Oral Argument Not Yet Scheduled

Nos. 16-2721 & 16-2944

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

COOPER TIRE & RUBBER CO.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL & SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO/CLC

Intervenor

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Cooper Tire & Rubber Co. ("the Company") for review, and the cross-application of the National Labor

Relations Board ("the Board") to enforce a Board Decision and Order issued against the Company on May 17, 2016, and reported at 363 NLRB No. 194. (A. 457-70.)[1] The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act ("the Act") (29 U.S.C. § 160(a)), which empowers the Board to prevent unfair labor practices affecting commerce.

The Board's Order is final with respect to all parties. The Company petitioned for review of the Board's Order on June 16, 2016, and the Board cross-applied for enforcement on June 29, 2016. Both filings were timely because the Act places no time limitation on the initiation of review or enforcement proceedings. The Court has jurisdiction pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), and venue is proper because the Company transacts business in Arkansas. The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO/CLC ("the Union") has intervened in support of the Board.

STATEMENT OF THE ISSUE PRESENTED

An employer violates Section 8(a)(3) and (1) of the Act by discharging an employee for picket-line misconduct that does not tend to coerce or intimidate other employees in their exercise of rights under the Act. Here, the Company

[1] Record references in this brief are to the Joint Appendix ("A."). References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." references are to the Company's opening brief.

discharged locked-out employee Anthony Runion for two racist remarks he made on the picket line about replacement workers after they had passed by in a van with the windows shut. The question before the Court is whether substantial evidence supports the Board's finding that those comments did not tend to coerce employees in their exercise of Section 7 rights, and therefore that his remarks were not so egregious to as to remove him from the Act's protection. If the Court answers that question affirmatively, then the Company violated the Act by discharging him.

NMC Finishing v. NLRB, 101 F.3d 528 (8th Cir. 1996).

Airo Die Casting, Inc., 347 NLRB 810 (2006).

Clear Pine Mouldings, 268 NLRB 1044 (1984), *enforced*, 765 F.2d 148 (9th Cir. 1985).

STATEMENT OF THE CASE

Acting on unfair labor practice charges filed by the Union, the Board's General Counsel issued a complaint alleging the Company violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1), by discharging Runion for engaging in union activities, namely, picketing to protest the Company's lockout. The parties waived a hearing and submitted the case to an administrative law judge on a stipulated record. Thereafter, the judge issued a recommended order finding that the Company violated the Act as alleged. On May 17, 2016, the Board issued

a Decision and Order adopting the judge's findings with one modification to his recommended order.

I. THE BOARD'S FINDINGS OF FACT

A. The Company Locks Out Bargaining Unit Employees and Hires Temporary Replacement Workers

The Company operates a tire manufacturing plant in Findley, Ohio, where it employs about 1,044 production and maintenance employees. (A. 459; 3.) For more than 70 years, it has had a collective-bargaining relationship with the Union, resulting in successive collective-bargaining agreements, including one that expired on October 31, 2011. The parties then began negotiations for a successor agreement. (A. 459; 5-6.) On November 22, 2011, the Company made a last, best, and final offer, which the Union's membership rejected. (A. 459; 6.)

Thereafter, the Company locked out the bargaining unit employees. (A. 459; 6-7.) During the lockout, the Union maintained picket stations around but not on the Company's facility. (A. 459; 7.) Groups of locked-out employees manned these stations 24 hours a day. (A. 459; A. 7-8.) The Company continued its operations with supervisors and managers, non-union employees from another plant, and temporary replacement workers provided by a private company. (A. 459; 7-8.) These workers crossed the picket line when arriving and leaving the facility, mostly in vans paid for by the Company. Many of the replacement workers were African-American. (A. 459; 7-8.)

B. While Picketing Outside the Company's Facility, Runion Makes Two Remarks Linking African-American Replacement Workers to Fried Chicken and Watermelon

Anthony Runion began working for the Company in November 2006 and was one of the bargaining unit employees locked out by the Company. As with the other locked-out employees, he volunteered on the picket line to protest the lockout.

On January 7, 2012, Runion and other locked-out employees attended a hog roast at the union hall, then walked over to join the picket line outside of the plant's main gate. (A 459; 8-9.) Throughout the evening, vans carrying replacement workers drove past the picketers with the windows closed, and the Company's security guards recorded the picketing activity on videotape. (A. 459-60; 7, 10-11.) At the 6:56 time mark on the video, one of those vans passed Runion and the other picketing employees, again with the windows shut. (A. 459-60; 9-10.) At the 7:02 time mark, several locked-out employees gestured with their middle fingers, and a picketer yelled, "Pieces of shit!" and "Hope you get your fucking arm torn off, bitch!" (A. 459-60; 9-10.) At the 7:04 time mark, Runion yelled, "Hey, did you bring enough KFC for everybody?" (A. 460; 11.) At the 7:25 time mark, Runion yelled, "Hey anybody smell that? I smell fried chicken and watermelon." (A. 460; 11.) By then, the replacements' van had already passed by with the windows shut. (A. 460; 11.)

C. After the Lockout Ends, the Company Discharges Runion

The lockout continued through February 27, 2012, when the unit employees ratified the parties' new collective-bargaining agreement. Thereafter, the Company began recalling locked-out employees. (A. 461; 6.) On March 1, 2012, however, the Company decided not to recall Runion, and to discharge him based on his January 7 picket-line statements alluding to some of the replacement workers with his comments about fried chicken and watermelon. (A. 461; 93.)

Before and after Runion's discharge, the Company suspended but did not discharge several employees for on-the-job statements that were physically threatening or racially offensive. For example, the Company gave a one-day suspension to an employee for saying, in the workplace, that he was "going to bloody people up." (A. 338.) The Company also gave two other employees six-day suspensions for making threatening and intimidating statements, on the plant floor and in the break room, about wielding knives. (A. 339-41.) In addition, the Company suspended but did not discharge Cliff Baxter, an African-American employee, for yelling at his Caucasian manager during a meeting that he and members of the local union were "dumb, white, hillbilly assholes." (A. 462; 347.) In suspending Baxter, the Company cited its policy of "maintain[ing] a work environment free from all forms of harassment," including "unwelcome comments or conduct relating to race . . . ." (A. 462; 347.)

