Nos. 16-2721 & 16-2944

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

COOPER TIRE & RUBBER COMPANY,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Repondent/Cross-Petitioner.

ON PETITION FOR REVIEW FROM THE
NATIONAL LABOR RELATIONS BOARD
NLRB Case No. 08-CA-087155

BRIEF OF INTERVENOR UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION

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SUMMARY OF THE CASE

Cooper Tire & Rubber Company discharged Anthony Runion because of his conduct on the picket line during a lockout. Discharging an employee for participation in a picket line violates the National Labor Relations Act unless the worker engaged in activity that, under the circumstances as they existed, may reasonably tend to coerce or intimidate other employees in the exercise of their rights. Mr. Runion made regrettable, racially-tinged remarks after the replacement workers entering the facility had already passed the picket line in enclosed vans. There is no evidence that the replacement workers heard the remarks, which were devoid of any threats. There were no incidents of violence on the picket line. The Board properly held that Cooper's discharge of Mr. Runion was unlawful because his remarks did not take his picket-line activity outside of the protection of the Act.

The Board did not abuse its discretion in declining to defer to a private arbitrator's opinion stating that Cooper was justified in discharging Mr. Runion because this opinion was repugnant to the Act. The arbitrator's opinion applied enhanced scrutiny to Mr. Runion's conduct because it occurred on a picket line, despite the fact that the Act requires that workers be given more leeway, not less, for picket-line conduct. Because this matter is a straightforward application of existing precedent, the Union does not believe that oral argument is necessary.

CORPORATE DISCLOSURE STATEMENT

In compliance with Fed. R. App. P. 26.1 and Local Rule 26.1A, Intervenor United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union states that it is not a parent, subsidiary or other affiliate of a publicly owned corporation, that it issues no stock, and that no publicly owned corporation owns 10 percent or more of its stock.

Respectfully submitted,

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Apposite cases: *Consolidated Communications, Inc. v. NLRB*, 2016 WL 4750914, No. 14-1135 (D.C. Cir. Sept. 13, 2016); *Airo Die Casting, Inc.*, 347 NLRB 810 (2006); *Catalytic, Inc.*, 275 NLRB 97 (1985); *Clear Pine Mouldings*, 268 NLRB 1044 (1984).

Apposite statutes: 29 U.S.C. § 157; 29 U.S.C. § 158.

B. Did the Board act reasonably in holding Cooper violated the Act despite the lack of anti-union animus on Cooper's part where the applicable standard does not require proof of anti-union motivation and where Cooper terminated Mr. Runion because of his picket-line activity?

Apposite cases: *Univ. Truss, Inc.*, 348 NLRB 733 (2006); *Siemens Energy & Automation, Inc.*, 328 NLRB 1175 (1999); *Clear Pine Mouldings*, 268 NLRB 1044 (1984).

Apposite statute: 29 U.S.C. § 158.

C. Did the Board abuse its discretion in declining to defer to the Arbitrator's Opinion because it was repugnant to the Act where the Arbitrator disregarded the *Clear Pine Mouldings* standard applicable to picket-line misconduct cases and stated that Mr. Runion's conduct was "more serious" because it occurred on a picket line?

Apposite cases: *Doerfer Eng'g v. NLRB*, 79 F.3d 101 (8th Cir. 1996); *Olin Corp.*, 268 NLRB 573 (1983); *Am. Cyanamid Co.*, 239 NLRB 440 (1978); *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955).

D. Did the Board act reasonably in interpreting Section 10(c) of the Act to permit reinstatement and back pay for Mr. Runion where the statute permits such remedies if an employee was terminated for an unlawful reason and where Mr. Runion was unlawfully terminated because of his protected picket-line activities?

Apposite cases: *Fibreboard Paper Product Corp. v. NLRB*, 379 U.S. 203 (1964); *NLRB v. Potter Elec. Signal Co.*, 600 F.2d 120, 123-124 (8th Cir. 1979); *Anheuser-Busch, Inc.*, 351 NLRB 644 (2007).

Apposite statute: 29 U.S.C. § 160.

II. STATEMENT OF THE CASE

A. The Company maintained a harassment policy and suspended violators.

The events at issue in this matter occurred in Findlay, Ohio, where Cooper Tire & Rubber Company (the "Company") operates a tire manufacturing plant. (SF #7-8, JA0003).[1] The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union and its Local 207L (collectively, the "Union") and their predecessors have represented production and maintenance employees there for at least seventy years. (SF #15-18, JA0004). The Union-represented workers at the facility include individuals who are African-American and individuals who are white.

The Company maintained a Harassment Policy ("Policy"). (JA0331). Jodi Rosendale ("Ms. Rosendale"), Cooper's Human Resource Manager at Findlay, testified that the Policy prohibited threats, in addition to harassment on the basis of race, color, religion, age or national origin. (JA0199). The Policy does not require that violators be discharged. (JA0207; JA0331).

In practice, Cooper did not terminate employees who violated the Policy. The record contains copies of some disciplinary actions taken for threats, fights,

[1] To facilitate references to the record, the numbered paragraphs in the Joint Motion and Stipulation of Facts to Administrative Law Judge Randazzo are identified with the notation "SF #." Pages from the Joint Appendix are referred to using the notation "JA."

discrimination or racial slurs. (J.S. #106-107, JA0017; JA0336-342). None of those disciplinary actions included Cooper's termination of any employee. (JA0338-42). These employees had made verbal threats to other employees at the workplace, sometimes while holding knives. (JA0338-42). Two of these disciplinary reports specifically referred to the Policy. (JA0339-40).

Ms. Rosendale also testified that an African-American employee named Cliff Baxter ("Mr. Baxter") called a white manager "a dumb white hillbilly asshole." (JA0205). She recalled that these comments occurred during Mr. Baxter's work hours and inside the facility. (JA0206). Mr. Baxter was suspended. (JA0205; JA0347). This occurred in August 2011. (J.S. #110, JA0018; JA 0347-0349).

B. The Company locked out Union-represented employees and used replacement workers to operate its facility.

The contract between the Union and the Company expired on October 31, 2011, without an agreement on a new contract. (JA0005-6, SF #20, #23). On November 28, 2011, the Company locked out all Union-represented workers, approximately 1044 people, prohibiting them from working until the parties reached an agreement.[2] (JA0006-7, SF #26, #31).

[2] The Union filed unfair labor practice charges with Region 8 of the National Labor Relations Board alleging that the Company had violated the National Labor Relations Act in connection with the lockout and by other conduct occurring around the same time. (SF #29, JA0006; JA0118-126).

During the lockout, the Company operated the facility with managers, employees who ordinarily worked at the Company's facility in Mississippi, and replacement workers provided by Strom Engineering ("Strom"), a contractor. (SF #32, JA0007). Some of the employees from Mississippi and some of Strom's workers were African-American. (SF #38, JA0007).

C. The Union peacefully picketed the facility.

The Union set up six picket stations around the facility, and Union members staffed these stations around the clock for the duration of the lockout to picket peacefully in protest of the Company's decisions to lock out the union and to utilize replacement workers. (SF #33, #34, #35, JA0007). The Company's guards monitored the activity of picketers and recorded much of the activity on video. (SF #35, JA0007). Individuals entering or leaving the facility had to cross the picket lines. (SF #37, JA0007). Vans transported many of the replacement workers across the picket lines. (*Id.*).

So that the picketing could be kept peaceful, the Company and the Union communicated throughout the lockout about conduct by either locked out workers or the replacement workers that might increase tensions. (SF #36, JA0007). These efforts were entirely successful. There is no evidence of any violence on the picket lines, and Cooper did not discipline any Union members for violence on the picket line. (SF #91, #94, JA0014). No court ever entered an order or injunction

regulating the conduct of picketing or limiting the number of picketers, as courts regularly do in the event of picket line violence. (SF #45, JA0008). The Union's internal guidelines for picket line conduct advised picketers to refrain from violence, threatening conduct, and racist, sexist, or sexually explicit language. (JA0336).

While there were no incidents of violence, replacement workers, the Company's guards, and Union members regularly directed harsh words, foul language, and unfriendly gestures at each other, as is common on picket lines. (JA0218-219). Foul language was used every day. (JA0219). Replacement workers routinely took pains so that picketers could see as they mouthed "f*** you" from behind the windows of their vans; they displayed their middle fingers, and they pressed dollar bills up against the windows as they rode by. (JA0218).

D. Anthony Runion attended the Union's January 7, 2012, hog roast, subsequently protested at the picket line, and made unfortunate remarks.

