dismissal of the Section 8(a)(5) allegation here. The Respondent's decision to terminate the CSA and close the Louisville terminal was exactly the type of business decision the Court addressed in that case. And the Court's rationale also applies here. Quickway could not provide the assurances Obermeier was demanding: if the threatened strike materialized, it could not guarantee that it would meet its obligations under the CSA, for all the reasons previously explained. The Respondent had no choice but to withdraw from the CSA, and the closing of the Louisville terminal followed inevitably. Thus, once Obermeier issued his ultimatum, Quickway "ha[d] no feasible alternative to the closing." Moreover, Quickway had "great need for speed . . . in meeting . . . [the] exigencies" of the moment, since Obermeier gave CEO Prevost just three hours to respond to his ultimatum. Under these circumstances, bargaining over the decision to withdraw from the CSA would have been "futile."

In addition, the Respondent believed that had it not terminated the CSA, the economic consequences could have been severe, not only for itself but also for its corporate parent Paladin, at a time when Paladin was seeking a new line of credit to finance its own and its affiliates' day-to-day operations. The Respondent estimated that in the worst-case scenario, its losses in the short term could have run into the millions. Even if Quickway's executives overestimated those losses, the financial consequences would have been grave.

Faced with this risk, the Respondent determined, in the judge's words, "not to take chances on a strike by the Union if it failed to reach agreement with the Union" on December 10.

The majority does not take issue with the foregoing. They acknowledge that an economically motivated partial-closing decision is exempt from bargaining under *First National Maintenance*. They simply find that the decision to close the Louisville terminal was motivated by antiunion reasons, not economic ones. As explained at length above, I disagree.

Because the record as a whole clearly reflects that the Respondent's decision to terminate the CSA was made for economic reasons, the Respondent had no obligation to bargain with the Union over its decision to terminate the CSA with Kroger and close the Louisville terminal. Accordingly, it did not violate Section 8(a)(5) by making those decisions unilaterally.

The majority also errs in finding that Quickway violated Section 8(a)(5) by failing to bargain over the effects of the closure decision. Quickway offered to bargain over those effects when it met with the Union on December 10, and the Union refused its offer. I recognize that as a general rule, an employer must provide the union notice of a decision before it is implemented in order to meet its effects-bargaining duty. *See 800 River Road Operating Co., LLC d/b/a Care One at New Milford*, 369 NLRB No. 109, slip op. at 6 (2020) (effects-bargaining obligation "arises after the decision has been made but before it is implemented") (emphasis in original), enfd. mem. 848 Fed. Appx. 443 (D.C. Cir. 2021). Here, however, this was not feasible. There was no decision to close the Louisville terminal until Obermeier accepted Quickway's "resignation"

from the CSA, and Obermeier did so the very day the Louisville terminal was closed. Under the circumstances, there was no time to engage in meaningful effects bargaining before the decision was implemented.[36] Moreover, Quickway proposed effects bargaining the very next day, and the Union plainly had no interest in bargaining over effects. My colleagues do not seriously dispute any of this. They base their finding of an effects-bargaining violation on their prior findings that Quickway's nondiscriminatory reasons for closing the Louisville terminal were pretextual, and that Quickway violated Section 8(a)(5) by failing to bargain over the closure decision itself. For reasons already explained, those prior findings are meritless.

C. The Settlement Agreements Must Be Reinstated

I would adopt the judge's dismissal of the allegations covered by the settlement agreements. As noted above, those settlement agreements were set aside and the settled allegations reinstated on the ground that the Respondent's post-settlement closing of the Louisville terminal was unlawful. *See YMCA of Pikes Peak Region*, 291 NLRB 998, 1010 (1988) ("[A] settlement agreement may be set aside and unfair labor practices found based on [pre-settlement] conduct if there has been a failure to comply with the provisions of the settlement agreement or if [post-settlement]

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[36] *See Raskin Packing Co.*, 246 NLRB 78, 84 (1979) ("[A]n employer is sometimes compelled by the exigencies of the situation to forthwith discontinue its business operations in a manner which precludes prior notice and bargaining with the [u]nion regarding the effects of the decision.").

unfair labor practices are committed."), enfd. 914 F.2d 1442 (10th Cir. 1990), cert. denied 500 U.S. 904 (1991). The judge found, and I agree, that the Regional Director was not justified in setting aside the settlement agreements because the Respondent's closing of the Louisville terminal was lawful. Accordingly, the settlement agreements must be reinstated, and the settled allegations dismissed.[37]

D. The Evidence Is Insufficient to Support a Finding That Terminal Manager McCurry Coercively Interrogated Employees

Contrary to the judge and my colleagues, I would dismiss the allegation that Louisville Terminal Manager Jeff McCurry coercively interrogated employees about their union activities. "The Act does not make it illegal per se for employers to question employees about union activity." *Trinity Services Group, Inc.*, 368 NLRB No. 115, slip op. at 1 (2019), enfd. in relevant part 998 F.3d 978 (D.C. Cir. 2021). Rather, to establish a violation, the General Counsel must show that, under all the circumstances, the questioning reasonably tended to restrain, coerce, or interfere with employees in the exercise of their Section 7 rights. *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). The General Counsel simply failed to carry her burden.

The sole basis for the majority's 8(a)(1) finding here is McCurry's emails to Cannon and another man-

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[37] Unlike my colleagues, therefore, I find it unnecessary to consider the allegations that were resolved by the settlement agreements.

ager on September 18, when agents of Local 89 were conducting a job action in front of the Louisville terminal. In his first email, McCurry stated that "union guys" were talking to the drivers and that he would "try to find out what the discussion is." In his second email sent two hours later, McCurry stated: "As far as what [the union representatives] were discussing with drivers, all of the drivers I spoke with shut them down. The drivers that were coming in this morning were not interested in talking with the union." McCurry's second email establishes that he spoke with drivers, but the General Counsel did not solicit any testimony from McCurry regarding what he asked or said. Likewise, no employees testified about the conversation they had with McCurry or the circumstances surrounding the conversation. Based on such a limited record, I cannot conclude that McCurry was "seeking information upon which to take action against individual employees"[38] or that the totality of the circumstances supports an inference that the conversations reasonably tended to restrain, coerce, or interfere with the drivers in the exercise of rights protected by the Act. *See Hackensack Hospital Association*, 264 NLRB 1360, 1360 fn. 2 (1982) (dismissing allegation that the employer coercively questioned an employee about union literature because the question alone, "without more record evidence regarding the time and circumstances of the questioning, was insufficient to show an unlawful purpose to restrain or coerce the employee"); *see also Rossmore House*, 269 NLRB at 1177 ("'To hold that any instance

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[38] *John W. Hancock Jr., Inc.*, 337 NLRB 1223, 1224 (2002) (citing *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964)), enfd. 73 Fed. Appx. 617 (4th Cir. 2003).

of casual questioning concerning union sympathies violates the Act ignores the realities of the workplace.'") (quoting *Graham Architectural Products v. NLRB*, 697 F.2d 534, 541 (3d Cir. 1983)). Accordingly, I would dismiss this allegation as well.

CONCLUSION

The Respondent made a business decision to seek release from its contract with Kroger because the ultimatum issued to it by Kroger, its main customer, left it no other choice, especially in light of its reasonable fear that a strike and resulting shutdown of the KDC could impose unacceptable costs as well as its likely fear of risking its relationship with Kroger, which was the source of 75 to 80 percent of the Respondent's revenue. Because Kroger was the only customer the Respondent serviced out of its Louisville terminal, the termination of that contract resulted, inevitably, in the closure of that terminal and the layoff of the Respondent's Louisville drivers. Under *Darlington* and *First National Maintenance*, such a decision violated neither Section 8(a)(3) nor Section 8 (a)(5). Accordingly, the settled 8(a)(1) and (4) allegations, erroneously reinstated on the basis of the General Counsel's incorrect belief that Quickway committed postsettlement violations, must also be dismissed. And the evidence is insufficient to support a finding that Quickway, by Terminal Manager McCurry, coercively interrogated employees in violation of Section 8(a)(1). Because I would dismiss the complaint in its entirety, I respectfully dissent.

Marvin E Kaplan
Member

Dated, Washington, D.C. August 25, 2023

NOTICE TO EMPLOYEES MAILED AND POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with closure of our terminal in Louisville, Kentucky (Louisville terminal) if you select General Drivers, Warehousemen and Helpers, Local Union No. 89, affiliated with the International Brotherhood of Teamsters (the Union) as your representative.

WE WILL NOT instruct you to provide us with a list of employees who are involved in the Union's organizing campaign or who support the Union.

WE WILL NOT threaten you that we will lose our contract with The Kroger Company and be forced to discharge all the employees at the Louisville terminal if you select the Union as your representative.

WE WILL NOT threaten you that we will cease making contributions to your ESOP account if you select the Union as your representative.

WE WILL NOT threaten you with legal action because you file unfair labor practice charges.

WE WILL NOT coercively question you about your union activities.

WE WILL NOT cease operations at the Louisville terminal and discharge our employees in the bargaining unit for antiunion reasons and to chill unionism at our other terminals and at other affiliates of Paladin Capital, Inc. in circumstances where such a chilling effect is reasonably foreseeable.

WE WILL NOT fail and refuse to provide the Union notice and an opportunity to bargain regarding our decision to cease operations at the Louisville terminal and discharge all our unit employees and the effects of that decision.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within a reasonable period of time, reopen and restore our business operations at the Louisville terminal as they existed on December 9, 2020.

WE WILL, following the restoration of our operations at the Louisville terminal, offer unit employees full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, to the extent that their services are needed at the Louisville terminal to

perform the work that we are able to attract and retain from The Kroger Company or new customers after a good-faith effort, giving preference to the unit employees in order of seniority. WE WILL offer remaining unit employees reinstatement to any positions in our existing operations that they are capable of filling, with appropriate moving expenses, giving preference to the remaining unit employees in order of seniority. WE WILL, in the event of the unavailability of jobs sufficient to permit the reinstatement of all unit employees, place unit employees for whom jobs are not now available on a preferential hiring list for any future vacancies that may occur in positions in our existing operations that they are capable of filling.

WE WILL make the unlawfully discharged unit employees whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest, and WE WILL also make such employees whole for any other direct and foreseeable pecuniary harms suffered as a result of their discharges, including reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s) for each employee.

WE WILL file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such

additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges, and WE WILL, within 3 days thereafter, notify each of the employees in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time drivers employed by us at our 2827 S. English Station Road, Louisville, Kentucky facility and our sub-terminals located in Versailles and Franklin, Kentucky, excluding all office clerical employees, temporary employees, professional employees, guards and supervisors, as defined by the National Labor Relations Act (Act).

The certification year is extended for an additional 12 months from the date that we begin to bargain in good faith.

QUICKWAY TRANSPORTATION, INC.

DECISION,
ADMINISTRATIVE LAW JUDGE AMCHAN
(JANUARY 4, 2022)

NATIONAL LABOR RELATIONS BOARD

QUICKWAY TRANSPORTATION, INC.,

v.

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,

Case No. 09-CA-251857

Before: Arthur J. AMCHAN,
Administrative Law Judge.

STATEMENT (OVERVIEW) OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried via Zoom video technology on August 16, September 13-15, 16 and October 1, 27 and 28, 2021. The first charge in this matter was filed by Geoffrey Brummett on November 15, 2019. The charges related to the closing of Respondent's Louisville operations on December 9, 2020, were filed by Brent Wilson on December 15, 2020, and by the Union

on February 12, 2021. The General Counsel issued a consolidated complaint on May 25, 2021.

The heart of this case involves events culminating on December 9, 2020, when Respondent, Quickway Transportation, Inc., voluntarily resigned from its carrier services agreement with the Kroger Supermarket Company for performance of services at Kroger's Louisville (KY) Distribution Center (the KDC).[1] It then discharged or laid off all its employees at the KDC and at satellite facilities in Versailles and Franklin, Kentucky. The General Counsel alleges that Respondent violated Section 8(a)(5) and (3) and (1) in doing so. For the reasons stated below, I conclude that this complaint item must be dismissed pursuant to the U.S. Supreme Court decision in *Textile Workers Union of America v. Darlington Manufacturing Co.*, 380 U.S. 263 (1965).

The case also involves a number of alleged Section 8(a)(1) violations that occurred in 2019 and earlier in 2020. These were settled in September 2020, Jt. Exh. 5.[2] In light of the alleged violations committed in December 2020, the General Counsel set aside the settlement of the 2019 and earlier 2020 allegations and reinstituted its allegations that Respondent's conduct violated Section 8(a)(1) and in one case Section 8(a)(4) and (1). Since the Region set aside the settlement on the basis of the alleged violation in

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[1] Technically Kroger's contract was with a sister company, Quickway Logistics, which had a contract with Quickway Transportation, Inc. Both companies are affiliates of Paladin Capital.

[2] The Acting Regional Director approved the settlement on September 16, 2020, Jt. Exh. 5.

withdrawing from Louisville, I find that the Region was not justified in setting aside the settlement and dismiss these complaint allegations as well.

However, there were several violations which emanated from materials produced by Respondent to the General Counsel pursuant to subpoenas issued in preparation for this hearing. For reasons also discussed herein I find 8(a)(1) violations that were not covered by the settlement agreement.

On the entire record,[3] including my observation of the demeanor of the witnesses,[4] and after considering the briefs filed by the General Counsel, Respondent,[5] and Charging Party Union, I make the following:

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[3] Tr. 339, line 21 should be Wayland, not Gleason.

Tr. 383, line 12, mutual should be neutral.

Tr. 406, line 12: If should be unless.

Tr. 898, line 22 "the president" should be "those present."

[4] While I have considered witness demeanor, I have not relied upon it in making any credibility determinations. Instead, I have credited conflicting testimony based upon the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. *Panelrama Centers,* 296 NLRB 711, fn. 1 (1989).

[5] Respondent filed 2 posttrial briefs by different law firms. One brief addressed the allegations that were settled and in which the settlement was set aside by the Region. The other addressed the events in late 2020 leading to Respondent's withdrawal from its contract with Kroger.

