

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

No. 05-16096-C

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

GIMROCK CONSTRUCTION, INC.

Respondent

**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER AND APPELLATE
JURISDICTION**

This case is before the Court on the application of the National Labor Relations Board (“the Board”) to enforce its Supplemental Decision and Order against Gimrock Construction, Inc. (“Gimrock”). The Board issued the Order after addressing the matters this Court remanded to the Board in *NLRB v. Gimrock Constr., Inc.*, 247 F.3d 1307 (11th Cir. 2001). The Board’s Supplemental Decision

and Order issued on June 30, 2005, is reported at 344 NLRB No. 128, and reaffirms the Order contained in the Board's original decision. (SD&O 1-7; D&O 10.)¹ The Board's Order is final with respect to all parties under Section 10(e) of the National Labor Relations Act, as amended ("the Act") (29 U.S.C. §§ 151, 160(e)).

The Board had subject matter jurisdiction under Section 10(a) of the Act (29 U.S.C. § 160(a)). The Court has jurisdiction over this proceeding pursuant to Section 10(e) of the Act (29 U.S.C. § 160(e)) because the unfair labor practices occurred in Miami, Florida. The Board's Supplemental Order is a final order under Section 10(e) of the Act.

¹ "SD&O" refers to the Board's Supplemental Decision and Order, which can be found at Volume III, Document 30 of the record. "D&O" refers to the consecutively paginated decisions of the Board and the administrative law judge, which can be found at Volume III, Document 18 of the record. "Tr" refers to the transcript of the unfair labor practice hearing, contained in Volume I of the record. "GCX" and "RX" refer to exhibits of the General Counsel and Gimrock, respectively, contained in Volume II of the record. "Order," "GC Motion," and "Respondent's Opposition" refer to the Board's Order Granting General Counsel's Motion for Clarification and Denying Respondent's Cross-Motion for Clarification, the General Counsel's Motion, and Gimrock's Cross-Motion, which can be found at Volume III, Documents 19, 20, and 22 of the record. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

The Board filed its application for enforcement on November 2, 2005. The Board's filing is timely because the Act places no time limit on the institution of proceedings to enforce Board orders.

STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence supports the Board's finding that Gimrock violated Section 8(a)(3) and (1) of the Act by refusing to reinstate lawful economic strikers following their unconditional offer to return to work. The subsidiary issue is whether substantial evidence supports the Board's finding that the Union's bargaining position—in support of which the strike was conducted—did not evidence an unlawful jurisdictional objective.

ORAL ARGUMENT STATEMENT

The Board believes that this case involves the application of well-settled principles to straightforward facts and that argument would therefore not be of material assistance to this Court. If the Court decides that argument is necessary, however, the Board believes that 15 minutes per side would be sufficient.

STATEMENT OF THE CASE

A. The Board's Original Decision and Order

Upon charges filed by the International Union of Operating Engineers, Local Union 487, AFL-CIO ("the Union"), the Board's General Counsel issued a complaint alleging that Gimrock violated Section 8(a)(1), (3), and (5) of the Act

(29 U.S.C. § 158(a)(1), (3), and (5)). Following a hearing, an administrative law judge issued a recommended decision finding that Gimrock violated Section 8(a)(3) and (1) by failing to reinstate economic strikers upon their unconditional offer to return to work. (D&O 9.) The administrative law judge further recommended dismissing allegations that Gimrock violated Section 8(a)(5) by refusing to execute a collective-bargaining agreement or insisting on a non-mandatory subject of bargaining and dismissed those allegations. (D&O 7.) To remedy the violations found, the administrative law judge recommended an order with reinstatement and backpay provisions for the strikers. (D&O 9-10.)

The General Counsel, the Union, and Gimrock all filed exceptions to the judge's decision with the Board. In its original Decision and Order, the Board (former Chairman Gould and Members Fox and Hurtgen) adopted the administrative law judge's findings and recommended order, with modifications. Specifically, the Board disavowed reliance on the judge's statements to the effect that the Union, during the course of negotiations, sought to have oiler and mechanic work assigned exclusively to its members. Rather, the Board found merit in the Union's claim that it had simply taken the position during bargaining that any employees doing this work should be covered by the collective-bargaining agreement. The Board's original Decision and Order issued on August 27, 1998, and is reported at 326 NLRB 401. (D&O 1-10.)

Thereafter, on July 27, 1999, the Board clarified its Decision and Order by reaffirming its finding that the Union made an unconditional offer on behalf of the strikers to return to work, and that no further action was necessary to activate Gimrock's obligation to reinstate the strikers. (SD&O 2 n.3; Order 1-3.)

B. This Court's Decision and the Board's Action on Remand

On the Board's application for enforcement of its Order, this Court (Circuit Judges Birch and Black, District Judge Nesbitt) temporarily denied enforcement and remanded the case to the Board "for a thorough discussion of the evidence supporting the Board's determination of the Union's bargaining position and for a thorough explanation of the Board's reasons for discounting the conflicting evidence on this issue." *Gimrock Constr.*, 247 F.3d at 1312-13.

The Board accepted this Court's remand and the General Counsel, the Union, and Gimrock all filed statements of position with the Board. In its Supplemental Decision and Order, the Board discussed the parties' positions, the evidence, and the relevant precedent. The Board reaffirmed its original decision, finding that Gimrock violated Section 8(a)(3) and (1) of the Act by failing to reinstate lawful economic strikers upon their unconditional offer to return to work.² (SD&O 7.)

² On the same date, the Board decided *Gimrock Constr., Inc.*, 344 NLRB No. 112 (2005) (*Gimrock II*). On January 25, 2006, this Court consolidated the Board's application for enforcement in *Gimrock II* (No. 05-15860-C) with the instant case.

STATEMENT OF THE FACTS

I. THE BOARD'S FINDINGS OF FACT

A. The Union Wins a Secret Ballot Election and is Certified as the Exclusive Bargaining Representative of a Unit of Operators, Oilers, and Mechanics

Gimrock, a contractor specializing in harbor and marine construction, operates throughout southern Florida and the Caribbean and employs two types of field employees: operating engineers and construction specialists. (D&O 2; Tr 196.) Between 1988 and 1994, Gimrock and the Union executed a series of pre-hire project agreements as allowed by Section 8(f) of the Act (29 U.S.C. § 158(f)), which covered the operating engineers.³

Operating engineers worked in three job classifications: equipment operator, oiler/driver, and equipment mechanic. They operate and maintain “heavy machinery,” such as cranes, backhoes, and front-end loaders. (Tr 195.) Under the Section 8(f) agreements, Gimrock hired operating engineers through the Union’s hiring hall. In addition, the project agreements specified the engineers’ terms and conditions of employment, such as wages and benefits. (SD&O 2; Tr 198-99, GCX 6a-d.)

³ Under Section 8(f) of the Act, employers and unions in the construction industry may enter pre-hire contracts requiring employees to be members of the union even though the union does not have majority status. 29 U.S.C. § 158(f).

Construction specialists and field mechanics were not hired through the Union's hiring hall or, therefore, covered by the project agreements. (D&O 2.) These employees worked on the same jobsites as operating engineers and performed work such as pile driving, carpentry, welding, small engine repair, and steel erection. (Tr 176, 196.) Construction specialists performed oiler work when operating engineers were busy, and at times, Gimrock's two field mechanics repaired the heavy equipment used by the operating engineers. (SD&O 3 n.7.)

