No. 15-60474

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DRESSER-RAND COMPANY

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

ON PETITION FOR REVIEW
AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT REGARDING ORAL ARGUMENT

The National Labor Relations Board believes that oral argument is appropriate in this case. Petitioner/Cross-Respondent Dresser-Rand Company is challenging the Board's determinations that it committed a wide range of unfair labor practices involving discrimination against strikers and failure to bargain over recall procedures and terms of employment. Oral argument will assist the Court in understanding the Board's grounds for those determinations.

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BRIEF FOR
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JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Dresser-Rand Company for review, and the cross-application of the National Labor Relations Board for enforcement, of a Board Order issued against Dresser-Rand. The Industrial Division of the Communications Workers of America, Local 313 ("the Union") has intervened on the Board's side. The Board had jurisdiction over the unfair-

labor-practice proceeding below under Section 10(a) (29 U.S.C. § 160(a)) of the National Labor Relations Act, as amended ("the Act," 29 U.S.C. §§ 151, et seq.). The Board's Decision and Order, issued on June 26, 2015, and reported at 362 NLRB No. 136 (RE.1-8),[1] is a final order with respect to all parties.

Dresser-Rand petitioned for review on July 6, 2015, and the Board cross-applied for enforcement on July 31. The Court has jurisdiction pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), and venue is proper because Dresser-Rand is headquartered in Texas. The filings were timely, as the Act imposes no time limit on the initiation of review or enforcement proceedings.

STATEMENT OF ISSUES

1. Whether substantial evidence supports the Board's finding that Dresser-Rand violated Section 8(a)(3) and (1) of the Act by discriminatorily locking out strikers to punish them for their participation in a lengthy but lawful strike.

2. Whether substantial evidence supports the Board's finding that Dresser-Rand, upon ending the lockout, violated Section 8(a)(3), (5) and (1) of the Act by unilaterally imposing a discriminatory recall procedure that punished employees who had continued to participate in the strike until its conclusion.

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[1] "RE" refers to Dresser-Rand's record excerpts; "Tr." to the transcript of the hearing before the administrative law judge; "GCX" (General Counsel's), "RX" (Dresser-Rand's), and "JX" (Joint) to exhibits introduced at that hearing. References preceding a semicolon are to Board findings; those following, to supporting evidence.

3. Whether the Board is entitled to enforcement of its findings that Dresser-Rand violated Section 8(a)(3) and (1) by suspending employee Marion Cook for his protected comments about striker replacements, and by discharging employee Kelvin Brown for his union activity.

4. Whether substantial evidence supports the Board's finding that Dresser-Rand violated Section 8(a)(3) and (1) of the Act by denying certain strikers accrued vacation benefits because of their union activities.

5. Whether substantial evidence supports the Board's finding that Dresser-Rand violated Section 8(a)(5) and (1) of the Act by unilaterally changing its practice regarding paid lunch breaks during weekend overtime shifts.

STATEMENT OF THE CASE

Acting on unfair labor practice charges filed by the Union, the Board's General Counsel issued a complaint against Dresser-Rand alleging that it unlawfully discriminated against strikers and failed to bargain over recall procedures and employment terms. (RE.9, 13.) After conducting a hearing, an administrative law judge found that Dresser-Rand committed numerous unfair labor practices. (RE.45-46.)

After Dresser-Rand filed exceptions to the judge's decision, the Board (Chairman Pearce and Member Griffin; Member Hayes dissenting in part) issued a Decision and Order affirming, with slight modifications, the judge's findings,

conclusions, and recommended order. 358 NLRB No. 97 ("2012 Decision and Order") (RE.9-12.) Dresser-Rand petitioned the Court for review of that Decision and Order, and the Board cross-applied for enforcement. After the Board filed the record, the Court stayed the case pending the Supreme Court's review of *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013).

On June 26, 2014, the Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), which held that three recess appointments to the Board in January 2012, including that of Member Griffin, were invalid under the Recess Appointments Clause. Subsequently, this Court, granting the Board's motion, vacated the Board's 2012 Decision and Order, and remanded the case to the Board for further proceedings. *See* Case No. 12-60638 (5th Cir.). On June 26, 2015, the Board (Chairman Pearce and Member Hirozawa; Member Johnson dissenting in part) issued the Decision and Order (362 NLRB No. 136) now before the Court. (RE.1-8.) Having considered de novo the administrative law judge's decision and the record in light of the parties' exceptions and briefs, the Board explained why it agreed with the vacated 2012 Decision and Order, which it incorporated by reference. (RE.1-2.)

I. THE BOARD'S FINDINGS OF FACT

A. After an Economic Strike, Dresser-Rand Locks Out Strikers but Not Other Unit Employees

Dresser-Rand manufactures compressors that extract oil and natural gas. It has long had a collective-bargaining relationship with the Union, which represents production and maintenance employees at Dresser-Rand's facility in Painted Post, New York. In the spring of 2007, the parties began negotiations for a successor collective-bargaining agreement to replace one that was due to expire on August 3. (RE.1, 13-14; Tr.843-44, JX.1.) The negotiations failed to produce a new agreement, and, on August 4, the Union commenced an economic strike. All of the approximately 417 bargaining unit employees initially participated. (RE.14; Tr.172-74, 926-27, 952.)

Early in the strike, Dresser-Rand hired temporary replacements to continue operating the business. (RE.14; Tr.841, 1143, RX.59.) In late August or early September, 13 of the strikers made an unconditional offer to return, crossed the picket line, and began working again. (RE.14; Tr.192-93.) In mid-September, Dresser-Rand also began hiring permanent replacements. (RE.14; Tr.961-63, RX.36.)

