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

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

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A. Introduction

Protecting racist statements on the picket line serves no purpose under the National Labor Relations Act. Moreover, the Board's policy of providing a "free pass" for racist statements on the picket line ignores the inherently coercive impact of those statements under Section 7 and the Title VII rights of the African-American replacement workers subjected to them. Such a policy also impermissibly interferes with the purpose and objectives of Title VII and employers' legal and moral obligations to their employees.

The arguments made by the General Counsel and the Intervenor USW in favor of enforcing the Board's order do not justify keeping in place an antiquated policy of providing protection to racist speech simply because it happens to occur on a picket line.

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

This Court has made clear that the ultimate inquiry in its review of a Board order is whether the "balancing test" employed by the Board is "anchored in the policies of the Act" and whether enforcing the Board order will "serve the purposes of the Act". *Earle Industries, Inc.*, 75 F.3d 400 (8th Cir. 1996)*; NMC Finishing*, 101 F.3d 528 (8th Cir. 1996). Neither the GC nor the Union provide any reasoned explanation as to why protecting Runion's racist statements in this case furthers the purposes of the Act. For this reason,

the Board's application of the *Clear Pine* picket line misconduct test to protect Runion's racist statements is entitled to no deference from this Court and this Court should refuse to enforce the Board's order.

Rather than explaining why protecting Runion's racist statements furthers the purposes of Section 7, the GC and the Union simply direct this Court to *Airo-Die Casting, Inc*. 348 NLRB 810 (2006) and other picket line misconduct cases that conclude that the Act protects any statement by a picketing employee, including "f--- you n-----", so long as the statement does not threaten physical violence. The GC and the Union argue that this Court must defer to the Board's application of *Clear Pine* to Runion's racist statements and enforce the Board's order because substantial evidence in the record supports it. But the contentions of the GC and the Union are without merit.

As an initial matter, the standard of review urged by the GC and the Union is incorrect. In *NMC Finishing*, this Court held that it reviews the Board's application of the *Clear Pine* picket line misconduct test *de novo* (as either a question of law or a mixed question of fact and law). 101 F.3d at 532. The Board is not entitled to deference if its order does not further the purposes of the Act.

Second, the Board's expressed rationale for protecting picket line misconduct undercuts its decision to protect Runion's racist statements in this case. The General Counsel explains that the reason the Board interprets *Clear Pine* to extend protection to racist statements, like Runion's, is that "impulsive behavior on the picket line is to be expected" arising from "confrontations between union members and replacement workers." (GC Brief at pg. 15). But the GC cites no evidence and makes no argument that Runion's racist statements were impulsive or arose from a confrontation. The Union, for its part, argues that Runion's racist statements should be protected primarily because they did *not* arise from a confrontation with replacement workers. (USW Brief at pgs. 24-31). But if Runion's racist statements were not "part of a package of verbal barbs thrown out during a picket line exchange" with replacement workers (and they clearly were not), then the rationale for protecting his statements, flimsy as it is, collapses. *NMC Finishing*, 101 F.3d at 533.

The GC and the Union also repeatedly claim – without any evidence – that the African-American replacement workers did not hear Runion's racist statements and thus that his racist statements should be protected under the Act. As a matter of fact, the video makes clear that the replacement workers *could* hear what the picketers were saying. (Cooper's Principal Brief, at pgs.

33-4). Moreover, this Court, in *NMC Finishing*, correctly noted that it was not relevant whether the targeted employee in that case saw the offensive sign about her because "whether a specific individual was actually coerced or intimidated" by a statement on the picket line is not relevant under *Clear Pine*. 101 F.3d at 532. It is also disingenuous to argue that no evidence exists that the African American replacement workers heard Runion's racist statements when any testimony by such workers would have been excluded as irrelevant under *Clear Pine*'s objective test.

As for the racist statements themselves, the Board's precedents are frankly tone-deaf to the inherently coercive impact of such statements. It is simply not true that a racist statement shouted from a crowd of angry white picketers "d[oes] not differ from the general atmosphere on the picket line" and reflects nothing more than "the usual tension between strikers and replacement workers." *Airo-Die,* 348 NLRB at 812. Racism is not a "usual tension" on the picket line or anywhere else. It is statutorily proscribed misconduct that the federal government has spent decades trying to root out of the workplace. As Judge Millett persuasively explained in her concurring opinion in *Consolidated Communications*, 837 F.3d 1 (D.C. Cir. 2016), "conduct of a sexually or racially demeaning and degrading nature is categorically different" from heated words over a labor dispute. Id. at 22.