By late 1994, the Union became concerned about instances in which Gimrock seemingly transferred workers to projects not covered by a current project agreement, while continuing to make contributions to union pension and welfare funds on the workers' behalf, thereby potentially exposing the Union to liability.⁴ (SD&O 2; Tr 24-25.) In an effort to deal with that problem, the Union asked Gimrock to sign a collective-bargaining agreement covering the operators, oilers, and mechanics then employed by Gimrock. (SD&O 2.) Gimrock refused, agreeing only to sign a project agreement. (SD&O 2; Tr 23-26.)

On January 26, 1995, the Union filed a representation petition with the Board, seeking an election and certification as the statutory bargaining

⁴ Section 302 of the Labor Management Relations Act, which regulates employer payments to union trust funds, requires, in part, that "the detailed basis on which such payments are to be made is specified in a written agreement with the employer" 29 U.S.C. § 186(c)(5)(B).

representative of a unit of Gimrock's employees. (D&O 3; GCX 2.) Thereafter, Gimrock and the Union entered into a Stipulated Election Agreement. The agreement provided for a stipulated unit of the following classifications:

Included: All equipment operators, oiler/drivers and equipment mechanics employed by [Gimrock] in Dade and Monroe counties in Florida.

Excluded: All office clerical employees, professional employees, guards and supervisors as defined in the Act.

(SD&O 2; GCX 2, Tr 8-10.)

Employees eligible to vote in the election, under the agreement, included (1) those employed at least 30 working days in the year before the eligibility date, and (2) those employed some time in the preceding year and at least 45 working days in the preceding 2 years. (GCX 3.) Gimrock furnished an election eligibility list comprising 11 employees.⁵ (D&O 3; GCX 4, Tr 9-10, 199-200.) Eligible employees included: crane operators, backhoe operators, loader operators, a drill rig operator, mechanics, and an oiler. (Tr 62.) At the time, Gimrock also employed 30 to 40 construction specialists who did not qualify to vote either because they did not work in the job classifications specified in the stipulation or because they did not work a sufficient number of hours. (Tr 198, 200.)

⁵ The Board requires employers to provide voting eligibility lists prior to the election. *Excelsior Underwear*, 156 NLRB 1236, 1239-40 (1966). The list of eligible voters was based on the construction industry eligibility formula set out in *Steiny & Co.*, 308 NLRB 1323 (1992), and *Daniel Constr. Co., Inc.*, 133 NLRB 264 (1961), as modified by 167 NLRB 1078 (1967).

On March 3, 1995, the Board conducted the election. Eligible employees could vote at one of three jobsites: Brickell Avenue Bridge, Miami International Airport, or Port of Miami. (GCX 2.) The Union received the majority of votes cast. (SD&O 3; Tr 200-01.) On March 20, 1995, the Board certified the Union as the statutory bargaining representative of all operators, oilers, and mechanics employed by Gimrock in Dade and Monroe counties. (SD&O 3; GCX 5, Tr 9-10.)

**B. Gimrock and the Union Begin Contract Negotiations;
Gimrock Seeks to Continue its Practices under the 8(f)
Agreements**

Following the certification, the Union opened negotiations in late March by proposing its standard collective-bargaining contract. (SD&O 3; Tr 14-16, 28-29.) That contract included a recognition clause identical to the stipulated unit description, specifically, equipment operators, oiler/drivers and equipment mechanics employed in Dade and Monroe counties in Florida. (SD&O 3; GCX 8 and 9, Art. I Sec. 1 and 5.) In addition, the Union's proposed contract included a statement that "oiler/drivers shall be utilized to assist in the erection and dismantling of all cranes and to move or drive all lattice boom mobile cranes."⁶ (SD&O 3; Tr 14-16, 28-29, GCX 8 and 9, Art. I Sec. 4.)

⁶ Under the direction of an operator, oilers assemble, disassemble, transport, and maintain certain heavy equipment. Because not every piece of heavy equipment requires an oiler, oilers typically assist crane and drill rig operators. For example, the oiler drives the crane while the operator sits in back with the boom, preventing it from hitting power lines, telephone poles, or cars. (Tr 49-52, 172.)

Notwithstanding Gimrock's agreement to include oilers in the unit, no employees were employed exclusively in the oiler classification. (SD&O 3 n.7; Tr 48, 63.) Rather, prior to the Union's certification, Gimrock had sometimes assigned certain oilers' or mechanics' work to construction specialists, particularly when operating engineers were busy with other duties. (SD&O 3 n.7, D&O 2.) At the time of the election, Gimrock had one employee who worked as both an operator and an oiler, two employees who worked as equipment mechanics, and two field mechanics. (Tr 48, 62-63, 206.)

Although Gimrock agreed to recognize the Union as the sole bargaining representative of the certified unit, it insisted on the freedom to assign work to construction specialists that the Union claimed was traditionally performed by the classifications contained in the Union's certification. (SD&O 3; GCX 10 Art. I Sec. 1, and Art. IV Sec. 10, Tr 29-31, 90-92.) By letter dated April 4, 1995, Gimrock made two proposals: that the Union's language regarding the use of oiler/drivers be deleted and that a new section be added. Gimrock's proposed addition—a new Article IV, Section 10—stated:

The parties recognize that [Gimrock] has an established past practice, essential to its economic viability, of using non-bargaining unit employees to perform work on the following type of equipment: boring machines, pumps, air compressors, trucks, welding machines, boats (tug, etc.), cranes, yard cranes, derricks, derrick barges, and similar items. Notwithstanding the fact that certain of this work is listed in the wage rate provisions of this Agreement, the parties agree that [Gimrock] may maintain its past practice as described

herein without violating this Agreement or giving rise to a claim for fringe benefits. To the extent such work is performed by non-bargaining unit personnel, said work shall not be considered as falling within the provisions of this Agreement. To avoid confusion, the parties will agree to and maintain at all times a list of bargaining unit employees, which will be considered conclusive as to the identity of the employees covered by this Agreement.

(SD&O 3.)

Gimrock objected to the Union's position—that oilers be “utilized to assist in the erection and dismantling of all cranes and to move or drive all lattice boom mobile cranes”—on the ground that it would require Gimrock to hire additional workers. The Union viewed Gimrock's proposals as an attempt to remove bargaining unit work from the newly certified unit, and in its April 12 response, rejected both of Gimrock's proposals. (SD&O 3; Tr 34.)

Gimrock and the Union met twice more, but they could not agree on the extent to which job duties—or the employees performing those duties—should be covered by the collective-bargaining agreement. (SD&O 3.) Most of the dispute centered on the oilers and mechanics. (SD&O 3; Tr 54.)

In the bargaining sessions, the Union maintained that certain work traditionally performed by oilers and mechanics was bargaining unit work—that is, work covered by the classifications in the certified bargaining unit. The Union claimed this work included assembling, disassembling, transporting, and erecting cranes; operating jet pumps and power packs; and repairing the heavy equipment

used by equipment operators. (SD&O 5 n.13; Tr 68-71.) Gimrock maintained that it should have the flexibility to continue its former, pre-certification practice of assigning non-bargaining unit employees—that is, construction specialists and field mechanics—to perform oiler and mechanic work. (SD&O 3.)

