

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

DOUGLAS AUTOTECH CORPORATION,

Respondent,

and

Case No. GR-7-CA-51428
Hon. Paul Buxbaum

INTERNATIONAL UNION, UNITED
AUTOMOBILE, AEROSPACE AND
AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA (UAW), AFL-CIO, AND ITS
LOCAL 822,

Charging Union.

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**CHARGING PARTY'S ANSWERING BRIEF TO
RESPONDENT'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION**

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I. INTRODUCTION

This case is about the illegal discharge of an entire bargaining unit on August 4, 2008. The mass discharge occurred 3 months *after* the Union made an unconditional offer to return to work to end a 4 day strike commenced without notice to FMCS under §8(d)(3) of the Act. The mass discharge occurred 3 months *after* the Company locked out the unit in support of its bargaining position.

This Answering Brief focuses on the Company's treatment of the locked out employees *as employees* under the Act. The Union adopts the Answering Brief of Counsel for the General Counsel with respect to the other issues raised by Respondent's Exceptions.

The most significant feature of the Company's Exceptions and Supporting Brief is the omission of one incontrovertible fact -- the fact that on August 4, 2008 the Company discharged the 33 unit employees who were on layoff or sick leave in addition to the 114 former strikers.¹ As the ALJ noted:

It is clear that the only employees discharged on August 4 were those who belonged to the Union. In fact, management decided to clean house with a very broad broom. It not only terminated those union members who withheld their labor during the strike, it also chose to fire union members who were on sick leave, workers' compensation, or layoff status at the time of the strike. (JD p. 38)

II. THE OPERATIVE FACTS

Douglas Autotech and UAW Local 822 have had collective bargaining agreements since 1941. The last CBA expired April 30, 2008. (R. 737, GC Ex. 2)

¹ (JD p. __) denotes page references to Judge Buxbaum's Decision and Recommended Order. (R. __) denotes page references to the hearing transcript.

On Thursday, May 1, 2008, approximately 114 active employees went on strike.² (R. 84, GC Ex. 49)

On the afternoon of Friday, May 2, 2008, the UAW International Representative Phil Winkle learned that the §8(d) (3) notice had not been filed with FMCS due to a clerical error. (R. 87, 89)

On Saturday, May 3, 2008, Winkle and Local 822 officers called a membership meeting for the following day. (R. 93)

On Sunday, May 4, 2008, Local 822 members voted to make an unconditional offer to return to work the next morning. (R. 94)

At 6:30 a.m. Monday, May 5, 2008, first shift employees arrived at the Company ready to return to work. Winkle attempted to deliver to Paul Viar, the Company's Director of Operations and in-house counsel, a letter that "your employees are immediately returning to work unconditionally." (GC Ex. 7) Winkle was prohibited from entering the plant. He had the unconditional offer to return faxed to the Company. Shortly thereafter, Bruce Lillie, the Company's labor counsel and chief negotiator, called Winkle. Winkle verbally confirmed that, "We've offered an unconditional offer to return to work." (R. 97) Lillie asked that the Union bargaining committee meet with the Company that evening.

In the afternoon of May 5, 2008, Viar, Lillie and Glen Kirk, the Director of Finance, assessed the situation. They "suspected surmised ... knew something was wrong because I couldn't find it [i.e. the notice to FMCS]." (R. 709) They "suspected that the strike was illegal and that the F-7 notice had not been filed." (R. 637) They formulated a written response to the Union's

² It appears that 112 active employees struck. Additionally, there was one employee on sick leave, one employee on workers' compensation leave and one employee whose status on May 1, 2008 (active or sick leave) is not clear on the record.

unconditional offer to return -- an explanatory letter with an attached 15 page “Company Proposal/General Synopsis.” (GC Ex. 8)

In the evening of May 5, 2008, the Company delivered its written response to the Union’s unconditional offer to return to work. The explanatory letter provided that:

Earlier today, the Company received the Union request to return from the Strike. The offer to return to work was unconditional.

