

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

DRESSER-RAND COMPANY,	§	
	§	
Respondent	§	
	§	Cases: 3-CA-26543
and	§	3-CA-26595
	§	3-CA-26711
IUE-CWA, AFL-CIO, LOCAL 313,	§	3-CA-26943
	§	
Charging Party	§	

**RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO
THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Arthur T. Carter
Texas State Bar No. 00792936
Samuel "Brett" Glass
Texas State Bar No. 24040975
John M. Farrell
Texas State Bar No. 24059735
Erin E. Shea
Texas State Bar No. 24070608
HAYNES AND BOONE, L.L.P.
2323 Victory Ave., Suite 700
Dallas, Texas 75219
(214) 651-5683
(214) 200-0393 (Fax)

ATTORNEYS FOR RESPONDENT

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I. PRELIMINARY STATEMENT

This case arises from a fifteen-week strike by Charging Party, IUE-CWA, AFL-CIO, Local 313 (the “Union”) commencing on August 4, 2007, and a subsequent six day lockout (including Thanksgiving and a weekend) at Respondent, Dresser-Rand Company’s (“DRC” or the “Company”) Painted Post, New York facility. The Complaint alleged violations of Sections 8(a)(3) and (5) of the Act¹ which the Administrative Law Judge (“ALJ”) heard over the course of eight days in mid-2009. He issued his Decision and Recommended Order on January 29, 2010.

The ALJ found the Company violated Sections 8(a)(3)² and (5). Specifically, he found DRC violated Section 8(a)(3) by (i) employing an unlawful partial lockout; (ii) affording preferential treatment, following the lockout, to employees who had abandoned the strike and returned to work for DRC (“Crossovers”); (iii) discharging Kelvin Brown (“Brown”); (iv) suspending Marion Cook (“Cook”) for 2 days;³ and (v) denying vacation benefits to certain full-term strikers recalled to work a year after the strike commenced. The ALJ also found the Company violated Section 8(a)(5)⁴ by unilaterally implementing procedures for recalling full-term strikers and eliminating paid lunch breaks on weekend overtime shifts.⁵

¹ Despite the use of economic weapons on both sides, there were no allegations taken to complaint that DRC: (i) bargained in bad faith; (ii) unlawfully declared impasse; (iii) improperly implemented its final offer; or (iv) engaged in conduct warranting a finding that the Union’s strike was an unfair labor practice strike. Further, Region 3 did not issue complaint on a single independent 8(a)(1) violation.

² The ALJ dismissed the 8(a)(3) allegation relating to Alan Owlett’s discharge for strike-related misconduct.

³ DRC has filed exceptions to the ALJ’s findings concerning Cook. The ALJ improperly found the suspension was unlawful based on Cook’s supposed protected status because he used the term “scab.” Cook’s conduct was not protected activity, but rather his statements, five months removed from end of the lockout, were intended to be offensive and degrading to other employees. *Reynolds Electrical & Engineering Co.*, 292 NLRB 947 (1989); *United Aircraft Corp.*, 134 NLRB 1632 (1961). Exceptions applicable to this issue include: Exceptions 1, 3, 16, and 26-29.

⁴ The ALJ dismissed the 8(a)(5) allegation that DRC unilaterally changed voluntary weekend overtime shifts.

⁵ DRC has filed exceptions to the ALJ’s findings concerning paid lunch breaks. The ALJ erroneously determined that DRC had unilaterally eliminated the weekend paid lunch breaks. This finding was an impermissible contractual interpretation, giving controlling weight to the parties’ past practice and ignoring the terms of the Implemented Offer, which had eliminated such paid lunch breaks and all past practices. Exceptions applicable to this issue include: Exceptions 2, 3, and 30-34.

For the reasons set forth herein, the ALJ erred in finding these violations, and the Board should grant the Company's exceptions and refuse to enforce the ALJ's Decision and Order.

II. STATEMENT OF THE ISSUES⁶

1. **THE CROSSOVERS:** WHETHER THE ALJ ERRED WHEN HE FOUND THAT DRC VIOLATED SECTION 8(A)(3) BY ALLOWING CROSSOVERS TO RETURN PRIOR TO FULL-TERM STRIKERS:

At the time of the strike, there were 417 bargaining unit employees. Approximately 13 Crossovers returned to work at various times during the strike. On November 19, the Union ended the strike and offered to return to work. DRC responded by locking out full-term strikers and Crossovers in support of its bargaining position. The lockout did not include the approximately 98 permanent replacements lawfully hired during the strike. The lockout ended on November 29 at approximately 11:30 a.m., contemporaneous with DRC's lawful declaration of impasse and implementation of its last, best, and final offer. That afternoon, 12 of the Crossovers returned to work, and the thirteenth returned by early the next morning – all before any of the full-term strikers returned. The ALJ found that DRC violated Section 8(a)(3) by allowing Crossovers to return before full-term strikers.⁷

2. **FAILURE TO BARGAIN OVER RETURN TO WORK:** WHETHER THE ALJ ERRED WHEN HE FOUND THAT DRC VIOLATED SECTION 8(A)(5) BY UNILATERALLY IMPLEMENTING ITS RETURN TO WORK PROCESS:

After the lockout, the parties sought to return employees to work as quickly as possible. Between November 29 and December 2, the parties communicated extensively regarding the recall process. After the Union failed to respond to DRC's November 29 notice, November 30 proposal, and December 2 facsimile containing the draft preferential recall list, DRC began recalling employees pursuant to a ranking that took into account both seniority and performance. The ALJ

⁶ This brief addresses most, but not all, of the issues raised in the exceptions, which are filed herewith. On issues not briefed, DRC does not concede and is not intending to waive any of its positions or arguments.

⁷ Exceptions applicable to this issue include: Exceptions 1, 3, 11, 43, and 46-50.

ruled that DRC failed to bargain over the recall process, or, alternatively, that DRC presented the Union with a *fait accompli*.⁸

3. **DENIAL OF VACATION BENEFITS: WHETHER THE ALJ ERRED WHEN HE FOUND THAT DRC VIOLATED SECTION 8(A)(3) BY DENYING VACATION BENEFITS TO CERTAIN FULL-TERM STRIKERS:**

Twenty-three returning strikers were deemed ineligible for vacation benefits under DRC's Implemented Offer immediately upon their return in August and September 2008. The ALJ ruled that this denial of vacation benefits violated Section 8(a)(3).⁹

4. **DISCHARGE: WHETHER THE ALJ ERRED IN FINDING THAT DRC VIOLATED SECTION 8(A)(3) BY DISCHARGING KELVIN BROWN FOR LAYING ON THE HOOD OF A VAN CARRYING REPLACEMENT EMPLOYEES ACROSS THE PICKET LINE.**¹⁰

5. **THE LOCKOUT: WHETHER THE ALJ ERRED BY RULING THAT CERTAIN "FOUND ULP'S" ESTABLISHED THAT THE PARTIAL LOCKOUT WAS MOTIVATED BY UNION ANIMUS:**

The Company locked-out full-term strikers and Crossovers on November 23, 2007, and lifted the lockout on November 29th. Permanent replacements were not locked out, and the Company operated during the lockout with the permanent replacements and temporary workers. Although the ALJ found that DRC had a substantial and legitimate business justification for the lockout, and that it was lawfully implemented, he ruled that the lockout was unlawful because animus could be inferred from the following "found unfair labor practices": 1) Brown's discharge; 2) Cook's suspension; 3) the denial of vacation to some of the returning strikers; 4) preferential treatment afforded to Crossovers at the conclusion of the lockout; and 5) the failure to bargain over recall procedures.¹¹

⁸ Exceptions applicable to this issue include: Exceptions 2, 3, 9, 10, 12-15, and 52-68.

⁹ Exceptions applicable to this issue include: Exceptions 1, 3, and 35-40.

¹⁰ Exceptions applicable to this issue include: Exceptions 1, 3, and 17-25.

¹¹ Exceptions applicable to this issue include: Exceptions 1, 3, 41-45, and 51.

6. UNLAWFUL REMEDY: WHETHER THE ALJ'S RECOMMENDED REMEDY AND ORDER IS IMPROPER.¹²

III. STATEMENT OF THE CASE

The relevant facts underlying this case all stem from a strike and lockout at DRC's manufacturing facility in Painted Post, New York. Prior to the strike, DRC and the Union participated in two extensive rounds of bargaining, one in May 2007 and the other in July 2007.¹³ Both efforts were unsuccessful, and the Union went on strike on August 4, 2007, one day after the expiration of the collective bargaining agreement (the "2004 CBA").¹⁴

DRC continued its operations during the strike through the use of temporary employees, Crossovers,¹⁵ and beginning on September 17, 2007, permanent replacements.¹⁶ On November 19, 2007, the Union made an offer to return to work on behalf of the strikers.¹⁷ DRC, however, had doubts about, *inter alia*, the unconditional nature of the offer and its ability to achieve its bargaining objectives.¹⁸ To pressure the Union to accept its proposals, DRC instituted a lockout that lasted until November 29, 2007.¹⁹ On that date, DRC declared impasse, implemented its last, best, and final offer (the "Implemented Offer"), and lifted the lockout.²⁰ The parties communicated extensively over the next few days about returning the strikers to work, but when DRC sent the draft return to work process and preferential hire list to the Union for consideration and possible

¹² Exceptions applicable to this issue include: Exceptions 4-8.

¹³ Tr. 926-27. The following abbreviations are used in this brief's citations: "Tr." references the hearing transcript; "ALJD" references the Administrative Law Judge's Opinion; "GC Ex." references General Counsel Exhibits at the hearing; "Jt. Ex." references Joint Exhibits at the hearing; "Co. Ex." references the Company's Exhibits at the hearing.

¹⁴ Tr. 173-74; 952.

¹⁵ The Crossovers abandoned the strike and returned to work at different points during it.

¹⁶ Tr. 961-63, 1143; Co. Ex. 59.

¹⁷ GC Ex. 2.

¹⁸ Tr. 1014-22.

¹⁹ GC Ex. 4.

²⁰ GC Ex. 6.

counter-offer, the Union did not respond.²¹ The strikers began returning on December 4, 2007, and by April 2008, the vast majority of strikers had been recalled.²²

IV. ARGUMENT AND AUTHORITY

A. DRC LAWFULLY PERMITTED CROSSOVERS TO RETURN TO THEIR JOBS AFTER THE LOCKOUT.

The ALJ found that DRC violated Section 8(a)(3) by according preferential treatment to the Crossovers when it allowed them to return to work following the lockout before the full-term strikers.²³ In doing so, the ALJ found this case to be “directly analogous” to *Peerless Pump Co.*²⁴ The ALJ erred.

1. *Peerless Pump is Inapposite.*

Far from the ALJ’s suggestion that it is “directly analogous,” *Peerless Pump* is distinguishable in several respects, including the fact that it involved a strike only -- not a strike followed by a lockout. Also, the Board found a violation there based on the company’s preferential treatment of previously reinstated crossovers as compared to full-term strikers -- not differing treatment of previously reinstated crossovers as compared to full-term strikers as is alleged here.

During the strike in *Peerless Pump*, multiple crossovers made individual offers to return and signed a preferential rehire list. When the strike ended and the union offered to return on behalf of the “remaining strikers,” many of the crossovers had yet to be reinstated. At the end of the strike, the company maintained a preferential rehire list for reinstated crossovers and full-term strikers. If job vacancies could not be filled through internal posting, the company recalled individuals from the list, giving first preference to the reinstated crossovers. *Id.* at 371-73.

²¹ GC Ex. 14, 16.

²² Tr. 1387.

²³ ALJD p. 56, L. 13-18.

²⁴ 345 NLRB 371 (2005); ALJD p. 55, L. 37-46. The ALJ cited no other authority in support of this conclusion.

The Board affirmed the ALJ's finding of a Section 8(a)(3) violation, concluding that the full-term strikers and unreinstated crossovers were both encompassed in the Union's offer, on behalf of the "remaining strikers," to return. The Board found that, under the union's offer, all former strikers who had not yet been recalled including the unreinstated crossovers were entitled to reinstatement to vacancies following the strike. Specifically, the Board stated:

"At that point [*i.e.*, when the union ended its strike with its unconditional offer to return], all former strikers were equally entitled to be recalled to their former positions, even if some of them may have declared their individual availability while the strike was in progress. The Respondent was then required to deal with all available former strikers on a nondiscriminatory basis." *Id.* at 376.

It is to this finding of a violation – dealing with preferential treatment afforded as-yet unreinstated crossovers – that the ALJ analogized the case here.

Peerless Pump involved an entirely different set of circumstances and addressed a question not at issue here. The portion of *Peerless Pump* to which the ALJ analogized this case involved preferential treatment given to previously unreinstated crossovers.²⁵ All of the Crossovers in this case had already been reinstated and were working for DRC when the Union ended its strike.²⁶ Thus, there were no unreinstated crossovers to which DRC could have given preferential treatment. Accordingly, *Peerless Pump* has no application to this case,²⁷ and the ALJ erred in relying on it to find against the Company with respect to its treatment of the Crossovers vis-à-vis the full-term strikers.

²⁵ ALJD p. 55, L. 29-46.

²⁶ Tr. 192-3, 1277; GC Ex. 4.

²⁷ Indeed, *Peerless Pump* did not address an allegation that the employer violated the Act by failing to displace the crossovers actually reinstated during the strike, which is the exact issue facing the Board here.

2. ***The ALJ's finding ignores TWA and AquaChem.***

a. **TWA Controls: Crossovers are not subject to displacement by full-term strikers.**

The ALJ failed to consider the dispositive effect of *TWA v. Independent Federation of Flight Attendants*²⁸ and *Aqua-Chem, Inc.*²⁹ on the manner in which the Company treated the Crossovers vis-à-vis the full-term strikers. In *TWA*, the Supreme Court held that an employer cannot be required to displace crossovers to create vacancies for full-term strikers.³⁰ The union struck TWA, but TWA continued to operate with a mix of permanent replacements, non-strikers, and crossovers. When the strike ended and the union made an offer to return on behalf of the full-term strikers, the union also demanded that TWA displace the crossovers in favor of full-term strikers. TWA refused, and the union sued, alleging that TWA had discriminated against full-term strikers in violation of the RLA.