Prior to the Union's certification, Gimrock had sometimes assigned certain oilers' or mechanics' work to Gimrock nonunion employees, particularly when union employees were busy with other duties. (SD&O 3 n.7; Tr 45-46, 48-50, 140-45, 171-77, 230-31.) If forced to stop that practice, Gimrock argued, it would be required to hire additional employees into the unit and might have to lay off some nonunion employees. (SD&O 3; RX 1 p.1, Tr 65-66.)

The Union responded that it had no intention of requiring the hiring or dislodging of any employees. (Tr 43-44, 51-52, 85, 103-05.) Rather, the Union said, Gimrock was free to assign oilers' or mechanics' work to any employees (union or nonunion), provided that, while they were performing the work, the employees would be covered by the collective-bargaining agreement and paid in accordance with its terms. (SD&O 5-6; Tr 46, 79-82, 104, 257.)

Gimrock, on the other hand, argued that it should be free not only to assign work within the unit description to nonunion employees, but also to do so with the understanding that the collective-bargaining agreement would not apply to them. (SD&O 4; GCX 10 Art. IV Sec. 10, Tr 30-34, 257-58.) Further, Gimrock

proposed that the wage rates and fringe benefits in the collective-bargaining agreement would not apply to employees performing work within the contractual job classifications unless the employees' names appeared on a separate list of bargaining unit employees that was to be maintained by the parties. (SD&O 4; GCX 10 Art. IV Sec. 10, Tr 30-31.)

The parties were seemingly in agreement about the classification of "equipment operator" contained in the certification, but negotiations failed to yield agreement on the issue of the oilers and mechanics. (SD&O 3 and 5 n.12; Tr 46, 72, 78-80, 104, 257.) On May 30, the Union informed Gimrock that it would strike the next day if the "oiler issue" were not resolved. (SD&O 5.)

On May 31, the Union went on strike, setting up a picket line at Gimrock's Port of Miami jobsite. (SD&O 3; Tr 54, 137.) That day, Donald Ryce, Gimrock's counsel, sent the Union a letter reiterating its position that the Union's claims for the certified oiler and mechanic work would "totally disrupt[] the status quo by removing significant job duties from its present non-bargaining unit workforce and likely would lead to layoffs of some of these personnel." (SD&O 3-4, n.9.) The Union's attorney contacted Ryce the next day and offered to give up its claims to operation of the power packs and jet pumps, if Gimrock would agree to the Union's position regarding the oilers and mechanics. Ryce said he would contact the Union if Gimrock changed its position. (SD&O 4.)

Gimrock did not change its position, and the strike continued. On June 2, the third day of the strike, Gimrock Vice President Lloyd Hunt telephoned Bennie Splain, the regional director of the International Union, to solicit his help in ending the strike. (SD&O 6; Tr 112-13, 215.) Hunt told Splain that the strike was “effectively shutting down three or four different contracts” and asked if Gimrock could sign a project agreement limited to the Port of Miami. (D&O 6; Tr 114, 215.)

Splain called the Union’s business agent, Gary Waters. Waters and Splain agreed that oilers would be employed at Gimrock’s option based on need; however, the Union did not change its position that oiler work was part of the certified bargaining unit. (SD&O 6; Tr 116.) Waters proposed that when lesser-skilled mechanics were used, they could be paid at a lower mechanics’ helper rate. (SD&O 6; Tr 118.) Splain relayed these proposals to Hunt. Although Hunt told Splain he might agree on the oiler and mechanic issues, he would still only sign a project agreement limited to the Port of Miami. (D&O 6; Tr 117-18, 218.)

By June 6, Gimrock had hired at least two and possibly four permanent striker replacements. (D&O 5; RX 4a-d, Tr 220.)

C. Gimrock Refuses To Reinstate Strikers Following Their Unconditional Offer To Return to Work

On June 6, Union President James Allbritton was directed by Waters to talk to the strikers and to make an unconditional offer to return to work. Allbritton met

with the strikers on the picket line at the Port of Miami to arrange an end to the strike. On behalf of the strikers, Allbritton spoke to Douglas Calais, Gimrock's marine superintendent at the Port of Miami jobsite. (D&O 8-9; Tr 60-61, 137-38, 151-54, 157, 166-67, 221-23, 233-35, 272-75.) Allbritton told Calais that the strikers were making an unconditional offer to return to work. Allbritton also said that, as the strikers were returning to work, Gimrock could send the replacements home. (D&O 8-9; Tr 137-38, 157, 166-67, 223-24, 234, 273-75.)

Calais responded that he would have to call Hunt and went to make the call. (D&O 8; Tr 138, 157, 166, 275.) At about the same time, the strikers were putting on their work shoes to return to work. (D&O 5; Tr 166-67, 233-35, 273-74, 276-78.) Hunt, however, refused to reinstate the strikers, and the strikers resumed picketing. (D&O 5 and 8; Tr 138, 157-58, 167, 234-35, 275-78.)

Shortly after the strikers' offer to return to work, Hunt spoke to some strikers on the picket line. When a striker asked what it would take to work things out and get the strikers back to work, Hunt answered that he would not agree to a contract covering Dade and Monroe counties but would probably be willing to pay \$1 over union scale if the Union would sign a project agreement limited to the Port of Miami. (D&O 6; Tr 168-69, 224-25.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Battista and Members Liebman and Schaumber) concluded, consistent with its original decision, that the evidence failed to establish that the Union's bargaining position represented an unlawful jurisdictional objective, and therefore the Union did not engage in an unlawful strike. Accordingly, the Board found that Gimrock violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by failing to reinstate economic strikers upon their unconditional offer to return to work. (SD&O 2.)

The Board's Order requires Gimrock to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their statutory rights. (D&O 10.) Affirmatively, the Order requires Gimrock to offer the strikers reinstatement to their former jobs,⁷ make them whole for losses suffered as a result of their unlawful discharges, and post copies of a remedial notice to employees. (D&O 10.)

⁷ The Board noted its earlier order, issued in response to the General Counsel's motion to delete the words "upon application" from its remedial order and clarify the remedial provisions in its original Decision and Order. In its clarification order, the Board reaffirmed its finding that the Union had made an unconditional offer to return to work, stated that no further offer from the Union was required to activate Gimrock's obligation to reinstate the strikers, and found that, although the phrase "upon application" was imprecise, Gimrock's obligation was clear and deletion of the term in the remedial provision was unnecessary. (SD&O 2 n.3.)

SUMMARY OF ARGUMENT

This case involves Gimrock's refusal to reinstate economic strikers following their unconditional offer to return to work in violation of Section 8(a)(3) and (1) of the Act. Gimrock claims it was not required to reinstate the strikers because they engaged in an unlawful jurisdictional strike, thereby losing the protection of the Act. The Board, affirming its original decision, found that the Union's strike evinced only lawful, representational aims.

Following the Union's election win and certification, Gimrock and the Union began negotiating a collective-bargaining agreement. During these negotiations, Gimrock consistently refused to recognize that the parties' prior agreements (which were limited to specific employees working on specific jobsites) no longer applied. Instead, the Union had become the exclusive bargaining representative of equipment operators, oiler/drivers, and equipment mechanics employed by Gimrock in Dade and Monroe counties. While Gimrock insisted that any agreement continue to be limited to specific jobsites and a restricted list of employees, the Union argued that, as the certified bargaining representative, it represented all the employees, whoever they were, doing work in the job classifications contained in the Union's certification. When Gimrock failed to agree, the Union went on strike.