Please be advised that effective immediately, the Company is locking out the bargaining unit in support of its bargaining position. (See attached.)

Please advise the Company as soon as possible if the Union accepts the proposal and when an Agreement has been reached so that employees can be expeditiously returned to work. (GC Ex. 8)

Winkle asked, “You know, we’ve offered to come back unconditionally. Is this what you want us to come back under, under this [attached] 15-page document?” (R. 101) Lillie responded, “No, absolutely not.” (R. 101) The Company did not say that it was reserving its right to terminate employees for engaging in an illegal strike. (R. 158-159)

Shortly after May 5, 2010, the locked out employees filed for unemployment benefits with the Michigan Unemployment Insurance Agency. (R. 699) The Michigan law provides employees who are unemployed due to a labor dispute (strike or lockout) are not entitled to unemployment benefits. M.C.L.A. §421.29(8)

On May 20, 2008, the Company faxed its opposition to unemployment benefits for locked out employees with the Michigan Unemployment Insurance Agency (MUIA), because the “reason for the individual[s] unemployment [was] involved in the labor dispute at the plant or jobsite.” (R.

700, Respondent Ex. 3, GC Ex. 44)³ The Company prevailed. On June 30, 2008, the MUIA ruled that the locked out employees were disqualified from unemployment because, “On 5/5/08 the strike ended but the labor dispute continued as a lockout.” (GC Ex. 45, p. 2)

On May 21, 2008, the parties met to bargain a successor CBA. (R. 104, Jt. Ex. 1) Lillie commented that the strike was illegal and cryptically stated that the Company “doesn’t waive” rights. (Respondent Ex. 4) The Company said it was considering disciplinary action against some locked out employees who had filed “false” unemployment claims alleging they were terminated. Lillie said: “They weren’t terminated. We haven’t terminated anybody... we haven’t terminated anybody, sir.” (R. 113-114)

On June 2, 2008, the parties met to bargain a successor CBA. Lillie assured the Union that the replacements “are temporary, and once we get a contract, [the locked out employees will] go back to work -- everybody goes back to work.” (R. 121) The Company made a new proposal for a complete CBA. (R. 122, GC Ex. 38) The Company did not say it was reserving its right to terminate employees for engaging in an illegal strike. (R. 159)

On June 13, 2008, the parties met to bargain a successor CBA. The Company assured the Union that the locked out employees would be returned to work as soon as a contract was achieved. Lillie said: “The [replacements] are temporary, and once we get a contract, everybody goes back

³ GC Ex. 44 is the Company’s filing with the Michigan Unemployment Insurance Agency. The first page is the fax transmittal sheet dated May 20, 2008. The second page is a letter from MUIA to the Company dated May 9, 2008 enclosing a request for basic information and a form identifying the specific reason for each individual’s unemployment. Viar signed the general information request and certified the reason for each claimant’s unemployment. He attached a list of the entire bargaining unit. He designated 112 locked out employees as Code 2 (“Involved in a labor dispute at the plant or job site”) and the 30 employees who were previously laid off as Code 1 (“Layoff for lack of work not caused by a labor dispute”).

to work... that's our goal. That's our goal. Once we get a contract, everybody goes back to work.”

(R. 123-124) At this meeting, Kirk gave the Union a letter which provided that:

Consistent with the National Labor Relations Act, the mandatory union membership dues provision of the contract will no longer be applied or enforced by the Company... Please understand that the Company has no objections to employees voluntarily not joining the Union, voluntarily joining the Union, voluntarily continuing membership in the Union and/or paying money/dues to the Union. No matter what decision is made by an employee, it will not effect [sic] the employees [sic] job at the Company. (GC Ex. 15)

The Company did not say that it was reserving its right to terminate employees for engaging in an illegal strike.

On July 1, 2008, the parties met to bargain a successor CBA. The Union stated that its unconditional offer to return was still on the table. (R. 215) Lillie said that the Company “was concerned that if people came back under an unconditional offer, there was nothing to stop them from going on strike again.” (R. 215) To address this concern, the Union then presented a written proposal reiterating its unconditional offer to return to work and pledging not to strike following an unconditional return to work.

