No. 24-651

IN THE
Supreme Court of the United States

QUICKWAY TRANSPORTATION, INC.,
Petitioner,

v.

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

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

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

INTRODUCTION

The General Counsel of the National Labor Relations Board alleged that Petitioner Quickway Transportation, Inc., violated Section 8(a)(3) of the National Labor Relations Act (29 U.S.C. § 158(a)(3)) by closing a trucking terminal in order to—at least in part—discourage union organizing at some of Quickway's remaining terminals. The General Counsel further alleged that Quickway derivatively violated Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) by not bargaining with Respondent General Drivers, Warehousemen & Helpers, Local Union No. 89 prior to closing the terminal.

Before an administrative law judge, the Board, and the Sixth Circuit, Quickway argued only that the factual record didn't support findings of violations. Quickway lost at the NLRB, and the Sixth Circuit enforced the Board's order.

Now in its petition, Quickway raises only legal questions never presented to the Board or the court of appeals. But the NLRA expressly bars the Court from hearing arguments not first presented to the Board. This is then an extremely flawed vehicle to address the questions presented, and the Court should deny Quickway's petition for that alone. But even if the arguments were properly preserved, Quickway's arguments are wrong on the merits.

The Court should deny the petition.

STATEMENT OF THE CASE

Respondent Union incorporates by reference the statement of the case within the NLRB's response in opposition brief.

REASONS FOR DENYING THE WRIT

As Judge Murphy explained in his opinion below concurring in judgment, Quickway "chose to argue [on appeal] primarily over the facts." App.49a. By choosing that litigation strategy, Quickway faced the heavy burden of overcoming substantial-evidence review, and the court of appeals panel unanimously held that Quickway failed to do so. Now seeking a writ of certiorari from this Court, Quickway raises two legal—not factual—arguments. Quickway's questions presented are jurisdictionally barred and are wrong on the merits. As such, the Court should deny Quickway's petition.

I. Both of Quickway's Questions Presented Are Jurisdictionally Barred.

As mentioned, Quickway presents two questions in its petition for certiorari. But it never raised either argument before the Board, and indeed, never even properly raised them before the court of appeals. As such, the Court can't grant certiorari.

Take Quickway's first question. Quickway draws this question—whether the Board properly interprets *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), when it says that an employer has a duty to bargain over an unlawfully motivated partial plant closing—entirely from Judge Murphy's opinion concurring in judgment. *See* App.49a-53a. But after raising the question, Judge Murphy further explained that there was no need to address it because "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 anti-union reasons." *Id.* at App.53a. (emphasis in original). And that is also true for Quickway's litigation

strategy at the Board; it never made this legal argument there.

The same goes for Quickway's second question. Quickway made the argument that otherwise lawful communications between managers cannot be used as evidence to support an unfair labor practice finding only in its reply brief to the court of appeals. It never raised it before the Board.

Accordingly, these questions are unpreserved and cannot be heard by the Supreme Court. Because these arguments were not presented to the Board, Section 10(e) of the NLRA bars any court from hearing them. 29 U.S.C. § 160(e); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982). Similarly, arguments not raised to a court of appeals or raised first in a reply brief are abandoned. *See Bard v. Brown County, Ohio*, 970 F.3d 738, 751 (6th Cir. 2020) ("appellant abandons all issues not raised and argued in its initial brief on appeal" (cleaned up)). Quickway's petition then must be denied.

II. Even if Quickway's Questions Presented were not Jurisdictionally Barred, the Court of Appeals Properly Enforced the Board's Order.

Even if the Court were not jurisdictionally barred from addressing the questions presented, the Court should deny the petition because the court of appeals correctly enforced the Board order.

Consider Quickway's first question. Quickway argues that the Court's decision in *First National Maintenance* means it may never be held to violate Section 8(a)(5)'s duty to bargain if it partially closes its facilities without negotiating with the Union.

Pet. 23 ("*First National Maintenance* held that a partial closing decision is, categorically and irrespective of motive, not a mandatory subject of bargaining." (underline in original)). But the Court never held that. Instead, the Court addressed only the question of whether an employer has a duty to bargain over "an economically motivated decision to shut down part of a business." *First Nat. Maintenance*, 452 U.S. at 680. In answering that question, the Court concluded that

> the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business *purely for economic reasons* outweighs the incremental benefit that might be gained through the union's participation in making the decision and we hold that the decision itself is not part of § 8(d)'s 'terms and conditions,' over which Congress has mandated bargaining.

Id. at 686 (emphasis supplied). It is clear then that the Court held only that the "decision" to close a "business purely for economic reasons" was not a mandatory subject of bargaining.

