UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

COOPER TIRE & RUBBER COMPANY	
and	**Case 08-CA-087155**
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO/CLC	

RESPONDENT COOPER TIRE & RUBBER COMPANY'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Pursuant to Section 102.46 of the Board's Rules and Regulations, Respondent Cooper Tire & Rubber Company ("Cooper") submits the following Brief in Support of its Exceptions to the Decision of Administrative Law Judge Thomas M. Randazzo, dated June 5, 2015 ("ALJD").

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Cooper Tire & Rubber Company fired Anthony Runion because he shouted two racial epithets at African-American replacement workers who were crossing a picket line during a lawful lockout at Cooper's Findlay Ohio plant on January 7, 2012. Like the Arbitrator who had earlier heard a parallel grievance, ALJ Thomas Randazzo found that Runion made both racist comments, and that he was not telling the truth when he denied making the second comment. Moreover, the ALJ found that the statements uttered by Runion most certainly were "racist, offensive, and reprehensible." But, unlike the Arbitrator who had concluded that Cooper discharged Runion for just cause for his reprehensible speech which violated Cooper's Harassment Policy, ALJ Randazzo ordered Cooper to reinstate Runion with full backpay. In the ALJ's view, Runion's vile and reprehensible conduct was insufficient to take him out of the protection of the Act under current Board law because his racist invective was not accompanied by violence or threatening behavior.

Cooper submits that, if the ALJ is right about what current Board law provides, then it is time for the law to change. When the NLRA was passed segregation was both legal and constitutional. Much has changed. Sixty-one years ago – 29 years after the NLRA was passed – the Supreme Court held that segregation was *not* constitutional. Fifty-one years ago, the Civil Rights Act of 1964 was passed outlawing racial discrimination in the private sector. It has been 50 years since the March on Selma. It has been less than one year since the riots in Ferguson over whether "black lives matter" with similar protests over racial bigotry spreading across the United States. The segregation-era NLRA may have tolerated racist comments from picketing employees at one time. In this day and age such tolerance should no longer be tolerated. Employers have a duty to let their minority employees know that their lives *do* matter.

Cooper further submits that making racist comments is *not* protected activity under the NLRA. Accordingly, firing an employee because he makes racist comments *cannot* violate the Act. Section 7 of the Act should no longer be construed so as to provide any protection to racist speech and conduct that an employer is required to eradicate by Title VII.

To the extent that current Board precedent provides such protection, it improperly places the Section 7 rights of the picketing employees above the Section 7 *and* Title VII rights of the non-picketing employees. Providing backpay and reinstatement to picketers discharged for making racist statements likewise impermissibly infringes on the objectives of Title VII. Further, it simply does not reflect reality to treat racist statements shouted from a crowd of white picketers at African-American replacement workers as having an equivalent coercive impact as garden-variety insults and profanities shouted from that crowd. Nor is there any legitimate reason to protect racist statements under Section 7 when such statements, by their nature, are not directed at the legitimate cause of the picketer's anger – the crossing of the picket line – but instead at an immutable characteristic of the non-picketers.

Although the Board may have once found it necessary to cloak racist statements made on the picket line under the protection of the Act to avoid unduly "chilling" employee's freedom to engage in protected activity, there is no legitimate purpose for providing such protection in 2015. And employers should not be faced with the Hobson's choice of either permitting employees to make racist statements with impunity on the picket line and risking liability under Title VII or risking liability under the NLRA by complying with their legal obligation under Title VII to stop racist conduct. Thus, to the extent that the ALJ's decision is based upon currently applicable Board precedent, the Board should overturn that precedent.

Cooper also submits that the ALJ erred in applying the NLRA and current Board principles to this case.

First, Section 10(c) of the Act prohibits the reinstatement of Runion or the payment of backpay to him and the ALJ erred in finding to the contrary. Section 10(c) provides that the Board cannot reinstate, or order backpay for, an employee discharged "for cause" by an employer. "Cause" in the context of Section 10(c) arises when the reason for the discipline is not that the employee engaged in union or other protected concerted activities but instead that the employee is disciplined for actions the employer considers to be misconduct. The parties stipulated that Cooper discharged Runion because Cooper management believed Runion made the two racist statements. The ALJ found that Cooper was right about its belief that Runion made both statements, despite his efforts to deny making one. Runion's racist statements constituted unprotected conduct that violated Cooper's Harassment Policy. Thus, Runion's discharge was "for cause" within the meaning of Section 10(c) of the Act.

Second, the ALJ erred in concluding that Counsel for the General Counsel carried her burden of proving that Cooper discriminated against Runion by discharging him for engaging in protected concerted activities in violation of Section 8(a)(3) of the Act. Runion's racist statements were serious enough to warrant his discharge even under existing Board law relating to picket line misconduct. Moreover, the underlying rationale for the Board's protection of picket line misconduct is that "impulsive behavior" and "animal exuberance" is natural on the picket line and failing to protect misconduct arising from such emotional outbursts would place undue strictures on the employees' exercise of their protected activity. Runion is not entitled to the Act's protection here because the evidence is clear that he was not in a heated exchange or otherwise in the throes of uncontrollable emotion on January 7, 2012. As the ALJ noted, Runion had "his hands in his coat pockets" when he shouted his "offensive and reprehensible" comments. His intentional decision to utter racist statements (in a manner intended to egg on his fellow picketers to join him) was so opprobrious as to forfeit the protection of the Act. In

addition, just because Runion made his racist statements on the picket line, this is not sufficient to prove a violation of Section 8(a)(3) because it does not prove that Cooper's *reason* for discharging Runion was a subterfuge for unlawful discrimination.

Finally, the ALJ erred in refusing to defer to Arbitrator Williams's Award. Board precedent clearly establishes that the "just cause" issue before Arbitrator Williams was "factually parallel" to the issue in this unfair labor practice proceeding under *Olin*. Arbitrator Williams was presented generally with the facts relevant to resolving the statutory issue here. In addition, Arbitrator Williams's Award is not clearly repugnant to the Act. The Act itself does not specifically protect racist speech. And, for reasons articulated above, the Act should no longer be construed so as to provide the penumbra of its protection to speech and conduct that infringes upon other employees' Title VII rights to work in an environment free from racial invective. Further, the "clearly repugnant" standard requires only that Arbitrator Williams's Award be susceptible to an interpretation consistent with the Act. Arbitrator Williams's evaluation of Runion's racist statements, within the context of the night of January 7, 2012, is consistent with the "reasonable person" test of coercion and intimidation set forth in *Clear Pine Mouldings* as well as Board law under *Atlantic Steel* concerning when an employee's conduct is "so opprobrious" as to lose the protection of the Act, even if the ALJ and this Board disagree with his ultimate conclusion. His Award is also consistent with Section 10(c)'s "for cause" provision for the reasons set forth above.

II. STATEMENT OF THE FACTS

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

Cooper currently has three tire manufacturing plants in the United States – its plants in Findlay, Ohio and Texarkana, Arkansas are unionized. Its plant in Tupelo, Mississippi is non-

union (Stip. Facts at #9, #10). Cooper has recognized the Union and/or its predecessor Local Unions at the Findlay, Ohio Plant for at least 70 years (Stip. Facts at #18). There is no evidence – indeed no allegation – that Cooper possesses any animus towards its employees' Union activities. To the contrary, in 2008/2009, Cooper had an economic need to close one of its four then-existing U.S. tire plants. Rather than simply closing one of its two unionized plants based upon their existing costs, Cooper engaged in concession bargaining in Texarkana and Findlay, then closed the non-union Albany, Georgia plant (Stip. Facts at #19).

B. Cooper's Harassment Policy.

Cooper recognizes that it has a moral and legal obligation to ensure that employees, contract workers, and visitors at the Findlay plant are free from unlawful harassment based upon race, color, religion, sex, age or national origin (Tr. at 21-22). As Plant Human Resources Manager Jodi Rosendale testified at the arbitration, maintaining a workplace free of harassment is not only required by federal law, it is also "the right thing to do" (Tr. at 22).

Cooper has a Harassment Policy prohibiting unlawful harassment based upon race, color, religion, sex, age or national origin (Stip. Facts at #102; Co. Ex. 1 to Arbitration). The prohibition extends to "Cooper employees, vendors, customers or other visitors" and provides that "Cooper employees found to be harassing others will be subject to disciplinary action up to and including discharge" (Co. Ex. 1). As such, Cooper employees who violate the policy are subject to disciplinary action up to and including termination (Co. Ex. 1; Tr. at 22). Runion received a copy of Cooper's Harassment Policy when he began employment and was again reminded about his obligations under the Policy in a memorandum that was delivered to all employees on October 25, 2007 (Stip. Facts at #103, #104, #105, Ex. Q; Co. Ex. 3; Tr. at 26-27).

C. The Lawful Lockout.

From approximately September 7, 2011 until February 23, 2012, Cooper and the Union engaged in negotiations for a successor collective bargaining agreement covering the Unit at the Findlay, Ohio facility (Stip. Facts at #23). On November 22, 2011, Cooper made a last best and final offer to the Union in Findlay. After the Union's membership rejected the contract offer, Cooper imposed a lockout on November 28, 2011 because of Cooper's concerns over the possibility of simultaneous strikes in Findlay and Texarkana (Stip. Facts at ##24-26).

Cooper maintained plant operations using supervisors and managers, plus employees from its Tupelo plant and temporary replacement workers provided by Strom Engineering (Stip. Facts at #32). The Union set up picket lines when the lockout began (Stip. Facts at #33). Many of Cooper's replacement workers were transported across the picket line in vans provided by Strom Engineering and/or another company (Stip. Facts at #37). Many of the replacement workers were African-American (Stip. Facts at #38).

Cooper and the Union ultimately reached a tentative agreement that was ratified by the Union employees on February 27, 2012 (Stip. Facts at #27). The lockout ended on February 28, 2012 and Cooper began recalling locked-out employees to work on March 3, 2012 (Stip. Facts at #28). Cooper and the Union expressly agreed to arbitrate any grievance filed over a discharge of a bargaining unit employee during the lockout (Stip. Facts at #82). They further agreed that the arbitration would be subject to the grievance and arbitration procedure of the new CBA (Stip. Facts at #82).

On December 6, 2011, the Union filed Case 08-CA-70209 alleging, among other violations, that Cooper's lockout of employees was unlawful (Stip. Facts at #29, Exs. G-J). On March 30, 2012, the Regional Director dismissed the allegation that Cooper's lockout of

employees was unlawful (Stip. Facts at #30, Ex. K). This determination was upheld by the Office of Appeals on December 14, 2012 (Stip. Facts at #30, Ex. L).

