

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

DRESSER-RAND COMPANY

and

**Cases 3-CA-26543
3-CA-26595
3-CA-26711
3-CA-26943**

IUE-CWA, AFL-CIO, LOCAL 313

**GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT'S EXCEPTIONS TO
THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

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I

STATEMENT OF THE CASE

The procedural history and posture of these cases is set forth in both the ALJ's Decision and Respondent's brief in support of its exceptions.¹

Pursuant to Section 102.46 (d) of the Board's Rules and Regulations, the General Counsel submits this Answering Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge in the above-captioned cases.

II

RESPONDENT'S EXCEPTIONS

A. The Discharge of Kelvin Brown Violated Section 8(a)(1) and (3).

Exceptions 1(b), 3, 17-25; Respondent's brief at 34-38.

There is no disagreement that the ALJ followed the correct analytical framework in deciding the issue of Brown's discharge, and one other discharge for alleged misconduct away from the picket line.² Respondent's disagreement is with the result reached by the ALJ respecting Brown.

The discharge of a striker is presumptively unlawful. Ornamental Iron Work Co., 295 NLRB 473, 479 (1989). However, employees who engage in serious acts of misconduct may be denied reinstatement. The standard for deciding picket line misconduct cases has been settled for over 25 years. In Clear Pine Mouldings, 268 NLRB 1044 (1984), the Board adopted the test enunciated by the Third Circuit in NLRB v. W.C. McQuaide, Inc., 552 F.2d 519, 527 (3rd Cir. 1977), for determining whether striker misconduct justifies an employer's refusal to reinstate. The test is: "whether the misconduct is such that, under the circumstances existing, it may

¹ Respondent's exceptions and supporting brief were filed on March 19, 2010.

² The ALJ recommended dismissal of the allegation that employee Allan Owlett's discharge violated the Act. The General Counsel does not except to the Judge's findings and conclusions respecting Owlett.

reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act.” 268 NLRB at 1046, citing McQuaide, *supra* at 527.³

The allocation of the burdens in strike misconduct cases is set forth in Avery Heights, 343 NLRB 1301 (2004), vacated and remanded on other grounds, 448 F. 3d 189 (2d Cir. 2006), on remand 350 NLRB 214 (2007), *enfd* 303 Fed. Appx. 998 (2d Cir. 2008):

Initially, the General Counsel must show that the employee in question was a striker and the employer took action against the employee for conduct related to the strike. If the General Counsel makes this showing, the burden shifts to the employer to show that it honestly believed the employee engaged in the conduct for which he or she was discharged. If the employer does so, the burden shifts back to the General Counsel to establish that the employee did not in fact engage in the alleged misconduct...Even if the misconduct did in fact occur, the Act will still have been violated if the conduct at issue was not sufficiently egregious...to lose the protection of the Act.

343 NLRB at 1302, citing: Detroit Newspapers, 340 NLRB 1019, 1024 (2003); Siemens Energy & Automation, Inc., 328 NLRB 1175 (1999). The Clear Pine standard is objective: it does not call for an inquiry into whether any particular employee was actually coerced or intimidated. Mohawk Liqueur Co., 300 NLRB 1075 (1990).

To meet its initial burden, an employer must do more than merely assert an honest belief, but need not establish the misconduct to a certainty. An employer must adduce specific record evidence of misconduct. General Telephone Co. of Michigan, 251 NLRB 737, 739 (1980); Avery Heights, *supra* at 1304, fn. 13. Such evidence may include hearsay reports from nonstriking employees, police, security guards and others. Clougherty Packing Co., 292 NLRB 1139, 1142 (1989); Detroit Newspapers, *supra* at 1025.

³ The Board in Clear Pine overruled its previous decisions that called for striker misconduct to be balanced against the seriousness of the employer’s unfair labor practices. It also abandoned its earlier holdings that verbal threats, unaccompanied by acts of violence, are never enough to justify a discharge. Clear Pine, *supra*, at 1045-1046, 1047.

Furthermore, such a belief must be based on information available to the employer at the time the disciplinary decision was made. Giddings & Lewis, 240 NLRB 441, 448 (1979). An employer's honest belief is unavailing where it is shown that the employee did not engage in the misconduct charged. Eller Media Co., 326 NLRB 1287, 1292 (1998).

Even where an employee is found to have engaged in picket line misconduct, there will be a violation if the General Counsel establishes that the alleged misconduct was not so "flagrant or egregious" as to warrant discharge or denial of reinstatement. Medite of New Mexico, 314 NLRB 1145 (1994); National Gypsum Co., 302 NLRB 534, 539-40 (1991); Ornamental Iron Work Co., 295 NLRB 473, 478 (1989); Desert Inn Country Club & Spa, 275 NLRB 790, 795 (1985); Newport News Shipbuilding & Drydock, 265 NLRB 716 (1982).

Respondent decided to discharge Brown on December 1, 2007.⁴ (Decision at 33, fn. 126) The information available to Respondent at that time consisted of security officer Kevin Harrington's incident report dated Sept. 20, (R 65) and a conversation between Respondent's then-Human Resources Manager Daniel Meisner and Painted Post Police Chief Robert Halm, wherein Chief Halm identified Brown as the individual involved.⁵ (Tr. 1207).

The author of the incident report, Kevin Harrington, stated that an unidentified "white male" jumped on a vehicle preventing it from traveling into the facility. Harrington refers to himself as the "videographer" and there is reference to a numbered video tape.⁶ (R 65). Meisner did not view the videotape before deciding that Brown was ineligible for reinstatement, and Respondent did not rely on the tape in making its decision regarding Brown. (Tr. 1241). The video is in evidence as GC 49.

⁴ All dates are in 2007 unless otherwise noted.

⁵ Respondent did not rely on the testimony in Brown's misdemeanor trial, or on the verdict, because the trial and the verdict occurred on December 10, eight days after the decision to discharge Brown was made. (R 16 at p. 1).

⁶ Harrington did not testify. Meisner did not testify as to whether he spoke to Harrington about the incident. R 65, the incident report, was admitted in evidence, but not for the truth of the matters asserted therein. (Tr. 1208).

The ALJ found that Respondent could have held an honest belief that Brown engaged in the conduct for which he was discharged, and the General Counsel does not except to this finding. The Judge disagreed with the General Counsel’s argument that Brown did not in fact engage in misconduct, and no exception is taken to that finding. Respondent, however, excepts to the ALJ’s finding that the conduct Brown did engage in was not sufficiently serious to warrant his discharge. (Decision at 32, line 31 to 33, line 26). The ALJ’s findings and conclusions as to Brown are correct should be affirmed.

The most that Brown did, according to the ALJ, was that he “either briefly stepped in front of a van, or lay or leaned against a van’s bumper for a moment.”⁷ (Decision at 33, lines 1-3). Respondent makes a two-pronged argument that the conduct found by the ALJ justified Brown’s discharge: First, Brown jeopardized his own safety and that of others; and, second, his conduct inflamed other picketers and posed a risk of violence. (Brief at 36, 37). Respondent then attempts to analogize the instant case to CalMat Company, 326 NLRB 130 (1998), and Precision Concrete, 337 NLRB 211 (2001).⁸ Those cases, like the instant case, involved pickets and moving vehicles, but that is about where the similarity ends: the conduct of the discharged strikers in those cases was far more egregious than “the worst that the evidence demonstrates with respect to Brown.” (Decision at 33, lines 1-2).

The discharged striker in CalMat, Andrews, continued to walk in front of a tractor-trailer exiting the employer’s facility though other pickets had obeyed the instructions of security personnel to clear a path for the truck. Andrews claimed to have been grazed by the truck’s bumper, and because he was unable to jump out of the way, he turned his back to lean against the grill, shuffling his feet forward to keep from falling under the truck, which was moving at no

⁷ Respondent, at page 36, fn. 155 of its Brief mischaracterizes this finding in footnote 155. The ALJ did not find that Brown “merely ‘leaned’ against the vehicle, as opposed to laying on the vehicle.” The ALJ credited the account of Painted Post Police Officer Michael Slowinski, whom he found to be an unbiased witness. Nevertheless, he correctly found that Brown’s conduct did not warrant discharge.

