

UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 00-10372-EE

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NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

GIMROCK CONSTRUCTION, INC.

Respondent

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

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF JURISDICTION

This case is before the Court on application of the National Labor Relations Board ("the Board") for enforcement of its final order against Gimrock Construction, Inc. ("the Company"). The Board's Decision and Order issued on August 27, 1998, was clarified on July 27, 1999, and is reported at 326 NLRB No. 33. (Vol III Doc 18 and Doc 22.)<sup>1</sup>

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<sup>1</sup> "Vol I Tr" refers to pages of the Transcript, contained in Volume I of the record. "Vol II GCX" or "RX" refers to exhibits of the General Counsel or the Respondent Company, contained in Volume II. "Vol III Doc" refers to numbered documents in Volume III Pleadings. Record references before a semicolon are to the Board's findings; those following are to the supporting evidence.

Pursuant to Section 10(a) of the National Labor Relations Act ("the Act") (29 U.S.C. § 160(a)), the Board had jurisdiction over the underlying administrative proceeding. International Union of Operating Engineers, Local 487, AFL-CIO ("the Union") initiated that proceeding by filing an unfair labor practice charge against the Company. (Vol III Doc 1 p. 1.) This Court has jurisdiction under Section 10(e) of the Act (29 U.S.C. § 160(e)), as the unfair labor practices found occurred in Florida, where the Company resides and transacts business (Vol III Doc 1 p. 3.) The Board filed its application for enforcement on January 25, 2000. There is no time limit in the Act for seeking enforcement or review of Board orders.

#### STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board's finding that the Company violated the Act by refusing to reinstate lawful economic strikers following their unconditional application to return to work.

2. Whether the Board abused its broad remedial discretion by failing to toll backpay for the strikers during the period before the Board's clarification of its Decision and Order.

#### STATEMENT OF THE CASE

As noted, the Union filed an unfair labor practice charge against the Company. Complaint issued on the Union's charge and a hearing was held before an administrative law judge.

(Vol III Doc 1 p. 1.) The judge found merit in complaint allegations that the Company had unlawfully failed to reinstate strikers, after their unconditional application to return to work. To remedy the violation found, the judge recommended an order with reinstatement and backpay provisions for strikers. (Vol III Doc 1 pp. 13-19.) As to all other alleged violations of the Act, the judge recommended dismissal. (Vol III Doc 1 pp. 10-13 and 19.)

After considering the exceptions and briefs of the parties, the Board issued a Decision and Order, adopting the administrative law judge's findings and recommended order, with modifications. (Vol III Doc 18.) Thereafter, the Board clarified its Decision and Order by reaffirming that an unconditional offer to return to work had been made on behalf of the strikers, and that no further offer was necessary to trigger the Company's reinstatement obligations under the order and Board precedent. (Vol III Doc 22 pp. 1-2.)

#### I. STATEMENT OF FACTS

##### A. The Union Wins a Representation Election and Is Certified To Represent a Unit of the Company's Employees

The Company is a civil contractor, specializing in harbor and marine construction in South Florida and the Caribbean. (Vol III Doc 1 p. 3; Vol I Tr 195.) For some years, the Union supplied workers to the Company through its hiring hall, under a series of prehire agreements that were limited to particular

projects of the Company. (Vol III Doc 1 p. 3; Vol I Tr 198-199, Vol II GCX 6A-6D.)

By late 1994, however, the Union became concerned about instances in which the Company appeared to have 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. (Vol III Doc 1 p. 4; Vol I, Tr 24-25.) 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). In an effort to deal with that problem, the Union asked the Company to sign a collective-bargaining agreement rather than a project agreement. The Company declined. (Vol III Doc 1 p. 4; Vol I 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 representative of a unit of the Company's employees. (Vol III Doc 1 p. 4; Vol II GCX 2.) Thereafter, the Company and the Union entered into a Stipulated Election Agreement. The agreement provided for an election in a stipulated unit including, "All equipment operators, oiler/drivers and equipment mechanics employed by the Employer

in Dade and Monroe counties in Florida." (Vol III Doc 1 p. 4; Vol II GCX 3 p. 2, Vol I 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. (Vol II GCX 3 Attachment.) The Company furnished an election eligibility list comprising 11 employees. (Vol III Doc 1 p. 4; Vol II GCX 4, Vol I Tr 9-10, 199-200.)

The day before the election, the Company, through its attorney, offered to sign a project agreement and to pay the employees \$1 per hour over union scale. The Company's attorney told the Union's business manager it would be very hard to reach agreement after the Union's certification. When the Union's business manager asked why, the Company's attorney said to take his word for it, "[I]t would be very hard." (Vol III Doc 1 pp. 4, 11; Vol I Tr 27.)