The Union has already made an unconditional offer to return to work, which is still on the table. In addition, while the parties continue to negotiate, the Union will also agree to not strike for 60 days after returning to work, and will in addition provide a 7 day notice of intent to strike following the 60 day period. (GC Ex. 39)

The Company did not say that it was reserving its right to terminate employees for engaging in an illegal strike. (R. 159-160)

On July 2, 2008, the parties met to bargain a successor CBA. The Union asked about replacement workers. (R. 128) The Company said that the replacements were temporary, and that former strikers would be returned to work once they had a contract. (R. 129-130, 219-220) The

Company did not say it was reserving its right to terminate employees for engaging in an illegal strike. (R. 160)

On July 14, 2008, the parties met to bargain a successor CBA. (Jt. Ex. 1) The Company did not say it was reserving its right to terminate employees for engaging in an illegal strike. (R. 160)

On July 15, 2008, the parties met to bargain a successor CBA. (Jt. Ex. 1) The Company did not say it was reserving its right to terminate employees for engaging in an illegal strike. (R. 160)

On July 24, 2008, the parties met to bargain a successor CBA. (Jt. Ex. 1) The Company did not say it was reserving its right to terminate employees for engaging in an illegal strike. (R. 160)

On July 25, 2008, the parties met to bargain a successor CBA. The Company did not say that it was reserving its right to terminate employees for engaging in an illegal strike. (R. 160)

On July 28, 2008, the parties met to bargain a successor CBA. The Company did not say that it was reserving its right to terminate employees for engaging in an illegal strike. (R. 160)

On July 31, 2008, the parties met to bargain a successor CBA. (Jt. Ex. 1) The Company, *for the first time*, said it was reserving its right to terminate employees for engaging in an illegal strike. (R. 240)

Between May 5, 2008 and August 4, 2008, several locked out employees attempted to withdraw money from their 401(k) accounts. Viar was the administrator of the 401(k) plan. Viar denied the locked out employees access to their 401(k) money because they had not been terminated. (R. 320, CP Ex. 2) Locked out employees were only eligible for “in-service” hardship withdrawals from their 401(k) accounts. (R. 346-348, CP Exs. 1, 2, 3)

On August 4, 2008, Viar mailed a termination letter to every member of the bargaining unit. (R. 278) The letter provided that:

Because you participated in an illegal strike, you have lost any and all protection under the National Labor Relations Act, including any right to continued employment. Your employment with Douglas Autotech Corporation is terminated effective immediately because of your participation in the illegal strike of May 1, 2008, and thereafter. (GC Ex. 47)

After August 4, 2008, Viar allowed the former locked out employees to withdraw money from their 401(k) accounts because they had been terminated. (R. 320, 349-350, CP Ex. 1) *After* August 4, 2008, former locked out employees also began receiving unemployment compensation because they had been terminated. (R. 579-580, GC Ex. 45)⁴

On August 14, 2008, the parties were supposed to meet to bargain a successor CBA. The Company refused to meet with the Union. Winkle, the Local 822 President, Sam McKnight, an attorney who attended for the Union, and the Mediator went to the Company caucus room. Viar, Lillie, Kirk, Diane Hedgecock (Viar's assistant) and attorney Daniel Cohen⁵ were present. McKnight asked about the status of the replacement employees. Lillie said the Company would take this question "under consideration." (R. 139, GC Ex. 67) McKnight asked the Company to come and bargain a contract with the Union. Lillie responded: "We're not going to come and bargain. All the employees have been terminated." (R. 138) Lillie said he would only talk about "effects." McKnight again asked the Company to "come and bargain a contract." Lillie said no. McKnight

⁴ GC Ex. 45 is a chronology of Michigan Unemployment Insurance Agency determinations for a typical locked out employee. The determinations show the employees were originally denied benefits because their unemployment was due to the strike. (p. 1) They were then denied benefits because on 5/5/08, the strike ended but the labor dispute continued as a lockout. (p. 2) Employees finally began receiving benefits when the Agency learned that, as of 8/4/08, the employees had been terminated. (p. 3)