But Quickway did not close the trucking terminal "purely for economic reasons." The Board found, and the court of appeals affirmed, that Quickway closed it, at least in part, to chill union organizing at its other terminals. *First National Maintenance*, then, offers no guidance on Quickway's bargaining obligation. Instead, because Quickway's decision was driven by employer-employee considerations, the instant situation is more akin to the Court's decision in *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964). There, the Court held that the decision to subcontract union members' work was a mandatory subject of bar-

gaining because the decision was motivated by labor cost-savings. 379 U.S. at 213-14.

Ultimately, the Board here decided that, by violating Section 8(a)(3) by closing the Louisville terminal for antiunion reasons, Quickway derivatively violated Section 8(a)(5) by refusing to bargain over the decision and the effects of that closing. App.132a. Nothing in *First National Maintenance* prohibits this finding.[1]

Quickway is equally off-target with its second question presented. The company seems to think that Section 8(c) of the NLRA prohibits consideration of any noncoercive statements when determining an employer's motivation. *See* Pet. 31-32. This grossly overstates the breadth of Section 8(c).

Section 8(c) says that the "expressing of any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). On its face then, Section 8(c) is limited to expressions of "view[s], argument[s], or opinion[s]." And that is how the courts and the Board have read it in the cases cited by Quickway. *See, e.g., Holo-Krome Co. v. NLRB*, 907 F.2d 1343, 1347 (2d Cir. 1990) (holding that "the Compa-

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[1] Considering the derivative nature of the Section 8(a)(5) violation, Quickway spends no time explaining how its question presented would affect the remedial order. The only part of the order reliant on the Section 8(a)(5) finding is an order to "[c]ease and desist" from "[f]ailing 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." App.167a-68a. The remainder of the remedial order is fully supported by the Section 8(a)(3) finding, and the order to cease and desist refusing to bargain doesn't require any affirmative action by Quickway at this point.

ny's statements expressing opposition to the Union during the 1985 election" were not permissible evidence); *United Site Servs.*, 369 NLRB No. 137, sl. op. 14 n. 68 (2020) (declining to rely on employer's "Non-Union Philosophy" statement in employee handbooks as evidence of an unfair labor practice).

Quickway makes no effort in its petition to point to which specific statements it believes the Board and court of appeals relied on that were in fact Section 8(c)-protected expressions of "view[s], argument[s], or opinion[s]," likely because none of the statements in the record fall into those categories. Surely not such statements as threats to drivers that they may lose their jobs if they were to organize. App.20a. Nor a top manager's instruction to other managers to "disconnect" the Murfreesboro, Tennessee terminal from the Louisville terminal to prevent the Union from "infect[ing]" the Murfreesboro-based drivers. App.24a, App.287a-88a.[2]

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[2] Nor is it at all clear that the Board and court of appeals relied on any noncoercive expressions in finding violations. The court of appeals explained that, in reaching its finding that the terminal closing was motivated in part by antiunion animus, "[t]he 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." App.19a (cleaned up). The court of appeals further explained that, by "expressed hostility," the court was referring to Quickway officials' threatening "warning[s to] drivers that they may lose their jobs if the Louisville terminal unionized." App.20a. (cleaned up). Accordingly, the evidence in the record upon which the Board found antiunion animus was Quickway's conduct and unprotected threats of reprisal for organizing. None of those are noncoercive expressions. Same for the finding of a purpose to chill unionization. Evidence that supported the

Indeed, Quickway's overly broad reading of Section 8(c) would mean that direct evidence of motivation—such as an admission that certain employees were fired due to their union activity—expressed between managers would be inadmissible. But "[Section] 8(c) merely implements the First Amendment[,]" *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969) (cleaned up), and nothing about the First Amendment would require the Board or a court of appeals to close their eyes to such direct evidence of motivation.[3]

Neither of Quickway's arguments hold any water. The court of appeals properly enforced the Board's order, and so the Court should deny the petition.

Board's finding includes the "close proximity between the terminated Louisville drivers and Quickway's other drivers"; top Quickway management "order[ing of] the Louisville and Murfreesboro terminals to disconnect any and all Mufreesboro drivers from picking up loads from the [closed terminal]"; top management being "alerted to the possibility of the Indianapolis terminal renewing a union campaign"; and "Quickway employee Hendricks['] announce[ment] that the Union 'is coming for Hebron!'" App.23.a-24a. That record evidence is not noncoercive expressions protected by Section 8(c).

[3] Nor must the Board ignore this evidence when making the additional determination under *Darlington* of whether the partial closing was intended to chill unionization at other locations. The Board has never held that it must ignore direct evidence of a motivation to chill because the statements are noncoercive and made to other members of management. *See Darlington Mfg. Co.*, 165 NLRB 1074, 1077-79 (1967) (finding a purpose to chill based on antiunion statements made publicly and to members of company management and rejecting the argument that Section 8(c) requires excluding these statements from its purpose to chill analysis), *enf. Darlington Mfg. Co. v. NLRB*, 397 F.2d 760 (4th Cir. 1968).

CONCLUSION

The Court should deny Quickway's petition.

Respectfully submitted,

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