At the election on March 3, 1995, two employees voted who were not on the Company's eligibility list. Their ballots were challenged, but the challenges were never resolved because the challenged ballots were insufficient in number to affect the outcome of the election, which the Union won. (Vol III Doc 1 p. 4; Vol II GCX 3 p. 2, Vol I Tr 200-201.) On March 20, 1995, the Board certified the Union as the statutory bargaining representative of the Company's employees in the stipulated

unit. (Vol III Doc 1 p. 4; Vol II GCX 5, Vol I Tr 9-10.) 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).

B. The Employees Strike After the Company  
and the Union Fail To Reach Agreement

Collective-bargaining negotiations between the Company and the Union began in March 1995, following the Union's certification. (Vol III Doc 1 p. 5; Vol I Tr 28.) During negotiations, the Union proposed standard union contracts with recognition clauses that tracked the certified unit description. (Vol III Doc 18 n. 1 and Doc 1 p. 5; Vol I Tr 14-16, 28-29, Vol II GCX 8 and 9, Art. I Sec. 1.) The Company agreed to recognize the Union as the sole bargaining representative of the certified unit, but insisted that the Company remain free to assign work within the unit description to its nonunion employees. (Vol III Doc 1 p. 5; Vol II GCX 10 Art. I Sec. 1, and Art. IV Sec. 10, Vol I Tr 29-31, 90-92.) As used in this brief, "nonunion employees" are employees who were not referred to the Company through the Union's hiring hall; "union employees" are employees who were so referred. See below, p. 26 n. 10.

Prior to the Union's certification as the exclusive statutory bargaining representative of the Company's equipment operators, oiler/drivers, and equipment mechanics in the area,

the Company had sometimes assigned certain oilers' or mechanics' work to the Company's nonunion employees, particularly when union employees were busy with other duties. (Vol III Doc 1 pp. 3 and 4; Vol I Tr 45-46, 48-50, 140-145, 171-177, 230-231.) If forced to stop that practice, the Company argued, it would be required to hire additional employees into the unit and might have to lay off some nonunion employees. (Vol III Doc 1 p. 6; Vol II RX 1 at p. 1, Vol I Tr 65-66.)

The Union responded that it had no intention of requiring the hiring or dislodging of any employees. (Vol I Tr 43-44, 51-52, 85, 103-105.) Rather, the Union said, the Company was free to assign oilers' or mechanics' work to any employees (union or nonunion), provided that, while they were performing the work, the employees were covered by the collective-bargaining agreement and paid in accordance with its terms. (Vol III Doc 18 n. 1; Vol I Tr 46, 79-82, 104, 257.)<sup>2</sup>

The Company, on the other hand, argued that it should be free not only to assign work within the unit description to nonunion employees, but to do so with the understanding that the collective-bargaining agreement would not apply to them. (Vol III Doc 1 p. 5; Vol II GCX 10 Art. IV Sec. 10, Vol I Tr

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<sup>2</sup> The above statement of the Union's bargaining position is based on the Board's interpretation of essentially undenied testimony of union and company witnesses. See record references above and discussion below, pp. 25-28, 30.

30-34, 257-258.) Further, the Company 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. (Vol II GCX 10 Art. IV Sec. 10, Vol I Tr 30-31.)

Collective-bargaining negotiations continued, without agreement, until the Union struck on May 31, 1995. (Vol III Doc 18 n. 1 and Doc 1 pp. 6-7; Vol I Tr 53-54, 212-213.) Various efforts to reach an agreement to settle the strike were unsuccessful, including a proposal by Company Vice President Lloyd Hunt that the Company and Union sign a project agreement limited to the Port of Miami. (Vol III Doc 1 pp. 8-9; Vol I Tr 124-125, 213-215.) In June 1995, the Company began hiring some striker replacements. (Vol III Doc 1 p. 15; Vol I Tr 121, 219-220, 241-243, Vol II RX 4A-4D.)

C. The Company Refuses To Reinstate Strikers  
Following Their Application To Return to Work

On June 6, 1995, Union President James 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, Union President Allbritton applied to Douglas Calais, the Company's marine superintendent at the job site. (Vol III Doc 1 pp. 9-10, 15-17; Vol I Tr 60-61, 137-138, 151-154, 157, 166-167, 221-223, 233-235, 272-275.) Union President Allbritton told

Superintendent Calais that the strikers were making an unconditional offer to return to work, and that the Company could send the replacements home. (Vol III Doc 1 pp. 15-17; Vol I Tr 137-138, 157, 166-167, 223-224, 234, 273-275.)

Superintendent Calais answered that he would have to call Company Vice President Lloyd Hunt, and went to make the call. (Vol III Doc 1 p. 9; Vol I Tr 138, 157, 166, 275.) At about the same time, strikers were putting on their work shoes to return to work. (Vol III Doc 1 pp. 9-10; Vol I Tr 166-167, 233-235, 273-274, 276-278.) The Company, however, refused to reinstate the strikers, and the strikers resumed picketing. (Vol III Doc 1 pp. 9-10, 15-16; Vol I Tr 138, 157-158, 167, 234-235, 275-278.)

