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,
Respondent/Cross-Petitioner.

On Petition For Review From The
National Labor Relations Board
Case No. 08-CA-087155

BRIEF OF PETITIONER/CROSS-RESPONDENT COOPER TIRE & RUBBER COMPANY

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SUMMARY OF THE CASE

Cooper Tire & Rubber Company discharged Anthony Runion because he shouted racist comments at African-American replacement workers crossing a picket line. Both an arbitrator and an ALJ found these comments to be "racist, offensive, and reprehensible." The arbitrator upheld the discharge but the ALJ, as upheld by the NLRB, refused to defer to the award, concluding that Cooper violated Sections 8(a)(1) and (3) by discharging Runion because his racial epithets were not accompanied by violence or threats of violence. The issue before the Court is whether Runion's racist speech deserves protection under the Act simply because it occurred on the picket line.

This Court should refuse to enforce the Board Order. Protecting Runion's racist statements serves no statutory purpose under the NLRA but instead privileges Runion's *misconduct* over the Section 7 *and* Title VII rights of the African-American replacement workers. The Board's reinstatement of Runion also violates Section 10(c) of the Act. Given that the racist statements were the stipulated motive for his discharge, the Board cannot demonstrate anti-union animus to support its 8(a)(3) finding. Finally, deferral to the arbitrator's award is appropriate under the Board's deferral policy. No matter where they are uttered, racist statements deserve no protection under the Act and the arbitrator correctly found just cause for discharge. Cooper requests 30 minutes for oral argument.

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CORPORATE DISCLOSURE STATEMENT

In compliance with Fed. R. App. P. 26.1 and 8th Cir. R. 26.1A, Petitioner/Cross-Respondent Cooper Tire & Rubber states that it is not a parent, subsidiary or other affiliate of a publicly owned corporation and that no publicly owned corporation owns 10% or more of its stock.

/s/Morris L. Hawk
Morris L. Hawk
Dated: 8/24/2016
One of the Attorneys for Cooper Tire & Rubber Company

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I. JURISDICTIONAL STATEMENT

The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union filed an unfair labor practice charge on August 13, 2012 with Region 8 of the National Labor Relations Board alleging that Cooper's discharge of Runion violated Sections 8(a)(1) and (3) of the Act. Region 8 issued a Complaint over Runion's discharge on January 20, 2015 under 29 U.S.C. 160(b). The Board had jurisdiction over the Complaint under 29 U.S.C. 160(c). The parties submitted the case to Administrative Law Judge Thomas Randazzo on a stipulated record. The ALJ issued a decision on June 5, 2015 concluding that Cooper had violated Sections 8(a)(1) and (3) of the Act by discharging Runion. Cooper timely filed exceptions to the ALJ's decision.

On May 17, 2016, the Board issued a Decision and Order adopting the ALJ's decision. The Board's decision was a "final order" within the meaning of 29 U.S.C. 160(f) and Cooper timely petitioned this Court for review of the Board's Order on June 15, 2016. This Court has jurisdiction to hear this petition because Cooper has a tire manufacturing plant located within this Circuit, specifically at 3500 Washington Road, Texarkana, Arkansas 71854, and thus "transacts business" in this Circuit within the meaning of 29 U.S.C. 160(f).

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

A. Cooper Discharged Runion For Shouting Two Racist Statements At African-American Replacement Workers Crossing A Picket Line. The Board Reinstated Runion Because It Concluded That His Statements Did Not Constitute A Threat of Violence. Runion's Statements Were Intentional, Not Impulsive, And Vilified The African-American Replacement Workers Based On Their Race, Not Because They Crossed The Picket Line. Does Protecting Runion's Racial Invective Further Any Legitimate Statutory Purpose?

Apposite cases: *NMC Finishing*, 101 F.3d 528, 531 (8th Cir. 1996); *Earle Industries, Inc. v. NLRB*, 75 F.3d 400, 405 (8th Cir. 1996); *Southern Steamship v. NLRB*, 316 U.S. 31 (1942).

Apposite statutes: 29 U.S.C. 157; 42 U.S.C. 2000e-2

B. Section 10(c) Of The Act Prohibits The Board From Reinstating An Employee Discharged "For Cause" Even If The Misconduct Occurs During Otherwise Protected Activity. The Parties Have Stipulated That Cooper Discharged Runion Because Of His Racist Statements And An Arbitrator Held That His Discharge Was For Just Cause. Does The Board's Reinstatement Of Runion Violate Section 10(c) Of The Act?

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Apposite cases: *NLRB v. Potter Electric Signal Company*, 600 F.2d 120 (8th Cir. 1979); *NLRB v. Local Union No. 1229, IBEW*, 346 U.S. 464 (1953).

Apposite statute: 29 U.S.C. 160(c).

C. In Order To Establish Unlawful Discrimination Under Section 8(a)(3), The General Counsel Must Show That Runion's Protected Conduct Was A Motivating Factor In His Discharge. Here, Runion's Racist Statements Were The Stipulated Reason For His Discharge And There Is No Evidence That Cooper Was Motivated By Anti-Union Animus. Did Cooper's Discharge Of Runion Violate Section 8(a)(3) Of The Act?

Apposite case: *Nichols Aluminum, LLC v. NLRB*, 797 F.3d 548 (8th Cir. 2015).

Apposite statute: 29 U.S.C. 158(a)(3).

D. Arbitrator Williams Found That Cooper Discharged Runion For Just Cause For Violating Its Harassment Policy. The Board Refused To Defer To His Award, Finding It Repugnant To The Act. Is Arbitrator Williams's Award Susceptible To An Interpretation Consistent With The Act, And Thus Entitled To Deference, Where The Board Has

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Apposite cases: *Doerfer Engineering v. NLRB*, 79 F.3d 101 (8th Cir. 1996); *Olin Corporation*, 268 NLRB 573 (1984); *Spielberg Manufacturing Co*., 112 NLRB 1080 (1955); *Aramark Services, Inc*., 344 NLRB 549 (2005).

III. STATEMENT OF THE CASE

A. Long-Standing Relationship Between Cooper and the Union and Cooper's Lack of Anti-Union Animus.

Cooper has three tire manufacturing plants in the United States – its plants in Findlay, Ohio and Texarkana, Arkansas are unionized. Its plant in Tupelo, Mississippi is non-union (R.1, Jt. Motion and Stipulation of Facts ("SF") at #9, #10, JA0003). Cooper has recognized the Union and/or its predecessor Local Unions at the Findlay, Ohio Plant for at least 70 years (R.1, SF at #18, JA0004). There is no evidence that Cooper possesses any animus towards its employees' Union activities.

B. Cooper's Harassment Policy.

Cooper recognizes that it has a moral and legal obligation to ensure that its employees and other persons at the Findlay plant are free from unlawful harassment based upon race, color, religion, sex, age or national origin (R.1, Ex. P, Arbitration Transcript ("Tr.") at JA0172-3). Cooper therefore has a policy prohibiting such unlawful harassment (R.1, SF at #102, JA0017; R.1, Ex. P, Co. Ex. 1 to Arbitration, JA0331). The prohibition extends to "Cooper employees, vendors, customers or other visitors" and provides that "Cooper employees found to be harassing others will be subject to disciplinary action up to and including discharge" (R.1, Ex. P, Co. Ex. 1, JA0331). Runion received a copy of Cooper's

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Harassment Policy when he began employment and was again reminded about his obligations under the Policy in a memorandum that was delivered to all employees on October 25, 2007 (R.1, SF at #103, #104, #105, JA0017).

C. The Lawful Lockout.

Beginning on September 7, 2011, Cooper and the Union engaged in negotiations for a successor collective bargaining agreement covering the Unit at the Findlay, Ohio facility (R.1, SF at #23, JA0006). On November 22, 2011, Cooper made a last best and final offer to the Union in Findlay. After the Union's membership rejected Cooper's last best and final offer on November 22, 2011, Cooper imposed a lockout on November 28, 2011 (R.1, SF at ##24-26, JA0006). The Regional Director of Region 8 of the NLRB subsequently determined that Cooper's lockout was lawful. His determination was upheld by the Office of Appeals of the NLRB (R.1, SF at ##29-30, JA0006-7).

During the lockout, Cooper maintained plant operations using supervisors and managers, plus employees from its Tupelo plant and temporary replacement workers (R.1, SF at #32, JA0007). The Union set up picket lines when the lockout began (R.1, SF at #33, JA0007). Many of Cooper's replacement workers were African-American, including its Tupelo employees, and were transported across the picket line in vans (R.1, SF at #37-38, JA0007).

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Cooper and the Union ultimately reached a tentative agreement that was ratified by the Union employees on February 27, 2012 (R.1, SF at #27, JA0006). The lockout ended on February 28, 2012 and Cooper began recalling locked-out employees to work on March 3, 2012 (R.1, SF at #28, JA0006). Cooper and the Union expressly agreed to arbitrate any grievance filed over a discharge of a bargaining unit employee during the lockout (R.1, SF at #82, JA0013).

D. Racist Comments Made by Runion While on the Hog Roast Picket Line.

On January 7, 2012, the Local Union held a hog roast at the Union Hall for locked-out workers and their families (R.1, SF at #41, JA0008). Runion attended the January 7, 2012 hog roast with his girlfriend, Venessa Barnes, and her son, Collin (R.1, SF at #42, JA0008). The Union Hall is located on Lima Avenue, approximately 50 yards from the main gate to the Findlay plant (R.1, SF at #43, JA0008, Ex. M is a map showing the area, JA0133). There were more people than usual on the picket line on January 7, 2012 as the people who attended the hog roast joined the picket line during that evening, shortly before shift change, when non-Union workers began crossing the picket line (R.1, SF at #44, JA0008).