FINDINGS OF FACT

I. Jurisdiction

Respondent, a corporation with headquarters in Nashville, Tennessee, transports grocery products from facilities in many different states, including Kentucky, Indiana, Tennessee, Ohio and Michigan. Quickway Transportation, Inc. is one of several affiliates of Paladin Capital, a holding company. In the year prior to May 1, 2021,[6] Quickway Transportation, Inc. performed services valued in excess of $50,000 for customers outside of Kentucky. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union. Local 89 of the International Brotherhood of Teamsters, is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

As stated previously, Quickway Transportation, Inc. is an affiliate of Paladin Capital. It and/or other Paladin affiliates have contracts to haul groceries from Kroger facilities, as well as other companies, in various states. At some Kroger facilities, such as the one at Shelbyville, Indiana, Respondent performs services for Kroger without a contract. At some Kroger facilities, the Paladin affiliate is the primary carrier; at others it is a secondary carrier. It may also be a

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[6] Other affiliates within the Paladin Group are Quickway Carriers, Quickway Services, Quickway Logistics, which enters into contracts with companies such as Kroger to provide transportation services, Capital City Leasing (CCL) which owns the truck cabs and other equipment used by the transportation affiliates.

dedicated carrier, meaning it services only Kroger at this facility.

At the Kentucky Distribution Center (KDC) in Louisville, Quickway was a secondary carrier to Transerv [or Transervice], whose drivers were also represented by Teamsters Local 89. At most of its unionized terminals, Quickway is the primary trucking carrier. At the KDC, Quickway received orders to carry Kroger products from Transerv. JB Hunt trucking company also delivered Kroger products from the Louisville terminal. Transerv transported 50-60 percent of the Kroger product from KDC, employing about 100 drivers. Quickway employed about 60-63 drivers to transport most of the rest of the KDC product.[7] These drivers occasionally transported Kroger product from other Quickway terminals. Local 89 also represents about 600 warehouse employees at the KDC who work for Zenith Logistics.

William Prevost, who is Chief Executive Officer of the Quick-way companies and Paladin Capital, started with Respondent in 2004, as did Chris Cannon, the current vice-president of operations. When Prevost and Cannon took over Respondent, employees at 4 of its current terminals were represented by Teamster Union locals.[8] Respondent has maintained a relation-

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[7] The KDC services 242 Kroger stores in various states.

[8] The unionized terminals are in Livonia, Michigan (Teamsters Local 164), Lynchburg, VA (Local 171), Shelbyville, Indiana (Local 135) and Landover, MD (Local 639). The Landover terminal, which does not service Kroger, was organized in 2006. In connection with the Landover campaign, Respondent was found to have violated the Act by engaging in the surveillance of employees' union activities, coercively interrogating employees, refusing to reinstate unfair labor practice strikers, locking out

ship with those locals up to the present day, except the one in Indianapolis which was decertified in 2008.[9] With the exception of the Louisville and Landover, Maryland terminals, none of Respondent's terminals have been organized during the tenures of Prevost and Cannon.

Quickway began servicing Kroger in Louisville in 2014. The most recent Carrier Services Agreement between Kroger and Quickway regarding the Louisville terminal was set to expire on February 3, 2021. In 2014, Quickway purchased the business of Mala Trucking company from Ed Marcellino. Marcellino stayed with Quickway as a vice-president until January 2020, when Respondent terminated him.

Quickway operated out of a facility on English Station Road which was about 9 miles from the main KDC warehouse, where the Transervice trucks were parked. The KDC warehouse employees worked for Zenith Logistics, which has a collective-bargaining agreement with Local 89, as does Transervice.

The English Station Road property was jointly leased from Lamar Properties, by Respondent and Paladin affiliate Capital City Leasing per a lease that runs from 2014 to 2024. Mechanics employed by Capital City Leasing worked out of the same facility as the Quickway drivers until February 2021, 2 months after Respondent withdrew from its agreement

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employees, engaging in direct dealing and transferring bargaining unit work by unilaterally removing employees from the bargaining unit, *Quickway Transportation, Inc.,* 354 NLRB 560 (No. 80), (2009); reaffd. 355 NLRB 678 (2010).

[9] Teamsters Local 135 tried unsuccessfully to organize the Indianapolis terminal again in 2019.

with Kroger and laid off all of its Louisville employees. Respondent began to attempt to sublease this property in February 2021 and succeeded in doing so in September 2021.[10]

Local 89 began an organizing drive at Quickway's KDC operation in the summer of 2019. Quickway's Vice President of Operations, Chris Cannon, became aware of this no later than August 2019 and most likely earlier. He instructed VP Ed Marcellino, then Quickway's senior on-site representative at KDC, that Respondent needed to find out if the Quickway drivers were being pushed to sign union authorization cards, G.C. Exh. 48.[11]

2019 and 2020 allegations that were settled and then vacated by the General Counsel and other evidence bearing on antiunion animus or violative conduct occurring prior to December 2020

Warren Tooley, a prounion former Quickway driver, testified about statements made on July 27, 2019, in the dispatcher's office at the KDC. Kerry Evola, then the Respondent's operations manager,[12] stated in front of several employees, that if Quickway at the KDC were to go union, that Bill Prevost, the CEO of Paladin Capital and Quickway, would shut

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[10] Whether and under what terms Respondent could cancel the sublease are not reflected in this record.

[11] Marcellino reported to Cannon.

[12] Respondent either terminated Evola in June 2020 or he resigned because he expected to be terminated. Tooley currently works as a driver at the KDC for another employer.

the facility down. Evola testified that he did not make such a statement.[13]

Given his commission of documented unfair labor practices, which he could not deny, I discredit Evola's testimony and credit Tooley. Moreover, regardless of whether he heard from Prevost that Respondent would not tolerate another unionized terminal, such a statement is not inconsistent with Respondent's history. In addition to the violations alleged in the complaint, Evola photographed union stickers on the personal trucks of Quickway drivers at some point in time, Tr. 677-678.

Donald Hendricks, a former dispatcher for Quickway, testified that in August 2019, Ed Marcellino, then Quickway's vice-president of Operations,[14] asked him to give Marcellino a list of union supporters at the KDC, and that he intended to put a stop to the union organizing. Marcellino denies this.[15] I credit Hendricks to the extent that Marcellino asked him for a list indicating which employees were inclined to vote for unionization. This is consistent with Respondent's conduct with regard to the 2019 Indianapolis representation election. It is also consistent with Marcellino's email of August 12, 2019, in which he indicates that he is having his son spy on union activity, G.C. Exh. 48.

Warren Tooley also testified that sometime in 2019, then terminal manager Chris Higgins told

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[13] This is alleged to be a violation of Sec. 8(a) (1) in complaint paragraph 5(a).

[14] Respondent terminated Marcellino in January 2020

[15] Complaint par. 6.

employees that if Quickway employees unionized, the company would have to raise its prices and might lose its contract with Kroger. Higgins, who Respondent fired in June 2020, denies this allegation.[16] I credit Tooley. Higgins' total lack of familiarity or total disregard of employee rights is evident from his interrogation of dispatcher Michael Jenkins and other dispatchers about how they intended to vote in a representation election for a bargaining unit of dispatchers, G.C. Exh. 31.

On October 10, 2019, Chris Cannon sent an email to Ed Marcellino and others which reads in part, "In recent days and weeks I have asked about any union talk and the reply has been "no talk about union". It is very apparent we still have union talk in our Louisville terminal and this needs to be addressed very quickly." G.C. Exh. 11.

On November 1, 2019, Cannon emailed other managers with regard to the representation election in Indianapolis which was scheduled later that month involving Teamsters Local 135. That email establishes that Respondent was keeping a list of each drivers' likely vote.

In a conversation secretly recorded by driver Brent Wilson, Kerry Evola told employees on January 24, 2020, that if they selected the Union as their bargaining representative, Respondent would cease making contribution to the employee stock plan (ESOP).[17]

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[16] Complaint par. 7 (a).

[17] Complaint par. 7(b).

Chris Higgins sent an email to Chris Cannon and HR Director Randy Harris on January 31, 2000, which attached photos of employees' private vehicles which displayed Local 89 stickers, G.C. Exh. 14. Higgins was the Quickway terminal manager in Louisville at this time. Thus, Kerry Evola was not the only Quickway manager engaging in surveillance of employees' union activities. Since there is no evidence that either Cannon or Harris expressed disapproval of this spying, I infer they approved of it and may have authorized it.

In February 2000, Respondent considered and may have implemented discipline less severe on a driver because he "is one of the few drivers at the Louisville terminal who is not supporting the union cause." Eric Hill, a Quickway manager, wrote that "Perhaps in light of the circumstances only a written warning for this offense with probationary period and if this happens again a three day suspension followed by termination if it happens a third time. In light of the unusual circumstances with the Union." G.C. Exh. 16.

The complaint alleges that on about March 9, 2020, Operations Manager Kerry Evola told employee Brent Wilson that he was going to file a lawsuit against him. In February 2020, Wilson had filed an NLRB unfair labor practice charge alleging that Respondent, by Evola, had violated the Act. In March, Wilson recorded a conversation with Evola in which Evola told him "You said I was gonna, uh, retaliate against you if you said something to the Union, you went to the Labor Board about it, yeah you did, so,

when it's all over, make sure you've got an attorney, because I'm coming back . . . "[18]

On March 11, 2020, Chris Cannon sent an email to William Prevost recommending that Quickway hire the Labor Relations Institute. Prevost approved engaging this firm. In his email, Cannon set forth the reasons for this engagement, R. Exhs. 67 and 68:

> Both companies [Labor Relations Institute and another] are considered as "union busters" and have a 90% win vote for the company during the election.
>
> The advantage of using these companies is they have the legal right to say what our company cannot say during a union campaign. During a union campaign, Quickway is restricted to not talk about the negative effects if the drivers form a union such as decreased pay and benefits, loss of business, drivers rights being taken away, any fees or penalties a driver can face from the union, etc. . . . They also educate our office staff on what to say and what not to say during campaigns so we can avoid additional ULP charges. . . . Considering the force of the union, Randy [Harris, Paladin's HR director] and I would like the allowance to use either of the two companies to help keep our Louisville terminal non-union.

This email not only evidences anti-union animus, but indicates a willingness to violate Section 8(a)(1) of the Act through the agency of LRI.

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[18] Complaint par. 8

On March 22, 2020, Lori Brown, Respondent's office manager in Louisville, took notes of a conversation amongst 3 Quick-way drivers about whether there were any advantages to being represented by the Union. Brown sent her notes to Chris Higgins, then the terminal manager and operations vice-president Chris Cannon. Cannon instructed Higgins as follows: "Let Lori know to observe and take notes of the conversations. She does not need to engage and ask questions as she did." G.C. Exh. 22. At trial, the General Counsel moved to conform the pleadings to the evidence by alleging illegal surveillance on the part of Cannon.

On May 28, 2020, Chris Cannon advised subordinates as follows:

> I'd like to disconnect any and all Murfreesboro drivers from picking up loads from the KDC. Any Murfreesboro driver that comes on the lot at the KDC is being approached by the union, and we certainly do not want the union to infect our Murfreesboro fleet.

G.C. Exh. 25, pg. 3.

Quickway drivers from the Kroger facility in Murfreesboro, Tennessee, as well as from Indianapolis picked up loads from the KDC, Tr. 290-292. In May 2020 Respondent shifted work from its Murfreesboro drivers to the Louisville drivers precisely for the purpose of avoiding a union campaign in Murfreesboro, G.C. 25, Tr. 1717-1718.

In June 2020, Bill Prevost suggested to Chris Cannon and Randy Harris, the Paladin HR director, that Kroger could have loads towed from the KDC to the Quickway yard in order to prevent the Teamsters

from picketing at the KDC. There is no evidence whether this was explored in December 2020, as a means of limiting the impact of a strike against Quickway, G.C. Exh. 30.

On September 14, 2020, 2 drivers asked terminal manager Jeff McCurry[19] if the terminal would close if the Union was voted in. McCurry responded by saying that he could not speak for Kroger but that he was unaware of any location where there were 2 union carriers at a Kroger distribution center. R. Exh. 76.

On September 18, 2020, the Union demonstrated in front of the Quickway facility at the Kentucky State Fairgrounds. The Union displayed a "Fat Cat" balloon at the site. Interim terminal manager Jeff McCurry went outside the terminal and photographed the Union representatives and the "Fat Cat." McCurry informed his superiors, including Chris Cannon, the VP of Operations, that he would attempt to find out what the union representatives were discussing with Quickway drivers, G.C. Exh. 34.

A few hours later, McCurry reported, "as far as what they were discussing with drivers, all of the drivers I spoke with shut them down. The drivers that were coming in this morning were not interested in talking with the union," G.C. Exh. 35. At trial, the General Counsel moved to conform the pleadings to the evidence by alleging illegal surveillance and interrogation on the part of Respondent.

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19 McCurry replaced Chris Higgins as Respondent's Louisville terminal manager.

On September 30, 2020, McCurry photographed the Union activity across the street from the Quickway facility again.

In October 2020, Respondent opened a new facility in Hebron, Kentucky, which is adjacent to the Greater Cincinnati airport, about a 2-hour drive from Louisville.

Events Leading Up to Respondent's Closure of Its Louisville Operations

After unsuccessfully seeking voluntary recognition on January 22, 2020, Teamsters Local 89 filed a petition to represent Quickway's drivers on May 6, 2020, The Union won the Board mail-ballot election conducted between May 22 and June 19, 2020, by a vote of 25-17.[20] Respondent requested review of the election results on July 23, 2020. The Board denied the request for review on October 26, 2020, Jt. Exh. 7.

On October 27, 2020, Local 89 requested that Quickway provide dates for collective bargaining.

On November 19, 2020, Quickway and the Union had their first bargaining session. The parties reached several tentative agreements. There was no discussion of economic issues, such as wages. However, at some point, Union President Fred Zuckerman told the Quickway bargaining committee that he was "very adamant about the area standards." Tr. 501, 510. A second bargaining session was scheduled for December 10, 2020.

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[20] Quickway was obviously very surprised at this result, R. Exh. 71. R. Exh. 33, Article 23.

The events of December 6-10, 2020

On December 6, 2020, the Union held a meeting for its members. At this meeting, the members present voted to authorize a strike by Local 89, if necessary, R. Exh. 219. Business agents Brian Trafford and David Thornsberry told employees that if there was a strike, the picket line would be honored by Transerv and Zenith employees who were represented by Local 89, Tr. 923. Trafford testified that nothing was said about when a strike might occur or that it would occur on December 10. There is no evidence to the contrary in part because I did not allow Respondent to delve into matters of which it was not aware when it terminated its contract with Kroger.