The Supreme Court rejected this contention, stating that crossovers who are reinstated and work during an economic strike are like permanent replacements who need not be displaced following the strike.³¹ The Court also ruled that TWA had not discriminated against the strikers on the basis of their union activity in filling available positions following the strike. Specifically, the Court stated that “[t]he positions occupied by newly hired replacements, employees who refused to strike, and employees who abandoned the strike [i.e., crossovers], are simply not ‘available

²⁸ 489 U.S. 426 (1989).

²⁹ 288 NLRB 1108 (1988).

³⁰ 489 U.S. at 432. Although the case was decided under the RLA, its holding and principles are equally applicable to the NLRA. In fact, the Supreme Court relied almost exclusively on NLRA precedent in deciding *TWA*. The Board has since also relied on and applied *TWA* in similar cases. See, e.g., *Encino-Tarzana Regional Med. Ctr.*, 332 NLRB 914, 914 (2000) (holding that an employer was not required to displace crossovers following a 1 day strike, and observing that doing so “would function only to put strikers back on the job in preference to the crossovers, while leaving [replacement employees hired from the outside] in place,” which “is not a permissible result under the principles of *TWA*”).

³¹ *TWA*, 489 U.S. at 433-34 (citing *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 33 (1938); *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967); *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983)).

positions' to be filled."³² Thus, positions held by crossovers at the end of a strike are not positions to which full-term strikers have reinstatement rights pursuant to *Laidlaw Corp.*³³

In finding a violation against DRC, the ALJ set out a rationale conflicting with the Supreme Court's holding in *TWA* and the Board's amicus brief. According to the ALJ, "[o]nce the lockout ended, the locked out employees here (the full term strikers and the crossovers who had been locked out), were equally entitled ... to be recalled to their former positions."³⁴ Thus, the ALJ wrongly assumed that the crossovers' positions were "available positions," such that the full-term strikers had *Laidlaw* rights to those positions. The ALJ's assumption is unfounded, and his conclusion is legally wrong.

Under *TWA*, the Crossovers in the present case – all of whom had been reinstated and were working for DRC at the end of the strike – had the same status and rights to their positions as the permanent replacements hired by DRC. Accordingly, the positions held by them at the end of the strike were not vacant, and the full-term strikers had no *Laidlaw* rights to the jobs held by the Crossovers.

b. *Aqua-Chem* Controls: Crossovers' preferential job rights are not forfeited when they are locked out.

While DRC locked out the Crossovers at the end of the strike, its decision to do so did not cause those employees to forfeit their jobs and did not create any vacancies for the full-term strikers. The General Counsel, the Union, and the ALJ are all in accord that DRC's lockout of the previously-reinstated Crossovers is analogous to a decision to temporarily lay off those

³² *TWA*, 489 U.S. at 438 (emphasis added). The Board filed an amicus brief in *TWA*, stating "the employer not only may, but must, accord preferential treatment to crossovers, on the ground that once the crossovers have resumed work – which they have a right to do if jobs are available – the positions they occupy are not 'vacant' at the end of the strike." *Id.* at 450 n.7.

³³ 171 NLRB 1366 (1968).

³⁴ ALJD p. 55, L. 37-40.

employees.³⁵ Thus, the question of whether DRC's lockout of the Crossovers triggered the full-term strikers' *Laidlaw* rights must be analyzed under the Board's decision in *Aqua-Chem, Inc.*³⁶

There, the Board set forth the test to be used to determine whether the layoff of permanent replacements following a strike creates vacancies for which reinstated strikers may exercise their *Laidlaw* rights. In that case, the Board found that the layoffs created such vacancies and that the employer therefore violated Sec. 8(a)(3) by not offering strikers reinstatement to those positions.³⁷ The Board, however, disagreed with the ALJ's analysis. The ALJ had opined that an economic layoff of permanent replacements for a prolonged, indefinite period necessarily creates vacancies that trigger the reinstated strikers' *Laidlaw* rights. According to the Board, "this analysis fails to satisfactorily take into account the employer's right to permanently replace economic strikers and to assure the replacements of the permanency of their positions."³⁸ Indeed, the Board stated, the right to permanently replace economic strikers would be severely undermined if "every layoff for an indefinite period creates a vacancy which activates a striker's reinstatement rights."³⁹ Accordingly, the Board crafted the following test for such cases:

³⁵ Tr. 1379-80; GC Trial Brief p. 10, n. 8; ALJD p. 44, n.144, L. 35. *See also Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 301-02 (1965) ("The question presented is...whether an employer commits an unfair labor practice...when he temporarily lays off or 'locks out' his employees during a labor dispute to bring economic pressure in support of his bargaining position.") (emphasis added). That DRC's decision to lockout the previously-reinstated Crossovers is analogous to a decision to temporarily lay off those employees is further supported by the fact that, as the Board noted in *Bud Antle, Inc.*, 347 NLRB 87, 89 (2006), "locked-out employees cannot be permanently replaced," and "[e]mployers may use only temporary replacements in order to engage in business operations during an otherwise lawful lockout," unless, as here, permanent replacements were hired during a strike preceding the lockout. *Id.* (citing *Harter Equipment (Harter I)*, 280 NLRB 597 (1986)). "As a result, once a lockout ends, temporarily replaced locked-out employees are entitled to reinstatement." *Bud Antle*, 347 NLRB at 89 (emphasis added). **Thus, unlike the full-term strikers who had been permanently replaced during the strike, the crossovers could only be temporarily replaced (if at all) during the lockout and were entitled to be reinstated to the positions they held prior to the lockout once it ended.**

³⁶ 228 NLRB 1108 (1988), *enf.*, 910 F.2d 1478 (7th Cir. 1990).

³⁷ *Id.* at 1111.

³⁸ *Id.* at 1109 (citing *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938)).

³⁹ *Id.* at 1109.

“When it is alleged that an employer has violated Section 8(a)(3) by recalling laid-off permanent replacements ahead of unreinstated strikers, we shall require the General Counsel to first establish a prima facie case that the layoff truly signified the departure of the replacements under *Laidlaw* and thus created vacancies to which the unreinstated strikers were entitled to be recalled. In this regard, the General Counsel will be required to show...that, based on objective factors, the laid-off permanent replacements had **no** reasonable expectancy of recall...The objective factors relevant to the replacements’ reasonable expectancy of recall would include, inter alia, evidence concerning the employer’s past business experience, the employer’s future plans, the length of the layoff, and what the employee was told regarding the likelihood of recall.”⁴⁰

In DRC’s case, neither the General Counsel nor the ALJ addressed whether the locked-out Crossovers had a reasonable expectancy of recall. Thus, the General Counsel has not carried his burden, and it cannot be said that the locked-out Crossovers had no expectation of recall. In any event, the record evidence establishes the opposite – the Crossovers had every expectation that they would be recalled following the lockout.⁴¹

(i) The lockout of the Crossovers.

DRC did not want to lock out the Crossovers, struggled with finding a legal means of retaining them during the lockout, and only locked them out when it determined that it was legally obligated to do so.⁴² Ultimately, the lockout lasted less than a week (from November 23 until noon on November 29), a period spanning a weekend and the Thanksgiving holiday.⁴³ At the end of the

⁴⁰ *Id.* at 1110 (emphasis added; citations omitted). See also *Bancroft Cap Co.*, 245 NLRB 547 at n. 1 (1979) (finding no vacancies occurred because “the General Counsel has failed to prove by a preponderance of the evidence that the laid-off employees had no reasonable expectation of recall”).

⁴¹ Tr. 1077;1278. See *NLRB v. Delta-Macon Brick and Tile Co.*, 943 F.2d 567 (5th Cir. 1991) (noting that the Board did not rely on any evidence that the laid off permanent replacements had lost their expectation of recall and, reversing the Board, finding a 15 month layoff did not create *Laidlaw* vacancies).

⁴² DRC’s witnesses testified, and the ALJ found, that DRC even apologized to the Crossovers for locking them out. When it informed the Crossovers that it was locking them out, DRC told them that it preferred to keep them working during the lockout but did not believe the law allowed it. When the Crossovers asked DRC whether they could return to work when the lockout ended, the Company assured them that they could return to work following the lockout so long as they made individual offers to return under the terms and conditions in place at the end of the lockout. The Crossovers also asked DRC if they could contact DRC “every day” to find out when the lockout ended, and DRC assured them that they could. (Tr. 1075-77, 1278).

⁴³ Tr. 176-77, 854, 915, 920.

lockout, all 13 Crossovers immediately returned to the very same positions they held immediately before the lockout.⁴⁴ As a result, the Crossovers were not included on the preferential rehire list that DRC compiled and maintained for the full-term strikers because they were already working in the jobs they were entitled to under *TWA* and *Aqua-Chem*.⁴⁵

In sum, the Crossovers were locked out only because DRC believed it was legally obligated to lock them out; the lockout lasted less than a week; DRC planned to return the locked-out Crossovers to their positions following the lockout; DRC informed the employees of those plans at the outset; and, at the end of the lockout, the Crossovers did in fact return to the very same positions they held prior to the lockout. The undisputed record evidence clearly establishes that the Crossovers not only had a reasonable expectation of recall following the lockout, they had every reason to believe that they would be recalled. DRC's decision to lock-out the Crossovers, therefore, did not create any vacancies for which the full-term strikers had *Laidlaw* rights, and DRC did not violate 8(a)(3) by allowing the locked-out Crossovers to return to their jobs before reinstating the full-term strikers.⁴⁶

⁴⁴ Tr. 1192.

⁴⁵ Tr. 1192-93; GC Ex. 17.

⁴⁶ The facts the Board relied on in *Aqua-Chem* to find that the laid off replacements had no reasonable expectation of recall stand in stark contrast to the facts relating to the locked-out Crossovers in the instant case. First, the layoffs at issue in *Aqua-Chem* were for a "prolonged" period, and by the time of the hearing, almost none of the employees had been recalled. 288 NLRB at 1109. Further, when the employees were laid off, the employer told them the layoff was indefinite and due to a lack of work, and it advised the laid off employees to look for other employment or to file for unemployment compensation. Moreover, the employer immediately canceled the laid off employees' benefits. Finally, when the employer laid off the replacements, it made only a "vague" promise to "make every effort to return" the employees "to work as soon as possible." *Id.* at 1110. In contrast, the locked out Crossovers in the matter *sub judice* were out of work for 6 calendar days, and DRC told them they could come back immediately upon the end of the lockout. Hence, no *Laidlaw* vacancies arose from the manner in which DRC treated the locked out Crossovers. *See, e.g., Mike Yurosek & Son, Inc.*, 295 NLRB 304, 305-06 (1989) (finding General Counsel "ha[d] not established that [a 6 month] layoff truly signified the departure of the replacements under *Laidlaw* and thus created vacancies to which the unreinstated strikers were entitled" and rejecting General Counsel's argument to contrary because it "ignore[d] the underlying premise that a vacancy must exist" and would destroy "the balance between the *Mackay* rights of permanent replacements and the *Laidlaw* rights of strikers so carefully created in *Aqua-Chem*") (citing *TWA*, 489 U.S. 426 (1989)); *Bancroft Cap Co.*, 245 NLRB at 245 n. 1 (affirming ALJ's "conclusion that there were no vacancies which respondent was obligated to offer unreinstated strikers" and finding that "the General Counsel has failed to prove by a

c. Adhering to *Midwest Generation*, the Company was obligated to lockout the Crossovers.

Finding that DRC violated the Act by allowing the Crossovers to return before the full-term strikers would also place employers in an untenable legal position. In *TWA*, the Supreme Court held that an employer cannot be required to displace crossovers to make room for the return of full-term strikers. On the other hand, however, the law also requires employers to lock out crossovers.

Indeed, in *Midwest Generation*,⁴⁷ the employer continued to operate during a strike using both non-strikers and crossovers. A week after the strike ended, the employer locked out the full-term strikers, but not the crossovers. The general counsel alleged that the employer violated Section 8(a)(3) by locking out full-term strikers while not locking out crossovers. The Board found that the employer's decision was justified as a means of economically pressuring the remaining striking employees and by the employer's operational needs during the strike and lockout. Thus, the Board concluded the employer did not violate the Act.

On appeal, however, the Seventh Circuit found the employer failed to establish a legitimate and substantial business justification for not locking out the crossovers and therefore concluded that the employer violated the Act as alleged.⁴⁸ Specifically, the court rejected the Board's finding that the employer's decision not to lockout non-strikers and crossovers was justified by the employer's operational needs, stating:

“The claim that [the crossovers], together representing less than 2% of the total bargaining unit, were so vital to the maintenance of business operations that it was necessary for Midwest to violate employees' section 7 rights stretches the bounds of credulity...

preponderance of the evidence that the laid-off employees had no reasonable expectation of recall,” particularly because layoffs were caused by shortage of materials and lasted “for periods of only 2 to 7 days”).

⁴⁷See *Local 15, Int'l Brotherhood of Elec. Workers v. NLRB* (“*Midwest Generation*”) 429 F.3d 651 (7th Cir. 2005), cert. denied 549 U.S. 810 (2006).

⁴⁸*Id.* at 661.

Simply put, to justify a partial lockout on the basis of operational need, an employer must provide a reasonable basis for finding some employees necessary to continue operations and others unnecessary.”⁴⁹

The court also rejected the Board’s finding that the partial lockout was justified as a means of economically pressuring the holdout strikers. The employer asserted, and the Board had found, that the employer did not lock out the non-strikers and crossovers because they had abandoned the union’s bargaining position, “making it unnecessary to pressure them.”⁵⁰ The court rejected this argument, finding it based on a “fatally flawed” assumption that the decision to abandon a strike is the equivalent of a decision to abandon the union’s bargaining demands.⁵¹ Moreover, by the time the lockout commenced, all unit employees had abandoned the strike and offered to return to work, and the only distinction between the crossovers and the full-term strikers was “whether an individual worker had made his or her offer to return as part of the Union’s action or individually.”⁵²

Next, the court found that the employer’s actions carried their own indicia of union animus. Thus, even if the employer had proven a substantial and legitimate business justification, the Seventh Circuit found the employer’s partial lockout, during which it retained the crossovers, would still have been unlawful.⁵³ According to the court:

“By acting only against those who had exercised their section 7 right to strike, Midwest appears to have demonstrated an anti-union animus. The *only* distinction between the two groups of employees at the time of the lockout was their participation in Union activities. Discriminating in a way that has a natural tendency to discourage participation in concerted union activities is a violation of section 8(a)(3) of the [NLRA].”⁵⁴

⁴⁹ *Id.* at 658-59.

