UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 05-1058

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 15, AFL-CIO

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

and

MIDWEST GENERATION, EME, LLC

Intervenor

ON PETITION FOR REVIEW OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

JURISDICTIONAL STATEMENT

The jurisdictional statement of International Brotherhood of Electrical Workers, Local 15, AFL-CIO ("the Union") is not complete and correct.

This case is before the Court upon the petition of the Union to review a final order of the National Labor Relations Board ("the Board") dismissing an unfair labor practice complaint against Midwest Generation, EME, LLC ("the

Company"). The Board had jurisdiction over the unfair labor practice proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. § 151, 160(a)) ("the Act"). This Court has jurisdiction over this proceeding pursuant to Section 10(f) of the Act (29 U.S.C. § 160(f)), because the alleged unfair labor practice occurred in Illinois. The Board's Decision and Order issued on September 30, 2004, and is reported at 343 NLRB No. 12. (A 225-31.)[1] The Union's petition for review was timely filed with the Court on January 10, 2005; the Act places no time limit on the institution of proceedings to review Board orders. The Company has intervened on the side of the Board. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO ("the Amicus") has filed an amicus brief on behalf of the Union.

STATEMENT OF THE ISSUE PRESENTED

Whether the Board had a rational basis for concluding that the Company did not violate Section 8(a)(3) and (1) of the Act by refusing to reinstate and locking out those employees who were on an economic strike at the time of the Union's unconditional offer to return to work, while not locking out those individuals who,

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[1] "A" references are to the Union's Appendix. "JX 3 p.4" refers to page four of the Company's answer to the complaint, which was inadvertently omitted from the Union's appendix. A copy of that missing page is attached as an addendum to this brief for the convenience of the Court. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

prior to the Union's offer, had ceased participating in the strike and had either returned to work or scheduled a return to work.

STATEMENT OF THE CASE

Based upon an unfair labor practice charge filed against the Company by the Union, the Board's General Counsel issued a complaint alleging that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by refusing to reinstate employees who were on an economic strike at the time of the Union's unconditional offer to return to work, while allowing other employees who had previously returned to work, or who were previously scheduled to return to work, to continue working. (A 225; 4, 5-8.) The Company timely filed an answer, denying the commission of any unfair labor practices. (A 225; 25-30.)

The parties subsequently jointly waived a hearing before an administrative law judge, and filed a joint motion to transfer the proceeding to the Board upon a stipulated record. (A 225; 94-95, 33-93.) The Board issued an order transferring the proceeding to itself and approving the stipulation. (A 225; 97-98.) On September 30, 2004, the Board issued its Decision and Order, finding that the Company had not violated the Act as alleged in the complaint. (A 225-31.)

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background; the Union Represents the Company's Operating and Maintenance Employees; in June 2001, the Company Bargains in Good Faith with the Union for a New Contract, but the Parties Are Unable To Reach Agreement; on June 28, the Union Engages in an Economic Strike; the Company Continues Operations, Using Employees Who Never Struck, Returning Strikers, Supervisors, Contractors, and Temporary Replacement Employees

The Company is engaged in the production and wholesale of electricity to end-users in Chicago and Northern Illinois. (A 225; 34, 35(¶¶ 5, 11).) In 1999, the Company purchased several facilities from Commonwealth Edison Company ("Commonwealth Edison"), and adopted the collective-bargaining agreement then in effect between Commonwealth Edison and the Union, which represented the 1,150 operating and maintenance employees employed at those facilities. (A 225; 34-35(¶¶ 7, 9, 10).)

In June 2001,[2] the parties began negotiations for a new collective-bargaining agreement. Although the Company negotiated in good faith with the Union, the parties were unable to reach agreement. (A 225; 36, 37(¶¶13, 14, 15).) On June 28, the Union commenced an economic strike at all of the Company's facilities in support of its bargaining position. (A 225; 37(¶¶ 15, 16).) With the exception of

[2] All dates are in 2001.

approximately eight bargaining unit members who continued working ("the nonstrikers"), the entire 1,150 employee bargaining unit participated in the strike as of its commencement on June 28. (A 225; 37(¶ 17).)

In July, approximately 16 striking employees offered to return to work, and the Company accepted them back to work, without regard to their membership status in the Union. (A 226; 37(¶¶19, 20).) Between August 1 and August 31, approximately 31 additional bargaining-unit employees offered to return to work (collectively, "the crossovers"), and the Company accepted them back to work also, without regard to their union membership status. (A 226; 37(¶¶ 19-20).)

During this time period, the Company maintained operations. In addition to using the employees who never struck and the returning strikers, the Company also utilized supervisors, contractors and some temporary replacement employees. (A 225-26, 228; 37(¶¶ 18, 19).)

B. By Letter Dated August 31, the Union Makes an Unconditional Offer To Return to Work on Behalf of All Strikers; the Company Declines the Union's Offer To Return to Work, Locks Out the Remaining Employees, and States that They Will Not Be Permitted To Return to Work Until the Union Agrees to a New Contract; the Company Continues To Utilize the Services of the Employees Who Never Struck or Who Returned to Work During the Strike, as Well as the Supervisors, Contractors, and Temporary Replacements

As of August 31, the Company and the Union had not reached agreement on the terms of a new contract, but were still engaged in bargaining for a new contract. (A 226; 39(¶26).) By letter dated August 31, the Union notified the Company that it was terminating the strike and made an unconditional offer to return to work on behalf of those employees who were still engaged in the strike on behalf of the Union's bargaining position. (A 226; 39(¶27), 86.)

On September 4, the parties held a bargaining session. (A 226; 39 (¶ 29).) During the meeting, the Company told the Union that it was evaluating the Union's offer to return to work, but had not yet reached any decision. (A 226; 39(¶ 29).)