⁵ Cohen was with the Pilchak, Cohen & Tice law firm. The Company's privilege log, prepared in response to Subpoenas Duces Tecum from Counsel for the General Counsel and Counsel for the Union lists 22 different attorneys during the period January 2008 to mid-June 2009. (GC Exs. 55A, 55B and 57)

concluded: “I would like for you to come and bargain a contract, but I can’t force you. If you’re not going to come and bargain, then we’re going to leave. (R. 139-140)

On August 25, 2008, Cohen advised the Union that the replacement employees were “temps.” (GC Ex. 31)

On September 9, 2008, Kirk wrote another management official that: “The entire bargaining unit has been discharged.” (CP Ex. 4)

On December 2, 2008, Viar wrote a transport vendor “summarizing the labor situation of Douglas.”

Current Status Bargaining Unit -- Douglas terminated the bargaining unit August 4, 2008. This matter has been referred to the National Labor Relations Board for resolution.” (GC Ex. 51)

III. THE ALJ CORRECTLY FOUND THAT THE FORMER STRIKERS WERE REEMPLOYED WITHIN THE MEANING OF §8(d) OF THE ACT AFTER THEY UNCONDITIONALLY OFFERED TO RETURN TO WORK AND THE COMPANY LOCKED THEM OUT IN SUPPORT OF ITS BARGAINING POSITION.

This Answering Brief cannot improve on the ALJ’s cogent analysis of Board and Court precedent to conclude that locked out employees were employees within the meaning of the Act based on the facts in this case.

The Company’s version of the facts regarding the unconditional offer and the lockout is contrary to the record. On the one hand, the Company contends that on May 5, 2008, the Union did not make an unconditional offer to return because it did not accept the “conditions” in the 15 page “Company Proposal/Synopsis” attached to the Company’s lockout letter. (Company Brief pp. 3-5)⁶ On the other hand, the Company contends that it locked out the employees “in support of its

⁶ Company Brief p. __ denotes page reference to the Company Brief In Support Of Exceptions.

bargaining position.” (Company Brief p. 10) Those two facts are mutually exclusive. If the Union **did not** make an unconditional offer, the employees are still on strike and were not locked out. If the Union **did** make an unconditional offer, the employees were locked out by the Company in support of its bargaining position. The Company cannot have it both ways. And the facts **are** that the Union expressly made an “unconditional offer to return to work;” and the Company expressly acknowledged that the “offer to return to work was unconditional.” Indeed, when asked if the 15 page “attached proposal” was the “conditions under which the Company wanted the employees to return to work,” Lillie replied: “No. Absolutely not.” That is because, on its face, the attached 15 page “Company Proposal/Synopsis” is a proposal for a contract (albeit incomplete) and not merely working “conditions” for an unconditional return. Lillie, Viar and Kirk admitted this legal fact. (R. 734-744, 881-882, 917-918, 1049-1050)

The Company’s arguments regarding *Boghosian Raisin*, 342 NLRB 383 (2004) are way off the mark. For example, the Company argues that ALJ Buxbaum “is incorrect in his finding that the employees in *Boghosian Raisin* did not unconditionally offer to return to work.” (Company Brief p. 11) In *Boghosian Raisin*, Judge Buxbaum did **not** make any findings. In *Boghosian Raisin*, **the Board** found that the union failed to make an unconditional offer to return to work and instead made a series of **conditional** proposals while it continued its illegal strike. The Board stated that:

When the union in the instant case learned of its mistake, it did not terminate its unlawful strike immediately with an unconditional offer to return to work, but allowed it to continue for 4 additional days. *Id.* at 387.

That finding distinguishes *Boghosian* from this case. In this case, when the Union learned of its mistake, the Union immediately made an unequivocal and unconditional offer to return to work.⁷

The Company also argues that the employer in *Boghosian Raisin* “locked out the union strikers” (Company Brief p. 12) and that the Board in *Boghosian Raisin* decided that a lockout is not reemployment under the NLRA. (Company Brief p. 11) That is not true.