D. The Union Files a Grievance over Runion's Discharge; an Arbitrator Rules that the Company Discharged Him for Just Cause

The Union filed a grievance alleging that the Company violated the parties' collective-bargaining agreement by discharging Runion. (A. 461; 15.) Following a hearing, an arbitrator ruled that the Company had discharged him for "just cause" under the agreement. (A. 461; 350-63.) While the arbitrator found the picketing was peaceful and that Runion had not threatened anyone, he upheld the discharge on the ground that Runion had violated the Company's harassment policy. (A. 461; 360-63.) The arbitrator also concluded that Runion had engaged in "gross misconduct," which he characterized as "just cause" for discharge under the parties' agreement. (A. 461; 360-63.)

In upholding the discharge, the arbitrator analyzed Runion's comments under a standard inconsistent with Board law governing picket-line misconduct. (A. 461; 360-63.) Specifically, the arbitrator opined that Runion's "comments would have been serious misconduct in any context, but in the context of the picket line, where there was a genuine possibility of violence, his comments were even more serious." (A. 467.) His finding that Runion's remarks were entitled to less protection because they were made on the picket line rather than on the job conflicts with *Clear Pine Mouldings*, 268 NLRB 1044 (1984), *enforced*, 765 F.2d

148 (9th Cir. 1985), and its progeny, which afford greater leeway to impulsive picket-line statements.

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board (Chairman Pearce and Members Hirozawa and McFerran) found, in agreement with the administrative law judge, that the Company violated Section 8(a)(3) and (1) of the Act by discharging Runion. The Board reasoned that although Runion's remarks were offensive, "there was no evidence to establish that the statements contained overt or implied threats, that they coerced or intimidated employees in the exercise of their rights protected under the Act, or that they raised a reasonable likelihood of an imminent physical confrontation." (A. 464.)

The Board also agreed with the administrative law judge's determination not to defer to the arbitration award because it was "clearly repugnant" to the Act. (A. 457 n.1, 467.) As the Board and the judge found, the arbitrator evaluated Runion's statements under a standard that was inconsistent with the Board's longstanding, judicially-approved standard for evaluating picket-line misconduct. (A. 457 n.1, 467.)

The Board's Order requires the Company to cease and desist from the unfair labor practice found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights under Section 7 of the Act, 29 U.S.C. § 157. (A. 457,469.) Affirmatively, the Order requires the

Company to reinstate Runion to his former job and make him whole for any lost earnings and benefits, and to post a remedial notice. (A. 457, 469.)

SUMMARY OF ARGUMENT

It is undisputed that locked-out employees have a statutorily protected right to protest the lockout by engaging in picketing. It has also long been recognized that picketing involves an element of confrontation, and for that reason some impulsive behavior is to be expected, particularly when directed against replacement workers who have taken the picketers' jobs. Accordingly, given the adversarial context of the picket line and its status as protected activity, misconduct on the picket line is analyzed under a more forgiving standard than conduct in the workplace.

Specifically, under the Board's well-established, judicially-approved *Clear Pine Mouldings* test, an employer can discharge an employee for picket-line misconduct only if the misconduct would reasonably tend to coerce or intimidate employees in the exercise of their rights under the Act. If that standard is not met, then the misconduct is deemed insufficiently egregious to cause the picketer to forfeit the Act's protection, and discharging him for his picketing activity is unlawful.

Substantial evidence supports the Board's finding here that the Company violated Section 8(a)(3) and (1) of the Act by discharging locked-out employee

Anthony Runion for two racist remarks about fried chicken and watermelon that he made while picketing to protest the lockout. As the Board found, his remarks, while offensive to the dignity of African-American replacement workers who had just passed by in a van with the windows shut, were not so egregious as to cause him to forfeit the Act's protection. Rather, under *Clear Pine Mouldings*, his comments would not have reasonably tended to coerce or intimidate employees in the exercise of their rights under the Act. Thus, as the Board noted, his statements were directed at fellow picketers, not the replacement workers who had already passed by. Moreover, his comments were not violent in nature; they contained no threatening language; and they were unaccompanied by any threatening behavior or indications of hostility. The Company's arguments to the contrary are premised largely on inapposite cases that fail to undermine the Board's finding or require a different result.

The Company also errs in contending that it had to discharge Runion in order to avoid liability under Title VII of the Civil Rights Act of 1964. Its amici echo this claim, but neither they nor the Company cite a single case where an employer was found liable under Title VII for failing to police off-duty, off-site, picket-line misconduct. Nor do they cite any cases holding that uttering two racially offensive remarks creates a hostile work environment under Title VII.

Indeed, the very cases cited by the Company and its amici establish that such isolated comments would not constitute a Title VII violation.

Contrary to the Company's further claim, the proviso to Section 10(c) of the Act does not bar the Board from ordering the Company to reinstate Runion with backpay. The Company elides the distinction between Section 10(c)'s bar against reinstatement of employees discharged "for cause" and the arbitrator's finding of "just cause" for Runion's discharge under the parties' collective-bargaining interpretation. Moreover, the blanket rule urged by the Company – that any misconduct in the course of protected picketing activity should deprive the Board of authority to order make-whole relief – would effectively extinguish the court-approved *Clear Pine Mouldings* standard for determining when picket-line misconduct is sufficiently egregious to warrant discharge.

Finally, the Board acted well within its broad discretion under the Act in declining to defer to the arbitrator's award. Applying settled law, the Board reasonably found that the award was "palpably wrong" and "clearly repugnant" to the purposes and policies of the Act because the arbitrator analyzed Runion's picket-line misconduct under a standard wholly inconsistent with *Clear Pine Mouldings*. The Company's arguments to the contrary misconstrue the Board's well-established, judicially-approved deferral standard, and rely on inapposite cases.

STANDARD OF REVIEW

The Board's factual findings and its application of the law to those facts are "conclusive" when supported by substantial evidence on the record considered as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 493 (1951); *accord Laborers Dist. Council of Minn. & N.D. v. NLRB*, 688 F.3d 374, 381 (8th Cir. 2012); *Cedar Valley Corp. v. NLRB*, 977 F.2d 1211, 1215 (8th Cir. 1992).

A Board finding that addresses whether an employer was warranted in disciplining or discharging an employee based on picket-line misconduct is entitled to "considerable deference." *Georgia Kraft Co., Woodcraft Div. v. NLRB*, 696 F.2d 931, 939 (11th Cir. 1983). After all, "it is the primary responsibility of the Board and not the courts 'to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy.'" *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967) (quoting *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33-34 (1967)); *see also NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 829 (1984) (deciding whether an employee's activity falls within the protection of the Act "implicates [the Board's] expertise in labor relations."). The Board's evaluation of these competing interests, "unless illogical or arbitrary, [should] not be disturbed." *F.W. Woolworth Co. v. NLRB*, 655 F.2d 151, 154 (8th Cir. 1981).

