

No. 25-391

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

**NATIONAL LABOR RELATIONS BOARD
Petitioner**

v.

**KIRIN TRANSPORTATION, INC. d/b/a
KIRIN TRANSPORTATION
Respondent**

**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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STATEMENT OF JURISDICTION

This case is before the Court on the application of the National Labor Relations Board (“the Board”) for enforcement of a Board Decision and Order issued against Kirin Transportation, Inc. d/b/a Kirin Transportation (“the Employer”) on December 16, 2024, and reported at 374 NLRB No. 4. The Board had jurisdiction over the unfair-labor-practice proceeding below pursuant to Section 10(a) of the National Labor Relations Act, 29 U.S.C. §§ 151, *et seq.*, as

amended (“the Act” or “the NLRA”). 29 U.S.C. § 160(a). The Board’s Order is final, and this Court has jurisdiction pursuant to Section 10(e) of the Act.

29 U.S.C. § 160(e). Venue is proper as the Board found unfair labor practices that occurred in New York. The application for enforcement is timely as the Act provides no time limit for such filings.

STATEMENT OF THE ISSUES

1. Does substantial evidence support the Board’s findings that the Employer violated the Act by coercively interrogating and threatening Qian Wang, and by suspending and discharging her in response to her statutorily protected activities?

2. Does substantial evidence support the Board’s findings that the Employer violated the Act by coercively interrogating and threatening Tiande Wang, and by discharging Tiande Wang, Lu Yang, and Ya Xu in response to their statutorily protected activities; and does substantial evidence support the Board’s finding that the Employer failed to establish the drivers in question are independent contractors excluded from the coverage of the Act?

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

A. The Employer's Operations, Management Hierarchy, and Employment Relationship to Its Drivers

The Employer operates a non-emergency transportation service for elderly residents in and around New York City. (D&O.8-9; A.125.)¹ Primarily tasked with transporting residents to and from senior centers and medical appointments, the Employer receives most of its revenue from insurance companies, medical transportation brokers, and senior centers. (D&O.8; S.A.110-11.) The Employer later transmits a portion of the revenue received for each ride to the driver responsible, while keeping the remainder. (D&O.8-10; A.117.)

The Employer receives ride bookings and employs dispatchers who oversee the assignment of rides to drivers. (D&O.10; S.A.2-4.) Dispatchers generally email lists of rides to drivers a day in advance and monitor the drivers' progress throughout the workday. (D&O.10; A.304-78, A.382-406, S.A.2-4, S.A.25, S.A.49-50, S.A.65-68, S.A.76-79, S.A.87, S.A.102-03, S.A.202-06.) The Employer dictates the number of rides assigned to each driver, the identities of the

¹ "A." citations are to the appendix filed by the Employer. "S.A." citations are to the supplemental appendix filed by the Board. For clarity and ease of reference, the Board hereinafter refers to the Decision and Order under review (A.266-300) as "D&O" using its own internal pagination (D&O.1-35). "Br." references are to the Employer's opening brief to the Court.

customers, the pickup times, and the pickup and drop-off locations, while requiring drivers to submit detailed trip reports. (D&O.10; A.125, S.A.2, S.A.6-8, S.A.76-79, A.116.) The drivers are prohibited from declining to accept ride assignments. (D&O.10; A.20, S.A.95-96, S.A.116.)

The Employer dictates drivers' days of work and prohibits them from taking leave without permission. (D&O.10; A.18-19, S.A.1-5, S.A.19-25, S.A.68-70, S.A.94-97.) The Employer has refused drivers' requests to take leave when there were not enough alternative drivers available. (D&O.10; S.A.80.) The drivers utilize their own vehicles and are responsible for gasoline, maintenance, and other upkeep costs. (D&O.10; A.85-87.) The Employer directs its drivers to display stickers bearing the Kirin Transportation name on their personal vehicles and to distribute company-branded business cards and pens to customers. (D&O.10; S.A.64, S.A.80-81, S.A.97.) The Employer maintains workers' compensation insurance for its drivers, but issues them yearly 1099 tax forms rather than W-2 tax forms. (D&O.9; A.25.)

From 2013 through early 2019, the Employer was co-owned by Frank Chen. (D&O.9; A.117-18.) Between 2015 and 2016, Chen hired Tiande Wang and Lu Yang as drivers, Qian Wang as an administrative and clerical employee, and Ya Xu as a sales employee. (D&O.9; A.6, A.43-44, A.70-72, A.82-83, S.A.9-10, S.A.73-75, S.A.96.) Chen told Yang that he was required to give at least one

month's notice prior to leaving his employment. (D&O.9; A.71-72.) After working in sales for approximately one year, Xu transitioned to full-time work as a driver. (D&O.9; A.82-83, S.A.82-85, S.A.98-100.) Qian Wang's job duties included preparing payroll, issuing checks, preparing invoices to insurance companies, recording the receipt of payments, and, on occasion, scheduling and dispatching drivers. (D&O.9; S.A.9-10, S.A.15-16.) Qian Wang is the daughter of driver Tiande Wang. (D&O.9; S.A.41.)

In March 2019, employees were informed that the Employer was promoting Nancy Song to be its chief executive officer, with sole authority over "all decisions concerning management of personnel." (D&O.9, D&O.19; A.160, S.A.51-53, S.A.75, S.A.86, S.A.117-22, S.A.167, S.A.212-14, S.A.221-22.) Song thereafter exercised sole responsibility over personnel decisions and day-to-day management. (D&O.9-10; S.A.106-07.)

B. Qian Wang Initiates a Collective Lawsuit for Unpaid Wages

In April 2020, the Employer began withholding wages owed to Qian Wang and other employees. (D&O.11; S.A.27.) Song told Wang that the Employer was experiencing financial difficulties and asked her to be "patient." (D&O.11; S.A.27-28.) The problem of unpaid wages continued to grow over the following months and affected all four employees at issue in the present case. (D&O.11; S.A.27-28, S.A.60, S.A.88, S.A.104.)

On November 6, 2020, Qian Wang and former coworker Zhanwen Chi filed a complaint against the Employer in the U.S. District Court for the Eastern District of New York alleging violations of the Fair Labor Standards Act and New York state law, including unpaid wages and unpaid overtime. (D&O.11; S.A.132-58.) The complaint sought certification of a class action on behalf of all similarly situated individuals employed by the Employer. (D&O.11; S.A.132-58.)²

C. Song Confronts Qian Wang and Tiande Wang About the Lawsuit; the Employer Suspends Qian Wang

On November 25, 2020, Song called Tiande Wang into her office for a meeting. (D&O.11; S.A.58-62.) Qian Wang was seated nearby and could overhear the conversation. (D&O.11; S.A.29-31.) Song began by showing Tiande Wang a copy of the recently filed complaint and asking him whether he knew his daughter had filed a lawsuit against the Employer. (D&O.11; S.A.58-62.) Song asked Tiande Wang to persuade Qian Wang to withdraw the lawsuit, but he refused. (D&O.11; S.A.58-62.) Song then stated that she would make the Wangs “pay” and that the Employer would file a countersuit against them. (D&O.11, D&O.19; S.A.29-31, S.A.58-62.)