The GC and the Union both cite *Consolidated Communications* to argue that this Court, like the D.C. Circuit, should defer to the Board's protection of Runion's racist statements. However, this Court made clear in *Earle Industries* and *NMC Finishing* that it will not simply rubber-stamp the Board's application of any of its balancing tests. This Court will only enforce a Board order if doing so will serve the underlying purposes of the Act. *Earle Industries*, 75 F.3d at 405; *NMC*, 101 F.3d at 532. Based on the holdings of *Earle Industries* and *NMC Finishing*, the protection of Runion's racist statements serves absolutely no statutory purpose. Judge Millett authored a very eloquent concurring opinion in *Consolidated Communications* exhorting the Board to overturn its obsolescent precedent. This Court's precedents permit it to go beyond exhortation and show the Board the way to the 21st Century.

The GC and the Union unsuccessfully attempt to distinguish this case from *Earle Industries* on the grounds that the conduct in *Earle Industries* occurred in the workplace and Runion's racist statements occurred on the picket line. But this fact does not mean that the guidelines for evaluating employee misconduct outlined in *Earle Industries* do not apply to this case. In *NMC Finishing*, this Court expressly noted that the analysis of the picket line misconduct in that case "must fall within [the] rules set out in *Earle*

Industries." Id. at 532. Thus, *Earle Industries'* distinction between "impulsive" picket line misconduct (which may be protected within reasonable bounds) and "flagrant" and "intentional" misconduct (which is not protected) applies to this Court's evaluation of Runion's racist statements. 75 F.3d at 406. As Cooper set forth in its initial Brief, Runion's racist statements do not meet the standard for permissible "impulsive" conduct outlined in *Earle Industries*. This is not a circumstance where "tempers [ ] flare[d]" and "harsh words were exchanged." Id. Runion intentionally and repeatedly injected race into a labor dispute in an attempt to incite a large white crowd of picketers. Such conduct is not protected by the Act and renders Runion "unfit for employment." Id.

Similarly, the GC and the Union attempt to distinguish *NMC Finishing* on the grounds that Runion's racist statements were directed to all African-American replacement workers rather than directed to a single employee. But *NMC Finishing* cannot fairly be read as implying that this Court evaluates racist statements on the picket line based upon whether the statements are directed to a single employee or a group of employees. In fact, this Court noted in *NMC* that statements "designed to 'degrade and humiliate' may have no protection whatever under the NLRA." Id. at 531, citing *NLRB v. Longview Furniture Co*., 206 F.2d 274, 275 (4th Cir. 1953). Moreover, this

Court did not state that "offensive words [that are] part of a package of verbal barbs thrown out during a picket line exchange" or a message "dealing with the morals and character of crossovers generally" are entitled to the protection of the Act. Id. at 532. It only noted that it "might" enforce a Board order protecting such statements. Id. As set forth above, Runion's racist statements were not "thrown out during a picket line exchange" and did not "deal[ ] with the morals and character of crossovers generally." Thus, his racist statements do not even meet the standard that this Court indicated that it "might" enforce.

The only imperative laid down by this Court in *NMC Finishing* and *Earle Industries* is that a Board Order "must be anchored in the policies of the Act" in order for this Court to enforce it. 101 F.3d at 532; 75 F.3d at 405. Here, the Board has not, and cannot, provide a plausible justification as to why protecting Runion's racist statements furthers the rights provided under Section 7 (for both employees who choose to picket and those who exercise their corresponding right to cross the picket line). Certainly, the fact that Runion was the only Cooper employee discharged for picket line misconduct (out of 1,044 locked out employees) demonstrates that the protection of racist statements is not essential to protect the rights to communication and self-organization set forth in Section 7 for the picketing employees. And neither the GC nor the Union present any argument that protecting such statements

meets this Court's requirement that the Board's balancing of interests demonstrate an "equal[ ] commit[ment] to the protection of the rights and sensibilities of those who assert their non-union prerogatives under section 7 of the Act". *NMC*, 101 F.3d at 532-33. Finally, for reasons set forth in more detail below, the Board also fails to properly account for the Title VII rights of the African-American replacement workers.