Moreover, the Board's authority to issue a remedial order is a "broad discretionary one, subject to limited judicial review." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964). Its choice of a remedy "should stand unless it can be shown that [it] is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943).

Finally, the Board has considerable discretion in deciding whether it is appropriate to defer to an arbitration award, and courts will overturn the Board's determination only for an abuse of discretion. *Doerfer Eng'g, a Div. of Container Corp. of Am. v. NLRB*, 79 F.3d 101 (8th Cir. 1996).

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCHARGING ANTHONY RUNION FOR PROTECTED PICKET-LINE CONDUCT

A. An Employer Violates the Act by Discharging a Locked-Out Employee for Picket-Line Statements if They Did Not Cause Him To Forfeit the Act's Protection

Section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1), prohibits an employer from interfering with, restraining, coercing, or discriminating against employees in the exercise of rights under Section 7 of the Act.[2] Among the rights protected by Section 7 is that of locked-out employees to participate in a picket line protesting the employer's lockout. *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 310 n.10 (1965); *cf. United Steelworkers of Am. v. NLRB*, 376 U.S. 492, 499 (1964) (recognizing picketing as the most effective way of reaching those who would enter a struck employer's business); *Airo Die Casting Inc.*, 347 NLRB 810, 811 (2006) (recognizing employees' right to picket).

[2] Section 7 of the Act guarantees employees the right to "assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." 29 U.S.C. § 157. Section 8(a)(3) of the Act makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment . . . to discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). A Section 8(a)(3) violation derivatively violates Section 8(a)(1). *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

Moreover, the Board and the courts have long recognized that "'one of the necessary conditions of picketing is a confrontation in some form between union members and employees.'" *Chicago Typographical Union No. 16*, 151 NLRB 1666, 1668 (1965) (quoting *NLRB v. United Furniture Workers*, 337 F.2d 936, 940 (2d Cir. 1964)). *Accord NMC Finishing v. NLRB*, 101 F.3d 528, 532 (8th Cir. 1996) (describing picketing as part of the "rough and tumble activity established by Congress through the NLRA"); *Carpenters Local 1506*, 355 NLRB 797, 802 (2010) ("Th[e] element of confrontation has long been central to our conceptions of picketing . . . ."); *Teamsters Local 557*, 338 NLRB 896, 899 (2003) (same), *enforced*, 91 F. App'x 157 (D.C. Cir. 2004). Accordingly, "[i]mpulsive behavior on the picket line is to be expected, especially when directed against replacement workers" who have taken the striking or locked-out employees' jobs. *Allied Indus. Workers Local Union No. 289 v. NLRB*, 476 F.2d 868, 879 (D.C. Cir. 1972) (quoting *Montgomery Ward & Co. v. NLRB*, 374 F.2d 606, 608 (10th Cir. 1967)).

Keeping in mind these special circumstances, as well as the fact that picketing typically occurs when employees are off-duty and off-site, the Board, with judicial approval, has long given more leeway to picket-line conduct than to conduct on the job. Thus, an employer can discharge an employee for picket-line conduct only if it was sufficiently egregious to cause the picketer to lose the Act's protection. *Augusta Bakery Corp.*, 298 NLRB 58, 58, 62 (1990), *enforced*, 957

F.2d 1467 (7th Cir. 1992); *Seeburg Corp.*, 192 NLRB 290, 290, 302-03 (1971), *enforced sub nom. Allied Indus. Workers Local 289 v. NLRB*, 476 F.2d 868 (D.C. Cir. 1973).

In conducting this inquiry, the Board, with court approval, analyzes picket-line activity under a well-established framework. Initially, the Board asks whether the employer took an adverse action like discharge based on conduct associated with the employee's picketing, and whether the employer had an honest belief he engaged in the conduct. *Detroit Newspapers*, 342 NLRB 223, 228 (2004), *enforced*, 171 F. App'x 352 (D.C. Cir. 2006). If so, then the discharge will be an unfair labor practice unless "under the circumstances existing," the misconduct also "may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." *Clear Pine Mouldings, Inc.*, 268 NLRB 1044, 1046 (1984), *enforced mem.*, 765 F.2d 148 (9th Cir. 1985) (quoting *McQuaide, Inc.*, 552 F.2d 519, 528 (3d Cir. 1977)); *accord NMC Finishing v. NLRB*, 101 F.3d 528, 531 (8th Cir. 1996) (applying this standard). The standard for coerciveness is objective; it does not matter whether employees actually were intimidated or whether the picketer intended to intimidate. *Clear Pine Mouldings*, 268 NLRB at 1046; *accord Universal Truss, Inc.*, 348 NLRB 733, 734 (2006).

Under this standard, the Board and the courts have long recognized that "not every impropriety committed [on the picket line] deprives an employee of the

Act's protection." *Avery Heights*, 343 NLRB 1301, 1322 (2004), *enforcement denied on other grounds*, 448 F.3d 189 (2d Cir. 2006). Specifically, the use of obscene or racially offensive language or gestures, "standing alone without any threats or violence, d[oes] not rise to the level where [a picketer] forfeit[s] the protection of the Act" unless "'under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act.'" *Airo Die Casting*, 347 NLRB at 812 (quoting *Clear Pine Mouldings*, 268 NLRB at 1046). Absent such circumstances, "epithets, vulgar words or profanity" usually "do[] not deprive a [picketer] of the protection of the Act." *W.C. McQuaide, Inc.*, 552 F.2d at 524; *accord Briar Crest Nursing Home*, 333 NLRB 935, 947 (2001) ("[b]y and large obscene statements . . . have been held insufficient to justify a refusal to reinstate").

For example, in *Airo Die Casting*, 347 NLRB at 812, the Board found that in the circumstances of that case, an isolated offensive racial remark did not deprive a picketing employee of the Act's protection. Similarly, in *APA Warehouses, Inc.*, 291 NLRB 627, 630 (1988), *enforced mem.*, 907 F.2d 145 (2d Cir. 1990), a picketer's comparison of his supervisor to Hitler was found insufficient to deprive him of the Act's protection. *See also Calliope Designs, Inc.*, 297 NLRB 510, 521 (1989) (picketer's obscene statements to non-striking employee not egregious enough to forfeit Act's protection). Such "impulsive behavior" is not unexpected

in an adversarial context where passions run high, especially when directed against replacement workers. *Allied Indus. Workers Local 289*, 476 F.2d at 879 (internal quotation marks omitted).