By letter dated September 6, the Company declined the Union's offer to return to work, and instituted a lockout of all those individuals on strike as of the date of the Union's August 31 offer to return to work. (A 226; 40 (¶ 30), 87.) The Company's letter stated, "[E]ffective immediately, Midwest Generation will not allow striking employees to return to work until a new contract

is agreed to and ratified by your membership. Those employees who had already returned to work, or were scheduled to return to work, prior to Friday, August 31, 2001, will be allowed to continue to work." (A 226; 87.) Six employees were allowed to return to work between September 1 and September 5, but all of them had ceased participating in the strike and had scheduled their return to work prior to the Union's August 31 offer to return to work. (A 226 n.4; 40(¶ 31).)

Many bargaining-unit employees sought to return to work after the lockout commenced. The Company informed them that they could not return to work until a new contract was agreed to and ratified by the union membership. (A 226; 40(¶ 33).)

C. In October, the Union Members Ratify the Company's Bargaining Proposals; the Company Places the Formerly Locked-Out Employees on Its Active Payroll, and All Employees Who Opted To Do So Return to Work

Following the implementation of the lockout, the Company and the Union continued to meet and bargain for a new collective-bargaining agreement. (A 226; 41(¶¶ 37, 38).) On October 16, the bargaining unit ratified the Company's contract proposal. (A 226; 42(¶ 39).) On October 22, the Company ended the lockout, and all locked-out employees who opted to do so returned to work. (A 226; 42(¶ 40).) The parties executed a collective-bargaining agreement effective from October 22, 2001 to December 31, 2005. (A 226; 42(¶ 41).)

Throughout the course of negotiations, the Company and the Union met and bargained in good faith. (A 225; 36(¶ 14).) During the strike and the lockout, the Company never hired any permanent replacements. (A 226; 37(¶ 18).)

II. THE BOARD'S CONCLUSIONS AND ORDER

On September 30, 2004, the Board (Chairman Battista and Member Schaumber; Member Walsh dissenting) issued its decision, finding that the Company did not violate Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by locking out and/or refusing to reinstate those employees who were on an economic strike at the time of the Union's unconditional offer to return to work, while not locking out those individuals employed by the Company who, prior to the Union's unconditional offer to return to work, had ceased participating in the strike by making an offer to return to work and had either returned to work or scheduled a return to work at the Company. (A 225-31.) Accordingly, the Board dismissed the complaint. (A 230.)

SUMMARY OF ARGUMENT

This case involves the Board's dismissal of an unfair labor practice complaint alleging that the Company violated the Act by refusing to reinstate economic strikers upon their union's unconditional offer to return to work. The Board plainly had a rational basis for concluding that the Company did not violate the Act by refusing to reinstate the economic strikers, because the stipulated record shows that the Company had a legitimate and substantial business justification for its refusal, namely to apply economic pressure in support of its legitimate bargaining demands.

The fact that, *after* the lockout, the Company retained nonstrikers and the strikers who had returned to work *before* the lockout, hardly compelled the Board to find that the Company refused to reinstate the remaining strikers in order to punish them. Instead, the Board could reasonably find that it was for the purpose of applying pressure in support of the Company's legitimate bargaining demands. Indeed, when the employees ratified the Company's bargaining proposal, the Company terminated the lockout, placed all the strikers on its active payroll, and reinstated all the strikers who wanted to return to work.

The Union repeatedly mischaracterizes prior Board decisions in support of its mistaken claim that the Board's decision is inconsistent with precedent. The Union and Amicus fail to show that the Company's lockout was inherently

destructive. Accordingly, proof of unlawful motivation was necessary to establish a violation here.

ARGUMENT

THE BOARD HAD A RATIONAL BASIS FOR CONCLUDING THAT THE COMPANY DID NOT VIOLATE SECTION 8(a)(3) AND (1) OF THE ACT BY REFUSING TO REINSTATE AND LOCKING OUT THOSE EMPLOYEES WHO WERE ON AN ECONOMIC STRIKE AT THE TIME OF THE UNION'S UNCONDITIONAL OFFER TO RETURN TO WORK, WHILE NOT LOCKING OUT THOSE INDIVIDUALS WHO, PRIOR TO THE UNION'S OFFER, HAD CEASED PARTICIPATING IN THE STRIKE AND HAD EITHER RETURNED TO WORK OR SCHEDULED A RETURN TO WORK

A. Applicable Principles and Standard of Review

Section 7 of the Act (29 U.S.C. § 157) grants employees the "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." The right of employees to engage in primary strike activity in support of economic demands is fundamental to the Act. This right is expressly recognized in Section 13 of the Act (29 U.S.C. § 163), which provides: "Nothing in this [Act] shall be construed so as either to interfere with or impede or diminish in any way the right to strike . . . ."

Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the

exercise" of their Section 7 rights. Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) in turn makes it an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization."

It is well settled that an economic striker retains his status as an "employee" under Section 2(3) of the Act (29 U.S.C. § 152(3)). *NLRB v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375, 378 (1967) ("*Fleetwood Trailer*"); *Laidlaw Corp. v. NLRB*, 414 F.2d 99, 103 (7th Cir. 1969). It is equally well settled that, although employees engaged in an economic strike are generally entitled to reinstatement upon the conclusion of their strike, an employer may refuse to reinstate them"[i]f [it] can show a 'legitimate and substantial business justification'" for its refusal. *NLRB v. Mars Sales & Equipment Co.*, 626 F.2d 567, 572 (7th Cir. 1980) (citation omitted). *Accord Fleetwood Trailer*, 389 U.S. at 378 (an employer who fails to reinstate economic strikers violates Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) unless he shows that "his action was due to 'legitimate and substantial business justifications'").