Under these circumstances, the Board's application of *Clear Pine* to protect Runion's racist statements is not a "permissible construction of the statute." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984). The reason why is self-evident – a Board order that does not further the purposes of the Act constitutes an extension of the Board's authority beyond the limits of the statute it was created to enforce.

As Board Members Dotson and Hudson noted in *Clear Pine*, "the only activity the statute privileges in this context [the picket line], other than peaceful patrolling, is the nonthreatening expression of opinion, verbally or through signs and pamphleteering." *Clear Pine Mouldings*, 268 NLRB 1044, 1087 (1984). Runion's offensive and degrading statements do not constitute an expression of opinion as to terms and conditions of employment or convey any message about self-organization or representation. To the contrary, Runion's racist statements targeted African-American replacement workers

because of their personal protected traits, not because they crossed the picket line.

And as the GC and the Union concede, Runion was not in the throes of animal exuberance when he made his racist statements. (GC Brief at pg. 19; USW Brief at pgs. 26-7). They were not an impulsive "slip of the tongue." (JA0361). He was calm, standing with his hands in his pockets, when he made the decision to shout his offensive and degrading statements. Such statements do not deserve the protection of the Act.

C. Protecting Runion's Racist Statements Interferes With The Purposes Of Title VII.

The GC and the Union argue that the protection of Runion's racist statements does not conflict with Title VII because his statements were allegedly not sufficient to constitute a racial hostile work environment claim under Title VII. But this is a "straw-man" argument. Cooper has never claimed that Runion's racist statements, standing alone, would entitle the African-American replacement workers to a judgment against Cooper for a hostile work environment. Thus, the GC's claim that Cooper does not cite a case where an employer was found liable for a picketer's racist statements is also beside the point. (GC Brief at pg. 24). Cooper's position is that it has the legal obligation under Title VII to apply its lawful policy prohibiting harassment to racist statements (even on the picket line). *Dowd v. United*

Steelworkers of America, 253 F.3d 1093 (8th Cir. 2001), cited by the Amici, directly supports Cooper's position because this Court stated that racist statements on the picket line could be "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Id. at 1102.

As for the Board's obligations relating to Title VII, what Cooper is arguing (and what the Supreme Court has held) is that the Board is not permitted to exercise its remedial powers under the Act in a manner that interferes with the purposes and objectives of other federal statutes – in this case, Title VII. Further, based upon this Court's description of the statutory interests to be balanced in *NMC Finishing*, Cooper submits that this Court must also consider the Title VII rights of the African-American replacement workers who were the subject of Runion's racist and demeaning statements.

The GC's argument that Title VII is not relevant unless the Board's Order would directly violate it is without merit. In *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002), the Supreme Court rejected this argument, holding that a Board order impermissibly "subverted" the IRCA even though it did not expressly conflict with it. Id. at 149; see also, *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 172 (1962) (vacating an ICC order because of its "possible effect" on a union's attempt

to exert economic pressure on a group of local motor carriers). The Board is required to exercise "careful accommodation" between the Act and other federal statutes. *Southern Steamship v. NLRB*, 316 U.S. 31, 47 (1942). It is not free to do what it will unless an order directly conflicts with another federal statute.

Further, no party is arguing that Runion's racist statements, standing alone, constitute hallmark Section 7 activity. It is frankly stunning that the GC is taking the position that this Court should permit the Board to evaluate his racist statements without even acknowledging the purposes and objectives of Title VII.[1] If the Board was prohibited from encroaching on maritime law in *Southern Steamship* where the conduct at issue (the right to strike) was the foundational right enshrined in Section 7, then it has clearly exceeded its

[1] The GC claims that the Board has acknowledged the purposes of Title VII in picket line misconduct cases, citing *Consolidated Communications, Inc.*, 360 NLRB No. 140 (2014), at footnote 21. That footnote states:

> Williamson's gesture cannot be legitimately characterized as "sexual harassment." In Title VII cases, a plaintiff cannot generally prevail on the basis of a single incident not involving physical contact. The record, herein, of course is barren as to whether Respondent has ever applied its sexual harassment policy to a single incident not involving physical contact. (citations omitted).