In contrast, misconduct found to be unprotected includes physical violence against non-picketers and "statements which could be construed as threats of bodily injury or property damage." *Briar Crest Nursing Home*, 333 NLRB at 947. *See, e.g.*, *Precision Concrete*, 337 NLRB 211, 229 (2001) (threats of bodily injury and property), *enforced in relevant part*, 334 F.3d 88 (D.C. Cir. 2003); *Siemens Energy & Automation*, 328 NLRB 1175 (1999) (throwing nails onto the roadway and kicking a car entering the plant entrance); *Calmat Co.*, 326 NLRB 130, 135 (1998) (blocking access to employer's premises).

B. The Company Violated the Act By Discharging Runion for His Isolated Picket-Line Remarks about Fried Chicken and Watermelon

1. Because Runion's comments did not tend to coerce or intimidate employees, they did not cause him to lose the Act's protection

Applying the *Clear Pine Mouldings* test described above, the Board reasonably found that Runion's two remarks, while racist, offensive and reprehensible, did not in the circumstances tend to coerce or intimidate employees in the exercise of their rights under the Act. (A. 463-64.) Accordingly, the Board reasonably found that his statements did not cause him to lose the Act's protection, and the Company violated the Act by discharging him for uttering them as he

picketed to protest the lockout. As shown below, substantial evidence supports the Board's decision, which is consistent with precedent.

On the day in question, Runion, along with other locked-out employees, picketed near the Company's facility. Several seconds after a van of African-American replacement workers had passed the picket line with the windows rolled up, Runion yelled, "Hey, did you bring enough fried chicken for everyone?" Twenty seconds later, he yelled, "Hey, anybody smell that? I smell fried chicken and watermelon." Based on those two remarks, the Company discharged Runion, asserting that he had violated its harassment policy.

In concluding that Runion's statements did not cause him to forfeit the Act's protection because they would not have reasonably tended to coerce or intimidate employees, the Board explained that his fleeting remarks were not violent in nature; they contained no overt or implicit threatening language; and they were unaccompanied by threatening behavior or indications of physical hostility. To the contrary, as the Board noted (A. 464), Runion stood with his hands in his pockets. In addition, the record did not establish that the replacement workers were capable of hearing his remarks because the van's windows were closed and Runion made the statements after the van had passed by. In these circumstances, Runion's two remarks, while offensive, racist, and disrespectful to the dignity and feelings of African-Americans, would not have reasonably tended to coerce the replacements

in the exercise of their right to work during the lockout. Indeed, as the Board found, Runion's comments were directed at his fellow picketers rather than the replacements. However, there was no evidence that his remarks would have tended to coerce or intimidate other picketers, some of whom had moments earlier shouted offensive slurs, on a picket line that was otherwise largely free of misconduct.

As the Board also noted (A. 464-65), its finding is consistent with precedent. Thus, in *Airo Die Casting*, 347 NLRB 810 (2006), the Board found that a picketer who yelled a racist comment to African-American replacement workers did not lose the Act's protection. Rather, the Board concluded that the picketing employee's use of obscene language, gestures, and a racial slur, standing alone without any threatening behavior or violence, "did not differ from the general atmosphere on the picket line with the usual tensions between strikers and replacement workers and the use of obscene gestures and vulgar language." *Id.* at 812.

Recently, in *Consolidated Communications Inc. v. NLRB*, __F.3d __ (2016), 2016 WL 4750914, at *7 (D.C. Cir. Sept. 13, 2016), the Court agreed with the Board that a picketer who grabbed his crotch and gave a female replacement worker "the middle finger and uttered its associated obscenity" did not lose the Act's protection. In finding that the employer unlawfully suspended him for that

picket-line misconduct, the Court upheld the Board's finding that although his actions were "totally uncalled for and very unpleasant," they could not objectively be perceived "as an implied threat of the kind that would coerce or intimidate a reasonable [replacement] employee from continuing to report for work."[3] *Id.*

2. The Company relies on inapposite cases

The Company errs in its heavy reliance (Br. 21-22, 29, 31-33, 35) on *NMC Finishing v. NLRB*, 101 F3d. 528, 532 (8th Cir. 1996), a case that does not undermine the Board's finding here. As noted above, in *NMC Finishing*, this Court appropriately analyzed the picket-line misconduct under *Clear Pine Mouldings*, and correctly identified the issue as whether the misconduct would tend to coerce or intimidate employees. Although the Court disagreed with the Board's conclusion regarding the coercive tendency of the misconduct in question, it did so based on factual considerations not present here. *Id.* at 531-32. Thus, in *NMC Finishing*, unlike the instant case, the picketer singled out a specific

[3] The author of the Court's opinion, Judge Millet, also wrote a concurrence suggesting that the Board adopt a stricter standard for evaluating picket-line misconduct involving sexually and racially offensive statements. 2016 WL 4750914, at *15. It bears repeating, however, that writing for the unanimous panel, she upheld the Board's application of *Clear Pine Mouldings*. This is because the question for the reviewing court is whether that longstanding, judicially-approved standard constitutes a reasonably defensible interpretation of the Act. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984) ("the question for the court is whether the agency's [interpretation] is based on a permissible construction of the statute").

employee by vilifying her with a picket sign publicizing her alleged sexual proclivities. He paraded the sign in the presence of everyone near the plant's gate. *Id.* at 530. In those very different circumstances, the Court concluded that a woman singled out publicly for private sexual conduct "would have tended to feel coerced, intimidated, harassed and fearful." *Id.* at 532. By contrast, here Runion did not single out or direct his comments toward a specific replacement worker. Rather, as the Board observed, he directed his remarks at other locked-out picketers. Moreover, his two remarks were fleeting, not put on display for an extended period like the sign in *NMC Finishing*. Given these critical differences, the Company's likening Runion's comments to the sign in *NMC Finishing* is unavailing.

The Company gains no more ground in relying (Br. 21, 22, 25, 29, 31-33) on *Earle Industries, Inc. v. NRLB*, 75 F.3d 400 (8th Cir. 1996), a case that does not involve picket-line misconduct. There, the Court upheld the discharge of an employee for calculated insubordination on the plant floor. *Id.* at 406. In so ruling, the Court emphasized that her conduct took place on the job. The Court also contrasted the situation with "the context of strikes" and the picketing that accompanies it. In that different context, the Court noted, it has "acknowledged the need to excuse impulsive, exuberant behavior (so long as not flagrant or rendering the employee unfit for employment) as an inevitable concomitant of

struggle." *Id*. Thus, Runion's remarks fall squarely within the circumstance not at issue in *Earle Industries* – namely, impulsive conduct on the picket line.