After Tiande Wang left, Song called Qian Wang into her office. (D&O.11; S.A.29-31.) Song again displayed a copy of the recently filed complaint, pointed

² Chi quit his employment prior to the events at issue here. (D&O.9; A.6.)

at Wang's name in the caption, and asked if Wang had filed a lawsuit against the Employer. (D&O.11; S.A.29-31, S.A.54-56.) Song accused Wang of having an affair with the other named plaintiff, stated that everything in the lawsuit was false, and asked Wang to withdraw it. (D&O.11; S.A.29-31.) Song warned that, if Wang did not withdraw the lawsuit, Song would make Wang and her family "pay" and the Employer would file a countersuit. (D&O.11; S.A.29-31.) Song further asked Wang to tell the other named plaintiff to "come over" if he had the "guts," and that Song would be "waiting for [him]." (D&O.11; S.A.29-31.)

Several days later, on December 1, Qian Wang posted a message in the office reminding drivers of the deadlines for daily ride verifications and directing them to contact her with any questions about billing or payments. (D&O.11-12; S.A.226.) Wang forwarded the same message to the drivers by email the following day. (D&O.12; S.A.191-92.) When Song saw the posting she interpreted it as an attempt to solicit drivers' wage-related grievances in connection with the wage-and-hour lawsuit. (D&O.26-27; A.154-55, S.A.178-79.)

After Song observed the posting on December 1, Wang received an out-of-the-ordinary chat message from dispatcher Chao Xu requesting an update on "billing progress" and directing her to "bring documents you have at home to the company tomorrow." (D&O.12; S.A.34-35, S.A.169-76.) Moments later, Xu sent a follow-up message stating that the Employer needed billing information related

to a particular medical transportation broker. (D&O.12; S.A.12-13, S.A.169-76.)

Wang attempted to comply and uploaded a billing spreadsheet to the chat.

(D&O.12; S.A.169-76.) Xu did not respond, but several hours later sent a late-night chat message stating: “The company has never received your billing progress table. Therefore, starting from today, please wait for further notice from the company before you come back to work again.” (D&O.12; S.A.169-76.)

The following morning, December 2, the Employer sent Wang a longer email stating:

Due to frequent mistakes in your work, such as salary settlement recently; also for several months, you have not kept a daily work schedule and records in accordance with company regulations. The company also discovered that some internal information was inappropriately leaked. In recent few days, you have privately emailed the drivers beyond your scope of work. Out of love for you, the company has decided to ask you to temporarily suspend all work from 12/01/2020 during this pandemic period and wait for the company’s further notice.

(D&O.12; S.A.178-79.) Wang had no prior history of discipline or counseling for mistakes in her work. (D&O.13; S.A.36-40.) Several hours later, the Employer emailed Wang again, reiterating that she had been suspended and directing her to prepare to hand over documents she had in her possession for working from home.

(D&O.13; S.A.181-82.) Song and dispatcher Chao Xu drove to Wang’s residence to collect the documents. (D&O.13-14; S.A.169-76.) Wang was not at home, and Song called the police when Wang did not immediately respond to messages.

(D&O.13-14; S.A.169-76.) Wang eventually returned home and proceeded to return all of the documents in her possession. (D&O.13-14; S.A.44-48, S.A.57, S.A.108-09, S.A.112-15, S.A.184-87.)

D. Tiande Wang Files To Join the Lawsuit; the Employer Indefinitely Suspends Tiande Wang and Discharges Qian Wang

On December 2, Tiande Wang formally filed to join the wage-and-hour lawsuit. (D&O.12; S.A.189.) The next day, December 3, Wang received an email from the Employer stating that “the company has decided to temporarily suspend your work.” (D&O.14; S.A.194-97.) As justifications, the email stated:

However, it is also due in part to your own actions: deliberately instigating the company’s current and former employees to sue the company, which has had a great negative impact on the company, with the details as follows:

1. Without the company’s knowledge, you have changed your vehicle code number, dispatched works, or even used other individual’s vehicle code number (626) to dispatch works.
2. You have made disturbance in company office, intimidated company managers and threatened to retaliate against Chinese bosses.
3. On the evening of Dec. 2, 2020, you yelled loudly around the company manager’s vehicle, threatened the persons inside the vehicle and ignored the safety of others.

(D&O.14; S.A.194-97.) The Employer never subsequently recalled Wang to work.

(D&O.14; S.A.63, S.A.74.) On December 10, the Employer mailed a letter to Wang reiterating the justifications in its December 3 email. (D&O.15-16; S.A.199-201.)

Also on December 10, the Employer mailed a letter to Qian Wang terminating her employment. (D&O.15; S.A.160-62.) The letter stated, in part:

Due to your recent poor work performance which has caused our company ... to suffer adverse impact such as; turning payroll report late, creating conflicting between our staff and drivers, using personal emails for communicate with staff without company authority and purposefully misleading our driver and causing trouble for the stability of our company. We have temporarily suspended your employment with Kirin Transportation Inc.

Not only do you not follow company's instruction and direction. You have also secretly taken important company files to your house

Because of your behaviors is harming our Company's interest and benefit, you should have returned all the documents of the Company back to us but there are still missing files and documents papers

As of 12/04/2020, you have been terminated.

(D&O.15; S.A.160-62.) The Employer has never identified which documents Wang purportedly failed to return on December 2. (D&O.30.)

E. Lu Yang and Ya Xu Complain About Unpaid Wages and Later File To Join the Lawsuit; the Employer Discharges Yang and Xu

In late December 2020, Yang and Xu each had separate conversations with Song in which they raised their shared concerns about the Employer owing the employees unpaid wages. (D&O.16; A.63, S.A.88, S.A.104-05.) Song warned Yang that if he was considering “[going] to court,” then he would not get “a penny.” (D&O.16; A.63.) Song similarly told Xu that he would not see “a single penny” if he joined the wage-and-hour lawsuit filed by Qian Wang. (D&O.16;

S.A.88.) Yang and Xu nonetheless filed to join the lawsuit in February 2021. (D&O.16; S.A.208, S.A.210.) One week later, on March 1, dispatcher Chao Xu called Ya Xu and told her that she and Yang were fired. (D&O.16; S.A.89-90.) When Ya Xu asked for a reason, Chao Xu responded that Song had told him to call them and tell them they were fired. (D&O.16; S.A.89-90.) Ya Xu later went to the office to ask Song for a reason for her termination, but Song refused to provide one and threatened to call the police if Xu did not leave. (D&O.16; S.A.90-91.)