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

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

After the hog roast, Runion participated in the picketing outside of Cooper's Findlay, Ohio facility (Stip. Facts at #47). Company Exhibit 6 contains true and accurate copies of video taken of activities on the picket line during the evening shift change on January 7, 2012 (Stip. Facts at #50). The video footage represented in Company Exhibit 6 was taken by one of the security guards employed by Cooper specifically for the lockout (Stip. Facts at #51).

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

Runion and Collin stand on the west side of the railroad tracks (Stip. Facts at #60). They stand with two other locked-out employees, David Burns and Todd Carnes (Stip. Facts at #61).

Burns is wearing a gray shirt and holding a sign (Stip. Facts at #62). Carnes, who wears glasses, has a dark hat and a dark hooded coat (Stip. Facts at #63).

When the white vans arrive carrying the replacement workers, as the video shows, Runion, Burns, Carnes, and other picketers shouted various comments at them. Burns yells "Go home," "Get out of here," and "Go back where you came from." (Stip. Facts at #66). As one van passes, Carnes and Runion display their middle fingers and Burns holds up his sign and yells "Piece of Shit!" (Stip. Facts at #69). Carnes yells, "Hope you get your fucking arm tore off, bitch!" (Stip. Facts at #70). The Stipulated Facts recite the conduct of the picketers in detail (Stip. Facts at #41-74).

At approximately the 7:04 time mark on the video, Runion yells "Hey, did you bring enough KFC for everybody?" ("the KFC statement") (Stip. Facts at #71). After Runion shouts the "KFC" statement, an unidentified individual yells "Go back to Africa, you bunch of fucking losers" (Stip. Facts at #72). At approximately the 7:25 time mark on the video, Runion shouts "Hey, anybody smell that? I smell fried chicken and watermelon." ("the fried chicken statement").[1] At approximately the 14:45 time mark, Runion takes Collin by his hand and crosses the street against the light, which temporarily impedes a van (Stip. Facts at #76). Runion was given a citation for jaywalking. Cooper did not discharge Runion for the jaywalking depicted in the video (Stip. Facts at #78).

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

On March 1, 2012, Cooper discharged Runion for gross misconduct for making racist statements while on the picket line on January 7, 2012 (Stip. Facts at #29, #30, #91, #92; Jt. Ex.

[1] Another person whom Cooper could not identify shouted "f****ing monkey scabs" at the 16:27 time mark and "f****ing n***** scabs" at time marks 16:27 and 17:09. The parties agree that the person who made those statements was not Runion (Stip. Facts at #74).

2). The parties have stipulated that Plant Manager Jack Hamilton and Ms. Rosendale made the determination to discharge Runion because, upon viewing the video, they believed that he made the following statements:

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

(Stip. Facts at #54). The parties also stipulated that Cooper discharged Runion for making the:

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

(Stip. Facts at #92).[2]

The Union filed its grievance over Runion's discharge on March 12, 2012 (Stip. Facts at #95).

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

An arbitration hearing was held over Runion's discharge before Roger C. Williams, the Permanent Impartial Arbitrator (Stip. Facts at #97). The Union and Cooper agree that the arbitration hearing was procedurally fair and equitable (Stip. Facts #99).

It was clear from Runion's testimony at the arbitration that he was not willing to come clean about the racist comments he shouted at replacement workers after the hog roast or even sincerely apologize for making such abusive and bigoted remarks.

At the hearing, Rosendale testified that Runion had said nothing during the grievance procedure to express remorse for his conduct and characterized his "one" racist statement as a

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[2] Burns and Carnes, who are at the west side of Western Avenue (the left side of the video) throughout the entire course of the video, certainly made it clear how they felt about the replacement workers that night, referring to them as "scum", "worthless piece of shit", "worthless sack of shit", even expressing the hope that a replacement worker would "get [his] f****** arm tore off" (Co. Ex. 6; Stip. Facts at ##69-70). However, they confined their angry rantings to non-racist epithets, such as "scum", or to profanity and scatological remarks, with no racial overtones. Thus, they were not disciplined by Cooper.

"slip of the tongue" (Tr. at 38-40). At the arbitration, he likewise expressed no remorse – Runion simply explained how his racial invectives had impacted *him*, not how they could affect others (Tr. at 40).

During his arbitration testimony, Runion also denied that he uttered the second racist statement – i.e., "Hey anybody smell that? I smell fried chicken and watermelon!" (Co. Ex. 6; Tr. 74). As both Arbitrator Williams and ALJ Randazzo concluded, Runion clearly made the second statement. His denial is frankly astounding given the video evidence. As for the "KFC" slur which Runion admits came from his mouth, Runion did not directly apologize for the comment at the hearing. The most that he could muster was that he was "out of line" and he was embarrassed that he made the comment (Tr. at 73). He attempted to explain it away by claiming that he was under "high stress" and that he "had a slip of the tongue at that moment" (Tr. at 73). Runion also tried to justify his racist statement as a response to provocation by the replacement workers (they held money up to the windows of the vans and "flipped the bird" to the picketers) (Tr. at 72-73). Runion also claimed that he felt "expendable" as a result of being locked out and was under great stress (Tr. at 66-67).

When confronted with the video which could prove or disprove his assertions, Runion admitted that, on January 7, 2012, the replacement workers did nothing to provoke his racist statements (Tr. at 83-84). Moreover, Runion did not appear to be in the throes of anger or "animal exuberance" when he made his racist remarks – as the ALJ noted, Runion simply stood with his hands in his pockets while shouting his racist remarks (ALJD at 12, lines 4-6. Anybody watching the video would reasonably conclude that Runion was not in an excited or even angry mood – he was having fun while he spewed his bigoted comments.

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

The Union filed its original charge, Case No. 08-CA-087155, on August 13, 2012, a month after the arbitration hearing. The consideration of the charge was deferred to arbitration (Stip. Facts at #1, Ex. A).

H. Arbitrator Williams Issues His Award Finding Just Cause for Runion's Discharge.

Arbitrator Williams issued his Opinion and Award upholding Runion's discharge on May 14, 2014 (Stip. Facts at #111, Ex. T – Arbitrator Williams's Opinion).

Arbitrator Williams concluded that Runion made both racist statements: "Hey, did you bring enough KFC for everybody?" and "Hey, anybody smell that? I smell fried chicken and watermelon" (rejecting Runion's claim that he did not make the second statement) (Ex. T at 11). He further concluded that, by making the racist statements, Runion committed a clear violation of Cooper's Harassment Policy which was so intolerable as to constitute just cause for his discharge (Ex. T at 14).

In assessing Runion's racist statements, Arbitrator Williams considered the impact of the statements "under the circumstances" existing on the night of January 7, 2012. He specifically noted that, as the videotape clearly demonstrates, there were "constant verbal exchanges" between the replacement workers and the picketing employees (Ex. T at 12; Co. Ex. 6). In addition, he stated that Runion yelled his two racist statements so that "dozens of people could hear" them – and potentially act upon them (*Id.* at 12-13). Arbitrator Williams further noted that Runion's initial racist comment inspired another unidentified individual to shout additional hate-filled racist invective (*Id.* at 7). Based upon his evaluation of the circumstances of that night, Arbitrator Williams concluded that "there was a genuine possibility of violence" on the picket

line that night and that Runion's comments increased the possibility that the "meet and greet with the scabs" (as Runion described it) "would escalate into violence" (*Id.* at 6, 12-13).

In evaluating Runion's conduct, Arbitrator Williams expressly noted in his Opinion that the Union argued that "on a picket line . . . there is generally more tolerance for misconduct that would constitute just cause for discharge if it were committed in the plant" (Ex. T at 10). Although Arbitrator Williams did not expressly cite Section 7, it is also clear from his Opinion that he recognized and understood that Runion and the other picketers had the right to picket and to express their "animosity toward the replacement workers." (Ex. T at 13). He, in fact, expressly noted, without censure, that the picketers and the replacement workers "yelled swear words and made lewd gestures at each other" on the picket line throughout the course of the lockout.

Arbitrator Williams concluded that just cause existed for Runion's discharge. In reaching this decision, Arbitrator Williams expressly considered the impact of Runion's racist statements on the rights of the African-American replacement workers to whom it was directed. Specifically, he found:

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

(Ex. T at 13-14, emphasis added). Arbitrator Williams concluded that, notwithstanding the picketers' understandable expressions of animosity toward the replacement workers, the African-American replacement workers did not deserve extra hatred due to their race. Thus, Arbitrator

Williams concluded that Runion's racist statements crossed the line and were "so intolerable" as to constitute "gross misconduct" (*Id.* at 14).

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

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

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

The ALJ, like Arbitrator Williams, concluded that Runion made both racist statements and that his denial of the second racist statement was not credible (ALJD at 5, lines 28-40). Nevertheless, the ALJ concluded, on the merits, that Runion's racist statements were not sufficient for Runion to lose the protection of the Act while on the picket line because his statements, although "racist, offensive, and reprehensible", "were not violent in character" and "did not contain any overt or implied threats to replacement workers" (ALJD at 12, lines 1-2). In reaching this decision, the ALJ noted that Runion, while making both statements, did not make "any threatening gestures or movements" but simply "stood with his hands in his pockets" (ALJD at 12, lines 3-5).

With respect to the deferral issue, the ALJ concluded that, under *Olin*, the Board should not defer to Arbitrator Williams's Award (ALJD at 16, lines 16-17). The ALJ concluded that Arbitrator Williams did not adequately consider the unfair labor practice issue because he considered only whether there was "just cause" for Runion's discharge and did not consider the statutory rights at issue (ALJD at 17, lines 14-19). The ALJ also concluded that Arbitrator

Williams's Award was "clearly repugnant" to the Act because Arbitrator Williams concluded that Runion's discharge was warranted even though his racist statements did not constitute a threat (ALJD at 17, lines 20-34). Thus, the ALJ held that Arbitrator Williams's Award "provide[d] less protection for picket line conduct than the Act affords." (ALJD at 17, lines 14-34).