⁵⁰ *Id.* at 659.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 661-62.

⁵⁴ *Id.* at 661 (citing *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963)).

In short, the Seventh Circuit essentially found a lawful, partial lockout impossible, at least in circumstances like those presented in the instant case.⁵⁵

DRC had no reason to believe that the General Counsel or any final arbiter of this issue would not adhere to the Seventh Circuit's position. The U.S. Supreme Court denied *certiorari*, and the Board, on remand, accepted the court's opinion as "the law of the case."⁵⁶ In addition, since the court's opinion issued, the Board has not questioned or rejected its analysis. Moreover, as the ALJ in the present case noted, had DRC not locked out the Crossovers, the General Counsel may very well have pursued a complaint alleging an 8(a)(3) violation under *Midwest Generation*.⁵⁷ DRC, thus, had every reason to believe that the law required it to lock out the Crossovers, and it acted accordingly.

d. The ALJ's interpretation and finding of a 8(a)(3) violation concerning the Crossovers is unreasonable and conflicts with TWA.

Under *TWA*, DRC could not be required to displace the Crossovers to make room for the full-term strikers at the conclusion of the strike, yet, under *Midwest Generation II*, DRC also could not lawfully retain the Crossovers during its otherwise justified lockout. Under the General Counsel's and the ALJ's reasoning, following the lockout, DRC also could not return the Crossovers to the positions they held just days earlier.⁵⁸ Rather, it had to consider those positions vacancies to which the previously unreinstated, full-term strikers had *Laidlaw* rights.

⁵⁵ As in *Midwest Generation*, the Crossovers here were very few in number (13 of approximately 400 unit members), and DRC's business operations were continued during the lockout without the crossovers. (Tr. 839-40; Jt. Ex. 4). Thus, DRC did not believe it could justify retaining the Crossovers during the lockout on the grounds that they were necessary, while the unreinstated strikers were not. Additionally, like *Midwest Generation*, DRC had no evidence that the Crossovers had chosen to abandon the strike because they disagreed with the Union's bargaining demands and position. As a result, had DRC not locked out the Crossovers on the basis that the Crossovers had abandoned the Union's position, and, therefore, did not need to be locked out to place pressure on the Union, its justification would have been rejected as being based on mere speculation.

⁵⁶ See *Midwest Generation, EME, LLC*, 352 NLRB 243, 243 (2008).

⁵⁷ ALJD p. 52, L. 4-6; Tr. 985.

⁵⁸ ALJD p. 56, L 13-18.

The ALJ's finding of a violation in these circumstances is not a reasonable interpretation of the Act, for it would dramatically shift the carefully crafted balance of economic power between employers and unions. Knowing that they must be displaced following any lockout in favor of their full-term striking peers, potential crossovers will be dissuaded from exercising their Section 7 rights not to engage in, or to cease participating in, a strike. At the very least, this, in turn, would limit an employer's protected right to use crossovers while operating during a strike. There is no warrant under the law for skewing the economic balance in favor of labor like this.

Moreover, finding a violation in these circumstances would also punish the Crossovers who exercised their protected right to cease or refrain from striking; this runs afoul of the principles set forth in *TWA*. As the Supreme Court observed in *TWA*, the "NLRA protect[s] an employee's right to choose not to strike ... and, thereby, protect[s] employees' rights to the benefit of their individual decisions not to strike."⁵⁹ In summarizing, the Court stated:

"To distinguish crossovers from new hires [*i.e.*, permanent replacements] in the manner [the union] proposes would have the effect of penalizing those who decided not to strike in order to benefit those who did. Because permanent replacements need not be discharged at the conclusion of a strike in which the union has been unsuccessful, a certain number of prestrike employees will find themselves without work. We see no reason why those employees who chose not to gamble on the success of the strike should suffer the consequences when the gamble proves unsuccessful. Requiring junior crossovers, who cannot themselves displace the newly hired permanent replacements, ... to be displaced by more senior full-term strikers is precisely to visit the consequences of the lost gamble on those who refused to take the risk. ... [N]othing in the NLRA or the federal common law we have developed under that statute requires such a result."⁶⁰

Accepting the ALJ's finding of a violation would have precisely the effect here that the Court in *TWA* sought to protect against:

⁵⁹ 489 U.S. at 436.

⁶⁰ *Id.* at 438 (emphasis added).

- The permanent replacements, who DRC hired during the strike and continued to employ throughout and after the lockout (the retention of which during the lockout the ALJ found to be lawful) would be permitted to retain their jobs and could not be displaced by the full-term strikers.
- The full-term strikers who chose to gamble on the success of the strike (at least those who were not permanently replaced by new hires) would be reinstated to available jobs per *Laidlaw*.
- The Crossovers – the very individuals who exercised their protected right not to gamble on the strike – would be displaced and would suffer the “consequences of the lost gamble” (at least those who fell lower on the *Laidlaw* list).

As the Court found in *TWA*, however, “nothing in the NLRA or the federal common law ... developed under the statute requires such a result.”⁶¹ Yet, that is the result of the ALJ’s decision. Thus, the ALJ erred in finding the Company violated the Act by permitting the Crossovers to return to work before the full-term strikers.

B. DRC FULFILLED ITS BARGAINING OBLIGATIONS CONCERNING THE RETURN OF FULL-TERM STRIKERS.

DRC ended the lockout at noon on Thursday, November 29, 2007.⁶² Five and a half days later, on Tuesday, December 4, the first group of employees returned to work.⁶³ The ALJ found that DRC unilaterally implemented the return to work process in violation of Section 8(a)(5).⁶⁴ In doing so, the ALJ misconstrued the governing law and failed to consider undisputed facts showing that DRC gave the Union adequate notice and an opportunity to bargain, but the Union, by its

⁶¹ *Id.* at 438. See also *Encino-Tarzana Regional Med. Ctr.*, 332 NLRB at 914. Any argument that the intervening lockout precludes the application of the principles of *TWA* and *Aqua-Chem* would be turning Federal Labor Law on its head. Indeed, under *Aqua-Chem*, the Crossovers retained the same rights to their jobs after the lockout that they had before it. Further, if one is to agree with the ALJ, the full-term strikers’ *Laidlaw* rights were triggered by a single unconditional offer on November 19 – at the conclusion of the strike and before the lockout – and were not changed, but merely delayed, by the lockout. If that is so, the same is true for the Crossovers. When the strike ended and the Union offered to return, the Crossovers were actively working for DRC and, under *TWA*, could not be displaced. Moreover, in as much as the intervening lockout is analogous to a layoff, it merely served as a brief delay in the Crossover’s return to their positions.

⁶² GC Ex. 6.

⁶³ Tr. 1195. Additional groups returned in the first half of 2008. The latest wave returned in August/September 2008. (Tr. 1387; GC Ex. 21).

⁶⁴ ALJD p. 60, L. 7-40; p. 61, L. 1-21.

inaction, waived its bargaining rights. Further, the ALJ's alternative finding that DRC presented the Union with a *fait accompli* was in error.

1. The ALJ Misconstrued the Governing Law

Citing statements by the Union President and a Steward from a brief telephone conversation on the afternoon the lockout was lifted, the ALJ found that “the Union made a timely request to bargain over the return to work process, and even presented [DRC] with its initial position that recall should be exclusively based on seniority.”⁶⁵ The ALJ then concluded that it was not necessary to consider whether DRC had presented its recall proposal as a *fait accompli* (though he later concluded that it had) or whether, by inaction following its initial demand, the Union waived its bargaining rights.⁶⁶ Rather, according to the ALJ, “as of November 29 a successful argument that the Union waived its bargaining rights cannot be made, because the Union explicitly requested bargaining as to the return process on that date.”⁶⁷ Stated another way, the ALJ essentially held that, once the Union demanded bargaining, Respondent's hands were thereafter tied unless it could achieve bilateral agreement.⁶⁸

The ALJ's conclusion that a union's initial demand to bargain coupled with a proposal precludes further inquiry into union waiver is a strikingly inaccurate statement of the law. Regardless of the initial demand, whether and how the Union responded to DRC's efforts to engage it in bargaining is obviously relevant to the 8(a)(5) issue in this case. The mere fact that the Union initially requested bargaining and demanded recall by seniority does not absolve it of its statutory duties under Section 8(b)(3); it simply begins the interactive bargaining process. Nor does such a

⁶⁵ ALJD p. 58, L. 17-19.

⁶⁶ ALJD p. 58, L. 19-23; p. 59, L. 7-14.

⁶⁷ ALJD p. 59, n. 168, L. 44-46.

⁶⁸ That this was the ALJ's view is evident from his commentary that DRC did not provide adequate notice that it was “deviating from seniority” and that it knew that the Union objected to “the inclusion of anything other than seniority as a basis for recall...” (ALJD at 59, L. 9-21).

demand and proposal require an employer to offer substantive concessions.⁶⁹ Once having made a request to bargain, a union must thereafter proceed with due diligence to actually engage in bargaining.⁷⁰ Here, notwithstanding DRC's numerous efforts to engage the Union in bargaining, the Union did and said nothing following its initial bargaining request.⁷¹

2. DRC Gave the Union Adequate Notice and an Opportunity to Bargain.

DRC provided information to and communicated with the Union about its intended approach to the recall of employees on November 29, November 30 and December 2.

On November 29, the day DRC ended the lockout, the Union instructed all of the locked out strikers to report to work at 7 a.m. the next day, regardless of their regular work shifts.⁷² After learning of the Union's instructions to the strikers, Louis DiLorenzo ("DiLorenzo"), DRC's chief spokesman for the negotiations, wrote Union attorney and chief spokesman Thomas Murray ("Murray") that it was impractical to have all employees report the next day and explained that DRC needed to "match [its] business needs with [its] manpower needs" and that "employment level demands [would] not be sufficient to accommodate all Union employees." DiLorenzo closed by stating that DRC would be putting together a return to work schedule for the strikers.⁷³

⁶⁹ See *Alcoa, Inc.*, 352 NLRB 1222, 1224 (2008); see also *NLRB v. Hi-Tech Cable Corp.*, 128 F.3d 271, 278 (5th Cir. 1997) (finding that company negotiators did not act in bad faith by failing to offer certain counter-proposals that may have been acceptable to the Union, noting "it is unreasonable and illogical to punish the company for its negotiators failure to engage in a discussion in which the Union negotiators obdurately refused to participate").

⁷⁰ See *Richmond Times-Dispatch*, 345 NLRB 195, 199 (2005) ("it was incumbent on the Union to test the Respondent's intent to bargain...by engaging in negotiations"); *AT&T Corp.*, 337 NLRB 689, 693 (2002) ("a union must exercise due diligence to ensure that its demand to bargain is continuous"); *The Goodyear Tire & Rubber Company*, 312 NLRB 674, 674 n. 1 (1993) ("we note that the Union must act with due diligence to preserve its request to bargain...prudence dictates that the Union follow up on its demand...[t]he Union's subsequent silence indicates a lack of due diligence"); *Medicenter, Mid-South Hospital*, 221 NLRB 670, 679 (1975) ("[s]uch a failure of prosecution constitutes a waiver of a union's right to bargain").

⁷¹ Tr. 264-66. At the hearing, the Union acknowledged that, following its initial demand to bargain on November 29, it did not demand additional bargaining over the return to work process or otherwise respond to DRC's proposal. (*Id.*).

⁷² GC Ex. 7.

⁷³ GC Ex. 8.

In the afternoon on November 29, the parties participated in a conference call.⁷⁴ DRC representatives reiterated the need to formulate a more orderly process, including conducting a manpower assessment based on business needs.⁷⁵ Union President Steve Coates (“Coates”) became angry, stating that all the Union employees were coming back and that DRC could not “pick and choose” who would return, it had to be by seniority.⁷⁶ The parties ultimately decided to let their respective spokesmen, DiLorenzo and Murray, discuss the issue (as they had for all other issues during the negotiations).⁷⁷

Later that evening and the next morning, DiLorenzo and Murray continued their communications. DiLorenzo informed Murray that DRC was moving as quickly as possible so as not to delay the return to work process and promised more detailed information in the afternoon. Murray, in turn, promised to be available by email.⁷⁸

On Friday, November 30, DiLorenzo sent Murray another letter. As he had stated the day before, DiLorenzo explained that DRC was performing an assessment of its business and manpower needs and formulating a return to work plan. DiLorenzo stated that DRC was proposing a preferential hiring list that ranked employees using a mix of seniority and performance. His letter also stated that DRC was prepared to begin calling employees on Sunday and Monday, Dec. 2 and 3, to return to work on Tuesday and Wednesday, Dec. 4 and 5. The letter specifically invited

⁷⁴ Tr. 1186-87.

⁷⁵ Tr. 1188.

⁷⁶ GC Ex. 15.

⁷⁷ Tr. 1292. The ALJ found that the Union made its bargaining demand and initial proposal that seniority be used to recall the strikers in this November 29 telephone conference. (ALJD p. 57, L. 7-11). DRC does not except to this finding.