F. The Board’s General Counsel Issues an Unfair-Labor-Practice Complaint; an Administrative Law Judge Issues a Recommended Order Finding the Employer Violated the Act as Alleged

Acting upon charges filed by Qian Wang, Tiande Wang, Lu Yang, Ya Xu, and Zhanwen Chi, the Board’s General Counsel issued an unfair-labor-practice complaint in April 2021, as subsequently consolidated and amended. (D&O.8.) Following a hearing, an administrative law judge issued a recommended decision and order finding merit to most of the alleged violations of Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), including the allegations that the Employer unlawfully discharged Qian Wang, Tiande Wang, Lu Yang, and Ya Xu. (D&O.7-35.)

II. THE BOARD’S CONCLUSIONS AND ORDER

On December 16, 2024, the Board (Chairman McFerran and Members Kaplan and Prouty) issued a Decision and Order affirming the administrative law judge to find that the Employer violated Section 8(a)(1) of the Act by coercively

interrogating, threatening, suspending, and then discharging Qian Wang because of her statutorily protected activities, by coercively interrogating and threatening Tiande Wang, and by discharging Tiande Wang, Lu Yang, and Ya Xu because of their statutorily protected activities. (D&O.1-2.)³

The Board's Order requires the Employer to cease and desist from the unfair labor practices found and from, in any other manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by the Act. (D&O.4.) Affirmatively, the Board's Order requires the Employer to: offer Qian Wang, Tiande Wang, Lu Yang, and Ya Xu full reinstatement to their former jobs or substantially equivalent positions; make Qian Wang, Tiande Wang, Lu Yang, and Ya Xu 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; post and mail a remedial notice and explanation of rights; and host a meeting or meetings at which the remedial notice and explanation of rights are read aloud to its employees. (D&O.4-5.)

³ The administrative law judge found that the Employer also violated the Act by filing a retaliatory lawsuit in state court against the four employees at issue here and former employee Zhanwen Chi. The Board severed that allegation for further consideration (D&O.2), and it is therefore not before the Court.

SUMMARY OF ARGUMENT

This case involves straightforward unfair labor practices by the Employer as part of an unlawful campaign of reprisals it undertook against its employees for initiating and joining in a statutorily protected wage-and-hour lawsuit seeking to improve their working conditions by collecting unpaid wages. The Employer does not meaningfully contest any of the operative legal standards, and the limited question before the Court as to each issue is whether a rational factfinder could have drawn the conclusions that the Board did based on the record evidence.

The record evidence amply supports the Board's findings that the Employer first violated the Act by targeting clerical employee Qian Wang for helping to initiate the lawsuit as one of two named co-plaintiffs on the initial complaint. The Employer coercively interrogated her about the lawsuit, threatened her and her family with reprisals if she did not withdraw the lawsuit, and then suspended and discharged her in quick succession on pretextual grounds—all in the span of about a week. The Board reasonably concluded that Wang's suspension and discharge were motivated by her statutorily protected activities, relying in particular on the Employer's overt hostility toward the lawsuit, the highly suspicious timing of the suspension and discharge, and the Employer's inability to corroborate any of its vague, shifting, and pretextual claims of misconduct. The Board further found that

the Employer failed to prove it would have disciplined Wang in the absence of her statutorily protected activities.

Around the same time, the Employer also coercively interrogated Qian Wang's father, Tiande Wang, about his daughter's wage-and-hour lawsuit, and threatened him with reprisals if he did not convince her to withdraw it. One week later, when Tiande Wang formally filed to join the lawsuit as a plaintiff, he too was promptly discharged on pretextual grounds. The Board relied on the Employer's express reference to the lawsuit in the discharge notice, the highly suspicious timing of the discharge, and the Employer's shifting and pretextual claims of misconduct to find that the discharge of Tiande Wang was motivated by his statutorily protected participation in the lawsuit. The Board also once again found that the Employer failed to prove it would have discharged him in the absence of his statutorily protected activities.

Despite the unlawful terminations of Qian and Tiande Wang, drivers Lu Yang and Ya Xu were not dissuaded from joining the lawsuit when their own grievances regarding unpaid wages went unredressed. Almost immediately after Yang and Xu filed to join the lawsuit as plaintiffs, the Employer discharged them as well—this time without even bothering to provide a pretextual explanation for the discharges. The Board found that Yang's and Xu's discharges, too, were motivated by their statutorily protected activities, and the Employer's only

response on review is its highly implausible and demonstrably false claims that Xu was never employed by the Employer and that Yang and Xu voluntarily quit.

On review, the Employer has failed to call any of the Board’s careful findings into question. To the extent the Employer has adequately briefed its arguments for the Court’s consideration, it primarily relies on: (i) renewed citations to managerial testimony that the Board thoroughly discredited and that is contradicted by the weight of the record evidence; and (ii) a threshold argument that three of the employees at issue—drivers Tiande Wang, Lu Yang, and Ya Xu—were independent contractors excluded from the protections of the Act, rather than statutory employees. But the Employer presents no grounds for the extraordinary step of calling the Board’s witness-credibility determinations into question, and the record evidence fully supports the Board’s conclusion that the Employer failed to carry its burden of proof in establishing independent-contractor status. As the Board found, the traditional common-law factors for distinguishing between employees and independent contractors show that the drivers are run-of-the-mill employees whose day-to-day work is extensively controlled by the Employer. Full enforcement of the Board’s Order is warranted.

STANDARD OF REVIEW

The Court’s review of Board decisions is “quite limited.” *HealthBridge Mgmt., LLC v. NLRB*, 902 F.3d 37, 43 (2d Cir. 2018). The Court will enforce the

Board’s order “where its legal conclusions are reasonably based, and its factual findings are supported by substantial evidence on the record as a whole.” *Id.*; see *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Substantial evidence means “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,” and the Court will not disturb the Board’s findings of fact unless convinced that “no rational trier of fact” could reach the conclusions drawn by the Board. *HealthBridge*, 902 F.3d at 43. The Court affords even greater deference to findings of fact based on witness-credibility determinations, which the Court will not second-guess unless the testimony is “hopelessly incredible” or the findings “‘flatly contradict’ either the ‘law of nature’ or ‘undisputed documentary testimony.’” *NLRB v. Thalbo Corp.*, 171 F.3d 102, 112 (2d Cir. 1999).