This footnote, composed by an ALJ not the Board, does not constitute a reasoned analysis by the Board of the impact of Title VII on its picket line misconduct jurisprudence.

authority here by extending its protection to Runion's racist statements in a manner that trumps Title VII.

In this respect, it is important to remember that "[Title VII's] 'primary objective' [with respect to employment discrimination] is a 'prophylactic one,' . . . aiming chiefly 'not to provide redress but to avoid harm.'" *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545 (1999). Consistent with their legal obligations under Title VII, employers, like Cooper, adopt harassment policies to restrict behavior that, if left unaddressed, could foster or contribute to a hostile work environment. By arguing that the Board's order does not impinge upon Title VII because Runion's racist statements, standing alone, do not create a hostile work environment (and thus that Cooper has no authority to police them), the GC and the Union are essentially arguing that Cooper has no right to enforce its Harassment Policy unless and until an employee's racist statements rise to the level of a hostile work environment (and not even then if the racist statements occur on the picket line). That would, of course, defeat the very purpose of the Harassment Policy and run roughshod over the primary purpose of Title VII.[2]

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[2] The GC and the Union argue that Cooper disparately enforced its Harassment Policy against Runion based upon its suspension of an African-American employee for a statement made at work. (GC Brief at pg. 27; USW Brief at pg. 35). As set forth in Cooper's Motion to Strike, these arguments are not properly before this Court. Both the GC and the Union raised (con't)

It would also be an impossible standard to apply since what creates a hostile work environment is not a bright line test. By contrast, the standard that Cooper would have the Board apply – to stop protecting racist speech on the picket line unless the Board can show the employer's true motivation for discipline is the employee's Section 7 activity rather than his unprotected violation of policy – is a standard that the Board routinely applies in every other Section 8(a)(3) case.

Two further arguments by the Union deserve mention. First, the Union claims that Cooper could have simply warned Runion that no further racist statements would be tolerated. (Un. Brief at pg. 35-6). During the grievance procedure, Cooper's Human Resources Manager Jodi Rosendale did speak to Runion twice about the racist statements. Runion denied making the "KFC" statement (and repeated that denial at the arbitration). He neither apologized for his conduct nor expressed regret for it. (JA0188). Instead, he just noted that he did not say the "N" word and expressed shock that he was discharged for "one slip of the tongue" (a characterization that he also repeated at the

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this disparate treatment argument before the ALJ. The ALJ did not rule or rely upon the argument. Pursuant to 29 U.S.C. 160(e) and 29 CFR 102.46(h), the GC and the Union were required to file a cross-exception to preserve the disparate treatment issue for review. Neither did so before the Board. Thus, they waived the argument. See, *NLRB v. L & B Cooling, Inc*., 757 F.2d 236, 240 (10th Cir. 1985).

arbitration). (JA0189-90). Upon speaking with Runion, Ms. Rosendale believed that Runion "did not see the significance of what he had said" and left her with no assurance that it would not happen again. (JA0190-1).

Second, the Union claims that if this Court refuses to enforce the Board order, it will "open the door for employers who wish to retaliate against employees for protected picketing to discharge them for supposedly harassing remarks" including private jokes among picketers. (Un. Brief at pg. 38). The Union's concerns are unwarranted. First, there is no dispute that Runion's comments were racist and offensive. Second, there is no dispute that he shouted them at the picket line because he either wanted the African-American replacement workers to hear them or he wanted to incite the crowd of white picketers to engage in further racist statements. Third, the parties have stipulated that Runion's racist comments were the reason that he was discharged, so this is not a case where the Court must decide whether Runion's racist statements are a pretext for unlawful discrimination. Fourth, *Wright Line* provides a vehicle for ascertaining an employer's true motivation in cases where there is a legitimate issue as to the reasons for discharge.