With the lockout having dragged through the holidays, the Union held a hog roast for workers and their families on Saturday, January 7, 2012. (SF #41, JA0008). The event was held at the Union hall, approximately fifty yards from the facility. (SF #43, JA0008). Anthony Runion ("Mr. Runion"), a Union member who worked as a machine attendant and finisher at the Cooper facility, where he began work in November 2006, attended the hog roast. (SF #42, JA0008;

JA0216). Accompanying Mr. Runion were his girlfriend and her young son, Collin. (SF #42, JA0008).

Locked-out workers and their families walking over from the hog roast swelled the picket lines that evening. (SF #44, JA0008). Despite the greater number of individuals involved, the parties agree that there was no violence whatsoever on the picket line on January 7. (SF #46, JA0008). A Company security guard employed specifically for the lockout filmed some of the picket line activity.[3] (SF #50, #51, JA0009; Co. Ex. 6).

Shortly after 6 p.m., approximately two dozen men, women, and children were standing at the corner of Western Avenue and Lima Avenue. (Co. Ex. 6). They jeered when white vans of replacement employees drove into the plant, and they appealed to other passing vehicles, many of which honked to signify their support.[4] (Co. Ex. 6). One individual waved a large American flag, and many held signs. (*Id.*). The white vans carrying replacement employees drove down Western Avenue toward the main gate of the facility, which is situated past the corner on Western. (Co. Ex. 6; JA0133). The windows on the vans were closed. (JA0233).

[3] There are two videos on Company Exhibit 6, a long version lasting 52 minutes and twelve seconds and a shorter version lasting 22 minutes and three seconds, consisting of excerpts from the longer video. References to times in the video pertain to the shorter version.

[4] No stipulations or findings addressed the racial composition of this crowd, but it appears on the video to be entirely composed of white individuals. (Co. Ex. 6).

At the 5:10 mark of the video, Mr. Runion and Collin are visible for the first time. (SF #52, JA0009; Co. Ex. 6). Holding the child's hand, Mr. Runion crossed from the east side of Western Avenue toward the west side. (*Id.*). At the 6:03 mark, two white vans carrying replacement workers crossed Lima Avenue and were briefly impeded from continuing along Western Avenue by individuals crossing on foot. (SF #64, #65, JA0011; Co. Ex. 6). While the vans passed, the crowd yelled and waved signs, and Mr. Runion and another worker gestured with their middle fingers. (SF #66, #67, JA 0011; Co. Ex. 6). At the 6:56 mark, another van crossed Lima Avenue and proceeded down Western Avenue. (SF #68, JA0011; Co. Ex. 6). It moved substantially faster than the previous two vans because it did not have to slow for pedestrian traffic. (Co. Ex. 6). As the van passed, Mr. Runion and at least one other worker displayed middle fingers again. (SF #69, JA0011; Co. Ex. 6). The van passed out of the frame by the 6:59 mark on the video.

Starting at about the 7:04 mark on the video and ending at the 7:06 mark, Mr. Runion said "Hey, did you bring enough KFC for everybody?" (SF #71, JA0011; Co. Ex. 6). No vans or replacement workers were visible for any portion of this statement. (Co. Ex. 6). Between approximately the 7:25 and 7:29 marks of the video, Administrative Law Judge Randazzo ("ALJ Randazzo" or the "ALJ") found that Mr. Runion made a further remark "Hey, anybody smell that? I smell

fried chicken and watermelon." (SF #73, JA0011; Co. Ex. 6; JA0407-408). Mr. Runion's hands were in his pockets during both of these statements, while he was standing or walking along the side of the road. (Co. Ex. 6). No vans or replacement workers were in view; the next van drove past at approximately 7:49 on the video. (Co. Ex. 6). The audience of the remarks, then, consisted of Mr. Runion's cohorts on the picket line rather than those crossing it. There is no evidence that either of the comments were actually heard by any replacement workers.[5]

A substantial number of additional vehicles carrying replacement workers drove past the location over the next few minutes, and an African-American replacement worker felt sufficiently confident in his safety at the picket line to

[5] Cooper strains to interpret the section of the video before Mr. Runion appeared, at 3:31 through 4:00, to indicate that the replacement workers could hear Mr. Runion's statements, but the video simply does not show this. (Cooper Br. at 34; Co. Ex. 6). At most, the video shows that some picketers were yelling in the direction of the facility, perhaps in response to inaudible statements by individuals in the direction of the facility, which included Cooper's guards (one of whom was filming the picketers). There is no evidence that replacement workers heard or responded to those statements. And even if there had been an interchange with replacement workers some several minutes before the comments (there is a cut in the video at 4:30), that would not be evidence that replacement workers heard Mr. Runion. Cooper's contention that replacement workers were moving between vans and the facility seemingly concedes that even if some replacement workers had engaged in a shouted exchange with picketers at 3:31, those replacement workers would not have been in any position to hear Mr. Runion because they would have loaded into vans or entered the facility in the intervening minutes. (Cooper Br. at 34). The record is therefore devoid of evidence that any replacement workers heard the statements.

arrive by bicycle. (SF #75, JA0012; Co. Ex. 6; JA0233). He passed within fifteen feet of Mr. Runion and the other picketers. (JA0233). Mr. Runion did not make any racially-tinged statements.[6]

E. The Company reviewed the video of the Remarks and took no action.

Sometime in the following week, January 9-13, 2012, Ms. Rosendale viewed the security guard's footage of the January 7 picketing after having been notified of the incident by the guards' supervisor. (JA0179). She identified Mr. Runion as having made the statements at that time on the basis of the video. (JA0179). Although the Company and the Union kept in contact regarding picket-line activities that had the potential to increase tensions, there is no record evidence that the Company conveyed any concerns to the Union regarding the use of racially-tinged language on the picket line by Mr. Runion or by anybody else. (SF #37, JA0007).

F. The Union and the Company reached an agreement on a new contract and the lockout was ended.

The parties reached an agreement on a new contract that was ratified on February 27, 2012. (SF #27, JA0006). The lockout ended, and the Company

[6] The video also captured other individuals, whose identities are not known, making racial comments. Between approximately 7:17 and 7:21, an individual yelled "Go back to Africa, you bunch of f***ing losers." (SF #72, JA0011; Co. Ex. 6). During the time Mr. Runion was not present, some person shouted "f***ing monkey scabs" at approximately 16:27 and "f***ing n***** scabs" at approximately 16:27 and 17:09. (SF #74, JA0012; Co. Ex. 6).

began returning locked-out employees to work starting on about March 3, 2012.[7] (SF #28, JA0006). The replacement workers who had operated the facility during the lockout were no longer employed at the facility. (JA0209).

G. The Company terminated Mr. Runion for his statements on the picket line and the Union filed an unfair labor practice charge.

Rather than permit Mr. Runion to return to work with his colleagues, the Company informed him on March 1, 2012, that he was being terminated for "gross misconduct." (SF #92, #93, JA0014; JA0325). By this, the Company meant the January 7, 2012, statements and nothing else. (SF #92, JA0014).

The Union filed a charge with Region 8 of the National Labor Relations Board ("NLRB") alleging that the Company's discharge of Mr. Runion for his conduct on the picket line violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act ("Act") on August 13, 2012. (SF #114, JA0018; JA0022).

H. The Company and the Union arbitrated the question of whether Mr. Runion's discharge violated the collective bargaining agreement.

The Union filed a grievance alleging that the Company had violated the new collective bargaining agreement by discharging Mr. Runion. (SF #95, JA0015; JA0328). This grievance was filed on March 12, 2012, and it was processed

[7] On March 30, 2012, NLRB Region 8 issued an unfair labor practice complaint alleging the Company violated the Act during bargaining and immediately prior to the lockout. (SF #30, JA0006-7; JA0127). Cooper subsequently settled those allegations. (SF #30, JA0007).

through the contract's grievance procedure. (SF #95, #96, JA0015). On July 10, 2012, Arbitrator Roger C. Williams (the "Arbitrator") heard the grievance in a hearing conducted at the Findlay Conference Center. (SF #97, JA0015). The Company argued to the arbitrator that it was justified in terminating Mr. Runion solely on the basis of the comments made on the picket line on January 7, 2012. (SF #92, JA0014; JA0163-164; JA0184; JA0196-197).

While the arbitration case was pending, the Regional Director deferred consideration of the Union's unfair labor practice charge. (SF #115, JA0019).

I. The Arbitrator upheld the discharge.

The Arbitrator rendered a decision ("Opinion" or "Award") on May 14, 2014, in which he upheld the Company's decision to discharge Mr. Runion. (SF #111, JA0018). In this decision, he concluded that Mr. Runion's remarks "were even more serious" because they occurred "in the context of the picket line." (JA0361). Notably, the Award did not state that any violence occurred on the picket line before, during, or after the January 7, 2012, incident; nor did the Arbitrator find that Mr. Runion threatened anyone. (JA0360-363).