It follows that the Company likewise errs in contending (Br. 40-44) that the Board should have analyzed Runion's discharge under *Wright Line*, 251 NLRB 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981). *Wright Line* applies in "dual-motive" situations, where an employee has engaged in protected activity, but the employer asserts that the adverse action was caused by unrelated job performance. In other words, *Wright Line* applies "when an employer has discharged (or disciplined) an employee for a reason assertedly *unconnected to* protected activity." *Shamrock Foods Co. v. NLRB*, 346 F.3d 1130, 1135 (D.C. Cir. 2003). Indeed, in *Wright Line* itself, the employee claimed that he was terminated due to his protected activities, while the employer conceded the protected activity, but claimed that he was terminated for inaccurate record keeping. 662 F.2d at 900. By contrast, as the Board explained here (D&O 10) and in *Siemens Energy & Automation, Inc.*, 328 NLRB 1175, 1175-76 (1999), *Clear Pine Mouldings* provides the applicable analysis for assessing misconduct that occurs during the course of protected picketing activity. *Accord Consolidated Commc'ns*, 2016 WL 4750914, at *7 n.3 (*Wright Line* "has no application to [picket-line] misconduct cases.").

C. The Board's Unfair-Labor-Practice Finding Does Not Conflict with Title VII

The Company argues (Br. 28-29) that if it had not discharged Runion pursuant to its harassment policy, it could have been held liable for creating a hostile work environment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. ("Title VII"). Its amici echo this claim,[4] but neither they nor the Company cite a single case where an employer was found liable under Title VII for failing to police the off-duty, picket-line misconduct of a locked-out employee. Nor do they cite any cases holding that uttering two offensive remarks creates a hostile work environment under Title VII. Indeed, the very cases cited by the Company and its amici establish that such isolated utterances would not constitute a Title VII violation. Accordingly, the Company errs in asserting (Br. 29) that its obligations under Title VII are incompatible with its obligations under the Act.[5]

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[4] Two amici curiae briefs were filed in support of the Company: one by the National Association of Manufacturers ("NAM"), and the other by the Equal Employment Advisory Counsel, Chamber of Commerce of the United States of America, and the National Federation of Independent Business Small Business Legal Center ("EEAC").

[5] The Company gains no more ground in relying (Br. 27-28) on a line of cases starting with *Southern Steamship v. NLRB*, 316 U.S. 31, 47 (1942), which admonished the Board not to apply labor law "so single-mindedly that it may wholly ignore other and equally important Congressional objectives." These cases are inapposite because they involve Board rulings found to conflict directly with

Thus, the Company (Br. 28-29) relies on *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986), but the Board's order directing Runion's reinstatement poses no conflict with this case. In *Meritor*, the Court held that to violate Title VII, harassment must be so "severe or pervasive" as to "'alter the conditions of employment and create an abusive work environment.'" *Id.* (internal citation omitted). The Court cautioned, however, that "not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII." *Id.* (internal citation omitted). The Court then cited *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), another case on which the Company mistakenly relies (Br. 29). *Rogers*, however, undermines the Company's position. It holds that "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" would not sufficiently alter terms and conditions of employment to violate Title VII. *Id.* at 238. *Accord Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (Title VII is not "a general civility code for the American workplace," and verbal harassment "is [not] automatically discrimination under Title VII"). Thus, even if the Company had not locked Runion out of a job, and he had made his racist remarks while

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non-labor statutory imperatives. *See, e.g.*, *id.* at 47 (finding Board order reinstating seamen who struck on board ship conflicted with maritime law requiring obedience to officers on ship); *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 151-52 (2002) (finding Board award of backpay to undocumented worker contravened immigration law foreclosing the availability of backpay). As shown above, there is no conflict here.

employed on the worksite, the Company would not have been required to discharge him in order to avoid liability under Title VII.[6]

For their part, amici (NAM Br. 9-10, EEAC Br. 12-14) erroneously rely on *Dowd v. United Steelworkers of America*, 253 F.3d 1093, 1102 (8th Cir. 2001), which found that Title VII authorizes hostile work environment claims by replacement employees against a *union* for picket-line misconduct if it condones, encourages, or ratifies the picketers' actions. Here, however, no replacement workers alleged that the Union was responsible for Runion's remarks, nor was there any evidence it condoned them. To the contrary, the record shows that the Union distributed cards instructing picketers not to use any racist language. (A. 355.) In any event, *Dowd* recognized that "[t]he touchstone for a Title VII hostile environment claim is whether 'the workplace is permeated with' discriminatory intimidation, ridicule and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" 253 F.3d at 1101-02 (citations omitted).

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[6] The Company also errs in relying (Br. 30) on *Walton v. Johnson & Johnson Services, Inc.*, 347 F.3d 1272 (11th Cir. 2003), another case that does not involve picket-line statements. In *Walton*, the Eleventh Circuit found that by promulgating an anti-harassment policy that adequately addresses Title VII's deterrent purpose, an employer can avoid liability for maintaining a hostile work environment based on a supervisor's behavior. *Id.* at 1283-88. The instant case does not involve vicarious liability for supervisory statements.

To the extent the Company suggests (Br. 27-30) that even if Title VII did not require it to discharge Runion, it was obligated or entitled to do so under its policy against workplace harassment, its claim rings hollow. As shown above (p. 6), the Company applied its policy inconsistently. Thus, before the lockout, the Company merely suspended Baxter, an African-American employee, while he was at work and on the clock, for telling his supervisor and local union officials they were "white, hillbilly assholes." By contrast, the Company discharged Runion for his brief outburst on the picket line, a zone of increased leeway, and thereby treated him more harshly than an on-the-job employee who directed racist epithets towards specific people, including his supervisor.

To be sure, Title VII fosters the important policy of prohibiting racial harassment in the workplace. Here, however, the Board's order directing the Company to reinstate Runion creates no conflict with that statutory imperative. As shown, neither the Company nor its amici establish how Runion's picket-line remarks altered employees' terms and conditions of employment so as to impose Title VII liability on the Company. Accordingly, Title VII does not preclude the Board from applying the settled principles set forth in *Clear Pine Mouldings*, and concluding that Runion's comments were not so egregious as to remove him from

the protection of the Act.[7]

D. The Board's Remedial Order Is Not Barred by Section 10(c) of the Act

The Company contends (Br. 37-40) that because an arbitrator found that Runion's picket-line remarks gave it "just cause" for discharging him, his discharge was also "for cause" under Section 10(c) of the Act, 29 U.S.C. § 160(c), and therefore the Board could not order him reinstated with backpay. In so arguing, the Company elides the distinction between Section 10(c)'s bar against reinstatement of employees discharged "for cause" and the arbitrator's finding of "just cause" for discharge under the parties' collective-bargaining agreement. Moreover, the blanket rule urged by the Company (Br. 39) – that any misconduct in the course of protected activity should deprive the Board of authority to order make-whole relief – would effectively extinguish the court-approved *Clear Pine Mouldings* standard for evaluating picket-line misconduct. As shown below, the Company's arguments ignore the Board's findings and disregard settled law.