⁸ Respondent asserts that the instant case is “more similar to CalMat than any authority cited by the ALJ.”

more than 3 miles per hour.⁹ A security guard (coincidentally, named Harrington) pulled Andrews from the truck's path, but Andrews (whose asserted belief that the driver had hit him intentionally was also discredited) grabbed the door handle on the driver's side with one hand, pulled himself up on the truck's running board and opened the door in the process. With his picket sign in the other hand, Andrews began hitting the driver's window.

Harrington pulled Andrews from the truck and with Andrews came the handle to the driver's door. The truck continued across an intersection. So did Andrews, who again jumped on the running board, this time grabbing the side mirror. Andrews was pulled from the truck a second time. 326 NLRB at 131.

In attempting to shoehorn the instant case into CalMat, Respondent relies heavily on the verdict of the Town Court, which is quoted in part by the ALJ at page 32, footnote 119 of the Decision, and at page 36 of Respondent's brief.¹⁰ The Town Justice was troubled by "the fact that (Brown) recklessly created a risk for (his) own personal well-being ..." Respondent ties this together with the statement of the administrative law judge¹¹ in CalMat that "[d]eliberately putting one's self in the way of physical harm and simultaneously jeopardizing *those assigned to monitor the safety of all individuals in and around the picket line* is itself clearly a justifiable ground for discharge."¹² One is of course hard pressed to argue with that general proposition. But contrary to Respondent, the instant case is markedly different from CalMat.

As the ALJ noted, the testimony of Officer Slowinski, though credible, was at variance with the report of the non-testifying security guard. It was that report, and not the testimony of

⁹ The administrative law judge discredited Andrews' claims that he had been hit by the truck, and that he was unable to get out of the way because his knee "numbed up," especially in view of Andrews' subsequent histrionics.

¹⁰ Respondent cites R 14, the transcript of the Town Court proceeding. R 14 is not in evidence as the ALJ rejected the exhibit. (Tr. 638). A portion of the transcript is in evidence as R 16, but not the cited passage. The ALJ quoted the very same passage, though it is not part of the record.

¹¹ Not the Board, as is stated at page 36, fn. 157 of Respondent's brief.

¹² Emphasis added. Respondent paraphrased this passage slightly in fn 157 (Brief at 36). The italicized reference was to "the security guards (who were) trying to save (Andrews) from serious injury," a circumstance not present in this case. 326 NLRB at 135.

the officer or the Town Court's verdict that Respondent relied upon to discharge Brown.¹³ This is not to say that the Judge ignored the Town Court proceeding. Correctly, he found it not to be controlling in this matter.¹⁴ But if the "worst that the evidence demonstrates with respect to Brown" is that he briefly stepped in front of, or momentarily lay or leaned against the van, then Brown's conduct can not be equated with, or even fairly analogized to, that of Andrews in CalMat.

Respondent cites Precision Concrete, 337 NLRB 211 (2001), in support of its argument that Brown's conduct "inflamed his fellow picketers and posed a risk of violence." Again, the circumstances surrounding the discharge of employee Corona in Precision Concrete simply do not compel a finding that Brown "inflamed" others and surely do not compel a finding that he was lawfully discharged.

In Precision, the driver of a truck attempted to exit the employer's facility by "inch(ing) his way" through a picket line. As he did so, the truck "touched" Corona, at which he began to "scream and yell, pretending to be injured and causing other pickets to be incited against (the driver)." 337 NLRB at 228. Respondent asserts that herein, "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 other picketers and posing a risk that they would retaliate against the van's driver, the van occupants, or the police officer." (Brief at 37). Respondent paints a picture of a veritable riot, narrowly averted.

Just where in the above-quoted passage Brown's purported words end and Respondent's characterizations begin is not self-evident, but it is safe to rely on the very portion of the transcript that Respondent cites. Officer Slowinski's testimony was that *after* Brown got in the

¹³ Decision at 32, lines 31-33. The security guard's report was admitted for the limited purpose of showing that Respondent had an honest belief that Brown engaged in misconduct, but not for the truth of the matters asserted in the report.

¹⁴ Newport News Shipbuilding, 265 NLRB 716 (1982), cited at page 32, lines 35-37 of the Decision.

police car, with the other picketers loudly protesting that Brown had done nothing, Officer Slowinski:

...finally had to roll the windows up so I could actually speak to (Brown). When I finally got a chance to speak with him I told him what he did and he said he got hit by the car. I told him he didn't; I watched it happen. That's pretty much it.

(Tr. 663-665).

If the other pickets were "inflamed" against the Officer, it was not because of anything Brown said.¹⁵ Rather, the pickets believed, rightly or wrongly, that the Officer had no reason to put Brown in the patrol car, and they expressed that point of view. There is no evidence that the pickets touched the police car, that they prevented the car from leaving the scene, or that they made any statements or gestures that could have been perceived as threatening to the Officer.¹⁶

As for the van, its driver and its occupants, there is no evidence that they were detained at the point of the incident. The record evidence is that the van involved and others continued into the facility without further incident, while the pickets' undivided attention was given to Officer Slowinski and Brown. (Tr. 560-561, 644; GC 49).

Unlike Corona, the employee in Precision Concrete, Brown did not "scream and yell." And there is more to Precision Concrete than finds its way into Respondent's brief. In Precision, there had been antecedent acts of violence that made it far more likely that Corona's conduct would inflame his fellow pickets toward the driver of the truck (two strikers who had crossed the picket line were pulled out of vehicles in separate incidents). Corona's conduct also appeared to have violated a state court injunction. 337 NLRB at 228-229. Thus, the situation in Precision

¹⁵ With the windows of the police car rolled up, and the cacophony going on outside, it is hard to imagine that any of the pickets heard Brown say to Officer Slowinski that the car hit him. More to the point, there is no evidence that they did.

¹⁶ Officer Slowinski did not call in additional patrol cars, the County Sheriff, or the State Police. He rolled up the windows.

was considerably more charged, and Corona's theatrics were far more likely to inflame others than Brown's claim to the Officer that he had been hit.¹⁷

The Board is less likely to find employee misconduct egregious enough to justify discharge where the strike as a whole is not marred with instances of violence. Briar Crest Nursing Home, 333 NLRB 935, 938 (2001). The record evidence does not show any instances of violence toward nonstrikers, or anyone.¹⁸ Respondent faults the ALJ for "erroneously stat(ing)" that "there is no evidence of other incidents involving picket line misconduct," and cites the state court injunction as evidence to the contrary. (Brief at 38, fn 163). When the footnote following this passage (fn 125, Decision at 33) is read, however, it becomes clear that the ALJ meant that there were no other allegations in the complaint that employees were unlawfully discharged for picket line misconduct. The ALJ was clearly aware of the injunction proceeding.¹⁹

Finally, Respondent mischaracterizes the Judge's determination as to Brown in asserting that the ALJ "held that the determining factor was Brown's failure to brandish weapons or issue threats." Brief at 38, fn 166. This is not a fair reading of the Decision. The ALJ, in contrasting the instant case from others, simply observed that there was no evidence that Brown had engaged in such conduct. Decision at 33, lines 19-26. It was part of his consideration of all the circumstances, not the "determining factor."

The Judge's analysis and conclusions regarding Brown's discharge were thorough and well-reasoned. They should be affirmed.

¹⁷ Respondent points out, correctly, that a state court injunction was obtained by Respondent. However, unlike Corona, Brown did not violate the court's order because it issued on October 2, almost two weeks later. (R 3) The September 20 incident involving Brown is not mentioned specifically in the order granting the injunction, though several other instances of alleged picket line misconduct are discussed in detail (including that of Allan Owlett which, the ALJ herein concluded, justified his discharge).

¹⁸ Save for the incident involving employee Allan Owlett, away from the picket line.

¹⁹ Decision at 22, fn 80.

B. Respondent's Preferential Treatment Of Crossovers At The End Of The Lockout Violated Section 8(a)(1) and (3).

Exceptions 1(e), 3, 11, 43, 44, 46-50; Respondent's brief at 5-16.

