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

REPLY BRIEF OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

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

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INTRODUCTION

The Board and the Union assert that 29 U.S.C. § 160(e) ("Section 10(e)") bars this Court from considering the questions presented. *NLRB Brief in Opposition* ("Board Opp.") 10, 12-13, 15; *General Drivers, Warehousemen and Helpers, Local Union No. 89 Brief in Opposition* ("Union Opp.") 2-3. Both are mistaken as to the applicability of Section 10(e) and the preservation of the issues raised. Section 10(e) does not prevent this Court's review of the questions presented. Moreover, there is no deficiency in the preservation of the issues now before this Court. Neither the Board nor the Union present substantial challenges to the questions presented, which are ripe for the Court's consideration for the reasons set forth in the Petition and reiterated herein.

ARGUMENT

I. Section 10(e) Does Not Bar Consideration of the Questions Presented.

Section 10(e) states in relevant part: "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court[.]" 29 U.S.C. § 160(e). The Board argues that Section 10(e) "forecloses [...] consideration before this Court" of the questions presented. Board Opp.12. The Union likewise asserts "Section 10(e) of the NLRA bars <u>any</u> court from hearing" the questions presented. Union Opp. 3 (emphasis added). Both rely principally upon this

Court's decision in *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645 (1982). However, such reliance on *Woelke* is misguided.

In *Woelke*, the Court declined to review an issue decided by the Ninth Circuit, not because Section 10(e) barred this Court's review, but because Section 10(e) barred the Ninth Circuit from ruling on the issue. The Ninth Circuit held "that unions do not violate § 8(b)(4)(A) when they picket to obtain a subcontracting clause sheltered by the construction industry proviso. However, the Court of Appeals was without jurisdiction to consider that question." *Woelke*, 456 U.S. at 665 (emphasis added). Because the Ninth Circuit "did not have jurisdiction to consider the picketing question," this Court "vacate[d] that portion of the Court of Appeals' judgment that relate[d] to this issue, and remand[ed] with instructions to dismiss." *Id.* at 648, 666. Thus, *Woelke* cannot be read as applying Section 10(e) as a jurisdictional bar against this Court's review.

Furthermore, this incorrect reading of *Woelke* is inconsistent with the language of Section 10(e), which is limited to petitions for enforcement (and petitions for review under 29 U.S.C. § 160(f)) made to "any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred [...]." 29 U.S.C. § 160(e) (emphasis added); 29 U.S.C. § 160(f). This Court has recognized the distinction between "the court [of appeals]" and "the Supreme Court of the United States" in Section 10(e) and found that "Congress has charged the Courts of Appeals and not this Court with the normal and primary responsibility for granting or

denying enforcement of Labor Board orders." *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951) (brackets in original). Accordingly, "the court" in Section 10(e) refers to circuit courts and district courts, not this Court.

II. The Questions Presented Are Properly Before This Court.

Neither of the questions presented would be barred under Section 10(e) even if it applied. Nor would the Court's "traditional rule" preclude consideration of the questions presented. Board Opp.10, 13. The first question is "[w]hether anti-union animus renders an employer's partial closing decision a mandatory subject of bargaining under 29 U.S.C. § 158(a)(5) and (d)." The administrative law judge specifically held that "under *Darlington*, [Quickway]'s conduct did not violate the Act despite its anti-union motivation" and therefore dismissed the allegation of unlawful failure to bargain over the partial closing decision. App.232a, 257a (emphasis added). Because Quickway prevailed on the question of its bargaining obligations related to its decision, it had no occasion to urge an objection to the Board concerning this issue.

The issue involved in the first question did not arise until the Board's August 25, 2023 decision. App.131a ("[W]here 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*[.]"). Quickway promptly filed its petition for review on August 25, 2023 and unambiguously argued in its principal brief that a partial closing decision is categorically exempted from mandatory

bargaining pursuant to *First National Maintenance* and *Darlington*:

> 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").

Sixth Circuit Case No. 23-1780, ECF Doc. No. 35, p. 44. (emphasis added).[1]

The Sixth Circuit ultimately held, contrary to *First National Maintenance* and *Darlington*, that "Quickway's decision to cease operations at its Louisville terminal was born out of anti-union animus" and thus "Quickway's failure to bargain over that decision violated Section 8(a)(5)." App.29a (emphasis added). It is therefore beyond dispute that the first question presented is properly before this Court. Any objection that this

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[1] Judge Murphy's comment that "Quickway's briefing chose *not* to challenge the Board's legal interpretation of *First National Maintenance*" is mistaken. App.53a.

Court's review of the first question is barred by Section 10(e) or would "contravene [...] this Court's traditional rule against considering questions not pressed or passed upon below" is simply without merit, as the question was both pressed before and passed upon by the Sixth Circuit. Board Opp.10.