But more fundamentally, Cooper submits that it is not too much to ask that picketers in 2016 refrain from racist speech on the picket line. The GC has expressly stated that a policy prohibiting "racial slurs" and "derogatory

comments" does not violate 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]. The Union's own picket line rules instructed its members not to use "racist, sexist or sexually explicit language." (JA0336). Title VII has been the law of the land (except for the NLRB) since 1965. As Judge Millett notes, the very fact that the overwhelming majority of picketers are "able to effectively communicate their grievances and viewpoints without resort to racial- or gender-based attacks . . . proves that there is no legitimate or organizational role for such misconduct." *Consolidated*, 837 F.3d at 23.

D. The General Counsel Did Not Meet Its Burden Under Section 8(a)(3) Of Proving That Cooper Was Motivated By Anti-Union Animus In Discharging Runion.

Both the GC and the Union dispute Cooper's argument that this Court should refuse to enforce the Board's order because the GC failed to carry her burden under Section 8(a)(3) of proving that Cooper was motivated by anti-union animus in discharging Runion. They argue that there is no necessity to show anti-union animus because this case involves picket line misconduct. Both argue that under *Siemens Energy & Automation, Inc*., 328 NLRB 1175 (1999), Cooper cannot get past the first hurdle (that Runion's racist statements

did not reasonably tend to coerce and intimidate employees under *Clear Pine*) and thus that the Board properly concluded that Cooper violated Section 8(a)(3) by discharging Runion.

However, even if this Court agrees with the Board that Runion's racist statements do not cross the *Clear Pine* threshold of coercion, that finding is not sufficient to conclude that Cooper engaged in unlawful discrimination under Section 8(a)(3). As the D.C. Circuit stated in *Consolidated Communications, Inc.*, in the burden shifting test for picket line misconduct, it is the "General Counsel's obligation to carry the ultimate burden of proving that illegal discrimination has occurred." *Consolidated Communications*, 837 F.3d at 8, citing *Axelson, Inc.*, 285 NLRB 862, 864 (1987).

In fact, the very purpose of the burden shifting under *Siemens* is to shake out either the absence of misconduct (in which case there is no evidence that the employee did anything other than engage in protected activity) or anti-union animus by the employer (the employer's discharge of the picketer was because of his picketing activity and not because of his misconduct). But in this case, the *Siemens* test cannot be used as a stalking-horse for anti-union animus on the part of Cooper and its application cannot give rise to a reasonable inference of discriminatory animus (which is the GC's ultimate burden to prove).

The reason why is that the parties have stipulated that Runion was discharged because Cooper believed that he made the racist statements. Board law is clear that the racist statements, by themselves, are unprotected. Thus, just because Runion's racist statements occurred on the picket line 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).[3]

In order to prove a violation of Section 8(a)(3) in this case, the GC must present some evidence of anti-union animus to meet her ultimate burden of proving discrimination. The record is devoid of any evidence of anti-union

[3] Cooper recognizes that this Court has held that the "*Wright Line* analysis is only necessary if the employer's stated rationale for termination is not activity protected by the NLRA" and that "if the employer's stated reason is itself an activity protected by the statute, the *Wright Line* analysis does not apply." *NLRB v. RELCO Locomotives, Inc*., 734 F.3d 764, 780 (8th Cir. 2013). In *RELCO*, the employer fired two employees for spreading a "malicious rumor." As the Court noted, because that communication was protected activity, firing the employees violated the Act without the need to apply *Wright Line*. Id. at 789-91. But here, Runion's racist statements are the stipulated reason for his discharge and his racist statements are not inherently protected activity. The *only* reason that the Board is protecting Runion's racist statements is because of *where* they occurred – on the picket line. Thus, the fact that Cooper applied its policy to misconduct on the picket line does *not* equate to a finding that Cooper discharged Runion for protected activity. Cooper's stated reason is not, in itself, protected activity. To establish a violation of 8(a)(3), the GC must further demonstrate, per *Wright Line*, that Cooper discharged Runion because he was on the picket line.

animus by Cooper. (Cooper Brief at pgs. 42-3). Thus, the GC has failed to establish that Cooper violated Section 8(a)(3) of the Act by discharging Runion.