After the hog roast, Runion participated in the picketing outside of Cooper's Findlay, Ohio facility (R.1, SF at #47, JA0008). Company Exhibit 6 contains true and accurate copies of video taken of activities on the picket line during the evening shift change on January 7, 2012 (R.1, SF at #50, JA0009; Co. Ex. 6 –

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DVD, at back cover of Joint Appendix, Vol. 1). The video footage was taken by one of the security guards employed by Cooper specifically for the lockout (R.1, SF at #51, JA0009).

Runion can first be viewed on Company Exhibit 6 at the 5:10 time signature mark when he crosses the street, holding the hand of Runion's girlfriend's son, Collin (R.1, SF at #52, JA0009). Runion and Collin, who is holding a sign, walk from the east side of Western Avenue (where most people are located) to the west side of Western Avenue (R.1, SF at #58, JA0010). Runion is wearing a camouflage coat with "lock-out chains" crisscrossed over his chest and back (R.1, SF at #59, JA0010).

Runion and Collin stand on the west side of the railroad tracks (R.1, SF at #60, JA0010). They stand with two other locked-out employees, David Burns and Todd Carnes (R.1, SF at #61, JA0010). Burns is wearing a gray shirt and holding a sign (R.1, SF at #62, JA0010). Carnes, who wears glasses, has a dark hat and a dark hooded coat (R.1, SF at #63, JA0011).

When the white vans arrive carrying the replacement workers, as the video shows, Runion, Burns, Carnes, and other picketers shouted various comments at them. Burns yells "Go home," "Get out of here," and "Go back where you came from" (R.1, SF at #66, JA0011). As one van passes, Carnes and Runion display their middle fingers and Burns holds up his sign and yells "Piece of Shit!" (R.1, SF

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at #69, JA0011). Carnes yells, "Hope you get your fucking arm tore off, bitch!" (R.1, SF at #70, JA0011). The Stipulated Facts recite the conduct of the picketers in detail (R.1, SF at #41-74, JA0008-12).

At approximately the 7:04 time mark on the video, Runion yells "Hey, did you bring enough KFC for everybody?" (the "KFC" statement or epithet) (R.1, SF at #71, JA0011). After Runion shouts the "KFC" statement, an unidentified individual yells "Go back to Africa, you bunch of fucking losers" (R.1, SF at #72, JA0011). At approximately the 7:25 time mark on the video, Runion shouts "Hey, anybody smell that? I smell fried chicken and watermelon." ("the fried chicken and watermelon" statement or epithet) (R.1, Ex. P, Co. Ex. 6-DVD at back cover of Joint Appendix Vol. 1). Collin turns his head toward Runion when the statement is made. Collin then turns to hear a response from across Western Avenue and immediately turns back to Runion and, unfortunately modeling the racist behavior that he has just witnessed, asks Runion "Do you know what I smell?" (R.1, Ex. P, Tr. at JA0184; Co. Ex. 6).

At approximately the 14:45 time mark, Runion takes Collin by his hand and crosses the street against the light, which temporarily impedes a van (R.1, SF at #76, JA0012). Runion was given a citation for jaywalking. Cooper did not discharge Runion for the jaywalking depicted in the video (R.1, SF at #78, JA0012).

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E. Cooper Discharges Runion for Making the Racist Statements and the Union Takes Its Grievance Over His Discharge to Binding Arbitration Pursuant to the Parties' Agreement.

On March 1, 2012, Cooper discharged Runion for gross misconduct for making racist statements while on the picket line on January 7, 2012 (R.1, SF at #91, #92, JA0014; Jt. Ex. 2). The parties have stipulated that Plant Manager Jack Hamilton and Ms. Rosendale made the determination to discharge Runion because, upon viewing the video, they believed that he uttered the following comments:

> "Hey, did you bring enough KFC for everybody?" (at the 7:04 time mark) and later "Hey, anybody smell that, I smell fried chicken and watermelon." (at the 7:25 time mark).

(R.1, SF at #54, JA0009). The parties also stipulated that Cooper discharged Runion for making the:

> ["KFC statement" and the "fried chicken and watermelon statement"] and "did not terminate him for any other conduct that he engaged in on the picket line."

(R.1, SF at #92, JA0014).[1]

---

[1] Employees Burns and Carnes certainly made it clear how they felt about the replacement workers that night, referring to them as "scum", "worthless piece of shit", "worthless sack of shit", even expressing the hope that a replacement worker would "get [his] fucking arm tore off" (R.1, SF at ##69-70, JA0011; Ex. P., Co. Ex. 6). However, they confined their angry rantings to non-racist epithets, such as "scum", or to profanity and scatological remarks, with no racial overtones. Thus, they were not disciplined by Cooper.

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The Union filed its grievance over Runion's discharge on March 12, 2012 (R.1, SF at #95, JA0015).

F. At the Arbitration, Runion Claims That He Did Not Make the "Fried Chicken and Watermelon" Remark and Says the KFC Statement Was a "Slip of the Tongue".

An arbitration hearing was held over Runion's discharge before Roger C. Williams, the Permanent Impartial Arbitrator (R.1, SF at #97, JA0015).

As Rosendale testified at the arbitration, Runion denied making both racist comments *during the grievance procedure* and expressed no remorse for his conduct. (R.1, Ex. P, TR, JA0189-190). *At the arbitration*, he admitted that he made the "KFC" comment but denied that he uttered the "fried chicken and watermelon" comment despite the video evidence. (R.1, Ex. P, Co. Ex. 6; TR, JA0225). As for the "KFC" epithet, Runion did not directly apologize for the comment at the arbitration. The most that he could muster was that he was "out of line" and he was embarrassed that he made the comment (R.1, Ex. P, TR, JA0224). He attempted to explain it away by claiming that he was under "high stress" and that he "had a slip of the tongue at that moment" (*Id.* at JA0224). Runion also tried to justify his racist statement as a response to provocation by the replacement workers (they held money up to the windows of the vans and "flipped the bird" to the picketers) (*Id.* at JA0223-4).

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When confronted with the video which could prove or disprove his assertions, Runion admitted that, on January 7, 2012, the replacement workers did nothing to provoke his racist statements (*Id.* at JA0234-5). Moreover, Runion did not appear to be in the throes of anger or "animal exuberance" when he made his racist remarks – as the ALJ noted, Runion simply stood with his hands in his pockets while shouting his racist remarks (R.12, Board Order at JA0464).

G. The Union Files Its Unfair Labor Practice Charge Challenging Runion's Discharge a Month After the Arbitration Hearing and the Charge Is Deferred by the Regional Director.

The Union filed its original charge, Case No. 08-CA-087155, on August 13, 2012, a month after the arbitration hearing. (R.1, SF, Ex. A, JA0022). Cooper then asked the Union to agree to submit the unfair labor practice issue to Arbitrator Williams for his determination. The Union refused. (R.3, Exs. 1 and 2 of 3/30/15 Letter, at JA0380-1). The consideration of the charge was deferred to arbitration (R.1, SF at #115, JA0019).

H. Arbitrator Williams Finds Just Cause for Runion's Discharge.

Arbitrator Williams issued his Opinion and Award upholding Runion's discharge on May 14, 2014 (R.1, SF at #111, JA0018; Ex. T – Arbitrator Williams's Opinion at JA0350-363). Arbitrator Williams concluded that Runion made both racist statements: "Hey, did you bring enough KFC for everybody?" and "Hey, anybody smell that? I smell fried chicken and watermelon" (rejecting

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Runion's claim that he did not make the second statement) (R.1, Ex. T at JA0360). He further concluded that, by making the racist statements, Runion committed a clear violation of Cooper's Harassment Policy which was so intolerable as to constitute just cause for his discharge (*Id.* at JA0363).

In assessing Runion's racist statements, Arbitrator Williams considered the impact of the statements "under the circumstances" existing on the night of January 7, 2012. He specifically noted that, as the videotape clearly demonstrates, there were "constant verbal exchanges" between the replacement workers and the picketing employees (R.1, Ex. T at JA0361; Ex. P, Co. Ex. 6). In addition, he stated that Runion yelled his two racist statements so that "dozens of people could hear" them – and potentially act upon them (R. 1, Ex. T at JA0361-2). Arbitrator Williams further noted that Runion's initial racist comment inspired another unidentified individual to shout additional hate-filled racist invective (*Id.* at JA0356). Based upon his evaluation of the circumstances of that night, Arbitrator Williams concluded that "there was a genuine possibility of violence" on the picket line that night and that Runion's comments increased the possibility that the "meet and greet with the scabs" (as Runion described it) "would escalate into violence" (*Id.* at JA0355, 361-2).

In evaluating Runion's conduct, Arbitrator Williams expressly noted in his Opinion that the Union argued that "on a picket line . . . there is generally more

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tolerance for misconduct that would constitute just cause for discharge if it were committed in the plant" (*Id.* at JA0359). Although Arbitrator Williams did not expressly cite Section 7, his Opinion makes clear that he recognized and understood that Runion and the other picketers had the right to picket and to express their "animosity toward the replacement workers." (*Id.* at JA0362). He, in fact, expressly noted, without censure, that the picketers and the replacement workers "yelled swear words and made lewd gestures at each other" on the picket line throughout the course of the lockout. (*Id.* at JA0355).