⁷⁸ GC Ex. 16.

questions from the Union and provided Murray the contact information for two Company representatives.⁷⁹

Surprisingly, in view of the Union's previously stated opposition to "picking and choosing," and its insistence on seniority as the only means to return employees to their jobs, the Union's only response to this explicit proposal to use seniority and performance was a one line email from Murray requesting that the preferential hiring list be sent to him by email and facsimile.⁸⁰

On Sunday, December 2, DRC delivered the proposed preferential list to the Union, as well as a description of the process used to create the list.⁸¹ The proposal also reiterated that the recall process would take longer than expected because, although DRC was in the "process of reviewing various procedures for getting the most qualified people into the [available] positions," it needed "more time" for a "smooth phase 1 transition."⁸² The attachment to the letter described the proposed process as a "guideline" to be used to return the first group of strikers and noted that DRC was continuing to work through the details.⁸³ Despite the fact that the Union was expecting the proposal and the cover letter reiterated DRC's desire to begin recalling employees that afternoon, neither the Union nor its counsel even bothered to look at the proposal until Monday.⁸⁴ Even then, the Union did not respond.⁸⁵ Therefore, DRC began the process of recalling employees pursuant to the guidelines it had proposed.

⁷⁹ GC Ex. 17.

⁸⁰ GC Ex. 16.

⁸¹ GC Ex. 17.

⁸² GC Ex. 17.

⁸³ GC Ex. 17. These statements in the December 2 letter implicitly invited further negotiations and made clear that this was not a completed transaction, but rather would take place over time.

⁸⁴ Tr. 200, 1372.

⁸⁵ Tr. 264-66.

3. *The Union, By Its Inaction, Waived its Bargaining Rights.*

The only effort made by the Union to bargain was its statement demanding bargaining in the November 29 telephone call. The Union did not, during the entire period from the end of the lockout through the months long recall process, take any other steps to effectuate its bargaining demand. Most certainly, after receiving DRC's November 30 proposal, it was incumbent on the Union to reject the proposal or in some way indicate that the proposal was unacceptable and that further bargaining would be required.⁸⁶ The Union did not call, write, or protest in any way whatsoever. It also did not request an extension of the recall time to engage in further bargaining. In short, the Union did nothing.

The ALJ ignored the Union's silence and inaction and deemed DRC to be on notice that the Union had somehow rejected its proposal, stating that DRC "already knew before providing the Union with its return to work process, that the Union objected to the centerpiece of the process, that is, the...inclusion of anything other than seniority."⁸⁷ Of course, bargaining nearly always begins with the parties objecting to the other's proposals. It is through the bargaining process that two parties attempt to resolve their disagreement over such issues. This requires both parties to actively engage in the interactive process that is collective bargaining.

While DRC did, in fact, know that the Union was demanding the use of seniority only, the reverse is also true. The Union knew, by virtue of the November 29 letter and conference call,⁸⁸ that DRC was not willing to return strikers by seniority alone. After DRC's November 30 proposal,

⁸⁶ *Richmond Times-Dispatch*, 345 NLRB at 199.; *AT&T Corp.*, 337 NLRB at 693; *The Goodyear Tire & Rubber Company*, 312 NLRB at 674 n. 1; *Medicenter, Mid-South Hospital*, 221 NLRB at 679.

⁸⁷ ALJD p. 59, L. 19-21.

⁸⁸ The ALJ found that DRC did not inform the Union of its intent to deviate from the Union's straight seniority proposal until its November 30 letter. (ALJD p. 59, L. 8-11). This finding does not withstand scrutiny. The Union was on notice that DRC proposed to recall employees in a different manner as of the November 29 letter, and certainly no later than the conference call that afternoon, in which Coates vehemently disagreed with what he called DRC's attempt to "pick and choose." (GC Ex. 8, 15).

it was then incumbent upon the Union to respond.⁸⁹ It did not (either before the first phase of recalls or the subsequent recalls) despite ample opportunity.

This case is similar to *Richmond Times-Dispatch*,⁹⁰ wherein the company proposed discontinuing payment of Christmas bonuses. After initially requesting bargaining, the union never followed up to schedule meetings, nor did it offer an alternative proposal. Despite the fact that the union initially requested bargaining, the Board held that it thereafter waived its right to bargain by failing to actually engage in bargaining following its request. Here, the Union requested bargaining and even submitted an initial proposal, but then it sat back on its heels and did nothing in response to DRC's proposals (except to eventually file unfair labor practice charges).

4. *The Compressed Timeframe Cannot Excuse the Union's Failure to Respond.*

The Union received DRC's proposal on November 30, two days prior to when DRC suggested informing employees when to return and five days before any strikers were actually recalled.⁹¹ The notice given here was reasonable under the circumstances, and the Union's failure to respond cannot be excused.⁹²

After receiving DRC's proposal, the Union could have, at any time, said that the proposal was unacceptable or that more time was required to evaluate and respond to the proposal and that the recall process should be delayed to allow additional bargaining. It simply did nothing.⁹³

⁸⁹ Taking the ALJ's statement – that DRC should have been on notice that the Union would reject any proposal that did not return strikers to their positions on the basis of seniority alone – to its logical conclusion actually supports a finding that the parties were at impasse, and DRC was free to implement its proposal.

⁹⁰ 345 NLRB 195 (2005).

⁹¹ GC Ex. 14, 17.

⁹² The question of whether the Union was given adequate notice is “one of fact, reviewed for substantial evidence.” *NLRB v. Roll and Hold Warehouse*, 162 F.3d 513, 519 (7th Cir. 1998); *see also NLRB v. Oklahoma Fixture Co.*, 79 F.3d 1030, 1035 (10th Cir. 1996).

⁹³ The Union's failure to engage can perhaps be explained by its admission that it believed (in error) that no bargaining was required and that the recall had to be governed by the layoff provisions of the Implemented Offer. (Tr. 1379-80).

The ALJ excused the Union's inaction, concluding that it did not have an adequate opportunity to respond to DRC's proposal.⁹⁴ This conclusion was not based on any assertion made by the Union at the time it received the proposal, nor is it supported by any record evidence. The ALJ's entire finding consists of a conclusory statement that, "[i]n terms of the combined length of the strike and lockout here, allowing the Union less than 48 hours, over a weekend, to analyze [DRC]'s return process...is not reasonably adequate."⁹⁵ The ALJ's unsupported assertion is inconsistent with his citation of *Emhart Industries*, which, requires consideration of "all the circumstances of a case" to determine the adequacy of the notice given.⁹⁶

One of the circumstances that justifies a shortened period of notice is the need to reinstate employees quickly. Indeed, this was the situation in *Emhart Industries*. There the striking union made an offer to return on March 16, 1983. Later the next day, the employer informed the union that it was not prepared for all the strikers to return at once, but that it would notify selected employees to report on Monday, March 21. The union did not respond to this communication and instead filed charges.⁹⁷ The Board rejected the union's claim that it had an insufficient opportunity to respond to the company's proposal, noting the need to reinstate employees quickly.⁹⁸

The instant case and *Emhart Industries* are strikingly similar. Both employers moved expeditiously to reinstate workers. Further, the notice periods are virtually identical, *i.e.*, notice Friday for a Tuesday recall in the instant case compared to Thursday for a Monday recall in

⁹⁴ ALJD p. 58, L.46-49; p. 59, L. 1-28.

⁹⁵ ALJD p. 59, L. 16-19.

⁹⁶ ALJD p. 58, L. 31-33, citing *Emhart Indus.*, 297 NLRB 215, 216 (1987).

⁹⁷ *Emhart Indus.*, 297 NLRB at 215.

⁹⁸ *Id.* at 216.

Emhart.⁹⁹ Thus, as in *Emhart*, DRC's notice was sufficient under the circumstances and provided the Union an adequate opportunity to respond.¹⁰⁰

Additionally, the ALJ's conclusion is confusingly based on the length of the strike and the lockout, as opposed to the complexity of the proposal at issue, which cannot be fairly said to be overly complex. The actual matters that needed to be addressed were simple, namely, when employees would be called back to work and how they would be selected for recall - *i.e.*, who and when.¹⁰¹ DRC's proposal involved a standard calculation and ranking of employees based on seniority and performance.¹⁰² The Union had, as was its right, already staked out the position that seniority should govern and that DRC could not "pick and choose."¹⁰³ Assuming it was still of this view after DRC's November 30 and December 2 letters, it easily could have rearticulated this position. The Union, instead, chose not to respond.¹⁰⁴

5. *The ALJ's Fait Accompli Analysis is Unnecessary and Incorrect.*

After initially concluding a *fait accompli* analysis was unnecessary, the ALJ nevertheless found, as an alternative basis for concluding that DRC violated 8(a)(5), that DRC presented the

⁹⁹ The facts of the instant case actually gave the Union more time to respond. The company in *Emhart* began calling employees the day immediately following issuing notice to the union. Here, DRC gave the Union notice on Friday, but did not begin calling employees until Sunday afternoon – after further correspondence with the Union in the interim. (GC Ex. 14, 17).

¹⁰⁰ See also *Haddon Craftsmen*, 300 NLRB at 789-91 (finding 5 days notice sufficient); *M.A. Harrison Manufacturing Co.*, 253 NLRB 675 (1980), *enf.*, 682 F.2d 580 (6th Cir. 1984) (2days); *Clarkwood Corp.*, 233 NLRB 1172, 1172 (1977) (5 days); *Cliffside Healthcare Center*, 279 NLRB 670 (1975) (2 days); *Medicenter, Mid-South Hospital*, 221 NLRB at 680 (2 days); *Shell Oil Co.*, 149 NLRB 305 (1964) (2 days).

¹⁰¹ The preferential recall list contained substantial information that would have aided the Union in any bargaining, had it chosen to take advantage of such information. Included on the list was every bargaining unit employees' name, department, years of service, position, and performance rating. If the Union had sought to bargain, it would easily have been able to determine from this list where there were deviations in seniority in the ranking which would have narrowed the bargaining task. Inexplicably, the Union chose not to review this list until after the fact. (GC Ex. 17).

¹⁰² This was not a foreign concept to the Union. For example, the 2004 CBA provided for a consideration of both seniority and qualifications when effecting a reduction in force and recall from such reduction. See Jt. Ex. 1, p. 17 ("In case of decrease or increase of working forces, seniority shall prevail except competency...shall be used...for the purposes of making determinations of job eligibility").

¹⁰³ GC Ex. 15.

¹⁰⁴ Tr. 264-66.

Union with a *fait accompli*.¹⁰⁵ A *fait accompli* excuses a union's failure to exercise due diligence in requesting bargaining in the first instance.¹⁰⁶ Thus, the ALJ's conclusion – to which DRC does not except – that the Union in fact requested bargaining renders his *fait accompli* analysis and finding erroneous and irrelevant.

In any event, a *fait accompli* analysis applies the same standards of adequate notice and adequate time to respond addressed above. Thus, for the same reasons (namely, DRC provided the Union adequate notice and opportunity to respond), the ALJ erred in finding in the alternative that DRC violated the Act because it presented the Union with a *fait accompli*.

Further, a *fait accompli* violation must be based on objective evidence evaluated in the context of the bargaining at issue, not the subjective impressions of the Union (or, in this case, the ALJ).¹⁰⁷ Hallmark evidence of a *fait accompli* includes notice to employees prior to or simultaneous with notice to the union; evidence that the company developed its proposal after significant expense and/or time (showing a firm commitment to the proposal suggesting an unwillingness to bargain over any changes); and misleading the union.¹⁰⁸ None of these hallmarks are present here.

Indeed, there is not even evidence that the Union subjectively believed it had been presented with a *fait accompli* at the time DRC made its proposal.¹⁰⁹ Instead, the ALJ's alternative finding that DRC presented the Union with a *fait accompli* rested entirely on his own subjective impression

¹⁰⁵ ALJD p. 60, L 19-21.

¹⁰⁶ See *Ciba Geigi Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982).

¹⁰⁷ See *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023-24 (2001).

¹⁰⁸ See *Pontiac Osteopathic Hospital*, 336 NLRB at 1023-24; *Ciba Geigi*, 264 NLRB at 1017.

¹⁰⁹ Conveniently, at the hearing, Union counsel Murray testified that the Union did not respond to DRC's proposal because, in his opinion, DRC's communications made it clear that the Company wasn't interested in bargaining, that they were going to implement what they wanted to implement, and that it was clear they were going to do what they were going to do. (Tr. 1370). However, neither he nor anyone else for the Union communicated this impression to DRC at the time, and the Union never attempted to test its purported supposition by responding to DRC's proposal. Murray's testimony, well after the fact, is not supported by any objective record evidence.

that, “[i]n terms of the combined length of the strike and lockout here, allowing the Union less than 48 hours, over a weekend, to analyze the Respondent’s return process...is not reasonably adequate.”¹¹⁰ The ALJ’s subjective impression is belied by all of the credible, objective evidence. Specifically, the objective evidence shows that the Union was: 1) put on notice that DRC was proposing returning strikers based on performance and seniority;¹¹¹ 2) given a sufficient amount of time to either request further bargaining or reject the proposal;¹¹² 3) informed that the proposal was a “guideline” and that DRC was continuing to work out the details of a return to work process; 4) invited to question the proposal;¹¹³ and 5) was silent in the face of a mutually desired, accelerated timeframe.

There is no support under the law, properly applied, or in the facts of this case for the ALJ’s conclusions. There is undisputed evidence that DRC provided adequate notice to the Union and an opportunity to bargain, but the Union, through inaction, lack of diligence, and failure to engage

¹¹⁰ The ALJ’s conclusion that the Union was not given a reasonable period of time to respond to DRC’s proposal – when the Union itself had initially insisted that DRC immediately reinstate all strikers – impermissibly allows the Union the best of both worlds. Under the ALJ’s reasoning, after having complained on the front end that the Company is not acting quickly enough, the Union can then turn around and complain that the Company is acting too quickly, thereby justifying its refusal to respond in any way.

¹¹¹ DRC’s November 29, November 30, and December 2 communications all constituted proposals triggering the Union’s responsibility to respond. *See Alcoa, Inc.*, 352 NLRB 1222, 1224 (2008) (holding that statements by the employer that the policy of allowing employees to leave early for union meetings “must change” were sufficient to constitute a proposal that the policy be eliminated); *Pinkston-Hollar Construction Services, Inc.*, 312 NLRB 1004, 1006 (1993) (rejecting the General Counsel’s assertion that the company did not provide a proposal to the Union when it stated that it would implement its own benefit plans effective September 1, despite the fact that no details concerning the plans were given to the Union).