As the Union concedes (Br 14, 27 n.22), one such valid justification for refusing to reinstate economic strikers and continuing to operate with temporary replacements is when the employer engages in a lockout for the purpose of bringing economic pressure to bear on a union to accept the employer's legitimate bargaining demands. *See Eads Transfer, Inc. v. NLRB*, 989 F.2d 373, 376 (9th Cir. 1993); *NLRB v. Ancor Concepts, Inc.,* 166 F.3d 55, 58-59 (2d Cir. 1999). *Cf. Int'l Brotherhood of Boilermakers Iron Shipbuilders, Blacksmiths, Forgers & Helpers, AFL-CIO, Local 88*, 858 F.2d 756, 769 (D.C. Cir. 1988) ("*Boilermakers, Local 88*").

As the Board has explained, the impact of such a lockout on employee rights is comparatively slight, because the temporarily replaced, locked-out employees do not face the permanent loss of their jobs, and because the union members can end the dispute at any time by agreeing to the employer's legitimate demands and returning to work. *See Harter Equipment, Inc.*, 280 NLRB 597, 599-600 (1986), *affirmed*, 829 F.2d 458 (3d Cir. 1987); *Boilermakers, Local 88*, 858 F.2d at 764-65.

Accordingly, an employer does not violate the Act if it refuses to reinstate economic strikers in order to put pressure on their union to accept its legitimate bargaining demands. *NLRB v. Ancor Concepts, Inc*., 166 F.3d 55, 56-59 (2d Cir. 1999) (employer did not violate the Act by stating upon union's offer to return to

work that it would not reinstate the strikers until they agreed to a new contract); *Eads Transfer, Inc. v. NLRB*, 989 F.2d at 376 (noting that an employer's lockout in support of its bargaining position is a legitimate business justification for refusing to reinstate strikers, provided that the employer informs the union that employees can end the lockout by accepting its terms); *Field Bridge Associates*, 306 NLRB 322, 330, 334 (1992) (employer was privileged to convert economic strike into an economic lockout when strikers asked for reinstatement, and therefore did not violate the Act by refusing to reinstate them, so long as it maintained the lockout in support of its bargaining position), *enforced*, 982 F.2d 845 (2d Cir. 1993). *Cf. Boilermakers, Local 88*, 858 F.2d at 757, 769 (employer did not violate the Act by continuing to operate its business with temporary replacements after lawfully locking out its permanent employees in support of its legitimate bargaining demands); *Harter Equipment, Inc.*, 280 NLRB at 599-600 (same), *affirmed*, 829 F.2d 458 (3d Cir. 1987).

The "primary responsibility" for striking the proper balance between an employer's asserted business justifications and the employees' right to reinstatement rests "[with] the Board and not [with] the courts." *Fleetwood Trailer*, 389 U.S. at 378. In striking this balance, the Board "engages in the 'difficult and delicate responsibility' of reconciling conflicting interests of labor and management [, and] the balance struck . . . is 'subject to limited judicial

review.'" *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 267 (1975) (citation omitted). In short, the Board's legal conclusions may not be disturbed so long as they are "reasonably defensible." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496-97 (1979).

Where, as here, the Board finds that the challenged conduct does not violate the Act, and accordingly dismisses complaint allegations, judicial review is extremely limited. A Board conclusion that a party did not violate the Act "'must be upheld unless [it] has no rational basis,'" (*Kankakee-Iroquois County Employers' Ass'n v. NLRB*, 825 F.2d 1091, 1093 (7th Cir. 1987) (citation omitted); *District 65, Distributive Workers of America v. NLRB*, 593 F.2d 1155, 1164 (D.C. Cir. 1978)), or unless the only inference that could reasonably be drawn from the record is one that "require[s]" the Board to find the violation. *Amalgamated Clothing Workers of America, AFL-CIO v. NLRB*, 334 F.2d 581, 581 (D.C. Cir. 1964).

As we now show, the Board plainly had a rational basis for concluding that the Company did not violate the Act by refusing to reinstate the strikers upon the Union's offer to return to work, because the stipulated record shows that the Company refused to reinstate the strikers for the legitimate purpose of applying economic pressure in support of its legitimate bargaining demands.

B. The Stipulated Record Shows that the Company Refused To Reinstate the Strikers for the Purpose of Applying Economic Pressure in Support of its Legitimate Bargaining Demands

There can be little doubt that, as the Board found (A 227), the Company refused to reinstate the strikers to put pressure on the Union and strikers to accept its legitimate bargaining demands. Indeed, the stipulated record virtually compels such a finding. The Company asserted in its answer to the complaint that it had "acted for the purpose of exerting pressure in support of its lawful bargaining demands." (A 226-27; JX 3 page 4.) The Company's answer in this regard was not after-the-fact, self-serving legal rhetoric. Rather, it was entirely consistent with the Company's contemporaneous correspondence with the Union and the Company's subsequent actions in this case.

Thus, as the Board found (A 227; 40(¶ 30), 87), the Company expressly stated--in its September 6 letter to the Union announcing the lockout--that it would "not allow striking employees to return to work until a new contract is agreed to and ratified by your membership." *See Ancor Concepts, Inc.*, 323 NLRB 742, 744 (1997) (an employer's "assertion that it w[ill] not offer the strikers reinstatement until a new agreement [is] reached [is] sufficient to inform the striking employees that the employer [is] locking them out in support of its bargaining position."), *affirmed in relevant part*, 166 F.3d 55, 57, 59 (2d Cir. 1999). And, true to its word, the Company then ended the lockout, placed the locked out employees on its

active payroll, and permitted them to return to work once the employees ratified the Company's bargaining proposal. (A 226; 42(¶¶ 39, 40).) In short, the Company's entire course of conduct both in word and deed demonstrates that the Company did indeed refuse to reinstate the strikers to put pressure on them to accepts its bargaining demands.[3]

Finally, there is no dispute that the bargaining demands that the Company wanted the Union to accept were legitimate. Indeed, as the Board noted (A 225, 227 & n.5; 36(¶ 14)), the Union stipulated that the Company bargained in good faith throughout the course of negotiations, and the Union has never argued that any of the Company's bargaining proposals were unlawful or dealt with nonmandatory subjects.