Section 17.2 of Local 89's collective-bargaining agreement with Transervice provides:

> It shall not be a violation of this Agreement, and it shall not be cause for discharge, disciplinary action or permanent replacement in the event an employee refuses to enter upon any property involved in a primary labor dispute, or refuses to go through or work behind any primary picket line, including the primary picket lines at the Employer's places of business.
>
> It shall not be a violation of this Agreement and it shall not be cause for discharge, disciplinary action or permanent replacement if any employee refuses to perform any service which his/her Employer undertakes to perform as an ally of an Employer or person whose employees are on strike and which service, but for such strikes, would be per-

> formed by the employees of the Employer or person on strike.
>
> R. Ex. 22.

However, there is no evidence that any unit employee is required to honor a picket line. Indeed, Local 89's proposal to Respondent specifically stated that each employee had the right to determine as an individual whether he shall refuse to go through bona fide picket line, and no employee shall be disciplined or discharged for exercising this right.

Strike benefits were authorized for Quickway employees if they went on strike and for Transerve and Zenith employees if they did not work due to their refusal to cross a Local 89 picket line.

On December 7, 2020, several television stations, WHAS11 and WDRB in Louisville received an anonymous text message. Andy Russell, an employee of WDRB advised Kroger that he could not "confirm whether the sender was involved with "the organization" just because of his email is an icloud.com email." The communication was almost certainly sent by Donald Hendricks, a former dispatcher for Quickway. It read:

> On October 26, 2020 truck drivers for Quickway Carriers, a contract carrier for Kroger grocery stores, located at 2827 S. English Station Rd., Louisville, KY had their majority vote to unionize with Teamsters local 89 as their representative was formally recognized. This was after a nearly a year of stalling and retaliatory practice implemented by Quickway Carriers against their employees.

> To date the company has not negotiated in good faith and 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.
>
> The next meeting between Teamsters Local 89, Drivers and company officials will be held at the Hilton Garden Inn 2735 Crittenden Dr. Louisville, KY starting at 0800 on December 10, 2020. At the conclusion of this meeting if company officials refuse to ratify a contract Quickway Carrier Truck Drivers in Louisville will strike.
>
> In recognition, the Teamsters Local 89 Truck Drivers and Warehousemen who work for Transervice and Zenith Logistics which are responsible for the majority of the Kroger Transportation and 100% of warehouse operations will also strike in support of Quickway Carrier drivers.
>
> **THIS WILL SHUT DOWN KROGER DISTRIBUTION OPERATIONS IN THEIR ENTIRETY.**

At least one TV station contacted Kroger about this message. Joe Obermeier,[21] Kroger's Vice-President of Supply Chain Operations then called Chris Cannon, Respondent's Vice President of Operations, about the message. There is no evidence that any news organi-

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[21] Mr. Obermeier's name is mistranscribed as Overmeier at some places in the transcript.

zation contacted the Union or when, or even if, the Union was aware of Hendrick's text messages.

At 4 p.m. Central time on December 7, 2020, Chris Cannon and Joe Campbell, President and Chief Operating Officer of Paladin Capital, participated in a conference call with representatives of Kroger and Eddie Byers, the Regional Manager for Zenith Logistics. According to Campbell, Daniel Vasser of Kroger asked Byers to reach out to the Local 89 business agent for Zenith to determine whether a reserve gate could be established for Quickway at the KDC. Byers did not testify in this proceeding and there is no credible evidence that either Zenith, Transerve, Kroger or Quickway seriously explored the possibility of establishing a reserve gate at KDC in order to avoid enmeshing Zenith, Transerve and Kroger in any strike that Local 89 might call against Quickway.[22]

In a December 7 or 8, conversation, Cannon and/or Prevost told Obermeier that if the Union insisted on the same terms that were contained in its collective-bargaining agreement with Transerv, that

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[22] Chris Cannon testified that he discussed the possibly of a reserved gate with Quickway counsel Mike Osterle on the morning of December 7, Tr. 1764. Zenith appears to have established a reserve gate for Quick-way drivers as of 11 p.m. on December 9, after Quickway's contract with Kroger had expired, Tr. 55.

I give no weight to the unsigned letter from Zenith counsel, A. Dennis Miller, dated December 9 for the proposition that attorney Miller discussed a strike with Local 89 business agent Trey McCutcheon. Miller did not testify. The letter is rank hearsay as I stated on the record at, Tr. 1819-1820. Moreover, it does not indicate when Miller may have spoken to McCutcheon and says nothing about Zenith employees going on strike.

would be a problem for Quickway.[23] In that event, Cannon stated Quickway might want to be relieved of its obligations under its contract with Kroger.

On December 8, 2020, Cannon asked Obermeier to cancel Kroger's contract with Quickway. Obermeier refused to do so, Tr. 373.

Obermeier told Cannon that Kroger would not cancel the contract and that it expected continued good service from Quickway. Ultimately, Kroger allowed Quickway to cancel its contract.[24]

Obermeier and Cannon also discussed whether Quickway would respond to Kroger's Request for Proposal for the contract term beginning in February

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[23] It is possible that Obermeier was wrong about talking to Cannon on December 7. However, I credit his testimony that Cannon and/or Prevost told him that it would be a challenge for Quickway to agree to the same terms as were contained in L89's agreement with Transerve, Tr. 371-372. Cannon's testimony at Tr. 1879-1883 is consistent with Obermeier's testimony. Cannon testified that the Transerve agreement did not fit Quickway's business model and that it was "a far stretch" from any collective-bargaining agreement to which Quickway was a party.

[24] Respondent's witnesses contradicted Obermeier's testimony in several respects. I credit Obermeier since I see no incentive for him to fabricate his testimony and plenty of incentives for Respondent to contradict it. Moreover, the differences in the testimony of Obermeier and Respondent's witnesses are for the most part inconsequential. It is uncontroverted that the initiative for cancellation of Respondent's contract at the KDC came from Respondent, not Kroger.

If Obermeier told Prevost that Kroger would not renew its contract with Quickway, he did so after being informed that Quickway was seeking to get out of its current contract. Tr. 1332.

2021. Obermeier understood that a Paladin entity, other than Quickway, would respond to the RFP.

On December 9, 2009, Respondent resigned from its carrier services agreement with the Kroger supermarket chain at the Kentucky Distribution Center (KDC).[25] It then discharged or laid off the employees belonging to a bargaining unit of all full-time and regular part-time drivers at the KDC and the Versailles and Franklin, Kentucky sub-terminals.[26] Quickway continues to lease property at KDC. The vast majority of cabs Quickway used at Louisville were distributed to other Paladin affiliated terminals or sold if they were near the end of their shelf-life, R. Exh. 62.

Respondent met with the Union on December 10, 2020, at about 8 a.m. Respondent offered to bargain about the effects of the closing of the Quickway operation at KDC; the Union refused. The Union insisted on continuing negotiations for a collective-bargaining agreement; Respondent refused. At about noon several union business representatives picketed Quickway near the property it leased at the Kentucky State Fairgrounds. They also temporarily blocked 2 Quickway drivers from Indianapolis from leaving the Quickway facility at the Fairgrounds.

Teamster Organizing Activity in Indianapolis

Teamsters Local 135 conducted an organizing campaign of Quickway employees working at Kroger's

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[25] This agreement was effective on February 3, 2018, and was to expire in February 2021.

[26] The bargaining unit consisted of about 60-70 employees.

Indianapolis terminal in 2019. A representation election was conducted in November 2019, which the Union lost. The Union did not file any unfair labor practice charges relating to this campaign.

On December 10, 2020, Quickway's Indianapolis terminal manager Eric Rowe dispatched 2 drivers to the KDC to pick up Quickway trailers. The drivers learned that Quickway had shut down its Louisville facility. Quickway employees at other terminals may have become aware of the shutdown, when vehicles used at Louisville were transferred to their terminals.

According to Lewis Johnston, a prounion driver at Indianapolis, this knowledge put an end to plans by Indianapolis drivers to start another organizing campaign. Johnston testified that he told Rowe, who no longer works for Quickway, about the plans for a second union campaign prior to December 9. Rowe denies this conversation took place. Johnston's conversation with Rowe is not mentioned in Johnston's June 3, 2021 affidavit. Thus, I do not credit this testimony.

Respondent's Version of the Events Leading to the Closure of Its Operations in Louisville

According to Respondent, only 3 people were involved in the decision to cease its operations in Louisville: Paladin/Quickway CEO Bill Prevost, Joe Campbell, President and Chief Operating Officer of Paladin Capital and Quickway Chief Operating Officer Chris Cannon. Their version of events is that Respondent did not consider ceasing operations in Louisville until Kroger advised Respondent of an inquiry from Louisville television stations regarding a strike. Kroger forwarded to Respondent the emails it had

received and quoted above indicating that Local 89 would strike Quickway, and that Transerv and Zenith employees would also strike and shut down the Kroger Kentucky Distribution Center.

Up until that time, according to Respondent, it intended to negotiate with Local 89 and reach a collective-bargaining agreement. However, Respondent submits that unless it ceased operations in Louisville, it would be liable for any damage to Kroger's business and this liability would ruin not only Quick-way, but all of Paladin Capital.

Respondent made no effort to contact Local 89 about the alleged strike threat. Quickway counsel Mike Osterle contacted Local 89 President Fred Zuckerman on the morning of December 8, but did not inquire about a strike threat or the information Quickway had received from Kroger regarding media inquiries, G.C. Exh. 25. Instead Respondent made, according to its witnesses, a number of assumptions: 1) that Local 89 would go on strike on December 10; 2) that all Transerve and Zenith employees would go on strike and 3) that it would be responsible for hiring replacement workers for Transerve and Zenith and that it would be responsible for any damage to Kroger's business. Among the more radical assumptions testified to by Respondent witnesses are that they expected all drivers employed by Quick-way and Transerve to pull off the road when the strike started which would allow the cargo to rot, that Respondent would lose its line of credit and insurance and that the consequences of a strike would ruin Paladin, as well as Quickway.

These assumptions were unwarranted and unreasonable for a number of reasons. The Transerv and Zenith collective-bargaining agreements did not

require unit employees to honor a picket line. Article 23 of the Transerve agreement provides:

> Each employee covered by this Agreement shall have the right to determine as an individual whether he shall refuse to go through [a] bona fide picket line, and no employee shall be disciplined or discharged for exercising this right.

R. Exh. 233.

Article 18.2 of the Zenith Agreement provides:

> It shall not be a violation of this Agreement, and it shall not be cause for discharge, disciplinary action or permanent replacement in the event an employee refuses to enter upon any property involve in a primary labor dispute, or refuses to go through or work behind any primary picket line, including the primary picket lines at the Employer's places of business.
>
> It shall not be a violation of the Agreement and is shall not be cause for discharge, disciplinary action or permanent replacement if any employee refuses to perform any service which his/her Employer undertakes to perform as an ally of an Employer or person whose employees are on strike and such service, but for such strikes, would be performed by the employees of the Employer or person on strike.

R. Exh. 234.

There is no reason to assume that all Quickway employees, would have gone on strike had the Union

gone on strike. They certainly weren't required to do so and only 25 of Quickway's 60 employees voted to be represented by the Union; 17 voted against such representation. Similarly, there is no evidence on which to assume that all or even a substantial number of Transerve or Zenith employees would have honored a Local 89 picket line.

Secondly, Respondent has not established that Transerve and Zenith could not have avoided the impact of a strike against Quickway by establishing a reserve gate. In June 2020, Respondent contemplated having product towed from the KDC to its English Station Road facility for loading onto its trucks. There is no evidence as to why this was not feasible in December or why Respondent did not explore it. Finally, Kroger was unconcerned that a Local 89 strike against Quickway would shut down the KDC, Tr. 429-431. Kroger would have found other avenues to ensure that its stores were serviced.

Whether or not Respondent decided to terminate its contract with Kroger prior to December 8, I infer that receipt of the media inquiry through Kroger presented Quickway with an opportunity to do what it preferred to do in any event; withdraw its recognition of the Union, terminate its contract with Kroger and layoff all of its Louisville drivers. I infer that Respondent strongly desired not to have another unionized terminal and would have tolerated another one, if at all, only if Local 89 accepted a collective-bargaining agreement such as it had in Lynchburg, Virginia, which did not contain the area standards that Local 89 was seeking.

Finally, no credible evidence in this record supports a conclusion that Quickway's departure from

Louisville was necessarily permanent., Jt. Exh. 13.[27] The equipment needed to service KDC is still owned by a Paladin affiliate and Quickway continues to lease the property on English Station Road.

Analysis

The starting point for analysis of a plant closure is the U.S. Supreme Court decision in *Textile Workers Union of America v. Darlington Manufacturing Co.*, 380 U.S. 263 (1965). The Court held that closing an entire business does not violate the Act, even if done for discriminatory reasons. However, a partial closing may violate the Act if motivated by a desire to chill unionism in the remaining parts of the enterprise and if the employer may reasonably have foreseen that such closing would likely have that effect.

Darlington is distinguishable from the instant case in that the Board of directors of the parent company voted to liquidate the corporation and sell all the plant's machinery and equipment. In contrast, there is nothing necessarily permanent about Respondent's withdrawal from the Carrier Services Agreement with Kroger. Respondent did not liquidate anything-other than getting rid of some trailer cabs that were at the end of their shelf life. Much of this equipment was transferred to other Quickway or Paladin operations. There is nothing to prevent Respondent from bidding

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[27] On the basis of Obermeier's December 9, 2020 letter, Jt. Exh. 13,I discredit Bill Prevost's testimony that Obermeier told him that Kroger would not renew its Carrier Services Agreement with Quickway. Moreover, as demonstrated by its operations at Shelbyville, Respondent could have continued servicing the KDC without such a renewal, and even now could return to KDC without such a contract.

on the Louisville work again or for Kroger to award the Louisville work to it again, with or without a contract.

Finally, if Respondent took or were to take more permanent steps after December 9, 2020, that preclude its return to the KDC, that would be irrelevant to whether it violated the Act. Whether its conduct violated the NLRA depends on the situation that existed on that date. Thus, the sublease of the English Station Road property is irrelevant to the resolution of this case.