J. ALJ Randazzo holds that Mr. Runion's conduct was protected and that the Arbitrator's decision was repugnant to the Act.

The Regional Director issued a complaint on January 20, 2015, alleging that the Company violated Sections 8(a)(1) and 8(a)(3) of the Act by discharging Mr.

Runion for his conduct on the picket line. (JA0025-29). The issue was submitted to ALJ Randazzo on stipulated facts. (JA0001-21; JA0376).

Applying well-established law, the ALJ concluded that Cooper violated the Act when it discharged Mr. Runion and that the Board should not defer to the Arbitrator's Award because it was "clearly repugnant" to the Act. (JA0419; JA0423). The ALJ's decision ("ALJ Decision") explained that the Act protected the right to picket and that the Board applies different standards to employee conduct in the workplace than to conduct on the picket line, where "a certain degree of confrontation is expected." (JA0413). He applied the Board's standard for picket line misconduct adopted in *Clear Pine Mouldings*, 268 NLRB 1044(1984), *enf'd* 756 F.2d 148 (9th Cir. 1985), *cert. denied* 474 U.S. 1105 (1986), and elaborated in *Seimens Energy & Automation, Inc.*, 328 NLRB 1175 (1999). (JA0413; JA0418).

The ALJ found that the record evidence showed that Mr. Runion's "conduct and statement did not tend to coerce or intimidate employees in the exercise of their rights under the Act, nor did they raise a reasonable likelihood of an imminent physical confrontation." (JA0414). ALJ Randazzo concluded that there was "no evidence to establish that [Mr. Runion's remarks] increased the potential for violence on a picket line where there was undisputedly no evidence of any picket line violence on that day, nor on any other day during the lockout." (JA0415).

The ALJ Decision situated Mr. Runion's conduct in the context of a long line of Board decisions in which more egregious remarks actually perceived by replacement employees were held not to remove speakers from the protection of the Act.[8] (JA0415-0416).

The ALJ Decision also carefully evaluated and rejected Cooper's argument that the Remarks were not protected by the Act. (JA0417-418). This argument, the ALJ found, "lacks merit" because it incorrectly inferred that Mr. Runion's Remarks should be evaluated in isolation, separate and distinct from his picketing activity, using the standards applicable to the normal workplace environment. He held that Board precedent, particularly *Airo Die Casting, Inc.*, 347 NLRB 810 (2006), and *Triple Play Sports Bar & Grille*, 361 NLRB No. 31 (2014), *enf'd* 629 Fed. Appx. 33 (2d Cir. 2015), constrained him from applying the factors in *Atlantic Steel*, 245 NLRB 814 (1979), to activity which occurred on a picket line rather than in the workplace. (JA0418). ALJ Randazzo accordingly concluded that Cooper violated the Act when it discharged Mr. Runion. (JA0419).

Turning next to the question of whether the Board should defer to the Arbitrator's Award, the ALJ found that deferral was inappropriate because the Award was "clearly repugnant" to the Act. (JA0420).

[8] The ALJ similarly relied upon this established precedent to reject Cooper's argument that it is contrary to public policy for the Board to protect racist statements on a picket line. (JA0422-423).

> [C]ontrary to the Board law establishing that conduct on the picket line is protected unless it is threatening to other employees' Section 7 rights, the Arbitrator held that Runion's statements ". . . would have been serious misconduct in any context, but in the context of the picket line, where there was a genuine possibility of violence, his comments were even more serious." Such reasoning provides less protection for picket line conduct than the Act affords, and such determination by the Arbitrator is inconsistent with the purposes and policies of the Act, and with the well-established Board precedent.

(*Id.* (internal citations omitted)). He concluded that the Board should decline to defer to an award that is so "palpably wrong." (JA0420-421).

Finally, the ALJ Decision addressed Cooper's contention that reinstatement and back pay for Mr. Runion would violate Section 10(c) of the Act and concluded that it would not. Section 10(c) provides that "[n]o order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." The ALJ explained that the Arbitrator's conclusion that Mr. Runion was discharged for "just cause in accordance with the [collective-bargaining] agreement" was distinct from the meaning of "for cause" in Section 10(c). (JA0421-422). Pointing to *Anheuser-Busch*, 351 NLRB 644 (2007), he stated that the Board construes "for cause" in that provision to mean discipline "that is not imposed for a reason that is prohibited by the Act." (JA0422). In this case, the ALJ reasoned, Mr. Runion was discharged for a

prohibited reason, *viz.*, his protected picketing activity, which was not rendered unprotected by the fact that this activity included the statements. (JA0422).

K. The Board upholds the ALJ's Decision.

Although Cooper and *amici* raised largely the same points to the Board that are urged in the appeal to this Court, a three-member panel of the Board unanimously upheld the ALJ Decision on May 17, 2016 ("Board Decision"). (JA0457). Specifically addressing the propriety of the ALJ's conclusion that deferral to the Award was not appropriate, the Board held that the Award was "clearly repugnant" to the Act, including for the reason that the Arbitrator's statement that Mr. Runion's remarks were "even more serious" because they occurred on a picket line is contrary to the Board's established standard for evaluating picket-line misconduct under *Clear Pine Mouldings*, *supra*. (*Id.*). The Board further noted that the replacement employees did not actually hear the comments:

> [C]ontrary to [Cooper's] assertions, *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), is distinguishable from the instance case on its facts. There, without reaching the legality of the alleged discriminatees' conduct, the Board deferred to the arbitral finding that the employer lawfully refused to reinstate four striking employees based on allegations that they persistently shouted profane insults, including racist slurs, at individuals over several days of picketing. *Id*. at 1082 & fn. 6. Here, in contrast, Runion made his two racially offensive statements about replacement workers after a closed van carrying those workers had passed.

(JA0457). The Board ordered that Cooper reinstate Mr. Runion to his former position or one substantially equivalent and make Mr. Runion whole for any loss of earnings and other benefits, among other remedial measures. ("Board Order"). (JA0469).

Cooper timely petitioned for review of the Board Decision by this Court, and the Board sought enforcement of its Decision. The Union has been granted leave to intervene following a timely motion.

III. SUMMARY OF ARGUMENT

This Court defers to the Board's interpretation of the Act when it is reasonable and to its factfinding when it is supported by substantial evidence. There is no reason for the Court to refuse to enforce the Board's Order. The Board properly determined, on the basis of well-established law, that Cooper violated the Act by discharging Mr. Runion for statements on a picket line that did not contain any direct or indirect threats and which did not raise the reasonable likelihood of an imminent physical confrontation. This is especially true because there is no evidence that the replacement workers actually heard the comments Mr. Runion made. Because Cooper terminated Mr. Runion for his picket-line activity that the Board determined had not lost the protection of the Act, the Board did not have to conclude that Cooper's action was motivated by anti-union animus, and Section 10(c) does not prohibit the Board from ordering reinstatement and back pay.

Further, the Board did not abuse its discretion in declining to defer to the Arbitrator's Opinion in this case. The Arbitrator's Opinion cannot be reconciled with the Board's legal standards for evaluating picket-line misconduct and was consequently repugnant to the Act. The Arbitrator inappropriately stated that Mr. Runion's comments "were more serious," not more entitled to protection, because they were made on a picket line. The Arbitrator also seriously erred in asking only whether the statements had some tendency to increase the potential for violence, ignoring the applicable standard, which asks whether the comments raised the reasonable likelihood of an imminent physical confrontation.

Because the Board's factfinding was supported by substantial evidence, its view of the law reasonable, and its decision not to defer to the arbitrator within its discretion, this Court should enforce the Board's Order.

IV. ARGUMENT

A. The Court defers to the Board's construction of the Act, as informed by its policy judgments, and to the facts as found by the Board.

As the agency charged with administering the Act, the Board is entitled to significant deference in interpreting the law. This Court, following the Supreme Court's teaching, "defer[s] to the Board's interpretation of the Act, so long as it is rational and consistent with that law." *NLRB v. Am. Firestop Solutions, Inc.*, 673 F.3d 766, 768 (8th Cir. 2012), *citing NLRB v. Ky. River Comm'y Care, Inc.*, 532

U.S. 706, 725 (2001) (Kennedy, J., concurring in part); *Pony Express Courier, Corp. v. NLRB*, 981 F.2d 358, 363 (8th Cir. 1992), *cert. denied*, 508 U.S. 950 (1993). The Supreme Court instructs courts to "recognize the Board's special function of applying the general provisions of the Act to the complexities of industrial life" and of balancing conflicting legitimate interests using its "special understanding of the actualities of industrial relations." *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963) (internal quotations omitted); *Randall, Div. of Textron, Inc. v. NLRB*, 687 F.2d 1240, 1244 (8th Cir. 1982), *quoting Erie Resistor*, 373 U.S. at 236. Therefore, "if the Board's construction of the statute is reasonably defensible it should not be rejected merely because this Court might prefer another view of the statute." *Kirkwood Fabricators, Inc. v. NLRB*, 862 F.2d 1303, 1306 (8th Cir. 1988).