¹¹² *See Emhart Industries*, 297 NLRB 215, 216 (1987).

¹¹³ It is anticipated that the General Counsel may argue that the proposals suggested an unwillingness to respond due to the “positive language” used to describe the proposal (*i.e.*, “the Company has reached some preliminary decisions,” “the Company is developing a preferential hiring list...through a mixture of performance and seniority,” and “the Company plans to contact approximately 150 employees on Sunday and Monday”). This argument is without merit. *See Haddon Craftsmen*, 300 NLRB 789, 790 (1990) (reiterating that it is not unlawful for an employer to use “positive language” to describe its plan); *Garcia Corp.*, 222 NLRB 558, 563 (1976) (holding that there is no need to defer the decision, and the only requirement is to give notice to the union of the decision so that alternatives can be discussed); *Ozark Trailers, Inc.*, 161 NLRB 561, 568 (1966) (noting that the illegality lay not in the fact that the employer had first made the decision before consulting with its employees’ representative). Notably, the Company’s proposals specifically invited questions from the Union, indicating that there was still an opportunity for the Union to engage in bargaining.

waived its bargaining rights. For much the same reasons, DRC's proposal did not constitute a *fait accompli*.

C. DRC LAWFULLY DENIED CERTAIN RETURNING STRIKERS THE RIGHT TO IMMEDIATELY TAKE ADVANTAGE OF VACATION BENEFITS.

1. *Facts Relevant to the Denial of Vacation Benefits Allegations.*

The General Counsel alleged, in Complaint Paragraph XI, that “[s]ince on or about August 4, 2007, DRC has denied accrued vacation leave to recalled employees that participated in the strike...” in violation of § 8(a)(3). The ALJ erred in finding the violation as alleged.

The facts regarding this allegation are not in dispute. Twenty-three strikers returned to work in August and September 2008 (the “Late 2008 Returnees”), approximately a year following the beginning of the strike.¹¹⁴ At a meeting to explain the terms of the Implemented Offer to the Late 2008 Returnees, the Company informed them that they were not immediately eligible to take vacation, but rather had to first meet the eligibility requirements contained in Section 10D of the Implemented Offer (*i.e.*, work 900 hours in the 12 month period immediately preceding the vacation).¹¹⁵

2. *Argument and Authority.*

In *Texaco, Inc.*,¹¹⁶ the Board set forth a burden shifting test for determining whether a denial of benefits to strikers violated 8(a)(3). Initially, the General Counsel must establish an adverse effect on employee rights by showing: 1) the benefit was accrued; and 2) the benefit was withheld on the apparent basis of a strike. The burden then shifts to the employer to prove a legitimate and

¹¹⁴ (Tr. 1298).

¹¹⁵ Tr. 346, 1298. After the meeting, DRC also informed a Union that returning strikers must qualify under Section 10D to be eligible for vacation, and DRC again reiterated this position at a subsequent meeting with the Union to discuss the issue. (Tr. 346-347).

¹¹⁶ 285 NLRB 241 (1987).

substantial business justification for the denial of benefits, such as reliance on a nondiscriminatory contract interpretation that is reasonable and arguably correct.¹¹⁷

a. The vacation benefit for the returning strikers had not accrued.

Under *Texaco*, establishing that a benefit has accrued requires evidence that the benefit was “*due and payable* on the date on which the employer denied [it].”¹¹⁸ Based on the relevant contractual provisions and hours worked requirement, vacation benefits were not due and payable to the Late 2008 Returnees immediately upon their return in August or September 2008.¹¹⁹

Both the 2004 CBA and the Implemented Offer continued the “refresher” style accrual system for vacation benefits that had been in place for years. Under this system, employees were awarded all of their vacation at the turn of the year.¹²⁰ However, both the 2004 CBA (Section 14D) and the Implemented Offer (Section 10D) restricted the use of vacation:

“An employee, to qualify for a vacation must, in addition to the requirements as to length of continuous service with the Company, be on the active payroll and have worked at least 900 hours in the twelve months *immediately preceding his vacation*.”¹²¹

Section 14N of the 2004 CBA also contained a guaranteed vacation provision that was stricken from the Implemented Offer:

“Anything herein contained to the contrary notwithstanding, an employee who has worked 900 or more hours in any calendar year, . . . , shall *at the end*

¹¹⁷ *Id.* at 245-46.

¹¹⁸ *Id.* at 245 (emphasis added).

¹¹⁹ It is undisputed that only the Late 2008 Returnees were declared ineligible for vacation under Section 10D of the Implemented Offer. All of the other returning strikers (those returning in 2007 or early 2008) either immediately qualified for and took vacation or soon thereafter achieved eligibility and took vacation. (Tr. 1299, 1308). It is also undisputed that many of the Late 2008 Returnees subsequently qualified for and took vacation in 2008. (Tr. 1309).

¹²⁰ (Tr. 1297-1298).

¹²¹ Jt. Ex. 1, p. 14; Jt. Ex. 2, p. 7. Consistent with this language, Kevin Doane (“Doane”), DRC’s Project Manager for Human Resources, testified that Respondent looked at a “rolling” 12 month period, rather than a particular calendar year, to determine eligibility under Section 14D (and later Section 10D). (Tr. 1296-1297).

of such year be entitled, irrespective of any subsequent occurrence, to a minimum vacation with pay in the following calendar year as follows:...”¹²²

These two provisions worked in tandem. Section 14D of the 2004 CBA was crafted to protect DRC from excessively long absences and inconsistent attendance. Thus, the requirement that an employee work in excess of 900 hours in the 12 month period *immediately preceding their vacation*, as opposed to the previous calendar year. Section 14N offered protection to employees that had worked 900 hours in a previous calendar year but who, because of some event occurring after satisfying the hours requirement, could not meet the eligibility requirement in the following calendar year in time to take vacation. This provision guaranteed such employees a vacation even if their ability to qualify under Section 14D was hampered by events out of their control.¹²³

An arbitration decision construing these provisions – upon which the ALJ relied in finding the violation – confirms this.¹²⁴ The arbitration panel decided that, although Section 14D generally controlled an employee’s vacation eligibility, DRC could not ignore Section 14N. Thus, the arbitration panel held that if an employee that had been recalled from layoff failed to qualify for vacation under Section 14D, but had worked 900 hours in the previous calendar year, DRC must condition eligibility on the twelve month period prior to the vacation, excluding the months in which the employee was laid off.¹²⁵

¹²² Jt. Ex. 1, p.16.

¹²³ In the normal course of operations, employees would work more or less full-time and have no problems meeting the eligibility requirements of Section 14D. However, certain events could disrupt this. Section 14D specifically dealt with workers’ compensation or disability leave, but other events, such as personal leave, Family Medical Leave Act (“FMLA”) leave, maternity leave, layoffs, strikes, and lockouts, to name a few, were not specifically addressed in the 2004 CBA. Section 14N guaranteed that if an event such as these occurred, employees would still earn a vacation if they provided a minimum level of services in the preceding calendar year and, but for the event occurring, would have been eligible to take their vacation under Section 14D.

¹²⁴ ALJD p. 43, L. 10-17; p. 44, L 14-19.

¹²⁵ GC Ex. 25, p. 3-4 (“A reconciliation can be made between 14(D) and 14(N) if...[a]t that time of future recall their eligibility for vacation shall be calculated based upon the prior 12 months previous to layoff without consideration in the calculation for the time while on current layoff”).

Unfortunately for the Late 2008 Returnees, even the guarantee provision of the 2004 CBA contains a caveat. The guaranteed vacation is not awarded until the *end of the year*. (Jt. Ex. 1, p.16). While, this would not have mattered in previous years, the 2004 CBA expired on August 2, 2007, and the Implemented Offer (eff. Nov. 29, 2007) did not continue awarding guaranteed vacations at the end of the year. The only way an employee could use vacation benefits under the Implemented Offer was to qualify under Section 10D.¹²⁶ Thus, the Late 2008 Returnees had not and could not have earned vacations under Section 14N, *i.e.*, there were no vacation benefits immediately “due and payable” to them.

The General Counsel and the ALJ analogized the instant case to *Swift Adhesives*,¹²⁷ a classic attempt to fit a square peg in a round hole.¹²⁸ The CBA¹²⁹ in *Swift* is described as follows:

“Under the terms of the expiring collective bargaining agreement...employees who had been employed 196 calendar days during the calendar year **were eligible** for vacation benefits...employees who became eligible for vacation days during a calendar year were to take them the ensuing calendar year according to a schedule promulgated by the Respondent...employees who were terminated for any reason **were to be paid for the vacation days for which they had become eligible.**”¹³⁰

The *Swift* CBA is significantly different from the 2004 CBA. The *Swift* CBA used a “straight-line” accrual system, *i.e.*, vacation benefits for a subsequent year accrue as an employee works in the current year and are immediately awarded, or vested, after the employee works the number of days required in the agreement. This is not true under the 2004 CBA. The 2004 CBA is a “refresher” style policy that awards vacation at the turn of each year.¹³¹ Employees do not vest

¹²⁶ Jt. Ex. 2, p.7.

¹²⁷ 320 NLRB 215 (1995).

¹²⁸ ALJD 44, L. 19-21; GC Trial Brief p. 106.

¹²⁹ No opinion in *Swift* (not the Eighth Circuit, Board, or ALJ) actually quotes the relevant vacation provisions.

¹³⁰ *Id.* at 215 (emphasis added).

¹³¹ Tr. 1297-1298.

vacation for a subsequent year by working in the current year. Section 14N confirms this, stating that the guaranteed vacation is awarded “at the end of such year.”¹³²

Crowbaring this case into *Swift*, the General Counsel characterized the arbitration award as vitiating the eligibility provision of Section 14D and transforming Section 14N into a “straight-line” accrual provision.¹³³ While the ALJ apparently agreed, this characterization goes too far.¹³⁴

In any event, at the end of 2007, the guarantee provision had expired, and it was not included in the Implemented Offer. Thus, no employees had accrued a guaranteed vacation under the 2004 CBA. DRC, therefore, did not violate Section 8(a)(3) by insisting that the Late 2008 Returnees satisfy Section 10D of the Implemented Offer before taking a vacation.

b. DRC’s denial of vacation benefits was based on its reasonable and arguably correct, nondiscriminatory interpretation of the contract.

As detailed above, DRC did not deny any accrued vacation benefits to the Late 2008 Returnees. However, even assuming it had, DRC relied on a reasonable and arguably correct, nondiscriminatory interpretation of the contract.¹³⁵

¹³² Jt. Ex. 1, p.16.

¹³³ In support of this proposition, the General Counsel attacked Doane’s testimony, finding it “interesting” that Doane would testify that the vacation provision could be based on a rolling 12 month period and yet still be a “refresher” policy, and asking the question, “[i]f the 900-hour requirement is based on a ‘rolling’ 12-month period, why does ... January 1 (the first day of the calendar year) matter?” The answer is, rather obviously, that employees are awarded all of their vacation at the end of the year for use between January 1st and December 31st, subject to the use restrictions in Section 14D (10D under the Implemented Offer), which looks at a rolling 12 month period.

¹³⁴ The arbitrator only confirmed that if an employee did not and could not meet the use restrictions contained in Section 14D in time to take vacation, but had worked 900 hours in the previous year, he would be entitled to take vacation under Section 14N. (GC Ex. 25). The decision did not transform DRC’s “refresher” policy into a “straight-line” accrual policy. Indeed, the arbitrator would have no power to do so. See Jt. Ex. 1, p. 33 (“Any Board of Arbitration appointed...shall not have authority to change this Agreement in any way”).

¹³⁵ The ALJ states that the Company did not argue in its brief that it had a legitimate and substantial business justification for its action, but DRC’s entire brief on the subject argues that its interpretation of the 2004 CBA drove its decision to require all of its employees to meet the eligibility requirements of Section 10D of the Implemented Offer prior to using vacation benefits, *i.e.*, its interpretation was its legitimate and substantial business justification.

(i) **DRC's Interpretation is Reasonable and Arguably Correct.**

DRC relied on the plain language of the 2004 CBA and basic contract law in determining that the Late 2008 Returnees were not entitled to take vacation until they had become eligible under Section 10D of the Implemented Offer. Section 14N expressly stated that there was no minimum vacation granted to employees “until the end of the year” (December 31, 2007).¹³⁶ Coupling this with the fact that the 2004 CBA had expired prior to December 31, 2007, DRC reasonably determined that vacation eligibility was governed exclusively by Section 10D of the Implemented Offer.¹³⁷

The ALJ, however, erroneously relied on the arbitration decision described above to find that DRC's interpretation was not reasonable and arguably correct.¹³⁸ The ALJ read the arbitration decision to mean that the minimum vacation guarantee of Section 14N operated to vest vacation benefits in strikers prior to the expiration of the 2004 CBA, but it in no way mandates that position. First, the arbitration decision did not address striking employees who, while similar to laid off employees in certain respects, are not the same in all respects. The parties' silence regarding strikers here suggests that they intended to treat laid off and striking employees differently for vacation purposes. Second, the arbitration decision did not deal with the circumstances presented here, where the contract granting a guaranteed vacation at the end of a year expired prior to year's end and the guarantee had been discontinued.

¹³⁶ Jt. Ex. 1, p. 16.

¹³⁷ Unlike *Texaco*, DRC is not raising a *post hoc* interpretation of the contract to rationalize its decision to require employees to meet the requirements of Section 10D prior to taking vacation. DRC told the Union, contemporaneously with the announcement to the Late 2008 Returnees, that the reason they were ineligible for vacation benefits was because they had worked 0 hours in the preceding 12 months and would have to accumulate 900 hours prior to achieving eligibility under Section 10D. Tr. 346-347, 1298. Cf. *Texaco*, 285 NLRB at 246 (holding that company's denial of benefits violated Section 8(a)(3) in part because company's interpretation of contract seemed to be “post-hoc rationalization” because of no contemporaneous announcement of interpretation at time benefits were denied).

¹³⁸ ALJD p. 44, L. 13-19.