Concluding that just cause existed for Runion's discharge, Arbitrator Williams expressly considered the impact of Runion's racist statements on the rights of the African-American replacement workers to whom it was directed. He found:

> The lockout was undoubtedly frustrating and difficult for all of the locked-out employees, and the locked-out employees' animosity toward the replacement workers is certainly understandable, *but African-American replacement workers were not deserving of any more animosity than the other replacement workers, and there was absolutely no reason for any of the picketers to inject race into the exchanges on the picket line, or to express their animosity toward African-American replacement workers by using racial slurs or demeaning racial comments*.

(*Id.* at JA0362-3, emphasis added). Arbitrator Williams held that, notwithstanding the picketers' understandable expressions of animosity toward the replacement workers, the African-American replacement workers did not deserve

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extra hatred due to their race. Arbitrator Williams found that Runion's racist statements crossed the line and were "so intolerable" as to constitute "gross misconduct" (*Id*. at JA0363).

I. The Unfair Labor Practice Proceeding and ALJ Randazzo's Decision.

After Arbitrator Williams issued his decision, the Union requested that the Regional Director not defer to Arbitrator Williams's decision and a Complaint issued. The parties agreed to waive a hearing and submitted the dispute to Administrative Law Judge Randazzo on stipulated facts and briefs.

ALJ Randazzo issued his decision on June 5, 2015 finding that Cooper violated Sections 8(a)(1) and 8(a)(3) of the Act by discharging Runion and that the Board should not defer to Arbitrator Williams's determination that just cause existed for Runion's discharge.

The ALJ, like Arbitrator Williams, concluded that Runion voiced both racist comments and that Runion lied when he denied making the second racist statement (R.12, Board Order at JA0460). The ALJ nevertheless concluded that Runion's racist statements were not sufficient for Runion to lose the protection of the Act while on the picket line because his statements, although "racist, offensive, and reprehensible", "were not violent in character" and "did not contain any overt or implied threats to replacement workers" (*Id.* at JA0464). In coming to this

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decision, the ALJ noted that Runion did not make "any threatening gestures or movements" but simply "stood with his hands in his pockets" (*Id.*)

The ALJ held that, under *Olin*, the Board should not defer to Arbitrator Williams's Award (R.12, Board Order at JA0467). The ALJ found that Arbitrator Williams's Award was "clearly repugnant" to the Act because Arbitrator Williams found that Runion's discharge was warranted even though his racist statements did not constitute a threat (*Id.* at JA0466-7). Thus, the ALJ held that Arbitrator Williams's Award "provide[d] less protection for picket line conduct than the Act affords" (*Id.* at JA0467).

J. The Board Adopts The ALJ's Decision And Orders The Reinstatement Of Runion With Backpay.

On May 17, 2016, the Board adopted the ALJ's rulings, findings and conclusions with one modification. Specifically, the Board stated that it was adopting the ALJ's determination that Arbitrator Williams's Award was repugnant to the Act but *not* his determination that Arbitrator Williams had failed to adequately consider the unfair labor practice issue under *Olin* (*Id.* at fn. 1, JA0457). Cooper timely petitioned this Court for review of the Board's Order on June 15, 2016.

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IV. SUMMARY OF ARGUMENT

The NLRB is a creature of statute. As a consequence, its enforcement authority cannot exceed the limits of the statute which created it or infringe upon rights protected by other federal statutes. For this reason, this Court has long held that, in reviewing a Board order, its ultimate concern is whether the order, if enforced, would further the purposes of the NLRA. This concern is particularly appropriate where the Board seeks to protect an employee from the consequences of his own misconduct.

Here, it is undisputed that Runion shouted two racial epithets on the picket line. The Board agrees that his comments were "racist", "offensive" and "reprehensible" and the parties have stipulated that the persons who fired him were motivated by their belief that he made both racist comments (despite his denial of one). Nevertheless, the Board seeks to protect Runion's racist statements on the grounds that they were, essentially, "not threatening enough". But the question is not whether Runion's racist statements exceed the *Board*'s standards for severity of misconduct. The question is whether protecting Runion's racist statements serves any legitimate statutory purpose at all.

Cooper submits that it does not.

First, the Board fails to even acknowledge that the African-American replacement workers, who were the targets of Runion's statements, had the Section

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7 right to enter Cooper's facility on January 7, 2012 free from coercion and intimidation.

Second, the Board ignores the Title VII rights of those workers; Cooper's obligation to protect those rights; and the Supreme Court's mandate that the Board cannot enforce its remedial powers in a manner that impairs other federal statutes which provide rights equally important to those provided by Section 7.

Third, the Board ignores the fact that its very rationale for permitting profane statements on the picket line (to protect picketing employees from their own "animal exuberance") is not implicated in this case (where Runion stood calmly with his hands in his pockets and attempted to incite an angry, white crowd – for the fun of it).

Fourth, when Justice Frankfurter first introduced the term "animal exuberance" to labor law in 1941[2], *Plessy v. Ferguson* was the law of the land and Title VII would not be passed for another 23 years. In the era of racial unrest embodied by the "Black Lives Matter" movement, whatever policy reasons that the Board *initially* had to protect racist statements occurring on the picket line in the 1940s are antiquated and should be abandoned. It simply does not reflect reality to treat racist statements shouted by a white picketer at African-American replacement workers as having an equivalent coercive impact as garden-variety

[2] *Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 294 (1941).

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insults and profanities shouted by picketers. Nor is there any legitimate reason to protect racist statements under Section 7 when such statements, by their nature, are not directed at the legitimate cause of the picketers' anger – the crossing of the picket line – but instead at an immutable characteristic of the non-picketers.

The Board also exceeds its authority under Section 10(c) of the Act by ordering the reinstatement of Runion. The "for cause" provision of Section 10(c) was designed to preclude the Board from reinstating an individual who has been discharged because of misconduct whether or not the acts constituting the cause for discharge were committed in connection with a concerted activity. *NLRB v. Local Union No. 1229, IBEW*, 346 U.S. 464, 477-78 (1953). Here, the parties have stipulated that Runion's discharge was motivated by his racist statements. To conclude that Cooper did not have "cause" for Runion's discharge simply because he made his racist statements on the picket line is to write Section 10(c) out of the statute.

Similarly, the Board's conclusion that Cooper violated Section 8(a)(3) must be rejected where Runion's racist statements, not his protected conduct, were the motivating factor in Cooper's decision to discharge him and there is no evidence that Cooper acted with discriminatory animus toward Runion. Just as the Board's "gradations of offensiveness" standard[3] fails to consider whether the protection of

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[3] *Earle Industries, Inc. v. NLRB*, 75 F.3d 400 (8th Cir. 1996).

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picket line misconduct furthers the purposes of the Act, it is also insufficient to establish the discriminatory animus necessary to establish a violation of Section 8(a)(3). Cooper submits that the *Wright Line* test should be used in any case where the Board believes that an employer's true motivation for discharge is not an employee's misconduct but rather his protected activity.

Finally, the Board's conclusion that Arbitrator Williams's Award is repugnant to the Act is inconsistent with *Olin Corporation,* 268 NLRB 573 (1984) and its progeny. Even if Arbitrator Williams did not replicate the language of the Board's objective test for picket line misconduct in his opinion (*Clear Pine Mouldings*, 268 NLRB 1044 (1984)), he noted that there is generally more tolerance for misconduct on a picket line; assessed Runion's racist statements under the circumstances existing that night; and considered the coercive impact of his statements on the African-American replacement workers. The Board's disagreement with his conclusions is not sufficient, under *Olin*, to refuse to defer to his Award.

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V. ARGUMENT

A. This Court Should Refuse To Enforce The Board's Order Because Protecting Runion's Racist Statements Serves No Statutory Purpose And His Statements Would Reasonably Tend To Coerce And Intimidate Employees In The Exercise Of Rights Protected Under The Act.

Standard of Review: Where it is undisputed that an employee engaged in misconduct on the picket line, this Court reviews *de novo* the issue of whether the misconduct caused the employee to lose the protection of the Act. *NMC Finishing*, 101 F.3d 528, 532 (8th Cir. 1996).

1. Protecting Runion's Racist Statements Serves No Statutory Purpose.

In evaluating misconduct occurring in the course of otherwise protected activity, this Court has made clear that the ultimate inquiry is whether protecting the misconduct serves the purposes of the Act. *Earle Industries, Inc. v. NLRB*, 75 F.3d 400, 405 (8th Cir. 1996). This Court has rejected the Board's practice of "distinguish[ing] only between gradations of offensiveness" in evaluating the misconduct. *Id.* Instead, this Court has evaluated whether the Board's balancing of the competing interests in such cases is "anchored in the policies of the Act." *Id.* (balancing the employee's Section 7 rights with the employer's right to operate its business); *NMC Finishing*, 101 F.3d at 532 (balancing the competing Section 7 rights of the picketing and nonpicketing employees). Where the Board improperly

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balances the competing interests, this Court has refused to enforce the Board's orders. *Id.*

Here, Runion's racist statements implicate not only Section 7 of the Act but also the rights of the African-American replacement workers under Title VII to be free from discrimination and harassment and Cooper's legal obligation to protect those rights. The Board's order extending the Act's protection to Runion's racist statements fails to properly balance, or even acknowledge, the Section 7 or Title VII rights of the African-American replacement workers. The Board instead only evaluates the "gradations" of violence in Runion's racist statements and considers only *his* Section 7 rights.

The Board's protection of Runion's racist statements, simply because they are allegedly not violent enough, fails this Court's ultimate test that the Board protect misconduct only to the extent that such protection furthers the purposes of the Act. The Board's protection of Runion's racist statements (the *stipulated* reason for his discharge) is untethered to any legitimate statutory purpose at all.