Respondent's operation at Louisville was highly profitable. Respondent had hoped that with its business model it could capture the work currently done by Transervice. There is no evidence that Respondent has abandoned this goal. It still holds the lease on its Louisville property until 2024.[28] In the absence of a Board Order finding its December 2020 conduct illegal, there is substantial incentive for Respondent to return to Louisville without any obligation to honor its former employees' organizational rights.[29]

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[28] Of lesser importance is the fact that Respondent did not terminate Jeff McCurry, its Louisville terminal manager, it merely reassigned him to other relatively near-by locations.

[29] This case is distinguishable from First National Maintenance Corp v. NLRB, 452 U.S. 666 (1981). In that case the employer closed part of its business because its contract with a nursing home was not profitable. That was not the situation in this case. Moreover, here the issues for which Respondent shut down its Louisville operation were amenable to resolution through the collective bargaining process. Respondent left Louisville due to a concern about higher labor costs. Finally, Respondent's decision was in large part motivated by anti-union animus.

Despite the above, the holding in *Darlington*, which specifically allows an employer to close part of its business even if motivated by anti-union animus cannot be materially distinguished. Thus, I conclude Respondent's withdrawal from the Carrier Services Agreement did not violate the Act, *RAV Truck and Trailer Repairs, Inc. v. NLRB,* 997 F. 3d 314 (D.C. Cir. 2021).[30]

The Board addressed the "chilling effect" exception to the Darlington rule in *George Lithograph Co.,* 204 NLRB 431 (1973). There, the Board held that the General Counsel must only prove the foreseeability of a "chilling effect" on unionization and not necessarily that the partial closing had a "chilling effect:" on the remaining employees. She must also prove that the partial closing was motivated at least in part by a desire to chill unionization in any remaining part of its business, *Bruce Duncan Co., Inc.,* 233 NLRB 1243 (1977).

Respondent's withdrawal of recognition would most clearly have a chilling effect on employees at other Paladin companies considering unionization. However, I do not think the record is sufficient to establish that this was Respondent's motivation. This record only establishes Respondent's determination

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[30] I conclude also that the Supreme Court decision in *NLRB v. Great Dane Trailers, Inc.,* 388 U.S. 26 (1967) does not lead to a different result. First of all, I find that Respondent's withdrawal from Louisville was motivated by anti-union animus. However, under *Darlington* Respondent's conduct did not violate the Act despite its anti-union motivation and despite the fact that what it did is inherently destructive of the Section 7 rights not only of the Louisville employees, but also of the employees working for any of the Paladin affiliated companies.

not to bargain with the Union in Louisville and a determination not to take chances on a strike by Local 89 if it failed to reach agreement with the Union.

Applying the test enunciated in *Wright Line* 250 NLRB 1083 (1980), were it not for *Darlington,* I would find that Respondent violated Section 8(3) and (1) by withdrawing its services from the KDC and laying off all its Louisville unit employees. Respondent knew of the employees' union activity, bore animus towards it[31] and took these actions to avoid bargaining further with the Union and to cease recognizing it as the authorized collective bargaining representative of these employees, *Century Air Freight,* 284 NLRB 730, 732 (1987).

Respondent does not even advance a non-discriminatory motive. Were it not for *Darlington,* I would also find that Respondent violated Section 8(a)(5) and (1) by not negotiating with the Union to impasse. Respondent did what it did to avoid collective bargaining, or even on the best interpretation of its motives, to avoid a perfectly legal strike. There is no credible evidence that Respondent could not have addressed its concerns through perfectly legal measures, such as establishing a reserve gate at KDC, having products ferried to its facility from the KDC and hiring replacements if there was a strike.

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[31] As evidenced by its illegal surveillance of employees' union activities; unlawful interrogations, threats and hiring of a "union-buster" to thwart organization.

8(a)(1) Allegations Covered by the September 2020 Settlement Agreement

As a general rule a settlement agreement with which the parties have complied bars subsequent litigation of the settlement conduct alleged to constitute unfair labor practices, *Hollywood Roosevelt Hotel Co.,* 235 NLRB 1397 (1978). However, there is an exception to the settlement bar rule where the "prior violations were unknown to the General Counsel and not readily discoverable by investigation, *Leeward Nursing Home*, 278 NLRB 1058 (1986). Since I dismiss the allegations that led the Region to set aside the settlement, I must also dismiss the complaint al-legations covered by the settlement. Nevertheless, in the event that I am reversed, I am setting forth my view as to whether the General Counsel would have otherwise established these violations.

Complaint paragraph 5(a)

Respondent, by Kerry Evola, violated Section 8(a)(1) as alleged in telling employees that Respondent would close the Louisville facility if they unionized. His comments meet the test for a statutory violation set forth in *Rossmore House*, 269 NLRB 1176 (1984).

Complaint paragraph 6(b)

Respondent, by Ed Marcelino, violated Section 8(a)(1) by asking Donald Hendricks to create a list of union supporters. Asking an employee for a list of union supporters violates Section 8(a)(1), *Key Electronics,* 167 NLRB 1104 (1967).

Complaint paragraph 7

Respondent, by Chris Higgins, violated Section 8 (a)((1) by telling Warren Tooley that if employees unionized, Respondent would have to raise its prices and might lose Kroger as its main customer.

Complaint paragraph 8

Respondent, by Kerry Evola, violated Sections 8 (a)(4) and (1) of the Act by indicating that he was going to sue Brent Wilson for filing a unfair labor practice charge alleging retaliation by Evola and suggesting that Wilson may need a lawyer.

8(a)(1) Allegations Not Covered by the Settlement Agreement

In determining whether or not an interrogation violates Section 8(a)(1) of the Act, the Board looks to whether under all the circumstances the interrogation reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. The total circumstances of the conversation must be considered in determining whether any questioning was coercive in nature. *See Rossmore House*, 269 NLRB 1176 (1984).

I find that Jeff McCurry's questioning of employees on September 18, 2020, violated the Act. There is no evidence that McCurry interrogated only known union supporters. In fact, I infer he was talking to employees of whose sympathies he was unaware. Known union supporters were unlikely to provide him with the information he was seeking. The fact that the employees who spoke to McCurry disavowed interest in the Union is compelling evidence that his inquiries were

coercive. Given the substantial number of employees who voted for union representation, it is highly likely that McCurry spoke to some of those employees, who gave him untruthful answers because they felt coerced.

This allegation was not plead as a violation by the General Counsel until September 15, 2021. Respondent submits that it has been prejudiced by the General Counsel's motion on that date to conform the evidence to the pleadings regarding this allegation. Section 102.17 of the Board's Rules give a judge wide discretion to grant or deny motions to amend complaints. The factors to be evaluated in determining whether an amendment should be allowed are (1) whether there was surprise or lack of notice, (2) whether there was a valid excuse for the delay in moving to amend, and (3) whether the matter was fully litigated, *Stagehands Referral Service,* 347 NLRB 1167, 1171-1172 (2006).

Respondent was not prejudiced by the General Counsel's motion to amend regarding these events on September 15, 2021, Tr. 650-653. The General Counsel stated that he had not moved to amend earlier because he was unaware of the instances until he received the subpoenaed documents. I granted the amendment but stated that if Respondent could demonstrate prejudice, I would reverse my ruling. Respondent called Jeff McCurry as a witness on September 17, 2021. Tr. 986. Respondent examined McCurry about the events of September 18, 2020, Tr. 1013-1018. Respondent specifically questioned him about G.C. Exh. 35, in which McCurry indicated that he would find out what the union representatives were discussing with Quickway employees. Later, he stated that he had spoken to drivers about union activity. I have previously discredited McCurry's tes-

timony that he only spoke to drivers who approached him. Respondent thus had amble evidence to introduce any exculpatory evidence.[32] Moreover, the violation is established by Respondent's documentation of the interrogations.

Similarly, I find that Respondent violated the Act by Chris Cannon's approval of Lori Brown's documentation of employees' conversations about the Union in March 2020 and his encouragement for her to continue doing so. The General Counsel moved to amend the pleadings to conform to the evidence with regard to this conduct as well. G.C. Exh. 22. This establishes an 8(a)(1) violation on its face and was introduced into the record on September 13, 2021, Tr. 282-283. Respondent objected to the introduction of the document only on relevance grounds. Immediately after receipt of the document into the record, the General Counsel called Chris Cannon as an adverse witness. Respondent called Cannon as its witness on October 28, 2021, Tr 1695. This was a month and a half after the General Counsel moved to amend the pleadings to allege that Cannon had violated the Act by engaging in surveillance on March 18, 2020, Tr. 650-653. Thus, Respondent had ample opportunity to elicit evidence to show that Cannon did not violate the Act as alleged.

These violations were fully litigated, *Williams Pipeline Co.,* 315 NLRB 630 (1994); *Casino Ready Mix, Inc. v. NLRB,* 321 F.3d 1190, 2000 (D.C. Cir. 2003). Thus, Respondent suffered no prejudice by virtue of the motion to conform the pleadings. Given the circumstances, I conclude that whether or not the

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[32] The trial continued well into October.

General Counsel could have plead these violations earlier is immaterial.

The March 2020 and September 18, 2020 Allegations are Not Covered By the Settlement Bar Rule

While the above 2 allegations were not covered by the September 2020 settlement agreement, neither would have come to light had not the Region set aside the settlement agreement. I do not find this to be a reason for precluding a finding that Respondent violated the Act as alleged. This is particularly so since Respondent appears to have a penchant for spying on employees' union activities. It did so, as found by the Board in the Landover, Maryland case, a matter that also involved Chris Cannon and in Indianapolis as well as in Louisville.

CONCLUSIONS OF LAW

Respondent, by Jeff McCurry violated the Act on September 18, 2020, by interrogating employees about their union activities.

Respondent, by Chris Cannon, in March 2020 violated Section 8(a)(1) by condoning prior surveillance of employees' union activities and sanctioning further surveillance.

Respondent did not violate the Act in any other respect alleged by the General Counsel.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirm-

ative action designed to effectuate the policies of the Act.

ORDER

Respondent, Quickway Transportation, Inc., Nashville, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union activities.

(b) Engaging in the surveillance of employees' union activities.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, Respondent shall duplicate and mail, to all current employees and former employees employed by the Respondent in or related to its Louisville, Kentucky operations on December 9, 2020, at its own expense, a copy of the attached notice marked "Appendix." Onv forms provided by the Regional Director for Region 9. It shall be mailed after being signed by the Respondent's authorized representative.[33]

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[33] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interrogate you about your union activities or the union activities of other employees.

WE WILL NOT engage in surveillance of your union activities or create the impression that we are doing so.

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of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

QUICKWAY TRANSPORTATION, INC.
(Employer)

HIGGINS EMAIL WITH IMAGES OF LOCAL 89 UNION CAMPAIGN STICKERS (JANUARY 31, 2020)

From: Chris Higgins [chrish@quickwaycarriers.com]
Sent: 1/31/2020 12:26:01 PM
To: chrisc@quickwaycarriers.com; Randy Harris [crharris@paladin-capital.com]; Jessie Dillard [jessied@ccl-tn.com]
Cc: Chris Higgins [chrish@quickwaycarriers.com]
Subject: Local 89 Union Campaign stickers in cars on our lot
Attachments: 20200131_125038.jpg; 20200131_124629.jpg; 20200131_124550.jpg; 20200131_124542.jpg

Thank you,

Chris Higgins
Terminal Manager
2827 South English Station Road
Louisville, KY 40299
chrishquickwaycarriers.com
502-708-1300 office
502-708-1320 fax


TEAMSTERS
LOCAL 89
TEAMSTERS
LOCAL 89


QUICKWAY
WORKERS


EMPLOYEES
OF
QUICKWAY
FOR
TEAMSTERS
LOCAL 89


TEAMSTERS
LOCAL 89

PREVOST AND FRANK EMAILS WITH LRI STATEMENT OF WORK (MARCH 11, 2020)

To: Bill Prevost[billp@quickwaycarriers.com]
Cc: 'Randy Harris' [crharris@paladin-capital.com]
From: chrisc@quickwaycarriers.com [chrisc@quickwaycarriers.com]
Sent: Wed 3/11/2020 6:40:50 AM (UTC-05:00)
Subject: LRI Consulting Services, Inc – Quickway Carriers – Engagement Letter
Quickway Carriers, Inc – Engagement Letter-March 9, 2020.pdf
Quickway Carriers, Inc – Campaign Consulting – March 9, 2020.pdf

Bill,

Randy and I have been in discussions with Labor Relations Institute (LRI) and National Labor Relations Advocate (NLRA) regarding our Louisville terminal. LRI was recommended by jack Finklea and NLRA came in unsolicited. Both companies are considered as "union busters" and have a 90% win vote for the company during an election.

The advantage of using these companies is they have the legal right to say what our company cannot say during a union campaign. During a union campaign, Quickway is restricted to not talk about the negative effects if the drivers form a union such as decreased pay and benefits, loss of business, drivers rights being taken away, any fees or penalties a driver can face from the union, etc. They come with a wealth of knowledge and can educate our drivers about the law and their rights during a union campaign. They deploy person-

nel to our location and hold group meetings and one-on-one meetings with our drivers. They also educate our office staff on what to say and what not to say during campaigns so we can avoid additional ULP charges.

The attachment is a quote from LRI. LRI is approx. $3000 per day and NLRA is $2500 per day. We have 15 days before the election that we can use either of the two companies as Quickway's advocate and educate our drivers to vote NO for the union.

Considering the force of the union, Randy and I would like the allowance to use either of the two companies to help keep our Louisville terminal non-union. We can make ourselves available for discussion at any time.

Thanks
Chris

From: Rebecca Frank <rfrank@lrionline.com>
Sent: Monday, March 9, 2020 1:50 PM
To: chrisc@quickwaycarriers.com
Cc: crharris@paladin-capital.com
Subject: LRI Consulting Services, Inc – Quickway Carriers – Engagement Letter

Dear Mr. Cannon,

Attached please find our engagement letter per your conversation with Eric Funston. Our statement of work will follow, shortly. If you have any questions, please contact Eric or me at 1-800-888-9115.

The fee for consulting is $3,000 per consultant per day (plus travel expenses). For purposes of this statement of work, a consulting day is defined as each calendar day worked by each consultant. If more than

one consultant is working on your case the parties understand and agree that multiple consulting days may be worked on each calendar day. The fee for off-site consulting is $375 per hour (this is inclusive of but not limited to pre-planning, conference calls, slide production, material collection, report generation, etc.). The off-site fees will not exceed $3,000 per day.

Thank you for the opportunity to support Quickway Carriers. We look forward to working with you.