III. STATEMENT OF THE ISSUES WITH REFERENCE TO THE SPECIFIC EXCEPTIONS TO WHICH THEY RELATE.

A. Whether Racist Speech and Conduct Should Be Accorded Protection by Section 7?
Exceptions 1-2, 16

B. Whether Reinstating Runion With Backpay Violates Section 10(c) of the Act?
Exceptions 3, 16

C. Did the ALJ Err in Concluding That the General Counsel Carried Her Burden of Proving That Cooper Discriminated Against Runion by Discharging Him for His Racist Comments?
Exceptions 4-11, 16

D. Is Arbitrator Williams's Award Upholding the Discharge of Runion for His Racist Remarks Entitled to Deference Under *Olin?*
Exceptions 12-15

IV. LEGAL ARGUMENT

A. Racist Speech and Conduct Should Be Accorded No Protection by Section 7.

Exceptions 1-2, 16

When the NLRA was passed, *Plessy v. Ferguson*[3] was the law of the land. "Separate but equal" was okay. But it has been over 60 years since the Supreme Court decided *Brown v. Board of Education*[4] holding that "separate" is *not* equal. And, it has been over 50 years since Title VII was passed outlawing racial discrimination. Whatever protection the National Labor

[3] 163 U.S. 537 (1896).
[4] 347 U.S. 483 (1954).

Relations Act might have historically applied to racist comments, it should no longer do so today. Racist comments have no more place on the picket line than they do at a fraternity party. Treating angry white picketers shouting racist comments as having an equivalent coercive impact on African-American replacement employees as that same crowd shouting garden-variety insults and vulgarities simply does not accurately reflect the coercive impact of racist statements. In this respect, it is important to note that when the Board adopted the *Clear Pine Mouldings* test in 1984, the Supreme Court had not yet even recognized that a violation of Title VII could occur based solely on a hostile work environment in the absence of any tangible economic discrimination. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

When evaluating whether an employee steps beyond the scope of Section 7 protection by making racist statements, the Board is obligated to recognize that such statements do not just infringe upon general notions of civility or an employer's right to maintain discipline. Racist statements also infringe upon the statutory purposes and objectives of Title VII. The very existence of Title VII demonstrates the power of racist statements to coerce and intimidate, as the federal courts have long recognized. *McDonald v. Santa Fe Transportation*, 427 U.S. 273 (1976) (Congress's intent in passing Title VII was to root out invidious discrimination and eliminate the lasting effects of discrimination). And the Board itself has recognized, in other contexts, that appeals to racial prejudice even in the absence of threats of physical violence, nevertheless are an especially "powerful emotional force" that have an enhanced ability to coerce and intimidate employees in the exercise of their Section 7 rights. *Sewell Mfg. Co.*, 138 NLRB 66, 71 (1962). It is long past time for the Board to recognize that racist statements on the picket line likewise have an enhanced coercive impact on minority employees exercising their Section 7 rights to cross a picket line.

That is especially true here. The parties have stipulated that Runion was discharged for his racist statements. Thus, this is not a case where the Board is charged with determining what Cooper's true motivation was in discharging Runion. The question squarely before the Board is whether Runion's racist statements are protected by the Act.

Runion's racist statements do not deserve the protection of the Act. Providing picketers like Runion with impunity to direct racist statements at non-picketing employees privileges the picketers' Section 7 rights over the Section 7 and Title VII rights of the non-picketers. Reinstating picketers who engage in racism and racist statements also impermissibly interferes with the objectives of Title VII. Finally, equating racist statements with other insults, such as "scab" or "rat", under *Clear Pine Mouldings* does not accurately reflect the reasonable tendency of racist statements to coerce and intimidate and the potential of such statements to foment violence. Being angry at employees crossing the picket line is okay. Calling them racist names is not. For these reasons, to the extent that Board precedent, in cases like *Airo-Die Casting*, 347 NLRB 810 (2006), permits picketers to engage in racist statements with impunity so long as such statements do not explicitly threaten violence, this Board should overturn that precedent and acknowledge the true coercive impact of racist statements on the Section 7 rights of non-picketing employees.[5]

[5] *Clear Pine Mouldings*, 268 NLRB 1044 (1984), establishes a "reasonable person" test for determining whether an employee loses the protection of the Act by engaging in misconduct – namely," whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." For the reasons set forth later in this Brief, Cooper submits that Runion's racist statements, under the circumstances existing on January 7, 2012, reasonably tended to coerce and intimidate the African-American replacement workers or, alternatively, that Arbitrator Williams's Award finding just cause for Runion's discharge based upon his racist statements is susceptible to an interpretation consistent with the Act. However, to the extent that the Board agrees that the ALJ correctly applied existing Board precedent, Cooper submits that the Board should overturn that precedent.

1. Upholding the ALJ's Decision Places Employers Between the Scylla of Title VII and the Charybdis of Section 7.

Since the enactment of the Taft-Hartley Act, the NLRA has not been a one-way street. Runion had the Section 7 right to engage in picketing on January 7, 2012 in front of Cooper's Findlay, Ohio tire plant. However, the non-picketing employees (many of whom were African-American) had a countervailing right to cross the picket line and work at the plant. *Axelson, Inc.*, 285 NLRB 862, 864 (1987) ("Section 7 as clearly protects the right of an employee to refrain from taking part in a strike as it does the right of an employee to peacefully participate in one").

When evaluating whether the Act should permit Runion to direct racist statements at the African-American replacement workers, the Board must balance Runion's Section 7 rights with the Section 7 *and* Title VII rights of the replacement workers. In a proper evaluation of these competing interests, the right of the replacement workers to engage in protected activity and to be free from invidious discrimination clearly outweighs Runion's right to cloak himself in the protection of Section 7 while making racist statements on the picket line.

With respect to the Section 7 rights of Runion and the African-American replacement workers, the African-American replacement workers were engaged in protected activity when they crossed the picket line. *Axelson, Inc.*, 285 NLRB at 864. By contrast, although Runion had the right to picket and to express his views of the non-picketers, Runion's racist statements (the stipulated reason for his discharge) are not, in themselves, protected activity. The Board has long held that it does not "condone" picket line misconduct such as that engaged in by Runion. *Longview Furniture*, 100 NLRB 301, 304 (1952). Instead, the Board has merely concluded that, in certain circumstances, an employee's unprotected misconduct is not sufficient to remove the employee from the penumbra of protection provided by Section 7 of the Act.

But the Board's traditional extension of Section 7 to protect picketing employees from their own "animal exuberance" does not outweigh the hallmark Section 7 rights of the African-American replacement workers to be free from coercion and intimidation in exercising their right to cross the picket line. This is particularly true here where Runion was not in the throes of an uncontrollable emotional outburst when he uttered the racist statements. Instead, as the video demonstrates and the ALJ found, he was calm, "st[anding] with his hands in his coat pockets" (ALJD at 10, line 5).

Even more importantly, the African-American replacement workers also have the statutory right under Title VII to be free from racial harassment. And the Board is obligated to refrain from exercising its remedial powers in a manner that interferes with the purpose and objectives of Title VII. As the Supreme Court first stated in *Southern Steamship v. NLRB*, 316 U.S. 31 (1942), the NLRB is obligated, particularly when devising remedies for unfair labor practices, to take into account the objectives of other federal statutes. The Court has, in fact, "never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and polices unrelated to the NLRA." *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 143-44 (2002).

In *Southern Steamship*, the Board had ordered the reinstatement of thirteen seamen that had engaged in hallmark protected activity (specifically, a strike) when they had peacefully refused the orders of their supervisors to prepare their ship to leave the dock of Houston. 316 U.S. at 34-35. The Supreme Court denied enforcement of the Board's order because, under 18 U.S.C. Sections 483 and 484, the seamen's refusal to work also constituted an unlawful mutiny. *Id.* In this circumstance, the Court held that the Board had exceeded its remedial powers by enforcing the seamen's right to engage in protected activity in a manner that conflicted with the 18 U.S.C. Sections 483 and 484. *Id.* Similarly, in *Hoffman Plastic Compounds*, the Court

refused to enforce a Board order awarding backpay to an undocumented alien employee discharged for engaging in protected activity because such an award ran counter to the IRCA. 535 U.S. at 143-44. See also, *Sure-Tan v. NLRB*, 467 NLRB 883 (1986) (holding same under previous version of IRCA); *Connell Constr. Co. v. Plumbers*, 421 U.S. 616, 626 (1975) (rejected claim that federal antitrust policy should defer to the NLRA); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984) (limiting Board's remedial powers to the extent that they conflicted with bankruptcy law).

Here, Runion's racist statements have a much more tenuous connection to protected activity than the seamen's strike in *Southern Steamship.* Thus, under *Southern Steamship*, the Board exceeds its remedial authority when it permits the protection of Section 7 to extend to Runion's racist statements thus trumping the statutory purpose and objectives of Title VII. Unlike Runion's racist statements (which are not themselves protected but which the ALJ found insufficient to remove Runion from the protection of the Act), the African-American replacement workers right to be free from racial harassment in the workplace falls squarely within the protective ambit of Title VII. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 66 (1986) (racial harassment falls directly within Title VII's mandate to prevent discrimination against employees in their "terms, conditions, or privileges of employment"), citing *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971). Thus, this is not a circumstance, as in *Southern Steamship*, where there are equal and competing statutory interests. Here, Title VII's mandate to protect against invidious discrimination substantially outweighs the NLRA's interest (to the extent that it exists at all) to give Runion a free pass for making racist statements on the picket line.

Adopting a standard that employees lose the protection of the Act by making racist statements also reflects employers' obligations under Title VII to provide a remedy for such conduct. Employers can *choose* whether they wish to impose a code of civility in the workplace.

However, employers are *required* to stop racial harassment. An employer is legally responsible for racial harassment of its employees if it has knowledge of such harassment and takes no action to remedy it. *Faragher v. City of Boca Raton,* 524 U.S. 775 (1998). Section 7 protection provided to otherwise unprotected racist statements that occur on the picket line should not outweigh Cooper's right to enforce its Harassment Policy to fulfill its legal obligation to prevent unlawful racial harassment. The federal courts, in enforcing Title VII, have long recognized that although it may not be within an employer's power to guarantee an environment free from bigotry, the employer has the right and obligation to "let it be known . . . that racial harassment will not be tolerated" and to "take all reasonable measures to enforce this policy". *Davis v. Monsanto Chem. Co.*, 858 F.2d 345, 350 (6th Cir. 1988).

That the replacement workers who were the specific targets of Runion's invective would not be returning to the Findlay plant after the lockout was over is irrelevant under Title VII. Cooper had (and has) an obligation to protect *all* of its employees from a racially hostile work environment – including replacement workers hired just for the lockout, such as the Strom Engineering workers, Cooper's Tupelo employees who worked in Findlay during the lockout, and its minority employees who work in Findlay, whether or not on the picket line. Whether minorities themselves or simply non-bigoted white employees, *all* of Cooper's employees deserve to work in an environment where racial harassment is not tolerated.