On the afternoon of November 29, several hours after Respondent ended the lockout and implemented its final offer, representatives of the Union and Respondent held a conference call. During the conference call, the Union made clear that its unconditional return to work offer of November 19 remained in effect, and the parties discussed the process of returning employees to work. (Tr. 181-186, 325-327: GC 15).

However, even as the Union and Respondent were conferencing by telephone -- and before the conference call began -- crossover employees were returning to work. The record shows, and Respondent does not dispute, that 12 crossover employees returned to work on November 29 and a thirteenth returned on November 30. (JX 4)²⁰ It is also undisputed that the crossovers' names do not appear on the preferential hiring list created by Respondent several days later, and the recall process implemented by Respondent was never applied to them. (Tr. 200-204; GC 17, attachment [preferential hiring list]; GC 21, attachment).²¹

It is well settled that upon the conclusion of a strike, all former strikers, including those who declare their availability while the strike is in progress, (the crossovers herein, for example), are equally entitled to be reinstated to their prestrike jobs or to substantially equivalent jobs as openings occur. Peerless Pump Co., 345 NLRB 371, 376 (2005). Respondent did not accept the Union's November 19 unconditional offer. Instead, it locked out striking employees and the crossovers. In finding that Respondent's preference for the crossovers in recalling employees after the lockout violated the Act, the ALJ found Peerless Pump to be "directly analogous" to the

²⁰ JX 4 shows the times that the crossover employees swiped in and out on November 30 and December 1. It was stipulated that the 2008 date on the document is in error and that it should read "2007." (Tr. 135-137).

²¹ The attachment to GC 21 is a list of Unit employees working in the plant as of January 4, 2008, and their return to work dates. The list was provided to the Union by Respondent, pursuant to the Union's request. The names of all 13 crossovers appear on this list, and the return to work date for each is November 29 (except employee Lyon, who returned to work on November 30).

instant case. (Decision at 55, lines 37-38). Respondent argues that Peerless Pump is inapplicable to this case.

In Peerless Pump, the employer, during an ongoing strike, created a preferential hiring list for employees who wished to leave the strike and return to work. Interested employees could sign the list, and await recall if there was no immediate opening. Some striking employees signed the list and returned to work during the strike. The employer continued its operation during the strike with what eventually became a full complement consisting of replacement employees and employees who had abandoned the strike. When the strike was over, the employer invited employees who remained on strike until the end to sign the list, by a date certain. Some did. Even after the union's unconditional offer to return to work, the employer continued to give effect to the list it had created during the strike by simply adding to it the names of those who signed the list after the strike was over, and then adding the names of those who never signed it. The result was a three-tiered list which gave first preference in reinstatement to employees who had signed the list before the strike ended, second preference to those who signed the list after the strike ended, and third preference to those who never signed the list.

The Board found that the employer gave an “unwarranted advantage to employees who had abandoned the strike.”

...(U)nder Laidlaw,...once a strike ends, all unreinstated strikers are entitled to be considered for recall on a nondiscriminatory basis, without regard to their previous relative levels of commitment to the strike...(W)e find, in agreement with the judge, that the Respondent's reinstatement preference for crossover employees following the conclusion of the strike violated Section 8(a)(3) and (1) of the Act.

345 NLRB at 376.

Respondent stresses that Peerless Pump involved recall from a strike, not recall from a lockout after a strike. (Brief at 5). The ALJ was well aware of this fact, but he also recognized that the locked out employees had Laidlaw rights, and there is no reason to apply Laidlaw or Section 8(a)(3) any differently in a lockout context. (Decision at 55, fn 160)

In arguing that Peerless Pump has no application to this case, Respondent distinguishes the instant case from Peerless on the basis that Peerless involved preferential treatment of “previously reinstated crossovers,” while the instant case involves “previously reinstated crossovers.”²² It is a distinction without a difference. As the ALJ correctly recognized, once Respondent locked out the crossovers, they stood in the same shoes as the full-term strikers. At the end of the lockout, they were entitled to be treated equally with the strikers, but not to be treated better than them.

Contrary to Respondent, (Brief at 7-8), the ALJ’s analysis and conclusions are not in conflict with the Supreme Court’s holding in TWA v. Independent Federation of Flight Attendants, 489 U.S. 426 (1989). In TWA, the Court held that crossover employees are akin to permanent replacement employees and therefore the crossovers’ positions were no more “available” to former strikers than were the permanent replacements’ positions. The airline was not required to displace the crossovers in favor of full-term strikers, and its refusal of the union’s demand that it do so did not violate the Railway Labor Act. The ALJ’s Decision does not “displace” the 13 crossovers; Respondent displaced them when it locked them out. Unlike the crossovers in TWA, the crossovers herein did not, on November 29, 2007, stand in the same shoes as the permanent replacements who were not locked out; they stood in the same shoes as

²² In Peerless, the Board used the term “unreinstated crossover” to describe reinstated employees who had signed the employer’s preferential hiring list during the strike, thus indicating their availability. As used herein, the term “crossover” denotes those employees who abandoned the strike and returned to work, and who were later locked out along with striking employees.

the full-term strikers who were. Accordingly, the crossovers were entitled to be treated equally with the other locked out employees, but not to be treated better than them.

Nor does Aqua-Chem, Inc., 288 NLRB 1108 (1988), control here. Respondent asserts that “[t]he 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.”²³ (Brief at 8-9). The lockout of the crossovers did not trigger anything. The *end of the lockout* triggered the Laidlaw rights of both the crossovers and the full-term strikers. Under Peerless Pump, *supra*, both groups of employees were equally entitled to reinstatement when the lockout ended.

This case is simply unlike Aqua-Chem, or Bancroft Cap Co., 245 NLRB 547 (1979), cited by Respondent at page 10, footnote 40 of its brief. In Bancroft Cap, the Board held that the employer did not violate the Act when, after a brief layoff that was due to a material shortage, the employer recalled crossovers and permanent replacements, instead of more senior, unreinstated strikers. The Board found the recall of the laid-off crossovers and permanent replacements lawful because the crossovers and permanent replacements had a reasonable expectation of recall, once the materials in short supply became available. Thus, their temporary absence from the plant did not create any “vacancies” that had to be offered to strikers.²⁴ In the instant case, the crossovers’ six-day absence was not due to a material shortage, or any other reason that would have created a reasonable expectation of recall. It was due to Respondent’s decision to lock them out, along with the full-term strikers. Once they were locked out, the crossovers had no greater expectation of recall than the strikers.

²³ Respondent, at pages 8-9 of its brief, and in footnote 35 on page 9 cites, variously, passages from the General Counsel’s brief to the ALJ, the ALJ’s Decision, and the testimony of the Union’s attorney, Thomas Murray, to incorrectly suggest that the Judge and the other parties agree with Respondent that this case is properly analyzed under Aqua-Chem, rather than Peerless Pump. Each of these passages are taken quite out of context, and can not be fairly read the way that Respondent suggests. Moreover, Respondent (again) cites material that is not in the record: the General Counsel’s post-trial brief.

²⁴ The General Counsel has never taken the position that the lockout of the crossovers created “vacancies” that Respondent was required to fill with striking employees.

Bud Antle, Inc., 347 NLRB 87 (2006) is also inapposite here. Bud Antle, cited at page 9, fn 35 of Respondent's Brief, holds that: (1) locked out employees may not be permanently replaced, and an employer may use only temporary replacements, and (2) once a lockout ends, temporarily replaced locked out employees are entitled to reinstatement. The General Counsel does not disagree with either of those propositions. However, the crossovers in this case were not "temporarily replaced." Certainly, there is no evidence in the record that they were.²⁵

Respondent argues at length (Brief at 10-16) that it was legally obligated to lock out the crossovers. The General Counsel's position has been made clear: there is no allegation that locking out the crossovers was unlawful.²⁶ Whether it was lawful or unlawful to lock out the crossovers, or whether Respondent was legally obligated to do so (questions that are not before the Board) is irrelevant to the matter of whether Respondent unlawfully discriminated by affording preferential treatment to the crossovers vis-a-vis the full-term strikers.