Not all strikes based on bargaining unit disputes are jurisdictional. A strike has an unlawful jurisdictional purpose only if a union demands that an employer assign work to one group of employees rather than another. *Carey v. Westinghouse*, 375 U.S. 261, 263 (1964). Where, as here, the controversy concerns which union (or no union) should represent the employees doing particular work, the strike has a lawful representational purpose. *Id.* The Union's strike was lawful, and Gimrock was obligated to offer reinstatement to the striking employees. As the Board reasonably found, Gimrock's refusal to offer reinstatement violated the Act.

STANDARD OF REVIEW

Under Section 10(e) of the Act (29 U.S.C. § 160(e)), the Board's factual findings are conclusive, if they are supported by substantial evidence on the record considered as a whole. *See Cooper/T. Smith v. NLRB*, 177 F.3d 1259, 1261-63 (11th Cir. 1999); *NLRB v. Dynatron/Bondo*, 176 F.3d 1310, 1313 (11th Cir. 1999). So long as the Board has made plausible inferences from the record evidence, the Court will not overturn the Board's determinations, even if the Court "would have made different findings upon a *de novo* review of the evidence." *Cooper/T. Smith v. NLRB*, 177 F.3d at 1261.

Credibility determinations of the administrative law judge, affirmed by the Board, "will not be disturbed unless they are inherently unreasonable or self-

contradictory.” *NLRB v. McClain of Georgia, Inc.*, 138 F.3d 1418, 1422 (11th Cir. 1998). Disagreement between the Board and the administrative law judge on the inferences or legal conclusions to be drawn from the credited testimony cannot detract from the evidence supporting the Board’s decision, nor modify the standard of review. *Georgia Kraft Co. v. NLRB*, 696 F.2d 931, 937 (11th Cir. 1983), *judgment vacated in part and remanded on other grounds*, 466 U.S. 901 (1984).

The Board’s construction of the Act “is entitled to considerable deference,” and the Court “will uphold any interpretation that is reasonably defensible.” *Sure-Tan v. NLRB*, 467 U.S. 883, 891 (1984). Remedial decisions of the Board, under Section 10(c) of the Act (29 U.S.C. § 160(c)), “merit the greatest deference.” *ABF Freight System v. NLRB*, 510 U.S. 317, 324 (1994). Such decisions are entitled to “controlling weight unless . . . ‘arbitrary, capricious, or manifestly contrary to the statute.’” *Id.* (quoting *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984)). Accordingly, a remedial order of the Board “will not be disturbed unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.” *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964) (internal quotation marks omitted).

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT GIMROCK VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY REFUSING TO REINSTATE LAWFUL ECONOMIC STRIKERS FOLLOWING THEIR UNCONDITIONAL OFFER TO RETURN TO WORK

A. Introduction

After many years of employing union employees through a hiring hall arrangement and a succession of Section 8(f) agreements, Gimrock agreed to a stipulated Board election in a unit that expressly included “all equipment operators, oilers/drivers and equipment mechanics” employed in Dade and Monroe counties. Gimrock agreed to these classifications despite the fact that it did not employ anyone exclusively within the category of “oiler/driver” and despite a practice of using both union and nonunion construction specialists to perform oiler work. (SD&O 4 n.11.)

After the Union won the election and became the exclusive Section 9(a) representative of the employees in these classifications,⁸ the fissures in the parties’ understanding of these certified classifications became clear. As the Board

⁸ Section 9(a) of the Act (29 U.S.C. §159(a)) specifies that “representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . .”

recognized, from the beginning of the negotiations, Gimrock took the position that the Union's certification did not change the status quo between the parties—that is, that the certified unit should be coextensive with the prior Section 8(f) unit represented by the Union. In contrast, the Union sought to define the unit, not in terms of individuals, but by reference to the job duties performed by persons occupying or performing the functions in the classifications delineated in the certification. (SD&O 4.) When the parties failed to reach agreement on a contract, the Union went on strike.

The crux of the dispute is whether the strike was lawful, because it was in furtherance of the Union's representational objectives, or unlawful, because it was in furtherance of jurisdictional objectives prohibited by the Act, as alleged by Gimrock. After fully analyzing the bargaining positions of the parties, the Board found that the Union engaged in a lawful economic strike in pursuit of a lawful representational objective. Accordingly, Gimrock's failure to reinstate the strikers upon their unconditional offer to return to work constituted a violation of Section 8(a)(3) and (1) of the Act. (SD&O 1.)

B. Applicable Principles

Section 7 of the Act (29 U.S.C. § 157) guarantees employees the right to engage in union or other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and Section 13 of the Act (29 U.S.C.

§ 163) expressly preserves the right to strike. An employer who refuses to reinstate striking employees, at the conclusion of a lawful strike in which the strikers have given an unconditional offer to return to work, violates Section 8(a)(1) and (3) of the Act (29 U.S.C. § 158(a)(1) and (3)).⁹ *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967).

Strikes that are grounded in bargaining unit disputes in furtherance of a union's representational objectives in bargaining, as the Board found was the case here, are lawful. However, a strike that is in support of an unlawful jurisdictional objective loses the protection of the Act.¹⁰ As the Board explained, in a jurisdictional dispute, "a union seeks to have the employer assign the work to one group of employees rather than to another." (SD&O 4.) In a dispute involving a

⁹ Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise" of their statutory rights. A violation of Section 8(a)(3) of the Act therefore results in a "derivative" violation of Section 8(a)(1). *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

¹⁰ Section 8(b)(4)(D) of the Act (29 U.S.C. § 158(b)(4)(D)) makes it an unfair labor practice for a labor organization or its agents to:

(4) . . . threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is –

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work....

representational claim, “the union seeks to have the employees who perform the work, *whoever they are*, included in the unit and covered in the contract.” (SD&O 4, emphasis in original). See *Carey v. Westinghouse*, 375 U.S. 261, 263 (1964); *Int’l Longshoremen’s & Warehousemen’s Union, Local 62-B v. NLRB*, 781 F.2d 919, 924-25 (D.C. Cir. 1986) (“*Local 62-B*”); *The Mountain States Telephone and Telegraph Co.*, 118 NLRB 1104, 1107 (1957).

To determine whether a strike is representational or jurisdictional, the Board reviews “the real nature and origin of the dispute.” *Indus., Prof’l, & Technical Workers Int’l Union (Recon Refractory & Constr., Inc.)*, 339 NLRB 825, 827 (2003), enforced sub nom. *Recon Refractory & Const. Inc. v. NLRB*, 424 F.3d 980 (9th Cir. 2005) (quoting *Teamsters Local 578 (USCP-Wesco)*, 280 NLRB 818, 820 (1986), *affd. sub nom. USCP-Wesco, Inc. v. NLRB*, 827 F.2d 581 (9th Cir. 1987)). Representational disputes may be resolved in the context of a Section 8(a)(5) unfair labor practice proceeding.¹¹ Jurisdictional disputes are appropriately resolved in a Section 10(k) proceeding, which is triggered by a strike and the filing

¹¹ Section 8(a)(5) (29 U.S.C. §158(a)(5)) makes it an unfair labor practice for an employer to “refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).”

of a Section 8(b)(4)(D) unfair labor practice charge.¹² *See Metromedia, Inc., KMBC-TV v. NLRB*, 586 F.2d 1182, 1189-90 (8th Cir. 1978).