This Court affords factual findings of the Board "great deference" when the Board has affirmed the findings of an ALJ, as the Board did here. *ConAgra Foods, Inc. v. NLRB*, 813 F.3d 1079, 1084 (2016); *Town & Country Elec., Inc. v. NLRB*, 106 F.3d 816, 819 (8th Cir. 1997). The Court asks whether the Board's factual findings are supported by "substantial evidence on the record as a whole, even if we might have reached a different decision had the matter been before us de novo." *ConAgra Foods*, 813 F.3d at 1084. "Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

Consol. Edison Co. v. NLRB, 305 U.S. 197, 229 (1938); *ConAgra Foods*, 813 F.3d at 1084.

Reviewing the Board's Decision in light of these standards, the Court must conclude that the Board's interpretation of the Act is rational and that there is substantial evidence supporting its finding that the remarks did not reasonably tend to coerce or intimidate employees. This is particularly so because there was no evidence that any replacement employees even heard the comments.

B. Cooper's discharge of Mr. Runion violated the Act.

Standard of Review: The Court asks whether the Board's interpretation of the Act is "rational and consistent with that law." *Am. Firestop Solutions*, 673 F.3d at 768. This Court will not reject the Board's construction of the Act if it is "reasonably defensible." *Kirkwood Fabricators*, 862 F.2d at 1306. The Court reviews whether the Board's factual findings are supported by substantial evidence. *ConAgra Foods*, 813 F.3d at 1084.

i. The Board's conclusion that Mr. Runion was discharged for engaging in protected activity is squarely in line with longstanding precedent.

The Board properly applied the long-established rule of *Clear Pine Mouldings*, 268 NLRB 1044 (1984), *enf'd* 765 F.2d 148 (9th Cir. 1985), *cert. denied*, 474 U.S. 1105 (1986), in holding that Cooper's discharge of Mr. Runion for his picket-line conduct on January 7, 2012, was unlawful. This rule, adopted

unanimously from the Third Circuit's decision in *NLRB v. W.C. McQuaide, Inc.*, 552 F.2d 519 (3d Cir. 1977), provides for an objective test for determining whether picket-line conduct justifies an employer's refusal to reinstate a worker after a strike or lockout: "whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." 268 NLRB at 1046, *quoting W.C. McQuaide*, 552 F.2d at 528.

The *Clear Pine Mouldings* standard is thus objective but sensitive to context. The Board looks to the overall "circumstances existing" at the time to determine whether the conduct "may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." *Clear Pine Mouldings*, 268 NLRB at 1046; *see also Briar Crest Nursing Home*, 333 NLRB 935, 937-938 (2001) (emphasizing the importance of context in this analysis). This formulation substantially refined the previous standard, which held that verbal threats alone, unaccompanied by physical acts or gestures, could never constitute serious misconduct warranting refusal to reinstate picketers. *Clear Pine Mouldings*, 268 NLRB at 1045-1046. The Board in *Clear Pine Mouldings* overruled this rule, it said, because "actions such as the making of abusive threats against non-striking employees equate to 'restraint and coercion' prohibited elsewhere in the Act." *Id.* at 1046. It adopted the "objective test" articulated by the Third Circuit in

McQuaide. *Id.* There, the Third Circuit considered other courts' various approaches to the issue, including inquiries into either the subjective intent of the picketing employee who engaged in the conduct or the subjective perception of the individual toward whom the conduct was directed, but it concluded that the better way was to instead objectively inquire whether the picketer's conduct "may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." 552 F.2d at 527-528; *see also Mohawk Liqueur Co.*, 300 NLRB 1075, 1075 (1990).[9]

Applying *Clear Pine Mouldings*, the Board has engaged in case-by-case evaluations of whether individual incidents of picket-line conduct reasonably tend to coerce or intimidate employees in exercising their protected rights. In *Clear Pine Mouldings*, for example, the Board upheld the discharge of a picketer who told one non-striking employee that she was taking her life in her hands by

[9] The Board elaborated upon the analysis for discipline for picketer misconduct in *Siemens Energy & Automation, Inc.*, 328 NLRB 1175 (1999). There, the Board stated that the *Clear Pine Mouldings* inquiry is the first step. 328 NLRB at 1175. If the worker did engage in misconduct which may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act, and the Board's General Counsel establishes that this misconduct was the reason for the failure to reinstate the worker, then the employer must prove that it had an honest belief that the striker in question engaged in the strike misconduct. *Id.* Once the employer has carried this burden, the General Counsel must prove that the worker did not in fact engage in the misconduct alleged. *Id.* The instant case does not require the Court to pursue the full *Siemens* analysis because the ALJ and the Board concluded that Mr. Runion's comments did not reasonably tend to coerce or intimidate employees in the exercise of their protected rights. (JA0418 & n. 17). The inquiry thus stopped at the first step.

crossing the picket line and that she would live to regret it and who threatened to burn down the house of another non-striking employee. 268 NLRB at 1048; *see also Univ'l Truss, Inc.*, 348 NLRB 733 (2006) (upholding discharges of picketers who threatened violence, vandalized property, or threw rocks).

The Board has often held that foul and offensive language unaccompanied by threats or threatening conduct did not justify failure to reinstate a picketer because such statements do not reasonably tend to coerce or intimidate employees who exercise their Section 7 rights by crossing a picket line. *See Consol. Comm'ns*, 360 NLRB No. 140 (2014), *enf'd in relevant part*, 2016 WL 4750914, No. 14-1135 (D.C. Cir. Sept. 13, 2016) (upholding reinstatement of picketer who grabbed his crotch "as a hostile gesture toward" a line-crossing employee); *Calliope Designs, Inc.*, 297 NLRB 510, 521 (1989) (obscene sexual comments did not lose protection); *Catalytic, Inc.*, 275 NLRB 97, 97-98 (1985) ("You God d***ed b****" did not lose protection). In *Catalytic*, continuing its contextual, case-by-case approach, the Board recognized that "in certain circumstances, a profane epithet unaccompanied by an overt or indirect threat might also be coercive or intimidating if it raises the reasonable likelihood of an imminent physical confrontation." 275 NLRB at 98.

The *Clear Pine Mouldings* analysis is quite simple in this case. Remarks that are unheard by line-crossing employees could have no coercive effect, so

examining the content of the statements is not even necessary. Moreover, the statements here contained no overt or implied threats, and they did not make an imminent physical confrontation reasonably likely. The peaceful nature of the picket line in this case is amply documented. Tellingly, neither Cooper nor its guards took any action that indicated they believed the comments posed a reasonable likelihood of a physical confrontation. The guards took no action at the time of the incident to defuse any prospect of violence, and Cooper did not express any concerns regarding the remarks to the Union.

The instant case has some parallels to a unanimous Board decision from the last decade holding that much more egregious racial comments by a picketer did not lose the protection of the Act, *Airo Die Casting, Inc.*, 347 NLRB 810 (2006). Similar to the facts in this case, the replacement workers in *Airo* were transported into and out of the employer's facility in vehicles. *Id.* at 811. Picketers and replacement workers shouted obscenities at each other and exchanged obscene gestures. *Id.* On one occasion, a picketer advanced, with both hands raised and middle fingers extended, to within two feet of a vehicle containing an African-American individual leaving the facility, whereupon he screamed "f*** you n*****." *Id.* The employer discharged the picketer for violating its harassment policy. *Id.*

The ALJ in *Airo* applied the *Clear Pine Mouldings* standard and concluded that the video recording of the incident showed that, but for the words of the picketer's statement, it did not differ from the "general atmosphere on the picket line with the usual tensions between strikers and replacement workers and the use of obscene gestures and vulgar language" and that the conduct was not accompanied by any threats, coercion, or intimidating conduct. *Id.* at 812. Acknowledging that the picketer's racial epithet was repulsive and offensive, the ALJ relied upon *Clear Pine Mouldings* and concluded that the conduct in question, "standing alone without any threats or violence" did not lose the protection of the Act. *Id.* at 812.

A unanimous panel of the Board affirmed the ALJ's decision. *Id.* at 810. Members Schaumer and Kirsanow stated that "there may well be circumstances, absent here, in which a picketing employee's use of the word "n[*****]" might cause the employee to lose the Act's protection, even in the absence of violence or explicit threats of violence." *Id.* at 810 n.3. They justified this by stating that "under the right (or wrong) circumstances, the word itself may be so incendiary as to constitute an implied threat or an incitement to violence." *Id.* (emphasis added). Member Liebman declined to pass on such a hypothetical. *Id.* The decision in *Airo* declined to establish a rigid, *per se* rule that uses of the word "n*****" are never protected, and it similarly declined to state that uses of the word were always

protected. Rather, the Board kept to the *Clear Pine Mouldings* approach of judging incidents of picket-line conduct under all the circumstances, leaving open the possibility that a picketer's use of the word could be found to be coercive in its entire context.