ARGUMENT

I. Substantial Evidence Supports the Board’s Findings That the Employer Violated the Act by Coercively Interrogating, Threatening, Suspending, and Discharging Qian Wang in Response To Her Protected Activities

Section 7 of the Act guarantees employees the right to engage in “concerted activities for the purpose of ... mutual aid or protection.” 29 U.S.C. § 157. It is well established that employees’ collective efforts to improve their working conditions through resort to administrative or judicial forums, such as participating in wage-and-hour litigation in court or discussing their wages with coworkers in anticipation of such litigation, are protected under the Act. *Cordúa Rests., Inc.*,

368 NLRB No. 43, 2019 WL 3842331, at *4-5 & n.15 (Aug. 14, 2019) (citing cases), *enforced*, 985 F.3d 415 (5th Cir. 2021); *see also, e.g., Socony Mobil Oil Co. v. NLRB*, 357 F.2d 662, 663-64 (2d Cir. 1966) (affirming that employee engaged in statutorily protected conduct by filing complaint with government).

In the present case, the Employer repeatedly violated the Act upon learning that employee Qian Wang had engaged in protected concerted activity by spearheading a collective wage-and-hour lawsuit seeking to address her and her coworkers' longstanding grievances about unpaid wages. As shown below, substantial evidence supports each of the Board's unfair-labor-practice findings.⁴

A. The Employer Coercively Interrogated and Threatened Qian Wang for Filing the Wage-and-Hour Lawsuit

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 their statutory rights. 29 U.S.C. § 158(a)(1). Statements by an employer or its agents violate Section 8(a)(1) if they would have a “reasonable tendency” to coerce employees. *N.Y. Univ. Med. Ctr. v. NLRB*, 156 F.3d 405, 410 (2d Cir. 1998). An employer violates Section 8(a)(1) by interrogating employees about their statutorily protected activities in a manner that, considering the totality of the circumstances, would

⁴ Much of the Employer's brief is dedicated to contesting the employee status of drivers Tiande Wang, Lu Yang, and Ya Xu, as addressed below. *See infra* pp. 27-33. Qian Wang, by contrast, was employed as an administrative and clerical worker. The Employer concedes Qian Wang was a statutory employee. (Br. 31.)

have a tendency to coerce. *NLRB v. Special Touch Home Care Servs.*, 566 F.3d 292, 301-02 (2d Cir. 2009); *Rossmore House*, 269 NLRB 1176, 1177-78 & n.20 (1984) (listing relevant factors). Likewise, an employer violates Section 8(a)(1) by threatening employees with reprisals for engaging in statutorily protected activities. *NLRB v. J. Coty Messenger Serv.*, 763 F.2d 92, 97-98 (2d Cir. 1985).

Substantial evidence supports the Board's findings that Song's statements to Qian Wang on November 25 crossed the line into unlawful coercion. (D&O.23-24.) Considering all of the circumstances, Song's coercive demand to know the genesis of the wage-and-hour lawsuit and overt threat to make Wang and her family "pay" if the lawsuit was not withdrawn had an obvious tendency to coerce a reasonable employee in Wang's position. That is particularly true given that Wang had just overheard Song make an identical threat to her father. The Board thus found the Employer violated the Act by interrogating Wang about her protected activities and by threatening her and her family with reprisals. (D&O.24.) *E.g.*, *Deep Distribs. of Greater N.Y.*, 365 NLRB 947, 963-64 (2017) (finding unlawful coercion where employer asked about employees' involvement in wage-and-hour lawsuit and threatened reprisals), *enforced*, 740 F. App'x 216 (2d Cir. 2018).

The Employer does not contest that such statements would have a reasonable tendency to coerce. Instead, the Employer's only response is to deny that Song made any such statements to Qian or Tiande Wang on November 25, seemingly

based on Song’s denial that she knew about the lawsuit as of that date. (Br. 14, 29.) As an initial matter, it is doubtful that the Employer’s skeletal briefing has satisfied its obligations under Federal Rule of Appellate Procedure 28(a)(8) and Local Rule 28.1(a) to preserve the issue for this Court’s review. *See Palin v. N.Y. Times Co.*, 113 F.4th 245, 279 (2d Cir. 2024) (noting that issues “adverted to in only ‘a perfunctory manner’” will typically be deemed forfeited); *United States v. Apple, Inc.*, 791 F.3d 290, 338 n.26 (2d Cir. 2015) (“Issues not sufficiently argued are in general deemed waived and will not be considered on appeal.”).

In any event, the Board reasonably discredited Song’s testimony that she did not know about the lawsuit as of November 25—going out of its way to highlight the repeated, demonstrable falsehoods offered by Song in her testimony, along with her markedly unreliable demeanor as a witness. (D&O.18-19.) The Board instead credited the mutually corroborative testimony of Qian and Tiande Wang. (D&O.26-27.) The Court will not second-guess the Board’s witness-credibility determinations unless “hopelessly incredible.” *Thalbo Corp.*, 171 F.3d at 112.

B. The Employer Suspended and Discharged Qian Wang on Pretextual Grounds in Retaliation for the Lawsuit

An employer further violates Section 8(a)(1) by discharging or otherwise disciplining an employee for engaging in statutorily protected activities. *NLRB v. Coca-Cola Bottling Co. of Buffalo, Inc.*, 811 F.2d 82, 88-90 (2d Cir. 1987). When an employer’s motive for disciplining an employee is in dispute, the Board applies

its well-established *Wright Line* framework. *NLRB v. Newark Elec. Corp.*, 14 F.4th 152, 169 (2d Cir. 2021) (citing *Wright Line*, 251 NLRB 1083, 1087 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981)); *see also NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 400-04 (1983).