[7] The Company (Br. 27), seconded by its amici, erroneously suggest that the Board has never "even acknowledge[d] the purposes and objectives of Title VII" in picket-line cases. *See, e.g*, *Consolidated Commc'ns*, 360 NLRB No. 140, slip op. 13 & n.21 (2014), 2014 WL 3051019, at *1& n.21 (discussing Title VII case law in finding that a single instance of picket-line misconduct involving obscene gestures and language did not constitute sexual harassment), *enforced in relevant part*, 2016 WL 4750914 (D.C. Cir. Sept. 13, 2016).

Under Section 10(c) of the Act Congress granted the Board authority, upon finding a violation of the Act, to order an employer "to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of [the Act]." 29 U.S.C. § 160(c). Consistent with this provision, the Supreme Court has explained that the basic purpose of a Board remedial order is "a restoration . . . , as nearly as possible, to that which would have obtained but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). Although Section 10(c) further provides that "[n]o order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause," it does not explicitly define the term "for cause," or explain how the term should be applied in particular situations. *Brewers & Maltsters, Local Union No. 6 v. NLRB*, 414 F.3d 36, 47 (D.C. Cir. 2005).

Accordingly, the Board, exercising its authority to fill in the interstices of the Act by interpreting ambiguous statutory terms (*see* n.3 above), has explained that in the context of Section 10(c), cause "effectively means the absence of a prohibited reason." *Anheuser-Busch, Inc.*, 351 NLRB 644, 647 (2007), *pet. for review denied sub nom. Brewers & Maltsters, Local Union No. 6 v. NLRB*, 303 F. App'x 899 (D.C. Cir. 2008). As a result, "[i]t is important to distinguish between the term 'cause' as it appears in Section 10(c) and the term 'just cause,' which

encompasses principles such as the law of the shop, fundamental fairness, and related arbitral decisions." *Taracorp*, 273 NLRB 221, 222 n.8 (1984). *See* Elkouri & Elkouri, *How Arbitration Works* 974 (6th ed. 2003) ("'[c]ause' as used in Section 10(c), should not be confused with 'just cause' as that term is used by arbitrators").

Furthermore, "[t]here is no indication . . . that [Section 10(c)] was designed to curtail the Board's power in fashioning remedies when the loss of employment stems directly from an unfair labor practice as in the case at hand." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 217 (1964). As a result, the Company does not help itself by citing cases where Section 10(c) proscribed reinstatement and backpay because an employer discharged an employee for a reason unrelated to the unfair labor practice. For example, the Company relies on *NLRB v. Potter Electric Signal Company*, 600 F.2d 120 (8th Cir. 1979), to support its contention that the Board lacks authority to order reinstatement of employees discharged for "obvious personal misconduct." (Br. 37.) But the employer in that case properly discharged employees for participating in an on-the-job physical fight that was unrelated to the unfair labor practice, which involved subsequent unlawful investigatory interviews about the incident.[8] *Id.* at 123. *See also Hyatt Corp. v.*

[8] For similar reasons, the Company errs in relying (Br. 39) on *NLRB v. Local Union No. 1229, International Brotherhood of Electrical Workers*, 346 U.S. 464

NLRB, 939 F.2d 361, 376 (6th Cir. 1991) (explaining that the proviso to Section 10(c) bars reinstatement only when the unfair labor practice "had no effect on the discharge decision" and the discharges are "independent of the employer's unlawful conduct").[9]

By contrast, here, as the Board found, "Runion was discharged for a prohibited reason – the protected activity of engaging in picketing." (A. 468.) And under *Clear Pine Mouldings*, the two racist statements that he made in the course of that protected activity were not so egregious as to remove him from the Act's protection. (A. 468.) Accordingly, applying the pertinent legal analysis,

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(1953) ("*Jefferson Standard*"), where employees were discharged for distributing a handbill that made "a vitriolic attack" on the employer's product and business. *Id.* at 468. In *Jefferson Standard*, unlike the instant case, the handbill had "no discernible relation" to the labor controversy. *Id*. In those very different circumstances, the Supreme Court agreed with the Board that the handbill exhibited "such detrimental disloyalty as to provide 'cause'" for dismissal. *Id.* at 472.

[9] Similarly, as the Supreme Court explained in *NLRB v. Transportation Management Corporation*, 462 U.S. 393 (1983), "[t]he 'for cause' proviso was not meant to apply to [*Wright Line*] cases in which both legitimate and illegitimate causes contributed to the discharge." *Id.* at 401 n.6. Rather, the proviso was "sparked by a [Congressional] concern over the Board's perceived practice of inferring from the fact that someone was active in a union that he was fired because of anti-union animus even though the worker had been guilty of gross misconduct." *Id.* (citing H.R. Rep. No. 245, 80th Cong., 1st Sess., at 42 (Apr. 11, 1947)). Thus, although the instant case is not governed by *Wright Line* (*see* p.23 above), *Transportation Management* teaches that the proviso to Section 10(c) does not preclude reinstatement where, as here, minor misconduct occurs in the course of protected activity.

Runion's discharge was not "for cause," and the Board's order directing his reinstatement does not constitute "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Elec. & Power Co.*, 319 U.S. at 540. For all these reasons, the Company errs in claiming that Section 10(c) bars the Board from ordering reinstatement with backpay here.

E. The Board Properly Exercised Its Discretion in Declining To Defer to an Arbitrator's Award that Is Clearly Repugnant to the Act

Under certain circumstances, the Board will defer to an arbitration award involving the same subject matter as an unfair-labor-practice case. But it will decline to do so if the award is inconsistent and irreconcilable with Board precedent on a core issue or analytical approach. Here, the Board did not abuse its discretion in finding that the arbitration award was unworthy of deferral because, contrary to the Board's well-established standard for evaluating picket-line misconduct, the arbitrator subjected Runion's picket-line statements to greater scrutiny than employee conduct in the workplace.