C. Substantial Evidence Supports the Board’s Finding that the Union was Pursuing a Representational Objective and Therefore the Strike was Lawful

Consistent with this Court’s directive in its remand order, the Board fully analyzed the parties’ negotiations and concluded that Gimrock failed to prove its affirmative defense that the Union’s bargaining position evidenced an unlawful jurisdictional objective. Rather, as the Board found, in its negotiations with Gimrock, the Union “sought to define the unit not in terms of particular individuals but rather, by reference to the particular work duties performed by persons occupying the job classifications delineated in the certification.” (SD&O 4.) It is well established that when a union demands recognition as the bargaining representative “for employees doing a particular job, or in a particular department, [that demand] does not to the slightest degree connote a demand for the assignment

¹² Under the express terms of the Act, a strike over a jurisdictional dispute is subject to Board resolution under Section 10(k) of the Act (29 U.S.C. § 160(k)). If the evidence adduced demonstrates reasonable cause that the Act has been violated, the Board will award the disputed work to employees represented by one of the parties to the dispute. If the charged party complies with the award of work, the Section 8(b)(4)(D) unfair labor practice charge will be dismissed. Generally, a party cannot be found to violate Section 8(b)(4)(D) unless the Board has first made an award of the disputed work to a different group of employees in a so-called 10(k) proceeding. *See generally Longshoremen's Local 14 v. NLRB*, 85 F.3d 646, 650-52 (D.C. Cir. 1996).

of work to particular employees rather than to others.” *Int’l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., Local No. 222* (“*Teamsters Local 222*”), 206 NLRB 809, 811 (1973).

As the Board found, from the very inception of negotiations, Gimrock disputed those parts of the Union’s proposed contract that sought to define the classifications included in the certification. (SD&O 3-4 n.9 and 4; GCX 10 Art. IV Sec. 10.) Gimrock counter-proposed language that would allow for the continuation of its pre-certification practice of using non-bargaining unit employees to perform a laundry list of duties, including work traditionally performed by oilers and mechanics. The counter-proposal noted that “notwithstanding the fact that certain of this work is listed in the wage rate provisions of this agreement,” the prior practice would continue and the listed work would not be covered by the parties’ contract. (SD&O 3-4; GCX 10 Art. IV Sec. 10.) Additionally, Gimrock proposed that the parties maintain a list of bargaining unit employees, which would serve as the list of all employees covered by the contract. (SD&O 3; GCX 10 Art. IV Sec. 10.)

As the Board recognized, the Union’s subsequent proposals not surprisingly were “influenced by and responsive to” Gimrock’s efforts to continue its pre-certification practices, and the Union’s efforts to define the certified unit, most notably the equipment mechanics and oilers. The Union’s position during

bargaining shows that it was concerned with the scope of the certified bargaining unit, and was not demanding work assignments. Thus, for example, with respect to the equipment mechanics, the Union proposed that work that had traditionally been performed by equipment mechanics—repair and maintenance work performed on the heavy equipment utilized by the equipment operators—was “bargaining unit work” covered by the agreement. In response to Gimrock’s claim that the Union’s position would require it to fire some of its construction specialists and hire more “bargaining unit” employees, union agent Waters repeatedly emphasized that the Union was not trying to deprive Gimrock’s construction specialists of their jobs, and it never demanded that current employees be fired or new employees be hired.¹³ (Tr 43, 48-49, 52, 58.)

¹³ In its brief, Gimrock uses the term “union member” to suggest that the Union was requiring it to hire employees who were union members. Gimrock’s position is simply a reference to its previous practice under the Section 8(f) agreements to hire employees who had been referred for jobs via the Union’s hiring hall, and who were the only employees covered by the Section 8(f) contracts. In the new 9(a) context, “union member” lost its meaning. The Union is now the exclusive representative of a bargaining unit of operators, oiler/drivers, and mechanics. *See Wallace Corp. v. NLRB*, 323 U.S. 248, 255-56 (1944) (“By its selection as bargaining representative, [the union] has become the agent of all the [unit] employees, charged with the responsibility of representing their interests fairly and impartially.”). Indeed, as Florida is a right-to-work state, unit employees are free to reject union “membership” under the Act. *Retail Clerks v. Schermerhorn*, 373 U.S. 746, 750-52 (1963).

Waters' credited testimony was that he did not demand that the two field mechanics no longer work on the Company's equipment, "but if in any event that they did do work on the heavier equipment . . . then they would be within the bargaining unit I made it clear to [Gimrock's counsel] that we had no objection to taking those people into the bargaining unit that they already had employed" (SD&O 5; Tr 104.) Thus, as the Board found, the Union "simply sought assurances from [Gimrock] that *if* the field mechanics in fact performed heavy equipment repair work, they would be included in the bargaining unit represented by the [Union]." (SD&O 5-6, emphasis in original.)

Importantly, as the Board found, Gimrock understood that the Union merely sought contract coverage for all mechanics performing heavy equipment repair work. (SD&O 6.) Thus, it is uncontroverted that after the strike began, Gimrock's vice-president, Lloyd Hunt, contacted the regional director for the International Union, Bennie Splain, and indicated that while Hunt did not object to paying the union wage rate to some of the mechanics, he did not want to pay that rate to the lesser-skilled mechanics—presumably a reference to the field mechanics. (SD&O 6 and n.19; Tr 47.) In sum, ample evidence supports the Board's finding that the Union's position with regard to the mechanics clearly had a representational objective and did not evidence an unlawful jurisdictional intent to reassign heavy equipment repair work to a specific employee or group. (SD&O 6.) Rather, the

Union sought only “to represent those employees who are doing the . . . work and to apply the collective bargaining agreement to those employees.” *Local 421, Glass, Molders, Pottery, Plastics & Allied Workers Int’l Union*, 324 NLRB 670, 674 (1997).

The Board also closely analyzed the Union’s position as it related to the oiler work and determined that, although the Union’s position with respect to the employees performing oiler work was at times “ambiguous,” it could not conclude that it “evidenced a jurisdictional purpose.” (SD&O 7.) Thus, after examining the exchanges between the parties, the Board determined that, in response to Gimrock’s position that it should be free to maintain the status quo as it existed pre-certification, the Union initially adopted the position that crane transportation, jet pumps and power pack work constituted bargaining unit work for which Gimrock should use oilers. Thereafter, in an effort to reach agreement, the Union offered to relent on its demand regarding the use of equipment operators for jet pumps and power pack work, if the parties could reach agreement with respect to the remaining oiler and mechanic work. (SD&O 6 n.21; Tr 76-77.)

As the Board found, the Union’s bargaining position was responsive to Gimrock’s bargaining proposal to retain the status quo, which essentially “foreclosed or rendered futile” the Union’s position that the certification conferred on the Union the right to represent all employees performing the designated work

duties. (SD&O 7.) In the Board’s view, Gimrock’s insistence on a pre-certification, Section 8(f) model compelled the Union “to pursue an alternative means to achieve its objective of defining the oiler/driver classification and retaining oiler work within the certified unit.” (SD&O 7.)