Respondent gave the crossovers the same kind of "unwarranted advantage" as did the employer in Peerless Pump. In so doing, Respondent violated Section 8(a)(1) and (3). The ALJ Decision should be affirmed.

C. Respondent's Failure To Bargain Concerning The Recall Of Locked-Out Employees Violated Section 8(a)(1) and (5).

Exceptions 2(b), 3, 9-15, 48, 52-68; Respondent's brief at 16 – 27.

By fax letter on November 29, Respondent's lead negotiator, attorney Louis DiLorenzo, advised the Union and its counsel, Thomas Murray, that the lockout would end at noon that day. In the same letter, Respondent declared a bargaining impasse, and its intention to implement the

²⁵ One of Respondent's justifications for keeping the permanent replacements during the lockout was the high cost of temporary replacements, and the rate of turnover among them.

²⁶ It is and has been the General Counsel's position that the partial lockout was not unlawful because of who Respondent locked out; it is who Respondent did *not* lock out (the permanent replacements) that is relevant. The fact that the crossovers were locked out is only relevant because it tends to undermine some of Respondent's asserted business justifications for not locking the permanent replacements out. (See the General Counsel's cross-exception and supporting brief).

terms of its last offer. The letter stated that: “Any or all Union employees are free to return to work. Stated another way, any employee offering to unconditionally return to work under the terms of the implemented offer should notify the Company as soon as possible.” (GC 6).

Respondent also mass-mailed a letter that day to locked-out employees, announcing the end of the lockout. (GC 11(a)-(c))

In response, Murray faxed a letter to Respondent, stating that the Union was directing its members to report to the plant at 7:00 a.m. on November 30, regardless of shift. (GC 7) Murray testified that the Union so directed its members because it was “a little suspicious” of what appeared to be Respondent’s inviting employees to make individual offers to return to work:

“...I didn’t want to be in a position where they were going to say, ‘Oh, so and so didn’t make an individual offer.’”

(Tr. 1367).

DiLorenzo wrote back to Murray later the same day, and asserted that it was “unclear” whether the Union was unconditionally offering to return to work under the implemented offer. DiLorenzo stated that if that was the case, a manpower assessment would need to be conducted, so that a “projected return to work schedule for Union employees” could be created. Because he had been unable to reach Murray directly, DiLorenzo wrote, Respondent’s managers Doug Rich, Dan Meisner and Kevin Doane would be speaking with Union president Steve Coates that afternoon. (GC 8).

Meisner contacted Coates, who confirmed that the Union was available by telephone. (Tr. 1186). At approximately 4:40 p.m., there was a conference call, with Rich, Doane and Meisner on the line for Respondent. Coates and three other Union officials, Glenn Painter, Mickey Keefer and Jeff Ingersoll participated for the Union. (Tr. 181-186, 325-327; GC 15).

The conference call began with the Union clarifying that its November 19 unconditional offer to return to work remained in effect. (Tr. 182-183). The discussion then turned to the

subject of the return to work. According to Coates, Meisner said that Respondent would do a “manpower assessment to decide how many people...would be brought back.” Coates told Meisner that Respondent “needed to negotiate a process with us but that everybody should be recalled by seniority.” According to Coates, Painter also stated that Respondent needed to bargain the return to work process.²⁷ (Tr. 183). In Meisner’s direct testimony, he did not mention the demands for bargaining, (Tr. 1187-1190), but admitted on cross-examination that “Glenn did state that at some point in that call.” (Tr. 1227). At or near the end of the conference call, Coates told Respondent that the Union would “not have everyone show up if that is what you want.” (GC 15, p.2).

At approximately 7:35 p.m. on November 29, Murray faxed a letter to DiLorenzo. Murray wrote that he had spoken with Coates after the conference call, reiterated the Union’s position that its November 19 return to work offer “was and remains unconditional,” and stated that all striking employees wished to return to work and were immediately available except for those on disability or other leaves of absence. (GC 9).

Murray’s letter and DiLorenzo’s earlier letter of November 29 (GC 8) evidently crossed, because at some point on the 29th, DiLorenzo sent Murray an e-mail message referencing his attempts to reach Murray earlier in the day, and asking for a list of employees who wished to return to work. Murray replied at 10:57 p.m., stating that he had sent a letter to DiLorenzo earlier that day, and that it was his understanding that Coates had already provided Meisner with such a list. (GC 16, p.1).

Early on Friday, November 30, DiLorenzo e-mailed Murray, acknowledging receipt of his letter and the list from Coates. DiLorenzo wrote that he hoped to communicate some detailed

²⁷ Painter recalled that Coates demanded bargaining but did not testify that he himself reiterated the bargaining demand (Tr. 327). However, according to Respondent’s notes of the conference call, Painter stated, “That process needs to be negotiated.” (GC 15, p. 2).

information to Murray later that day, and asked whether Murray would be in his office. Murray replied that he would be out of his office until after 2:00 p.m., but could receive e-mail messages on his BlackBerry. (GC 16, p.1).

At approximately 5:40 p.m. on November 30, DiLorenzo faxed a letter to Murray, with copies to Coates and Meisner.²⁸ DiLorenzo wrote that Respondent had “reached some preliminary decisions” (about the recall process) and he wished to inform Murray of those decisions. In part, DiLorenzo wrote that:

“...(T)he Company is developing a preferential hiring list to be used to fill vacancies. The list will rank employees through a mixture of performance and seniority...”

“...(T)he Company plans to call approximately 150 employees Sunday and Monday, so that they may report to work on Tuesday and Wednesday...”

“...By 5:00 p.m. tomorrow, Saturday, we will forward the list and a description of the process. Please let me know the best way to get these documents to you.”

(GC 14).

Murray sent the following e-mail message to DiLorenzo at 6:25 p.m. on November 30:

“Lou, please send me any documents by e-mail and by fax. I will be away for the weekend, but will check my e-mail.”

(GC 16, p. 2).

On Saturday, December 1, at 6:27 p.m., DiLorenzo e-mailed Murray to inform him that Respondent was “still working on the process document and the preferential list,” and anticipated sending the documents to Murray and to the Union hall by 11:00 a.m. on Sunday, December 2. (GC 16, p. 2).

The process document and the preferential list were faxed and e-mailed to Murray and to the Union hall at approximately 11:11 a.m. on Sunday, December 2. Under Respondent’s

²⁸ The parties stipulated as to the time of the fax transmission. (Tr. 271).

process, employees were first ranked from highest to lowest, from a high of 4 to a low of zero, according to the performance rating they received in connection with their 2007 evaluations. Then, employees having the same performance rating were again ranked in order of plant seniority. Employees who had not completed their probationary period in 2007 received their probationary period performance rating. Employees who did not have a rating in 2007 (those who were out on workers' compensation or disability, for example) would receive a rating "if and when they become eligible to return to work." (GC 17, attachment, "Process for Returning Bargaining Unit Employees to Work – Phase 1," p. 1).

Neither the expired collective-bargaining agreement nor Respondent's implemented offer utilize performance ratings as a criterion for layoff or recall from layoff. (Tr. 197-198; JX 1, pp. 16-19, JX 2, pp. 10-13). Coates testified without contradiction that the use of performance ratings as a criterion for recalling employees was not discussed with the Union in the November 29 conference call, or at any time before December 2, when the process document and the list were sent to the Union.²⁹ (Tr. 197, 217).

Coates testified that, to the best of his recollection, he saw the process document and the list for the first time on Monday, December 3. (Tr. 200). By that time, Respondent had already begun to recall employees. (GC 18) Murray received a letter from DiLorenzo on his BlackBerry while traveling back to New York City from upstate New York late on Sunday, December 2. He was able to read DiLorenzo's letter, but was unable to open the attachments (the process document and the preferential hiring list) until he got to his office on Monday, December 3. (Tr. 1372).

²⁹ Except for DiLorenzo's letter of November 30, which refers to the procedure Respondent would use only in preliminary, general terms. (GC 14).