Although this case is similar to *Airo* in some respects, it differs quite substantially in that Mr. Runion made these statements about the replacement workers but directed them toward the other picketing workers, not to any replacement workers. There is no evidence in this case that replacement workers could have heard Mr. Runion's statements given the context in which he made them. The vans carrying the workers had passed by Mr. Runion, and their windows were sealed to preserve warmth on the January evening. Cooper brought forth no evidence that the comments were in fact audible to the African-American replacement workers.

Second, Mr. Runion's remarks are much less egregious than the statement at issue in *Airo*, and there is nothing about the overall circumstances that would transform his remarks into an implied threat or an incitement to violence. First, while the Remarks themselves are deplorable, they were failed jokes involving

stereotypes about African-American culinary preferences and not, as in *Airo*, the single word in our national life with more power than any other.[10]

Third, unlike the slur in *Airo*, Mr. Runion made the statements while on the side of the road with his hands in his pockets, not with his hands raised as he advanced to within a couple of feet of the vehicle carrying the people to whom the statements were directed. There was no possibility for anyone to interpret Mr. Runion's physical movements while he was speaking as threatening violence, and his overall conduct in no way raised the likelihood of an imminent physical confrontation. Indeed, there was no evidence of violence on the picket line at Cooper on January 7, 2012, or at any other time. Mr. Runion's comments did not advocate any violence, intimidation, or other coercion. In sum, the Board's Decision in this case was quite a bit simpler than was *Airo* and was wholly in line with the Board's precedents.

The D.C. Circuit's recent decision in *Consolidated Communications, Inc. v. NLRB*, 2016 WL 4750914, No. 14-1135 (D.C. Cir. Sept. 13, 2016), further supports the conclusion that the Board's Decision here should be upheld. The Board, in *Consolidated Communications*, 360 NLRB No. 140 (2014), applied

[10] "N[*****] is an infamous word in current English . . . . The word now ranks as almost certainly the most offensive and inflammatory racial slur in English, a term expressive of hatred and bigotry." "N[*****]," MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/n[*****](last visited Nov. 4, 2016).

Clear Pine Mouldings and held that the employer violated the Act by declining to reinstate certain employees for activities during a strike. In a unanimous opinion authored by Judge Millet, the D.C. Circuit examined the Board's application of the *Clear Pine Mouldings* standard to the conduct of each individual at issue. 2016 WL 4750914 at *4-14. In particular, the court upheld the Board's determination that striker Eric Williamson should be reinstated despite the fact that he grabbed his crotch and made an obscene gesture toward a worker crossing the picket line. *Id.* at *7.

> The Board, in fact, acknowledged that Williamson's gesture was "totally uncalled for, and very unpleasant," but nonetheless concluded that his actions could not objectively be perceived "as an implied threat" of the kind that would coerce or intimidate a reasonable employee from continuing to report to work during the strike. Given the rough-and-tumble nature of picket lines and the fleeting nature of Williamson's offensive misconduct, we cannot conclude that the Board erred in its assessment of the objective impact of this particular conduct in this instance.

Id. (internal citations omitted).

Although she authored an opinion upholding the Board's order reinstating Williamson and other strikers, Judge Millet made very clear that she disagreed with the Board's approach in a concurrence to her own opinion. *Id.* at *15-18. Although she called upon the Board to revisit its approach to such cases, Judge Millet made clear that the "deferential standard of review" and the record, which lacked any "evidence documenting an adverse effect on [the target of Williamson's

gestures],” nonetheless supported the conclusion that Williamson’s conduct was not so egregious to forfeit protection under the Act. *Id.* at *15. Here, where there is similarly no evidence documenting an adverse effect on anybody, there is no basis for this Court to deny enforcement of the Board’s Order.

This Court applied the *Clear Pine Mouldings* standard in *NMC Finishing v. NLRB*, 101 F.3d 528 (8th Cir. 1996), where it declined to enforce a Board decision reinstating a picketer who held up a sign that said “Who is Rhonda FSucking Today?” directed at a specific employee who had decided to cross the picket line. *Id.* at 530. The Court did not dispute that the Board’s *Clear Pine Mouldings* inquiry was the appropriate one, stating “we must, therefore, review whether the Board was correct in determining, under the *Clear Pine Mouldings* standard, that the misconduct would not ‘tend to coerce or intimidate’ an objective employee under the same circumstances.” 101 F.3d at 532. It concluded that the Board had abused its discretion in ordering that the picketer be reinstated. *Id.*

NMC Finishing has no application to the present case, where Mr. Runion made the statements to an audience of picketers and supporters, not to an audience that included replacement workers, and where there is no evidence that any replacement worker became aware of his comments.

Even setting aside the fact that no replacement workers here became aware of Mr. Runion’s remarks, *NMC Finishing* is a very different case from that

currently facing the Court.[11] The Court's conclusion in that case rested on the fact that an individual line-crossing employee was singled out for invective:

> Had the offensive words been part of a package of verbal barbs thrown out during a picket line exchange or of a sign-borne message dealing with the morals and character of crossovers generally, we might have a different view. Here, however, a specific employee was singled out and vilified by a sign paraded in the presence of everyone near to or passing by the exit gate. There is no question in our mind that an objective, reasonable employee in Yarborough's shoes would have tended to feel coerced, intimidated, harassed and fearful of the rationality of a person with the temerity to advance this type of message on a picket line.

Id. at 532 (emphasis added).

Unlike the picketer in that case, Mr. Runion did not single out any specific employee. Rather, his comments were part of a "package of verbal barbs" thrown on the picket line for the entertainment of his companions, out about a group of replacement workers, not any particular individual. Also, the nature of the

[11] Cooper incorrectly asserts that *Earle Industries, Inc. v. NLRB*, 75 F.3d 400 (1996), supports the conclusion that it did not violate the Act by discharging Mr. Runion. Cooper's argument ignores the fact that the conduct in *Earle Industries* did not occur on the picket line but inside the employer's facility, where she defied an order by the employer's personnel manager on the floor of the plant. 75 F.3d at 407. The Court in *Earle Industries* recognized that the situation in which the misconduct took place is important, and it explicitly distinguished the case at hand from cases of picket-line misconduct. *Id.* at 405-406. The Court observed that "in the context of strikes, grievances, and captive audience speeches, we have recognized that industrial conflict tends to bring out less than admirable conduct." *Id.* at 406. The *Earle Industries* Court relied on the fact that the conduct for which the employee was discharged did not occur in any of those contexts. *Id.* at 407. Consequently, the case has no bearing on this appeal.

remarks, which reference crude stereotypes about African-Americans' preferences in food, is not such that a reasonable employee who crossed the picket line would be "fearful of the rationality" of the speaker. This is not least because no replacement employee appears to have actually heard the statements.

ii. The Board's interpretation of the Act in this case does not conflict with Title VII.

Despite the flood of ink spilled by Cooper and its *amici*, it is abundantly clear that the Board's decision in this case does not conflict with Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq.*, where there is no evidence that the replacement workers heard the comments at issue. As the Supreme Court and this Court have long recognized, harassment is only actionable under Title VII if it is so severe or pervasive as to actually alter the conditions of the victim's employment by creating an abusive working environment. *E.g.*, *Sheriff v. Midwest Health Partners, P.C.*, 619 F.3d 923, 930 (8th Cir. 2010) ("A sexually hostile work environment is one in which the sexual harassment would reasonably be perceived, and is perceived by the victim, as 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'"), *quoting Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986). This Court has stated, "[b]ecause a subjectively hostile environment is one that by definition the plaintiff is aware of, a plaintiff cannot recover for harassment

of which he or she is unaware." *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 794 (8th Cir. 2004).

In this case, where there is zero evidence that any replacement worker ever became aware of the Remarks, it simply cannot be said that the comments had any impact on the terms and conditions of employment for those workers. The requirement that harassment be perceived by the victim makes clear that Mr. Runion's statements could not constitute actionable harassment. There could be, therefore, no conflict between the Board's Decision and the requirements of Title VII under the circumstances of this case.