Pursuant to *Wright Line*, the Board determines whether an employee's protected activities were at least *a* motivating factor in the decision to discipline the employee. *NLRB v. G&T Terminal Packaging Co.*, 246 F.3d 103, 115-16 (2d Cir. 2001). The Board may infer an unlawful motive if substantial evidence shows that: (i) the employee engaged in statutorily protected activities; (ii) the employer had knowledge of those activities; and (iii) the employer harbored animus toward those activities. *NLRB v. Igramo Enter., Inc.*, 310 F. App'x 452, 454 (2d Cir. 2009); *Consol. Bus Transit, Inc.*, 350 NLRB 1064, 1065-66 (2007), *enforced*, 577 F.3d 467 (2d Cir. 2009). The Board may rely on circumstantial evidence to infer unlawful animus or an unlawful motive, such as suspicious timing, pretextual or shifting explanations by the employer, or a broader course of conduct suggesting hostility toward the protected conduct. *G&T Terminal*, 246 F.3d at 116; *Abbey's Transp. Servs., Inc. v. NLRB*, 837 F.2d 575, 579-80 (2d Cir. 1988). If the Board finds that an unlawful motive contributed to the decision to discipline an employee, the employer may only avoid an unfair-labor-practice finding by proving, as an affirmative defense, that it would have taken the same action even in the absence

of the employee's protected conduct. *Newark Elec.*, 14 F.4th at 169-70. When there is strong evidence of an unlawful motive, the employer's defense burden increases accordingly. *Bally's Park Place, Inc.*, 355 NLRB 1319, 1321 (2010), *enforced*, 646 F.3d 929, 936 (D.C. Cir. 2011).⁵

Substantial evidence supports the Board's findings that the Employer violated Section 8(a)(1) by suspending and shortly thereafter discharging Qian Wang in retaliation for her protected activities. (D&O.26-30.) As demonstrated in part by Song's unlawful confrontations of Wang and her father on November 25, the Employer was well aware that Wang was engaged in the statutorily protected conduct of pursuing a collective wage-and-hour lawsuit. *Cordúa Rests.*, 2019 WL 3842331, at *4-5. The Employer repeatedly expressed overt animus against that protected conduct, including by: threatening to make the Wangs "pay" and to retaliate against them if the lawsuit was not withdrawn; warning Yang and Xu that

⁵ The Third Circuit's opinion in *Behring International, Inc. v. NLRB*, 675 F.2d 83 (1982), cited by the Employer (Br. 30), was vacated and remanded in light of *Transportation Management* and does not reflect the governing legal framework. Nor do the non-NLRA employment-law cases cited by the Employer (*e.g.*, Br. 47) involve an application of the Board's unique *Wright Line* framework as affirmed by the Supreme Court. Pursuant to *Wright Line*, it is not enough for an employer simply to identify "a legitimate, non-retaliatory reason" (Br. 47) for disciplining an employee if an unlawful motive also played a role. Rather, the employer's defense burden is to prove that it *would* have taken the same action in the absence of the employee's protected activities, and not merely that it *could* have done so. *Igramo Enter., Inc.*, 351 NLRB 1337, 1338 & n.10 (2007), *enforced*, 310 F. App'x 452 (2d Cir. 2009); *see Transp. Mgmt. Corp.*, 462 U.S. at 400-04.

they would not see “a penny” if they joined the lawsuit; and informing Tiande Wang that he was discharged in part for “instigating the company’s current and former employees to sue the company, which has had a great negative impact on the company.” (D&O.27.) Pursuant to *Wright Line*, the Board may infer an unlawful motive based solely on a showing of such targeted animus toward an employee’s known participation in statutorily protected activities. *Igramo Enter.*, 310 F. App’x at 454; *Consol. Bus Transit*, 350 NLRB at 1065-66.

The inference of an unlawful motive is further bolstered by the highly suspicious timing of Qian Wang’s suspension and discharge, which occurred just one week after Song unlawfully confronted Wang and her father about the lawsuit, and almost immediately after Song observed what she interpreted as a solicitation for additional employees to discuss their wages and after Wang’s father formally joined the lawsuit. (D&O.27-28.) *NLRB v. S.E. Nichols, Inc.*, 862 F.2d 952, 957 (2d Cir. 1988) (affirming finding of animus based on “abruptness” of discharge and proximity in time to protected activities). Indeed, the disciplinary notices for the suspension and discharge expressly referenced what Song believed to be Wang’s attempts to communicate with coworkers about their wages. The notices characterized such attempts, which would be another form of statutorily protected conduct, as “misleading our driver[s] and causing trouble for the stability of the company.” (D&O.26-27.) *See Cordúa Rests.*, 2019 WL 3842331, at *4-5 (finding

that coworkers' discussions of their wages in connection with a lawsuit is protected by the Act); *Lou's Transp., Inc.*, 361 NLRB 1446, 1447 (2014) (finding violation where employer disciplined employee based on belief the employee had engaged in activity that would be protected), *enforced*, 644 F. App'x 690 (6th Cir. 2016).

In addition, the Employer's unlawful motive is demonstrated by its shifting, false, and pretextual explanations for the discipline taken against Wang, and by its subsequent discharge of the three other employees involved in the wage-and-hour litigation. (D&O.27-28.) *NLRB v. Future Ambulette, Inc.*, 903 F.2d 140, 143-44 (2d Cir. 1990) (affirming finding of animus based on inconsistent and "vacillating" explanations for action); *Abbey's Transp.*, 837 F.2d at 580 (relying on fact that multiple union supporters were discharged in quick succession).

The Board further observed that the Employer wholly failed to carry its defense burden under *Wright Line* to affirmatively show that it would have suspended and then discharged Wang in the absence of her protected activities. (D&O.28-30.) The Board emphasized that the Employer failed to provide credible evidence supporting any of its vague claims of job-related misconduct, and that the Employer's stated justifications for suspending and discharging Wang were shifting, contradictory, and pretextual. (D&O.28-30.)

On review, the Employer again raises vague, uncorroborated claims of misconduct (Br. 46-49), but presents nothing to call the Board's reasonable

findings into question. As to Wang’s initial suspension on December 1, the Employer again presents shifting explanations—claiming at times that Wang was suspended for “stealing company property” and “deleting company documents” (Br. 30, 46-47) despite previously claiming such misconduct only occurred after she was suspended (D&O.29-30). Elsewhere, the Employer asserts without explanation that Wang was suspended due to “billing errors” and “potential billing fraud” requiring an investigation (Br. 6), despite the lack of any reference to such an offense in the disciplinary notice sent to Wang on December 2 (S.A.179).

Few of the Employer’s broad claims of misconduct are even nominally supported by citations to the record evidence. The only record evidence that the Employer does cite (Br. 13-14, 46) is discredited testimony from Song claiming unspecified “issues” involving “the company’s money” (A.148), and discredited testimony alleging purported errors or discrepancies in several checks written by Wang that were admittedly only discovered in preparation for the unfair-labor-practice hearing months *after* Wang’s discharge (A.103, A.143). *Future Ambulette*, 903 F.2d at 143 (rejecting proffered *Wright Line* defense based on misconduct only discovered after the fact, and as part of a deliberate effort “to build a case ... as pretext for the discharge”).⁶

⁶ Furthermore, the evidence does not corroborate the Employer’s claims or establish any wrongdoing by Qian Wang. The Employer failed to produce bank statements supporting its accusation that Wang and her father conspired to deposit

To the extent the Employer is also continuing to rely on its post hoc claim that Wang was suspended for assisting her father in attempting to bill for fictitious rides under the name of former customer Anne Tse (Br. 28, 48), such claim fails for the reasons outlined by the Board. (D&O.16-17, D&O.29.) In particular, there is no evidence the Employer was aware of Tse’s purported allegations until several months after the Wangs had been discharged; the Employer failed to explain why Tiande Wang was not suspended on December 1 for alleged misconduct that more directly implicated him; the provenance of an April 2021 statement signed by Tse is entirely unclear; and Tse herself offered conflicting testimony at the hearing, calling the reliability of the allegations into serious doubt. (D&O.16-17, D&O.29.)