[3] The Union's complaint (Br 8, 29-32)--that there is no record evidence that the Company refused to reinstate those strikers to bring pressure to bear in support of its bargaining demands--ignores the Company's September 6 letter to the Union and the Company's answer to the complaint, both of which are part of the record according to the terms of the Stipulation. (A 227, 229 & n.10; 33, 34(¶ 3), 40(¶ 30).) And, because the Company, by definition, was not refusing to reinstate or locking out the nonstrikers and crossovers, there was no need for the Company to "justify" its treatment of those employees in its September 6 letter to the Union. After all, the Company sent that letter to the Union to announce its refusal to reinstate the employees who were actively participating in the strike as of the Union's August 31 offer to return to work.

C. The Arguments of the Union and Amicus Lack Merit

1. The Union failed to show that the Company locked out the strikers to punish them

Before this Court, the Union asserts (Br 6, 22, 25) that the Company unlawfully refused to reinstate the strikers after the Union's August 31 offer to return to work in order to "punish[] them" for sticking with the Union until the end of the strike, rather than to put pressure on them to accept its bargaining demands. To be sure, as the Board noted (A 228-29), the Company's refusal to reinstate the strikers would indeed be unlawful if the record showed that the Company's refusal was actually motivated by a desire to punish the employees and the Union, rather than for the purpose of winning the economic battle and obtaining ratification of the Company's bargaining proposal. *See Local 702, IBEW v. NLRB*, 215 F.3d 11, 18 (D.C. Cir. 2000) (even if employer's lockout serves a legitimate business interest, it may still be found to be unlawful if the record shows that its use was actually motivated by antiunion animus). However, as this Court has noted, "'an unlawful purpose is not lightly to be inferred. In the choice between lawful and unlawful motives, the record taken as a whole must present a substantial basis of believable evidence pointing toward the unlawful one.'" *NLRB v. Wire Products Mfg. Corp.*, 484 F.2d 760, 765 (1973) (citation omitted).

The record in this case simply did not compel the Board to find that the Company acted for the purpose of punishing the employees and the Union for the

strike, rather than for the purpose of obtaining ratification of the Company's bargaining proposals. In fact, as the Board noted (A 227), there is *no* basis for concluding that the Company's stated justification was not the real reason for the lockout.

To begin, there is no direct evidence that supports the Union's assertion that the Company refused to reinstate the strikers on August 31 out of a desire to punish the employees for striking. To the contrary, as shown, the Union's argument ignores that the Company at all times acted entirely consistently with its stated purpose of exerting pressure in support of its lawful bargaining demands.

There is also no circumstantial evidence that supports the Union's assertion that the Company desired to punish employees who struck. The circumstantial evidence actually suggests otherwise. As shown, the Union stipulated that in July and August, approximately 47 striking employees offered to return to work, and the Company accepted them back without regard to their membership status in the Union. (A 226; 37(¶¶ 19, 20).) Thus, the Company treated employees who actually had gone out on strike in June, but who then sought to work before the Union's offer to return, precisely the same as it treated the employees who never struck at all--it permitted both groups to work. If, as the Union contends, the Company had wanted to punish employees for striking, it is difficult to understand

why during the strike the Company reinstated every striker who wanted to return to work.[4]

As the parties' stipulation also makes clear, the Company never even bothered to exercise its lawful right to hire permanent replacements for the strikers during the strike (and before the September lockout), an action that would have entitled the Company to refuse to reinstate the strikers even if the Union had capitulated and accepted the Company's bargaining demands when it made its August 31 offer to return to work. (A 226; 37(¶ 18).) *See, for example, Belknap, Inc. v. Hale*, 463 U.S. 491, 493 (1983) ("Where employees have engaged in an economic strike, the employer may hire permanent replacements whom it need not discharge even if the strikers offer to return to work unconditionally."). The Company's decision not to use permanent replacements during the strike (and prior

[4] The Union's suggestion (Br 31)--that the Company was only willing to take back employees if they eschewed the strike weapon on an individual basis, rather than through their union--is unsupportable speculation. There is no evidence that during the strike the Company would not have reinstated any employee on whose behalf the Union made an offer to return to work. Moreover, the stipulated record suggests that after the Company locked out employees, the Company treated employees who approached it individually the same as employees who dealt with the Company through the Union. Thus, the stipulation indicates that after the lockout, many employees sought to return to work, but the Company told them that they could not return to work until a new contract was agreed to and ratified, precisely the same thing that the Company told the Union in response to the Union's offer to return to work on behalf of the strikers. (A 226; 40(¶ 33), 87.)

to the lockout) is inconsistent with the Union's claim that the Company sought to punish the strikers.

Finally, the Union does not argue to this Court that the Company, after instituting the lockout, either delayed bargaining or bargained in bad faith. Had the Company wanted to punish strikers for "sticking with" the Union until the end of the strike, either of those tactics could have impaired the strikers' ability to end the lockout. To the contrary, as the Board noted (A 228; 36(¶ 14), 88), the Union stipulated that the Company bargained in good faith with the Union throughout the course of negotiations, and the record shows that the Company complied with a union information request after the lockout. This evidence of the Company's good faith tends to rebut the Union's claim that the Company's lockout was improperly motivated. *See Local 702, IBEW v. NLRB*, 215 F.3d 11, 18 (D.C. Cir. 2000) (employer's good-faith dealing with union and its desire to resolve differences supports Board's rejection of union's claim that lockout was improperly motivated). In the circumstances, it was thus entirely within the ability of the employees who "stuck with the Union until the end" to terminate the lockout immediately and avoid any so-called "punishment" by simply agreeing to the Company's bargaining demands.[5]

[5] The Union complains (Br 6, 38) in passing that the Company, rather than implementing the lockout upon receiving the Union's August 31 offer to return to work, deliberately delayed initiating the lockout until September 6 to permit it to

2. The Company's retention after the lockout of the nonstrikers and the crossover employees who returned to work before the lockout did not render the lockout unlawful

The Union complains (Br 19-24) that the Board's decision here is inconsistent with Board precedent that, according to the Union, holds that lockouts that are limited to employees who engage in strikes until their end are unlawful partial lockouts. The short answer is that *none* of the cases cited by the Union stands for the proposition that an employer cannot be held to have lawfully locked out employees in support of its bargaining position merely because it retained, after the lockout, nonstrikers and employees who crossed the picket line *prior* to the lockout. Indeed, that issue is not even presented in the Union's cases.