Contrary to the Company's prolonged contentions (Br. 44-60), the Board was fully warranted in finding that "in cases where arbitrators measure employee conduct against a standard which conflicts with or contradicts Board law, the Board has found the awards repugnant to the Act and has refused to defer." (A. 466.) The Board specifically invoked *Olin Corporation* and *Spielberg Manufacturing Company*, lead cases that articulate the Board's court-approved

deferral standard. As demonstrated below, the Board properly rejected the arbitrator's award based on this standard.

1. The Board did not defer to the arbitration award because the award applies a standard that is wholly inconsistent with the Act and "palpably wrong"

The Act empowers the Board to prevent and remedy unfair labor practices, an authority that "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." 29 U.S.C. § 160(a). Thus, the Board retains the power to resolve unfair-labor-practice cases even if the parties' collective-bargaining agreement provides for arbitration of grievances. "The mere presence of an arbitration award does not oust the Board's jurisdiction to adjudicate unfair labor practices on the same subject matter." *NLRB v. Owners Maint. Corp.*, 581 F.2d 44, 48 (2d Cir. 1978). *Accord NLRB v. Strong*, 393 U.S. 357, 360-61 (1969) ("Board may proscribe conduct which is an unfair labor practice even though it is also a breach of contract remediable as such by arbitration").

Nonetheless, the Board has discretion to defer to an arbitration award, and it follows a well-established a framework for deciding when to exercise that discretion. Under that framework, the Board will defer to an award if the arbitrator "adequately considered the unfair labor practice" and "the proceedings appear to have been fair and regular, all parties have agreed to be bound, and the decision of

the arbitrator is not clearly repugnant to the purposes and policies of the Act." *Olin Corp.*, 268 NLRB 573, 573-74 (1984); *see also Spielberg Mfg. Co.*, 112 NLRB 1080, 1082 (1955).[10]

As relevant here, an award is repugnant to the purposes and policies of the Act if it is "palpably wrong, i.e., . . . not susceptible to an interpretation consistent with the Act." *Olin Corp.*, 268 NLRB at 574 (internal quotation mark omitted). An award that is "totally inconsistent with Board precedent" or judicial case law on a central issue meets that standard. *Ralphs Grocery Co.*, 361 NLRB No. 9, 2014 WL 3778350, at *4 (2014). Thus, the Board has found repugnant to the Act awards that relied on novel concepts not recognized under or consistent with Board precedent. *United Cable Television Corp.*, 299 NLRB 138, 142 (1990).

Similarly, an award is repugnant to the Act if the analytical process it employs to assess a key issue conflicts with Board law on how to address that issue. *See U.S. Steel Corp.*, 264 NLRB 76, 79 (1982) ("Since we find the arbitrator's mode of analysis unacceptable, we reject the result he reached by way of that invalid reasoning."), *enforcement denied on other grounds*, 711 F.2d 772 (7th Cir. 1983). Any difference between the standard applied in the award and the

[10] Although the Board recently modified its deferral framework, the new framework applies prospectively only. *See Babcock & Wilcox Construction Co.*, 361 NLRB No. 132 (2014), 2014 WL 7149039, at*19 (2014). Since the arbitration hearing in the instant case took place in 2012, well before *Babcock & Wilcox Construction* issued, the Board's newly modified standard does not apply here.

standard that would have been applied by the Board is likewise relevant to the repugnancy analysis. *Olin Corp.*, 268 NLRB at 574; *see also Hertz Corp.*, 326 NLRB 1097, 1101 (1998) (deferral warranted even though "the arbitrator did not apply the explicit standard" used by the Board, because "the standard applied by him was in effect the same"). Finally, although the Board does not require that it "would necessarily reach the same result," *Smurfit-Stone Container Corp.*, 344 NLRB 658, 660 (2005), an award is unworthy of deferral if the Board, relying on settled precedent and analysis, would necessarily reach the *opposite* result. *See Chevron U.S.A., Inc.*, 296 NLRB 526, 531 (1989) (declining to defer to an award if "an arbitrator . . . reached a result in interpreting how the contract affected statutory rights which was exactly contrary to the result the Board would have reached").

Here, the arbitrator viewed Runion's misconduct as being "even more serious" because he was on the picket line. He scrutinized Runion's statements more strictly because they occurred on the picket line rather than on the job, on his theory that "verbal exchanges between the picketers and replacement workers [c]ould escalate into violence." (A. 361-62.) Based on his view that picket-line misconduct should be evaluated "more serious[ly]," the arbitrator concluded that the Company was entitled to discharge Runion for "just cause" under the collective-bargaining agreement. (A. 361-62.)

As the Board reasonably found, the arbitrator's award is repugnant to the Act because it is inconsistent and irreconcilable with decades of Board precedent on the core issue of picket-line misconduct. Simply put, his award cannot be reconciled with the analysis set forth in *Clear Pine Mouldings* and its progeny. (A. 457, 466-67.) As shown above pp. 14-18, the Board gives more leeway to picket-line conduct than to workplace conduct because it is not uncommon for picketing employees to use impassioned, inappropriate language, and picketing occurs in the context of an adversarial struggle that takes place off-site and off-duty. For those reasons, "[p]icket-line misconduct is accordingly evaluated by a different standard than similar conduct in a working environment." *Airo Die Casting, Inc.*, 347 NLRB 810, 812 (2006). *See also NLRB v. Iowa Beef Processors, Inc.*, 675 F.2d 1004, 1006 (8th Cir. 1982) (striking employee misconduct that is not flagrant or egregious remains protected under the Act).

As shown above pp. 14-18, based on those distinctions, Board law provides that "minor acts of misconduct," which "must have been in the contemplation of Congress" when it provided for the right to picket, are insufficient to remove a picketer from the Act's protection. *Ornamental Iron Work Co.*, 295 NLRB 473, 479 (1989) (making this point in the context of strike misconduct), *enforced*, 935 F.2d 270 (6th Cir. 1991). As a result, Board law recognizes the differences between conduct that occurs while employees are on the picket line and conduct

that occurs in the workplace. In direct conflict with that industrial reality, however, the arbitrator's award evaluated Runion's conduct under a harsher standard because he was on the picket line rather than on the job. (A. 361-62.) Having applied a principle that is directly contrary to the Board's standard for evaluating picket-line misconduct, the arbitrator reached a result directly contrary to court-approved Board law.