In *Boghosian*, the Board found that on October 1, the employees commenced an illegal strike. On October 1, the employer notified the union that the strike was illegal. On October 1, the union did **not** make an unconditional offer to return to work. Instead, on October 1, the union made a **conditional** proposal “to return all employees to work under status quo terms and conditions of employment and resume negotiations for a new contract provided the union could not find a copy of the FMCS notice.” *Id.* at 384. On October 2, the union made a **conditional** proposal “to end the strike under status quo terms of employment and continue negotiations.” The union continued to strike on October 1, 2, 3, 4 and 5. On October 5, the union again made a **conditional** proposal “to return to work on the basis of the company’s last best and final offer at the bargaining table.” *Id.* at 384. Later on October 5, the employer terminated the **striking employees** (**not** the locked out employees) because they were engaged in an illegal strike.

In this case, unlike *Boghosian*, the Company wrote it was “locking out the bargaining unit.” **In this case**, the Company wrote that “employees can be expeditiously returned to work... if the Union accepts the proposal.” **In this case**, for 3 months, the Company repeatedly assured the Union that employees would be returned to work. **In this case**, for 3 months, the Company repeatedly told the Union that it had locked out employees in support of the Company’s bargaining position. **In this**

⁷ A valid unconditional offer must be “unequivocally unconditional.” *Pan American Grain Co.*, 347 NLRB 318, 319 (2004).

case, for 3 months, the Company denied locked out employees access to their 401(k) money because they were locked out (and *not* terminated). *In this case*, for 3 months, the Company defeated the claims of locked out employees for unemployment benefits because they were unemployed due to a labor dispute/lockout (and *not* terminated).

The Company also fails in its attempt to distinguish the decision in *Fairprene Industrial Products Co.*, 297 NLRB 797 (1989). The Company argues that the *Fairprene* Board held that it was the physical act of “scheduling” former strikers to start work that constituted reemployment under the Act. To the contrary, ALJ Ludwig in *Fairprene* (whose decision was affirmed by the Board) underscored the General Counsel’s argument that Section 8(d) does not require that employees be returned to work to regain employee status.

[W]hen the Company agreed to reinstate all the strikers and the Union agreed to end the strike, the strikers at that point had been “reemployed” within the meaning of Section 8(d). “The statute does not require that the employees ‘return to work’ ... to regain employee status. Therefore, the strikers once again became statutory employees.” *Id.* at 802.

Similarly (and also incorrectly), the Company contends that the Sixth Circuit’s decision in *Shelby County Health Care Corp. v. AFSCME Local 1733*, 967 F.2d 1091 (6th Cir. 1992) stands for the proposition that former illegal strikers must be physically reinstated to their jobs in order to be reemployed within the meaning of §8(d) of the Act. In fact, *Shelby County* dealt with the protected status of former illegal strikers who were suspended and then discharged and never physically reinstated to their jobs. In *Shelby*, the union and the employer settled a strike in violation of §8(d) and (g) with an agreement that certain employees would be subject to unspecified discipline that could be protested through grievance and arbitration under the CBA. Sixteen of those employees who were suspended at the time of the settlement were subsequently discharged and never

physically reinstated to their jobs. The Union arbitrated one such discharge. The arbitrator awarded reinstatement. The employer sued to vacate, and the District Court agreed, stating that the arbitrator's decision was contrary to the public policy set forth in §8(d) and (g) of the Act. The Sixth Circuit reversed the district court on the grounds that the former illegal strikers were "reemployed" when the employer agreed to arbitrate their discipline.

As ALJ Buxbaum noted, the Sixth Circuit in *Shelby* endorsed a broad reading of "reemployment" under §8(d) to bring former strikers "under the protective mantle of the NLRA."