This Court's holdings in *Earle Industries and NMC Finishing* compel a finding that Cooper did not violate the Act when it discharged Runion for his racist statements. In a proper balancing of Runion's Section 7 rights with the Section 7 *and* Title VII rights of the African-American replacement workers (and Cooper's obligations to prevent unlawful discrimination under Title VII), the right of the

replacement workers to engage in protected activity and to be free from invidious discrimination clearly outweighs Runion's right (to the extent that he has one) to cloak himself in the protection of Section 7 while making racist statements on the picket line.

a. The Board's "Gradations Of Offensiveness" Approach To Picket Line Misconduct Provides No Guidance To Employers Who Are Navigating Between The Scylla Of Section 7 And The Charybdis Of Title VII.

There are two fundamental problems with the Board determining whether picket line misconduct is protected by the Act based simply upon "gradations of offensiveness". First, the Board's approach provides no real guidance to employers in deciding whether an employee's misconduct takes him outside the protection of the Act. An employer has no way of knowing, at the time it makes a discharge decision, whether the Board will conclude that the misconduct is offensive or violent enough to warrant discharge. Second, it simply makes no sense to apply such a test to racist statements, when protecting such statements furthers no purpose under the Act.

i. Both Runion and the targets of his racial invective were exercising their Section 7 rights on the night of January 7, 2012.

Both Runion and the African-American replacement workers were engaged in protected activity under Section 7 on January 7, 2012. The replacement workers had the right to cross the picket line and go to work. Runion had the right to picket

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and to express his views of the non-picketers. But Runion's racist comments are not, in themselves, protected under Section 7. The Board does not claim that they are. Rather, the Board holds that, in certain circumstances, an employee's unprotected misconduct is not sufficient to remove the employee from the protection of Section 7 of the Act. The Board's rationale for cloaking employees in the protection of the Act for picket line misconduct that, standing alone, would be unprotected is that some types of "impulsive behavior" and "animal exuberance" are "normal outgrowths of the intense feelings developed on picket lines" and that removing the protection of the Act for such "impulsive behavior" might place "undue strictures" on employees in the exercise of their protected activity. *Terry Coach*, 166 NLRB 560, 563 (1967); *W.C. McQuaide,* 220 NLRB 593, 594 (1975).

But the Board's traditional extension of Section 7 to protect picketing employees from their own "animal exuberance" does not apply to Runion's racist statements in this case. The Board adopted the ALJ's factual findings that, when Runion uttered his racist statements, he was standing "with his hands in his coat pockets" and "not making any threatening gestures or movements" (R.12, Board Order at JA0464). Reviewing the video shows that Runion is, in fact, relaxed on the picket line and not in the throes of uncontrollable emotion. He appears to be having fun attempting to egg on his fellow picketers to direct racist remarks at the

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replacement workers. He is certainly not engaged in a heated exchange with any replacement workers or in any sort of impulsive outburst. (R. 1, Ex. P., Co. Ex. 6 at 7:00 to 7:30).

As this Court held in *Earle Indus. Inc. v. NLRB*, 75 F.3d 400 (1996), although Section 7 may extend to protect "impulsive, exuberant behavior" in the course of protected activity, "calculated" and "flagrant" intentional misconduct does not deserve the protection of the Act. *Id.* at 407. This is not a circumstance where "tempers [ ] flare[d]" and "harsh words [were] exchanged" between Runion and a replacement worker. *Id.* at 406. Runion, like the employee in *Earle Industries*, broke a "legitimate company rule" and did so, not in the heat of the moment, but in a "calculated" and intentional manner. *Id.* at 407.

Moreover, even if this Court concludes that Runion was in the throes of "animal exuberance," there is still no justification for protecting his racist comments. In the 21st century, there is no reason to believe that discharging picketers for making racist comments would place "undue strictures" on the exercise of their Section 7 rights. *W.C. McQuaide,* 220 NLRB at 594. In fact, as the General Counsel noted in his recent guidance on employer work rules, the Board does not consider a policy prohibiting "racial slurs" and "derogatory comments" as violating the Act because no employees reasonably would read such a policy as prohibiting comments protected by the Act, but instead would read it as

prohibiting "unprotected" racist comments. [See General Counsel Memorandum – GC 15-04 Concerning Employer Rules (March 18, 2015), at 11-12]. If Cooper can reasonably promulgate a policy prohibiting racial harassment without running afoul of Section 8(a)(1) because no reasonable employee would interpret such a policy as interfering with rights protected by the Act, then it stands to reason that Cooper should be able to *enforce* such a policy without violating the Act.

The picket line rules that the Union distributed to Runion and his fellow picketers stated: "DO NOT use any racist, sexist or sexually explicit language" (R.1, Ex. P, Co. Ex. 5, JA0336). Clearly, before Runion was fired, the Union did not believe that a prohibition on racist statements was beyond the comprehension of its members or that such a prohibition unduly chills its members' exercise of their Section 7 rights. Cooper submits that it is not too much to ask that picketers refrain from racist speech on the picket line. In 2012, an employee should know the difference between a racial slur (or a negative racist stereotype) and a garden-variety profanity. Runion clearly knew that his comments targeted certain replacement workers *because they were African-Americans*, not because they had crossed a picket line.

As set forth above, the African-American replacement workers' Section 7 rights to be free from coercion and intimidation in exercising their right to cross the picket line outweigh Runion's Section 7 right (to the extent he has any such

right) to shout racist statements on the picket line. Protecting his racist statements furthers no purpose under the NLRA.

ii. The replacement workers also had Title VII rights to be free from racial harassment which the Board fails to take into account.

The Board's order is also deficient because it fails to balance, or even acknowledge, the Title VII rights of the African-American replacement workers to be free from invidious racial harassment. The Board is obligated to refrain from exercising its remedial powers in a manner that interferes with the purpose and objectives of Title VII. Its failure to even acknowledge the purpose and objectives of Title VII also compels this Court to refuse to enforce the Board's order.

As the Supreme Court first stated in *Southern Steamship v. NLRB*, 316 U.S. 31 (1942), the NLRB is obligated, particularly when devising remedies for unfair labor practices, to take into account the objectives of other federal statutes. The Court has, in fact, "never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA." *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 143-44 (2002).

In *Southern Steamship*, the Board had ordered the reinstatement of thirteen seamen that had engaged in hallmark protected activity (specifically, a strike) when they had peacefully refused the orders of their supervisors to prepare their ship to leave the dock of Houston. 316 U.S. at 34-35. The Supreme Court denied

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enforcement of the Board's order because, under 18 U.S.C. Sections 483 and 484, the seamen's refusal to work also constituted an unlawful mutiny. *Id*. In this circumstance, the Court held that the Board had exceeded its remedial powers by enforcing the seamen's right to engage in protected activity in a manner that conflicted with the 18 U.S.C. Sections 483 and 484. *Id; See also, Hoffman Plastic Compounds*, 535 U.S. at 143-44 (refusing to enforce backpay award to undocumented alien employee in violation of IRCA); *Sure-Tan v. NLRB*, 467 NLRB 883 (1986) (same); *Connell Constr. Co. v. Plumbers*, 421 U.S. 616, 626 (1975) (rejected claim that federal antitrust policy should defer to the NLRA); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984) (limiting Board's remedial powers to the extent that they conflicted with bankruptcy law).

Here, Runion's racist statements have a much more tenuous connection to protected activity than the seamen's strike in *Southern Steamship*. Thus, the Board exceeded its remedial authority when it permitted the protection of Section 7 to extend to Runion's racist statements thus trumping the statutory purpose and objectives of Title VII. Unlike Runion's racist statements (which are not themselves protected but which the ALJ found insufficient to remove Runion from the protection of the Act), the African-American replacement workers right to be free from racial harassment in the workplace falls squarely within the protective ambit of Title VII. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 66 (1986) (racial

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harassment falls directly within Title VII's mandate to prevent discrimination against employees in their "terms, conditions, or privileges of employment"), citing *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971).

Thus, this is not a circumstance, as in *Southern Steamship*, where there are equal and competing statutory interests. Here, Title VII's mandate to protect against invidious discrimination substantially outweighs the NLRA's interest (to the extent that it exists at all) to give Runion a free pass for making racist statements on the picket line.

Moreover, Cooper's obligations under Title VII exceed the obligations of the employers examined by this Court in *Earle Industries, Inc.* and *NMC Finishing*. Runion's racist statements do not just encroach upon Cooper's ability to operate its business; they are statutorily proscribed. Employers can *choose* to look the other way when employees engage in insubordinate behavior. However, employers are *required* to stop racial harassment.

An employer is legally responsible for racial harassment of its employees if it has knowledge of such harassment and takes no action to remedy it. *Faragher v. City of Boca Raton,* 524 U.S. 775 (1998); *McDonald v. Santa Fe Transportation*, 427 U.S. 273 (1976) (Congress's intent in passing Title VII was to root out invidious discrimination and eliminate the lasting effects of discrimination). According to the EEOC, an employer has the obligation to stop the harassment,

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correct its effects on the employee, and ensure that the harassment does not recur. *Walton v. Johnson & Johnson Servs., Inc.*, 347 F.3d 1272, 1288 (11th Cir. 2003) *quoting* EEOC Notice 915.002, at § V.C.1.f. (June 18, 1999).

Section 7 protection provided to otherwise unprotected racist statements that occur on the picket line should not outweigh Cooper's right to enforce its Harassment Policy to fulfill its legal obligation to prevent unlawful racial harassment or the Title VII rights of the African-American replacement workers. Protecting Runion's racist statements serves no statutory purpose under the NLRA. Thus, this Court should refuse to enforce the Board's order.