Even if there were credible evidence supporting the Employer’s dubious claims of preexisting performance issues involving Qian Wang, the Employer also offers no explanation for why those concerns suddenly prompted her suspension on December 1. An employer’s burden pursuant to *Wright Line* is to prove “it would have done what it did, *when it did*, in the absence of [the employee’s protected activities].” *G&T Terminal*, 246 F.3d at 117 (emphasis in original). Here, the timing of Wang’s suspension—one week after Song threatened to make the Wangs “pay” for pursuing the wage-and-hour lawsuit, and mere hours after Song observed

paychecks twice, and an investigation by the Employer’s bank found no discrepancies. (S.A.224.) Meanwhile, Wang testified that certain checks claimed to be suspicious were in fact filled out at Song’s own direction. (S.A.124-31.)

what she interpreted as a protected solicitation for coworkers to discuss their wages—undermines any claim that the suspension would have occurred in the absence of Wang’s statutorily protected activities. *See DHSC, LLC v. NLRB*, 944 F.3d 934, 938 (D.C. Cir. 2019) (affirming violation where employer initiated retaliatory investigation of employee after union election); *G&T Terminal*, 246 F.3d at 117 (rejecting *Wright Line* defense based on preexisting concerns at facility); *Future Ambulette*, 903 F.2d at 143 (rejecting *Wright Line* defense where employer failed to take any action until learning of union organizing activity).

As to Wang’s discharge, the only additional explanation offered by the Employer is its assertion that Wang engaged in terminable misconduct after her suspension by “stealing” company documents and refusing to return them to the Employer. (Br. 30, 46-47.) As the Board found, however, the credible evidence shows that Wang returned all of the documents in her possession when requested to do so on December 2. (D&O.29-30; *see, e.g.*, S.A.47-48.) The Employer has never identified any documents it suspects Wang of withholding, or the basis for that suspicion. (D&O.30.) Nor has the Employer shown that a hypothetical records-maintenance infraction would have resulted in Wang’s immediate discharge absent the wage-and-hour lawsuit. (D&O.29-30.)

II. Substantial Evidence Supports the Board’s Findings That the Employer Violated the Act by Coercively Interrogating and Threatening Tiande Wang, and by Discharging Tiande Wang, Lu Yang, and Ya Xu in Response To Their Protected Activities

After unlawfully retaliating against Qian Wang as the perceived ringleader of the wage-and-hour lawsuit, the Employer initiated a pattern of unlawful conduct by retaliating against each additional coworker involved in the lawsuit. The record amply supports the Board’s findings that the Employer unlawfully discharged drivers Tiande Wang, Lu Yang, and Ya Xu for joining the lawsuit—having already interrogated and threatened Tiande Wang about the lawsuit alongside his daughter. Moreover, the record amply supports the Board’s finding that the Employer failed to carry its burden of proof in arguing, as a threshold matter, that the three drivers are independent contractors who should be denied the protections of the Act.

A. The Employer Failed To Establish That the Drivers Are Independent Contractors Excluded from the Coverage of the Act

Section 2(3) of the Act contains a broad definition of a statutory “employee” that nonetheless excludes “any individual having the status of independent contractor.” 29 U.S.C. § 152(3). The Supreme Court has held that the “obvious purpose” of the independent-contractor exception is for the Board to apply “general agency principles” in distinguishing between the two types of workers. *NLRB v. United Ins. Co.*, 390 U.S. 254, 256 (1968). The Supreme Court, this Court, and the Board have all endorsed the nonexhaustive list of common-law

factors enumerated in the Restatement (Second) of Agency. *Id.* at 258; *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 752, 752 & n.31 (1989); *Hilton Int’l Co. v. NLRB*, 690 F.2d 318, 320-21 (2d Cir. 1982); *Atl. Opera, Inc.*, 372 NLRB No. 95, 2023 WL 4051664, at *2-3, *17 (June 13, 2023).

The party alleging independent-contractor status—which would strip the workers of all of their rights under federal labor law—has the burden of proof in establishing that claim. *Igramo Enter.*, 310 F. App’x at 453-54 (citing *BKN, Inc.*, 333 NLRB 143, 144 (2001)). In reviewing the Board’s application of the common-law factors to a particular case and its determination of whether a party has met the burden of proof, courts “may not displace the Board’s choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.” *United Ins.*, 390 U.S. at 260; *Herald Co. v. NLRB*, 444 F.2d 430, 435 (2d Cir. 1971).

Substantial evidence supports the Board’s finding that the Employer failed to establish that drivers Tiande Wang, Lu Yang, and Ya Xu should be deemed independent contractors excluded from the coverage of the Act. (D&O.21-23.) While acknowledging that the drivers utilize their personal vehicles for work and that several other considerations weigh in favor of independent-contractor status (D&O.23), the Board concluded that the overwhelming majority of the common-law factors demonstrate a traditional employment relationship (D&O.22-23).

Significantly, for example, the record shows that the Employer exercises extensive control over the means and manner by which drivers perform their work, including dictating the identity of the customers to be picked up, the timing and locations of the pickups, and even the drivers' conduct and demeanor toward customers. (D&O.22.) The Employer's dispatchers monitor the drivers' status throughout the workday, and drivers are prohibited from taking leave without the Employer's permission—which the Employer has routinely withheld in the past when understaffed. (D&O.23.) Drivers submit detailed trip reports and are paid directly by the Employer as a portion of the revenue the Employer receives for each ride from insurance companies, medical transportation brokers, and senior centers. (D&O.8-9, D&O.23.) The Employer unilaterally sets the drivers' rates of compensation (D&O.23), and the Employer concedes that the drivers' only choice if dissatisfied is to "work elsewhere" (Br. 41). *See Herald Co.*, 444 F.2d at 435 (affirming finding of employee status where employer exercised supervision over performance of job duties and maintained control over workers' income potential).