Indeed, the Board recognized that, in the absence of Gimrock’s unyielding position about continuing the pre-certification status quo, the Union would have maintained a consistent position with respect to the oiler position. (SD&O 7 n.23.) Thus, Waters repeatedly testified that his “position was that we had just won an election stipulated with oilers’ work in [it], that we would represent those people and they would be part of the bargaining unit.” (Tr 77-78, GCX 8 and 9 Art. I Sec. 4, and GCX 10 Art. I Sec. 4.) Waters further testified:

I thought that . . . on[c]e we had the election and stipulated in the agreement that we would be the bargaining agent for that group . . . , I mean, they were non-bargaining unit people before but I felt like after the stipulated agreement that they were bargaining unit people if they performed that work.

(SD&O 7 n. 23; Tr 93-94.) Indeed, the Union viewed Gimrock’s position as an improper attempt to remove “bargaining unit work” from any negotiated agreement. (SD&O 7 n. 24; Tr 78.)

Thus, in the context of the parties’ bargaining positions—particularly Gimrock’s intractable refusal to recognize that the certification altered the status quo—there is ample evidence to support the Board’s finding that the Union was

seeking to represent the employees who performed work in the classifications covered by the certification. *See Teamsters Local 222*, 206 NLRB 809, 811 (1973) (when a union seeks to represent a group of employees performing particular work, the dispute is representational). As such, the Board reasonably found that the Union's bargaining position had a representational objective, and thus the subsequent strike in support of this objective was lawful.

D. The Board Reasonably Rejected Gimrock's Unproven Affirmative Defense that the Union's Strike Had an Unlawful Jurisdictional Objective that Violated Section 8(b)(4)(D) and Section 303 of the Act

1. The strike was not founded on a jurisdictional objective

Notwithstanding Gimrock's repeated claims in its brief (Br 1, 14, 15, 19) that the Union's strike was in furtherance of an unlawful jurisdictional objective, the Board found that Gimrock failed to meet its burden of proving this affirmative defense. *Consol. Delivery & Logistics, Inc.*, 337 NLRB 524, 527 n.9 (2002) *enforced*, 63 Fed. Appx. 520 (D.C. Cir. May 16, 2003) (unpublished). Instead, as fully discussed above, the parties' bargaining dispute was founded on Gimrock's insistence that the Union's certification did not affect the status quo, and therefore Gimrock could assign work to individual employees in such a way as to exclude work by certain employees within the Board-certified classifications from coverage under the collective-bargaining agreement. In the negotiations, the Union "simply

had taken the position during bargaining that any employees performing oiler and mechanic work should be covered by the collective-bargaining agreement.”

(SD&O 2.) Such a request is not jurisdictional. *See The Mountain States Telephone and Telegraph Co.*, 118 NLRB 1104, 1107 (1957); *United Bhd. of Carpenters & Joiners of Am., Local 275*, 334 NLRB 422, 423 (2001); *Local 421, Glass, Molders, Pottery, Plastics & Allied Workers Int’l Union*, 324 NLRB 670, 674 (1997).

Before this Court, Gimrock continues to ignore the key fact that essentially ignited this controversy: the Union’s 9(a) status made it the bargaining representative of all employees who performed work within the classifications expressly established in its certification.¹⁴ The Union, by virtue of its election and certification, no longer was constrained by an 8(f) jobsite prehire agreement, but was responsible for representing all the employees in the unit; that is, all equipment operators, oiler/drivers, and equipment mechanics employed by Gimrock in Dade and Monroe counties.

Gimrock’s claim (Br 17) that there was no dispute about “who was in the bargaining unit” is disingenuous. Gimrock’s bargaining position was a repeated insistence that the bargaining unit comprised approximately 10 employees, while

¹⁴ No issue is presented here concerning the Board’s representation determinations. Under the Act, those determinations are not directly reviewable. *See Cooper/T. Smith, Inc. v. NLRB*, 177 F.3d 1259, 1261 n.1 (11th Cir. 1999).

the Union's appropriately focused on the work classifications contained in the certification for coverage under the collective-bargaining agreement. After all, Gimrock signed a formal stipulation agreeing to the bargaining unit classifications long before it even submitted the Excelsior list on which it places so much reliance. (Br 17 and n.3.)¹⁵

To the extent that there was a need to clarify the scope of the stipulated unit, the parties appropriately engaged in collective bargaining over the issue. The unit description in a stipulated election agreement is not required to specify the exact job titles or descriptions included in the unit. *Southwest Gas Corp.*, 305 NLRB 542, 543 (1991). Parties negotiate, as Gimrock and the Union did in this case, over the specific work which is included in the classifications in the unit. *See Mountain States*, 118 NLRB at 1107. As the Board found, the Union's proposals were directed toward defining the unit by reference to the work duties traditionally performed by the classifications contained in the certification.¹⁶

¹⁵ Under the Board's rules, when parties agree on the details of an election, they can enter a written "stipulation for certification on consent election," which must be approved by the Regional Director. *NLRB Rules and Regulations* (Series 8), 29 C.F.R. § 102.62(a). In addition to describing the time and place of the election, such a stipulation sets out the classifications in the bargaining unit. *See Southwest Gas Corp.*, 305 NLRB 542 (1991).

¹⁶ In finding that Gimrock failed to meet its affirmative defense, the Board (SD&O 5 and n.16) did not pass on whether the Union's view or Gimrock's view of the scope of the unit was correct. If Gimrock desired Board review of the classifications contained in the certification, it could have filed a unit clarification

Gimrock's claim that the strike was in furtherance of a jurisdictional objective is refuted by the very definition of a jurisdictional dispute. It is settled that a jurisdictional dispute has two central components: the dispute is not of the employer's own making, and the dispute is between two unions or employee groups. Both of these components must be present for the Board to find a strike jurisdictional. *Local 62-B*, 781 F.2d at 924. Otherwise, "an employer could always create a jurisdictional dispute between employee groups by reassigning work." *Local 62-B*, 781 F.2d at 925.

Here, Gimrock created the controversy by insisting that the parties maintain the "status quo" (SD&O 6), specifically, its flexibility to maintain its prior practice under the 8(f) agreements to assign certain employees work fairly within the bargaining unit classifications without paying them union wages and benefits. Thus, Gimrock had an interest in the outcome of the dispute. However, in jurisdictional disputes, "the employer ordinarily stands aloof," and the dispute is one that "is not of his own making and in which he has no interest." *Local 62-B*, 781 F.2d at 924. A jurisdictional dispute "is of so little interest to the employer that he seems perfectly willing to assign work to either [group of employees] if the other will just let him alone." *Local 62-B*, 781 F.2d at 924 (quoting *NLRB v. Radio*

petition. Under the Board's rules, an employer may file a petition for clarification of an existing bargaining unit or amendment of a certification. *NLRB Rules and Regulations* (Series 8), 29 C.F.R. § 102.60(b).

& Television Broad. Eng'rs Union, Local 1212, 364 U.S. 573, 579 (1961)).

Gimrock was certainly not “aloof” in this case.

The cases cited by Gimrock (Br 18) as support for its claim that the Union’s strike was jurisdictional all involved traditional work assignment disputes between two competing unions.¹⁷ The employers in those cases, unlike Gimrock, stood outside the dispute, not caring which union represented the particular employees at issue. In all four cases, one union had already been assigned the work and the competing union demanded that the work be reassigned. In addition, in none of those cases did a union have a certification or contract specifying that the work demanded belonged to it.