Respectfully,

Becky Frank, Executive Assistant
Labor Relations Institute | www.lrionline.com | 800.888.9115
Approachable Leadership Learning System | www.ApproachableLeadership.com

Love our work? Please tell a friend or colleague. Help us deliver our mission that everyone deserves a great workplace!

LRI Consulting Services, Inc.

phone 800-888-9115 | www.LRIonline.com
fax 918-455-9998|

Personal & Confidential

March 9, 2020

Chris Cannon
Vice President
Quickway Carriers, Inc
5209 Linbar Dr Suite 602
Nashville, TN 37211

RE: Campaign Consulting

Dear Mr. Cannon,

We are delighted and honored for the opportunity to educate your employees about the myths and realities of union representation. As we've discussed, unions have been on a steady and rapid decline since the 1950's. They are desperately trying to attract new members and because so few people have any experience with unions today it is very easy for employees to be misled by a union sales pitch. This is why it is so valuable to provide your team with access to a subject matter expert who can help answer questions and dispel common misconceptions about how unions work in real life.

We take our role of responsibly, legally and respectfully educating and answering questions about unions very seriously. Union campaigns can be highly emotional and disruptive. Our number one priority is to leave your company and your workforce better than how we found it. Since time is of the essence, I want

to quickly outline what you can expect from LRI during this engagement:

- We will assign one or more subject matter experts to meet with your managers and employees. All of our consultants have years of experience with unions and receive a thorough background check and sign an ethics pledge.
- We will assign a campaign manager who can answer any questions you have and determine how we will coordinate with your legal team — our firm is run by a labor attorney and we place the highest priority on following all legal requirements.
- Our primary goal is to educate, and we will provide provable and verifiable facts and encourage your employees to decide for themselves whether union representation is right for them — everyone is entitled to their own opinion and we will treat all of your employees with respect, even those who disagree with us.
- We will make sure that your leaders are well trained and understand the rules and legal requirements and we will do our very best to ensure that every employee is able to vote in a free and fair election.
- We will work with your managers to "up their game" as leaders — organizing events are stressful and challenging but we often find that with our guidance, relationships and connections between leaders and their team-mates dramatically improve.

- We will be available to you on a-24/7 basis and you can expect a return call or e-mail within 2 hours of any communication to us.

We are required to report our agreement with you to the Department of Labor within 30-days of today, and we will submit a copy of this document with that report. Since time is of the essence for this project we agree to handle expenses and fees incurred as outlined below:

- Out of pocket change or service fees for any non-refundable travel related expenses incurred;
- Actual consulting days performed for the Company (at our customary rates); and
- Any other reasonable business expenses spent on your behalf (if any).

If you have any questions or concerns, please contact me immediately at 918-455-9995. We very much appreciate the opportunity to work for you. You may be assured that you will receive our best efforts. We look forward to the opportunity to meet and educate your team.

Respectfully,

Phillip B. Wilson
President – General Counsel
LRI Consulting Services, Inc.

Contact information:
Campaign Manager-Executive Vice President:
Eric Funston
Office (800) 888-9115
Cell (918) 346-3840

Email: Efunston@lrims.com

President & General Counsel:
Phillip B. Wilson
Office (918) 455-9995
Cell (918) 361-4497
Email pbwilson@lrims.com

LRI Consulting Services, Inc.

phone 800-888-9115 | www.LRIonline.com
fax 918-455-9998|

Statement of Work

March 9, 2020

Chris Cannon
Vice President
Quickway Carriers, Inc
5209 Linbar Dr Suite 602
Nashville, TN 37211

RE: Campaign Consulting

Situation Assessment

You have requested a Statement of Work (SOW) to provide materials and consulting services to help you win your upcoming NLRB election. You have a few short weeks to educate your employees on the disadvantages of unions and convince them to put their trust in a direct relationship with you rather than the union, You want to make sure that your consulting is persuasive, does not interfere with employees' protected rights and provides the best opportunity to build trust with your employees.

Proposed Intervention(s)

Campaign Consulting: For this option we will provide expert campaign consulting with an on-site facilitator to communicate your message directly to employees in employee meetings and one-on-one. Our consultant will work with managers and supervisors at your location to increase your own internal capacity for handling employee relations issues after the campaign is over. Based on our joint assessment of the need, we will assign appropriate consulting resources to your campaign for a pre-approved schedule of meetings.

Objectives

- Win the NLRB election by as wide a margin as possible or achieve a withdrawal of the petition, without meritorious election objections or unfair labor practice charges.
- Increase trust and credibility of the current leadership team by improving communication and developing their ability to create a positive employee relations environment.
- Retain your direct relationship with employees and preserve the operational flexibility needed to remain productive and profitable. The dead weight cost of unionization is estimated at 25% for most organizations.

Value to Organization

- You avoid a steep and slippery learning curve and are free to do the most important trust-building work.

- You can talk to employees without engaging in mudslinging. You are free to spend your time on a positive message about the company.
- Your communication strategy is legally proven and sound. Our communication tools have never been found to be objectionable by the NLRB in thousands of elections.
- You receive a proven program, with over 10,000 successful client engagements.

Terms and Conditions

The fee for consulting is $375 per hour per consultant with a minimum of six hours per day on-site (plus travel expenses). Meals will be charged at the per diem rate of $50 per day for travel days and $65 per day for on-site days. A fee of $1000 will be applied for each consultant to cover travel time to the facility. For purposes of this statement of work, the travel fee will not exceed $1000 per consultant for each trip required. The fee for off-site consulting is $375 per hour (this is inclusive of but not limited to pre-planning, conference calls, slide production, material collection, report generation, etc.).

Attorneys and Privilege

The parties acknowledge that all of our work in relation to this proposal will be carried out in conjunction with and at the direction of in-house counsel and outside counsel. This includes our engagement, which was carried out at the direction of counsel, and the terms of the engagement, which counsel helped determine. As a result, it is understood that all communications involving LRI (*i.e.* both from LRI

and to LRI) are intended to be confidential, and covered by the attorney-client, and/or attorney work product privileges, including but not limited to the terms of this proposal. LRI agrees to use best efforts in labeling such communications "Privileged & Confidential: Attorney-Client Communication" or "Privileged & Confidential: Attorney Work Product" wherever feasible, but the absence of such designation does not detract from the intent that all communications from/to LRI, and all analyses or work product by LRI, fall under one of these privileges. The parties agree that any privilege covering this proposal is waived for the limited purpose of any dispute between the parties arising and concerning the terms of the engagement, that is to be resolved by arbitration, as described below.

Payment Terms

All fees are due upon delivery and are nonrefundable. You will receive regular statements outlining the number of days expended on your behalf and those statements are due upon receipt. Any fees and expenses incurred by consultant will be billed to you and you agree to pay those invoices upon receipt and to settle those statements within 14 days. You agree and acknowledge that failure to pay fees or expenses associated with this project under these terms will result in reassignment of consultant(s), a penalty of the maximum allowable interest rate per month plus any costs we incur to collect an outstanding balance, until all outstanding invoices are paid in full.

It is further understood that all materials included in or with the above referenced items or programs are fully covered and protected by federal copyright laws. Federal law provides civil and criminal penalties for the

unauthorized reproduction, distribution or exhibition of protected products.

You further acknowledge that no representation by LRI or its representatives were relied on by you or any member of your company in entering this agreement, and that this document represents the full understanding of the parties.

You also acknowledge and agree that we have informed you of the obligation to report any direct persuader activity performed on your behalf to the United States Department of Labor by both our firm and your firm and that failure to timely file these reports can subject your company to criminal penalties. Further, you agree to make LRI aware of and share copies of any unfair labor practice charges and or objections and challenges to the conduct of an election alleging anything regarding speech or behavior, in any form, on the part of any LRI consultant.

Your payment, in the absence of your signature below, indicates your acceptance of this project and the terms and conditions as stated herein. The terms and conditions on this Statement of Work (SOW) are good for 90 days from the date on this SOW unless specified otherwise. The parties agree that Oklahoma law governs any dispute between them and to resolve any disputes by arbitration in Tulsa, Oklahoma under the American Arbitration Association rules.

Acceptance

We accept the Statement of Work above and the intervention selected:

_____ Campaign Consulting

For LRI Consulting Services, Inc.

/s/ Phillip B. Wilson
Phillip B. Wilson, President/General Counsel

Date: March 9, 2020

For Quickway Carriers, Inc

/s/
Chris Cannon, Vice President

Date: _____

CANNON AND MOORE EMAILS REGARDING TRUCK SCHEDULING (MAY 29, 2020)

From: Chris Cannon [chrisc@quickwaycarriers.com] on behalf of Chris Cannon <chrisc@quickwaycarriers.com> [chrisc@quickwaycarriers.com]
Sent: 5/29/2020 8:04:18 AM
To: Kevinm@quickwaycarriers.com
CC: Chris Higgins [Chrish@quickwaycarriers.com]; Joel Burgess [Joelb@quickwaycarriers.com]; Mark Adams [Marka@quickwaycarriers.com]; Kerry Evola [kerrye@quickwaycarriers.com] Mike Miller [MIKEM@quickwaycarriers.com]; Joe Campbell [jlcampbell@paladin-capital.com]
Subject: Re: Murfreesboro Drivers Delivering KDC Loads

Now.

Next week will be fine.

On May 29, 2020, at 7:51 AM, Kevinm@quickwaycarriers.com wrote:

I will leave that to CC. I think he may have a game-plan of when he wants to do this.

From: Chris Higgins <chrish@quickwaycarriers.com>
Sent: Friday, May 29, 2020 7:46 AM
To: Kevin Moore <kevinm@quickwaycarriers.com>
Cc: Chris Cannon <chrisc@quickwaycarriers.com>; Joel Burgess <joelb@quickwaycarriers.com>; Mark Adams ‹marka@quickwaycarriers.com›; Kerry Evola

<kerrye@quickwaycarriers.com>; Mike Miller <mikem@quickwaycarriers.com>; Joe Campbell <jlcampbell@paladin-capital.com>
Subject: RE: Murfreesboro Drivers Delivering KDC Loads

Sounds good Kevin, what day should we plan to start coverage?

From: Kevin Moore [mailto:kevinm@quickwaycarriers.com]
Sent: Thursday, May 28, 2020 7:14 PM
To: Chris Higgins
Cc: Chris Cannon; Joel Burgess; Mark Adams; Kerry Evola; Mike Miller; Joe Campbell
Subject: Re: Murfreesboro Drivers Delivering KDC Loads

Yes we will not a problem. I will start putting some notes together tomorrow on how the tenders come across and the contacts we have at each place. We will do whatever is needed to make a smooth transition.

On Thursday, May 28, 2020, Chris Higgins <chrish@quickwaycarriers.com> wrote:

I agree on the middle man part. Can you help us out with the transition on the communication and help us understand the processes until we are comfortable?

From: Kevin Moore
[mailto:kevinm@quickwaycarriers.com]
Sent: Thursday, May 28, 2020 5:41 PM
To: Chris Higgins
Cc: Chris Cannon; Joel Burgess; Mark Adams; kerrye@quickwaycarriers.com; Mike Miller; Joe Campbell

Subject: Re: Murfreesboro Drivers Delivering KDC Loads

Tyson is 2 loads a week on Tuesday and Friday we pull them at 6 am.

I would think if Louisville took this over they would be getting the info and taking out the middle man and any Mia-communication that may arise? We can do it either way_

Need to keep at least 2 trailers at Tyson in-case something mechanical happens to one of them and we try to keep at least 3 at IWI and they have to be cleaned good before dropping or they will not load them.

On Thursday, May 28, 2020, Chris Higgins <chrish@quickwaycarriers.com> wrote: Thanks for the response Kevin. I have some follow up questions

- How many Tyson loads do you do a week? What are the planned times?
- I am not worried about the IWI loads. We can match them up with any Nashville load out of KDC here locally.
- Will Murfreesboro continue to manage the accounts for both Tyson and IWI and send us the information or are there other thoughts?
- What is the trailer counts required at Tyson?

- What is the trailer counts required at IWI

I have added Kerry Evola to this communication to help with organization.

Thanks
Chris

From: kevinm@quickwaycarriers.com
[mailto:kevinm@quickwaycarriers.com]
Sent: Thursday, May 28, 2020 9:17 AM
To: kevinm@quickwaycarriers.com; 'Joel D Burgess'; 'Chris Higgins'; 'Mark Adams'
Cc: 'Mike Miller'; 'Joe Campbell'
Subject: RE: Murfreesboro Drivers Delivering KDC Loads

We have 2 trucks in Nashville and we have a couple trucks and drivers that service the KDC from the IWI cold storage here in the B'oro.

From: chrisc@quickwaycarriers.com
<chrisc@quickwaycarriers.com>
Sent: Thursday, May 28, 2020 8:14 AM
To: Joel D Burgess <Joelb@quickwaycarriers.com>; Chris Higgins <Chrish@quickwaycarriers.com>; Mark Adams <marka@quickwaycarriers.com>; kevinm@quickwaycarriers.com
Cc: Mike Miller <mikem@quickwaycarricrs.com>; 'Joe Campbell' <jlcampbell@paladin-capital.com>
Subject: Murfreesboro Drivers Delivering KDC Loads

Chris H. /Joel,

I'd like to disconnect any and all Murfreesboro drivers from picking up loads from the KDC. Any

Murfreesboro driver that comes on the lot at the KDC is being approached by the union, and we certainly do not want the union to infect our Murfreesboro fleet.

I spoke to Mark and Kevin and they can stop sending drivers to retrieve loads but we need to offer that same capacity from the Louisville fleet.

Can you guys as a group come up with a plan to shift that capacity to the Louisville fleet? Do you think we can start next week?

Kevin / Mark,

How many trucks and drivers do you have dedicated to those lanes? All trucks and drivers are parked at the corporate yard correct? You'll be giving up revenue so you may need to give up those trucks and have the drivers report to Murfreesboro and that will fill up any open seats you have there locally.

Let me know that plan guys.