Section 158(d) does not mandate the discharge of an individual participating in an illegal strike, it merely deprives the individual of certain statutory rights. The employer then has the discretion to either discharge or retain the employee. If the employer decides to retain the employee, that employee then regains the protection of the Act pursuant to Section 158(d). ***In other words, an employee does not forfeit forever the protection of the NLRA by engaging in an illegal strike. The employee is unprotected only until the employer exercises the discretion implicitly granted by §158. Since the employee loses the protection of the Act because of his conduct, the employer is therefore not barred from terminating the employee for participating in the strike. But once the employer decides not to discharge the employee, that employee is once again brought under the protective mantle of the NLRA.*** 967 F.2d at 1096. (Emphasis added.)

The Board also endorsed the principle that unlawful strikers can regain the protection of the Act when they terminate the strike without returning to work in *Zartic, Inc.*, 277 NLRB 1478 (1986), *affd.* *Zartic, Inc. v. NLRB*, 10 F.2d 1080 (11th Cir. 1987). In *Zartic*, employees struck in support of an unlawful purpose -- the discharge of illegal and "green card" aliens. *Id.* at 1482. Soon thereafter, the strikers made an unconditional offer to return to work. *Id.* at 1483. The employer told the workers they had been permanently replaced, and their names would be placed on a preferential rehire list. The Board held the employer violated the Act when it filled vacancies with

new hires instead of former unlawful strikers. *Id.* at 1495. The ALJ, whose decision the Board affirmed, wrote:

An employer can discharge employees for taking part in an unlawful strike. But when Zartic voluntarily took a positive action, namely, put strikers on a preferential recall list and advised them of this when they attempt to return on July 22, it could not later disregard that positive action without giving a reasonable explanation for its conduct... While Zartic voluntarily changed the strikers' status on July 22, it never gave a valid explanation why it subsequently disregarded that changed status. *Id.*

The Company's position is that it had an indefinite right to discharge former strikers months or years after they ended the unlawful strike. According to the Company, the lockout had no legal significance. There is no legal authority for that position.

A lockout *does* have legal significance. Locked out employees possess all employee rights under the Act, including the right to collectively bargain, the right to strike, and the right to engage in union activity. *Harter I*, 280 NLRB 597 (1986). Locked out employees can only be temporarily replaced, out of respect for the rights they possess. *Id.* at 600. From May 5 to August 4, 2008, the Company treated the former strikers as locked out workers under the Act, because they *were* locked out workers under the Act.

The Company plainly *did not* satisfy its burden of proving that the locked out employees *indefinitely* lost their protected status under the Act. *Freeman Decorating Co*, 336 NLRB 1, 5-6 (2001).

IV. THE ALJ CORRECTLY FOUND THAT A COMPANY'S ILLEGAL CONDUCT WAS INHERENTLY DESTRUCTIVE OF EMPLOYEE RIGHTS UNDER THE ACT.

Not only does the Company omit the fact that on August 4, 2008 it discharged 33 employees on layoff or sick leave in addition to the 112 former strikers; but also the Company does not mention

the ALJ's finding that the Company's illegal conduct was inherently destructive of the employees' rights under the Act.

In this case, the uncontroverted documentary evidence establishes that the Company discharged all of the bargaining unit members on August 4 for the sole reason that they "participated" in the strike of May 1-5. (GC Ex. 47. See also, GC Ex. 26.) It is clear that the only employees discharged on August 4 were those who belonged to the Union. In fact, management decided to clean house with a very broad broom. It not only terminated those union members who withheld their labor during the strike, it also chose to fire union members who were on sick leave, workers' compensation, or layoff status at the time of the strike. The only common denominator was the union affiliation of the discharged employees. In such circumstances, I readily conclude that the unlawful discriminatory motivation is established and that the Employer has not presented any legitimate business justification for the discharges. *Catalytic Industrial Maintenance*, 301 NLRB 342 (1991), enf. 964 F.2d 523 (5th Cir. 1992). Because it discriminatorily discharged all of its bargaining unit employees due to their union affiliation and participation in union activities, the Company engaged in conduct that was inherently destructive of protected rights and lacking in any legitimate business purpose. That conduct violated Section 8(a)(3) and (1) of the Act.