The arguments advanced by the Board and the Union against the preservation of the second question likewise fail. They would require Quickway to "urge an objection" to the Board that 29 U.S.C. 158(c) ("Section 8(c)") bars consideration of lawful intra-management communications as evidence of a chilling purpose, even though the administrative law judge found no chilling purpose. App.257a-258a ("I do not think the record is sufficient to establish that this [*i.e.*, a chilling effect] was Respondent's motivation."). As discussed in the Petition, animus alone is insufficient to render a partial closing unlawful under 29 U.S.C. § 158(a)(3) ("Section 8(a)(3)"). Pet.16-20. Rather, under *Darlington*, a partial closing violates Section 8(a)(3) only if it is also "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." *Darlington*, 380 U.S. at 275 (emphasis added). As noted above, the Board's August 25, 2023 decision was the first and only finding at the administrative level that Quickway's partial closing decision violated the Act in any way or was motivated by a chilling purpose. The Section 10(e) argument as applied to this issue is, again, nothing more than an attempt "to make stumbling blocks out of procedural requirements and so shield [the Board's] orders from judicial review"

which "is not what § 10(e) is for." *Thryv, Inc. v. NLRB*, 102 F.4th 727, 742-43 (5th Cir. 2024).

The Board also falsely asserts that the second question was forfeited before the Sixth Circuit. Quickway raised its Section 8(c) defense in its opening brief to the Sixth Circuit related to lawful communications made to employees, and then subsequently expanded on this defense as applied to lawful intra-management communications. Sixth Circuit Case No. 23-1780, ECF Doc. No. 35, pp. 65-66; ECF Doc. No. 53, pp. 12-17. The Sixth Circuit has recognized that an argument may be more fully developed in a reply brief. *Turcios-Flores v. Garland*, 67 F.4th 347, 356 (6th Cir. 2023) ("[Petitioner] further expands on this previously raised argument in her reply brief, so the issue was not waived."). Additionally, statutory arguments, even if not previously raised, will be considered if the argument, like Quickway's Section 8(c) defense, "is purely a matter of law, is dispositive, and, if applied, will result in reversal." *Mayhew v. Allsup*, 166 F.3d 821, 823 (6th Cir. 1999). While the Sixth Circuit erred in failing to address Quickway's Section 8(c) argument, it did not find that this argument was forfeited, because it was not forfeited.

Although Quickway preserved the issues raised in its Petition, the Board and the Union also ignore this Court's discretion to consider questions not raised below, which it has done frequently. *See, e.g.*, *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980) ("Though we do not normally decide issues not presented below, we are not precluded from doing so."); *Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("the rule is not inflexible"). It is well-established that the Court may even address questions raised *sua sponte*. While Supreme Court

Rule 14.1(a) provides that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court[,]" the Court has held that "Rule 14.1(a), of course, is prudential; it 'does not limit our power to decide important questions not raised by the parties.'" *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 32 (1993) (citation omitted). Here, Quickway both preserved and raised the important questions presented. As stated in the Petition, the first question involves the application of two seminal decisions of this Court with potential implications for employers across the country. The second question concerns the congressional purpose of Section 8(c) to prevent "the Board from attributing anti-union motive to an employer on the basis of his past statements" which do not violate the Act, as it did here. *Linn v. United Plant Guard Workers*, 383 U.S. 53, 62, n.5 (1966); Pet.15. There is no obstacle to this Court's review of the questions presented.

III. The Briefs in Opposition Simply Repeat the Sixth Circuit's Misreading of *First National Maintenance* and *Darlington*.

The Sixth Circuit majority found that the presence of anti-union animus converts a non-bargainable partial closing decision into a mandatory subject of bargaining. App.29a. ("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)."). As discussed above and in detail in Quickway's Petition, *Darlington* requires the additional elements of a chilling purpose and foreseeability of a chilling effect to find a partial closing unlawful. *Darlington*, 380 U.S. at 275; Pet.16-20.

Under *First National Maintenance*, the decision "itself is not part of § 8(d)'s 'terms and conditions'" over which an employer must bargain, regardless of motivation. *First National Maintenance*, 452 U.S. at 684; Pet.14, 20-24. The Sixth Circuit's decision is contrary to both decisions of this Court in that it imposed a mandatory bargaining obligation over the partial closing decision, contrary to *First National Maintenance*, and did so on the basis of perceived anti-union animus alone, even though animus does not render a partial closing unlawful under *Darlington*.

In their briefs, the Board and the Union simply rely on the same misreading of *First National Maintenance* and *Darlington* without rebutting the arguments raised by Quickway. The Board repeats that "[b]ecause '[d]iscrimination on the basis of union animus' in violation of Section 8(a)(3) 'cannot constitute a lawful entrepreneurial decision,' a partial closing stemming from such a motivation falls outside of *First National Maintenance*'s domain." Board Opp.11. The Union states "the Board here decided that, by violation 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." Union Opp.5. However, the Sixth Circuit, the Board, and the Union have read into *First National Maintenance* an exception to the rule against mandatory bargaining over partial closing decisions which does not exist. Pet.16, 20-21.