2. Equating Racist Statements with Other Types of Insults or Vulgarity Does Not Accurately Reflect the Reasonable Tendency of Racist Statements to Coerce and Intimidate and the Potential of Such Statements to Foment Violence.

It is also contrary to public policy for the Board to continue to tolerate racism on the picket lines and to provide employees making racist statements the same level of protection under the Act as picketers who call replacement workers "scabs", "rats", "scum" or other non-

racist insults or who utter curse words and make vulgar statements. If any lesson can be drawn from the events of the last several years, it is that, in whatever context that racist statements arise (whether among college students in Oklahoma or in protests in Missouri and Baltimore),[6] they have a power to coerce and intimidate, not to mention the power to initiate violence, that other insults and vulgarities do not approach.

To the extent that *Airo-Die Casting* and other Board cases do not reflect this reality, the Board should overrule them and adopt a rule that racist statements, by their nature, reasonably tend to coerce and intimidate employees in the exercise of their Section 7 rights and that employees uttering such statements (whether on the picket line or anywhere else) should not be afforded the protection of the Act.

The Board's picket line misconduct cases traditionally treated all offensive and insulting comments as equivalent (including racist statements) so long as there was no actual violence or threat of violence. *Coronet Casuals*, 207 NLRB 304 (1973). But this false equivalency clearly no longer reflects reality, and probably never did – at least not the reality of African-Americans and other minority groups who are the targets of racism.

Cooper submits that no statutory purpose is served by protecting vile and reprehensible racist statements such as those uttered by Runion. The only rationale favoring the protection of such statements that can be discerned from Board precedent is that if the Board concluded that employees lose the protection of the Act by making racist statements while on a picket line, the Board might place "undue strictures" on employees in the exercise of their protected activity.

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[6] In his decision, the ALJ stated that he was not giving any consideration "to any facts in the briefs that are not supported by the stipulated record". It is not clear whether the ALJ was referencing specific facts relating to the arbitration or Cooper's reference to recent public events in Ferguson, Missouri and Baltimore, Maryland in support of its argument that the Board should no longer protect racist statements made on the picket line. To the extent that the ALJ was referencing these public events, the Board can properly take judicial notice of these events pursuant to Fed. R. Evid. 201(b), *Levine v. City of New York,* 2001 U.S. Dist. Lexis 21670, *2 fn. 1 (S.D.N.Y. Dec. 28, 2001) (a court may take "judicial notice of adjudicative facts 'generally known" within the territorial jurisdiction of the court, including facts pertaining to current events, politics, and similar facts.").

W.C. McQuaide, Inc., 220 NLRB 593 (1975). But even if it was reasonable to infer that employees must be permitted to engage in racist statements in moments of "animal exuberance" in 1975, it is certainly not reasonable to do so now.

Nor is it reasonable to infer in 2015 that prohibiting racist statements would have any chilling effect on employees in the exercise of their Section 7 rights. In fact, as the General Counsel noted in his recent guidance on employer work rules, the Board does not consider a policy prohibiting "racial slurs" and "derogatory comments" as violating the Act because no employees reasonably would read such a policy as prohibiting comments protected by the Act, but instead would read it as prohibiting "unprotected" racist comments. [See General Counsel Memorandum – GC 15-04 Concerning Employer Rules (March 18, 2015), at 11-12]. If Cooper can reasonably promulgate a policy prohibiting racial harassment without running afoul of Section 8(a)(1) because no reasonable employee would interpret such a policy as interfering with rights protected by the Act, then it stands to reason that Cooper should be able to *enforce* such a policy without violating the Act.[7] This is particularly true here where Runion did not utter his racist statements in the midst of a heated picket line exchange or in an emotional outburst.

Employees, like Runion, who make racist statements on the picket line must be considered to have removed themselves from the protection of the Act. And an employer should be permitted to discharge them for such misconduct. To the extent that Board precedent (in cases like *Airo-Die Casting*) permits picketers to engage in racist statements with impunity so long as such statements do not explicitly threaten violence, this Board should overturn that

[7] This Board recently reaffirmed that an employer has a legitimate business interest under Title VII to conduct investigations into complaints of harassment, even if such conduct occurred during the exercise of Section 7 rights. *Fresenius USA Manuf.*, 362 NLRB No. 130 (June 24, 2015) slip op. at 1. It also stands to reason that if an employer has the right under Title VII to investigate harassment occurring during the course of protected activity, that the employer should have the right to take action based upon the results of its investigation.

precedent and acknowledge the true coercive impact of racist statements on the Section 7 and Title VII rights of non-picketing employees.

B. Reinstating Runion with Backpay Violates Section 10(c) of the Act.

Exceptions 3, 16

Section 10(c) prohibits the Board from reinstating or ordering backpay for an employee discharged "for cause" by an employer. Here, the parties stipulated that Cooper discharged Runion for making the two racist statements. And an Arbitrator found that this was cause for discharge. Board law is clear that racist statements, such as those uttered by Runion, are not intrinsically protected by the Act. Thus, Cooper discharged Runion "for cause", not for his protected activity, and Section 10(c) prohibits the Board from ordering Cooper to reinstate Runion and make him whole for any loss of earnings or benefits that he has suffered.

The ALJ rejected Cooper's argument based on Section 10(c) on the basis that Runion's racist statements occurred during his protected activity and that he was thus discharged for engaging in protected activity (notwithstanding the parties' stipulation). The ALJ's decision is contrary to the plain language of Section 10(c) and the legislative history explaining the reasons why Congress included the "for cause" prohibition in the final version of the Taft-Hartley Act. The legislative history clearly reflects that an employer could have "cause" for discharge even if the misconduct occurred during the course of protected activity. The Conference Report, commenting on the final changes to the Act, states in relevant part as follows:

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

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

The Supreme Court has likewise acknowledged that, although an employer may not, under cover of its right to discharge employees, intimidate or coerce them with respect to their rights under the Act, "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." *NLRB v. Local Union No. 1229, IBEW*, 346 U.S. 464 (1953), citing *Labor Board v. Jones & Laughlin*, 301 U.S. 1, 45-6 (1937). The Court specifically acknowledged that the purpose of including the "for cause" prohibition in Section 10(c) was to enshrine this principle in the Act. *Id.* at 472-473, citing H.R. Rep. No. 80-510 at 39. Further, the Court noted that "cause" could exist for discharge within the meaning of Section 10(c) even if the misconduct occurred as a part of "concerted activity wholly or partly within the scope" of Section 7. *Id.* at 477-478. See also, *Paramount Mining Corp.*, 631 F.2d 346 (4th Cir. 1980); *NLRB v. Knuth Brothers*, 537 F.2d 950 (7th Cir. 1976).

The Board has likewise made clear that "cause" in the context of Section 10(c) arises when "the reason for the discipline is not that the employee engaged in union or other protected concerted activities" but instead that "the employee is disciplined for actions the employer considers to be misconduct". *Anheuser-Busch, Inc.*, 351 NLRB 644, 646 (2007). As the ALJ

notes, a termination is not "for cause" and is unlawful if is "*motivated* by protected activity." (ALJD at 19, lines 31-34, citing *Anheuser-Busch*, 351 NLRB at 648) (emphasis added). But contrary to the ALJ's reasoning, that passage does not support a finding that Cooper's discharge of Runion was not "for cause". It, in fact, supports the opposite conclusion. There is no dispute that Runion was on the picket line on January 7, 2012. But his presence on the picket line was not why he was discharged. He was discharged for making unprotected racist statements, as the parties have stipulated.

Section 10(c)'s "cause" inquiry as to whether an employer acted in "in the absence of a prohibited *reason*" is an inquiry into the "real motivating purpose" of the discharge. *Id.*, citing *Taracorp Industries*, 273 NLRB 221, at 222 fn. 8 (1984). Thus, even if Runion did not "lose the protection of the Act" because of his racist statements (and Cooper vehemently believes that he did), that does not mean that Cooper lacked "cause" for his discharge based upon his unprotected racist statements. The relevant question under 10(c) is *why Cooper discharged Runion.* If Cooper did so "for cause", then the Board may not reinstate Runion to employment under Section 10(c).[8]

The Board's recent decision in *E.I. Dupont*, 362 NLRB No. 98 (2015), cited by the ALJ, does not compel a contrary conclusion. In *Dupont*, the Board found the necessary nexus between the employer's unfair labor practice and the employee's misconduct because, had it not been for the employer conducting an unlawful meeting with the employee in violation of his *Weingarten* rights, the employee would not have engaged in the misconduct for which he was discharged. 362 NLRB, slip. op. at 4-5. Thus, as the Board held, the employer could not have possibly

[8] For this reason as well, the ALJ's attempt to distinguish Arbitrator Williams' "just cause" determination from Section 10(c)'s "for cause" determination is a distinction without a difference (ALJD at 19, lines 4- 41). Cooper concedes that the two inquiries are not identical. But that is because "just cause" is a more stringent standard than "cause" – which encompasses "good cause, bad cause or no cause at all". *Anheuser Busch*, 351 NLRB at 647. The only relevant issue is whether Cooper acted in the absence of a prohibited reason. Here, Cooper did so.

established that it would have discharged the employee even if the employer had not violated the Act. *Id.* at 4. In that circumstance, the Board reasonably concluded that reinstatement and backpay was appropriate to "restore the situation that would have prevailed but for the unfair labor practice". *Id.* at 5.

Here, by contrast, Cooper did not "trigger" Runion's misconduct, or otherwise create the circumstances for it to occur, by engaging in an unfair labor practice. Cooper's lockout was lawful. Although Runion had a right to be on the picket line and express his views of the replacement workers (along with the hundreds of other Cooper employees who freely expressed their views), his decision to engage in unprotected racist statements was his and his alone.

Cooper discharged Runion for engaging in unprotected conduct that violated its Harassment policy (and Arbitrator Williams found that just cause existed for his discharge). Section 10(c) expressly prohibits the Board from reinstating or ordering back pay paid to an employee who is discharged "for cause" for misconduct arising in the course of protected activity – that is, in fact, precisely what the "for cause" prohibition was designed to prohibit. The ALJ's contrary conclusion essentially reads Section 10(c) out of the statute.

C. The ALJ Erred in Concluding That the General Counsel Carried Her Burden of Proving That Cooper Discriminated Against Runion by Discharging Him for His Racist Comments.