Thus, unlike here, in three of the cases cited by the Union (Br 19, 22 & nn.15 & 16, 38 n.33), the employer did not even argue that it had refused to permit its employees to work for the purpose of exerting economic pressure in support of

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reinstate six more employees and thereby drive home the message that it was punishing employees who stuck with the Union until the end. But, the unfair labor practice complaint did not allege that the Company violated the Act by delaying the lockout until September 6. Moreover, as the Board noted (A 229), there is no specific evidence that the Company timed the commencement of the lockout because of antiunion considerations. Indeed, the Union's complaint is at odds with its stipulation, which provides that each of the six employees who returned to work between September 1 and September 6 had actually ceased participating in the strike and scheduled his return to work *before* the Union's August 31 offer to return to work. (A 226 n.4; 40(¶ 31).) In short, the six employees who returned were not similarly situated to the employees who remained out on strike.

its legitimate bargaining demands.[6] In another four of the cases cited by the Union (Br 22 n.15, 23), unlike here, there was concrete evidence that the employers locked out employees to retaliate against them for exercising their Section 7 rights, rather than to support a legitimate bargaining position.[7] In another case cited by

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[6] *McGwier Co., Inc.*, 204 NLRB 492, 495-96 (1973) (employer could not have refused to reinstate strikers in order to enhance its bargaining position because it had not even taken a bargaining position; instead, the employer argued to the Board that it did not have any obligation to reinstate strikers because the strike was unprotected and the union failed to make an unconditional offer to return to work); *Highland Superstores, Inc.*, 314 NLRB 146, 146 (1994) (although employer may lock out employees in support of a lawful bargaining position, its lockout here was not justified on that basis because employer never even asserted until the unfair labor practice hearing that its lockout was in support of its bargaining demands, and employer's unlawful threat to terminate employees for handbilling shows that lockout was in fact implemented to punish employees for handbilling); *ABCO Engineering, Corp.*, 201 NLRB 686, 689-90 & n.10 (1973) (employer merely claimed that it closed plant because employees were too "shook up" to get any work done, and employer refused to negotiate with employees as a group and forced them to resign unless each employee was willing to bargain on an individual basis), *enforced*, 505 F.2d 735 (8th Cir. 1974).

[7] *Thrift Drug Co.*, 204 NLRB 41, 41 n.2, 43 (1973) (employer plainly suspended employee for picketing--rather than locking her out in support of its bargaining position--because employer permitted her to return to work when she ceased picketing even though union had not accepted employer's bargaining position), *enforced*, 491 F.2d 751 (3d Cir. 1974); *Highland Superstores, Inc.*, 314 NLRB 146, 146 (1994) (post-handbilling lockout found to be unlawful "based on specific facts of this case," namely that employer had previously threatened to terminate employees if they handbilled, and employer never told union that employees could end lockout if they acquiesced to employer's bargaining position); *Schenk Packing Co.*, 301 NLRB 487, 489-90 (1991) (lockout unlawful where employer announced that union members would not be hired as replacements during the lockout and that existing employees would be considered for employment only if they resigned from the union); *O'Daniel Oldsmobile, Inc.,* 179 NLRB 398, 398-402 (1969) (finding a partial lockout of only those employees who struck unlawful, because

the Union (Br 22 n.15), the legality of the initial partial lockout was not even at issue because, as the Board noted, it was not the subject of a complaint allegation.[8] And in yet another case cited by the Union (Br 22 n.15), unlike here, the Board found that the employer's action could not even be characterized as a lockout in support of a bargaining position, because the employer chose to lock out only those employees who, upon the union's urging, insisted upon requiring the employer to provide their tools, as was their right under the terms of the final offer that the employer had implemented.[9]

The Union's reliance (Br 19 & n.12) *on Field Bridge Associates*, 306 NLRB 322 (1992) ("*Field Bridge*"), and *Ancor Concepts, Inc.*, 323 NLRB 742 (1997) ("*Ancor*"), is equally unavailing. In *Ancor*, the Board merely noted that following the declaration of a lawful lockout in support of its bargaining demands, an employer that seeks to continue to invoke the lockout as justification for refusing to reinstate strikers must refrain from engaging in conduct inconsistent with the lockout's justification. *Ancor*, 323 NLRB at 744 ("Such inconsistent conduct ends

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"abundant evidence" of antiunion animus showed that the lockout was implemented "in retaliation" for the employees' Section 7 activity).

[8] *Schenk Packing Co.*, 301 NLRB 487, 488 n.3 (1991).

[9] *Riverside Cement Co.,* 296 NLRB 840, 841-42 (1989).

the lawful lockout," and eliminates the employer's defense for refusing to reinstate employees).

The *Ancor* Board went on to cite its decision in *Field Bridge* as an example of that principle. There, the employer undermined its claim that it was continuing to lock out employees to put pressure on their union to accept its bargaining demands by reinstating some employees at a time when its bargaining demands still had not been accepted and when it was still refusing to reinstate other employees. *Id.* *See Field Bridge*, 306 NLRB at 330, 331, 334.