Shortly after the strikers' offer to return to work, Company Vice President 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, Vice President Hunt answered that he would probably be willing to pay \$1 over union scale if the Union would sign a project agreement for the Port of Miami. (Vol III Doc 1 p. 10; Vol I Tr 168-169, 224-225.)

## II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (former Chairman Gould and Members Fox and Hurtgen) affirmed the administrative law judge's unfair labor practice findings, with modifications.

(Vol III Doc 18 n. 1.) The Board agreed with the administrative law judge that the Company violated Section 8(a)(1) and (3) of the Act (29 U.S.C. § 158(a)(1) and (3)) by refusing to reinstate economic strikers following their unconditional application to return to work. (Vol III Doc 18 and Doc 1 pp. 15-17.)

Noting minor factual errors in the administrative law judge's decision, the Board found those errors did not affect the ultimate conclusion in the case. (Vol III Doc 18 n. 1.) The Board also disavowed various statements by the administrative law judge to the effect that the Union was seeking to have all oilers' and mechanics' work assigned to its members. Rather, the Board found, the Union's bargaining position was simply that any employee (union or nonunion) performing oilers' or mechanics' work should be covered by the contract and paid contractual wages and benefits, in accordance with the bargaining unit certification. (Vol III Doc 18 n. 1.)

The Board's order directs the Company to cease and desist from the violation found and from any like or related violation of employee rights. (29 U.S.C. § 157). Affirmatively, the order directs the Company, "[u]pon application," to offer immediate and full reinstatement to those strikers who have not yet returned to work, dismissing if necessary all persons hired as striker replacements after June 6, 1995, the date of the strikers' unconditional application to return. The order

further directs the Company to place on a preferential hiring list any striker applicants for whom positions are not immediately available. (Vol III Doc 1 p. 18, and Doc 18.) In addition, the order directs the Company to make the strikers whole for earnings and benefits lost as a result of the Company's refusal to reinstate them, and to post an appropriate notice to employees. (Vol III Doc 1 pp. 18-20, and Doc 18.) The Board deferred to subsequent compliance proceedings identification of the strikers unlawfully denied reinstatement, and the amount of backpay due them. (Vol III Doc 1 p. 18, and Doc 18.)

On March 3, 1999, counsel for the General Counsel filed a motion for clarification of the Board's Decision and Order. (Vol III Doc 19.) The motion noted the Board's affirmance of the administrative law judge's finding that the Union had made an unconditional application to return to work on behalf of the striking employees, on June 6, 1995. (Vol III Doc 19 p. 1, Doc 1 pp. 15-17, and Doc 18.) In light of that finding, the General Counsel sought deletion of the words "[u]pon application" from the Board's reinstatement order and its notice to employees, and clarification of the decision to state that no further application is necessary. (Vol III Doc 19 p.2, and Doc 1 pp. 18 and 20.)

On July 27, 1999, the Board (Member Hurtgen, concurring) issued an order granting the General Counsel's motion, in part.

(Vol III Doc 22.) The Board found its original decision made clear that the requirement of an application to return to work on behalf of the strikers had already been satisfied by the Union's unconditional offer on June 6, 1995. (Vol III Doc 22 p. 2, Doc 1 pp. 15-17, and Doc 18.) Accordingly, the Company had a duty to proceed with reinstatement offers, consistent with Board precedent. Although the Board deemed the "[u]pon application" language at the beginning of the reinstatement order inartful and superfluous, it found deletion of that language unnecessary. Rather, the Board majority concluded, "[W]e cannot find, in light of the entire Decision and Order, that the Respondent could reasonably have been misled into believing that a deviation from established Board law was intended." (Vol III Doc 22 p. 2.)

### III. STANDARD OF REVIEW

The Board's factual findings are conclusive, under Section 10(e) of the Act (29 U.S.C. § 160(e)), if they are supported by substantial evidence on the record considered as a whole. See Cooper/T. Smith v. NLRB, 177 F.3d 1259, 1261-1263 (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).

#### SUMMARY OF ARGUMENT

To defend its undisputed failure to reinstate strikers, the Company makes two contentions: 1. The Union failed to communicate to the Company an unconditional offer to return to work, on behalf of strikers. 2. Strikers lost the protection of the Act by engaging in an unlawful jurisdictional strike. The Board reasonably rejected those two defenses on factual grounds.

The Union's statement that the Company could send the replacements home did not transform the explicitly "unconditional" application to return to work into a conditional one. Not only did the Union properly address the application to the Company's marine superintendent at the job site, but the marine superintendent referred the offer to the Company's vice president. Neither the marine superintendent nor the vice president sought clarification of the application; nor did they suggest to the Union or the strikers that the Company viewed the application as conditional.