Exceptions 4-11, 16

The ALJ also erred in concluding that Cooper violated Section 8(a)(3) and (1) of the Act by discharging Runion. In order to establish a violation of Section 8(a)(3), the General Counsel, at all times, has the overall burden of proving discrimination. *Rubin Bros.*, 99 NLRB 610 (1952); *Schreiber Mfg., Inc. v. NLRB*, 725 F.2d 413, 416 (6th Cir. 1984). The Board employs a burden-shifting test for the purpose of determining whether the employer was motivated by anti-

union animus in discharging an employee.[9] Thus, the General Counsel bears the initial burden of establishing that an employee was fired for picket line misconduct. The employer may then rebut this prima facie case by showing that it had an "honest belief" that the striker engaged in the misconduct. The burden then shifts back to the General Counsel to prove that no misconduct occurred or that the misconduct was not so serious as to warrant discharge. *Schreiber Mfg., Inc.* 725 F.2d at 416. On these last two issues, the General Counsel carries the ultimate burden of persuasion. *Id.*

Here, the ALJ erred in concluding that the General Counsel met her burden of proof that Runion's racist statements were not so serious as to warrant discharge under existing Board precedent. The ALJ also erred in concluding that, under the facts of this case, the General Counsel met her ultimate burden of proving that Cooper was motivated by anti-union animus in discharging Runion.

The Board must make a factual determination of the employer's actual motive whenever the General Counsel claims that an individual has been unlawfully discriminated against because of union activities. The Supreme Court has held that the determination of whether the employer is guilty of unlawful discrimination hinges on the employer's true purpose or real motive in taking the action in controversy. See, e.g., *Local 357 Intern. Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. NLRB,* 365 U.S. 667 (1961). Sometimes an employer's conduct is deemed inherently destructive of important employee rights and, therefore, the Supreme Court has agreed with the Board that specific evidence of a discriminatory motive is not necessary. See, e.g., *NLRB v. Great Dane Trailers, Inc.,* 388 U.S. 26 (1967). A case such as this, where an employee is fired for making racist comments, albeit

[9] As the Board explained in *Wright Line*, 251 NLRB 1083 (1980) the purpose of employing a burden-shifting test is to establish a framework for discovering the motive of the employer. *Id.* at 1083.

while engaged in otherwise protective activity, cannot be deemed to fall within the category of "inherently destructive" conduct since racist speech, in itself, is not protected under Section 7. Indeed, the only reason the Board has ever extended protection under Section 7 to that non-protected activity is because holding otherwise *might* somehow chill activities that actually *are* protected by the Act. But the Supreme Court has also held that where the adverse effect of an employer's alleged discriminatory conduct on employee's rights is comparatively slight and the employer produces a legitimate business justification for its conduct, *specific* evidence of an anti-union motivation is necessary to sustain the unfair labor practice findings. See, e.g., *NLRB v. Brown,* 380 U.S. 278 (1965).

In the instant case, the parties stipulated that Cooper's decision to discharge Runion was based upon Cooper's belief that Runion had uttered both racist statements attributed to him on January 7, 2012. The video entered into evidence proved, to the satisfaction of both the ALJ and the Arbitrator, that Runion actually engaged in this misconduct. It is beyond question that Cooper has a duty under Title VII to promulgate and enforce a policy prohibiting discrimination and harassment. There is nothing under Title VII that provides an exception to an employer's duty to maintain a harassment-free work environment if the employees who create the hostile work environment are on a picket line. Accordingly, Cooper must be deemed to have met its burden of proving a legitimate business justification for its decision to discharge Runion.

In order to prevail, therefore, the burden was upon the General Counsel to prove *specific* evidence of unlawful intent or animus. There is no such evidence of animus in this case. To the contrary, the stipulated evidence shows that Cooper had an amicable relationship with its Unions for over 70 years and that even during the course of the lockout, Cooper and the Union cooperated in order to deter and address problems on the picket line (Stip. Facts at #18-9, 36). Accordingly, the *only* evidence in this case of Cooper's motive for firing Anthony Runion is the

parties' stipulation that Cooper fired Runion for making the racist statements. This evidence of motive is supported by Jodi Rosendale's testimony at the arbitration hearing, by the Arbitrator's finding that Runion's misconduct was just cause for discharge, and by the ALJ finding, in agreement with the Arbitrator, that Runion actually engaged in the misconduct attributed to him. Under the circumstances, the mere fact that this misconduct occurred on the picket line is insufficient to constitute "specific evidence" of unlawful motivation.

1. Firing an Employee for Making Racist Comments on the Picket Line Has a "Relatively Slight" Impact on Section 7 Rights.

In evaluating Runion's racist statements under the *Clear Pine Mouldings* test, the ALJ concluded, in part, that Runion's statements were not "directed" at the African-American replacement workers because Runion did not utter the statements until after the vans filled with replacement workers had passed by him and additionally that Runion was speaking to his fellow picketers and not to the replacement workers. Further, the ALJ concluded that there was no evidence that Runion's racist statements provoked the additional racist statements that followed his own. Thus, the ALJ concluded that there was no evidence that the statements "coerced or intimidated" those workers in the exercise of their Section 7 rights (ALJD at 12, lines 7-14, 28-30).

There are several problems with this analysis. First, the fact that Runion uttered his first racist statement six seconds after the first van passed and 27 seconds after the second van passed does not mean that the African-American replacement workers did not hear the statements. The video clearly demonstrates that the replacement workers and the picketers could hear each other. At 3:31 through 4:00 on the tape (prior to Runion yelling his racist statements) picketers Burns and Carnes were clearly conversing with replacement workers (who were either exiting vans to

report to work or entering vans to leave), although the tape did not pick up what the replacement workers said (Co. Ex. 6).

Second, even if Runion directed his shouts at the other picketers across the street, that does not lessen the reasonable tendency of his statements to coerce and intimidate the African-American replacement workers. In fact, it increases the tendency of the statements to coerce and intimidate because it demonstrates that Runion was trying to incite the crowd. Arbitrator Williams specifically noted the fact that Runion yelled his statements so that "dozens could hear him" in evaluating the impact of the statements to incite violence (Ex. T at 12-13). The other salient fact is that everyone in the crowd outside the gate that can be seen on the video is white. Thus, to the extent that Runion was shouting his racist comments across the street at his fellow picketers, he was fanning the flames of the angry, white crowd.

Third, to the extent that the ALJ finds that there is no proof that Runion's racist statements provoked additional racist statements, the ALJ is improperly placing the burden of persuasion on Cooper. Moreover, the video demonstrates that there were no racist statements made before Runion made his statements, but after Runion made his first racist statement, another unidentified individual chimed in with "Go back to Africa, you bunch of fucking losers" within 10 seconds of Runion's statement. In other contexts, the Board has recognized temporal proximity as evidence supporting causation. *Davey Roofing*, 341 NLRB 222, 223 (2004). A similar inference is warranted here.

Finally, the ALJ's conclusion that there is no evidence that Runion's "racist statements" *actually* coerced and intimidated African-American replacement workers is inconsistent with the *Clear Pine Mouldings* test. Under *Clear Pine Mouldings*, the test is whether Runion's racist statements, under the circumstances existing on January 7, 2012, would "reasonably tend" to coerce and intimidate the African-American replacement workers.

Cooper submits that Runion's racist statements would reasonably tend to coerce and intimidate the African-American replacement workers under the circumstances existing on January 7, 2012 under the *Clear Pine Mouldings* standard. Any reasonable person viewing the videotape from January 7, 2012 can see that it was a volatile situation.[10] There was a larger than ordinary group of locked-out employees (with their families and friends) gathered at Cooper's main gate just in time for the replacement workers to arrive in their vans (Stip. Facts at #44). Many individuals were yelling vulgar comments, including "Piece of Shit" and "Hope you get your fucking arm tore off, bitch" (Stip. Facts at ##69-70). As established above, the video also makes clear that the replacement workers could hear what the picketers were yelling (Co. Ex. 6 at 3:31–4:00).

The police were outside the gate that night and remained stationed there while the large crowd milled around, mostly on the eastern side of the gate. The police cited Runion for jaywalking (which impeded a van of replacement workers trying to enter Cooper) and employee Dave Gilbert for standing in front of a van of replacement workers that was trying to exit the plant (Stip. Facts at #78, #94). Thus, the police were clearly concerned about any situation where the vans were stopped in the midst of the angry crowd outside the gates. Less than a month before, locked-out employee Chris Jones had allegedly menaced a replacement worker and engaged in a high speed car chase of the worker (Stip. Facts at #98). So the police were right to be concerned about the crowd on January 7, 2012.[11]

Cooper further submits that Runion's demeanor on the night of January 7, 2012 supports a finding that his racist statements were sufficiently serious to warrant his discharge. Although

[10] Ten days later, a truck driver reported being threatened by a locked-out employee, subsequently determined to be Carl Bowers (Stip. Facts at #94, Ex. O - Security Guard report and Police Reports).

[11] The Board has, in other contexts, applied principles of mass psychology in determining the effect of certain types of speech when larger groups of employees are involved. See *Peerless Plywood,* 107 NLRB 427, 429 (1953). Considerations of mass psychology are similarly warranted here.

Clear Pine Mouldings looks to the impact of employee misconduct on a non-picketing employee, the necessary precondition for cloaking employees in the protection of the Act for picket line misconduct that, standing alone, would be unprotected is that some types of "impulsive behavior" and "animal exuberance" are "normal outgrowths of the intense feelings developed on picket lines" and that removing the protection of the Act for such "impulsive behavior" might place "undue strictures" on employees in the exercise of their protected activity. *Terry Coach*, 166 NLRB 560, 563 (1967); *W.C. McQuaide, Inc.*, 220 NLRB 593, 594 (1975). Thus, although the Board may not "condone" misconduct arising from "animal exuberance", it will protect the employee engaging in the misconduct (even if the misconduct itself is unprotected) in order to effectuate employee rights to engage in picketing. Id; Longview, 100 NLRB at 304.

But under this precedent, Runion is not entitled to this additional protection because he did not utter his racist statements in a moment of "animal exuberance". While Runion attempted to justify his misbehavior by attributing it to the stress of being locked out and to the provocative behavior on the part of the replacement workers, as the ALJ noted in his decision, when Runion uttered his racist statements, he was standing "with his hands in his coat pockets" and "not making any threatening gestures or movements" (ALJD at 12, lines 4-6). Reviewing the video shows that Runion is relaxed on the picket line and not in the throes of uncontrollable emotion. He appears to be having fun attempting to egg on his fellow picketers to direct racist remarks at the replacement workers. He is certainly not engaged in a heated exchange with any replacement workers or in any sort of outburst.