Accordingly, contrary to the Union's claim (Br 29), *Ancor* does not stand for the proposition that an employer needs a legitimate and substantial business justification--apart from putting pressure on employees to accept its bargaining demands--in order to justify refusing to reinstate strikers. Instead, *Ancor* merely stands for the common-sense proposition that an invalid lockout does not constitute a legitimate and substantial business justification for refusing to reinstate strikers who have been locked out. *See Ancor*, 323 NLRB at 744 (because "the lawful lockout was over" as the result of the employer's inconsistent conduct, the employer had to "demonstrate that it *then* had legitimate and substantial business reasons apart from the claimed lockout for refusing to reinstate" the strikers at that time) (emphasis added).

However, such reasoning has little persuasive force here where, as shown, the Company at all times acted consistently with its claim that the lockout was for the purpose of putting pressure on the Union to accept its bargaining demands. Thus, unlike *Field Bridge*, each unit employee who worked during the lockout here had been offered reinstatement at his request *prior* to the implementation of the lockout. Further, and also unlike *Field Bridge* where the employer offered to reinstate some (and only some) of the strikers *after* the lockout began, the Company here did not reinstate, or offer to reinstate, *any* strikers after instituting its lockout in support of its bargaining demands--until, that is, the employees ratified the Company's bargaining proposals. Then, the Company placed *all* the strikers on its active payroll and terminated its lockout.

In fact, *Ancor* supports the Board's position here, because in finding the employer's lockout to be unlawful, the Board there expressly declined to rely on the employer's reinstating *before* the lockout the only striker who sought to return to work. *See Ancor*, 323 NLRB at 743, 744, 745 n.20 (the employer's *pre*-lockout reinstatement of the only striker who sought to return to work stands in contrast to those in *Field Bridge*, where the employer offered reinstatement to some, and only some, of the strikers *after* the lockout began). Thus, *Ancor* drew a clear distinction between lockout cases, such as *Field Bridge*, where the employer reinstates some, but not all, strikers *after* the lockout begins and thereby undermines its claimed

justification for the lockout, and those lockout cases such as this one, where the employer reinstates all strikers who seek reinstatement *before* the lockout begins, and thereby does not undermine the lockout's justification.

Similarly, the record in this case did not compel the Board to find that the Company's lockout was rendered unlawful by its retention of nonstrikers and the strikers who returned to work, or scheduled their return to work, before the lockout was implemented. Thus, as the Board noted (A 227; 87, JX 3 p.4), the lockout applied to all employees who were actively participating in the strike on August 31 in support of the Union's bargaining demands, in order to pressure them to abandon those demands.

As the Board noted (A 228), and as the Union concedes (Br 33), it is self-evident that the Company sought to effectively continue operations during the lockout just as it had during the strike. Just as the Company's use of supervisors, contractors, and temporary employees augmented the Company's efforts to maintain production during the lockout, so too did the Company's retention of crossover employees and nonstrikers. *See Boilermakers, Local 88*, 858 F.2d at 767 (employer's ability to maintain a lockout in support of its legitimate bargaining position is enhanced when it continues to operate, especially with experienced,

skilled workers).[10] Indeed, the Union implicitly concedes that it was not unlawful for the Company to utilize the nonstrikers and the crossover employees up until August 31. And, as the Board noted (A 229), "it was no longer necessary for the [Company] to place additional pressure upon [the nonstrikers and crossover employees] in order for the [Company] to achieve its bargaining goals, for those employees had already eschewed the strike weapon during the strike."

This is not the first case in which the Board has found that it is reasonable for an employer in implementing a lockout to distinguish between a crossover employee who was apparently willing to abandon his union's demands and those who were still strikers and still opposed to the employer's contract demands. (A 229 n.13.) *See Tidewater Construction Corp.,* 333 NLRB 1264, 1269 (2001) (rejecting union's claim that lockout was unlawful because employer locked out strikers but permitted one employee to work during the lockout who had crossed the picket line before the lockout) ("*Tidewater*"), *order vacated on other grounds*, 294 F.3d 186 (D.C. Cir. 2002), *supplemental decision on remand*, 341 NLRB No.

[10] As the Board noted (A 228), there is no authority for the Union's claim (Br 4, 9, 33-34 & n.28) that the Company could not legally justify retaining the crossover employees and nonstrikers (instead of looking to less experienced temporary replacements) unless it proved that their retention was essential in order to maintain its operations during the lockout. *Cf. Belknap, Inc. v. Hale*, 463 U.S. 491, 504 n.8 (1983) (noting that the Board has long rejected the position that an employer must displace permanent replacements, and reinstate returning strikers, unless it can show that it was actually necessary to have offered "permanent" status to the replacement workers in order to keep its business operating).

55, 2004 WL 554321, (2004); *Ancor*, 323 NLRB at 743-45 & n.20 (employer's initial lockout and refusal to reinstate strikers not rendered unlawful by employer's retention of one employee who had offered to returned to work before lockout), *affirmed in relevant part*, 166 F.3d 55 (2d Cir. 1999).

As the Board explained in *Tidewater*, a case the Board expressly relied on here (A 229 & n.13) but one that the Union and Amicus fail to acknowledge in their briefs, "If the rationale underlying the allowance of a lockout is to put pressure on a union to accept the employer's bargaining demands, it would hardly serve that purpose to lock out [the employee] who worked, despite the strike, and did not support the [u]nion's strike." *Id.* at 1269. *Cf. NLRB v. Brown Food Store*, 380 U.S. 278, 285 (1965) (rejecting union's argument that employer lacked a legitimate business justification for locking out employees who wanted to work because it defies "commonsense . . . to say that the regular [union] employees were 'willing to work at the employers' terms'" when the employees' economic aims were still not realized) (citation omitted). Indeed, the Union's brief to the Board implicitly conceded that individuals who returned to work prior to the end of the

strike "demonstrat[ed] lack of continuing support for the union." (A 99, 106.)[11]

3. The Union and Amicus fail to show that the Company's lockout in support of its bargaining demands was inherently destructive

Finally, there is no merit to the claims of the Union (Br 24-29) and Amicus (Br 5-11) that proof of antiunion animus is unnecessary here because the Company's lockout was "inherently destructive." The Union (Br 24-25) and Amicus (Br 5) claim that the Company's lockout was inherently destructive because it had the "reasonably foreseeable result of discouraging participation in Section 7 rights" and because it distinguished among employees based on their participation in union activity.[12]

However, it is well settled that employer conduct may not be labeled "inherently destructive," thereby eliminating the need for proof of unlawful motivation, merely because the conduct has a foreseeable tendency to discourage

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[11] The Union complains (Br 16-17) that under the Board's reasoning, an employer may simply pick and choose among groups of employees to lock out, and thereby target only strong union adherents, such as the union negotiators. But, as shown, the Company did no picking and choosing in this case. The Company locked out every employee who was actively participating in the strike at the time of the Union's offer to return to work. Accordingly, the Court should simply ignore the parade of horribles conjured up by the Union in its brief, which are not presented on the facts of the case and which the Board never considered.