This case is analogous to *Advertiser's Manufacturing Company*,¹³⁹ where the company denied holiday benefits to employees on strike because of contractual language stating that an employee must be at work both the day before and the day after the holiday and be on active work status for three months preceding the holiday. The Board found that, while the denied benefits had accrued, the employer's interpretation of the contractual eligibility provisions was reasonable and arguably correct and therefore constituted a legitimate and substantial business justification for denying the strikers holiday benefits.¹⁴⁰

(ii) Nondiscriminatory.

DRC's interpretation is also nondiscriminatory. Far from using its interpretation to discriminate against strikers, DRC allowed the vast majority of returning strikers to immediately use their vacation benefits because they were eligible under Section 10D.¹⁴¹ It was only the Late 2008 Returnees that did not meet the eligibility requirement and who were told they had to work 900 hours prior to taking vacation. After they met the eligibility threshold, they too were allowed to either take their vacation or receive pay-in-lieu of time off.¹⁴²

In sum, the ALF erroneously concluded that DRC unlawfully denied vacation benefits to the Late 2008 Returnees. At the time they were reinstated, they had not accrued vacation benefits, *i.e.*, none were "due and payable." Further, even assuming the Late 2008 Returnees were denied accrued vacation benefits, such denial was justified by DRC's reasonable and arguably correct, nondiscriminatory contractual interpretation.

¹³⁹ 294 NLRB 740 (1989).

¹⁴⁰ *Id.* at 743-44. See also *Nuclear Fuel Servs, Inc.*, 290 NLRB 309, 310 (1988) (holding that company established legitimate and substantial business justification, in part by relying on provision that required employees to work the day before and after the vacation to be eligible to take vacation).

¹⁴¹ Tr. 1299, 1308.

¹⁴² Tr. 1309.

D. DRC LAWFULLY DISCHARGED KELVIN BROWN.

1. Facts Relevant to the Failure to Reinstate Kelvin Brown

Brown testified that he, along with approximately 8 to 12 others, were picketing at the “truck gate” entrance to DRC’s facility around 6:30 a.m. on September 20, 2007.¹⁴³ Brown and the others spaced themselves “so that [they] could impede the progress of the vans into the plant.”¹⁴⁴ They held up vans for six to eight minutes before allowing them to enter DRC’s property. The vans, as Brown knew, were carrying replacement workers.¹⁴⁵

That morning, Brown was arrested and charged with disorderly conduct at the picket line because of an incident involving a van trying to enter DRC’s facility. Police Officer Michael Slowinski (“Officer Slowinski”) testified that, with a clear view, he saw Brown walk up to a van in the crosswalk and lay on its fender, pretending that he had been hit by the van. Upon seeing this, Officer Slowinski immediately went to the truck gate where the incident occurred. When the Officer tried to talk to Brown—both outside and inside the squad car—the other picketers yelled at the Officer. Brown claimed the van had hit him, but Officer Slowinski knew that Brown had not been hit.¹⁴⁶ He placed Brown under arrest and issued him a ticket for disorderly conduct. Brown was later convicted.¹⁴⁷

Daniel Meisner (“Meisner”), then HR Manager at Painted Post, learned of Brown’s picket line misconduct as he came into work on September 20, 2007. He investigated the incident by reviewing information from the security force employed by DRC and from the Painted Post Police

¹⁴³ Tr. 552-53; 556.

¹⁴⁴ Tr. 611.

¹⁴⁵ Tr. 431; 608-609; 576-577.

¹⁴⁶ Tr. 665.

¹⁴⁷ Tr. 563-65, 571-72, 662-666, and 671.

Department. Meisner determined that Brown did what he was accused of doing, and he found that Brown's misconduct made him ineligible for reinstatement.¹⁴⁸

2. *Argument and Authority.*

In deciding the lawfulness of a discharge (or denial of reinstatement) for strike misconduct, the Board first considers whether the employer demonstrated an honest belief that the discharged employee engaged in strike misconduct of a serious nature.¹⁴⁹ Here, the ALJ found that DRC demonstrated its honest belief, at the time it decided to discharge Brown, that he engaged in misconduct of a serious nature.¹⁵⁰

The burden then shifted to the General Counsel to prove that either: (1) Brown did not, in fact, engage in the alleged misconduct; or (2) the misconduct was not serious enough for Brown to forfeit the Act's protection.¹⁵¹ While the ALJ specifically found that the General Counsel failed to demonstrate that Brown had not engaged in the misconduct, he erroneously concluded that such misconduct was not serious enough to warrant discharge.¹⁵²

Strike misconduct sufficiently serious to permit discharge is that which "may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act."¹⁵³ The Board applies an objective standard under which it need not be determined whether any particular employee felt intimidated or threatened or whether the discharged striker intended to intimidate or coerce others. Rather, this objective standard requires a review of all the surrounding facts and circumstances to determine whether the employer has a reasonable basis for concluding that the

¹⁴⁸ Tr. 1207, 1208, 1260, 1262; Co. Ex. 65.

¹⁴⁹ *Gem Urethane Corp.*, 284 NLRB 1349, 1352 (1987).

¹⁵⁰ ALJD p. 31, L. 25-27.

¹⁵¹ *Meditate of N.M., Inc.*, 314 NLRB 1145, 1146 (1994), *enf.* 72 F.3d 780 (10th Cir. 1995).

¹⁵² ALJD p. 31, L.29-30; p. 33, L. 22-26.

¹⁵³ *Clear Pine Mouldings*, 268 NLRB 1044, 1046 (1984)(internal quotations omitted), *enf. mem.* 765 F.2d 148 (9th Cir. 1985), *cert. denied* 474 U.S. 1105 (1986).

conduct of the discharged striker would reasonably tend to coerce employees crossing the picket line.¹⁵⁴

a. Brown Jeopardized the Safety of Himself and Others.

Brown’s attempt to block the van from entering DRC’s facility—by either leaning or laying against it¹⁵⁵—constituted serious misconduct because his actions put his safety, as well as the safety of the van’s driver and passengers, at risk.

This case is more similar to *CalMat Company*¹⁵⁶ than any authority cited by the ALJ. There, the Board held that in placing himself in front of a slow-moving truck, the discharged striker jeopardized his safety and the safety of security guards who tried to stop him, and, thus, the striker’s actions constituted serious strike misconduct justifying discharge.¹⁵⁷ Like the employee in *CalMat*, Brown jeopardized his own safety as well as the safety of others by placing his body in front of (or on top of) a moving vehicle. In fact, in Brown’s criminal trial, the Justice hearing the case noted that he could not “get past the fact that [Brown] recklessly created a risk for [his] own personal well-being.”¹⁵⁸ Additionally, by standing in front of the van and leaning against it, Brown could have caused a collision resulting in injuries to those inside the van.

¹⁵⁴ *Universal Truss, Inc.*, 348 NLRB 733, 735 (2006).

¹⁵⁵ While Brown’s misconduct justified his discharge either way, the ALJ’s determination that Brown merely “leaned” against the vehicle, as opposed to laying on the vehicle, is not consistent with the only testimony the ALJ credited, that of Officer Slowinski. The ALJ found that Officer Slowinski was the only witness “without an axe to grind” and he “displayed impressive demeanor on the witness stand, and gave no hint that he was predisposed towards one side or the other.” ALJD p. 32, n.118, L. 42-44. Further, the ALJ admitted that his determination that Brown only leaned on the van was based on his assumption that this scenario was “at least as likely” and “not at great variance with the Officer’s testimony.” ALJD p. 33, n. 124, L. 37-41. This is contrary to the weight of the very evidence the ALJ credited in this case.

¹⁵⁶ 326 NLRB 130 (1998).

¹⁵⁷ *Id.* at 135. In *CalMat*, after the employee deliberately stood in front of the moving vehicle, he twice attempted to assault the driver of the vehicle and damage the truck. However, only after finding that deliberately putting one’s self in the way of physical harm and simultaneously jeopardizing the safety of others, alone, constitutes a justifiable ground for discharge did the Board observe that the attempted assault also separately justified the employee’s discharge. *Id.*

¹⁵⁸ Co. Ex. 14.

Brown's conduct also had the effect of intimidating those employees exercising their right to cross the picket line. Brown knew he was blocking a van full of replacement employees entering DRC's facility.¹⁵⁹ Objectively, Brown's conduct would reasonably tend to coerce employees in the exercise of their rights out of fear that his conduct was a threat against them for entering the facility.

b. Brown's Conduct Inflamed His Fellow Picketers and Posed a Risk of Violence.

In the presence of fellow strikers, Brown told Officer Slowinski that the van hit him as he attempted to block it from entering DRC's facility, inflaming the other picketers and posing a risk that they would retaliate against the van's driver, the van occupants, or the police officer.¹⁶⁰ Similar to *Precision Concrete*, Brown blocked the path of a van entering DRC's facility, pretended that he had been hit when questioned, and, through his actions, incited a group of 8 to 12 fellow strikers to begin yelling incessantly at the police officer.¹⁶¹ While there were fortunately no acts of retaliation, Brown's actions, like those in *Precision Concrete*, posed a risk of violence that constitutes serious strike misconduct.

c. The Surrounding Circumstances Demonstrate that DRC Had a Reasonable Basis for Denying Brown's Reinstatement

Under *Clear Pine Mouldings*, in which the Board stressed that strike misconduct should be viewed *under all the circumstances*, Brown's conduct must be viewed in context.¹⁶² This was not an isolated threat to the safety of the strikers and the drivers/passengers of vehicles attempting to enter DRC's facility. Rather, strikers commonly blocked DRC's entrance in such a manner that

¹⁵⁹ Tr. 576-77; 608-09.

¹⁶⁰ Tr. 665. See *Precision Concrete*, 337 NLRB 211, 229 (2001) (finding that non-violent actions of striking employee - blocking path of vehicle in contravention of state law and feigning injury - constituted serious strike misconduct because striker's conduct could have inflamed other picketers and prompted them to retaliate against vehicle's driver).

¹⁶¹ Tr. 552-53; 662-66.

¹⁶² 268 NLRB at 1046.

DRC was compelled to file for and obtain a restraining order and temporary injunction.¹⁶³ In its filing, DRC cited instances where crossovers attempting to enter its facility were blocked for up to fifteen minutes and an instance where “one striker in a wheelchair darted into the crosswalk as cars approached.”¹⁶⁴

Brown’s conduct also resulted in police intervention, Brown’s arrest, and his later conviction for disorderly conduct, demonstrating the seriousness of his strike misconduct. While police intervention may not be determinative, it is an important factor that must be considered.¹⁶⁵ The ALJ’s failure to consider the serious criminal ramifications of Brown’s misconduct led him to incorrectly minimize the seriousness of the conduct and constitutes reversible error.¹⁶⁶

E. DRC’S LOCKOUT WAS NOT MOTIVATED BY UNION ANIMUS.

Even though the ALJ (i) found that DRC’s lockout was instituted for a substantial and legitimate business justification (“to apply pressure to the Union to accept its bargaining demands”) and that DRC engaged in good faith bargaining for a new collective bargaining agreement before, during, and after the lockout; (ii) rejected the General Counsel’s argument that DRC unlawfully

¹⁶³ Co. Ex. 3. The ALJ erroneously states that “there is no evidence of other incidents involving picket line misconduct.” DRC’s Temporary Injunction and Restraining Order outlines several other instances of picket line misconduct, including threats of violence made to Respondent’s employees “at or near the picket line.” DRC secured a court order prohibiting “obstructing, blocking, hindering, stepping in front of or otherwise interfering with ingress or egress from [Respondent’s] property and streets leading to [its] gates...” *Id.*

¹⁶⁴ Co. Ex. 3. Additionally, on September 14, 2007 (prior to the Brown incident), the Chief of the Painted Post Police Department filed an affidavit in support of DRC’s temporary injunction and restraining order due to his concerns that “someone was going to get hurt” by virtue of the strikers’ blocking the access to DRC’s facility. *Id.*

¹⁶⁵ See *Newport News Shipbuilding & Dry Dock Co. v. NLRB*, 738 F.2d 1404, 1411 (4th Cir. 1984)(holding that company lawfully denied reinstatement to striker due to seriousness of misconduct - intentionally blocking nonstrikers from going into shipyard for periods of five minutes - was demonstrated by fact that police intervention was needed to clear way).

¹⁶⁶ Further, the ALJ relied on the particular facts of inapposite cases, *Gem Urethane* and *Clear Pine Mouldings*. Specifically, the ALJ held that the determining factor was Brown’s failure to brandish weapons or issue threats. However, an employee need not brandish weapons or issue threats to commit serious strike misconduct. See *Cal Mat*, 326 NLRB at 135; *Precision Concrete*, 337 NLRB at 229. The ALJ’s erroneous inquiry fails to consider whether Brown jeopardized the safety of himself or others or whether Brown’s inflaming other strikers posed a risk of violence. Additionally, Brown’s conduct is clearly distinguishable from the non-serious strike conduct in *Medite of New Mexico, Inc.*, another case relied on by the ALJ. In that case, unlike here, no one’s safety was at risk, strikers did not block the ingress or egress of the vehicle, and the only physical contact between the strikers and the vehicle involved a cardboard sign; the strikers did not touch the vehicle, let alone lay on or lean against it.

retained the permanent replacements it hired during the Union's strike to continue work during the lockout; and (iii) did not find (and the General Counsel did not allege) that DRC engaged in any independent 8(a)(1) violations, he nevertheless concluded – in clear contravention of fact and law – that the lockout violated Section 8(a)(3).¹⁶⁷

The ALJ inferred the requisite animus and discriminatory intent from the other ULPs he deemed DRC to have committed, which he believed were “directly related to the strike or the lockout”: (i) discharging Brown; (ii) suspending Cook; (iii) permitting the Crossovers to return before the strikers following the lockout; (iv) denying vacation to certain returning strikers; and (v) failing to bargain with the Union over the procedure to recall strikers.¹⁶⁸ In so ruling, the ALJ erred, and his ruling should be reversed.¹⁶⁹

As demonstrated herein, DRC did not commit the violations of the Act found by the ALJ.¹⁷⁰ They, therefore, cannot supply the requisite animus and discriminatory intent. Further, even assuming DRC violated the Act in one or more of the ways relied on by the ALJ, he erred in inferring from such violations that DRC's decision to institute the lockout was unlawfully motivated.¹⁷¹

¹⁶⁷ ALJD p. 51, L. 34-35; p. 52, L. 1; p. 49, L. 42-44; p. 53, L. 36-40, n. 11, L. 41-49.