In this circumstance, his racist statements are more appropriately considered under the *Atlantic Steel* test (which focuses on the nature of an employee's conduct to determine whether it warrants the protection of the Act) rather than the *Clear Pine Mouldings* test (which extends

protection to otherwise unprotected activity in order to account for the "animal exuberance" of people on the picket line).

Under *Atlantic Steel*, Runion's conduct is so opprobrious as to lose the protection of the Act. Although *Atlantic Steel* did not involve racist remarks, existing Board precedent also supports the conclusion that an employee can lose the protection of the Act by making racist statements while otherwise engaged in protected activity. *Avondale Industries*, 333 NLRB 622, 637-8 (2001) (union activist lawfully discharged by making unfounded assertion that foreman was a Klansman); *Veterans Administration*, 26 FLRA 114, 116 (1987) (employer lawfully disciplined union president for engaging in unprotected racial stereotyping when president called a manager a "spook who sat by the door" and an "Uncle Tom" in union newsletter), aff'd sub nom. *AFGE v. FLRA*, 878 F.2d 460 (D.C. Cir. 1989). The same holds true for employees who engage in sexually harassing statements (which, like racist statements, implicate Title VII) while otherwise engaged in protected activity. *PPG Industries, Inc.*, 337 NLRB 1247, 1247 (2002) (male union supporter engaged in protected activity was lawfully disciplined for shouting at a female employee "They're f----ing you. They're screwing you. You need to sign one of my [union authorization] cards"). See also, *Advertiser Mfg. Co.*, 275 NLRB 100, 133 (1985) (shop steward lawfully disciplined for making debasing and sexually abusive remarks to a female employee who had crossed a picket line months earlier).

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

stereotypes was so "opprobrious" as to forfeit employee's protection under the Act). Runion's racist comments were the same type of racist stereotypes as those discussed in the Detroit Medical Center Advice Memo, and were, in fact, even more offensive.

Thus, for the reasons set forth above, the General Counsel has not met her burden of proof that Runion's racist statements were not so serious as to warrant discharge under existing Board precedent.

2. The General Counsel Did Not Meet Her Burden of Proving That Cooper Was Motivated by Anti-Union Animus in Discharging Runion.

Given that Runion's unprotected racist statements are the stipulated reason for his discharge, the General Counsel also cannot carry her burden of proving that Cooper discriminated against Runion by discharging him for engaging in protected concerted activities in violation of Section 8(a)(3) and (1) of the Act.

The ALJ concluded that the General Counsel had proven that Cooper acted with anti-union animus in discharging Runion under the test set forth in *Siemens Energy & Automation, Inc.*, 328 NLRB 1175 (1999) because Runion's racist statements did not reasonably tend to coerce or intimidate the African-American replacement workers in the exercise of their rights under the Act (ALJD at 15, line 20 to p. 16, line 10). However, even if the Board agrees with the ALJ on his evaluation of Runion's racist statements under *Clear Pine Mouldings*, it is not reasonable to infer that Cooper acted with anti-union animus in discharging Runion on the basis of this finding.

In the ordinary Section 8(a)(3) case, the parties are in dispute about the reason why the employer discharged an employee. Upon the General Counsel's meeting her initial burden of production, the employer presents evidence of its purported legitimate non-discriminatory reason for discharge. If the General Counsel proves that the employer's purported non-discriminatory

reason is not worthy of belief, then it is reasonable for the Board to conclude that the employer's purported reason for discharge was just a subterfuge for unlawful discrimination. *Wright Line*, 251 NLRB 1083 (1980).

But this is not the ordinary Section 8(a)(3) case. Here, the parties have stipulated that Runion was discharged because Cooper believed he made the racist statements. The ALJ found that he did, indeed, make both racist statements attributed to him. There is no evidence, or claim, that Cooper's reason for discharging him was untrue or a pretext, or motivated by animus. And Board law is clear that the racist statements, by themselves, are unprotected. Thus, just because Runion's racist statements occurred on the picket line, this does not prove that Cooper's *reason* for discharging Runion was just a subterfuge for unlawful discrimination (i.e., that Cooper's reason is not worthy of belief and therefore is not the true reason for Runion's discharge). It simply proves that Runion made his racist statements on the picket line. Such a finding is not sufficient to prove that Cooper was motivated by anti-union animus in discharging Runion.

The General Counsel always bears the ultimate burden of proving discrimination in any Section 8(a)(3) claim and she cannot meet her burden here. *Schreiber Mfg., Inc.* 725 F.2d at 416. The record is devoid of any evidence of anti-union animus by Cooper. Cooper and the Union have a long-standing relationship lasting over 70 years at the Findlay plant. In 2008, when Cooper was faced with a choice to close one of its plants, it chose its non-union plant in Albany, Georgia rather than its union plants in Findlay and Texarkana, Arkansas (Stip. Facts at #19). Cooper's lockout was lawful. And with respect to the picketing activity in 2012, Cooper ultimately refused to reinstate only one employee for picket line misconduct – Runion (Stip. Facts at #94). If Cooper was motivated by anti-union animus in disciplining employees for picket line misconduct, it would have surely disciplined employees Carnes and Burns – who

engaged in numerous vulgar and profane statements on the night of January 7, 2012 (Co. Ex. 6; Stip. Facts at #69, #70).

For this reason as well, the ALJ erred in concluding that Cooper violated Section 8(a)(3) and (1) in discharging Runion.[12]

D. Arbitrator Williams's Award Upholding the Discharge of Runion for His Racist Remarks Is Entitled to Deference Under *Olin*.

Exceptions 12-15

Under *Olin*, the Board must defer to Arbitrator Williams's Award so long as he adequately considered the unfair labor practice issue that the Board is called on to decide and his Award is not clearly repugnant to the purposes and policies of the Act. *Olin Corporation*, 268 NLRB 573, 574 (1984).[13] Here, Arbitrator Williams's Award clearly meets these two standards for deferral under *Olin* and the ALJ's decision to the contrary is in error.

The factual questions before Arbitrator Williams in making his determination that just cause existed for Runion's discharge were "coextensive" with the factual questions relevant to

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[12] The ALJ concluded that *Airo-Die Casting, Inc.*, 347 NLRB 810 (2006) was directly on point and compelled a finding that Runion's racist statements did not remove him from the protection of the Act. However, *Airo-Die* is distinguishable from the instant case for several reasons. First, the ALJ in *Airo-Die* concluded that the employer witnesses testifying about the racist incident in that case "embellished" and "exaggerated" the employee's misconduct. *Id.* at 812. The ALJ in *Airo-Die* further found that the employer did not consistently enforce its harassment policy in the workplace. *Id.* Here, ALJ Randazzo found that Runion was not telling the truth about his misconduct and found no evidence of disparate treatment. Thus, there are no determinations as to the credibility of Cooper's witnesses from which the Board could infer anti-union animus on the part of Cooper. Most importantly, for the reasons set forth fully in Section IV(D) of this Brief, *Airo-Die* did not involve deferral. Thus, *Spielberg Manufacturing Co.*, 112 NLRB 1080 (1955), where the Board deferred to an arbitrator's award refusing to reinstate picketers based upon profane and racist statements with no threat of violence, is more on point here than *Airo-Die Casting, Inc.* As for *Nickel Molding*, 317 NLRB 826 (1995), which is also cited by the ALJ in support of his decision, Cooper would note that the Fourth Circuit Court of Appeals refused to enforce the Board's order reinstating the employee who made the profane statements in that case and did so specifically on the basis that the Board failed to account for the "counterbalancing section 7 rights" of the non-picketing employee on the receiving end of the profanity. *NMC Finishing v. NLRB*, 101 F.3d 528, 532 (8th Cir. 1996).

[13] While the Board in *Babcock & Wilcox Construction, Inc.* overruled *Olin Corporation*, 268 NLRB 573, 574 (1984), the Board did so only prospectively so the *Olin* test for deferral applies to this case. The parties have stipulated that the first factors of the *Olin* test are met in this case – namely, that the arbitration hearing was procedurally fair and equitable and that the parties arbitrated Runion's grievance under Cooper and the Union's grievance procedure which provided that Arbitrator Williams's decision was "final and binding to both parties" (Stip. Facts at #99).

this unfair labor practice charge. That is all is required to meet Olin's "adequate consideration" requirement.

As to the repugnancy finding, the ALJ concluded that Arbitrator Williams's Award is repugnant to the Act merely because the ALJ disagreed with Arbitrator Williams's conclusions as to the severity of Runion's racist statements in light of current Board precedent and the impact of those statements on the night of January 7, 2012. For reasons more fully articulated in Section IV(A), supra, to the extent that the ALJ's finding that the Arbitrator's decision is "repugnant" to the Act is premised upon current Board law *requiring* the protection of "racist, offensive, and reprehensible" speech when it occurs on the picket line, then such law should be overturned as itself being "repugnant" to current societal standards.

But even if the Board declines to overturn such precedent and concludes that Runion did not lose the protection of the Act by making his racist statements, the Board's disagreement with Arbitrator Williams's contrary conclusion does not warrant a refusal to defer under *Olin*. An arbitrator's award is not "clearly repugnant" to the Act simply because it fails to replicate the Board's analytical framework for deciding a specific issue or because the arbitrator reaches a decision that is contrary to the decision that the Board would have reached. All that *Olin* requires is that an arbitrator's award be susceptible to an interpretation consistent with the broad parameters of the Act (i.e., that there be some Board precedent that supports the arbitrator's decision). In this case, Arbitrator Williams's Award is consistent with some Board precedent (even if it may be inconsistent with others). Under these circumstances, the Board should defer to Arbitrator Williams' Award under *Olin* even if the Board might come to a contrary conclusion.

In addition, for the reasons set forth in Section IV(B) of this Brief, Arbitrator Williams's Award is also consistent with the "for cause" provision of Section 10(c) of the Act.

1. Arbitrator Williams Adequately Considered the Statutory Issue in This Case Under *Olin's* "Factually Parallel" Test.

Under *Olin*, the inquiry into whether Arbitrator Williams "adequately considered the unfair labor practice issue" is a factual one. In *Olin*, the Board held that "it would find that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is *factually parallel* to the unfair labor practice issue, and (2) the arbitrator was presented generally *with the facts* relevant to resolving the unfair labor practice." *Id.* at 574 (emphasis added). If the factual questions before the arbitrator "were coextensive with those that would be considered by the Board in a decision on the statutory issue", then the arbitration award meets the third factor of the *Olin* test. *Martin Redi-Mix, Inc.*, 274 NLRB 559, 559 (1985).