[12] Thus, the Union states (Br 24-25) (emphasis added) that the Company's "selective reinstatement and lockout . . . has the reasonably foreseeable result of discouraging participation in Section 7 rights *and is, therefore,* inherently destructive of those rights in violation" of the Act.

protected union activity and distinguishes among employees based on their Section 7 activity. Thus, as this Court has noted, although the Supreme Court has never precisely defined the term inherently destructive, "it is clear that the label 'inherently destructive' may be applied only to conduct which exhibits hostility to the *process* of collective bargaining itself . . . i.e., that conduct which 'creat[es] visible and continuing obstacles to the future exercise of employee rights.'" *Esmark, Inc. v. NLRB*, 887 F.2d 739, 748 (7th Cir. 1989) ("*Esmark*") (citation omitted). *Accord Boilermakers, Local 88*, 858 F.2d at 763 ("whether employer conduct is inherently destructive hinges on the 'distinction between conduct which merely influences the outcome of a particular dispute'" and that which "'creates visible and continuing obstacles to the future exercise of employee rights' [and thus] . . . has 'far reaching effects which would hinder future bargaining'") (citations omitted).

Indeed, as this Court recognized long ago, Supreme Court precedent makes it clear that a variety of employer actions which "inevitabl[y] negative[ly] impact" and discourage union activity, and which draw distinctions based on union activity, are not ipso facto unlawful, but rather are permissible under the Act if they serve a legitimate and substantial business justification that outweighs the harm caused to Section 7 rights. *Giddings & Lewis, Inc. v. NLRB*, 675 F.2d 926, 929 (7th Cir. 1982). *See American Ship Building Co. v. NLRB*, 380 U.S. 300, 311 (1965)

(Supreme Court notes that it has "consistently construed [the Act] to leave unscathed a wide range of employer actions taken to serve legitimate business interests in some significant fashion, even though the act committed may tend to discourage" union activity).

For example, when an employer locks out its employees and continues to operate with nonunion temporary replacements, it, by definition, has denied work to the union-represented employees solely because of their Section 7 bargaining efforts. Yet, as the Union concedes elsewhere in its brief (Br 14, 27 n.22), it is simply too late in the day to argue that an employer, as long as it has a legitimate business justification, may not "discriminate" against such workers by locking them out and/or refusing to reinstate them. *See NLRB v. Brown Food Store*, 380 U.S. 278, 279-80, 288-89 (1965) (to invalidate employer's lockout and use of temporary replacements in response to a whipsaw strike, proof of antiunion motivation is required even though "the use of temporary nonunion personnel in preference to the locked-out union members is discriminatory" and harms employee rights); *Boilermakers, Local 88*, 858 F.2d at 764-69 (D.C. Cir. 1988) (an employer's lockout of unionized employees coupled with its use of temporary replacements in support of its bargaining position is not inherently destructive of protected employee rights).

Similarly, although it has long been recognized that "the effect [of a refusal to reinstate strikers] is to discourage employees from exercising their rights to organize and to strike" (*Fleetwood Trailer*, 389 U.S. at 378), this Court noted that the Supreme Court employed a "balancing test, weigh[ing] the inevitable negative impact on union activity of hiring permanent replacement workers against the business justification for doing so," in the course of concluding, once and for all, that the hiring of permanent replacements for strikers is permissible under the Act. *Giddings & Lewis, Inc. v. NLRB*, 675 F.2d at 929.

The Union and Amicus likewise fail to acknowledge that an employer that has retained nonstrikers and permitted crossovers to return to work may lawfully refuse to reinstate the remaining economic strikers upon their union's unconditional offer to return to work if prior to that offer the employer has hired permanent replacements for those employees who stayed out on strike until their union ended it. *See NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 337, 339, 346 (1938) (it was not unlawful for employer to reinstate only so many of the strikers as there were positions that had not been filled by permanent replacements and returning strikers), *enforcing*, 1 NLRB 201, 206 (1936); *Laidlaw Corp. v. NLRB*, 414 F.2d 99, 101, 105 (7th Cir. 1969) (although employer retained nonstrikers, there is no question that employer may refuse to reinstate those strikers whose permanent replacements remain on the job). This is so even though, as

shown, an employer's refusal to reinstate the remaining employees undoubtedly negatively impacts the right to strike, and even though the employer's staffing decision can be said to draw a distinction between those who stayed on strike until the end and those who never struck or who abandoned the strike early.

The cases cited by the Union and Amicus are not to the contrary. For example, both the Union (Br 25) and Amicus (Br 5) quote a portion of this Court's decision in *Esmark* out of context. They cite the *Esmark* court's statement (887 F.2d at 748) that among the types of acts that are considered inherently destructive are "actions which distinguish among workers based on their participation (or lack of participation) in a particular concerted action (such as a strike)." But, they utterly ignore that the *Esmark* court cited the "*unjustified* failure to reinstate ex-strikers" as an example of such inherently destructive conduct. *See id* at n.14 (emphasis added).