E. The Board's Reinstatement Of Runion Violates Section 10(c) Of The Act.

The GC argues that this Court must reject Cooper's Section 10(c) argument because Cooper allegedly "elides the distinction" between "cause" under Section 10(c) and "just cause" under the collective bargaining agreement and "disregard[s] settled law" concerning the meaning of Section 10(c). The GC's argument is both a mischaracterization of Cooper's argument and a misinterpretation of existing case law.

Cooper is not arguing that "just cause" equals "for cause".[4] Cooper does not dispute that the Board, in *Anheuser-Busch*, 351 NLRB 644, 646

[4] The GC cites *Anheuser-Busch*, 351 NLRB 644 (2007) to support its claim that Cooper is "eliding" the distinction between "just cause" and "for cause." In *Anheuser Busch*, the issue was whether an employer's use of unlawful video surveillance (which constituted an unfair labor practice) could be used to prove that employees engaged in misconduct justifying their discharge under Section 10(c)'s "for cause" provision. The Board raised the "just cause" standard to make the point that, in a labor arbitration, the determination of "just cause" implicates notions of due process which might require the exclusion of evidence obtained through unlawful means, whereas the Board was not restrained by such considerations, given that the definition of "for cause" under Section 10(c) simply meant the "the absence of a prohibited reason". Id. at 647 and footnote 14. This discussion cannot be interpreted as establishing that, under the facts of this case, a finding of "just cause" (con't)

(2007), defined "cause" in the context of Section 10(c) as "the absence of a prohibited reason". But the GC ignores the remaining part of that definition – i.e., that the Section 10(c) "cause" inquiry as to whether an employer acted "in the absence of a prohibited reason" is an inquiry into the "real motivating purpose" of the discharge. Id. at 646.

Here, the parties stipulate that Cooper discharged Runion for making the racist statements and did not terminate him for any other conduct he engaged in on the picket line. Prohibiting Runion's reinstatement under these circumstances does not "disregard" settled law but is, in fact, entirely consistent with the relevant case law and the meaning of "cause" in Section 10(c).

The Supreme Court has interpreted Section 10(c)'s "for cause" provision as barring reinstatement for misconduct even if that misconduct occurs 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). This Court has likewise 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

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is somehow fundamentally at odds with the "for cause" provision of Section 10(c).

interpreted by the Supreme Court in *Fibreboard*." *NLRB v. Potter Electric Signal Company*, 600 F.2d 120, 124 (8th Cir. 1979). Although *Potter Electric* admittedly involved misconduct *followed* by an unfair labor practice, this Court has also held that misconduct occurring in the midst of otherwise protected activity bars the award of reinstatement or backpay to the offending employee. *NLRB v. Red Top, Inc*., 455 F.2d 721, 725-726 (8th Cir. 1972). As this Court stated in *Red Top*:

> The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, *and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion*.

Id. at 726, citing *NLRB v. Jones & Laughlin Steel Corp*., 301 U.S. 1, 45-46 (1937) (emphasis added). See also, *NLRB v. Longview Furniture*, 206 F.2d 274, 275-6 (4th Cir. 1953) (the Act does not protect insulting and profane language designed to degrade and humiliate which occurs on the picket line). The "for cause" provision of Section 10(c) was designed to draw the line between the Board's proper exercise of authority to enforce employee's rights under the Act and the employer's right to discharge employees when that right is exercised for reasons other than intimidation and coercion designed to interfere with employee rights under the Act. See, *Potter Electric*, 600 F.2d

at 123-124, citing H.R. Rep. No. 245, 80th Cong., 1st Sess., 42 and H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 44 (1947).

Cooper is not urging this Court to ignore existing law regarding Section 10(c) but rather to follow it. As the Board itself directs, the relevant inquiry is what Cooper's "real motivating purpose" was in discharging Runion. The parties stipulated that Cooper discharged Runion for his racist statements. Cooper's stipulated reason for discharge was not pretext for unlawful discrimination designed to interfere or coerce Cooper's employees with respect to the exercise of their Section 7 rights. Like the employees in *Potter Electric*, Runion "by [his] own actions, caused [his] discharge." Id. at 123. Runion's misconduct constitutes "cause" under Section 10(c) and bars the Board from ordering his reinstatement or the payment of backpay to him.

The GC's contrary claim is not a permissible construction of Section 10(c)'s "for cause" provision. It is an impermissible attempt to write the "for cause" language out of the statute.