Contrary to the Company's second contention, the Board reasonably found that the strikers engaged in a lawful economic strike, rather than an unlawful jurisdictional strike over the assignment of work. Substantially undisputed record evidence supports the Board's conclusion that the Union did not seek to

compel the Company to assign oilers' and mechanics' work exclusively to union members. Rather, the Union stated that the Company was free to assign the work to nonunion employees, provided that they were covered by the collective-bargaining agreement while performing the work. Company counsel confirmed that the Union's business manager took such a position in the last bargaining session before the strike began. Other statements in the record are consistent with that testimony.

Finally, there is no merit to the Company's contention that the Board was required to toll backpay pending clarification of its Decision and Order. The Company does not dispute that the law imposes on an employer the obligation to offer reinstatement to strikers, following their unconditional application to return to work. As the Board's original decision clearly found that the strikers made an unconditional application to return to work on June 6, 1995, the Company's reinstatement obligation at that point was also clear. The "[u]pon application" language in the Board's reinstatement order did not entitle the Company to defer reinstatement pending a second and superfluous application to return to work. As the Board found, the Company could not reasonably have been misled into believing that such a deviation from established Board law was intended. In those circumstances, it was not an abuse of the Board's broad remedial discretion to grant the

strikers a full backpay remedy for the losses they suffered as a result of the Company's discrimination against them.

#### ARGUMENT

### I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED THE ACT BY FAILING TO REINSTATE STRIKERS

#### A. Introduction

An employer who refuses to reinstate striking employees, after the conclusion of a strike, discourages employees from exercising their rights to organize and strike, under Sections 7 and 13 of the Act.<sup>3</sup> NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 378 (1967). It is an unfair labor practice for an employer to interfere with those rights or to encourage or discourage union activities by discrimination in regard to hire or tenure of employment. Section 8(a)(1) and (3) of the Act (29 U.S.C. § 158(a)(1) and (3)).

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 American Machinery

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<sup>3</sup> 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. The right to strike is expressly preserved under Section 13 of the Act (29 U.S.C. § 163).

Corporation v. NLRB, 424 F.2d 1321, 1326 (5th Cir. 1970). See also C.H. Guenther & Son v. NLRB, 427 F.2d 983, 985 (5th Cir.), cert. denied, 400 U.S. 942 (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. NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 379 (1967). That justification is inapplicable, however, to strikers who were not permanently replaced at the time of their unconditional application to return to work or whose jobs became available thereafter. NLRB v. Fleetwood Trailer Co., 389 U.S. at 379-381; C.H. Guenther & Son v. NLRB, 427 F.2d 983, 985-986 (5th Cir.), cert. denied, 400 U.S. 942 (1970); American Machinery Corporation v. NLRB, 424 F.2d 1321, 1325-1328 (5th Cir. 1970).

As shown above, the Company here refused to reinstate strikers following their application 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. (Vol III Doc 1 p. 18; Vol I Tr 54, 241-243,

Vol II RX 4A-4D.)<sup>4</sup> Indeed, Company Vice President Hunt acknowledged that the Company was in urgent need of their services. (Vol I Tr 224.) As shown below, the strikers made a valid unconditional application to return to work. The Company's failure to reinstate them therefore violated Section 8(a)(1) and (3) of the Act (29 U.S.C. § 158(a)(1) and (3)).

B. The Strikers' Made a Valid Unconditional Application To Return to Work

Credited evidence supports the Board's finding that the Union made an unconditional application to return to work, on behalf of the strikers, on June 6, 1995. On that date, as found by the administrative law judge and affirmed by the Board, Union President Allbritton told Company Superintendent Calais the strikers were making an unconditional offer to return to work and the Company could send the replacements home. Vol III Doc 1 pp. 15-17, and Doc 18; Vol I Tr 137-138, 151-154, 157, 66-167, 222-223, 234, 272-275.) The Company contends (Brief 25-27) that President Allbritton's statements did not communicate to the Company an unconditional offer to return to work, on behalf of the strikers.

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<sup>4</sup> It also appears to be undisputed that, after the strikers' application to return to work, at least one of the replacements left the Company's employ and others were hired into the strikers' jobs. (Vol I Tr 228-230.) As noted, 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. (Vol III Doc 1 p. 18.)