Here, in contrast, Gimrock did not stand outside the dispute as an “aloof” observer: Gimrock sought to defeat the Union’s certification by demanding the flexibility to assign bargaining unit work to non-bargaining unit employees. Unlike the unions in the cases cited by Gimrock, the Union in this case was not demanding new work for its own members. Rather, the Union was willing to represent all the unit employees and only sought to define the unit by reference to

¹⁷ *Laborers Int’l Union of North Am., Local Union No. 282 (Southeast Missouri Stone Co.)*, 258 NLRB 940 (1981); *Local 110, Sheet Metal Workers Int’l Ass’n (Brown & Williamson Tobacco Corp.)*, 143 NLRB 947 (1963); *Local No. 27, Int’l Typographical Union (Heiter-Starke Printing Co., Inc.)*, 121 NLRB 1013 (1958); *Int’l Union of Operating Eng’rs, Local 825 (Building Contractors Ass’n of New Jersey)*, 118 NLRB 978 (1957).

the duties performed by employees in the job classifications contained in the Board certification. (SD&O 4.)

2. Gimrock's reliance on Section 8(b)(4)(D) and Section 303 is erroneous

Gimrock spends much of its argument (Br 19-24) refuting the rationale contained in the administrative law judge's decision—namely, that an employer may not allege a violation of Section 8(b)(4)(D) as a defense to a complaint alleging the failure to reinstate striking employees in violation of Section 8(a)(3). The short answer is that the Board found it unnecessary to reach this issue in light of its conclusion that the Union had a representational objective. (SD&O 7 n.26.) Moreover, the Board expressly refused to pass on the judge's conclusion that the procedural framework of Section 10(k) of the Act precluded his ruling on the merits of such a defense. (SD&O 7 n.26.)

Indeed, Gimrock's repeated invocation of Section 8(b)(4)(D) is a red herring. There is no dispute that a strike based on a jurisdictional objective is proscribed by Section 8(b)(4)(D) of the Act (29 U.S.C. § 158(b)(4)(D)).¹⁸ However, as the Board noted, this case did not involve a union simply asserting an demand for work that was being performed by nonunit employees and that had never been performed by unit employees. Rather, the case arose in the context of

¹⁸ Gimrock could have chosen to file a charge under Section 8(b)(4)(D) alleging that the strike was based on an unlawful jurisdictional objective; it did not.

collective-bargaining negotiations, during which the parties sought to resolve ambiguities in the stipulated bargaining unit classifications. Indeed, as the Board found, the proviso to Section 8(b)(4)(D) supported its conclusion that the Union's conduct was not unlawful, for that proviso allows "a union [to] engage in 8(b)(4) conduct if an employer 'is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work.'" (SD&O 7, quoting 29 U.S.C. § 158(b)(4)(D).)

There is no dispute that Section 303 generally allows an employer to file an action in federal district court to recover damages to business or property resulting from conduct defined as an unfair labor practice in Section 8(b)(4) (29 U.S.C. § 158(b)(4)). As Gimrock correctly points out (Br 20), a claim under Section 303 can go forward regardless of whether the Board has found a violation of Section 8(b)(4)(D). *Int'l Longshoremen's & Warehousemen's Union v. Juneau Spruce Corp.*, 342 U.S. 237, 243-44 (1952). In fact, Gimrock has exercised that right, filing a Section 303 suit against the Union in District Court following the Board's original decision in this case, and while the General Counsel's motion for clarification of the Order was pending before the Board.¹⁹

¹⁹ *Gimrock Constr., Inc. v. Operating Eng'rs Local 487* (No. 99-1527, S.D. Fla.). The District Court case is stayed, pending the outcome of this case.

However, Gimrock's claim (Br 24) that the Board erred by not finding that the strike violated Section 303 is simply wrong. The Board has no jurisdiction to declare that a strike violates Section 303, and Section 303 does not provide the standard by which the Board evaluates the lawfulness of strikes. Section 303 gives the power to award damages to the courts, not the Board. *Juneau Spruce*, 342 U.S. at 243-44. Not only did Congress not intend to give the Board power to award damages under Section 303, but the Board has found "in the structure of the Act, and in its legislative history, a clear prohibition against our granting the [requested] remedy." *Nat'l Mar. Union*, 78 NLRB 971, 989 (1948), *enforced*, 175 F.2d 686 (2d Cir. 1949).

E. The Strikers Made a Valid Unconditional Offer To Return to Work; Therefore, Gimrock Must Reinstate the Strikers

1. Applicable Principles

Upon their unconditional offer to return to work, economic strikers have the right to reinstatement as positions become available, and to be placed on a preferential hiring list until that time. *See Amer. Mach. Corp. v. NLRB*, 424 F.2d 1321, 1326 (5th Cir. 1970) (applying *Laidlaw Corp.*, 171 NLRB 1366, 1368-70 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969)). Accordingly, "unless the employer who refuses to reinstate strikers can show that his action was due to legitimate and substantial business justifications, he is guilty of an unfair labor practice." *NLRB v. Fleetwood Trailer Co.*, 389 U.S. at 378 (internal quotation marks omitted). *See*

also *C.H. Guenther & Son v. NLRB*, 427 F.2d 983, 985 (5th Cir. 1970) (“An employer may not, upon termination of an economic strike, refuse to reinstate the strikers because of their participation in the strike.”).

One legitimate and substantial business justification an employer may offer for refusing to reinstate economic strikers is that the “jobs claimed by the strikers are occupied by workers hired as permanent replacements” before the strikers sought to end the strike and return to work. *Fleetwood Trailer*, 389 U.S. at 379. That justification is inapplicable, however, to strikers who were not permanently replaced at the time of their unconditional offer to return to work or whose jobs became available thereafter. *Fleetwood Trailer*, 389 U.S. at 379-81; *C.H. Guenther*, 427 F.2d at 985-86; *American Machinery*, 424 F.2d at 1325-28.

Gimrock refused to reinstate the strikers following their unconditional offer to return to work. It is undisputed that at least some of the strikers had not been permanently replaced and that there was work available for them. (D&O 8; Tr 54, 241-43, RX 4a-d.)²⁰ Thus, because the strikers made a valid unconditional offer to

²⁰ It also appears to be undisputed that, after the strikers’ offer to return to work, at least one of the replacements left Gimrock’s employ and others were hired into the strikers’ jobs. (Tr 228-30.) The Board deferred to subsequent compliance proceedings identification of the strikers who were unlawfully denied reinstatement and determination of the amount of backpay due them. (D&O 9-10.)

return to work, Gimrock's failure to reinstate them violated Section 8(a)(1) and (3) of the Act.

2. The Union made an unconditional offer to return to work and provided Gimrock with actual notice of its offer

Credited evidence supports the Board's finding that the Union made an unconditional offer, on behalf of the strikers, to return to work on June 6, 1995. (D&O 9.) On that date, as found by the administrative law judge and affirmed by the Board, Union President James Allbritton went to the picket line at the Port of Miami jobsite and told Gimrock Superintendent Doug Calais that the striking employees "were making an unconditional return to work offer." (D&O 1, 8-9; Tr 137-38.) Superintendent Calais indicated he would communicate the strikers' offer to Company Vice President Hunt, and did so. (D&O 8; Tr 138, 157-58, 166-67, 222-23, 231-35, 275.) The striking employees began putting on their work boots so they could get back to work. (Tr 181, 276.)