The Board selectively quotes *First National Maintenance* as "explaining that Section 8(a)(3) 'prohibits partial closings motivated by antiunion animus[.]'" Board Opp.3. The full quotation reads as follows: "Moreover, the union's legitimate interest in fair dealing is

protected by § 8(a)(3), which prohibits partial closings motivated by antiunion animus, when done to gain an unfair advantage." 452 U.S. at 682 (citing *Darlington*) (emphasis added). Thus, the Court acknowledged that under *Darlington*, anti-union animus alone does not render a partial closing unlawful under Section 8(a)(3). Rather, a purpose of chilling "to gain an unfair advantage" must also be present. 452 U.S. at 682. In the above excerpt, the Court also recognized that Section 8(a)(3) protects unions from unlawful closures, not as a reason to impose a bargaining obligation over partial closing decisions, but rather to support its holding that mandatory bargaining over the decision is not necessary. A union "indirectly may ensure that the decision itself is deliberately considered" without engaging in bargaining over the decision itself. 452 U.S. at 682. The Court in *First National Maintenance* also noted the futility of treating a partial closing decision as a mandatory subject of bargaining, as unions will uniformly be opposed to closings:

> The union's practical purpose in participating, however, will be largely uniform: it will 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. There is no dispute that the union must be given a significant opportunity to bargain about these matters of job

> security as part of the "effects" bargaining mandated by § 8 (a)(5).

Id. at 681 (emphasis added).

The Sixth Circuit, the Board, and the Union find the basis of their proposed exception to the *First National Maintenance* rule in the following language:

> Under § 8 (a)(3) the Board may inquire into the motivations behind a partial closing. An employer may not simply shut down part of its business and mask its desire to weaken and circumvent the union by labeling its decision "purely economic."

First National Maintenance, 452 U.S. at 682. *See* App.28a ("*First National*, moreover, is limited to partial closures taken *purely* for economic reasons"); Board Opp.3; Union Opp.4. However, this Court's acknowledgement that merely labeling a partial closing decision as "purely economic" does not shield an employer from Section 8(a)(3) cannot be read as also creating a mandatory bargaining obligation over partial closing decisions where Section 8(a)(3) has been violated. Pet.25-26.

Indeed, nothing in *First National Maintenance* can be read as creating a mandatory bargaining obligation over a partial closing decision based on an 8(a)(3) violation or the presence of anti-union animus. The Sixth Circuit simply deferred to the Board's mistaken interpretation of *First National Maintenance* in *Delta Carbonate, Inc.*, 307 N.L.R.B. 118, 122 (1992), which held that "[w]here [...] a decision is motivated by anti-union reasons, an employer is not exempt from a bargaining obligation under *First National Maintenance*."). App.28a. However, the Board's interpretation

of this Court's precedent is not entitled to deference. The Sixth Circuit's decision plainly "conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). At minimum, *certiorari* should be granted in order to clarify the scope of *First National Maintenance*.

IV. The Sixth Circuit Relied on Expressions Protected Under Section 8(c) Contrary to Congressional Intent.

The Board and the Union oppose review of the second question primarily on grounds that they are unsure which intra-management communications are at issue and alleged to be covered by Section 8(c). Board Opp.16-17; Union Opp.6. Quickway's Petition specifically cites the portion of the Sixth Circuit's decision where, in support of its finding of a purpose to chill unionism, the court relied on the following intra-management communications:

> Cannon ordered the Louisville and Murfreesboro terminals to "disconnect any and all Murfreesboro drivers from picking up loads from the KDC," because "[...] we certainly do not want the union to infect our Murfreesboro fleet." Additionally, in August 2020 [...] Cannon asked Paladin's HR Director if they were interested in the services of "union busters." Later that fall, Quickway employee Hendricks announced that the Union "is coming for Hebron!," [...] and Campbell insinuated that he considered the announcement a "threat[] to harm our business." Considering 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.

App.24a-25a (internal citations omitted); Pet.31-32. The Union contends that "none of the statements in the record fall into" the categories of "Section 8(c)-protected expressions of 'view[s], argument[s], or opinion[s][.]'" Union Opp.6. The Board argues the Petition does not explain "why they qualify as '[t]he expressing of any views, argument, or opinion[.]'" Board Opp.16. However, the Sixth Circuit plainly considered the above communications to be expressions of Quickway's views and opinions in that it relied upon these communications as evidence of a motivation "to chill unionization[.]" App.25a. To the extent the Board and the Union disagree that such communications are within the scope of Section 8(c)'s proscription, this only further demonstrates the need for review of the question. As the Petition illustrates, the statute has been criticized for its broad language from its inception. Pet.33-35. Nonetheless, "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).

CONCLUSION

The briefs in opposition fail to show why the Court should not consider the questions presented. Resolution in favor of Quickway would require reversal of the imposed restoration order and other remedies. The Petition should be granted.

Respectfully submitted,

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