According to the Company (Brief 27), the mere statement that the Company could send the replacements home converted the Union's explicitly "unconditional" offer into an offer conditioned on the Company's discharge of the replacements. The Board's rejection of that contention was reasonable and is therefore entitled to affirmance under the substantial evidence test. (Vol III Doc 1 p. 17, and Doc 18.) 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)). Accord SKS Die Casting & Machining, Inc. v. NLRB, 941 F.2d 984, 988 (9th Cir. 1991).<sup>5</sup>

Equally without merit is the Company's contention (Brief 26) that the strikers' application to return to work was ineffective, as it was addressed to Company Superintendent Calais, who supposedly was not an "authorized agent" of the Company. Employee Murray Chinnars testified that Superintendent Calais was "my boss," and that he "verified my

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<sup>5</sup> See also Soule Glass and Glazing Co. v. NLRB, 652 F.2d 1055, 1107 (1st Cir. 1981) (explicitly unconditional application not rendered conditional by reference to application "as a group"); United States Service Industries, 315 NLRB 285, 286 (1994) (expressly unconditional application not made conditional by statement employees ready to return to same shifts and buildings), enforced mem. 72 F.3d 920 (D.C. Cir. 1995).

time and everything." (Vol I Tr 167.) Company witnesses acknowledged that Calais is the Company's "marine superintendent," at the Port of Miami, and Company Vice President Hunt referred to Calais as "my superintendent out on the job site." (Vol I Tr 272-273, 221-222, 234.)

In those circumstances, the Union reasonably addressed the strikers' unconditional application to return to work to Superintendent Calais, as the Company's on-site representative at the Port of Miami, where the strikers' picket line was located. Moreover, Superintendent Calais indicated he would communicate the strikers' application to Company Vice President Hunt, and did so. (Vol III Doc 1 pp. 9-10, 15-16; Vol I Tr 138, 157-158, 166-167, 222-223, 231-235, 275.)

Contrary to the Company's suggestion (Brief 26), the burden was on the Company to seek clarification from the Union if uncertain about the meaning of the strikers' application. See SKS Die Casting & Machining, Inc. v. NLRB, 941 F.2d 984, 989 (9th Cir. 1991) (risk with employer to clarify any ambiguity). Accord NLRB v. Okla-Inn, 488 F.2d 498, 505 (10th Cir. 1973). Neither Superintendent Calais nor Vice President Hunt sought any clarification. 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 merely reiterated the Company's request that the Union sign a project agreement. See above p. 9.

Accordingly, substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) and (3) of the Act (29 U.S.C. § 158(a)(1) and (3)) by refusing to reinstate strikers following their unconditional application to return to work.

C. The Board Reasonably Rejected the Company's Defense that the Strike Had an Unlawful Jurisdictional Object

As noted, the Board found that the strike was a protected economic strike. (Vol III Doc 18 n. 1, and Doc 1 p. 15.) The Company attacks that finding, urging that the employees lost the protections of the Act by striking with an unlawful jurisdictional object.<sup>6</sup> According to the Company (Brief 11-13), the strike was in support of a union effort to compel the Company to assign oilers' and mechanics' work to union employees rather than to nonunion employees. As noted, the Board found that the Union was not seeking to compel the

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<sup>6</sup> 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, among other things, to engage in or encourage a strike, where an object is--

forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular 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 . . . .

Company to assign work exclusively to union employees, and that the administrative law judge's findings to that effect were erroneous. (Vol III Doc 18 n. 1.) Set forth below is, first, the administrative law judge's view of the evidence and his reason for rejecting the Company's jurisdictional strike defense; and, second, the Board's view of the evidence, leading to the same result.

1. The administrative law judge's rejection of the jurisdictional strike defense

Although the administrative law judge found that the Union sought to have oilers' and mechanics' work assigned exclusively to its members, he concluded that the strike did not violate Section 8(b)(4)(D) of the Act (29 U.S.C. § 158(b)(4)(D)). Rather, the judge held that a violation of Section 8(b)(4)(D) could be found only if the Union failed to comply with a Board assignment of the disputed work pursuant to Section 10(k) of the Act (29 U.S.C. § 160(k)). (Vol III Doc 1, pp. 14-15.)

Under Section 10(k), whenever a violation of Section 8(b)(4)(D) is charged, the Board shall hear and determine the underlying jurisdictional dispute unless there is timely satisfactory evidence of voluntary adjustment. Upon the parties' compliance with the Board's award of the work or voluntary adjustment of the dispute, Section 10(k) provides for dismissal of the Section 8(b)(4)(D) charge. As the Board here had made no 10(k) award of the work, no 8(b)(4)(D) charge having been filed, the judge concluded that the strike was

lawful. (Vol III Doc 1, pp. 14-15.) Both the Company and the Union took exception to the administrative law judge's approach. (Vol III Doc 7 p. 4, and Doc 9 p. 10.)