¹⁶⁸ The ALJ focused particularly on the purportedly unlawful preferential treatment given to the Crossovers and DRC's alleged failure to bargain with the Union concerning the method of the employees' return following the lockout, finding that these violations affected “all of the full-term strikers.” (ALJD p. 54, L. 24-26).

¹⁶⁹ ALJD p. 54, L. 4-33.

¹⁷⁰ DRC does not concede that its suspension of Cook violated 8(a)(3). In any event, such violation would not support an inference of animus.

¹⁷¹ The two cases cited by the ALJ in support of his finding of inferred animus merely set forth the general proposition that other found ULP's can be used to supply the requisite animus. In *Midwest Generation I*, 343 NLRB 69 (2004), which, as noted *supra*, was later reversed by the Seventh Circuit, the Board did not actually decide the issue, as there were no other ULP's alleged. In *Cent. Ill. Pub. Serv.*, 326 NLRB 928 (1998), the Board considered, but ultimately rejected, the argument that the other ULP's there supported an inference that a lockout was unlawfully motivated.

1. The lockout decision-maker had no involvement with the other ULP's.

The ALJ found that former Chief Administrative Officer Beth Powers (“Powers”) made the decision to institute the lockout.¹⁷² Powers, however, was not alleged or found to be involved in the decision-making process with respect to any of the other actions or omissions on which the ALJ relied to infer unlawful animus. The ALJ did not explain how the actions and omissions of others gave rise to a viable inference that Powers was motivated by unlawful animus when she decided to institute the lockout, and the causal connection needed to link them cannot simply be assumed and is completely wanting here.¹⁷³

2. The “found ULP’s” cannot be used to infer animus as they do not themselves require evidence of animus.

The ALJ cites to four ULP’s – the discharge of Brown; the suspension of Cook; the denial of vacation benefits to returning strikers; and the failure to bargain – as evidence that the lockout decision was motivated by animus even though these ULP’s did not turn on DRC’s motivation.¹⁷⁴ The ALJ did not and could not explain how such violations, which require no finding of unlawful motivation, could be used to infer that the lockout was itself unlawfully motivated:

1. Brown - The ALJ found the discharge violated 8(a)(3), but only because the conduct was not serious enough for Brown to forfeit the protections of the Act. The ALJ found DRC had the requisite “honest belief” that Brown engaged in strike misconduct and that the General Counsel, in turn, had failed to show Brown had not engaged in that misconduct. There was no evidence

¹⁷² ALJD p. 51, n. 155, L. 41-51.

¹⁷³ See *Sociedad Espanola de Auxilio Mutuo y Beneficencia de P.R.*, 342 NLRB 458, 463 (2004) (refusing to infer from respondent’s other ULP’s that its lockout was unlawfully motivated, in part because the decision-makers involved in the various violations were different); *Brown & Root Indus. Servs.*, 337 NLRB 619, 619 (2002) (finding that, even assuming one supervisor’s alleged statements expressed union animus, his statements “do not support an inference” that respondent’s alleged unlawful hiring decisions were “motivated by union animus” because he was not involved in those hiring decisions); *The New Otani Hotel & Garden*, 325 NLRB 928, 928 n. 1, 939 & 942 (1998)(affirming ALJ’s conclusion that respondent did not unlawfully discharge 3 employees because “the record as a whole does not warrant any inference of antiunion motivation for the discharges,” in part because individuals alleged to have made statements indicating animus were not involved in discharge decisions); *Upper Great Lakes Pilots*, 311 NLRB 131, 136 n. 33 (1993)(“The General Counsel’s repeated reliance on [a particular individual]’s statements as evidence of unlawful motivation is somewhat peculiar, given that [he]...was not present when the layoff decision was made...”).

¹⁷⁴ ALJD p. 54, L. 4-33.

that Brown's support of the Union or the strike was any greater than any other employee, and the General Counsel did not allege statements of animus connected to the discharge.

2. Cook – Cook was suspended for violating DRC's conduct policies months after the lockout by admittedly calling replacements "scabs." Whether this was protected activity was the only issue the ALJ deemed relevant -- not whether the discipline was motivated by animus.¹⁷⁵
3. Denial of vacation benefits – This turned on a determination of whether the benefits were "due and payable" at the time of denial. Finding a violation did not require, and there was no evidence of, a showing of animus related to the decision. Indeed, it is undisputed that the vast majority of returning strikers were immediately able to use their vacation benefits. Only the Late 2008 Returnees were deemed unqualified to immediately take vacation based on DRC's interpretation of its lawfully Implemented Offer.
4. Purported failure to bargain over return to work process – This was alleged exclusively as a violation of 8(a)(5), so DRC's motive was irrelevant. It is therefore difficult to understand – at least without any supporting explanation, which the ALJ elected not to provide – how this violation is indicative of DRC's motivation for the lockout.¹⁷⁶

None of these ULPs implicate animus, and the ALJ's erroneously inferred animus from them.

3. *The "found ULP's" had no "pervasive impact" on the bargaining unit.*

The Board consistently refuses to find a lockout to be motivated by animus based on other ULP's when such ULP's do not have a "pervasive impact" on the bargaining unit as a whole.¹⁷⁷

The found ULP's here affected, at most, a relatively small number of employees and had no such impact:

1. The Brown discharge and the Cook suspension, even taken together, affected only 2 of 417 unit employees. There is equally no evidence that either was a particularly strong or vocal Union advocate.

¹⁷⁵ ALJD p. 39, L. 5-6.

¹⁷⁶ This is especially true considering that the 8(a)(5) allegation was not a general refusal to bargain, surface bargaining, bad faith bargaining, or direct dealing allegation. It is these types of 8(a)(5) violations that have been used to support an inference of animus. *See NLRB v. Citizens Hotel Co.*, 326 F.2d 501 (5th Cir. 1964) ("But this refusal to bargain must here be characterized as a 'technical' one in the sense that although the action violates the law because of its consequences, it was not an instance of deliberate, purposeful refusal to engage in negotiation...").

¹⁷⁷ *See Sociedad Espanola*, 342 NLRB at 458-59 (affirming ALJ's findings of various ULP's, including unlawful discharge of one of "Union's strongest and most vocal advocates," but refusing to infer respondent's decision to lock out employees was unlawfully motivated); *Cent. Ill. Pub. Serv. Co.*, 326 NLRB at 936 ("we decline to infer from this violation [*i.e.*, respondent's decision to terminate workers' compensation supplemental benefits for 21 employees] that touched so few employees that the respondent's lockout of all the union employees was antiunion motivated").

2. Only 13 Crossovers abandoned the strike. Thus, at most, only 13 full-term strikers (or roughly 3% of the unit) were affected by the alleged preferential treatment given to the Crossovers following the lockout – a number woefully inadequate to support a finding of a “pervasive effect on the bargaining unit.”¹⁷⁸
3. The alleged denial of vacation benefits to returning strikers nearly a year after the lockout also did not have a pervasive impact. Only 23 of the 400+ strikers were denied vacation benefits because they failed to meet the eligibility requirements of the Implemented Offer. This minimal impact cannot be used to infer animus, particularly where, as here, strikers who returned before the Late 2008 Returnees – a far greater number – did receive their vacation benefits.

4. *The “found ULP’s” that were remote in time cannot supply the requisite animus.*

The ALJ also improperly relied on two ULP’s that are too remote in time to suggest that DRC’s lockout decision was motivated by animus. Indeed, they occurred well after the lockout.¹⁷⁹

1. Cook – It is unreasonable to infer that the lockout decision was unlawfully motivated from Cook’s suspension 5 months after DRC implemented the lockout (particularly in light of the fact that DRC reinstated him following the lockout).
2. The denial of vacation benefits to the Late 2008 Returnees took place even later - nearly a full year following the lockout. It is quite remarkable to find that this decision, occurring so remote in time after the lockout decision, supports a finding of animus, especially when many more earlier-recalled strikers were deemed eligible for and allowed to use their vacation benefits.

5. *Additional characteristics of the preferential treatment of Crossovers allegation make it improper to infer animus.*

Any inference of animus that could be drawn from the alleged preferential treatment of the Crossovers is further severely undermined by the fact that DRC locked out the Crossovers for the sole reason that it believed not locking out the Crossovers would itself be discriminatory. DRC’s decision to lock out the Crossovers completely undermines the ALJ’s finding that the alleged preferential treatment accorded those same employees less than a week later could support an inference the lockout was unlawfully motivated. If, as the ALJ concluded, DRC wanted to punish

¹⁷⁸ ALJD p. 54, L. 32-33.

¹⁷⁹ See *The New Otani Hotel & Garden*, 325 NLRB at 928 n. 2, 939 (concluding that “record as a whole,” including evidence of a statement exhibiting animus 8 months before the alleged unlawful discharges at issue, “does not warrant any inference of antiunion motivation for the discharges”); *Upper Great Lakes Pilots*, 311 NLRB at 136 (finding that “unlawful statements,” including statements 3 months before and 5 months after the layoffs at issue, “do not establish retaliatory motivation”).

the full-term strikers with a lockout, it certainly would have been more effective (and logical) to exclude the Crossovers from the lockout in the first instance.

6. *Additional factors pertaining to the failure to bargain over the return to work process make it improper to infer animus therefrom.*

By definition, DRC could not have failed to bargain with the Union about the return to work process until after the lockout ended. Thus, the ALJ's finding that the failure to bargain over the recall procedure is "related to" the lockout (and that he could, therefore, infer that the lockout was unlawfully motivated) is completely misguided.¹⁸⁰ DRC's alleged failure to bargain over the recall procedure was "related," if at all, to its decision to end the lockout, not its decision to implement the lockout in the first place. As such, DRC's alleged failure to bargain the recall process post-lockout says nothing about DRC's motivation in commencing the lockout, and the ALJ did not attempt to explain this flawed reasoning.¹⁸¹

Contrary to the ALJ's finding, DRC's purported failure to bargain also did not affect the full-term strikers - at least not in any truly adverse sense. DRC did not attempt to avoid its duty to reinstate strikers following the lockout. Rather, it began reinstating strikers within days of ending the lockout. In addition, there is no allegation that DRC's process was discriminatorily applied, nor is there any claim that reinstatement was unlawfully delayed or denied to any particular employee(s) or to the full-term strikers as a group.¹⁸²

¹⁸⁰ ALJD p. 54, L. 4-9.

¹⁸¹ See *C-E Natco/C-E Invalco*, 272 NLRB 502, 505-06 (1984)(finding employer violated 8(a)(5) by dealing directly with locked out employees over their return to work but reversing ALJ's finding that lockout itself was unlawful); *U.S. Pipe & Foundry Co.*, 180 NLRB 325, 328-29 (1969), *enf.*, 442 F.2d 742 (D.C. Cir. 1971)(finding prior unlawful unilateral changes did not materially affect bargaining during or after lockout and, thus, lockout was not rendered unlawful).

¹⁸² Indeed, the ALJ distinguished this case from those where the Board has found an employer's lockout to be unlawful because it only called back some employees, while refusing to reinstate others. (ALJD p. 51, L. 11-19).

7. *The overall circumstances militate against a finding of inferred animus.*

The ALJ's conclusion that DRC's alleged unlawful motivation for the lockout can be inferred from its other alleged ULP's is also belied by his other findings and the record evidence as a whole, specifically:

- The parties' have a longstanding bargaining relationship;
- There is no allegation that DRC engaged in bad faith bargaining for a new collective bargaining agreement – before, during or after the lockout¹⁸³ – and the parties ultimately entered into a new agreement;
- The parties met many times, and exchanged many proposals and counterproposals, during their negotiations for a new agreement - even conducting “early” negotiations several months before the previous agreement expired in an effort to reach agreement prior to the contract's expiration;
- DRC continued bargaining with the Union during the strike (with the aid of a mediator), as well as during the lockout;
- There is no allegation that the Union's strike was an unfair labor practice strike;
- There is no allegation that the parties were not at impasse when DRC implemented its offer following the lockout or that DRC's Implemented Offer was otherwise unlawful; and
- The ALJ found that (i) DRC instituted the lockout for the lawful purpose of placing pressure on the Union to accept DRC's proposals, (ii) DRC's implementation of the lockout was timely, (iii) DRC clearly communicated to the Union and the employees its lawful purpose for the lockout and how the lockout could be ended, and (iv) DRC's use of permanent replacements hired during the strike to continue operating during the lockout was lawful and did not demonstrate any discriminatory intent or a hostile motivation.

The foregoing places the instant case squarely within the Board's holding in *Central Illinois Public Service Co.*¹⁸⁴ There, the Board majority reversed the ALJ's finding that the employer's lockout violated Section 8(a)(3) and declined to infer an unlawful motive from the employer's other violations of the Act because of evidence strikingly similar to this case, stating:

¹⁸³ This fact alone distinguishes this case from those where the Board has found that an initially lawful lockout was converted to an unlawful lockout because the employer engaged in bad faith during the lockout itself and its lockout was therefore no longer in support of a lawful bargaining position.

¹⁸⁴ 326 NLRB 928 (1998), *enfd sub. nom. IBEW Local 702 v. NLRB*, 215 F.3d 11 (D.C. Cir. 2000).

“Evaluation of the foregoing circumstances demonstrates, therefore, that ‘not only is there absent in the record any independent evidence of improper motive, but the record contains positive evidence of the [Respondent’s] good faith.’”¹⁸⁵

In sum, the ALJ’s finding that DRC’s other alleged violations of the Act support an inference that its decision to institute an otherwise lawful lockout was unlawfully motivated is unsupported by logic or any meaningful analysis, is inconsistent with other findings he made and conclusions he reached, and is contrary to both the overwhelming weight of the evidence and well-established law.¹⁸⁶ Essentially, the ALJ found that the mere happenstance of other ULP’s committed by the same employer at the same location – no matter how serious or disconnected they are from the decision at issue, and notwithstanding whatever evidence there is to the contrary – supports an inference of unlawful motivation. There is no warrant for such a finding, and the ALJ plainly erred.