Moreover, the drivers' work is at the heart of the Employer's existence as a transportation provider—as the Employer concedes (Br. 27)—rather than a part of an independent business operated by each driver. (D&O.22-23.) The drivers at issue drove exclusively for the Employer—displaying Kirin Transportation stickers on their personal vehicles and handing out marketing materials in the Employer's

name—and the Employer expressly prohibited at least one of the drivers, Xu, from working for other companies. (D&O.22.) The Employer also maintained workers' compensation insurance for its drivers, which would not be legally required for independent contractors, and the record does not show that the parties intended to create an independent-contractor relationship when the drivers were hired.

(D&O.22.) All of the drivers at issue had worked for the Employer for years, and they were all hired for indefinite terms. (D&O.9, D&O.22.) As the Employer concedes (Br. 37), at least one driver, Yang, was told that he was required to give one month's notice before leaving (D&O.22).

The Board's conclusion that the drivers at issue here are properly classified as statutory employees is consistent with numerous cases involving analogous facts. *See, e.g., Velox Exp., Inc.*, 368 NLRB No. 61, 2019 WL 4134112, at *2-5 (Aug. 29, 2019) (medical courier drivers who did not dictate their own schedules); *Stamford Taxi, Inc.*, 332 NLRB 1372, 1373 (2000) (taxicab drivers whose earnings were directly correlated with the employer's revenue); *Roadway Package Sys., Inc.*, 326 NLRB 842, 851-54 (1998) (delivery drivers whose work was essential to core function of the employer's business). Indeed, this Court has affirmed the Board's finding of employee status based on analogous facts. *Igramo Enter.*, 351 NLRB at 1344-45 (veterinary courier drivers whose pickup and drop-off locations were dictated by the employer), *enforced*, 310 F. App'x 452, 453-54 (2d Cir. 2009).

The Employer’s attempt on review to relitigate the independent-contractor status of the drivers is unavailing. Many of the Employer’s assertions are flatly contradicted by the credited evidence and the Board’s careful findings of fact. For example, the Employer erroneously claims, without citations to the record, that the drivers enjoyed scheduling flexibility and could choose which pickup assignments to accept or reject. (Br. 15, 26, 34, 42, 43.) The record is clear, however, that the drivers’ schedules and pickup assignments were dictated by the Employer, that drivers were not permitted to refuse assignments, and—as the Employer admits (Br. 43)—that drivers could not even take a day off without prior permission. (D&O.10-11, D&O.22-23.) The Employer insists that the drivers operated as franchisees and paid a “franchise fee” (Br. 16, 24-25, 34, 36-37), but each the drivers at issue credibly denied paying a regular weekly fee or having ever seen the purported franchise agreements produced at the unfair-labor-practice hearing. (D&O.9-10, D&O.19, D&O.22.)⁷

The Employer also repeatedly insists that the drivers were not “forbidden” from using their vehicles to perform work for other employers during their time off. (Br. 23, 26, 27, 28, 31, 32, 38, 41.) But the mere ability to moonlight or work

⁷ Notwithstanding the Employer’s arguments (Br. 40-41, 49-50), the Board reasonably afforded greater weight to the credited testimony of the drivers whose employment status is actually at issue over the testimony of two drivers called as employer witnesses who claimed—at times without documentary corroboration—to have been subject to different working conditions. (D&O.22 n.35.)

a second job would hardly be decisive proof of independent-contractor status. There is no evidence that the drivers operated transportation businesses or were capable of switching from day to day between the Employer and rival companies based on shifting incentives or entrepreneurial opportunities. *See Velox Exp.*, 2019 WL 4134112, at *4 (“[T]he drivers’ ability to use their vehicles to work for other employers does not so much reflect significant entrepreneurial opportunity as it does the part-time nature of their work for [the employer].”). To the contrary, the Employer dictated the drivers’ daily work schedules and prohibited them from taking days off without advance permission. Moreover, the Board reasonably credited Xu’s testimony that she *was* told not to drive for other companies. (D&O.22). The Employer’s claim that former driver Zhanwen Chi operated an “independent driving business” (Br. 23) lacks evidentiary support. Chi testified that he drove for the Employer “full-time,” and, after a translation error was clarified at the hearing, that he merely drove his friends around on weekends and did not operate an independent business. (A.24-25.)

While it is true that there is *some* evidence consistent with independent-contractor status—including, for example, the fact that the Employer did not treat the drivers as employees for tax purposes (Br. 25, 41), and the fact that Yang received a small commission for recruiting new customers (Br. 38)—the Board fully acknowledged those countervailing considerations as part of its analysis.

(D&O.23.) *NLRB v. Friendly Cab Co.*, 512 F.3d 1090, 1097 (9th Cir. 2008) (“[I]t is the rare case where the various factors will point with unanimity in one direction or the other.”); *see, e.g., Igramo Enter.*, 351 NLRB at 1344-45 (finding employee status notwithstanding employer’s failure to issue W-2 forms or to make necessary payroll deductions), *enforced*, 310 F. App’x 452 (2d Cir. 2009); *Stamford Taxi*, 332 NLRB at 1373, 1385, 1400 (same). In the end, the Employer failed to satisfy its evidentiary burden of proving that the drivers at issue should be deemed independent contractors outside of the Act’s protection. And the Employer has failed to demonstrate on review that “no rational trier of fact” could reach the conclusion that the Board did. *HealthBridge*, 902 F.3d at 43.

B. The Employer Coercively Interrogated and Threatened Tiande Wang in Response To His Daughter’s Wage-and-Hour Lawsuit

Having properly deemed Tiande Wang a statutory employee for the reasons just discussed, substantial evidence supports the Board’s finding that Song violated Section 8(a)(1) when she confronted Wang on November 25. (D&O.23-24.) As echoed in Song’s subsequent unlawful confrontation of Qian Wang—and contrary to the Employer’s vague contention that the confrontations in question never even occurred, *supra* pp. 17-19—Song demanded Tiande Wang provide information about the wage-and-hour lawsuit and threatened him with reprisals if he did not convince his daughter to withdraw it. (D&O.19.) The Employer does not contest that such statements would have an obvious tendency to coerce, and that, to the

extent they were made, they constituted an unlawful interrogation and unlawful threat in violation of the Act. (D&O.23-24.) *Deep Distribs.*, 365 NLRB at 963-64 (finding unlawful coercion where employer asked about employees' involvement in wage-and-hour lawsuit and threatened reprisals).