Thanks

CC

Kevin Moore
Terminal Manager Murfreesboro
(615) 895-1137 ext. 5321
cell (615) 587-0817

PREVOST EMAIL REGARDING SHUTTLING LOADS TO YARD (JUNE 23, 2020)

From: William Prevost
[wpprevost@paladin-capital.com]
on behalf of William Prevost
<wpprevost@paladin-capital.com>
[wpprevost@paladin-capital.com]
Sent: 6/23/2020 2:54:59 PM
To: Chris Cannon [chrisc@quickwaycarriers.com];
Randy Harris [crharris@paladin-capital.com]
Subject: Louisville

You could also get Kroger to have AGI or LSI or the Towing company shuttle our loads to our yard

That should prevent the ponies from picketing at the DC

William P. Prevost
Chairman & CEO
Paladin Capital Inc.
1116 Polk Ave.
Nashville, TN 37210
Phone: 615-620-3256
email: wpprevost@paladin-capital.com

HARRIS AND CANNON EMAILS REGARDING INTEREST IN LRI SERVICES (AUGUST 8, 2020)

From: crharris [crharris@paladin-capital.com]
Sent: 8/8/2020 9:42:20 AM
To: Chris Cannon [chrisc@quickwaycarriers.com]
Subject: RE: Fwd: Will the union be back?

Wasn't impressed with them in Louisville-they were our first choice there.

Sent from my Verizon, Samsung Galaxy smartphone

-------Original message-------
From: Chris Cannon <chrisc@quickwaycarriers.com>
Date: 8/8/20 9:25 AM (GMT-06:00)
To: Randy Harris <crharris@paladin-capital.com>
Subject: Fwd: Will the union be back?

Interested in their services?

Sent from my iPhone

Begin forwarded message:

From: Eric Funston <efunston@lrims.com>
Date: August 8, 2020 at 7:45:39 AM CDT
To: Chrisc@quickwaycarriers.com
Subject: Will the union be back?

Hi Chris,

I hope things are going well for you.

You beat the union in Indianapolis the last time and in just a few months the year will have expired. The union can come knocking again. Are you ready?

I have some ideas and strategies to get a jump on the union. Call me if you'd like to discuss. As always, I'm available 24/7.

All the best,

Eric Funston, Vice President
Labor Relations Institute | www.lrionline.com | 800.888.9115 o | 918.346.3840 c Approachable Leadership Learning System | www.ApproachableLeadership.com
Linkedin Profile

Love our work? Please tell a friend or colleague. Help us deliver our mission that everyone deserves a great workplace!

Perfection is achieved, not when there is nothing more to add, but when there is nothing left to take away.—Antoine de Saint- Exupéry

HENDRICK, HARRIS, AND CAMPBELL EMAILS REGARDING HENDRICKS THREAT (SEPTEMBER 16, 2020)

From: Joe Campbell
[jlcampbell@paladin-capital.com]
on behalf of Joe Campbell
<jlcampbell@paladin-capital.com>
[jIcampbell@paladin-capital.com]
Sent: 9/16/2020 1:49:39 PM
To: Randy Harris [crharris@paladin-capital.com];
Bill Prevost [wpprevost@paladin-capital.com]
Subject: RE: Teamsters is coming for Hebron!

He needs a cease and desist order sent or we will sue him for threatening to harm our business. . . .

From: Randy Harris <crharris@paladin-capital.com>
Sent: Wednesday, September 16, 2020 1:35 PM
To: Bill Prevost <wpprevost@paladin-capital.com>;
Joe Campbell <jlcampbell@paladin-capital.com>
Subject: Fwd: Teamsters is coming for Hebron!

FYI.

------Forwarded message------

From: Donald Hendricks <hendricksdonald@icloud.com>
Date: Wed, Sep 16, 2020, 1:22 PM
Subject: Teamsters is coming for Hebron!
To: <billp@quickwaycarriers.com>, Chris Cannon
<chrisc@quickwaycarriers.com>, Joel Burgess
<joelb@quickwaycarriers.com>, Randy Harris
<crharris@paladin-capital.com>, Jeff McCurry
<jeffmc@quickwaycarriers.com>

Ed Marcellino thought that I had something to do with organizing the Teamsters campaign in Louisville and he was dead wrong. He targeted me for termination for it, and Chris Cannon you know damn well that he did because he sent the email to you saying as much. I have the proof.

I may not have been responsible for Louisville, but I am damn well responsible for Hebron. Enjoy!

Donald Hendricks

QUICKWAY CROSS-EXCEPTIONS FILED IN NLRB, EXCERPT (MARCH 18, 2022)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION 9

QUICKWAY TRANSPORTATION, INC.

and

GEOFFREY BRUMMETT, AN INDIVIDUAL

and

DONALD RAY HENDRICKS, AN INDIVIDUAL

and

WARREN TOOLEY, AN INDIVIDUAL

and

BRENT WILSON, AN INDIVIDUAL

and

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Cases 09-CA-251857
09-CA-254584
09-CA-255813

09-CA-257750
09-CA-257961
09-CA-270326
09-CA-272813

RESPONDENT QUICKWAY TRANSPORTATION, INC.'S CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

COMES NOW, Respondent Quickway Transportation, Inc. and respectfully requests the Board consider the following Cross-Exceptions to the Decision of the Administrative Law Judge. Respondent files the below Cross-Exceptions to the findings, conclusions, omissions, and/or errors contained in the Decision of Administrative Law Judge Arthur J. Amchan, which issued in the above-captioned matter on January 4, 2022. In support of these Cross-Exceptions, Respondent . . .

[. . .]

19 n. 27). In support thereof, Respondent relies on the record and accompanying Brief in Support of Cross-Exceptions.

Cross-Exception 33. To the ALJ's failure to find that Respondent's sole motivation for the modification and early termination of the Carrier Services Agreement was to avoid damages and financial liability under the Carrier Services Agreement. (ALJD p. 14, lines 26-29). In support thereof, Respondent relies on the record and accompanying Brief in Support of Cross-Exceptions.

Cross-Exception 34. To the ALJ's failure to find that Respondent's decision to close was a *First National Maintenance* decision and not based on labor costs. (ALJD p. 14, lines 7-9 n. 29). In support thereof, Respondent relies on the record and accompanying Brief in Support of Cross-Exceptions.

Cross-Exception 35. To the ALJ's finding that the closure was inherently destructive. (ALJD p. 14, lines 11-15 n. 30). In support thereof, Respondent relies on the record and accompanying Brief in Support of Cross-Exceptions.

Cross-Exception 36. To the ALJ's finding that Respondent bore animus towards its employees' union activity. (ALJD p. 14, lines 33; pg. 15, lines 1-3, n. 31). In support thereof, Respondent relies on the record and accompanying Brief in Support of Cross-Exceptions.

Cross-Exception 37. To the ALJ's failure to find that the Union's actions involved an impermissible secondary object aimed at Kroger to put pressure on a primary employer, Respondent, and thus these activities were unprotected and unlawful under Section 8(b)(4) of the Act. (ALJD p. 15, lines 7-8). In support thereof, Respondent relies on the record and accompanying Brief in Support of Cross-Exceptions.

Cross-Exception 38. To the ALJ's failure to find that Respondent could not mitigate the effects of the announced strike through establishing a reserved gate, having its products ferried to . . .

**QUICKWAY BRIEF
IN SUPPORT OF CROSS-EXCEPTIONS
FILED IN NLRB, EXCERPT
(MARCH 18, 2022)**

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS
BOARD DIVISION OF JUDGES

QUICKWAY TRANSPORTATION, INC.

and

GEOFFREY BRUMMETT, AN INDIVIDUAL

and

DONALD RAY HENDRICKS, AN INDIVIDUAL

and

WARREN TOOLEY, AN INDIVIDUAL

and

BRENT WILSON, AN INDIVIDUAL

and

GENERAL DRIVERS, WAREHOUSEMEN AND
HELPERS, LOCAL UNION NO. 89, AFFILIATED
WITH THE INTERNATIONAL BROTHERHOOD
OF TEAMSTERS

Cases 09-CA-251857
09-CA-254584
09-CA-255813

09-CA-257750
09-CA-257961
09-CA-270326
09-CA-272813

BRIEF IN SUPPORT OF RESPONDENT QUICKWAY TRANSPORTATION, INC.'S CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

R. Eddie Wayland
Hunter K. Yoches
KING & BALLOW
315 Union Street, Suite 1100
Nashville, TN 37201

Attorneys for
Quickway Transportation, Inc.

[. . .]

. . . sublease. (Tr. 1860; R. Ex. 125).

None of the work previously performed by Respondent out of the Louisville KDC has since been performed by Respondent or any of its affiliates. (Tr. 1351-52, 1580-81, 1811-12; R. Ex. 59). Neither Respondent nor any of its affiliates have performed any work or operations with respect to, or arising out of, Respondent's Louisville terminal, Kroger's Louisville KDC, or in Louisville since 11:00 p.m. ET on December 9, 2020. (*Id.*).[17] Substantial evidence in the record

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[17] Respondent would have to find a customer to service. Respondent's Carrier Services Agreement with Kroger was terminated, and Respondent has no other customer in Louisville. Kroger renews or enters into new dedicated carrier services agreements through a Request for Proposal ("RFP") process

belies the ALJ's finding that "no credible evidence in this record supports a conclusion that Quickway's departure from Louisville was necessarily permanent." (ALJD p. 13, 18-19).

III. Respondent is not required to put forth a non-discriminatory motive for closure under *Darlington* and *First National Maintenance*

Cross-Exceptions 36, 74, 75

Respondent is not required to put forth a non-discriminatory motive under *Darlington* and *First National Maintenance*. Respondent can close its business for any reason, including anti-union reasons. The only motive that matters in this case is whether Respondent's motive in closing its Louisville terminal was to chill unionism at its other terminals. *Bruce Duncan Co., Inc.*, 233 NLRB 1243 (1977). In doing so, *Darlington* precludes a *Wright Line* analysis and the obligation to proffer a non-discriminatory notice for employer actions. *Darlington*, 380 U.S. at 267 n.5, 275; *See Smyrna Ready Mix Concrete, LLC*, 371 NLRB No. 73, slip op. at 5-6 (2022) (citing *Darlington*, 380 U.S. 272-73 & 272 fn. 16).

The ALJ correctly found that chilling unionism was not Respondent's motive as the totality of the evidence considered in the light of the December 7 through 9 circumstances demonstrates that the closure

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generally months before a contract expires. (Tr. 433, 776). Respondent did not receive an RFP for Louisville between April 2020 and December 9, 2020. (Tr. 789, 793). Further, Joe Obermeier was unsure of whether an RFP for Louisville had even been issued. (Tr. 431-43). To date, neither Respondent nor any affiliate of Paladin have requested or received an RFP for the work done at the Louisville KDC. (Tr. 800-01, 1346, 1632).

was not motivated even in part to chill unionism at any of Respondent's or its affiliates' remaining terminals. Neither could Respondent reasonably foresee such an effect.

Respondent's decision to cease operations, close its Louisville terminal, and lay-off all of its employees on December 9, 2020, did not involve any antiunion considerations or motives. As shown by the facts above, Respondent demonstrated a complete lack of animus by its conduct and proposals during contract negotiations. Indeed, on December 7 and 8, Respondent continued to prepare for the scheduled December 10 second negotiations meeting, while discussing with Kroger potential ways to mitigate the effects of the announced strike. (Tr. 1751; R. Exs. 102, 103).

Respondent's actions did not violate the Act as alleged. Ultimately, Respondent was forced to make the difficult decision to cease operations at its terminal in Louisville, Kentucky, due to unforeseen business circumstances and to avoid potential catastrophic loss and liability under the Carrier Services Agreement, precipitated by the Union's announced strike and the ruinous financial risks involved.

IV. The Inherently Destructive Theory Does Not Apply When All Employees are Treated Equally

Cross-Exception 35

The inherently destructive theory as General Counsel pled does not apply in this case as it would go directly against an employer's right to close its business under *First National Maintenance* and *Darlington*. However, assuming *arguendo* that *First*

National Maintenance and *Darlington* do not apply, which in this case they do, the inherently destructive theory still does not apply because Respondent laid-off all of its Louisville employees, union and non-union. The inherently destructive theory only applies when union and non-union employees are treated differently. *See NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). In this case, except for a . . .

QUICKWAY ANSWERING BRIEF FILED IN NLRB, EXCERPT (MARCH 18, 2022)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

QUICKWAY TRANSPORTATION, INC.

and

GEOFFREY BRUMMETT, AN INDIVIDUAL

and

DONALD RAY HENDRICKS, AN INDIVIDUAL

and

WARREN TOOLEY, AN INDIVIDUAL

and

BRENT WILSON, AN INDIVIDUAL

and

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Cases 09-CA-251857
09-CA-254584
09-CA-255813

09-CA-257750
09-CA-257961
09-CA-270326
09-CA-272813

ANSWERING BRIEF TO CHARGING PARTY UNION'S EXCEPTIONS AND BRIEF IN SUPPORT

R. Eddie Wayland
Hunter K. Yoches
KING & BALLOW
315 Union Street, Suite 1100
Nashville, TN 37201

Attorneys for
Quickway Transportation, Inc.

IV. Respondent is not required to put forth a non-discriminatory motive for closure *Darlington* and *First National Maintenance*

Respondent is not required to put forth a non-discriminatory motive under *Darlington* and *First National Maintenance*. Respondent can close its business for any reason, including anti-union reasons. The only motive that matters in this case is whether Respondent's motive in closing its Louisville terminal was to chill unionism at its other terminals. *Bruce Duncan Co., Inc.*, 233 NLRB 1243 (1977). In doing so, *Darlington* precludes a *Wright Line* analysis and the obligation to proffer a non-discriminatory notice for employer actions. *Darlington*, 380 U.S. at 267 n.5, 275. As this Board recently stated, facts like the ones found in this case are appropriately analyzed under *Darlington*, and not under *Wright Line*. *See Smyrna Ready Mix Concrete, LLC*, 371 NLRB No. 73, slip op. at 5-6 (2022) (citing *Darlington*, 380 U.S. 272-73 & 272 fn. 16). Accordingly, the Union's Exception No. 6 should be denied.

The ALJ correctly found that chilling unionism was not Respondent's motive as the totality of the evidence considered in the light of the December 7 through 9 circumstances demonstrates that the closure was not motivated even in part to chill unionism at any of Respondent's or its affiliates' remaining terminals. Neither could Respondent reasonably foresee such an effect.

Respondent's decision to cease operations, close its Louisville terminal, and lay-off all of its employees on December 9, 2020, did not involve any antiunion motives. As shown by the facts above, Respondent demonstrated good faith by its conduct and its proposals

during contract negotiations. Indeed, on December 7 and 8, Respondent continued to prepare for the scheduled December 10 second negotiations meeting, while discussing with Kroger potential ways to mitigate the effects of the announced strike. (Tr. 1751; R. Exs. 102, 103).