The Company urged before the Board, as it does here (Brief 22-23), that a jurisdictional strike is unlawful and unprotected even though the Board is barred from finding that the strike violates Section 8(b)(4)(D) of the Act (29 U.S.C. § 158(b)(4)(D)). In support of that contention, the Company cited cases in which employers recovered damages, under Section 303 of the Labor Management Relations Act, for damages accruing from jurisdictional pressure predating a Board Section 10(k) determination.<sup>7</sup> Section 303 of the LMRA (29 U.S.C. § 187) authorizes suits for damages to business or property

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<sup>7</sup> In the cases cited by the Company (Brief 22-23), unlike here, there was ultimately a determination by the Board or another appropriate tribunal that the employees to whom the unions sought to compel assignment of the work were not entitled to it. Longshoremen v. Juneau Spruce, 342 U.S. 237, 238-239 (1952) (Board 10(k) determination that employees represented by picketing union were not entitled to work); Harnischfeger Corp. v. Sheet Metal Workers, 436 F.2d 351, 353 (6th Cir. 1970) (same); Mason-Rust v. Laborers, 435 F.2d 939, 941-942 (8th Cir. 1970) (National Joint Board award of work to other employees).

resulting from conduct defined as an unfair labor practice in Section 8(b)(4) of the NLRA (29 U.S.C. § 158(b)(4)).<sup>8</sup>

In contrast to the Company's exceptions, the Union objected to the administrative law judge's characterization of the dispute between the Union and the Company "as being about whether certain work would be performed" by union members or by nonunion or nonunit employees. (Vol III Doc 18 n. 1; Doc 9 pp.7-8, 9-10.) The Union noted that it was certified as the bargaining representative of "all equipment operators, oiler/drivers and equipment mechanics" employed by the Company in Dade and Monroe counties, and that the certification encompassed all employees who performed work in those classifications, whether they were union members or not. (Vol III Doc 9 pp. 5-10.)<sup>9</sup> Consistent with the bargaining unit certification, the Union stated that its bargaining position was simply that any employee (union or nonunion) performing work as an oiler or equipment mechanic should be covered by the

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<sup>8</sup> Following the Board's Decision and Order in this case, and while the motion for clarification was pending before the Board, the Company filed a Section 303 suit against the Union in District Court. Gimrock Construction, Inc. v. Operating Engineers Local 487 (No. 99-1527, S.D. Fla.).

<sup>9</sup> See Wallace Corporation v. NLRB, 323 U.S. 248, 255-256 (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."). The Union also pointed out that, as Florida is a right-to-work state, unit employees are free to reject union "membership" under the Act. (Vol III Doc 9 p. 5.) Retail Clerks v. Schermerhorn, 373 U.S. 746, 750-752 (1963).

contract and paid contractual wages and benefits. (Vol III Doc 18 n. 1; Doc 9, pp. 9-10.)

2. The Board's finding that the strike was a lawful economic strike

Finding merit in the Union's exceptions, the Board disavowed various statements in the administrative law judge's decision to the effect that the Union was seeking to have all oilers' and mechanics' work assigned to its members. (Vol III Doc 18 n. 1.) Rather, the Board found that the Union agreed the Company could assign oilers' and mechanics' work to nonunion employees. In reaching that conclusion, the Board did not reverse the judge's credibility determinations; it merely drew different and reasonable inferences from largely undisputed evidence. See 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). See also NLRB v. Brooks Camera, 691 F.2d 912, 915 (9th Cir. 1982) ("As to derivative inferences, our deference is to the Board and not the administrative law judge.").

Union Business Manager Gary Waters testified that the Union did not oppose the assignment of oilers' and mechanics' work to nonunion employees. Instead, the Union urged that while employees were performing work within the unit/contract job classifications, they should be considered part of the unit covered by the contract and paid accordingly. (Vol I Tr 46,

78-80, 104.) Waters' testimony was confirmed by Company Attorney Don Ryce, who testified:

At the May 25th meeting, the union did take as one position that if the company wanted certain of this work they were claiming to be performed by non-bargaining unit employees, they would be willing to--to have those employees treated as bargaining unit employees only for the period of time they were performing that kind of work.

(Vol I Tr 257.)<sup>10</sup>

The Company (Brief 17 n. 6) seeks to dismiss that admission concerning the Union's bargaining position by characterizing it as "restricted to allowing nonbargaining unit employees to perform *certain*, but not all, of the disputed work if they were covered by the contract for that period of time." Company counsel's testimony itself, however, indicates that "certain" qualified, not what the Union would agree to, but what the Company wanted. Specifically, the statement indicates that if the Company wanted certain alleged unit work to be performed by nonunion employees, the Union was willing to have those employees perform the work and be treated as unit employees only for the time they spent performing it.

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<sup>10</sup>. "Non-bargaining unit employees," as the Company uses the term, are employees not referred to the Company through the Union's hiring hall. According to the Company, those employees were outside the bargaining unit even when they were performing oilers' and mechanics' work otherwise within the certified unit description. As noted above, in this brief, those employees are generally referred to as "nonunion employees."