The ALJ, in his decision, did not even undertake an analysis of whether Arbitrator Williams adequately considered the unfair labor practice issue. Instead, while acknowledging that *Olin* still applied, the ALJ essentially employed the Board's recent *Babcock & Wilcox* deferral standard when he concluded that Arbitrator Williams did not adequately consider the unfair labor practice issue because the Arbitrator considered only whether there was "just cause" for Runion's discharge and did not expressly enunciate and apply the *Clear Pine Mouldings* test for picket line misconduct.

The ALJ's conclusion is directly at odds with existing Board precedent under *Olin*. *Olin* does not require that an arbitrator expressly address the statutory issue in order for the Board to defer to the arbitrator's decision. *Olin*, in fact, expressly overruled *Raytheon Co.*, 140 NLRB 883 (1963) which *had* conditioned deferral on the arbitrator's having expressly considered the unfair labor practice issue.

Since *Olin*, the Board has deferred to an arbitrator's decision in numerous cases where the arbitrator did not expressly address the statutory issue in his decision, including this Board's

recent decision in *Babcock & Wilcox Construction Co.*, 2014 NLRB Lexis 964, 361 NLRB No. 132 (2014). See also, *Shimazaki Corporation,* 274 NLRB 15 (1985); *Andersen Sand & Gravel Co.*, 277 NLRB 1204 (1985); *Teledyne Industries*, 300 NLRB 780, 781-2 (1990) (same).

Texaco, Inc., 279 NLRB 1259 (1986) is directly on point regarding what is needed to meet the "adequate consideration" test under *Olin* in a case involving picket line misconduct. In *Texaco*, an arbitrator had concluded that an employer had just cause to suspend two employees for picket line misconduct. The ALJ in *Texaco* refused to defer to the arbitrator's award. The ALJ "based this determination on his finding that the arbitrator did not adequately consider the unfair labor practice because he failed to determine whether [the two employees] were engaged in conduct the Act protects". *Id.* at 1259.

The Board reversed the ALJ's decision, concluding that his finding regarding whether the arbitrator had adequately considered the statutory issue reflected "the precise analytical error Olin sought to rectify". *Id.* The Board's discussion of *Olin*'s adequate consideration test in *Texaco* is directly applicable to the instant case:

> Regarding whether the contractual and unfair labor practice issues are parallel, the essence of each proceeding is whether the Respondent was justified in imposing discipline on [the two employees] for their alleged strike misconduct. Concededly, each forum requires its own analytical framework. Thus, the arbitrator decided whether just cause for discipline existed while resolution of the unfair labor practice requires a decision on whether the employees' misconduct was such that they forfeited the protection of the Act. These analytical differences, however, are endemic to the relative forums and do not detract from the congruent issues of whether [the two employees'] misconduct justified the Respondent's imposition of discipline. Accordingly, the issues in the two proceedings are factually parallel.
>
> Respecting whether the arbitrator was presented generally with the facts relevant to resolving the unfair labor practices, there can be no serious dispute. Both the arbitrator and the judge were presented with evidence concerning the alleged actions of [the two employees], the circumstances surrounding their activities, and the impact of their acts on other persons present.

Id. at 1260.

Here, the parties stipulated that Cooper discharged Runion for making the racist statements observed on the video (Stip. Facts at #54, #92). Thus, the issue before Arbitrator Williams was whether Cooper had "just cause" to discharge Runion for making these racist statements. The issue in this unfair labor practice proceeding is whether Runion lost the protection of the Act by making these racist statements. *Texaco* expressly holds that these are "factually parallel" issues under *Olin*.[14] *Texaco, Inc.*, supra.

For these reasons, the ALJ erred in concluding that Arbitrator Williams did not adequately consider the unfair labor practice issue.

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

The ALJ's conclusion that Arbitrator Williams's Award is clearly repugnant to the Act is similarly flawed. In the ALJ's view, Arbitrator Williams's Award is repugnant to the Act because Arbitrator Williams concluded that there was just cause to discharge Runion even though his racist statements did not constitute a threat of violence and thus his Award conflicts with the Board's decision in *Clear Pine Mouldings* and *Airo-Die*. But the ALJ's conclusion misconstrues the *Olin* deferral standard.

In considering the "clearly repugnant" standard, the Board does not require that the award be totally consistent with Board precedent. *Olin Corp.*, 268 NLRB 573, 574 (1984). Rather, the Board will defer unless the award is not susceptible to an interpretation consistent with the Act. *Id. at* 574. "Susceptible to an interpretation consistent with the Act" means precisely that even if

[14] There can be no serious dispute that Arbitrator Williams was presented generally with the facts relevant to resolving this unfair labor practice proceeding. The vast majority of the stipulated facts in this proceeding are the same facts which Arbitrator Williams considered, specifically: 1) the events occurring on January 7, 2012 both before and after Runion's racist statements; 2) Cooper's decision to discharge Runion; 3) Cooper's Harassment Policy; and; 4) evidence concerning Cooper's past discipline of employees (Stip. Facts at ##41-80, ##91-111) These categories of facts are identical to those found sufficient in *Texaco* to establish the second prong of the "adequate consideration" test under *Olin*.

there is one interpretation that would be inconsistent with the Act, the arbitrator's opinion passes muster if there is another interpretation that would be consistent with the Act. *Stone Container Corp.*, 344 NLRB 658 (2005). Further, "consistent with the Act" does not mean that the Board would necessarily reach the same result. It means only that the arbitral result is within the broad parameters of the Act. *Id.* 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, even if other Board precedent is arguably contrary to the arbitral decision. *Kvaerner Philadelphia Shipyard, Ind.*, 347 NLRB 390, 391 (2006).

Thus, in this case, Arbitrator Williams's Award is susceptible to an interpretation consistent with the Act if there is Board precedent deferring to an arbitrator's decision finding that an employer properly discharged (or refused to reinstate) a picketer for engaging in profane and/or racist language that did not constitute a threat of violence. That is precisely the Board's holding in *Spielberg Manufacturing Co.*, 112 NLRB 1080 (1955), the hallmark deferral case that enunciated the "clearly repugnant" test.[15]

In *Spielberg*, the employer refused to reinstate four picketers who engaged in various profane and racist statements on the picket line but did not engage in threats or violence (similar to Runion's racist statements here).[16] The employer and the union agreed to arbitrate the issue of whether the strikers could return to work (just as Cooper and the Union did here even though there was no collective bargaining agreement between the parties when Runion was discharged).

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[15] Cooper acknowledges that, after issuing *Spielberg*, the Board moved away from the deferral standard set forth in that opinion for thirty years. However, when the Board issued its decision in *Olin*, the Board readopted *Spielberg*'s "clearly repugnant" test. In fact, it did not alter *Spielberg*'s "clearly repugnant" language in any way. The only change that *Olin* made to the *Spielberg* deferral test was to adopt the "factually parallel" requirement discussed above in Section IV(D)(1) Thus, *Spielberg*'s holding relating to the "clearly repugnant" standard is applicable here in determining whether Arbitrator Williams's Award is susceptible to an interpretation consistent with the broad parameters of the Act.

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

The arbitration panel in *Spielberg* conducted a hearing and concluded that the picketers were not entitled to reinstatement and the picketers then filed an unfair labor practice. Similarly, in this case, Arbitrator Williams conducted the hearing over Runion's discharge and the Union then filed its unfair labor practice charge.

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

Arbitrator Williams's Award that Runion's racist statements warranted his discharge is consistent with the Board's decision to defer to the arbitration panel's award in *Spielberg*. Thus, under *Olin*, Arbitrator Williams's Award is not "clearly repugnant to the Act".[17]

Because there is precedent consistent with Arbitrator Williams's Award, it is irrelevant that there may be other cases inconsistent with his Award. Thus, even if the Board concludes that the case cited by the ALJ [specifically *Mobil Oil Exploration & Producing, U.S.,* 325 NLRB 176 (1997); *Garland Coal & Mining Co.,* 276 NLRB 963 (1985); *Cone Mills Corp.,* 298 NLRB 661 (1990); and *Union Fork & Hoe Co.,* 241 NLRB 907 (1997)] are inconsistent with Arbitrator Williams's Award, that does not make deferral inappropriate in this case. Cooper would further

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

note that these cases are, in fact, all easily distinguishable from the instant case in that all of those cases involved circumstances where an arbitrator upheld a discharge where the conduct for which the employee was discharged was, itself, protected activity, rather than addressing whether an employee's unprotected misconduct caused him to lose the protection of the Act.

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

Arbitrator Williams's decision that Runion's statements were "so intolerable" as to warrant his just cause dismissal is also susceptible to an interpretation consistent with *Atlantic Steel* and its progeny – which hold that, even though an employee may be otherwise engaged in protected activity, he can engage in misconduct "so opprobrious" as to lose the protection of the Act (Ex. T – Arbitrator Williams's Opinion at 14).[18] Existing Board precedent, and the 2012 *Detroit Medical Center* Advice Memorandum, also support the conclusion that an employee can lose the protection of the Act by making racist statements while otherwise engaged in protected activity. See cases cited in Section V(C) of this Brief.[19] The existence of this precedent is sufficient under *Olin* to warrant deferral under the "clearly repugnant" test.

The ALJ concluded that Arbitrator Williams's Award is "clearly repugnant" to the Act without considering at all whether his award is susceptible to an interpretation consistent with

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[18] See *Atlantic Steel Company*, 245 NLRB 814, 816 (1979) (employee lost the protection of the Act when he called foreman a "lying son of a bitch" while engaged in protected activity); *Foodtown Supermarkets, Inc.*, 268 NLRB 630 (1984) (deferral appropriate where employee called company president "a son of a bitch" during a discussion regarding employee's grievance); *North American Refractories Co.*, 331 NLRB 1640 (2000) (employee lost protection of the Act by calling his supervisor a "stupid mother fucker" during a meeting that otherwise constituted protected, concerted activity); *Cellco Partnership d/b/a Verizon Wireless and Communications, AFL-CIO*, 349 NLRB 640, 641 (2007) (employee otherwise engaged in protected activity lost the protection of the Act by referring to a supervisor as "that bitch" and to other supervisors as "fucking supervisors").