2. Runion's Racist Statements Would Reasonably Tend To Coerce And Intimidate Employees In The Exercise Of Rights Protected Under The Act.

Cooper submits that this Court need not even consider whether Runion's statements "reasonably tended to coerce" the African-American replacement workers in refusing to enforce the Board's order. Whatever the impact of the racist statements, Runion was not privileged to make them under the Act and protecting his racist statements serves no statutory purpose. However, this Court's precedents also compel the conclusion that Runion's racist statements would reasonably tend to coerce and intimidate the African-American replacement workers in the exercise of their Section 7 rights and thus that this Court should refuse to enforce the Board's order.

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The Board adopted the ALJ's conclusion that Runion's racist statements, while "offensive" and "reprehensible", were protected by the Act because they were "not violent in character, not accompanied by violent or threatening behavior, [and] did not raise a reasonable likelihood of an imminent physical confrontation". (R.12, Board Order at JA0463-4). The ALJ further concluded that Runion's statements were not "directed" at the African-American replacement workers because Runion did not utter the statements until the vans filled with the replacement workers had passed by him and additionally that Runion was speaking to his fellow picketers and not to the African-American replacement workers. (*Id.* at JA0464). In adopting the ALJ's findings, the Board likewise noted that Runion made his two racist statements "after a closed van carrying [the replacement] workers had passed" (apparently assuming that because the vans had passed, the replacement workers did not hear his statements). (*Id.* fn. 1 at JA0457). The Board concluded that the statements did not reasonably tend to coerce or intimidate the non-picketing employees in the exercise of their Section 7 rights under *Clear Pine Mouldings*, 268 NLRB 1044 (1984).

This ruling is contrary to this Court's holdings in *Earle Industries* and *NMC Finishing*. In fact, the ALJ, in support of his decision, cited *Nickell Moulding*, 317 NLRB 826 (1995), the case which this Court expressly *refused* to enforce in *NMC*

Finishing. The Board's ruling also conflicts with its previous decision in *Mohawk Liqueur*, 300 NLRB 1075 (1990) that the *Clear Pine* test is objective in nature.

As set forth above, this Court has expressly noted that the Board's practice of deciding these cases based only upon "gradations of the offensiveness" of the misconduct is "far too blunt an instrument" to apply in determining whether an employee engaged in misconduct loses the protection of the Act. *Earle Industries*, 75 F.3d at 405. In *NMC Finishing*, this Court specifically rejected the Board's view that an "offensive" statement cannot run afoul of *Clear Pine Mouldings* simply because the statement did not constitute an overt threat and was not violent in character. *NMC Finishing*, 101 F.3d at 531-2.

In *NMC Finishing*, the Board reinstated an employee who had carried a sign on the picket line for five minutes that read: "Who is Rhonda Sucking today?" *Id.* at 530. The sign referred to a nonpicketing employee named Rhonda Yarborough. There was a dispute over whether Ms. Yarborough even saw the sign. *Id.* Nevertheless, the Court held that the sign reasonably tended to coerce and intimidate under Clear Pine because the offensive message did not "deal[ ] with the morals and character of crossovers generally" but instead "singled out" and "vilified" a specific employee. *Id.* at 532. Thus, the Court held that "an objective, reasonable employee in Yarborough's shoes would have tended to feel coerced,

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intimidated, harassed and fearful of the rationality of a person with the temerity to advance this type of message on a picket line." *Id.*

Runion's racist statements here, like the offensive statement in *NMC*, did not deal with the morals and characters of the replacement workers generally. Instead, Runion's statements singled out African-American replacement workers (many of whom had come from Cooper's Tupelo plant) for vilification because of an immutable characteristic that had nothing to do with their decision to cross the picket line. It is no less coercive to vilify a group of workers for their race than it is to vilify a single employee. In fact, the very existence of Title VII (and the body of law surrounding claims of racial harassment) stands as a testament to the particular power of racist statements to coerce and intimidate those subjected to them.

In addition, the "context" of Runion's statements, which this Court takes into account under *Earle Industries*, further supports a finding that his racist statements would reasonably tend to coerce and intimidate. *Earle Industries,* 75 F.3d at 407. Any reasonable person viewing the videotape from January 7, 2012 can see that it was a volatile situation. There was a larger than ordinary group of locked-out employees (with their families and friends) gathered at Cooper's main gate just in time for the replacement workers to arrive in their vans (R.1, SF at #44, JA0008).

The police were outside the gate that night and remained stationed there while the large crowd milled around. The police cited Runion for jaywalking (which impeded a van of replacement workers trying to enter Cooper) and employee Dave Gilbert for standing in front of a van of replacement workers that was trying to exit the plant (R.1, SF at #78, #94, JA0012, JA0014). Thus, the police were clearly concerned about any situation where the vans were stopped in the midst of the angry crowd outside the gates.

The video also makes clear that replacement workers *could* hear what the picketers were yelling, despite the Board's unsupported conclusion that they did not hear Runion's racist epithets. At 3:31 through 4:00 on the tape (prior to Runion yelling his racist statements) picketers were clearly conversing with replacement workers (who were either exiting vans to report to work or entering vans to leave), although the tape did not pick up what the replacement workers said (R.1, Ex. P, Co. Ex. 6 at 3:31–4:00, back cover of Joint Appendix, Vol. 1). The other salient fact is that everyone in the crowd outside the gate that can be seen on the video is white.

In that environment, Runion yelled his epithets so that "dozens could hear him". (R.1, Ex. T, JA0362). He did not do so in a heated exchange with a replacement worker. He made one racist statement and then, twenty seconds later, made another. Even if Runion directed his racist statements at the other picketers

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across the street, that does not lessen the reasonable tendency of his statements to coerce and intimidate the African-American replacement workers. In fact, it *increases* the tendency of the statements to coerce and intimidate because it demonstrates that Runion was trying to incite the crowd. And the evidence shows that he was successful. The video demonstrates that there were no racist statements made before Runion made his statements, but after Runion made his first racist statement, another unidentified individual chimed in with "Go back to Africa, you bunch of fucking losers" within 10 seconds of Runion's statement. (R.1, SF at #72, JA0012; Ex. P, Co. Ex. 6).

Certainly, if a reasonable employee would have tended to feel coerced and intimidated by the "offensive" sign in *NMC Finishing*, then African-American replacement workers would have tended to feel coerced and intimidated by Runion shouting racist statements in an attempt to incite a large, angry white crowd.

The Board's contrary conclusion is not even consistent with its own standard. Rather than analyze Runion's racist statements under an objective standard, both the ALJ and the Board rely on their conclusion (unsupported by any evidence in the record) that the African-American replacement workers did not hear the statements. (R.12, Board Order at JA0457, JA0464). In *NMC Finishing*, this Court recognized that it did not matter if Ms. Yarborough saw the offensive sign because her subjective reaction was not a material issue. *Id.* at 530.

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Similarly, whether the African-American replacement workers actually heard the racist statements here is not material. What matters is if the racist statements would have tended to coerce and intimidate a reasonable African-American replacement worker under the circumstances existing on that night.[4]

Thus, even if this Court believes it is necessary to evaluate the coercive nature of Runion's racist statements, this Court should refuse to enforce the Board's order. It simply does not reflect reality to treat racist statements shouted from a crowd of white picketers at African-American replacement workers as having an equivalent coercive impact as garden-variety insults and profanities shouted from that crowd. Nor is there any legitimate reason to protect racist statements under Section 7 when such statements, by their nature, are not directed at the legitimate cause of the picketer's anger – the crossing of the picket line – but instead at an immutable characteristic of the non-picketers.

[4] Moreover, as set forth above, there is clear evidence that the replacement workers could hear what the picketers were shouting. The video also does not show everyone within earshot of Runion's racist invective. There could have been other minority employees on or near the picket line or even non-minority employees who were offended by Runion's statements.

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B. This Court Should Refuse To Enforce The Board's Order Because Reinstating Runion With Backpay Violates Section 10(c) Of The Act.

Standard of Review: Cooper submits that the application of Section 10(c)'s "for cause" provision to the undisputed facts in this case is a question of law which this Court should review *de novo*. *NMC Finishing v. NLRB*, 101 F.3d 528, 532 (8th Cir. 1996).

Section 10(c) prohibits the Board from reinstating or ordering backpay for an employee discharged "for cause" by an employer. This Court has held that the Board "does not have the power to order reinstatement or backpay for employees discharged for obvious personal misconduct, because to do so would violate Section 10(c) as interpreted by the Supreme Court in *Fibreboard*". *NLRB v. Potter Electric Signal Company*, 600 F.2d 120, 124 (8th Cir. 1979); *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 217 (1964) (Section 10(c) "was designed to preclude the Board from reinstating an individual who had been discharged because of misconduct").

Here, the parties stipulated that Cooper discharged Runion for making the two racist statements. And an Arbitrator found that the racist statements were just cause for Runion's discharge. Thus, Cooper discharged Runion "for cause", not for his protected activity, and Section 10(c) prohibits the Board from ordering

Cooper to reinstate Runion and make him whole for any loss of earnings or benefits that he has suffered.