Further, Title VII has not been interpreted to impose liability for conduct like Mr. Runion's or the January 7, 2012, incident as a whole, even when the conduct occurred in the workplace and when the victims actually became aware of the statements. Stray remarks by co-workers do not satisfy the *Meritor Savings Bank* requirement that harassment be so severe or pervasive as to change the conditions of employment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) ("[O]ffhand comments and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment.") (internal quotation omitted). The Supreme Court recognizes that a higher standard is necessary to prevent flooding the federal courts with attempts to utilize Title VII to enforce a "general civility code" in the workplace. *Faragher*,

524 U.S. at 788; *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). The *Meritor Savings Bank* formulation "will filter out complaints attacking … the sporadic use of abusive language, gender-related jokes, and occasional teasing." *Faragher*, 524 U.S. at 788 (internal quotation omitted).

This Court evaluates hostile work environment claims by viewing the totality of the circumstances, including (1) "the frequency and severity of the discriminatory conduct," (2) "whether such conduct was physically threatening or humiliating, as opposed to a mere offensive utterance," and (3) "whether the conduct unreasonably interfered with the employee's work performance." *Smith v. Fairview Ridges Hosp.*, 625 F.3d 1076, 1085-1086 (8th Cir. 2010), *abrogated on other grounds by Torgerson v. City of Rochester*, 643 F.3d 1031, 1043 (8th Cir.2011) (en banc), *quoting Vajdi v. Mesabi Acad. of KidsPeace, Inc.*, 484 F.3d 546, 551 (8th Cir. 2007). A plaintiff must satisfy a "high threshold of actionable harm" to show that he or she was subject to a hostile work environment "permeated with discriminatory intimidation, ridicule, and insult." *Elmahdi v. Marriott Hotel Servs., Inc.*, 339 F.3d 645, 653 (8th Cir. 2003), *quoting Duncan v. Gen. Motors Corp.*, 300 F.3d 928, 934 (8th Cir. 2002). In view of this demanding standard, it is clear that even if a replacement worker had heard Mr. Runion's Remarks and filed a suit alleging a hostile work environment, it would not have

resulted in liability for Cooper.[12] Many courts, including this Court, have found that comments like the Remarks were not sufficient to state a claim of a hostile work environment. *See*, *e.g.*, *Smith* 625 F.3d at 1085-1086 (finding that comment about fried chicken and other incidents were not sufficient to create a hostile work environment); *Reed v. Proctor & Gamble Mfg. Co.*, 556 Fed. App'x 421, 433 (6th Cir. 2014) (finding that comments about fried chicken and watermelon by coworkers, along with other allegations, were not sufficient to create a hostile work environment); *Harrell v. Orkin, LLC*, 876 F. Supp. 2d 695, 704-705 (E.D. La.

[12] *Amici* offer selective readings of many cases in support of their contention that the Board's decision conflicts with Title VII. This is simply not the case, as an honest look at those cases makes clear. First, all of those decisions involved comments actually heard by the plaintiffs. Second, some of the cited cases involve the use of racial epithets by supervisors, which this Court recognizes as a much more serious matter than the use of similar language by a co-worker. *See Ellis v. Houston*, 742 F.3d 307, 325 (8th Cir. 2014) (distinguishing cases on the basis of whether remarks were made by supervisors or in their presence); *see also Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 280 (4th Cir. 2015) (finding hostile environment because the court deemed harasser to be a supervisor). NAM's truncated quotation from *Boyer-Liberto v. Fontainebleau Corp*, which misleadingly omitted the phrase "by a supervisor in the presence of his subordinates" is an example of such an attempt to paper over the important distinction between words offered by supervisors and those uttered by co-workers. (NAM Br. at 11, *quoting Boyer-Liberto*, 786 F.3d at 280).

Neither does this case bear comparison to *Dowd v. United Steelworkers of America, Local No. 286*, 253 F.3d 1093 (8th Cir. 2001). There, the Court upheld a jury verdict against the local union, not the employer, for a pervasive campaign of racial harassment on the picket line and within the facility in which local union officials participated and which was accompanied by physical acts against the cars of African-American employees. *Id.* at 1101-1103. No such allegations were leveled against the union here. The only offensive statements occurred on January 7, 2012, and there was no violence at any point.

2012) (statements by supervisors about watermelon and other racial comments insufficient); *Caldwell v. ServiceMaster Corp.*, 966 F. Supp. 33, 51 (D.D.C. 1997) (comment about watermelon and other allegations not sufficient); *compare Navarro v. U.S. Tsubaki*, 577 F. Supp. 2d 487, 510-511 (D. Mass. 2008) (plaintiffs complained of "numerous instances over a multi-year period" of inappropriate remarks by both co-workers and supervisors). Consequently, this Court should not accept Cooper's contention that the Board's Decision forced it to risk Title VII liability in order to comply with its obligations under the Act.

This is especially so because Title VII would not require that Cooper terminate Mr. Runion even if his Remarks would have subjected Cooper to liability. As *amici* observe, Title VII expects employers to "do something" in the face of conduct that could give rise to a hostile work environment claim. (EEAC Br. at 15), but it is quite a leap from "something" to the workplace equivalent of capital punishment. *See Davis v. Tri-State Mack Distributors, Inc.*, 981 F.2d 340, 343 (8th Cir. 1992) ("[T]he law does not require an employer to fire a harasser."). Indeed, Cooper's Policy does not require that it terminate violators. (JA0207). Cooper did not terminate an African-American employee who called a supervisor a "dumb white hillbilly asshole" during work time and inside the Findlay facility. (JA0206). Cooper's argument that it was forced to choose between complying with Title VII and obeying the Act is therefore baseless. Cooper could have

warned Mr. Runion that no racial comments like the Remarks would be tolerated when he returned to work. *See Zirpel v. Toshiba Am. Info. Sys., Inc.*, 111 F.3d 80, 81 (8th Cir. 1997) (warning found to be sufficient remedial action). This would have been consistent with its obligations under Title VII and would not have violated the Act. In sum, then, no law required Cooper to terminate Mr. Runion, and the Act forbade it.

iii. The per se rule urged by Cooper and amici would be unmanageable

Cooper and *amici* urge that the Court be the first in the nation to discard the well-established *Clear Pine Mouldings* framework and rule that employers are always privileged to terminate employees who make racist statements on picket lines. (Cooper Br. at 21-30; EEAC Br. at 11-27; NAM Br. at 5-19). Such an inflexible rule would pose substantial practical difficulties and would convert Title VII into a civility code for the picket line.

Consider a scenario in which a picketer makes a joke to a fellow picketer involving a racial stereotype and that, although the picketer made the joke quietly, it is nonetheless captured on video by a security camera. Assume that, as in this case, no replacement workers were present to hear the joke, but further assume that the joke is not even about the replacement workers. Cooper and *amici* argue that an employer must be able to terminate this hypothetical striker even though there

is, for practical purposes, no difference between this joke and one told by a striker to a fellow striker at a union meeting or at a private home.

Cooper's proposed rule would not stop at racist remarks. Cooper and *amici* argue that employers must have the freedom to terminate picketers who make statements that might theoretically expose them to liability under Title VII. But in addition to racial harassment, Title VII also prohibits sexual harassment, religious harassment, and national origin harassment. 42 U.S.C. § 2000e-2. The Americans with Disabilities Act prohibits harassment based on disability or perceived disability, including mental illness or intellectual disability. 42 U.S.C. § 12112. The Age Discrimination in Employment Act prohibits harassment based on the age of a person over forty. 29 U.S.C. § 623. Cooper's proposed rule would thus empower employers to terminate picketers who made a joke about the Pope, who used the word "b****," who said an older colleague was an "old fogey," or who stated that their supervisors were mentally ill or intellectually disabled. The Board would have to adjudicate whether these and other examples, like displaying a middle finger or saying "f*** you," would render picketing unprotected. The Board and reviewing courts would find it quite difficult to draw clear lines between such statements and those in this case.

These hypotheticals are worth taking seriously. Perhaps because, as noted above, Mr. Runion's comments would not qualify as actionable harassment

standing alone, *amici* argue that Cooper's failure to act against Mr. Runion for his statements might have been construed as tacit approval and encouraged future remarks, and the Remarks could have served as evidence of a pattern of the Company's failure to protect employees from alleged harassment. (EEAC Br. at 17). Those same arguments would apply to any of the hypothetical statements discussed above. Cooper and *amici* are not seeking a *per se* rule permitting action against only those statements that would constitute actionable harassment, as such a rule would not encompass Mr. Runion's comments. Instead, they seek a *per se* rule against any statement implicating a protected class, regardless of the circumstances. This would open the door for employers who wish to retaliate against employees for protected picketing to discharge them for supposedly harassing remarks. The net effect would be to transform Title VII and related statutes into a "civility code" for picket lines that they were never intended to be. *See Faragher*, 524 U.S. at 788 (stating that the standard for actionable harassment prevents Title VII from becoming a general civility code).

C. The Board properly did not rely on anti-union animus on the part of Cooper because Cooper discharged Mr. Runion for his participation in protected picketing.