There was, as the ALJ found, a clear demand by the Union for bargaining during the November 29 conference call.³⁰ (Decision at 57, lines 10-11). Respondent argues in the Brief that the ALJ misconstrued the governing law, incorrectly failed to find that the Union waived its bargaining rights through inaction, and incorrectly found that Respondent presented the Union with *fait accompli* in any event. (Brief at 16-17)

In some respects, Respondent misconstrues the ALJ's conclusions. For example, Respondent interprets his comment that a successful waiver argument could not be made because the Union had explicitly demanded bargaining on November 29 (Decision at 59, fn 168) to mean that "once the Union demanded bargaining, Respondent's hands were thereafter tied unless it could achieve bilateral agreement," and that "a union's initial demand to bargain coupled with a proposal precludes further inquiry into union waiver...". (Brief at 17) This is hardly a fair description of the ALJ's reasoning because he found not only that the Union had demanded bargaining, but also that Respondent failed to refrain from implementing its recall procedure until there had been a reasonable opportunity to bargain. (Decision at 58, line 25 to 59, line 28). Here, in less than 72 hours, the Union made its demand for bargaining, was presented with *fait accompli* and Respondent implemented its procedure.

Respondent's recitation of the facts at page 20 of its brief calls for a response. Respondent "delivered" the preferential hiring list and the process document (GC 17) on Sunday, December 2, by e-mailing the documents to Murray and by faxing them to the Union hall. As noted above, neither Coates nor Murray, for different reasons, saw the documents until the next day.³¹ Respondent had advised the Union, in an e-mail message to Murray on December 1, that it planned to fax the documents to the Union hall at about 11:00 a.m. on December 2, (GC 16, p.

³⁰ At page 25 of its brief, Respondent states that it does not except to the ALJ's conclusion that the Union requested bargaining, though Exception 56 raises that very issue.

³¹ Respondent would apparently have the Board believe, without any support in the record, that Murray and the Union simply laid the documents aside. ("[N]either the Union nor its counsel even bothered to look at the proposal until Monday.") (Brief at 20).

2). But it also had told the Union, on Friday, November 30, that it planned to begin recalling 150 employees on Sunday. Yet Respondent persists in characterizing the preferential hiring list and the process document (GC 17) as a “proposal.”

Contrary to Respondent, there is nothing about GC 17 that can be fairly read as an invitation to bargain. It is stretching to say that the language of the documents “implicitly invited further negotiations.” (Brief at 20, fn 83) For example, the process document is described as a “guideline,” but that does not mean that it is a proposal. It is a guideline for Respondent’s further refinement of a process it had already decided upon.

In support of its argument that the Union waived its bargaining rights by inaction, Respondent argues that the Union was put on notice of its intention to use a hybrid method (seniority and performance) of ranking employees for recall “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’.” (Brief at 21, fn 88) All that was conveyed to the Union in DiLorenzo’s November 29 letter (GC 8) and by Meisner during the conference call (GC 15) was Respondent’s desire for a “manpower assessment.” There was no indication on November 29 that Respondent intended to use the hybrid ranking method.³² When the notes of the conference call (GC 15, which are Respondent’s notes) are read closely, it becomes clear that Respondent is quoting Coates out of context. The words “pick and choose” appear in a question put to Meisner by Coates, (“Are you going to pick and choose?”) after Meisner said that it did not make sense to have all employees report at the same time. Coates and Painter objected to the notion that Respondent could go about recalling employees without bargaining over the process. But that does not mean that the Union was on notice of the process Respondent intended to use. The ALJ was therefore correct in finding that the Union’s first

³² An employer’s general statements concerning its planned decision will not always constitute adequate notice. Pan American Grain Co., 343 NLRB 318, 318 (2004).

notice of Respondent's intentions came late in the day on Friday, November 30. (Decision at 59, lines 8-12).

Respondent further asserts that its process "involved a standard calculation and ranking of employees based on seniority and performance," and that "[t]his was not a foreign concept to the Union," citing the language of the 2004 collective bargaining agreement on reductions in force. (Brief at 24, fn 102). It is plainly not the case that the expired agreement (JX 1, p. 17) contemplates using the 0 to 4 rankings of employee performance evaluations in determining job eligibility during a reduction in force. Nowhere in the agreement are these rankings mentioned. The term "competency," as used in the expired agreement, obviously means the ability to perform a job. That concept is surely familiar to the Union, but the ranking of employees by performance appraisal scores for recall purposes was no more familiar to the Union than using such scores to determine which employees would be laid off and which would remain during a reduction in force. There is no evidence that the Respondent had ever used the performance evaluation scores for such purposes.

Respondent cites Richmond Times Dispatch, 345 NLRB 195 (2005), in support of its claim that there was a waiver by inaction. However, the union in that case failed to act for several months, after being notified on July 31, 2001, that Christmas bonuses would not be given that year. Moreover, the employer reiterated its willingness to bargain after the initial notification, and the Board majority found that the union had not been presented with *fait accompli*. 345 NLRB at 196, 199. The circumstances of the instant case more closely resemble those of Laro Maintenance Corp., 333 NLRB 958, 958-959 (2001)(change having the effect of removing certain employees from preferential hiring list was effective the day after union was notified); and Champion International Corp., 339 NLRB 672 (2003)(employer notified union of change on evening before implementation).

Respondent incorrectly asserts that the ALJ's conclusion that the Union was presented with *fait accompli* "rested entirely on his own subjective impression," rather than objective evidence. (Brief at 25-26) Respondent quotes one sentence from the Decision, although the discussion of *fait accompli* covers much of pages 59 and 60 of the Decision. Moreover, the ALJ *did* recite, and relied upon, objective facts. (Decision at 59, line 7 to 28) What Respondent characterizes as the subjective impression of the ALJ was his conclusion, based on all of the circumstances of the case, that Respondent presented the Union with *fait accompli*.

The ALJ's findings that the Union did not waive its bargaining rights, that Respondent presented the Union with *fait accompli* and that Respondent violated Section 8(a)(1) and (5) by failing to bargain about the return to work process are correct, and should be affirmed.

D. The ALJ Correctly Found That Respondent's Lockout Was Motivated By Antiunion Animus, And Therefore Violated Section 8(a)(3).

Exceptions 1(a), 3, 41-45; Brief at 38-45.

In two recent cases, the Board held that the fact that partial lockouts treated employees disparately along Section 7 lines, standing alone, was not sufficient to prove discriminatory motive. Midwest Generation, EME, LLC, 343 NLRB 69 (2004); Bunting Bearings Corp., 343 NLRB 479 (2004).³³ Neither Midwest nor Bunting presented any evidence of other unfair labor practice conduct that would support an inference of animus. The instant case is distinguishable because herein, the ALJ found multiple violations of Section 8(a)(3) and (5), and further found that these violations support an inference of animus.

³³ In Midwest, the employer locked out striking employees and continued its operations with nonstrikers and crossovers. In Bunting, the employer locked out all non-probationary employees (all of whom were union members) and continued its operations with probationary employees, (all of whom it believed to be nonmembers).

More importantly, however, the Court of Appeals for the Seventh Circuit in Midwest and the D.C. Circuit in Bunting disagreed with the Board’s determinations and remanded both cases to the Board with instructions to find a violation of the Act.³⁴

Both Circuits held that the Board had erred in finding that the respondent employers had shown legitimate and substantial business justification for partial lockouts. The reviewing Court in Midwest observed that:

(T)he question whether a “legitimate and substantial” business justification exists is a threshold question, properly asked prior to any decision as to whether an action is “comparatively slight” or “inherently destructive” under Great Dane. If...business justification is found...the Great Dane analysis proceeds.

Local 15, International Brotherhood of Electrical Workers v. NLRB, 429 F.3d 651, 656-657 (7th Cir. 2005).

Having found, therefore, that Midwest had “failed to put forth a legitimate and substantial business justification,” the Court might have ended its inquiry there, but it went on to find that Midwest had acted out of antiunion animus because the only distinction between those locked out and those not locked out was their participation in union activities. 429 F. 3d at 661.