The Board, adopting the ALJ's opinion, rejected Cooper's Section 10(c) argument on the basis that Runion's racist statements occurred during his protected activity and that he was thus discharged for engaging in protected activity (notwithstanding the parties' stipulation) (R.12, Board Order at JA0468). The Board Decision also attempts to make a distinction between the arbitrator's "just cause" determination and Section 10(c) "for cause" language (*Id.*)

Neither of these arguments withstand scrutiny. As for the Board's contention that Section 10(c) does not apply to this case because Runion uttered his racist statements while engaged in protected activity, the Board decision is contrary to the plain language of Section 10(c) and its legislative history. The legislative history clearly reflects that an employer could have "cause" for discharge even if the misconduct occurred during the course of protected activity. The Conference Report, commenting on the final changes to the Act, states in relevant part as follows:

> [I]n section 10(c) of the amended act, as proposed in the conference agreement, it is specifically provided that no order of the Board shall require the reinstatement of any individual or the payment to him of any back pay if such individual was suspended or discharged for cause, *and this, of course, applies with equal force whether or not the acts constituting the cause for discharge were committed in connection with a concerted activity*.

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H.R. Rep. 80-510 at 39 (1947), reprinted in 1 LMRA Hist. 543 (emphasis added). In fact, in explaining the impetus for the "for cause" prohibition, the initial House Report on the bill referenced the Board's decision in *Wyman-Gordon Company*, 62 NLRB 561 (1945), which concerned, in relevant part, whether an employee was discharged for misconduct during the course of the protected activity of soliciting his fellow employees to join a union. See H.R. Rep. 80-245 at 42 (1947), reprinted in 1 LMRA Hist. 333. The report emphasized that the purpose of the "for cause" prohibition was to prevent the Board from "infer[ring] an improper motive when the evidence show[ed] cause for discipline or discharge". *Id*.

The Supreme Court has likewise acknowledged that that "cause" could exist for discharge within the meaning of Section 10(c) even if the misconduct occurred as a part of "concerted activity wholly or partly within the scope" of Section 7. *NLRB v. Local Union No. 1229, IBEW,* 346 U.S. 464, 477-478 (1953). See also, *Paramount Mining Corp*., 631 F.2d 346 (4th Cir. 1980); *NLRB v. Knuth Brothers*, 537 F.2d 950 (7th Cir. 1976). Thus, the simple fact that Runion's racist statements occurred during otherwise protected activity has no bearing on whether Section 10(c) prohibits the Board from reinstating Runion.

The Board Decision's attempt to argue that the arbitrator's determination that "just cause" existed for Runion's discharge somehow means that his discharge was not "for cause" is also meritless. The only distinction between "just cause"

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and "for cause" under Section 10(c) is that "just cause" is a more stringent standard. "For cause" under Section 10(c) simply means "the absence of a prohibited reason". *Anheuser-Busch, Inc*., 351 NLRB 644, 646 (2007). Here, it is stipulated that Cooper's managers discharged Runion because of his racist statements. There is absolutely no evidence that Cooper's true motivation for discharging Runion was his protected activity and that his racist statements were just a pretext for this unlawful discrimination. Under these circumstances, it is clear that Cooper's discharge of Runion was "for cause" within the meaning of Section 10(c). Thus, the Board's order does not merit enforcement.

C. This Court Should Refuse To Enforce The Board's Order Because The General Counsel Did Not Meet Her Burden Of Proving That Cooper Was Motivated By Anti-Union Animus In Discharging Runion.

Standard of Review: This Court will enforce a Board order finding a violation of Section 8(a)(3) if the Board has correctly applied the law and its factual findings are supported by substantial evidence. *Carleton College v. NLRB*, 230 F.3d 1075, 1078 (8th Cir. 2000).

Given that Runion's racist statements are the stipulated motive for his discharge, this Court should also refuse to enforce the Board's order because the General Counsel failed to carry her burden of proving that Cooper discriminated against Runion by discharging him for engaging in protected concerted activities in violation of Section 8(a)(3) of the Act.

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Section 8(a)(3) prohibits "discrimination" against an employee for engaging in protected activities. In order to establish a violation of Section 8(a)(3), the General Counsel, at all times, has the overall burden of proving discrimination. The General Counsel must first show that an employee's "protected conduct was a substantial or motivating factor in the adverse action" taken by the employer. If, and only if, the General Counsel meets that burden, the burden shifts to the employer to "exonerate itself by showing that it would have" taken the same action "for a legitimate, nondiscriminatory reason regardless of the employee's protected activity." The burden then shifts back to the General Counsel to prove that the employer's purported reason for the discharge is not worthy of belief, thus permitting the Board to conclude that the purported reason was just a subterfuge for unlawful discrimination. *Nichols Aluminum, LLC v. NLRB*, 797 F.3d 548, 554 (8th Cir. 2015).

Here, the General Counsel did not meet her initial burden of showing that Runion's "protected conduct" was a motivating factor in Cooper's decision to discharge him. Racist statements are not, themselves, protected activity under the Act. The fact that the racist comments were uttered on the picket line cannot equate to proof that the true motivation for Runion's discharge was his protected activity rather than his "reprehensible" misconduct. Thus, there was no initial

showing that Runion's racist statements were protected conduct and no Section 8(a)(3) violation can be proven.

The Board found that the General Counsel had proven that Cooper acted with anti-union animus in discharging Runion under the test set forth in *Siemens Energy & Automation, Inc*., 328 NLRB 1175 (1999) because, according to the Board, but not the arbitrator, Runion's racist statements did not reasonably tend to coerce or intimidate the African-American replacement workers in the exercise of their rights under the Act (R.12, Board Order at JA0466).

In *Siemens*, the Board held that, in evaluating discharges for picket line misconduct, it would first determine whether an employer denied reinstatement to a picketer whose misconduct "would reasonably tend to coerce or intimidate employees" under *Clear Pine*. Then, once the General Counsel established that the picketer was denied reinstatement for conduct related to his picketing activity, the employer would have the burden of showing that it had an honest belief that the picketer engaged in misconduct. If the employer met that burden, the General Counsel would then have the ultimate burden of proving that the picketer did not, in fact, engage in the misconduct. 328 NLRB at 1175.

Cooper would agree that in the ordinary case, the application of the *Siemens* test would give rise to a reasonable inference as to an employer's motivation in discharging a picketing employee. However, in this case, even if this Court agrees

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with the Board that Runion's racist statements do not meet the *Clear Pine* test for coercion, it is not reasonable to infer that Cooper therefore acted with anti-union animus in discharging Runion.

The parties have stipulated that Runion was discharged because Cooper believed he made the racist statements (R.1, SF at #54, #92, JA0009, JA0014). The Board found that he did, indeed, make both racist statements attributed to him. There is no evidence, or claim, that Cooper's reason for discharging him was untrue or a pretext, or motivated by animus. And Board law is clear that the racist statements, by themselves, are unprotected. Thus, just because Runion's racist statements occurred on the picket line, this does not prove that Cooper's *reason* for discharging Runion was just a subterfuge for unlawful discrimination (i.e., that Cooper's reason is not worthy of belief and therefore is not the true reason for Runion's discharge). It simply proves that Runion made his racist statements on the picket line. Such a finding is not sufficient to prove that Cooper was motivated by anti-union animus in discharging Runion.

The General Counsel always bears the ultimate burden of proving discrimination in any Section 8(a)(3) claim and she cannot meet her burden here. The record is devoid of any evidence of anti-union animus by Cooper. Cooper and the Union have a long-standing relationship lasting over 70 years at the Findlay plant. (R.1, SF at #18, JA0004). Cooper's lockout was lawful. And with respect

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to the picketing activity in 2012, Cooper ultimately refused to reinstate only one employee for picket line misconduct – Runion (R.1, SF at #94, JA0014). If Cooper was motivated by anti-union animus in disciplining employees for picket line misconduct, it would have surely disciplined employees Carnes and Burns – who engaged in numerous vulgar and profane statements on the night of January 7, 2012 (R.1, SF at #69, #70, JA0011).

For this reason as well, the Board erred in concluding that Cooper violated Section 8(a)(3) and (1) in discharging Runion and this Court should refuse to enforce the Board order reinstating him with backpay. Cooper requests that this Court drag the NLRB into the 21st Century so that the Board no longer extends the protection of Section 7 of the NLRA to racist speech and conduct that violates Title VII of the Civil Rights Act, unless the Board can prove that the employer's true motivation is not the employee's unprotected racist activity but instead his protected Section 7 activity.

D. Arbitrator Williams's Award Upholding The Discharge Of Runion Is Not Repugnant To The Act And Is Entitled To Deference Under *Olin Corporation,* 268 NLRB 573 (1984).

Standard of Review: This Court reviews a Board decision refusing to defer to an arbitrator's decision under an abuse of discretion standard. *Doerfer Engineering v. NLRB*, 79 F.3d 101 (8th Cir. 1996).

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Although this Court has addressed the Board's deferral policy on only one occasion, this Court has acknowledged the national policy favoring arbitration as set forth in *Olin Corporation*, 268 NLRB 573 (1984) and refused to enforce a Board order where the Board substituted its judgment for an arbitrator, simply because the arbitrator reached a decision with which the Board disagreed. *Doerfer Engineering v. NLRB*, 79 F.3d 101, 103 (8th Cir. 1996). This Court should similarly refuse to enforce the Board's order and reinstate Arbitrator Williams's Award in this case.

Under *Olin*, the Board must defer to an arbitrator's award so long as: 1) the arbitrator adequately considered the unfair labor practice issue that the Board is called on to decide; and, 2) the award is not clearly repugnant to the purposes and policies of the Act. *Olin Corporation*, 268 NLRB 573, 574 (1984).[5] Although the ALJ concluded that Arbitrator Williams's Award failed both *Olin* requirements, the Board relied only upon the ALJ's finding that the Award was repugnant to the Act in its decision to refuse to defer to his Award. Thus, the issue before this Court is whether Arbitrator Williams's Award is repugnant to the Act.