The *Esmark* court's statement plainly does not help the Union and Amicus here, because, as shown, the Company's justification for refusing to reinstate the strikers had been recognized as a legitimate and substantial business justification. Indeed, the Union and Amicus conveniently omit that the *Esmark* court noted that "where [as here] an employer's conduct is of temporary duration, and seeks to put pressure on union members to accept a particular management proposal, but does

not attempt to prevent the employees from bargaining collectively, it is not unlawful without proof of antiunion motivation." *See id* at 748.

In short, as *Fleetwood* and the lockout cases make clear, it is only where the employer lacks a legally recognized legitimate and substantial business justification for its refusal to reinstate strikers, that the refusal to reinstate may be found unlawful absent evidence of unlawful motivation. *See Fleetwood*, 389 U.S. at 378, 380 (absent a legitimate and substantial business justification, the refusal to reinstate economic strikers is unlawful without regard to the employer's intent). Thus, the Union *was* required to prove here that the Company's refusal to reinstate was improperly motivated by a desire to punish the strikers, because the Company did have a legitimate and substantial business justification for refusing to reinstate them--namely to pressure them to accept its bargaining demands. (A 228, 229 & n.14.)

The cases involving denial of benefits to strikers do not help the Union (Br 25, 27) and Amicus (Br 5-6) either. To be sure, the Board and the courts recognize that denying benefits to strikers, while awarding them to nonstrikers, does tend to discourage employees from striking. However, the cases do not hold that because of that tendency, the denial of benefits were per se unlawful without regard to the employer's motivation. Rather, the cases merely found that the denial of benefits were unlawful because the employers lacked legitimate and substantial business

justifications for denying the benefits to the strikers. *See NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 31, 34 (1967) ("it is not necessary for us to decide" whether the employer's conduct was inherently destructive, because the employer never came forward with a legitimate and substantial business justification for its conduct).[13] And, because the employers lacked legitimate and substantial business justifications for denying the benefits to the strikers, no proof of antiunion animus was necessary. *See Fleetwood Trailer*, 389 U.S. at 380 (noting that *Great Dane* held that proof of antiunion motivation was unnecessary because the employer's conduct could have adversely affected employee rights to some extent, and employer did not show a legitimate and substantial business justification for its actions). Such cases have little persuasive force here, where, as shown, the Company did have a legitimate and substantial business justification for its refusal to reinstate strikers.

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[13] *See NLRB v. Westinghouse Electric Corp.*, 603 F.2d 610, 615-17 (7th Cir. 1979) (contractual language does not constitute a legitimate and substantial business justification entitling employer to withhold benefits from employees who remained out on strike, because returning strikers who received the benefits did not qualify for them under the contractual language either); *NLRB v. Duncan Foundry & Machine Works, Inc.*, 435 F.2d 612, 618 (7th Cir. 1970) (employer's claim that it could lawfully deny benefits to employees who remained on strike, that were paid to nonstrikers and returning strikers, is based on a misreading of the contract, and the employer therefore failed to show a legitimate and substantial business justification for its discriminatory behavior).

Equally unavailing is the Union's reliance (Br 20 n.13, 27 n.23) on *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963), where a grant of superseniority to crossover employees and replacements for purposes of future layoffs was held "inherently destructive." As the Court emphasized, the grant of superseniority renders future bargaining difficult, if not impossible, for the employees' union by permanently dividing the unit. The Court explained that the grant of superseniority for purposes of future layoffs permanently divides the unit between those who gained extra seniority by returning to work before the end of the strike and those who stayed with their union until the end of the strike. This division would be reemphasized with each subsequent layoff. The Court concluded that this division would therefore stand "as an ever-present reminder of the dangers connected with striking and with union activities in general." *Id.* at 223, 231. The Court also noted that the employer's discriminatory conduct was more damaging to employee rights than the hiring of permanent replacements upheld in *Mackay*, and was not saved from illegality by an overriding business purpose justifying the invasion of employee rights. *Id.* at 225, 231, 232, 235-37.

Here, by contrast, the Company's lockout ceased to be an issue once the employees ratified the Company's contract proposal and the Company terminated the lockout. Accordingly, the Company's lockout, which was conduct of a temporary duration that merely sought to put pressure on the Union to accept

particular bargaining demands, did not create any continuing obstacles to future collective bargaining, and thus was not inherently destructive.[14]

[14] There is no need for this Court to consider the applicability of *Inland Trucking Co. v. NLRB*, 440 F.2d 562, 563, 565 (7th Cir. 1971), where this Court upheld then-current Board law, and found that an offensive lockout, accompanied by continued operation with replacement labor, violates the Act. The complaint in this case did not allege, and the Union does not argue to this Court, that the Company's lockout was unlawful because the Company continued to operate during the lockout. Instead, as shown, the Union claims (Br 14) only that the lockout was unlawful because the Company permitted nonstrikers and returning strikers to work (alongside the managers and temporary replacements). *Cf. American Cyanamid Co. v. NLRB*, 592 F.2d 356, 364 (7th Cir. 1979) (declining to consider under what circumstances an employer might be able to convert an economic strike to a permissible lockout where case did not squarely present that question, but noting that the situation of strikers seeking a return to work is different from one involving an employer-initiated lockout); *NLRB v. Wire Products Mfg. Corp.*, 484 F.2d 760, 762 n.3 (7th Cir. 1973) (court did not consider the applicability of *Inland Trucking* to the lockout in question, because the Board did not decide the case on that theory). *See* Section 10(e) of the Act (29 U.S.C. 160(e)) ("No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances"); *Diamond Walnut Growers, Inc. v. NLRB*, 113 F.3d 1259, 1264 (D.C. Cir. 1997) (The Board cannot be faulted for "failing to distinguish arguably applicable precedent when the petitioner never raised it or the proposition it stands for" with the Board) (en banc).

CONCLUSION

For the foregoing reasons, we respectfully submit that the Court should enter a judgment denying the petition for review.

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