[. . .]

QUICKWAY OPENING BRIEF FILED IN SIXTH CIRCUIT, EXCERPT (JANUARY 24, 2024)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

QUICKWAY TRANSPORTATION, INC.,

Petitioner
Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent
Cross-Petitioner,

v.

GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL UNION NO. 89,

Intervenor.

Nos. 23-1780/23-1820

Appeal from the National Labor Relations Board
Nos. NLRB-1:09-CA-251857, NLRB-1:09-CA-254584,
NLRB-1:09-CA-255873, NLRB-1:09-CA-257750,
NLRB-1:09-CA-257961, NLRB-1:09-CA-270326 &
NLRB-1:09-CA-272813.

BRIEF OF PETITIONER CROSS-RESPONDENT

R. EDDIE WAYLAND
MICHAEL D. OESTERLE
MARYKATE E. WILLIAMS
KING & BALLOW LAW OFFICES
26 Century Boulevard
Suite NT 700
Nashville, Tennessee 37214
(615) 259-3456

Counsel for Petitioner-Cross-Respondent
Quickway Transportation, Inc.

[. . .]

. . . also apply an abuse of discretion standard to procedural rulings, which may be reversed upon a showing that prejudice resulted from the Board's procedural lapses. *Napleton 1050, Inc. v. NLRB*, 976 F.3d 30, 39 (D.C. Cir. 2020).

ARGUMENT

I. Quickway Made a Lawful, Non-Bargainable Economic Business Decision Under *First National Maintenance*

An employer has the absolute right to close its business for any reason, including anti-union animus. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 677 (1981) (citing *Textile Workers v. Darlington Co.*, 380 U.S. 263, 268 (1965)). Quickway's entrepreneurial decision to cease operations and close its Louisville terminal was not subject to a bargaining obligation under the Supreme Court's *First National Maintenance* decision and its progeny. Decisions which fundamentally alter the scope and nature of a company's business, such as a partial closure, are not subject to a bargaining obligation. *Id*. at 677 (holding a decision "involving a change in the scope and direction of the enterprise, is akin to the decision whether to be in business at all").

As explained by the Supreme Court, "Congress 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 676. An employer "must be free from the constraints of the bargaining process to the

extent essential for the running of a profitable business." *Id.* at 678-79.

The Board majority recognized, as it must, that a *First National Maintenance* decision is non-bargainable. *Minteq International, Inc.*, 364 NLRB No. 63, slip op. at 4 (2016), *enf'd*, 855 F.3d 629 (4th Cir. 2017) (managerial decisions which "lie at the core of entrepreneurial control" are not mandatory bargaining subjects and are solely within the employer's prerogative). Through stacked inferences, however, the majority concocted a theory that Quickway's Decision was not motivated by the potential catastrophic financial consequences the Company faced on the eve of a planned strike and corresponding KDC shut down, but rather Quickway was motivated by union animus, a purported desire to avoid bargaining with Local 89, and to chill union activities elsewhere. The majority's theory is not only unsupported by substantial evidence, but is also contradicted by unrebutted convincing evidence concerning Quickway's actual legal economic motivation. *NLRB v. Kingsford*, 313 F.2d 826, 831 (6th Cir. 1963) ("animosity toward the union is insufficient basis for an inference that the employer's motive for change is illegal under the Act where there is convincing evidence that the change was economically motivated.").

Quickway was not required to contact Local 89 to discuss the strike announcement. Quickway believed the Union had been contacted by the media and was concerned contacting Local 89 may prompt an earlier strike. (JA-1184-85). Local 89 was able to call the strike and shut down the KDC at any time. Local 89 easily could have contacted Quickway if the strike announcement was not true or inaccurate, but they

did not. Their silence under the circumstances was deafening.

The Supreme Court acknowledged an employer may have great need for speed, flexibility, and secrecy in meeting business opportunities and exigencies. 452 U.S. at 682-83; *see also PG Publ'g Co. v. NLRB*, 83 F.4th 200, 221 (3d Cir. 2023) (holding that when an employer decides to change the scope of its business during contract negotiations, to require the employer to first bargain before effectuating its entrepreneurial decision would render its managerial rights under *First National Maintenance* illusory). A critical factor in determining whether bargaining is required "is the essence of the decision itself, *i.e.*, whether it turns upon a change in the nature or direction of the business, or turns upon labor costs . . . ." *Otis Elevator Co.*, 269 NLRB 891, 892 (1984).

No evidence was presented that Quickway's Decision was a result of labor costs. The record evidence conclusively demonstrates that Quickway's Decision was motivated solely by the pending risk of drastic financial consequences and damages under the CSA with a strike and shut down, and the corresponding risk of loss of the line of credit. Quickway's Decision fundamentally altered the scope and nature of its business, and is exactly the type of decision contemplated under *First National Maintenance*.

[. . .]

The Board majority's claim that the Union was not provided with sufficient notice for meaningful effects bargaining is without evidentiary support. Due to the circumstances and need to protect the business from the existential threat that existed, advance notice

was not reasonable or wise. Still, effects bargaining was offered at a meaningful time and in a meaningful manner. The Union's conduct and refusal to cooperate thwarted Quickway's efforts, and any lack of effects bargaining was because of the Union's intransigence and refusals. (JA-424, JA-426, JA-844, JA-1126, JA-1129, JA-2705; *see also* JA-47). Quickway clearly met its effects bargaining obligation.

III. The Closure of the Louisville Terminal Was Lawful Under *Darlington*

A. There was no intent to chill union activity

Quickway's Decision was motivated solely by the economic and financial risks and reasons stated, and not by a purpose to chill union activity at other terminals. Successful long-standing relationships with Teamsters locals existed. (JA-308, JA-310, JA-312, JA-315-16, JA-320). Under *Darlington*, the permanent closing of part of an employer's business is not an unfair labor practice unless evidence is elicited to support two separate findings. "First, the closing must be motivated, at least in part, by a purpose to chill unionism in any of the remaining facilities. Second, it must be found that the employer could reasonably have foreseen such an effect." *Bruce Duncan Co., Inc.*, 233 NLRB 1243, 1243 (1977); *Darlington*, 380 U.S. at 275. The Board has stated that in "determining whether a purpose to 'chill' existed we would rely on the 'fair inferences arising from the totality of the evidence considered in the light of then-existing circumstances.'" *George Lithograph Co.*, 204 NLRB 431, 431 (1973) (quoting *Darlington*, 165 NLRB 1074, 1083 (1967), *enf'd*, 397 F.2d 760 (4th Cir. 1968), *cert. denied* 393 U.S. 1023 (1969)).

Additionally, "the Board in determining whether or not the proscribed 'chilling' motivation and its reasonably foreseeable effect can be inferred considers the presence or absence of several factors including, *inter alia*, *contemporaneous union activity* at the employer's remaining facilities, geographic proximity of the employer's facilities to the closed operation, the likelihood that employees will learn of the circumstances surrounding the employer's unlawful conduct through employee interchange or contact, and, of course, representations made by employer's officials and supervisors to the other employees." 233 NLRB at 1243 (emphasis added).

The totality of the record evidence considered in the light of the events of December 7 through 9 demonstrates that the closure was not motivated, even in part, by an intent to chill unionism at other terminals, nor could Quickway reasonably foresee such an effect. Neither the General Counsel nor the Union introduced any evidence that Quickway's Decision was motivated by an intent to chill. The ALJ's finding on this issue was correct.

The Board majority acknowledged "there is no credited evidence that [Quickway] had actual knowledge of an active union campaign at *any* of its other terminals or at *any* other Paladin affiliate when it decided to cease operations at the Louisville terminal." (JA-11) (emphasis added). It is undisputed that the three executives making the decision had no knowledge of any alleged union activity at other locations, except for terminals with recognized Teamsters locals. Further, it is telling that the Union did not present any credible evidence of claimed ongoing, or planned, organizing

activities at any other locations. (JA-835, JA-840-44, JA-973-75, JA-1153-54).

Still, the majority chose to "infer" a purpose to chill unionism because Quickway allegedly believed that the Union "intended imminently to organize" employees at other terminals. No direct record evidence supports such an inference or belief. Again, layers of inferences drawn by the Board majority to support its conclusion are not supported by substantial evidence. *See Sears*, 450 F.2d at 56 ("upon the courts is cast the responsibility of determining whether a Board finding of fact, based on inference or otherwise, is supported by substantial evidence, when viewed on the record as a whole") (internal citation omitted).

These implausible and factually deficient inferences fail to establish that Quickway strongly believed that union activity was imminent as required by the Board's *Darlington* opinion. 165 NLRB at 1084 (absent ongoing union activity, an inference of an intention to chill may only be drawn where there was "a strong employer belief that the union [was] intending imminently to organize the employees in his other operations") (emphasis added).

The e-mail referenced by the Board majority regarding Murfreesboro drivers at the Louisville terminal, which occurred over six months before Quickway's Decision, does not even suggest any Murfreesboro organizing activity was occurring, much less demonstrate that Quickway strongly believed union activity was imminent. (JA-2533, JA-2538, JA-2541). Moreover, the Murfreesboro terminal was outside Local 89's jurisdiction, thus preventing any organizing attempts. (JA-45, fn. 33). There is no evidence of union

activity in Murfreesboro, or that Quickway strongly believed that it was imminent.

Similarly, a failed prior union election in Indianapolis is insufficient to support the majority's "inference" that over one year later Quickway strongly believed union activity was imminent. Again, there is no credible evidence that any union activity was taking place in Indianapolis, or that Quickway had knowledge or believed it was. If an intention to chill may be inferred simply from the expiration of the one-year certification period, then the Board could effectively factually infer an alleged belief of "imminent" union activity by any employer once the certification period has expired.

Next, the September 20 Hendricks' e-mail threatening to organize Hebron drivers, referenced by the majority, does not demonstrate that Quickway believed, much less strongly believed, such union activity by Local 89 was imminent. (JA-886-87, JA-2558). Again, no evidence was presented that any such organizing activity was taking place, or was even contemplated. Hendricks' e-mail is insufficient to support a reasonable inference Quickway strongly believed Local 89 activity was imminent. (JA-45).

The majority's conclusion that because Quickway and CCL shared the Louisville terminal it is sufficient to infer Quickway's Decision was motivated by the purpose to chill unionism at CCL, was clearly erroneous and unsupported by record evidence. There is no evidence of any union activity at CCL's Louisville operation or anywhere else, and certainly no evidence that Quickway believed *strongly* that CCL's five Louisville mechanics intended imminently to engage in union activity.

Likewise, the majority's contention that by sending Indianapolis drivers to the Louisville terminal to retrieve trailers the day after ceasing operations, Quickway would have known that those Indianapolis drivers were likely to learn what happened at the Louisville terminal, is another implausible inference unsupported by credible record evidence. There is no substantial evidence that Indianapolis drivers who were dispatched on December 10 learned the circumstances surrounding the closure of the Louisville terminal. Further, it is not reasonably foreseeable on the record evidence that this action would somehow lead to a prohibited chilling effect somewhere else. The only purported evidence the majority references is the hearsay testimony of an Indianapolis driver who the ALJ found to be not credible. Under this rationale, an intention to chill could be inferred any time after a partial closure, even where, as here, the decision was a lawful financially based business decision, because employees from other locations may inevitably discover the closure.

Finally, there is no evidence of any representations made by Quickway's management or supervisors regarding the Louisville closure. There is no evidence union activity was occurring at any other non-represented terminals, and the decisionmakers had no knowledge of any such "inferred" union activity.

The majority reversed the ALJ's finding that Quickway's Decision was lawful under *Darlington* based on compiling implausible, factually unsupported inferences upon inferences to support an alleged intent to chill where, on the same record evidence, both the ALJ and the Dissent found otherwise. The majority's inferences and findings of an intent to chill

are unreasonable and unsupported by substantial record evidence.

B. Quickway had no prior plan to close Louisville

The record evidence demonstrates Quickway's Decision was formulated and occurred during a 24-hour period on December 8 and 9, when Quickway realized the economic risks with which it was confronted.

In response to the General Counsel's extensive subpoena enforced by the ALJ, Quickway produced over 3,200 pages of responsive documents based on agreed search terms. (JA-226-27). Other than during December 8 and 9, no Company documents or e-mails disclosed any communications about an early closure of Louisville because of union activity or otherwise. The only evidence used by the General Counsel in a feeble attempt to show a prior plan was Quickway's CapEx budget for 2021. (JA-156, JA-1761).

A contingency was incorporated into the CapEx budget showing if the CSA expired in February, the Louisville assets could be redeployed, thereby deferring approximately $5 million in capital expenditures. (JA-903, JA-1761). Any reasonable businessperson would account for such unsecured business when no RFP had come from Kroger. (JA-903, JA-1233). Further, by securing Board approval of the full amount, if Kroger later renewed the CSA, the expenditures were already approved. (JA-903). The same conservative approach was taken with the Louisville 2021 operating budget, showing the CSA expiration followed by a wind down period. (JA-900, JA-1482). There was no consideration of any possible early termination of the CSA. (JA-905).

The evidence and Quickway's actions decidedly demonstrate Quickway wanted the CSA to be renewed (JA-533, JA-539-40, JA-1189, JA-1192, JA-1198, JA-1201), and it wanted to negotiate a contract with Local 89 similar to its other Teamsters' contracts. Quickway's proposal and bargaining on November 19 exhibit this intent. (SOF, Section C, pp. 11-13). Further, on December 7, Quickway provided the Union with requested information, and was diligently preparing for the December 10 meeting. (SOF, Section D). These are not actions of a company intent on planning to opt out of negotiations two days later.

Only on December 8 and 9, when Quickway fully realized the circumstances and related risks presented, did Quickway determine its only sure way to avoid this exposure was the Decision it reached, which was lawful under *Darlington* and *First National Maintenance*. (SOF, Sections G-H).

C. Quickway's Decision was not based on area standards or labor costs

Quickway's goal as presented to the Paladin Board was to reach an agreement with Local 89 and to grow Quickway's business in Louisville. (*See* fns. 4, 5 pp. 11-17, *supra*). (JA-742-43, JA-781, JA-783, JA-983, JA-1011).