Likewise, the reviewing Court in Bunting, after noting that the employer “did not even attempt” to meet its burden of showing business justification for its lockout, stated that:

In the absence of such an attempt, it was not appropriate for the ALJ or the Board to “speculate upon what might have motivated” Bunting.

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO v. NLRB, 179 Fed. Appx. 61, 63 (unpublished)(D.C. Cir. 2006).

Nevertheless, the Court found, in agreement with dissenting Member Liebman, that the showing of a “perfect correlation” between union membership and which employees were locked out, was enough to establish a discriminatory motive. 179 Fed. Appx. at 63.

³⁴ The Board’s Decision and Order on Remand in Midwest is reported at 352 NLRB 243 (2008).

Unlike the Circuit Courts in Midwest and Bunting, the ALJ herein found that Respondent had demonstrated a legitimate and substantial business justification.³⁵ The ALJ concluded that the partial lockout was motivated by animus, based on unfair labor practices found by him. However, this case also presents the sort of “perfect correlation” relied on by the D.C. Circuit in Bunting.

Except for the fact that Respondent locked out the crossovers, (which it asserts it did in order to avoid a charge of discrimination), there would be a “perfect correlation” between those who engaged in union activity (supporting the strike until it ended) and those who were locked out. The Circuit Courts’ decisions and the Board’s remand Decisions in Midwest and Bunting suggest that this type of correlation is itself *prima facie* evidence of discriminatory motive. The ALJ, however, inferred animus from the commission of other unfair labor practices herein. It was proper for him to do so, and his findings and conclusions should be affirmed.

Respondent first argues that because its vice president, Elizabeth Powers, was the decision maker on the lockout, and because she had no involvement with the other unfair labor practices, she (and thus Respondent) could not have been motivated by antiunion animus. (Brief at 40). The ultimate decisions to lock employees out at all, and to retain the permanent replacements may have been Powers’ but her decisions were informed by the opinions and recommendations of others in upper levels of management, and Respondent’s attorney and lead negotiator. (Tr. 1020-1025). Persons at the highest level of site management and/or corporate management were involved in the decisions to engage in a partial lock out, to allow the crossovers to return to work before the full-term strikers, to unilaterally implement a return to work process, to discharge Brown and suspend Cook, and to deny accrued vacation benefits to returning strikers. All of these acts are acts of the Respondent. The fact that Powers, the

³⁵ In his cross-exception and supporting brief, the General Counsel contends that this finding was error.

ultimate decision maker in regard to the lockout, may not have been involved in the other decisions does not somehow immunize Respondent from the consequences of that decision. Nor does it preclude the inference of animus drawn by the ALJ.

Of the four cases cited at page 40, fn 173 of Respondent's brief, only one involves a lockout.³⁶ In Sociedad Espanola de Auxilio Mutuo y Beneficencia de P.R., 342 NLRB 458 (2004), the Board found the isolated statement of the hospital's human resource director, to the effect that the union was to blame for the lockout, to be "far too slim a reed upon which to premise a conclusion that the lockout was unlawfully motivated." 342 NLRB at 463. No other evidence of animus was relied upon by the judge in Sociedad Espanola. In contrast, the ALJ herein relies on the commission of five discrete unfair labor practices.

Respondent makes the argument that an inference of animus from the unfair labor practices found by the judge is not permissible because the found unfair labor practices do not themselves require evidence of animus. However, Respondent cites no authority for this proposition. (Brief at 40-41).

Respondent further argues that the "found ULPs had no 'pervasive impact' on the bargaining unit." (Brief at 41-42) Respondent resorts to analyzing the percentage of employees in the bargaining unit that, in its view, were affected by these unfair labor practices. Respondent suggests that the suspension of Cook and the discharge of Brown had an impact only on those two employees, and that the denial of accrued vacation benefits to 23 employees had no impact beyond those 23 employees. Respondent further posits that only 13 of approximately 400 full-term strikers were affected by the preferential treatment given to the crossovers at the end of the

³⁶ The others are a "salting" case, Brown and Root Industrial Services, 337 NLRB 619 (2002), and two cases involving layoffs and/or discharges: The New Otani Hotel & Garden, 325 NLRB 928 (1998), and Upper Great Lakes Pilots, 311 NLRB 133 (1993). In each case, the complaint was dismissed, either because there was no nexus between the statements of supervisors and the adverse actions or the essential element of employer knowledge was not established. In Otani, the General Counsel relied upon disparate treatment evidence (evidence that the administrative law judge referred to as a "grab-bag of anecdotes") as evidence of motive, but none of the respondent's "central actors" were shown to have been aware of the alleged disparate treatment 325 NLRB at 942.

lockout. But the impact was surely wider than that because had Respondent applied the return to work procedure to the crossovers, the entire order of recall would have been affected.

Respondent simply ignores the fact that the ALJ found a violation in the unilateral implementation of that procedure, which surely had the most pervasive impact of all the unfair labor practices found. Bargaining may have resulted in a different set of recall criteria, which would also affect the order of recall. The ALJ was therefore correct in finding that the unfair labor practices had a “pervasive impact.”

Finally, Respondent argues that the unfair labor practices found by the ALJ are too remote to support the inference of animus. Some of the unfair labor practices are more proximate in time to the lockout than others. However, two serious unfair labor practices, the preferential treatment of the crossovers and the failure to bargain over the return to work process, are relatively contemporaneous with the lockout. Respondent cites no authority for the proposition that an inference of animus must be drawn only from unfair labor practices that occurred before a lockout.

As the General Counsel has argued in support of his cross-exception, the ALJ need not have reached the issue of animus, because Respondent did not have a legitimate and substantial business justification for the lockout. Nevertheless, his findings and conclusions as to animus are supported by the record evidence and should be affirmed.

E. Respondent Violated Section 8(a)(1) And (5) By Unilaterally Eliminating Paid Lunch Periods On Weekend Overtime Shifts.

Exceptions 2, 3, 30-34; Brief at 1, fn 5.

The expired collective-bargaining agreement and the implemented offer contain similar language in regard to lunch periods. Section 24 of the expired contract provided that a 20-minute paid lunch period would be granted to employees in two circumstances: where they were called upon to perform more than two hours of overtime work in any day, or where they worked on a

“continuous three-shift basis, where the end of one shift does not overlap the beginning of another shift.” (JX 1, p. 23-24). Section 6 C of the implemented offer provides for a 20-minute paid lunch period where employees work on a “continuous three-shift basis, where the end of one shift does not overlap the beginning of another shift,” and Section 6 D provides for a 20-minute paid lunch period where an employee works more than 4 hours in a given day. (JX 2, pp. 3-4). These provisions clearly apply to the regular working week, because all weekend work is overtime, and a “continuous three-shift” operation describes Respondent’s operation during the regular working week. Thus, neither the expired contract nor the implemented offer contain specific language covering paid lunch periods on weekend overtime. (Tr. 333-334).

The ALJ found that there was “uncontroverted” record evidence that the practice of providing a paid 20-minute lunch period to employees working weekend shifts of 7 or more hours had become a term and condition of employment. The evidence was also uncontroverted that Respondent changed this term and condition to require that employees work shifts of 8.5 hours or more in order to qualify for a paid lunch.

The ALJ rejected Respondent’s argument that the implemented final offer swept away the past practice. (Decision at 40, line 42 to 41, line 2). Respondent addresses this issue in a footnote, asserting that the Judge engaged in 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.” (Brief at 1, fn 5). As the ALJ noted, however, the paid lunch period was not simply a “past practice.” The Board has held that extra-contractual past practices may become sufficiently established that they may become implied contract terms, and part of employees’ terms and conditions of employment. Decision at 40, lines 29-32), citing Bonnell/Tredegar Industries, 313 NLRB 789 (1994); see also C&S

_____, 158 NLRB 454, 459 (1966); St. Vincent Hospital, 320 NLRB 42, 45 (1995). That is precisely the case here, and the ALJ correctly found a violation of Section 8(a)(1) and (5).

F. The Suspension Of Marion Cook Violated Section 8(a)(1) and (3).

Exceptions 1, 3, 16, 26, 29; Brief at 1, fn. 3.