Standard of Review: The Court asks whether the Board's interpretation of the Act is "rational and consistent with that law." *Am. Firestop Solutions*, 673 F.3d at 768. This Court will not reject the Board's construction of the

Act if it is "reasonably defensible." *Kirkwood Fabricators*, 862 F.2d at 1306.

Cooper's argument that it did not act out of anti-union animus is irrelevant to the Board's determination that Cooper violated the law in terminating Mr. Runion for his conduct on the picket line. The Board's well-established law is clear in that an employer may refuse to reinstate a picketer because it believed the picketer engaged in serious picketing misconduct unless (1) the misconduct was not so serious as to lose the protection of the Act or (2) the picketer did not actually engage in the alleged misconduct. *Univ'l Truss*, 348 NLRB at 734; *Siemens Energy & Automation, Inc.*, 328 NLRB 1175, 1175 (1999). The standard for the first prong are set forth in *Clear Pine Mouldings*: the conduct does not lose the protection of the Act if it did not have a reasonable tendency to coerce employees in the exercise of protected rights. 268 NLRB at 1046. This was the prong on which the ALJ and Board relied in the instant case. (JA0418 & n.17). Whether the General Counsel has proven anti-union animus on the part of the employer is not part of the inquiry.[13]

[13] Cooper's reliance on *Nichols Aluminum, LLC v. NLRB*, 797 F.3d 548 (8th Cir. 2015), is misplaced because that case dealt with an employer's termination of an employee for misconduct that occurred at work, not on a picket line. 797 F.3d at 551. In such cases, the standard for whether the discharge was unlawful is *Wright Line*, 251 NLRB 1083 (1980), which was the standard the Court used to review the discharge. 797 F.3d at 554-555. However, it is crystal clear that *Wright Line* does not apply to picket-line cases. *Consol. Comm'ns*, 2016 WL 4750914 at

Accepting Cooper's argument here would require complete abandonment of *Clear Pine Mouldings*. If an employer can simply say "I did not discharge the picketer for his picketing activity, I did so because of his deplorable statements," and not reinstate the picketer, then there would be no need to ask whether the misconduct tended to intimidate other employees. The employer would just always be able to terminate the picketer. It would be inappropriate for this Court to discard the Board's careful balancing of competing interests in *Clear Pine Mouldings* in favor of such a one-sided approach.

D. The Arbitrator's Award was repugnant to the Act, so the Board did not abuse its discretion in declining to defer to it.

Standard of Review: This Court reviews a Board decision regarding deferral to an arbitrator's decision for abuse of discretion. *Doerfer Eng'g v. NLRB*, 79 F.3d 101, 103 (8th Cir. 1996).

The Board did not abuse its discretion in determining that the Arbitrator's Opinion in this case was repugnant to the Act and that deferral to the Opinion would be inappropriate. (JA0457 n.1). The Board utilized the standard for deferral developed in *Spielberg Manufacturing Co.*, 112 NLRB 1080 (1955), and

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*7 n.3 (holding that application of *Wright Line* to picket misconduct "is a complete misstatement of the law" and that *Wright Line* "has no application to striker misconduct cases"); *Univ'l Truss*, 348 NLRB at 734; *Siemens Energy*, 328 NLRB at 1175 (stating it was inappropriate for ALJ to apply *Wright Line* analysis to a case in which a worker is discharged for alleged picket line misconduct).

Olin Corp., 268 NLRB 573 (1983).[14] One of the necessary criteria for deferral under this standard is that the arbitrator's decision must not be "clearly repugnant to the purposes and policies of the Act." *Olin* at 573-574. For the Board to decline to defer on the ground that the decision was repugnant to the Act, the arbitrator's award must be either "palpably wrong" or "not susceptible to an interpretation consistent with the Act." *Id.* at 574; *see also Verizon New England, Inc. v. NLRB*, 826 F.3d 480, 486-487 (D.C. Cir. 2015). If an arbitrator's opinion "is contrary to well-established Board precedent, the award will be deemed repugnant to the Act and not entitled to deferral." *Ciba-Geigy Pharma. Div.*, 264 NLRB 1013, 1016 (1982), *enf'd*, 722 F.2d 1120 (3d Cir. 1983).

The Board has stated that it will not defer to discipline for protected picket line conduct because such discipline is repugnant to the Act. *Am. Cyanamid Co.*, 239 NLRB 440, 441-442 (1978) (applying *Spielberg* and stating that "if, in fact, the discipline of [picketer] was unlawful, to let it stand unremedied is clearly repugnant"). In contrast, it will defer to discipline imposed for unprotected picket line misconduct. *See Texaco, Inc.*, 279 NLRB 1259, 1261 (1986) (deferring to arbitration opinion where workers engaged in serious misconduct, including throwing tacks on the roadway, blocking vehicles, and making threats of serious

[14] The Board has since revised its standard for deferral in *Babcock & Wilcox Construction Co., Inc.*, 361 NLRB No. 132 (2014), decided after the arbitration in this matter. All agree that the previous standard applies to this case.

bodily harm). Because the Arbitrator's Opinion in this proceeding upheld Cooper's termination of Mr. Runion for conduct which is protected by the Act, it was repugnant to the Act, and the Board properly declined to defer to it.

The Arbitrator's Opinion cannot be squared with the law governing discipline for picket line activities as set forth in *Clear Pine Mouldings* and subsequent cases. As discussed *supra*, the well-established standard is whether the picketer's actions "may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." *Clear Pine Mouldings*, 268 NLRB at 1046. Mere offensive speech, without direct or indirect threats, is not sufficient unless it "raises the reasonable likelihood of an imminent physical confrontation." *Calliope Designs*, 297 NLRB at 521; *Catalytic*, 275 NLRB at 98; *see also Airo*, 347 NLRB at 812 (stating that picketer's conduct including "the use of obscene language and gestures and a racial slur, standing alone without any threats or violence, did not rise to the level where he forfeited the protection of the Act."). It is equally clear that the Act provides greater protection to picket-line conduct than conduct in the workplace. *Consol'd Comm'ns*, 2016 WL 4750914 at *3 ("The striker-misconduct standard thus offers misbehaving employees greater protection from disciplinary action than they would enjoy in the normal course of employment"); *Airo*, 347 NLRB at 812.

The Arbitrator's Opinion turned this established law on its head by stating that Mr. Runion's comments "were more serious," and thus less deserving of protection, than the examples of workplace harassment introduced in the arbitration proceeding because Mr. Runion made them on a picket line. (JA0361-362). The Opinion took a well-established legal standard that gives greater protection to picket-line conduct than actions in the workplace and applied a standard of his own devising that afforded picket-line conduct less protection. The result of this different standard was predictable: the Arbitrator upheld the discharge. But it was also plainly inconsistent with the Act.

This was not the only way in which the Arbitrator's analysis was at odds with the Act. The Arbitrator also did not ask whether Mr. Runion's statements "raised the reasonable likelihood of an imminent physical confrontation," *Catalytic*, 275 NLRB at 98, but rather relied on his conclusion that the use of racial slurs "increased the possibility that the constant verbal exchanges between the picketers and the replacement workers would escalate into violence." (JA0361). The two formulations could not be more different. The Board's formulation asks if the statement made an immediate physical confrontation reasonably likely, which the Remarks plainly did not because they were not even heard by replacement employees. The Arbitrator's Opinion asked only whether the statement increased, by any amount, the potential for violence, however unlikely and however remote in

time. The Arbitrator's statement justifying his Opinion upholding the discharge would be true if the comments had increased the potential for violence at any time in the course of the lockout from 1 in 1,000 to 1 in 999. But such a miniscule impact obviously falls far short of the Act's requirement that statements lose protection only if they raise the reasonable likelihood of an imminent physical confrontation. *Calliope Designs*, 297 NLRB at 521; *Catalytic*, 275 NLRB at 98. The evidence before the Arbitrator could not support a finding that the comments raised the reasonable likelihood of a physical confrontation, and the Arbitrator did not make that finding.