C. The Employer Discharged Tiande Wang on Pretextual Grounds in Retaliation for Joining the Lawsuit

Substantial evidence supports the Board's finding that the Employer further violated Section 8(a)(1) by indefinitely suspending and effectively discharging Tiande Wang approximately one week after threatening him and his daughter, and just one day after he filed to join the wage-and-hour lawsuit. (D&O.26-30.) As with Qian Wang, the record is clear that the Employer knew or suspected Tiande Wang's involvement with the wage-and-hour lawsuit as early as November 25 when Song confronted him and threatened him with reprisals. Tiande Wang formally filed to join the lawsuit on December 2, which was an overt exercise of his statutory right to engage in protected concerted activity. *Cordúa Rests.*, 2019 WL 3842331, at *4-5. The very next day the Employer issued a notice stating that Wang was indefinitely "suspend[ed]" for "deliberately instigating the company's current and former employees to sue the company," alongside other vague claims of purported misconduct. (D&O.14.) The Employer has never recalled Wang to work or clarified his employment status, and, as the Board found, Wang was therefore effectively discharged as of December 3. (D&O.14 n.21.)

The evidence amply supports the Board's finding that that Tiande Wang's discharge was motivated by his protected involvement in the wage-and-hour lawsuit. (D&O.27-28.) Such an inference is supported by the Employer's demonstrated animus toward Wang's known participation in the lawsuit, its explicit reference to that protected conduct in his disciplinary notice, the highly suspicious timing of the discharge, the pretextual and shifting explanations for the discharge, and the parallel discharges of Qian Wang, Yang, and Xu. Meanwhile, as with Qian Wang, the Board reasonably found that the Employer failed to carry its *Wright Line* defense burden by showing it would have discharged Tiande Wang in the absence of his involvement with the wage-and-hour lawsuit. (D&O.28-30.)

Aside from the uncorroborated and after-discovered allegations involving former customer Anne Tse, which the Board reasonably rejected as a *Wright Line* defense for the reasons previously discussed, *see supra* p. 25, the Employer's only other argument on review is its renewed claim that Tiande Wang engaged in misconduct by using another driver's identification code. (Br. 48.) As the Board observed, however, it is far from clear that such infraction was even considered misconduct—much less terminable misconduct. (D&O.28-29.) And, in any event, Song admitted she was aware as early as June 2020 that Wang sometimes used the wrong driver-identification code, yet she took no action at the time. (D&O.10, D&O.28-29.) An employer cannot satisfy its *Wright Line* burden by pointing to

past infractions it failed to act upon until learning of an employee’s statutorily protected activities. *Future Ambulette*, 903 F.2d at 143.

D. The Employer Discharged Lu Yang and Ya Xu Without Explanation in Retaliation for Joining the Lawsuit

Substantial evidence also supports the Board’s findings that the Employer violated Section 8(a)(1) by discharging drivers Lu Yang and Ya Xu in retaliation for their own involvement in the wage-and-hour litigation against the Employer. (D&O.26-30.) Both Yang and Xu raised shared concerns about unpaid wages to Song in December 2020—prompting Song to warn them that they would never see “a penny” if they joined the Wangs’ wage-and-hour lawsuit—and both publicly joined the wage-and-hour lawsuit in February 2021. (D&O.27.) One week later, the Employer discharged both drivers without explanation. (D&O.16.) Given the Employer’s overt hostility toward Yang’s and Xu’s statutorily protected decision to join the wage-and-hour lawsuit, the parallel discharges of Qian and Tiande Wang, the highly suspicious timing of Yang’s and Xu’s discharges, and the Employer’s pointed refusal to provide any explanation for its decision to abruptly discharge two longtime employees, the Board properly inferred a retaliatory motive. (D&O.27-28.) The Employer did not even attempt to mount a *Wright Line* defense below or to claim terminable misconduct by either Yang or Xu, and the Board accordingly found a straightforward violation of the Act. (D&O.28.)

On review, the Employer renews its implausible claim that Xu was never employed by the Employer and therefore could not have been unlawfully discharged. (Br. 12, 17, 38.) As the Board observed, the overwhelming weight of evidence makes clear that—for a period of *years*—Xu worked as a driver for the Employer, the Employer assigned Xu work as a driver, and the Employer paid Xu directly for her work and submitted tax forms on her behalf. (D&O.19.) The Board discredited contrary testimony from Song and former owner Frank Chen—who improbably insisted, for example, that the Employer issued paychecks in Xu’s name because Yang owed Xu money. (D&O.19.) The Board relied instead on the credited testimony of Xu herself, the mutually corroborative testimony of her coworkers, and virtually all of the documentary evidence in the record. (D&O.19; *see, e.g.*, A.82-83, S.A.13-14, S.A.79, S.A.164-65, S.A.214.) The suggestion that Xu lacked a valid commercial license (Br. 12) was decisively disproven at the hearing, with Xu’s license entered into evidence. (D&O.11; S.A.219.)⁸

The Employer also asserts that Yang and Xu “voluntarily” left their employment and therefore were never unlawfully discharged. (Br. 7, 29, 30, 31.)

⁸ Indeed, counsel for the Employer initially conceded that Xu was employed as a driver and listed her on personnel rolls provided prior to the unfair-labor-practice hearing. (D&O.11; S.A.216-17.) The Employer continues to contradict itself even within its own brief on review. (*E.g.*, Br. 9 (“YA XU was a driver of Respondent Kirin.”); Br. 30 (admitting that Xu “performed services for the company,” while asserting that she “voluntarily left Kirin”).)

The Employer provides no record citations or argumentation in support of such assertion, and thus, once again, has failed to adequately brief the issue for this Court's review. *Apple*, 791 F.3d at 338 n.26. The evidentiary basis for the Employer's assertion is unclear. In any event, the Board reasonably credited the straightforward testimony of Yang and Xu that they did not voluntarily end their employment, but were informed that they were "fired" almost immediately after the Employer learned they were joining the wage-and-hour lawsuit. (D&O.16.)

CONCLUSION

For the foregoing reasons, the Board requests that the Court enter a judgment enforcing the Board's Order in full.

Respectfully submitted,

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National Labor Relations Board
March 2026

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

NATIONAL LABOR RELATIONS BOARD)	
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Petitioner)	No. 25-391
)	
v.)	Board Case Nos.
)	29-CA-270485, <i>et al.</i>
KIRIN TRANSPORTATION, INC. d/b/a)	
KIRIN TRANSPORTATION)	
)	
Respondent)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 8,708 words of proportionally-spaced, 14-point type, and that the word-processing system used was Microsoft Word 365.

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Dated at Washington, D.C.,
this 2nd day of March, 2026

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CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2026, I electronically filed the foregoing with the Clerk for the Court of the U.S. Court of Appeals for the Second Circuit by using the appellate ACMS system. I further certify that this document was served on all parties or their counsel of record through the appellate ACMS system.

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