The administrative law judge expressly credited Allbritton's testimony (corroborated by striking employee Murray Chinnors) that he told Calais the Union's offer was unconditional. (D&O 8-9; Tr 157, 178-79.) Rather than dispute that the Union made an explicitly unconditional offer, Gimrock makes two claims: that the Union's offer was conditioned on Gimrock's reinstating all the strikers and sending the replacements home (Br 28), and that the Union's unconditional offer

was not an “effective” communication of the offer because it was made to Superintendent Calais (Br 25).

The mere statement by Allbritton that Gimrock could send the replacements home did not convert the Union’s explicitly unconditional offer into an offer conditioned on Gimrock’s discharge of the replacements. *See NLRB v. Okla-Inn*, 488 F.2d 498, 504-05 (10th Cir. 1973) (employees’ otherwise explicitly unconditional offer not made conditional by their group request to return to work). As the administrative law judge noted, the Union could request, but not require, that Gimrock fire the replacements. (D&O 9.) Allbritton’s statement that Gimrock could send the replacements home, at most, constituted a request rather than a condition that all replacements be fired or that the strikers be reinstated as a group. (D&O 9.) *See Soule Glass and Glazing Co. v. NLRB*, 652 F.2d 1055, 1107 (1st Cir. 1981) (explicitly unconditional offer not rendered conditional by reference to offer “as a group”); *United States Service Indus.*, 315 NLRB 285, 286 (1994) (expressly unconditional offer not made conditional by statement that employees were ready to return to same shifts and buildings), *enforced mem.* 72 F.3d 920 (D.C. Cir. 1995).²¹

²¹ Gimrock’s reliance (Br 28) on *H&F Binch Co. v. NLRB*, 456 F.2d 357 (2d Cir. 1972), and *Histacount Corp.*, 278 NLRB 681 (1986), is misplaced. In *H&F Binch*, 456 F.2d at 360, not only did employees enter the employer’s premises *en masse* to demand a return to work, but also the employees’ offer to return was explicitly conditional (“All employees are willing to return provided you are willing to agree

Gimrock's claim that the offer was conditional is an affirmative defense, and Gimrock failed to meet that defense. *See Okla-Inn*, 488 F.2d at 505 (employer has burden to show offer was conditional). The burden was on Gimrock to seek clarification from the Union if it was uncertain about the meaning of the strikers' offer. *See SKS Die Casting & Machining, Inc. v. NLRB*, 941 F.2d 984, 989 (9th Cir. 1991) (risk with employer to clarify any ambiguity). Neither Superintendent Calais nor Vice President Hunt sought any clarification from the Union; Hunt's response to the offer was that the employees could not return to work until "we get everything straight." (Tr 224.) Indeed, even when strikers approached Vice President Hunt directly and asked what they could do to get back to work, Hunt voiced no concern about any alleged conditions attached to the strikers' offer to return to work. Rather, he only reiterated Gimrock's demand that the Union sign a project agreement. (Tr 180, 224.)

Accordingly, the Board's finding that the Union's offer was unconditional was reasonable and is therefore entitled to affirmance under the substantial

not to discriminate against any workers including the Raschel workers for the protest walkout concerning the change in working hours and your failure to discuss same."). *See NLRB v. Okla-Inn*, 488 F.2d 498, 504 (10th Cir. 1973). Here, the Union's reinstatement offer expressly noted its unconditional nature. In *Histacount*, 278 NLRB at 688-89, unlike here, the employees' offer involved a demand that all strikers be reinstated together, rather than as jobs became available.

evidence test. *See NLRB v. Augusta Bakery Corp.*, 957 F.2d 1467, 1472, 1473 (7th Cir. 1992) (“Board’s finding of an unconditional offer is a predominantly factual determination;” and “substantial evidence standard does not allow us to reject the Board’s choice between two fairly conflicting views” (internal quotation marks omitted)).

Equally without merit is Gimrock’s contention (Br 25) that the Union failed to “effectively communicate its offer to return to work” because the offer was addressed to Superintendent Calais, who was not a “responsible company official.” First, it is uncontested that Superintendent Calais indicated he would communicate the strikers’ offer to Vice President Hunt, and in fact did so. (D&O 8; Tr 138, 157-58, 166-67, 222-23, 231-35, 275.) Second, it is uncontested that Hunt made the decision and told Calais that the employees could not return to work. (D&O 8; Tr 138, 223, 275.)

Although Gimrock claims (Br 26) that the notice was somehow ineffective because it was not made to Donald Ryce, Gimrock’s outside counsel, or Vice President Hunt directly, that claim is refuted by Hunt’s own testimony that he received actual notice of the offer. (Tr 222-23.) Likewise, Gimrock’s claim (Br 26) that the Union violated “past practice” by contacting anyone other than Ryce ignores the fact that Hunt is Gimrock’s Vice President. By this time it was perfectly clear, as Waters testified, that “Ryce could never make a decision without

first going to ask Mr. Hunt if it was okay,” and Hunt “was the authority person in the negotiations ever since it began.” (Tr 283.)

3. Gimrock failed to reinstate the strikers to available positions or place their names on a preferential hiring list

The Board’s Order required Gimrock to “upon application, offer to those strikers who have not yet returned, immediate and full reinstatement to their former or substantially equivalent positions. . . .” (D&O 10.) When the Board’s General Counsel moved the Board to clarify the phrase “upon application,” Gimrock argued that it had assumed no liability accrued until the strikers made a second offer to return to work, and would be disadvantaged by any clarification of the Board’s order. (GC Motion 2, Respondent’s Opposition 2.) The Board granted the General Counsel’s motion in part. (SD&O 2 n.3; Order 2.)

While the Board acknowledged the “unnecessary and inartful” inclusion of the phrase “upon application” in its Order, it found that this imprecision did not disadvantage Gimrock. (Order 2.) There can be no doubt that when an economic striker makes an unconditional offer to return to work, he is entitled to an offer of reinstatement. Where the striker’s job has been filled by a permanent replacement, “if and when a job for which the striker is qualified becomes available, he is entitled to an offer of reinstatement.” *Fleetwood Trailer*, 389 U.S. at 381.

As the Board noted, the decision in this case was clear that the language of the Board's Order "has already been satisfied by the unconditional offer to return made on June 6, 1995." (Order 2.) Once the unconditional offer was made, "it was incumbent on [Gimrock] to seek [the strikers] out as positions were vacated." *Laidlaw*, 171 NLRB at 1369. See also *Zimmerman Plumbing & Heating Co., Inc.*, 339 NLRB 1302, 1304 n.6 (2003) (employees waiting to be reinstated are not obligated to continually apply for a position).

Here, Union President Allbritton made an unconditional offer on behalf of all strikers, and an offer by a union is "sufficient to constitute an offer on behalf of each striker." *Laidlaw Corp. v. NLRB*, 414 F.2d 99, 106 (7th Cir. 1969) (citing *NLRB v. Brown & Root, Inc.*, 203 F.2d 139, 147 (8th Cir. 1953)). Accord *Marlene Indus. Corp. v. NLRB*, 712 F.2d 1011, 1018 (6th Cir. 1983); *NLRB v. W.C. McQuaide, Inc.*, 552 F.2d 519, 529 (3d Cir. 1977); *Retail Wholesale Union v. NLRB*, 466 F.2d 380, 385 (D.C. Cir. 1972). At that point, Gimrock's liability under *Fleetwood* and *Laidlaw* accrued, and the Union was under no obligation to make a second return-to-work offer.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter judgment enforcing the Board's order in full.

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