Recognizing the clear conflict between the Arbitrator's decision and the Act, as interpreted by the Board in *Clear Pine Mouldings* and its progeny, Cooper argues that the Arbitrator's Opinion was consistent with the Act by pointing to Board decisions from the 1950s, long predating *Clear Pine Mouldings*, in which it characterizes the Board as holding that profane language by picketers was not protected or, in *Spielberg*, deferring to an arbitrator's award denying reinstatement to individuals who used profanity on a picket line. (Cooper Br. at p. 48-49 & n.6).[15] This argument cannot prevail because it would foreclose the Board from ever declining to defer to an arbitral decision that could be squared with some

[15] Cooper's Brief mischaracterizes one of the cited decisions. There was no picket line in *Nutone, Inc.*, 112 NLRB 1153 (1955), *enf'd in part*, 243 F.2d 593 (D.C. Cir. 1956), *aff'd* in part, 357 U.S. 357 (1957), and the profanity in that case occurred inside the employer's facility. 112 NLRB at 1166.

long-outdated decision of the Board. That would inhibit the Board's function: accounting for changing realities of industrial life and developing legal standards on the basis of its experience. *See, e.g.*, *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975) ("The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board."); *NLRB v. Seven-Up Co.*, 344 U.S. 344, 349 (1953) (observing that the Board's experience rests on a "constant process of trial and error"). The Board did this in *Clear Pine Mouldings*, approximately thirty years after the cases on which Cooper relies, and it should not be constrained to an approach it discarded thirty years ago.

The Board considered Cooper's argument and appropriately rejected it. Its decision noted key differences between the *Spielberg* and the instant matter. (JA0457 n.1). In *Spielberg*, the individuals not reinstated had engaged in conduct that is not remotely comparable to Mr. Runion's. The Board noted that the employees denied reinstatement in *Spielberg* had "persistently shouted profane insults, including racist slurs, over several days of picketing." (JA0457 n.1). These actions are far more threatening than Mr. Runion's two statements, made within a minute of each other, not over a period of days, and only after the replacement workers had already passed in a closed van. The Board took particular note of that last fact. (JA0457 n.1). The foreseeable impact of Mr. Runion's remarks, which appear not to have been heard by any replacement

workers, was thus wholly different from the conduct in *Spielberg*. Similarly, the campaign of profane name-calling in *American Tool Works Co.*, 116 NLRB 1681 (1956), occurred primarily through the windows of the employer's facility at the people inside, not only on a picket line, and some individuals actually climbed onto the employer's building to shout at workers inside the facility. 116 NLRB at 1700. This, too, is the kind of conduct that could be expected to produce far more of an impact on replacement employees than Mr. Runion's statements, which he made before an audience of fellow picketers and not to replacement workers and which were not projected inside the Company's facility. The Board, then, did not abuse its discretion in finding the Arbitrator's Opinion repugnant to the Act.

Cooper further asserts that the Arbitrator's Opinion is consistent with *Atlantic Steel Co.*, 245 NLRB 814 (1979), and its progeny, but in doing so it ignores the well-established doctrine that *Atlantic Steel* applies to misconduct in the workplace, not on the picket line. *Atlantic Steel* dealt with an obscene outburst on the factory floor and articulated a four-part balancing test for determining whether an employee's outburst while engaging in protected, concerted activity in the workplace removed the worker from the protection of the Act. *Id.* at 816. The "heart" of the *Atlantic Steel* analysis is balancing employees' protected activity against the employer's "legitimate need to maintain order." *Plaza Auto Cent., Inc.*, 355 NLRB 493, 494 (2010), *enf'd in part*, 664 F.3d 286 (9th Cir. 2011); *see also*

Triple Play Sports Bar and Grille, 361 NLRB No. 31 (2014) (articulating the employer's interest as "maintaining order at its workplace"). The relevant interests on a picket line are different: the employer has less interest in maintaining its authority compared to the shop floor, where that interest is at its apex, and the Section 7 rights of line-crossing workers must be considered. *See Clear Pine Mouldings*, 268 NLRB at 1047.

The four components of the *Atlantic Steel* analysis are: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was provoked by the employer's unfair labor practice. 245 NLRB at 816. This is incompatible with the *Clear Pine Mouldings* standard for evaluating picket-line conduct. Indeed, the Board in *Clear Pine Mouldings* explicitly considered and rejected utilizing any inquiry like the fourth *Atlantic Steel* factor. 268 NLRB at 1047 ("We do not agree with this test. There is nothing in the statute to support the notion that striking employees are free to engage in or escalate violence or misconduct in proportion to their individual estimates of the degree of seriousness of an employer's unfair labor practices."). So *Atlantic Steel* clearly cannot apply to picket-line cases.

In subsequent years, the Board has continued to apply *Atlantic Steel* to misconduct in the workplace. In *Triple Play Sports Bar and Grille*, 361 NLRB No. 31 (2014), the Board observed that *Atlantic Steel*'s framework "is tailored to

workplace confrontations with the employer" and declined to apply it to statements on social media. Slip op. at 4. The Board has never applied *Atlantic Steel* to a picket-line misconduct case. *See, e.g.*, *Airo*, 347 NLRB at 811 (applying *Clear Pine Mouldings*). By arguing that the Arbitrator's Opinion was consistent with *Atlantic Steel*, a case with no relevance to Mr. Runion's conduct, Cooper has only underscored the fact that the Opinion is repugnant to the Act as it is applied to picket-line conduct. Accordingly, the Board did not abuse its discretion in declining to defer to the Arbitrator's Opinion.

E. The Board correctly determined that Section 10(c) does not prohibit Runion's reinstatement or a make-whole remedy.

Standard of Review: The Court asks whether the Board's interpretation of the Act is "rational and consistent with that law." *Am. Firestop Solutions, Inc.*, 673 F.3d at 768. This Court will not reject the Board's construction of the Act if it is "reasonably defensible." *Kirkwood Fabricators*, 862 F.2d at 1306.

The Board appropriately recognized that Section 10(c) of the Act does not restrict its remedies in this case. Section 10(c) of the Act states, in part, that "[n]o order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." 29 U.S.C. § 160(c). ALJ Randazzo carefully examined this provision and correctly found that Section 10(c)

does not prohibit reinstatement of Mr. Runion or Cooper's liability for his back wages, and the Board adopted his reasoning. (JA0421-422; JA0457). The Board's conclusion is a rational interpretation of the Act.

The Board explained in *Anheuser-Busch, Inc.*, 351 NLRB 644 (2007), that Section 10(c)'s use of the word "cause" means discipline or termination imposed for a reason that is not prohibited by the Act. 351 NLRB at 647. Termination imposed because of an employee's activity that is protected under the Act is unlawful and cannot constitute "cause" under Section 10(c). *Id.* at 648; *see also Fibreboard Paper Product Corp. v. NLRB*, 379 U.S. 203, 217 (1964) ("There is no indication, however, that [Section 10(c)] was designed to curtail the Board's power in fashioning remedies when the loss of employment stems directly from an unfair labor practice… ."). Section 10(c) protects employers from Board orders reinstating individuals who were terminated for conduct that was not protected by the Act. *See, e.g., NLRB v. Potter Elec. Signal Co.*, 600 F.2d 120, 123-124 (8th Cir. 1979) (denying reinstatement for employees whose requests for union representatives at disciplinary meeting were denied when the workers were terminated for fighting on the production floor). It does not empower employers to refuse to reinstate employees terminated for unlawful reasons.

In arguing that it terminated Mr. Runion for cause, Cooper is effectively contending that Mr. Runion's remarks on the picket line were not part of his

protected activity. Thus, the entire inquiry collapses back into the *Clear Pine Mouldings* analysis into whether Mr. Runion's picket-line activities lost the protection of the Act. Because, as discussed *supra*, well-established law compels the conclusion that Mr. Runion was engaged in protected picketing activity, Section 10(c) does not limit the remedies available to the Board here.

V. CONCLUSION

This Court should enforce the Board's order reinstating Mr. Runion and awarding back pay. The Board was justified in concluding that Cooper violated the Act by discharging Mr. Runion on the basis of statements that did not contain any direct or indirect threats and did not raise the reasonable likelihood of an imminent physical confrontation, particularly where there is no evidence that the replacement workers actually heard the comments Mr. Runion made to his fellow picketers. Because Cooper terminated Mr. Runion for his picket-line activity that had not lost the protection of the Act, there was no requirement that the Board show that Cooper was motivated by anti-union animus, and Section 10(c) did not prohibit the Board from ordering reinstatement and back pay.

The Board did not abuse its discretion when it decided not to defer to the Arbitrator's Opinion in this case. The Arbitrator's Opinion was repugnant to the Act and cannot be reconciled with *Clear Pine Mouldings*. The Arbitrator inappropriately stated that Mr. Runion's comments "were more serious," not more

entitled to protection, because they were made on a picket line, and he erroneously asked only whether the statements had some tendency to increase the potential for violence, ignoring the proper question of whether they raised a reasonable likelihood of an imminent physical confrontation.

In view of the foregoing, the Union requests that this Court enforce the Board's order.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitation of FRAP 32(a)(7)(B) because this brief contains 12,758 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32 (a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2010 in Times New Roman typeface and 14 point font size.

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CERTIFICATE OF SERVICE

I, **HEREBY CERTIFY**, that on this 9th day of November, 2016, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the Eighth Circuit by using the Court's CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

The foregoing has been scanned for viruses and is virus-free.

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