F. Arbitrator Williams's Award Is Entitled To Deference Under *Olin Corporation*.

Both the GC and the Union argue that Cooper's reliance on *Spielberg Manufacturing Co.*, 112 NLRB 1080 (1955) to support its deferral argument is misplaced because *Spielberg* was issued prior to the Board's adoption of the *Clear Pine* picket line misconduct test. In fact, the Board's conclusion

that the arbitration award in *Spielberg* was "not repugnant to the Act" under the Board's pre-*Clear Pine* picket line misconduct test supports deferral to Arbitrator Williams's Award in this case. This is because the pre-*Clear Pine* picket line misconduct test was *harder* for employers to meet.

As the Union states in its Brief, prior to *Clear Pine*, the Board held that words alone "unaccompanied by physical acts or gestures, could never constitute serious misconduct warranting refusal to reinstate picketers". (USW Brief at pg. 21). The arbitration panel in *Spielberg* refused to reinstate four picketers based on words alone, i.e., various profane and racist statements made by the picketers to employees crossing the picket line. 112 NLRB at 1084-85. The Board, reversing an ALJ decision, held that the arbitration award was not repugnant to the Act even though, based on its own precedents, it conceded that it would not have "necessarily decide[d] the issue . . . as the arbitration panel did." Id. at 1082. Further, the Board deferred to the award because the union and the employer voluntarily agreed to arbitrate the issue of reinstatement and the unfair labor practice charge was filed only after the arbitration panel had heard the case. Id. at 1081-82.

If the arbitration award in *Spielberg* is "susceptible to an interpretation consistent with the broad parameters of the Act" when those parameters established that words alone on a picket line could not justify an employer's

refusal to reinstate, then Arbitrator Williams's award is certainly susceptible to an interpretation consistent with the Act. Under *Clear Pine*, words uttered on a picket line *can be* sufficient to justify an employer's refusal to reinstate. The test is one of reasonableness. That the Board disagrees with where Arbitrator Williams drew the line based upon his assessment of Runion's racist statements does not render Arbitrator Williams's Award repugnant to the Act under the *Olin* deferral standard. See, *Aramark Services, Inc*., 344 NLRB 549, 551 (2005).

Under *Olin*, if there is Board precedent that supports an arbitrator's decision, the award falls within the broad parameters of the Act and is not repugnant to the Act. *Kvaerner Philadelphia Shipyard Ind*., 347 NLRB 390, 391 (2006). *Spielberg* involved the same factual scenario that is presented in this case and because Arbitrator Williams's Award is consistent with *Spielberg*, it is not clearly repugnant to the Act.

The GC's contention that Arbitrator Williams's Award is repugnant to the Act because he allegedly "scrutinized Runion's statements more strictly because they occurred on the picket line rather than on the job" is also without merit. (GC Brief at 35). Under *Olin*, even if there is one interpretation of Arbitrator Williams's Award that is inconsistent with the Act, deferral is still appropriate if there is another interpretation that would be consistent with the

Act. *Stone Container Corp*. 344 NLRB 658, 659-60 (2005). Here, the ALJ and the Board chose to interpret Arbitrator Williams's Opinion in a manner that runs afoul of *Clear Pine* and, in so doing, fundamentally misread his Opinion.

Arbitrator Williams does not distinguish Runion's racist statements from other violations of Cooper's policy which occurred in the workplace on the basis that misconduct on the picket line, as a general matter, must be treated more severely than misconduct in the workplace. Nor does Arbitrator Williams state that just cause would not exist on the basis of Runion's racist statements if he had made them in the workplace but that his termination was justified because he made the statements on the picket line. Arbitrator Williams, in fact, acknowledged that "there is generally more tolerance for misconduct" on the picket line that would constitute just cause to discharge if it were committed in the plant. (JA0359). However, he concluded that Runion's racist statements were "more serious misconduct" because there were "dozens of people [who] could hear them" on the night of January 7, 2012 and, under the circumstances existing on that night, there was a "genuine possibility of violence." (JA0361-2).