The Union's willingness to have the work performed by nonunion employees is confirmed by the cross-examination of Union Business Manager Waters about the matter. Company counsel asked Waters:

Well, isn't it true that you took the position during the May 25th bargaining that you recognized that non-bargaining unit employees did certain work that you claimed was traditionally oilers' work but that you would apply the contract to them if we agreed to a contract only for those times they were performing oiler work and otherwise the contract wouldn't apply to non-bargaining unit employees?

(Vol I Tr 79.)

Business Manager Waters disputed the May 25th date, but not the Union's position. (Vol I Tr 79-82.) He confirmed the accuracy of his prehearing affidavit, which stated:

At one point I told [Company Attorney] Ryce that he could take his non-bargaining unit people and let them do oilers' work whenever it was required and they would be oilers under the contract only for those hours.

Vol I Tr 80, Vol II RX 2, p. 5.)<sup>11</sup> Not surprisingly in view

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<sup>11</sup> The Company's reliance (Brief 17 & n. 6) on some confusion in Union Business Manager Waters' testimony is misplaced. Not only did company counsel's testimony concede the Union's pre-strike acquiescence in the assignment of unit work to nonunion employees (see above pp. 26), but the Company's brief to the Board (p. 6) echoed that testimony. See Section 10(e) of the Act (29 U.S.C. § 160(e)), which provides, in part: "No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such exception shall be excused because of extraordinary circumstances."

of company counsel's testimony to the same effect, the above statement of the Union's pre-strike position was neither discredited nor denied.

Company counsel attributed to the Union, at the May 25 meeting, the view that a unit mechanic, rather than the Company's two nonunit mechanics, should perform mechanical work on what the Union viewed as unit equipment. (Vol I Tr 254.) But company counsel did not deny Union Business Manager Waters' specific testimony that Waters said, in that connection, "Well, when they [the Company's nonunit mechanics] do work on that equipment, then they're part of the bargaining unit." (Vol I Tr 46.)

Moreover, Waters' testimony in that connection is confirmed by company counsel's admission concerning the Union's position at the May 25 meeting. (Vol I Tr 257.) See above, p. 26. The record evidence, in context, therefore fully supports the Board's finding that the Union did not oppose the assignment of oilers' and mechanics' work to nonunion employees.

Ambiguities in the record are attributable, in part, to the Company's claim that it should be free to assign work within the certified unit description to nonunion (or "non-bargaining unit") employees, with the understanding that they would not be covered by the contract. (Vol III Doc 1 p. 5; Vol II GCX 10 Art. IV Sec. 10, Vol I Tr 33-34, 257-258.) The

Company's counterproposal provided that work on cranes and a variety of other equipment would not be subject to the collective-bargaining agreement if assigned to nonunit employees. (Vol II GCX 10 pp. 5-6.) "To avoid confusion," the Company's counterproposal stated, "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." (Id. at 5-6.)

Although the Union had no objection to the assignment of unit work to nonunion employees, it viewed the Company's counterproposal as an effort to remove work from the unit that was to be covered by the collective-bargaining agreement. Union Business Manager Waters expressed that view when asked if he took the position that only union employees could perform crane-related work referred to in a union contract provision struck by the Company. Waters responded: "My 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." (Vol I Tr 77-78, Vol II GCX 8 and 9 Art. I Sec. 4, and GCX 10 Art. I Sec. 4.) Waters further testified, (Vol I Tr 93-94):

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.

When company counsel asked if "jurisdiction" was not a problem at the May 25th negotiations, Union Business Manager Waters answered: "I don't--you're using the word jurisdiction. I wouldn't use that word. I would say that it was clear you wanted us to eliminate bargaining unit employment from our contract." (Vol I Tr 78.) In short, consistent with the testimony discussed above (pp. 25-28), Union Business Manager Waters opposed, not the assignment of unit work to nonunion employees, but the removal of unit work from the collective-bargaining agreement.

The Company places great reliance (Brief 6-7, 15 n. 5) on a letter sent by company counsel on May 31, 1995, and the Union's alleged failure at the hearing to dispute the letter's assertions. (Vol II RX 1.) That reliance is misplaced. Company counsel's letter, which was written on the day the strike began, charged the Union with insisting that the Company's "two non-bargaining unit field mechanics will no longer work on all of the [C]ompany's equipment." (Vol II RX 1 p.1.) In accordance with his earlier testimony (above p. 28), Union Business Manager Waters testified, (Vol I Tr 104):

I made no such statement. I said that their claim that these people were not in the bargaining agreement and worked on small equipment and didn't do repair work on heavy equipment that we covered was fine[;] but if in any event that they did do work on the heavier equipment, . . . then they would be within the bargaining agreement.

Union Business Manager Waters further testified that he disagreed with the claim in company counsel's May 31 letter that the Union's bargaining stance would force the Company to hire more union employees and dislodge nonunion employees. Waters stated that he thought he made that clear as well. "[W]e did not intend to require the Company to add any additional people to do oilers' work." "[And w]e had no intention of dislodging any employees from their current position." (Vol I Tr 105.)