Both parties used the recent Teamsters Local 171 contract as a model in preparing their respective initial proposals exchanged on November 19. Significantly, Local 89 did not propose the Transervice contract terms to Quickway. The Transervice agreement or its terms were never discussed at any time. Neither did the parties discuss the economics, wages or benefits of their respective proposals. (SOF, Section C, p. 12).

The Board majority's conclusion that the Union was "adamant about maintaining at the KDC the area standards set by its contract with Transervice" is strongly contradicted by undisputed record evidence. At no time did the parties discuss any proposed area standards, and the Company's bargaining notes do not reflect any discussion of "area standards." (SOF, Section C, pp. 12-13). The only reference to "area standards" was a single comment made by Zuckerman. (JA-427-30). Moreover, it is undisputed the Union did not advise the Company in writing at the start of bargaining claiming or designating protection of area standards, nor did it provide evidence of approval to do so, as required by the Teamsters' Constitution. (JA-192, Protection of Standards, Section (a)-(c), pp. 97-98). The majority ignored this evidence. Also, other than Zuckerman's comment, neither the Union nor the General Counsel presented any other evidence supporting the claimed "adamant" area standards position. A clear adverse inference should be drawn from this lack of evidentiary support. *UAW v. NLRB*, 459 F.2d 1329 (D.C. Cir. 1972).

Obermeier testified the Transervice agreement was discussed on a December 7 when he called Cannon on his cell phone, alleging Cannon said Quickway "might not be able to financially support holistically" the terms of the Transervice agreement (JA-353-54, JA-367-68, JA-1764). The record evidence reveals, however, that neither Cannon nor Prevost spoke with Obermeier on December 7, and Cannon's cell phone records reflect no such call, totally discrediting Obermeier's testimony. (SOF, Section G and fn. 7). Furthermore, there was no reason to discuss the Transervice contract on December 7, since

that contract was neither proposed by the Union nor discussed by the parties on November 19 or thereafter. (SOF, Section C, p. 12).

The foregoing undisputed facts clearly refute any Board majority finding that Quickway's Decision turned on purported labor costs or claimed area standards. The findings are without substantial evidentiary support.

IV. The Board Majority Erred by Reversing the ALJ's Decision and Concluding that Two Settlement Agreements Were Properly Vacated and Set Aside by General Counsel

The Board majority erred by reversing the ALJ's finding that the General Counsel was not justified in setting aside two prior settlement agreements that resolved earlier Section 8(a)(1) and (4) allegations. Because Quickway's Decision and the closure were lawful under *First National Maintenance* and *Darlington*, the settlement agreements should be reinstated, and the settled Section 8(a)(1) and (4) allegations dismissed.

[. . .]

. . . activity required dismissal of complaint), *rev'd and remanded sub nom.*, *Service Employees Local 87 v. NLRB*, 995 F.3d 1032 (9th Cir. 2021).

VII. Communications With Manager McCurry Were Lawful

Interrogation of employees is not illegal per se. *Rossmore House*, 269 NLRB 1176, 1177 (1984) ("To hold that any instance of casual questioning concerning union sympathies violates the Act ignores the realities

of the workplace."). Section 8(a)(1) of the Act prohibits employers *only* from activity which in some manner tends to restrain, coerce, or interfere with employee rights. To violate Section 8(a)(1), either the words themselves or the context in which they are used must suggest an element of coercion or interference. The majority's conclusion that McCurry's communications with drivers violated Section 8(a)(1) is not supported by substantial evidence.

Section 8(c) of the Act permits an employer to discuss the union as long as there is no threat of reprisal or force or promise of benefit. *See NLRB v. Gissel Packing Co.*, 395 U.S. 575, 579 (1969). McCurry's uncontradicted testimony was he simply had discussions with drivers who approached him. (JA-644-45). No direct evidence was presented by the General Counsel or the Union, through testimony from employees or otherwise, that any employee was threatened, coerced, or promised anything. Further, there is no direct evidence even regarding what McCurry asked or said to the drivers. (JA-48). The General Counsel did not meet her burden of proof and the majority's Section 8(a)(1) finding should be overturned.

CONCLUSION

For the foregoing reasons, Quickway respectfully requests that this Court grant the Company's Petition for Review, set aside the Board's Decision and Order, and deny the Board's Cross-Application for Enforcement.

Dated: January 24, 2024

Respectfully submitted,

/s/ R. Eddie Wayland
R. Eddie Wayland (Tenn. BPR No. 6045)
Michael D. Oesterle (Tenn. BPR No. 16338)
Marykate E. Williams (MA BPR No. 693978)
KING & BALLOW
26 Century Boulevard, Suite NT 700
Nashville, Tennessee 37214
(615) 403-5430
rew@kingballow.com
moesterle@kingballow.com
mwilliams@kingballow.com

Attorneys for Petitioner/Cross-Respondent,
Quickway Transportation, Inc.

QUICKWAY REPLY BRIEF
FILED IN SIXTH CIRCUIT, EXCERPT
(APRIL 17, 2024)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

QUICKWAY TRANSPORTATION, INC.,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner,

GENERAL DRIVERS, WAREHOUSEMEN, and HELPERS LOCAL UNION NO. 89,

Intervenor.

Appeal Nos. 23-1780 and 23-1820

On petition for review from the National Labor Relations Board Case Nos. 09-CA-251857, 09-CA-254584, 09-CA-255813, 09-CA-257750, 09-CA-257961, 09-CA-270326, and 09-CA-272813

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the Board did not reverse, was also raised for the first time at trial, and was based on alleged actions and statements of McCurry in September of 2020. (JA-25-26, 57, 490). Quickway has shown that the alleged statements of McCurry at issue were protected under Section 8(c) of the Act. (Brief, pp. 65-66). Notably, McCurry testified he did not initiate conversations with any driver during the September union event and did not ask questions of any driver. (JA-643-45). It is also telling that no Quickway driver testified regarding McCurry's alleged conduct to rebut McCurry's testimony. Moreover, McCurry had no involvement in or influence over the decision to close. (JA-630-31).[1]

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[1] The Union falsely asserts that Quickway transferred McCurry to Indianapolis to "keep a close watch and squash any nascent union organizing activity." (Intervenor Brief, p. 28). This is one of many factual misrepresentations made by the Union and the Board. The evidence establishes McCurry worked as a temporary terminal manager in Louisville from July 2020 to December 16, 2020, and subsequently "filled in for a short period of time in Hebron." (JA-631; Tr. 993). McCurry remained at Hebron until a vacancy arose for a terminal manager in Indianapolis in late March 2021. (JA-868; Tr. 993-94). This is consistent with Cannon's testimony that McCurry later became the Indianapolis terminal manager. (Tr. 304). However, no laid-off Louisville employee, all of whom remained eligible for rehire, applied for a job at Hebron, Indianapolis, or any other location after the Louisville closure. (JA-844-45).

B. Lawful communications between Quickway's managers and supervisors are precluded as evidence to support an alleged violation of the Act

The Board also attempted to base its findings of union animus on internal communications between Quickway's management and executive officers, as well as alleged communications between Quickway and Kroger. (*E.g.*, JA-9). These are recalled inaccurately by the Board and Union in their respective briefs as purported evidence of Quickway's union animus. (*E.g.*, Board Brief, p. 6; Intervenor Brief, p. 26). However, the Board's reliance on such communications to infer animus is contrary to the express language of the Act and its own case law.

In 2020, the Board held that statements which do not violate Section 8(c) of the Act cannot be relied upon as evidence in support of any unfair labor practice finding. *United Site Servs. of Cal.*, 369 NLRB No. 137, 14, n.68 (2020) ("Sec. 8(c) protects the Respondent's right to express its opposition to unionization and prohibits relying on that expression as evidence of an unfair labor practice."). The Board rejected its previous practice of considering "noncoervice statements of opposition to unions or unionization as evidence of antiunion animus in support of unfair labor practice findings." *Id.* (citing cases that "[s]everal courts of appeals have rejected the Board's position" and "agree[ing] with these courts that Sec. 8(c) precludes reliance" on such statements). Section 8(c) contains a clear "statutory command" that noncoercive statements of opposition to a union cannot be evidence of antiunion animus in support of unfair labor practice findings. *Id.*; *Medeco Sec. Locks*

v. NLRB, 142 F.3d 733, 744 (4th Cir. 1998) ("speech protected by that section [8(c)] cannot be used by the General Counsel to establish an employers' anti-union animus"), citing *Alpo Pet Foods, Inc. v. NLRB*, 126 F.3d 246, 252 (4th Cir. 1977).

An employer has no obligation to remain neutral to unionization, and "may dislike the union as much as it pleases and may use every legitimate means of keeping a union out of its plant." *NLRB v. Brewton Fashions, Inc., Div. of Judy Bond*, 682 F.2d 918, 923 n.8 (11th Cir. 1982).[2] "Any company has a perfect right to be opposed to a union, and such opposition is not an unfair labor practice." *Fla. Steel Corp. v. NLRB*, 587 F.2d 735, 753 (5th Cir. 1979). So long as an employer's expressions contain "no threat of reprisal or force or promise of benefit[,]" Section 8(c) permits an employer to "criticize, disparage, or denigrate a union without running afoul" of the Act. *Tesla, Inc.*, 370 NLRB No. 101, 7 (2021) (quoting *Children's Center for Behavioral Development*, 347 NLRB 35, 35 (2006)).

Because there is no record evidence that any intra-management statements alleged to exhibit union animus were communicated to employees, such statements necessarily could not have violated Section 8(c). Thus, "they cannot be used as 'evidence of an unfair labor practice under any of the provisions' of

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[2] The Board and Union ignore Quickway's "[v]ery good" relationships and repeated successive bargaining agreements for years with local unions at four terminals representing over 35% of the Quickway Group drivers. (Tr. 1635). They likewise ignore the substantial record evidence demonstrating that Quickway intended to reach an agreement with the Union in Louisville through good-faith negotiations, including at the November 19, 2020 meeting. (JA-310, 384-85, 783, 821-822, 908-909) (Brief, pp. 12-15).

the NLRA." *Sasol N. Am., Inc. v. NLRB*, 275 F.3d 1106, 1112 (D.C. Cir. 2002) (quoting 29 U.S.C. § 158(c)) (emphasis added). Even regarding communications between corporate executives, the Union takes liberty with the record, selectively quoting Cannon's March 11, 2020 email to Prevost and Harris to falsely suggest that Cannon sanctioned threats against drivers by prospective third-party consultants. (JA-1642). The Board and Union also emphasize Cannon's communication reassigning Murfreesboro drivers from routes to the KDC. This was a lawful communication under Section 8(c) and Cannon testified that to his knowledge, there was no organizational activity going on in Murfreesboro at the time, and this was an operational change of transferring work back to Louisville, which was "Louisville's work originally," and further gave the Louisville drivers more work. (JA-1038-39).

Nowhere did the Board find, nor do the General Counsel or Union claim, that any of these communications relied upon to infer alleged proof of animus are violations of the Act. If an intent to chill could be inferred from statements that do not violate Section 8(c), the Supreme Court's distinction in *Darlington* between union animus and a purpose to chill effectively becomes meaningless because a motive to chill could then almost always be inferred from statements of a non-neutral employer. The Second Circuit correctly observed that "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." *Holo-Krome Co. v. NLRB*, 907 F.2d 1343, 1347 (2d Cir. 1990); *Alpo*, 126 F.3d at 252. Inferences of a purpose to chill unionization in a partial closure

based on statements which do not violate the Act would clearly have the effect of chilling lawful employer speech. Therefore, the Board's reliance on protected expressions among Quickway's management to infer a purpose to chill unionism is contrary to the Act.

This Court has previously addressed the interpretation of Section 8(c) in a single reported decision, *NLRB v. Vemco, Inc.*, 989 F.2d 1468, 1474 (6th Cir. 1993), deferring to the Board's previous "policy in this area." 989 F.2d at 1474 n.8.[3] Noting the Board's then "noncommittal stance," the Court recognized the "plain meaning" interpretation, now the majority view, as "plausible[.]" *Id.* at 1474-75.[4] To the extent deference was given in the past to the Board's application of Section 8(c), in the *United Site Services of Cal* case, it has since unequivocally stated its position. (*See* p. 14, *supra*). Under Board precedent at the time of the closure and to date, Section 8(c) prohibits inferring union animus from protected expressions to support any unfair labor practice

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[3] The *Vemco* Court found that an unpublished opinion, *Active Transportation Co. v. NLRB*, 1991 U.S. App. LEXIS 1603 (6th Cir. Jan. 31, 1991), implicitly rejected the plain-meaning interpretation of Section 8(c). *See* 989 F.2d at 1474 n.7. However, as noted above, the Court should now consider that the Board has since adopted this interpretation of Section 8(c).

[4] The Board in *United Site Servs.*, 369 NLRB at 14 n.68, collecting cases, identified the D.C. Circuit, Second Circuit, Fourth Circuit, and Eleventh Circuit as precluding reliance on lawful Section 8(c) expressions to support "any unfair labor practice finding." Since *Vemco*, the Fifth Circuit has likewise found the "plain meaning" interpretation "to be more persuasive." *Brown & Root, Inc. v. NLRB*, 333 F.3d 628, 639 n.7 (5th Cir. 2003).

finding. 369 NLRB at 14 n.68; *see Pittsburgh S.S. Co. v. NLRB*, 180 F.2d 731, 735 (6th Cir. 1950).

C. The Union's alleged insistence on area standards is a factually unsupported theory concocted to support the claim of pretext

The Board and Union suggest that Quickway closed the Louisville terminal to avoid agreeing to area standards under the Transervice CBA. However, there is no substantial record evidence supporting any claimed "adamant" area standards position or discussions. In fact, substantial evidence contradicts the Board's and Union's claim regarding Zuckerman's alleged area standards position, let alone their repeated arguments that the Union was "adamant" or "insisted" on areas standards. The evidence demonstrates that Quickway's decision involved a fundamental change in the scope and direction of the business prompted by the serious risks involved with the strike and KDC shutdown. Specious claimed area standards labor costs did not motivate Quickway's decision and there is no evidence to support that it did. (Brief, pp. 13-14).

Quickway produced its November 19 bargaining meeting notes, which do not reflect any "area standards" discussion at the meeting. (JA-1280, 1542). The Union did not. Surely it would have produced notes demonstrating that it "insisted" on area standards if in fact it had done so. The only reference to "area standards" was a single comment by Zuckerman. No other evidence of an "adamant" area standards claim was presented by the Board or Union. Neither did they present any evidence . . .