The Board, adopting the ALJ's findings, concluded that Arbitrator Williams's Award was repugnant to the Act because his finding that Cooper

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[5] While the Board in *Babcock & Wilcox Construction, Inc.*, 361 NLRB No. 132 (2014) overruled *Olin Corporation*, 268 NLRB 573, 574 (1984), the Board did so only prospectively so the *Olin* test for deferral applies to this case.

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discharged Runion for just cause was contrary to Board precedent that "a picketer's use of even the most offensive language and/or gestures, standing alone, does not forfeit the protection of the Act, so long as those actions do not constitute a threat" (R.12, Board Order at JA0467). Further, the Board concluded Arbitrator Williams's statement that Runion's racist statements were "even more serious" in the context of a picket line because "there was a genuine possibility of violence" provided less protection for picket line misconduct than the Act affords. (*Id.*).

For the reasons set forth in Section I(A), supra, the Board's finding that the Arbitrator's decision is "repugnant" to the Act because Runion's racist statements were not threats is directly contrary to this Court's holding in *NMC Finishing* and thus does not warrant setting aside the Arbitrator's finding that just cause existed for Runion's discharge.

But even if this Court agrees with the Board that Runion's racist statements would not cause him to lose the protection of the Act if this case were originally heard by the Board, this disagreement with Arbitrator Williams's Award does not warrant a refusal to defer under *Olin*.

An arbitrator's award is not "clearly repugnant" to the Act simply because it fails to replicate the Board's analytical framework for deciding a specific issue or because the arbitrator reaches a decision that is contrary to the decision that the Board would have reached. All that *Olin* requires is that an arbitrator's award be

susceptible to an interpretation consistent with the broad parameters of the Act (i.e., that there be some Board precedent that supports the arbitrator's decision). *Smurfit-Stone Container Corp*., 344 NLRB 658, 659-660 (2005). In this case, Arbitrator Williams's Award is consistent with some Board precedent (even if it may be inconsistent with others). Under these circumstances, This Court should defer to Arbitrator Williams' Award under *Olin* even if it concludes that Runion's racist statements are protected by the Act.

1. An Arbitration Decision Upholding the Discharge of an Employee for Making Offensive and Reprehensible Racist Comments Is Not Repugnant to the Act.

The Board misconstrues its own precedents in concluding that Arbitrator Williams's Award is clearly repugnant to the Act. Arbitrator Williams's Award is susceptible to an interpretation consistent with the Act if there is Board precedent deferring to an arbitrator's decision finding that an employer properly discharged (or refused to reinstate) a picketer for engaging in profane and/or racist language that did not constitute a threat of violence. That is precisely what happened in *Spielberg Manufacturing Co*., 112 NLRB 1080 (1955), the hallmark deferral case that first enunciated the "clearly repugnant" test.

In *Spielberg*, the employer refused to reinstate four picketers who engaged in various profane and racist statements on the picket line but did not engage in threats or violence (similar to Runion's racist statements here). In *Spielberg*, the

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picketers called females crossing the picket line "prostitutes, whores and bitches", called an African-American employee "a yellow n---er" and called the treasurer of the Company a "J— S.O.B.". 112 NLRB at 1084-1085.

The employer and the union agreed to arbitrate the issue of whether the strikers could return to work (just as Cooper and the Union did here even though there was no collective bargaining agreement between the parties when Runion was discharged). The arbitration panel in *Spielberg* conducted a hearing and concluded that the picketers were not entitled to reinstatement and the picketers then filed an unfair labor practice. *Id.* at 1081. Similarly, in this case, Arbitrator Williams conducted the hearing over Runion's discharge and the Union then filed its unfair labor practice charge.

The ALJ in *Spielberg* refused to defer to the arbitration panel's decision, concluding that the picketers' profane and disparaging language was not sufficient to warrant the employer's refusal to reinstate them and thus that the employer had violated Section 8(a)(3) and (1) of the Act. The Board, however, reversed the ALJ's ruling, holding, in relevant part, that the arbitration panel's decision was not "clearly repugnant" to the Act even though the Board would not "necessarily decide the issue of the alleged strike misconduct as the arbitration panel did". *Id.* at 1082.

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Arbitrator Williams's Award that Runion's racist statements warranted his discharge is consistent with the Board's decision to defer to the arbitration panel's award in *Spielberg*. Thus, under *Olin*, Arbitrator Williams's Award is not "clearly repugnant to the Act".[6]

Because there is precedent consistent with Arbitrator Williams's Award, it is irrelevant that there may be other cases inconsistent with his Award. Thus, even if this Court concludes that the cases cited by the ALJ in his decision [specifically *Mobil Oil Exploration & Producing, U.S.,* 325 NLRB 176 (1997); *Garland Coal & Mining Co.,* 276 NLRB 963 (1985); *Cone Mills Corp.,* 298 NLRB 661 (1990); and *Union Fork & Hoe Co.,* 241 NLRB 907 (1997)] are inconsistent with Arbitrator Williams's Award, that does not make deferral inappropriate in this case. Cooper would further note that these cases are, in fact, all easily distinguishable from the instant case in that all of those cases involved circumstances where an arbitrator upheld a discharge where the conduct for which the employee was discharged was,

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[6] Cooper would further note that there are also Board cases, decided outside of the deferral context, where the Board has held that profane statements on the picket line, even where such statements do not involve racial slurs, were sufficient to remove striking employees from the protection of the Act. See *American Tool Works Company*, 116 NLRB 1681 (1956) (affirming ALJ decision that "certain strikers exceeded the bounds of protected activity by the use of profanity"); *Nutone, Inc*., 112 NLRB 1153, 1171-73 (1955) (same) enf'd in relevant part, *USW v. NLRB*, 243 F.2d 593 (D.C. Cir. 1956), aff'd in part and rev'd in part *NLRB v. USW*, 357 U.S. 357 (1957). The existence of this precedent is all that is needed to demonstrate that Arbitrator Williams's Award is not clearly repugnant to the Act.

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itself, protected activity, rather than addressing whether an employee's unprotected misconduct caused him to lose the protection of the Act.

The Board, in adopting the ALJ's decision, attempted to distinguish this case from *Spielberg* on the grounds that, in *Spielberg*, the profane insults occurred over several days of picketing whereas, in this case, Runion "made his two racist statements after a closed van carrying the replacement workers had passed" (R.12, Order at fn. 1, JA0457). This is a curious distinction, given that *Clear Pine* is an objective test and the Board is apparently taking the position that no racist statements on the picket line violate the Act unless they constitute threats. Moreover, Cooper's duty to protect the Title VII rights of its minority employees (and its right to enforce a harassment policy) is not dependent upon whether racist statements are made on one day or over several days.

But, notwithstanding the Board's inconsistent positions, it has repeatedly deferred to arbitration awards under *Olin* addressing misconduct occurring in the midst of protected activity even where the Board would have otherwise reached a different result than the arbitrator as to whether an employee's misconduct crossed the line. As set forth below, Arbitrator Williams's Award is, in fact, susceptible to an interpretation that is consistent with the Board's *Clear Pine* test for picket line misconduct.

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2. Arbitrator Williams's Decision Meets All the *Clear Pine Mouldings* Criteria for Evaluating Strike-Related Misconduct.

The Board standard for strike-related misconduct expressed in *Clear Pine Mouldings* is "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 1044, 1046 (1984). Although the Board may disagree with Arbitrator Williams's ultimate conclusion, his decision is susceptible to an interpretation consistent with the *Clear Pine Mouldings* test and thus must be deferred to under *Olin*.

First, Arbitrator Williams considered Runion's racist statements "under the circumstances" existing on the night of January 7, 2012 – noting the "constant verbal exchanges" between the replacement workers and the picketing employees (R.1, Ex. P, Co. Ex. 6; Ex. T at JA0361) and the fact that Runion yelled his two racist statements so that "dozens of people could hear" them – and potentially act upon them (R. 1, Ex. T. at JA0361-2). Arbitrator Williams concluded that "there was a genuine possibility of violence" on the picket line that night and that Runion's comments increased the possibility that the "meet and greet with the scabs" (as Runion described it) "would escalate into violence" (*Id.* at JA0355, JA0361-2).

Second, Arbitrator Williams considered whether Runion's racist statements reasonably tended to coerce or intimidate the African-American replacement

workers to whom it was directed (*Id.* at JA0362-3). He concluded that, although Runion and the other picketers had the right to express their animosity toward the replacement workers, the African-American replacement workers were not "deserving of any more animosity than the other replacement workers" (*Id.* at JA0363). Thus, Arbitrator Williams considered the coercive impact of Runion's racist statements on their intended targets – the African-American replacement workers – as *Clear Pine Mouldings* directs, in light of the circumstances existing on January 7, 2012.

Arbitrator Williams concluded that Runion's racist statements were "so intolerable" as to constitute "gross misconduct" and were just cause for his discharge (*Id.*). His consideration of the relevant factors under the *Clear Pine Mouldings* test is sufficient under *Olin* to warrant deferral in this case.

The Board's refusal to defer to Arbitrator Williams's evaluation of Runion's racist statements is not consistent with either the record evidence or Board precedent under *Olin*.