It was that "context" (not the simple fact that Runion uttered his statements on a picket line) which resulted in Arbitrator Williams's

concluding that there was just cause for Runion's discharge. It is important to note that the circumstances of that night were the focus of the arbitration proceedings. Portions of the video depicting the events of January 7, 2012 were shown three times during the hearing and, of course, submitted as an exhibit to Arbitrator Williams at its conclusion. (JA0162, JA0180-3, JA0232). Counsel for the Union questioned Runion about the circumstances of that night in an attempt to excuse his racist statements as a "high stress" comment in response to provocation from the replacement workers. (JA0223-224). Counsel for Cooper cross-examined Runion about those same circumstances to establish that the replacement workers did nothing to trigger the racist statements. (JA0233-235). Arbitrator Williams evaluated Runion's racist statements "under the circumstances existing" as the time that Runion made them. That is not contrary to *Clear Pine*. It is what *Clear Pine* directs.

The Union, for its part, claims that Arbitrator Williams's Award is repugnant to the Act because Arbitrator Williams found that Runion's racist statements were made in the context where there was a "genuine possibility of violence" but did not find that there was a "reasonable likelihood of imminent physical confrontation". (USW Brief at pg. 43-44). However, the standard under *Clear Pine* is whether a picketer's misconduct "reasonably tends to coerce and intimidate" – not whether there is a "reasonable likelihood

of imminent physical confrontation." That phrase comes from *Catalytic*, 275 NLRB 97 (1985) which involved a statement made over a telephone. *Catalytic* did not change the *Clear Pine* standard. In *Catalytic*, the Board, not surprisingly, noted that a profane epithet in a phone call did not raise the likelihood of an "imminent physical confrontation" but expressly stated that it would continue to evaluate picket line misconduct "on a case-by-case basis to determine whether the conduct at issue is coercive or intimidating or otherwise unprotected by the Act." Id. at 98.

Under *Olin*, if there is an interpretation of Arbitrator Williams's Award that is consistent with the Act, the Board must defer to it. Here, the Board closed their eyes to Arbitrator Williams's discussion of context and essentially concluded that his Award was repugnant to the Act because it disagreed with how he evaluated the circumstances existing on the night of January 7, 2012 (even though the Board in *Clear Pine* expressly rejected a *per se* rule evaluating picket line misconduct in favor of "case-by-case" test of reasonableness). The Board's refusal to defer cannot be squared with the long line of *Olin* deferral cases establishing that determining when an employee's misconduct is so egregious as to lose the protection of the Act is necessarily an exercise in "line-drawing" and that deferral to where an arbitrator draws that line is appropriate even if the Board would have reached a different

conclusion. *Aramark Services, Inc.*, 344 NLRB 549, 551 (2005); *Texaco, Inc.*, 279 NLRB 1259 (1986) (deferring to arbitrator's award upholding discharge of picketers for strike misconduct even though Board disagreed with the award, noting that it did not "replicate the Board's own findings, analytical framework, and remedial scheme"); *Sawin & Co., Inc.*, 277 NLRB 393, 395 (1985) (same).

Finally, this Court concluded in *Doerfer Engineering v. NLRB*, 79 F.3d 101 (8th Cir. 1996) that it was contrary to the federal policy favoring labor arbitration for a party to "renege upon [its] agreement to be bound by an arbitrator's decision and to circumvent the grievance procedure by filing an unfair labor practice charge" to seek a more favorable result. Id. at 103.

The rationale in *Doerfer* applies to this case. Here, the Union filed its unfair labor practice after Arbitrator Williams heard the case (but before he issued his decision) and rejected Cooper's offer to submit the unfair labor practice issue for Arbitrator Williams's determination. (JA0380-2). Thus, just as in *Doerfer*, permitting the Union to take two bites at the apple (when it had voluntarily agreed to abide by Arbitrator Williams's Award) is fundamentally at odds with "the national policy, favoring the voluntary arbitration of disputes." Id. For this reason, this Court should refuse to enforce the Board's order.

G. Conclusion

Cooper respectfully requests that this Court refuse to enforce the Board's Order in this case.

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 6,451 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 proportionally spaced typeface using Microsoft Word in Times Roman font-size 14.

/s/Morris L. Hawk
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CERTIFICATE OF SERVICE

I hereby certify that on December 9, 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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