[19] *Avondale Industries*, 333 NLRB 622, 637-8 (2001); *Veterans Administration*, 26 FLRA 114, 116 (1987) aff'd sub nom. *AFGE v. FLRA*, 878 F.2d 460 (D.C. Cir. 1989); *PPG Industries, Inc.*, 337 NLRB 1247, 1247 (2002) (addressing statements implicating sexual harassment); *Advertiser Mfg. Co.*, 275 NLRB 100, 133 (1985) (same); General Counsel Advice Memo for Case No. 07-CA-06682, *Detroit Medical Center*, 2012 NLRB GCM Lexis 1, at *7 (January 10, 2012) (the use of offensive racist stereotypes was so "opprobrious" as to forfeit employee's protection under the Act).

Atlantic Steel. Instead, the ALJ dispensed with *Atlantic Steel* in his discussion of the merits of the unfair labor practice charge, apparently assuming that since the Board would not utilize *Atlantic Steel* in evaluating whether Runion's racist statements were protected, that it is not necessary to consider *Atlantic Steel* and its progeny in determining whether Arbitrator Williams's Award is clearly repugnant to the Act.

But the ALJ fundamentally misconstrued *Olin* in making this assumption. Under Olin, the Board has not required an arbitrator to show perfect fealty to Board law or replicate the Board's analytical framework in order to find that the arbitrator's award is not clearly repugnant to the Act. For example, in *Motor Convoy, Inc.*, 303 NLRB 135 (1991), and *Dennison National Co.*, 296 NLRB 169 (1989), the Board deferred to awards where the arbitrator resolved the dispute based upon a contractual standard that was inconsistent with the statutory standard and, in fact, provided less protection for the statutory rights at issue. *Motor Convoy*, 303 NLRB at 136; *Dennison National*, 296 NLRB at 170. As the Board noted in *Motor Convoy*, although a difference in standards may be relevant to the issue of repugnance, it is not dispositive of it. 303 NLRB at 136-7.

Similarly, in *Aramark* Services, Inc., 344 NLRB 549 (2005), the arbitrator concluded that just cause existed for an employee's discharge where that employee harassed fellow employees in the course of seeking signatures on a petition to replace a union steward. The Board found the arbitrator's award consistent with general Board precedent holding that an employee engaged in protected activity can lose the Act's protection by soliciting during work hours and engaging in sexual harassment even though neither of the two cases that the Board cited in support of that principle was directly on point. *Id.* at 551, citing to *BJ's Wholesale Club*, 318 NLRB 684 (1995), and *PPG Industries*, 337 NLRB 1247 (2002). For purposes of *Olin's* "clearly repugnant" test, it was enough in *Aramark* that the arbitrator's award could be placed within the

broad parameters of Board precedent establishing that an employee's misconduct can be sufficiently egregious to lose the protection of the Act (even if the Board, determining the issue de novo, would have come to a contrary conclusion).

Arbitrator Williams's Award here is likewise consistent with Board precedent under *Atlantic Steel* and its progeny and thus is not clearly repugnant to the Act.

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

Arbitrator Williams's decision is also susceptible to an interpretation consistent with the Board standard for strike-related misconduct expressed in *Clear Pine Mouldings* – namely, "whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." 268 NLRB 1044, 1046 (1984). The arbitral decision at issue addresses each aspect of the *Clear Pine Mouldings* test.

First, as set forth in detail in Section II(H) of this Brief, Arbitrator Williams considered Runion's racist statements "under the circumstances" existing on the night of January 7, 2012 – noting the "constant verbal exchanges" between the replacement workers and the picketing employees (Ex. T at 12; Co. Ex. 6) and the the fact that Runion yelled his two racist statements so that "dozens of people could hear" them – and potentially act upon them (*Id.* at 12-13). Arbitrator Williams concluded that "there was a genuine possibility of violence" on the picket line that night and that Runion's comments increased the possibility that the "meet and greet with the scabs" (as Runion described it) "would escalate into violence" (*Id.* at 6, 12-13).

Second, Arbitrator Williams considered whether Runion's racist statements reasonably tended to coerce or intimidate the African-American replacement workers to whom it was directed (Ex. T at 13-14). He concluded that, although Runion and the other picketers had the

right to express their animosity toward the replacement workers, the African-American replacement workers were not "deserving of any more animosity than the other replacement workers" (Ex. T. at 14). Thus, Arbitrator Williams considered the coercive impact of Runion's racist statements on their intended targets – the African-American replacement workers – as *Clear Pine Mouldings* directs, in light of the circumstances existing on January 7, 2012.

Arbitrator Williams concluded that Runion's racist statements were "so intolerable" as to constitute "gross misconduct" and were just cause for his discharge (*Id.* at 14). His consideration of the relevant factors under the *Clear Pine Mouldings* test is sufficient under *Olin* to warrant deferral in this case even if this Board would come to the contrary conclusion.

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

First, the ALJ is incorrect when he states that Arbitrator Williams did not consider the fact that Runion made his racist statements on the picket line. Arbitrator Williams expressly noted in his Award that the Union argued that "on a picket line . . . there is generally more tolerance for misconduct that would constitute just cause for discharge if it were committed in the plant" (Ex. T at 10). Arbitrator Williams' determination that Runion's racist statements were still sufficient to justify his discharge, in light of the circumstances of January 7, 2012, is an implicit rejection of the Union's argument. The Board has long held that where an arbitrator was presented with an argument on the statutory issue and nevertheless upholds a discharge based on just cause, the arbitrator's award is susceptible to an interpretation consistent with the Act under *Olin* even if the arbitrator's award does not reflect the consideration of the statutory issue. *Babcock & Wilcox*, 361 NLRB No. 132, slip op. at 14 (decision arguably consistent with a finding that arbitral body considered and rejected the union's contention that a discharge was motivated by employee's steward activities); *Teledyne Industries, Inc.*, 300 NLRB 780, 781-2

(1990) (arbitrator "necessarily rejected" the Union's assertions that employee was discharged for protected activities by holding that just cause existed where employee was insubordinate); *Anderson Sand & Gravel*, 277 NLRB 1204, 1205 (1985) (arbitration panel, in deciding that employees walked out in violation of contractual no-strike clause implicitly rejected the Union's contention that the walkout was protected because it was in protest of abnormally dangerous working conditions).

As in *Babcock*, *Teledyne* and *Anderson Sand & Gravel*, Arbitrator Williams's implicit rejection of the Union's argument that more tolerance should be shown for Runion's racist statements because he made those statements on the picket line is sufficient to warrant deferral in this case.

Second, deferral is particularly appropriate here given that the *Clear Pine Mouldings* test, by its very nature, requires the exercise of judgment, based upon the specific facts of a case, as to whether the misconduct at issue reasonably tended to coerce and intimidate.[20] The *Clear Pine Mouldings* test is a rule of reasonableness. Here, Arbitrator Williams correctly concluded that Runion's racist statements would reasonably tend to inflame the angry crowd of white picketers on the night of January 7, 2012 against the African-American replacement workers who were the express target of those statements. This conclusion is supported by the video and common sense for the reasons set forth in detail in Section IV(C)(1) of this Brief. Deference to this Award under *Olin* is consistent with "the national policy strongly favor[ing] the voluntary arbitration of disputes" as well as the expertise of labor arbitrators in resolving industrial disputes. *Olin*, 268 NLRB at 573-4. It is also consistent with the Board's decisions in other contexts which apply

[20] The very reason that the Board instituted the *Clear Pine Mouldings* test was to dispense with "the per se rule" of *W.C. McQuaide, Inc.*, 220 NLRB 593 (1975), that "words alone can never warrant a denial of reinstatement in the absence of physical acts". 268 NLRB at 1046.

mass psychology in determining the coercive impact of speech directed at large groups of employees. *Peerless Plywood*, 107 NLRB 427, 429 (1953).

But in determining whether Arbitrator Williams's decision is susceptible to an interpretation consistent with the Act, even the Board's disagreement with Arbitrator Williams's exercise of his judgment is not sufficient under *Olin* to refuse to defer to his Award.

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

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

Just as in *Aramark*, Arbitrator Williams analyzed Runion's racist statements in this case consistent with the Board's *Clear Pine Mouldings* test. Thus, even if the Board would have concluded that Runion's racist statements did *not* "reasonably tend to coerce or intimidate" the

African-American replacement workers in the exercise of *their* Section 7 rights, deferral to the Arbitrator's contrary opinion is still appropriate under *Olin*.[21]

Finally, the *Olin* deferral standard recognizes that the parties, by agreeing to arbitrate a dispute, "have accepted the possibility that an arbitrator might decide a particular set of facts differently than would the Board". *Anderson Sand & Gravel*, 277 NLRB at 1205, fn. 6. Here, there was no collective bargaining agreement between the parties when Runion made his racist statements and neither party was *required* to arbitrate his discharge. At the time, the Union could have decided to file an unfair labor practice over Runion's discharge and eschew arbitration. But Cooper and the Union expressly agreed to arbitrate any grievances over the discharge of bargaining unit employees during the lockout. By so doing, the parties agreed to accept Arbitrator Williams's judgment in determining whether Runion's racist statements should be tolerated because he made them on the picket line or whether they constituted just cause for his discharge. The Union, however, decided to hedge its bets and filed its unfair labor practice charge one month *after* arbitrating the grievance. And, when it did not like the results of the arbitration, the Union chose *not* to be bound by the result. But Arbitrator Williams's Award is worthy of deferral. The *Clear Pine Mouldings* test, by its nature, requires a judgment as to the coercive impact of picket line misconduct in light of the circumstances giving rise to it. Thus, deferral to Arbitrator Williams's assessment of Runion's racist statements is warranted here even if the ALJ or the Board disagree with his conclusion.

[21] See also, *Texaco, Inc.*, 279 NLRB 1259 (1986) (deferring to arbitrator's award upholding discharge of picketers for strike misconduct even though Board would come to contrary conclusion and even though the award "it does not replicate the Board's own findings, analytical framework, and remedial scheme"); *Sawin & Co., Inc.*, 277 NLRB 393, 395 (1985) (deferring to arbitrator's award where arbitrator addressed only the issue of whether the employer acted "unfairly" in refusing to reinstate the strikers without addressing whether the strikers engaged in "serious acts of misconduct" under *Clear Pine Mouldings*, 268 NLRB 1044 or even specifying the actions in which the strikers had engaged).

V. CONCLUSION

For the foregoing reasons, Cooper respectfully requests that the Board overturn ALJ Randazzo's decision and enter an order finding that Cooper's discharge of Anthony Runion for his racist statements did not violate the Act.

Respectfully submitted,

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Proof of Service

This will affirm that copies of Respondent Cooper Tire & Rubber Company's Brief in Support of Exceptions to the Decision of the Administrative Law Judge in Case No. 08-CA-087155 have been served by electronic mail this 20th day of July, 2015 on the following:

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