In sum, the record does not support the Company's assertion (Brief 15 n. 5) that, "[i]n discussing the portions of Ryce's letter he objected to, Waters never disagreed with Ryce's statement that the Union was insisting on removing job duties from the non-union construction specialists and having that work assigned exclusively to operating engineers." The letter does not include that specific statement, and Union Business Manager Waters expressly disagreed with salient portions of the letter. (Vol II RX 1, Vol I Tr 74-75, 77-79, 103-107.)

Nor is there merit to the Company's suggestion that the administrative law judge "obviously credited" the letter's "summary of the status of negotiations at that juncture." (Brief 15.) The letter was not testimony, but a lawyer's effort to state the issues in the manner most favorable to his client on the day the strike began. In any event, when an

administrative law judge accepts one party's slant on the ultimate conclusion to be drawn from events, that acceptance is not a credibility determination entitled to Board deference. "[T]he Board is not required to accept an employer's self-serving declarations even when credited by the administrative law judge, but may draw its own inferences, giving such statements the weight it deems appropriate. NLRB v. Brooks Camera, 691 F.2d 912, 915 (9th Cir. 1982).

The administrative law judge did not discuss company counsel's key admission that the Union was willing to have work within the unit description assigned to nonunion employees and to have those employees treated as members of the bargaining unit only for the period of time they were performing that work. (Vol III Doc 1 pp. 6-7, Vol I Tr 257.) Nor did he discuss most of the testimony by Business Manager Waters to the same effect. See discussion above, pp. 25-27.

In those circumstances, the Board reasonably concluded, contrary to the administrative law judge, that the Union was not seeking to have oilers' and mechanics' work assigned exclusively to its members. See 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); Carpenters Local 33 v. NLRB, 873 F.2d 316, 319 (D.C. Cir. 1989).

It follows that the strike was a lawful economic strike in support of the Union's contract demands, rather than an

unlawful jurisdictional strike.<sup>12</sup> Cf. Glass & Pottery Workers Local 421 (A-CMI Michigan Casting Center), 324 NLRB 670, 674 (1997) (no jurisdictional dispute between employees where real dispute is between employer and union over whether employees performing certain work should be represented by union and covered by contract). Having found that there was no jurisdictional dispute in this case, but rather a claim of contract coverage for employees performing unit work, the Board never had occasion to reach the administrative law judge's alternate rationale for finding the strike lawful. (Vol III Doc 18 n. 1, and Doc 1 pp. 13-15.) See above, pp. 22-24. The validity of that rationale is therefore not before the Court.

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<sup>12</sup> As an alternate defense for its refusal to reinstate strikers, the Company argued in its reply brief to the Board (p. 4 n. 3) that the Union unlawfully sought contract coverage for employees while they were performing work within the certified unit job classifications. Because the Company's brief to the Court does not raise that defense, it may be deemed abandoned. See Rogero v. Noone, 704 F.2d 518, 520 n. 1 (11th Cir. 1983). See also United States v. Benz, 740 F.2d 903, 916 (11th Cir. 1984) (arguments raised for first time in reply brief not properly before court), cert. denied, 474 U.S. 817 (1985).

II. THE BOARD REASONABLY DID NOT  
TOLL BACKPAY FOR THE STRIKERS

The relevant provision of the Board's order directed the Company to take the following affirmative action:

Upon application, offer to those strikers who have not yet returned, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, dismissing if necessary all persons hired as striker replacements after June 6, 1995; and place on a preferential hiring list those striker applicants for whom positions are not immediately available.

(Vol III Doc 1 p. 18, and Doc 18.)

In light of the Board's clear determination that, on June 6, 1995, the Union made an unconditional application to return to work on behalf of the strikers, the words "[u]pon application" in the order obviously referred to something that had already occurred. (Vol III Doc 1 pp. 15-18, Doc 18, and Doc 22 p. 2.)

Equally clear is an employer's general obligation to offer reinstatement to strikers following their unconditional application to return to work. See discussion above, pp. 16-18. In those circumstances, there was ample basis for the Board's conclusion that the Company could not reasonably have been misled into supposing that it was entitled to wait for a second application from the strikers before offering them reinstatement. Accordingly, the Board did not abuse its broad

remedial discretion by providing the strikers with a full backpay remedy for the Company's discrimination against them.<sup>13</sup>

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<sup>13</sup> Cf. NLRB v. A.P.W. Products Co., 316 F.2d 899, 904-906 (1963) (rejecting employer's contention that Board was required to toll backpay between trial examiner's ruling in favor of employer and Board's overruling of precedent calling for tolling of backpay in those circumstances).

CONCLUSION

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

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