2. The Company's arguments misconstrue the standard for deferral and otherwise lack merit

The Company's primary argument (Br. 46-57) is that the arbitrator's award warrants deference because it is susceptible to an interpretation consistent with *Atlantic Steel*, 245 NLRB 814 (1979). But the arbitrator did not apply *Atlantic Steel* and even if he had, that analytical framework applies to assessing employee misconduct in the workplace, which is not the issue here. *See Triple Play Sports Bar & Grille*, 361NLRB No. 31, 2014 WL 4182707, at *1 ("the *Atlantic Steel* framework is not well suited to address . . . employees' off-duty, offsite [communications] with other employees or with third parties"), *enforced sub nom. Three D, LLC v. NLRB*, 629 F. App'x 33, 35 (2d Cir. 2015) (summary order).[11]

[11] The Company does not further its position by relying (Br. 57) on advice memoranda authored by the Board's General Counsel. Those memos do not constitute Board law, nor are they binding on the Board. *S. Jersey Reg'l Council of Carpenters, Local 623*, 335 NLRB 586, 591 n.10 (2001), *enforced sub nom. Spectacor Mgmt. Group v. NLRB*, 320 F.3d 385 (3d Cir. 2003); *Geske & Sons Inc.*,

Thus, it is of no moment whether the arbitrator's award is consistent with the inapplicable analysis set forth in *Atlantic Steel*, and the Board appropriately rejected the Company's reliance on that case. (A. 465.)

The Company also errs in arguing (Br. 47-50) that the Board should have deferred to the arbitration award here because it did so in *Spielberg*, 112 NLRB at 1082. As the Board correctly noted, *Spielberg* is factually distinguishable. It involved allegations that striking employees had "persistently shouted profane insults, including racist slurs, at individuals over several days of picketing." (A. 457 n.1 (discussing *Spielberg*, 112 NLRB at 1082 & n.6).) By contrast, Runion only made two simultaneous remarks at a time when the replacement workers were no longer present.

Moreover, *Spielberg* was decided in 1955, decades before the Board adopted its current test for analyzing picket-line misconduct. Thus, in *Spielberg* the Board necessarily did not consider whether the award was consistent with *Clear Pine Mouldings*. Indeed, in *Spielberg* the Board only had the decision of the arbitration panel, and not its rationale. *See Spielberg*, 112 NLRB at 1088 (arbitration panel majority "entered a written decision which merely states that the Company was justified in refusing to reinstate the four individuals"). By contrast, here the

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317 NLRB 28, 56 (1995), *enforced*, 103 F.3d 1366 (7th Cir. 1997). In any event, the cited memoranda address the *Atlantic Steel* standard, which is inapplicable to picket-line misconduct.

arbitrator provided his reasoning, and his analysis makes clear that he was applying principles inconsistent with the governing analysis set forth in *Clear Pine Mouldings*. (A. 467.)

The Company also demonstrates its misunderstanding of deferral principles by arguing (Br. 52-53) that because the Union presented the arbitrator with its position that picket-line conduct warrants greater protection than conduct in the workplace, the Board must defer to the award. A party's presentation of a legal argument to the arbitrator does not make his award "susceptible to an interpretation consistent with the Act." Rather, that factor goes to a different prong of the deferral analysis, one not at issue here – namely, whether the arbitrator "adequately considered the unfair labor practice." *Olin Corp.*, 268 NLRB at 574.

Contrary to the Company's further suggestion (Br. 53-54), whether an arbitrator is presented with the relevant facts is not determinative of whether the award is repugnant to the Act. Rather, they are distinct inquires. *Id.* In any event, the Board did not base its decision against deferral on any finding that the arbitrator failed to adequately consider the facts surrounding the unfair labor practice. (A. 457 n.1.) In addition, none of the cases cited by the Company (Br. 53) support its misguided suggestion that an award is not repugnant to the Act if the arbitrator was presented with all the facts. *See Teledyne Indus., Inc.*, 300 NLRB 780, 781-82 (1990) (arbitrator was sufficiently presented with the facts

regarding a discharge, an inquiry that is distinct from whether the arbitrator's decision was repugnant to the Act); *Anderson Sand & Gravel*, 277 NLRB 1204, 1205 (1985) (finding deferral appropriate where the contractual and statutory issues are parallel, arbitration panel was presented with the relevant facts, and award was not repugnant to the purposes and policies of the Act).[12]

Nor is the Company helped by *Doerfer Engineering, a Division of Container Corporation of America v. NLRB*, 79 F.3d 101, 103 (8th Cir. 1996), a case involving the very different question of arbitral authority to resolve the parties' dispute. The Court's ruling on that preliminary issue sheds no light on whether an arbitrator's decision is clearly repugnant to the Act.

Finally, the Company gains no ground by invoking (Br. 57-60) the general policy favoring arbitration. At bottom, the Company's view seems to be that deferral should occur when an arbitrator has issued an award – any award. But the general policy favoring arbitration does not strip the Board of its jurisdiction over and obligation to adjudicate unfair-labor-practice cases. *Owners Maint. Corp.*, 581

[12] The other cases cited by the Company (Br. 47, 54, 55 n.7) are also distinguishable. Thus, in *Smurfit-Stone Container Corporation*, 344 NLRB 658, 660 (2005), the Board deferred to an arbitrator's decision because (unlike the instant case) one basis for his ruling was consistent with the Act. The Board noted that if the arbitral analysis that was contrary to Board law had "been the only basis for the arbitrator's decision, deferral would [have] be[en] inappropriate." *Id.*

F.2d at 48. Moreover, the Board's deferral policy is not one of abdication. The Board retains the authority and the duty to determine whether an award is repugnant to the Act, and to refuse deferral in that circumstance. *See, e.g.*, *Ralphs Grocery*, 2014 WL 3778350, at *4. Where, as here, an arbitration award is palpably contrary to well-established Board law, deferral is inappropriate.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the Company's petition for review and enforcing the Board's Order in full.

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National Labor Relations Board

November 2016

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

COOPER TIRE & RUBBER CO. Petitioner/Cross-Respondent v. NATIONAL LABOR RELATIONS BOARD Respondent/Cross-Petitioner and UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL & SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO/CLC Intervenor	)	Nos. 16-2721 & 16-2944 Board Case No. 08-CA-087155

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 9,596 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010, and the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

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Dated at Washington, DC
this 10th day of November, 2016

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

COOPER TIRE & RUBBER CO.	)	
	)	
Petitioner/Cross-Respondent	)	
	)	Nos. 16-2721 & 16-2944
v.	)	
	)	Board Case No.
NATIONAL LABOR RELATIONS BOARD	)	08-CA-087155
	)	
Respondent/Cross-Petitioner	)	
	)	
and	)	
	)	
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL & SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO/CLC	)	
	)	
Intervenor	)	

CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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