The facts regarding Cook’s suspension have never been disputed, and they are set forth from page 28, line 10 to page 30, line 6 of the ALJ’s Decision. Respondent addresses the issue of Cook’s suspension in a footnote, (Brief at 1, fn 3), and cites Reynolds Electrical & Engineering Co., 292 NLRB 947 (1989) and United Aircraft Corp., 134 NLRB 1632 (1961), in support of its assertion that Cook’s remark about “scabs” was unprotected. In Reynolds, the respondent lawfully banned the wearing of a button with the word “scabs” and the familiar diagonal slash of international signage across the button so that it clearly conveyed the message “no scabs.” But the circumstances of Reynolds could not be more different than those of this case. There was a post-strike pattern of harassment by former strikers of employees who had crossed the picket line and worked during the strike. This included verbal abuse, serious damage to vehicles, urinating on a non-striker’s lunch, and threats. 292 NLRB at 949 – 951. In this proceeding, Cook’s supervisor at the time, James Hillock, testified that employees laughed in response to Cook’s statement. (Tr. 702) No evidence has been presented by Respondent that the sort of atmosphere that prevailed in Reynolds existed at Respondent’s facility after the strike.

United Aircraft is also distinguishable because there, the Board found that under the circumstances, the respondent had a reasonable apprehension that “Club Nine” pins worn by former strikers (to signify that they had remained on strike for the full nine weeks that it lasted) would promote disorder and breaches of discipline in the plant. United Aircraft, like Reynolds,

presented a pattern of post-strike harassment of nonstrikers that simply does not exist in this case.³⁷

Cook's remark, though it may have offended someone, was protected. The ALJ was correct in finding that his suspension violated the Act.

G. The Denial Of Accrued Vacation Benefits To Returning Strikers Violated Section 8(a)(1) and (3).

Exceptions 1(c), 3, 35-40; Brief at 27-33.

There was a collective-bargaining agreement, effective from 1985 to 1988, and extended to 1990, between Ingersoll-Rand, Respondent's predecessor, and the Union's predecessor, the International Union of Electrical, Electronic, Technical, Salaried and Machine Workers, AFL-CIO. (Tr. 225, GC 24). Section 14 of the 1985 contract contained the following provisions (quoted here in pertinent part) in regard to paid vacations:

14 D. 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...³⁸

(GC 24, pp. 22-23)

14 N. Anything herein contained to the contrary notwithstanding, an employee who has worked 900 or more hours in any calendar year, commencing with the calendar year 1985, shall at the end of such year be entitled, irrespective of any subsequent occurrence, to a minimum vacation with pay in the following calendar year as follows:...³⁹

(GC 24, pp. 27-28).

³⁷ Most prominently, a candidate for union office circulated a campaign letter that stated, in part, that "If I am elected, I pledge that every strikebreaker will be hunted down like the economic animal that he is..." 134 NLRB at 1634.

³⁸ The continuous service requirements are set forth in Section 14 A, and govern the amount of vacation an employee is entitled to after one year of service, three years of service, and so forth.

³⁹ The remainder of Section 14 N reiterates the length of continuous service requirements and the corresponding amounts of vacation set forth in Section 14 A.

In October 1987, a Board of Arbitration issued an Opinion and Award in Grievance No. C 889. The impartial arbitrator reconciled the apparent conflict between Section 14 D and Section 14 N this way:

“A reconciliation can be made between 14(D) and 14(N) if one is to apply a similar procedure as set forth for employees on “RDE” status as described in 14(D).

Accordingly, I find that employees on layoff status and those employees who are laid off in the future shall have their vacation eligibility frozen at the time of layoff. At the time of future recall their eligibility for vacation shall be calculated based upon the prior 12 months previous to layoff...

Thus, an employee who had worked the requisite number of hours to be eligible for vacation in the calendar year of layoff, will upon recall in a subsequent calendar year be immediately eligible to take vacation, consistent with the proviso in Section 14(J) that an employee upon recall may not receive vacation for 30 days unless agreed upon by his supervisor...”

(GC 25, p. 3).

Section 14 D of the 1985 contract was unchanged in the most recent (2004-2007) collective-bargaining agreement, which expired on August 3, 2007, the day before the strike commenced. (GC 24, pp. 22-23, JX 1, p. 14). Section 14 N was substantially unchanged.⁴⁰

Coates explained in his testimony that vacation which accrued in one calendar year entitled employees to take the accrued vacation in the following calendar year:

(I) If you worked 900 hours in (2008), that made you eligible for vacation in 2009.

(Tr. 224)

Painter testified similarly:

...(I) t had been the practice for many years, that in order to be eligible for -- when you worked your 900 hours of

⁴⁰ Section 14 N of the 2004-2007 contract (JX 1, p.16) reads, “commencing with the calendar year 1999,” instead of “calendar year 1985,” as did the 1985 contract. (GC 24, p. 27-28). The continuous service requirements are slightly changed. The language is otherwise identical.

eligibility, it made you eligible for the vacation the following year.

Q. When you say year, do you mean calendar year?

A. Yes, calendar year.

(Tr. 348)

Both Coates and Painter are longtime employees of Respondent. Coates had 34 years of service and Painter had 32 years. (GC 17, p. 38; Tr. 325)

Section 10 D of Respondent's implemented offer retained the first sentence of former Section 14 D:

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.

(JX 2, p. 7)

Section 14 N of the expired 2004-2007 agreement was not carried over in the implemented offer.

As former strikers were recalled to work after the lockout, Respondent held meetings with them, for the purpose of familiarizing them with their terms and conditions of employment, as set forth in the implemented offer. Union representatives also attended such meetings. (Tr. 344-345). On or about August 26, 2008, Respondent held a meeting with a number of returning former strikers. Glenn Painter attended in his capacity as a Union representative. Painter testified that there were 10 or 11 employees present,⁴¹ and Meisner, Doane and human resources specialist Julie Williams attended the meeting for Respondent. Doane presented a section-by-section review of the implemented offer. (Tr. 345).

Before the meeting began, Painter had a brief conversation with Meisner and Doane, during which they informed him that the returning strikers would not be eligible for vacation or holiday pay. They did not, at that time, explain why the employees were considered ineligible.

⁴¹ Coates estimated that between 15 and 18 employees were recalled in August 2008. (Tr. 219). Doane testified that 23 were recalled in August and September of 2008. (Tr. 1298).

During the meeting, when the employees were so informed, Painter stated that the Union objected and would grieve the matter. (Tr. 346).

Afterward, Painter spoke again with Meisner and Doane, who explained Respondent's position on the matter. They told Painter that the returning strikers had not been on the active payroll for the past 12 months, and were therefore ineligible. Painter argued the point, and brought to their attention the examples of employees Ralph Stage and John Cotton, who had been on leaves of more than 12 months, but were permitted to take vacation that had accrued before they began their leaves. (Tr. 346-347).

The Union requested a meeting with Respondent in regard to its position on vacation eligibility. On or about September 2, 2008, Coates, Painter and Union vice-president Mickey Keefer met with Meisner and Doane at Respondent's facility. (Tr. 218-219, 347-348). The Union representatives first asked for Respondent's position on holiday pay. They were advised that the returning employees would not be on the active payroll for 30 days preceding the Labor Day holiday. Coates contended that this limitation applied to new hires. The Union also pointed out that Respondent had paid holiday pay to former strikers who had returned earlier in the year, though they had returned less than 30 days before a holiday. This matter was quickly resolved, with Respondent agreeing to pay the former strikers returning in August 2008 for the Labor Day holiday. (Tr. 219-220).

The parties turned to the matter of vacation eligibility. Citing Section 10 D of the implemented offer, Doane asserted that the returning strikers had not been on the active payroll for the preceding 12 months, did not work at least 900 hours during that time, and were therefore ineligible. (Tr. 220-221). The Union asserted its position, i.e., returning strikers who had worked at least 900 hours during calendar year 2007, before the strike commenced, were eligible for vacation in calendar year 2008. (Tr. 348).