F. THE ALJ ERRED IN HIS RECOMMENDED REMEDY AND ORDER.

The ALJ concluded that DRC violated 8(a)(5) by “unilaterally implementing a procedure for recalling striking employees to work.”¹⁸⁷ As his recommended remedy for this violation, the ALJ stated that he would:

“defer to the compliance stage *the determination of a method of recall* which would have obviated the commission of the unfair labor practice, as this would have the result of restoring the status quo ante, to the extent feasible,

¹⁸⁵ 326 NLRB at 933-34 (emphasis added) (quoting *NLRB v. Brown Food Stores*, 380 U.S. 278, 290 (1965)).

¹⁸⁶ The ALJ’s error in concluding that the lockout was unlawfully motivated is highlighted by the inconsistency between his findings of fact and conclusion of law on this point. The ALJ concluded that Respondent violated Section 8(a)(3) “by locking out striking employees and those who had abandoned the strike ... but not locking out permanent replacement employees.” (ALJD p. 60, L. 36-39). Yet, in his decision, the ALJ expressly rejected this very contention. As the ALJ noted, “[t]he main thrust of the General Counsel’s argument here is that the very nature of the Respondent’s partial lockout, in which strikers and crossovers were locked out, but not permanent replacements, demonstrated the Respondent’s discriminatory intent.” (ALJD p. 52, L. 26-28). Rejecting this argument, the ALJ stated that “the Respondent’s continued usage of permanent replacements during the lockout did not impact the status of the strikers, [and] said usage did not imply hostile motivation any more than did the lockout itself, and is not persuasive evidence that the lockout was motivated by illegal purposes.” (ALJD p. 53, L. 37-40) (emphasis added).

¹⁸⁷ ALJD p. 61, L. 4-5.

as a setting for bargaining, and would provide *a basis for establishing the details of the recall...and the make whole remedy.*”¹⁸⁸

Further, the ALJ ordered that DRC “[m]ake whole, with interest, *all employees who would have been recalled from the 2007 lockout at an earlier date...but for the Respondent’s unilateral implementation of a recall procedure.*”¹⁸⁹ The ALJ also ordered that DRC:

“[o]ffer employees who have not been recalled from the 2007 lockout, full and immediate reinstatement to their former positions...should it be determined that they would have been recalled but for Company’s unilateral implementation of a recall procedure.”¹⁹⁰

Even assuming DRC did violate the law as found, the ALJ’s recommended Remedy and Order is inappropriate because 1) the case on which he relies to support his recommended Remedy and Order is inapposite, 2) the recommended Remedy and Order is contrary to law, and 3) it would not restore the *status quo ante*.

In support of his recommended Remedy and Order, the ALJ cites a single case – *Alaska Pulp Corp.*¹⁹¹ In the underlying ULP proceeding in *Alaska Pulp*, the Board concluded that the employer violated 8(a)(3) by instituting a striker recall procedure that was inherently destructive of employee rights.¹⁹² The Board, however, expressly declined to rule on whether the employer’s use of a merit-based recall system itself violated the Act, “as the Regional Director had previously dismissed similar charge allegations.”¹⁹³ The employer’s merit-based striker reinstatement process worked as follows:

“It ranked unreinstated strikers according to merit and placed them on a preferential hiring list. Thereafter, when a vacancy arose, the Respondent

¹⁸⁸ ALJD p. 61, L. 22-27 (emphasis added) (citing *Alaska Pulp Corp.*, 326 NLRB 522, 523 (1998)).

¹⁸⁹ ALJD p. 62, L. 42-45 (emphasis added).

¹⁹⁰ ALJD p. 61, L. 44-47.

¹⁹¹ 326 NLRB 522 (1998).

¹⁹² See 326 NLRB at 522 & n.5.

¹⁹³ *Id.*

filled the position by promoting the most senior replacement employee, nonstriker, or crossover employee occupying the position immediately below. Other employees within the department moved up in order of departmental seniority until an entry level opening was created. The entry level job was then offered to striker from the department with the highest merit ranking.”¹⁹⁴

Thus, the employer ignored the striking employees’ *Laidlaw* rights by relegating them to entry level positions, instead of reinstating them to jobs they previously held or their substantial equivalent.¹⁹⁵

At the compliance proceeding, the judge adopted a seniority-based recall method “to reconstruct the order in which economic strikers would have been reinstated pursuant to a lawful reinstatement plan” for purposes of determining the discriminatees’ backpay. The Board affirmed the judge, “but only for the reasons stated” in its decision.¹⁹⁶

DRC’s case is not at all similar to *Alaska Pulp*. *Alaska Pulp* involved an “inherently destructive” 8(a)(3) violation, not a unilateral implementation 8(a)(5) violation like the ALJ found here. In fact, there is no allegation or finding in this case that DRC applied its recall procedure discriminatorily to delay or to refuse reinstatement to any striking employee. Further, unlike in *Alaska Pulp*, there is no allegation or finding here that DRC ignored its striking employees’ *Laidlaw*

¹⁹⁴ *Id.*

¹⁹⁵ The Board’s holding in *Alaska Pulp* was reversed on appeal by the Ninth Circuit Court of Appeals. *See Sever v. NLRB*, 231 F.3d 1156, 1165-68 (9th Cir. 2000) (remanding with instructions to the Board to apply the employer’s merit-based system for compliance purposes, noting that “an employer is entitled to reinstate workers in any nondiscriminatory manner,” and finding that the Board abused its discretion by failing to follow existing precedent, speculating that the employer would have used seniority had it implemented a different process and ignoring its prior ruling in the underlying unfair labor practice case that the legality of the employer’s merit-based process was not at issue).

¹⁹⁶ *Alaska Pulp*, 326 NLRB at 523. The Board held that, in the circumstances of that case, “seniority is the most accurate method for determining the order in which strikers would have been reinstated pursuant to a lawful plan.” *Id.* It noted that the employer used seniority “during and after the strike to determine job priorities among nonstrikers, crossovers, and permanent replacements.” *Id.* Further, the Board found that the employer’s “merit rankings cannot reasonably be utilized because they were predicated on the unlawful assumption that strikers would be returning to entry level positions.” *Id.* In sum, the Board concluded that the employer’s system itself was rendered inoperative by virtue of its connection with the employer’s inherently destructive refusal to accord the striking employees their *Laidlaw* rights.

rights in any manner, let alone by relegating the returning strikers to entry level positions only.¹⁹⁷ Thus, *Alaska Pulp* provides no support for the ALJ's recommended Remedy and Order.

Not only is the ALJ's recommended Remedy and Order not supported by law he does cite, it constitutes an impermissible departure from well-established precedent. The ALJ's recommended Remedy and Order requires the Board to determine some method of recall other than the procedure implemented by DRC (despite the fact that the legality of the procedure itself has never been challenged). As the ALJ acknowledged, however, the method by which strikers are to be reinstated is a mandatory subject of bargaining. As a result, barring a binding past practice or agreement between the parties to the contrary, economic strikers have no right to recall using any particular method.¹⁹⁸

Nevertheless, the ALJ recommended that the Board itself determine "a method of recall" and establish "the details of the recall."¹⁹⁹ Stated simply, the ALJ has recommended that the Board determine and implement the method that it believes the parties would have, or should have, agreed to. The Board is prohibited from doing so.²⁰⁰

¹⁹⁷ The only similarity between *Alaska Pulp* and this case is that neither involved a claim that the merit-based recall system was itself unlawful, which was one of the key factors relied on by the Ninth Circuit in reversing the Board's decision in *Alaska Pulp*. See *Sever*, 231 F.3d at 1156, 1167 (holding that, in addition to ignoring the Board's existing precedent, "[t]he Board majority's substitution of seniority for merit...runs contrary to the Board's ruling in *Alaska Pulp I*" that the employer's institution of a merit-based recall system was not itself unlawful and could be used so long as it was applied in a nondiscriminatory manner, and noting that there was "no evidence in the record that the merit rankings were themselves discriminatory").

¹⁹⁸ See *Lone Star Indus.*, 279 NLRB 550, 551 (1986) ("Apart from obligations imposed by unilateral practice or through the collective-bargaining process, there is nothing in the Act itself or the Board's articulation of *Laidlaw* rights that establishes an individual economic striker's right to recall by seniority" or any other method, so long as the method used is nondiscriminatory, such as by "seniority, merit, age, or alphabetical order."); see also *Sever*, 231 F.3d at 1167, 1168 (finding that no law gives "the Board the right to select a recall order" and noting that, while "[i]t is one thing to figure out *who* were the victims of discrimination, it is quite another to choose the *order* of their reinstatement").

¹⁹⁹ ALJD p. 61, L. 23-25.

²⁰⁰ See *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108-09 (1970) (holding that the Board had no authority to remedy the employer's bad faith bargaining by ordering it to agree to a dues check-off clause because "allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based – private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract" and noting that while "[i]t may well be true...that the present remedial

Another aspect of the ALJ's recommended Remedy and Order similarly violates well-established legal principles. The ALJ ordered that DRC immediately recall unreinstated strikers to their former positions "should it be determined that they would have been recalled but for the Company's unilateral implementation of a recall procedure."²⁰¹ Not only does this portion of the ALJ's recommended Remedy and Order run afoul of *H.K. Porter* and *Lone Star Industries* (because it depends on the Board writing the parties' agreement on the recall procedure for them), it is also contrary *Mackay Radio, TWA* and *Laidlaw*.

Read together, these cases hold that economic strikers (like those here) only have reinstatement rights to their former or substantially equivalent positions if those positions are vacant, and positions held by permanent replacements and crossovers are not vacant. The ALJ's recommended Order, however, would require DRC to offer full and immediate reinstatement to any strikers who have not yet been recalled, but who would have been recalled had DRC not unilaterally implemented the recall procedure, without regard to whether or not the unreinstated strikers' former positions are vacant or whether their reinstatement will require DRC to displace a permanent replacement or crossover employee. This, too, is prohibited.

In any event, the ALJ's recommended Remedy and Order also would not restore the *status quo ante*. This is not a unilateral change case where DRC altered some prior agreement or practice and the Board can restore the *status quo* by ordering rescission of the implemented term and a return to the old one. Here, prior to DRC's alleged unlawful unilateral implementation of the recall procedure, the parties had no procedure at all for reinstating strikers. Thus, at the time of DRC's

powers of the Board are insufficiently broad to cope with important labor problems...it is the job of Congress, not the Board or the courts, to decide when and if it is necessary to allow governmental review of proposals for collective bargaining agreements and compulsory submission to one side's demands," a process which the Act currently "does not envision"); *Brede, Inc.*, 335 NLRB 71, 73 (2001) (rejecting a recommended order to remedy a Section 8(a)(5) violation because it "essentially forces" the employer "to accede" to the union's "bargaining demand," and "[i]t is well settled" that the Board may not compel agreement).

²⁰¹ALJD p. 62, L 47-49.

alleged violation, the *status quo* was that the parties were tasked with bargaining about a recall procedure – nothing more. Notwithstanding that fact, purportedly because doing so would “have the result of restoring the *status quo ante*,” the ALJ has recommended an order that would require the Board at compliance stage to determine other method of recall.²⁰² The ALJ’s recommended Remedy and Order would clearly not restore the *status quo ante* and is, therefore, void.²⁰³

V. CONCLUSION

Based on the record evidence in this case, the exceptions filed herewith, and for the reasons set forth above, the Respondent, Dresser-Rand Company, requests that the ALJ’s findings and conclusions be dismissed, DRC’s exceptions sustained, the Complaint lodged against it be dismissed in its entirety, and the ALJ’s Recommended Order be denied.

²⁰² ALJD p. 61, L. 24.

²⁰³ *See Brede, Inc.*, 335 NLRB at 73 (rejecting recommended order because it “does not restore the status quo ante,” in that it would result in a contractual arrangement never previously in place).

Dated: March 19, 2010

Respectfully submitted,

/s/ Arthur T. Carter

Arthur T. Carter
Texas State Bar No. 00792936
Samuel "Brett" Glass
Texas State Bar No. 24040975
John M. Farrell
Texas State Bar No. 24059735
Erin E. Shea
Texas State Bar No. 24070608
HAYNES AND BOONE, L.L.P.
2323 Victory Ave., Suite 700
Dallas, Texas 75219
(214) 651-5683
(214) 200-0393 (Fax)

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

This is to certify that the **RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION AND RECOMMENDED ORDER** in Case Nos. 3-CA-26543, 3-CA-26595, 3-CA-26711, and 3-CA-26943 has been filed electronically and that an original and eight copies of the Motion have been sent by certified mail, return receipt requested, to the party listed below on this 19th day of March, 2010:

Lester A. Heltzer, Executive Secretary
NLRB Office of the Executive Secretary
1099 14th Street, N.W.
Room 11602
Washington, D.C. 20570

Further, this same day, a copy of Respondent's Motion has been sent by email and certified mail to the following:

Hon. Mark D. Rubin
Administrative Law Judge
Chemung County Legislative Chambers
Hazlett Building 510
203 Lake Street
Elmira, New York 14901
Mark.Rubin@nrb.gov

Steve Coates, President
IUE-CWA Local 313
225 Steuben Street
Painted Post, NY 14870
unionone313@yahoo.com

Ron Scott, Esq.
Nicole Roberts, Esq.
Counsel for the General Counsel
National Labor Relations Board
Region Three
Niagara Center Building, Suite 630
130 South Elmwood Avenue
Buffalo, NY 14202
Ron.Scott@nrb.gov

Ronald Meisburg, General Counsel
NLRB Office of the General Counsel
1099 14th Street, N.W.
Washington, D.C. 20570

Thomas M. Murray, Esq.
Kennedy, Jennik & Murray, P.C.
113 University Place
New York, NY 10003
tmurray@kjmlabor.com

/s/ Arthur T. Carter
Arthur T. Carter