First, the Board, adopting the ALJ's decision, is incorrect in claiming that Arbitrator Williams did not consider the fact that Runion made his racist statements on the picket line. Arbitrator Williams expressly noted in his Award that the Union argued that "on a picket line . . . there is generally more tolerance for misconduct that would constitute just cause for discharge if it were committed

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in the plant" (R.1, Ex. T, JA0359). Arbitrator Williams' determination that Runion's racist statements were still sufficient to justify his discharge, in light of the circumstances of January 7, 2012, is an implicit rejection of the Union's argument. The Board has long held that where an arbitrator was presented with an argument on the statutory issue and nevertheless upholds a discharge based on just cause, the arbitrator's award is susceptible to an interpretation consistent with the Act under *Olin* even if the arbitrator's award does not reflect the consideration of the statutory issue. *Babcock & Wilcox*, 361 NLRB No. 132, 2014 NLRB LEXIS 964, *26-29 (2014) (decision arguably consistent with a finding that arbitral body considered and rejected the union's contention that a discharge was motivated by employee's steward activities); *Teledyne Industries, Inc*., 300 NLRB 780, 781-2 (1990) (arbitrator "necessarily rejected" the Union's assertions that employee was discharged for protected activities by holding that just cause existed where employee was insubordinate); *Anderson Sand & Gravel*, 277 NLRB 1204, 1205 (1985) (arbitration panel, in deciding that employees walked out in violation of contractual no-strike clause implicitly rejected the Union's contention that the walkout was protected because it was in protest of abnormally dangerous working conditions).

Second, deferral is particularly appropriate here given that the *Clear Pine Mouldings* test, by its very nature, requires the exercise of judgment, based upon

the specific facts of a case, as to whether the misconduct at issue reasonably tended to coerce and intimidate. The *Clear Pine Mouldings* test is a rule of reasonableness. Here, Arbitrator Williams reasonably found that Runion's racist statements would tend to inflame the angry crowd of white picketers on the night of January 7, 2012 against the African-American replacement workers who were the express target of those statements. Deference to this Award under *Olin* is consistent with "the national policy strongly favor[ing] the voluntary arbitration of disputes" as well as the expertise of labor arbitrators in resolving industrial disputes. *Olin*, 268 NLRB at 573-4.

Moreover, the Board's disagreement with Arbitrator Williams's exercise of his judgment is not sufficient under *Olin* to refuse to defer to his Award.

Aramark Services, *Inc*., 344 NLRB 549 (2005) is instructive on this point. In *Aramark*, the arbitrator found just cause for discharging the employee for harassment even though that harassment occurred during the course of protected activity. *Id*. at 549. In reversing the ALJ's decision and finding deferral appropriate under *Olin*, the Board admitted that "[a]rguably, a case can be made that [the employee's] conduct was not so 'abusive' or disruptive as to cost her the protection of the Act." *Id*. However, the Board concluded that "does not mean that the arbitrator's decision was repugnant to the Act", even though the arbitrator

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considered the subjective impact of the employee's "harassment" of her fellow employees – which was contrary to Board precedent. *Id.*

The Board noted that "[j]ust how abusive [an employee's] conduct must be to lose the Act's protection is a difficult issue, with the difficulties of line-drawing apparent in the Board's cases" and that "[d]istinctions are drawn based on the degree of offensiveness of the conduct and other factors". *Id.* at 551. Under the *Olin* standard, the Board found that, even if it were to conclude that the employee's conduct was protected, "the arbitrator was acting reasonably and rationally to come out the other way" because the arbitrator "analyzed the case consistent with the Board's approach to determining when union solicitation loses the protection of the Act." *Id.*

Just as in *Aramark*, Arbitrator Williams analyzed Runion's racist statements in this case consistent with the Board's *Clear Pine Mouldings* test. Thus, even if the Board would have concluded that Runion's racist statements did *not* "reasonably tend to coerce or intimidate" the African-American replacement workers in the exercise of *their* Section 7 rights, deferral to the Arbitrator's contrary opinion is still appropriate under *Olin*.[7]

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[7] See also, *Texaco, Inc.*, 279 NLRB 1259 (1986) (deferring to arbitrator's award upholding discharge of picketers for strike misconduct even though Board would come to contrary conclusion and even though the award "does not replicate the Board's own findings, analytical framework, and remedial scheme"); *Sawin & Co., Inc.*, 277 NLRB 393, 395 (1985) (deferring to arbitrator's award where (cont'd)

3. Arbitrator Williams's Award Is Consistent with *Atlantic Steel Company* and Its Progeny.

Arbitrator Williams's decision that Runion's statements were "so intolerable" as to warrant his just cause dismissal is also susceptible to an interpretation consistent with *Atlantic Steel Co.,* 245 NLRB 814 (1979) and its progeny – which hold that, even though an employee may be otherwise engaged in protected activity, he can engage in misconduct "so opprobrious" as to lose the protection of the Act (R.1, Ex. T at JA0363).

Although *Atlantic Steel* did not involve racist remarks, the Board has applied *Atlantic Steel* to racist statements and concluded that an employee can lose the protection of the Act by making racist statements while otherwise engaged in protected activity. *Avondale Industries*, 333 NLRB 622, 637-8 (2001) (union activist lawfully discharged by making unfounded assertion that foreman was a Klansman). The same holds true for employees who engage in sexually harassing statements (which, like racist statements, implicate Title VII) while otherwise engaged in protected activity. *PPG Industries, Inc*., 337 NLRB 1247, 1247 (2002) (male union supporter engaged in protected activity was lawfully disciplined for

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arbitrator addressed only the issue of whether the employer acted "unfairly" in refusing to reinstate the strikers without addressing whether the strikers engaged in "serious acts of misconduct" under *Clear Pine Mouldings*, 268 NLRB 1044 or even specifying the actions in which the strikers had engaged).

shouting at a female employee "They're f----ing you. They're screwing you. You need to sign one of my [union authorization] cards").

In fact, an Advice Memorandum from the General Counsel cited the above cases (with the exception of *PPG Industries*) in concluding that an employee engaged in a Facebook "discussion" implicating Section 7 concerns lost the protection of the Act under *Atlantic Steel* by using offensive racist stereotypes in his post – specifically, referring to his fellow employees as "ghetto people". See General Counsel Advice Memo for Case No. 07-CA-06682, *Detroit Medical Center*, 2012 NLRB GCM Lexis 1, at *7 (January 10, 2012) (the use of offensive racist stereotypes was so "opprobrious" as to forfeit employee's protection under the Act). Runion's racist comments were the same type of racist stereotypes as those discussed in the Detroit Medical Center Advice Memo, and were, in fact, even more offensive.

The existence of this precedent is sufficient under *Olin* to warrant deferral under the "clearly repugnant" test.

4. Enforcing The Board's Order And Refusing To Defer To Arbitrator Williams's Award Is Contrary To Federal Policy Favoring The Voluntary Arbitration Of Disputes.

Finally, in *Doerfer Engineering v. NLRB*, 79 F.3d 101, 103 (8th Cir. 1996), this Court recognized that enforcing a Board order under the circumstances of this case is contrary to federal policy favoring the voluntary arbitration of disputes.

In *Doerfer*, the union filed an unfair labor practice and a grievance challenging the employer's decision to unilaterally discontinue its practice of permitting employees to use company equipment for personal projects. *Id.* at 101. The NLRB deferred the matter to arbitration. Before the arbitrator, the employer claimed that the grievance was not arbitrable. The union insisted that it was. The arbitrator concluded that he had the authority to decide the grievance and ruled in favor of the employer. *Id.* at 102.

The union then returned to the Board claiming that the Board must disregard the arbitrator's award because the grievance was *not* arbitrable. The Board agreed and found in favor of the union on its unfair labor practice charge. *Id.* at 103.

On appeal, this Court refused to enforce the Board order and reinstated the arbitrator's award. The Court held that the union "cannot now change its position simply because the arbitrator reached an unfavorable conclusion on the merits" and concluded that enforcing the Board order "would go against the national policy, favoring the voluntary arbitration of disputes". *Id.* This Court concluded by noting that:

> A contrary decision would encourage the parties to renege upon their agreement to be bound by an arbitrator's decision and to circumvent the grievance procedure by filing an unfair labor practice charge whenever they felt they had a better chance for favorable resolution before the Board.

Id.

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Here, there was no collective bargaining agreement between the parties when Runion made his racist statements and neither party was *required* to arbitrate his discharge. At the time, the Union could have decided to file an unfair labor practice over Runion's discharge and eschew arbitration. But Cooper and the Union expressly agreed to arbitrate any grievances over the discharge of bargaining unit employees during the lockout. (R.1, Ex. P at JA0159-160). By so doing, the parties agreed to accept Arbitrator Williams's judgment in determining whether Runion's racist statements should be tolerated because he made them on the picket line or whether they constituted just cause for his discharge.

The Union, however, decided to hedge its bets and filed its unfair labor practice charge one month *after* arbitrating the grievance. It subsequently refused Cooper's request to submit the statutory issue to Arbitrator Williams for his determination (R.3, Exs. 1 and 2, JA0380-1). When the Union did not like the results of the arbitration, the Union chose *not* to be bound by the result.

Just as in *Doerfer*, enforcing the Board order in this case would undercut federal policy favoring voluntary arbitration. It would deter employers from voluntarily agreeing to arbitrate disputes occurring after the expiration of a collective bargaining agreement and encourage parties to an arbitration to circumvent agreements to arbitrate whenever they chose to do so.

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For this reason as well, this Court should refuse to enforce the Board's order and defer to Arbitrator Williams's Award.

VI. CONCLUSION

Cooper respectfully requests that this Court refuse to enforce the Board's Order reinstating Runion and awarding him backpay and to, instead, defer to Arbitrator Williams's Award that just cause existed for Runion's discharge.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 13,984 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times Roman font-size 14.

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I hereby certify that on August 24, 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 CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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