Obviously, the strikers returning in late August 2008 had been out of the plant for more than 12 months. (Tr. 221-222). Coates testified that he believed most of the strikers returning in August 2008 had worked at least 900 hours in calendar year 2007. (Tr. 222). Painter, though not entirely certain, believed that all of them had. (Tr.348-349).

In the case of a denial of benefits to striking employees, the Board applies the tests set forth in NLRB v. Great Dane Trailers, 388 U.S. 26 (1967) and Texaco, Inc., 285 NLRB 241 (1987) to determine whether there has been a violation of Section 8(a)(1) and (3). The General Counsel must make a *prima facie* case that there has been an adverse impact on employee rights. This burden can be met by a showing that (1) the benefit was accrued, and (2) the benefit was withheld on the apparent basis of a strike. If the General Counsel makes out a *prima facie* case, the burden shifts to the employer to demonstrate a legitimate and substantial business justification. If no such justification is proven, or if the employer's conduct is "inherently destructive" of Section 7 rights, there is a violation. If the employer is able to demonstrate a business justification, and if the adverse effect on employee rights is "comparatively slight," the Board will dismiss the complaint. However, even if the adverse impact is comparatively slight, a violation may still be found if the employer's conduct was motivated by antiunion animus.

The ALJ found that the contractual history and language supported a conclusion that the vacation benefit had accrued, under the expired collective-bargaining agreement, to those returning strikers who had worked at least 900 hours in calendar year 2007, before the strike commenced. (Decision at 44, Lines 7-9). Respondent argues that the ALJ misinterpreted Section 14 N of the expired agreement because its provision that "at the end of each year" employees shall be eligible to take their accrued vacation in the following calendar year means that their vacation benefit does not accrue, or is not "due and payable" until December 31 of each year. Because, on December 31, 2007, the 2004 collective-bargaining agreement had expired and the

Respondent's terms (sans the former Section 14 N) had been implemented, the strikers returning in August 2008 were ineligible for vacation until they again accrued 900 hours. Respondent asserts that, under Texaco, *supra*, its contractual interpretation is reasonable, and for that reason there is no violation. (Brief at 30-32)

The ALJ was, understandably, not persuaded by Respondent's argument. The impartial arbitrator "explicitly found that in the event of layoff, vacation benefit eligibility was frozen as of the date of the layoff, and was payable immediately upon recall in a subsequent calendar year." (Decision at 44, Lines 11-19).

Respondent cites the testimony of human resources project manager Kevin Doane that Respondent's vacation policy is, and has been, a "refresher" policy, meaning that on January 1st of each year, employees who have met eligibility requirements may take their accrued vacation. (Tr. 1296-1298). In its Brief, Respondent asserts that the ALJ failed to understand this, and improperly viewed Respondent's accrual policy as a "straight line" accrual policy, whereby vacation benefits accrue immediately once the requisite hours have been worked. (Brief at 30-32). But Doane's testimony does not prove that the benefit is not *accrued* until December 31 of each year. And it is not inconsistent with the testimonies of Coates and Painter that employees are allowed in each calendar year to *use* the vacation accrued in the previous calendar year. (Tr. 224, 348). Moreover, though it was not mentioned in the ALJD, Painter gave un rebutted testimony that Respondent had permitted employees Ralph Stage and John Cotton to use vacation time accrued in a previous calendar year, even though they had been on leave, and had not worked a full 12 months prior to their vacations. (Tr. 346-347).

If, as the ALJ has found, the vacation benefits of the 23 strikers who returned in August 2008 accrued before the strike, then this case is for all practical purposes indistinguishable from Swift Adhesives, 320 NLRB 215 (1995). The ALJ applied the Board's reasoning in Swift to the

facts of this case in finding a violation. (Decision at 44, lines 1-9). The Board in Swift found that the respondent could not rely upon the bargaining impasse and the implementation of its final offer to deny vacation benefits to the 15 strikers who met the accrual requirement under the expired contract (but fell short of the new requirement in the implemented offer). Citing R.E. Dietz Co., 311 NLRB 1259, 1266 (1993), the Board in Swift distinguished between *future* terms and conditions of employment (which may be implemented after an impasse) and past wages and benefits that accrued, pre-implementation, and are owed.

Simply stated, while Respondent could change the vacation accrual requirements going forward by implementing its terms, it could not rely on implemented requirements to deny a previously accrued benefit. Respondent had no business justification for denying the returning strikers their accrued vacation benefits. Respondent's conduct in this regard is therefore inherently destructive of the right to strike. The prospect that a substantial accrued benefit may later be denied based on strike activity has an inherent chilling effect upon the exercise of Section 7 rights. The ALJ's conclusion that Respondent violated Section 8(a)(1) and (3) of the Act should be affirmed.

H. The ALJ's Recommended Remedial Order Is Appropriate

Exceptions 4-8; Brief at 45-50.

Respondent excepts to the ALJ's proposed remedies for the unlawful partial lockout, the denial of accrued vacation benefits to returning strikers, the unilateral elimination of paid lunch periods on weekend overtime shifts, the suspension of Cook and the discharge of Brown. Respondent does not address these remedial issues in its Brief.

The remedies proposed by the ALJ for these violations are the Board's traditional remedies. Should the Board affirm the ALJ's findings and conclusions as to these unfair labor practices, it should also order these traditional remedies.

Respondent's arguments are focused on the ALJ's deferral to the compliance stage of this proceeding, "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...". (Decision at 61, lines 20-27 and fn. 170). The ALJ cited Alaska Pulp Corp., 326 NLRB 522, 523 (1998), where the Board found it appropriate to determine at the compliance stage the method and order of recall that would have resulted in the absence of Respondent's unfair labor practices.

Respondent argues that Alaska Pulp is inapposite because unlike the instant case, where the ALJ has found a violation of Section 8(a)(5), Alaska Pulp involved a procedure that was itself unlawful because it discriminated against unreinstated strikers by effectively relegating them to entry-level openings, rather than their former or substantially equivalent positions. (Brief at 46-48). Respondent further argues that deferring to the compliance stage the determination of what would have occurred in the absence of Respondent's unilateral action would unlawfully compel Respondent to accede to the Union's bargaining demand that recall be based on seniority. (Brief at 48-49).

In KSM Industries, 353 NLRB No. 117 (March 26, 2009) the Board affirmed an administrative law judge's supplemental decision that reconstructed the order of strikers' recall. The respondent in KSM had used a highly subjective, "most qualified" method of recalling strikers. The judge found that "the choices made by KSM using its recall method are infected by and of a piece with its unfair labor practices." (Id., slip op. at 35) This was so "*even assuming that KSM's 'most qualified method' of recall would not be independently unlawful.*" (Id., fn. 74, emphasis added). Thus, the fact that Respondent's recall procedure may not have been independently unlawful is not dispositive. Even so, Respondent's procedure was "infected by" its preferential treatment of the crossovers, who were never subjected to the recall process. At a

minimum, restoration of the status quo ante would require that they be included in any reconstructed process.

It is not necessarily the case that resolution of these issues at the compliance stage will require Respondent to accede to the Union's bargaining demands. As the Board stated in Alaska

Pulp:

Determining what would have happened absent a respondent's unfair labor practices...is often difficult and inexact. Several equally valid theories may be available, each one yielding a somewhat different result.

326 NLRB at 523

The violation found calls for a make-whole remedy. Only through compliance proceedings can it be determined which employees are entitled to a make-whole remedy. Respondent will have full opportunity to raise issues and theories at the compliance stage. The ALJ's deferral of this issue to the compliance stage is appropriate.

III

CONCLUSION

For the reasons set forth above, the Administrative Law Judge's findings and conclusions should be affirmed by the Board, and his recommended remedial order adopted.

Dated April 2, 2010
At Buffalo, New York

Respectfully submitted,

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STATEMENT OF SERVICE

Copies of the foregoing General Counsel's Answering Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge in Cases 3-CA-26543, 3-CA-26595, 3-CA-26711 and 3-CA-26943 were served on April 2, 2010 by electronic mail on the following parties and counsel:

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