This conclusion by the ALJ is unassailable.

V. THE ALJ CORRECTLY FOUND THAT REINSTATEMENT AND MAKE WHOLE IS THE APPROPRIATE REMEDY FOR THE ILLEGAL DISCHARGE OF THE LOCKED OUT EMPLOYEES.

The Company contends that the Board's decision in *Detroit Newspaper Agency*, 343 NLRB 1041, enf. 171 FED Appx. 352 (D.C. Cir. 2006), cert denied 549 U.S. 813 (2006) stands for the proposition that illegally discharged employees on lockout should be "reinstated to lockout." (Company Brief p. 25) That is absurd.

In *Detroit Newspaper Agency*, certain economic strikers were lawfully permanently replaced (i.e., prior to making an unconditional offer to return to work) *before* they were unlawfully

discharged. Consequently, such employees were “entitled to reinstatement upon the departure of [their] replacement[s], with backpay running from the date of the [permanent] replacements’ departure.” *Id.* at 1042. ***In this case***, the replacements are *temporary*; and the unlawfully discharged employees are entitled to be reinstated and made whole under established Board precedent.

The Company’s “remedy” (“reinstatement to lockout”) would turn the Act on its head.

VI. THE ALJ CORRECTLY FOUND THAT THE COMPANY FAILED AND REFUSED TO BARGAIN WITH THE UNION FROM AUGUST 14, 2008 TO THE PRESENT.

On August 14, 2008, the Company refused to bargain with the Union “because all the employees have been terminated.” “The entire bargaining unit [had] been discharged.” (CP Ex. 4) Lillie’s statement that the Company would discuss “effects” does not obviate the Company’s categorical refusal to bargain with the Union. The existence of a bargaining unit is a prerequisite for collective bargaining under §8(a)(5) of the Act. And the Company admittedly eliminated the entire bargaining unit.

The Company’s argument that it is still “wait[ing] for a request [by the Union] to bargain regarding the replacement workers” is ridiculous. (Company Brief p. 8) The Company has maintained that the replacements are temporary. Temporary replacements are not even in the bargaining unit. *Goldsmith Motors Corp*, 310 NLRB 1279, fn. 5 (1993); see also, *Harter II*, 294 NLRB 647 (1989).

VII. THE ALJ’S CREDIBILITY RESOLUTIONS ARE AMPLY SUPPORTED BY THE RECORD.

In *Standard Drywall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951), the Board held that its policy is “not to overrule an [ALJ’s] resolutions as to credibility except where a clear preponderance of all of the relevant evidence convinces us that the [ALJ’s] resolution was

incorrect.” In this case, the preponderance of the record evidence plainly does *not* contradict the ALJ’s credibility resolutions. In this case, the record evidence overwhelmingly *corroborates* the ALJ’s credibility resolutions.

VIII. THE ALJ CORRECTLY FOUND THAT THE COMPANY’S UNFAIR LABOR PRACTICES WARRANTED EXTRAORDINARY RELIEF UNDER THE ACT.

The enormity of this Company’s unfair labors is virtually unrivaled in modern NLRB history. Extraordinary relief is warranted to remedy this Company’s extraordinary illegal conduct.

IX. CONCLUSION

For the foregoing reasons, the Union requests that the Board affirm the Judge’s Findings of Fact and Conclusions of Law in their entirety as they relate to all matters raised by Respondent’s Exceptions.

Respectfully submitted,

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Dated: May 26, 2010

Counsel for Charging Union

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

DOUGLAS AUTOTECH CORPORATION,

Respondent,

and

Case No. GR-7-CA-51428
Hon. Paul Buxbaum

INTERNATIONAL UNION, UNITED
AUTOMOBILE, AEROSPACE AND
AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA (UAW), AFL-CIO, AND ITS
LOCAL 822,

Charging Union.

STATEMENT OF SERVICE

The undersigned states that on May 26, 2010, he served the Charging Party's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision upon the following parties by electronic mail:

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