During the strike, the parties met for bargaining three times. On November 19, the Union ended the strike, ceased picketing, and made an unconditional offer

to return to work on behalf of striking employees. (RE.14-15; Tr.1004-06, GCX.2).

On November 23, Dresser-Rand rejected the Union's offer to return to work and instituted a partial lockout. It locked out the employees who had participated in the strike, but not the employees who had been hired as permanent replacements, who were also bargaining unit members. (RE.15; Tr.854, 915, 989, 1023, GCX.4.) During the lockout, the parties met twice for negotiations. (RE.16; Tr.1029.)

B. Dresser-Rand Ends the Lockout, Immediately Recalls the Crossovers, and Unilaterally Implements Its Process for Recalling Full-Term Strikers

On Thursday, November 29, Dresser-Rand declared a bargaining impasse and announced that it was implementing its last offer. It simultaneously declared that the lockout was over and that the employees would be free to return to work if they did so under the terms of the implemented offer. (RE.16; GCX.6.) That day, the Union reiterated its unconditional offer to return to work, and reminded Dresser-Rand that it needed to negotiate over the process for returning employees to work, preferably by seniority. (RE.17; Tr.183, 1040, GCX.9, 13.) Dresser-Rand informed the Union that it needed time to assess its staffing needs and that not all strikers would be able to return immediately. (RE.16-17; Tr.1188-89.)

Without negotiating with the Union, however, Dresser-Rand immediately invited back all of the crossover employees—those who had abandoned the strike in August and September. Shortly after Dresser-Rand issued an 11:30 a.m. press release announcing the end of the lockout, Human Relations Project Manager Kevin Doane began calling crossovers and instructing them that they could return to work. (RE.16, 18 & n.34; Tr.1274-75, 1280-83.) Dresser-Rand brought back 12 of the crossovers that same day and returned the thirteenth the next morning. All of the crossovers were reinstated before any of the employees who struck for the duration. (RE.18; Tr.193-96, JX.4.)

On Friday, November 30, at 5:40 p.m., Dresser-Rand informed the Union that it would create a "preferential hiring list," ranking the full-term strikers based on a mixture of seniority and performance to recall them to work. (RE.18; Tr.271, 1368-69, GCX.14.) At 11:11 a.m. on Sunday, December 2, Dresser-Rand sent the Union a "process document" and recall list describing its procedure for recalling the full-term strikers based on unilaterally chosen criteria. The list did not include the names of the 13 crossovers Dresser-Rand had already taken back. (RE.18-19; Tr.200-04, 1371-72, GC.17.)

Later that same day, before hearing back from the Union, Dresser-Rand began contacting full-term strikers directly about returning to work pursuant to its unilaterally chosen criteria. Beginning on December 4, Dresser-Rand returned the

first wave of full-term strikers to work. That day, the Union sent Dresser-Rand a letter objecting that the recall was discriminatory. Dresser-Rand continued to recall the full-term strikers through April 2008 pursuant to its unilaterally chosen criteria. (RE.18-19, 45; Tr.196, 1038, 1195, 1377-78, RX.52.)

C. Dresser-Rand Discharges Kelvin Brown

Before sending the recall list to the Union, Dresser-Rand decided that Kelvin Brown would not be on it. Brown, a 33-year employee with Dresser-Rand, was a union member who had participated in the strike by picketing on a regular basis. Dresser-Rand refused to reinstate Brown, effectively discharging him, claiming he engaged in picket line misconduct. (RE.24-25; Tr.551-52.)

The morning of the alleged incident, on September 20, Brown and other strikers were picketing at a crosswalk in front of the facility's truck gate. (RE.25; Tr.556, 674-75.) A van stopped near the crosswalk for no apparent reason. A second van quickly arrived, pulling up behind the first van, and lightly striking it. The collision took place within inches of Brown. (RE.26; Tr.556-60.) A police officer approached the scene after noticing traffic was stopped, and saw Brown momentarily lean or lie against the second van's fender. (RE.30 & n.124; Tr.662-63.) He issued Brown a ticket alleging disorderly conduct, a misdemeanor in New York. Without questioning Brown, Dresser-Rand decided to discharge him based on a security guard report that described him as "jumping onto the front" of a

vehicle and confirmation from the officer that it was Brown. (RE.24 n.86, 27; Tr.1240-42, RX.65.)

D. Dresser-Rand Unilaterally Changes Employees' Paid Lunch Break for Weekend Overtime Work

Since at least the late 1980s, Dresser-Rand had a practice of providing a 20-minute paid lunch break to employees who worked weekend overtime shifts of 7 hours or greater. (RE.19 n.44; Tr.332-34, 354-56.) After the strike ended, Dresser-Rand stopped providing a paid lunch break for weekend work. Neither the expired collective-bargaining agreement nor Dresser-Rand's implemented terms specifically described the subject of paid lunch breaks during weekend overtime work. Dresser-Rand did not bargain with the Union regarding this change before implementing it. (RE.19-20; Tr.332-36, GCX.27.)

E. Dresser-Rand Suspends Marion Cook

Marion Cook worked for Dresser-Rand for over 31 years. He was a union member who participated in the strike by regularly walking the picket line. On January 14, 2008, Dresser-Rand recalled Cook to a department in which employees who had been hired as permanent replacements were working alongside employees who were former strikers. (RE.27; Tr.296-97, 304, 961-63.)

During a routine department meeting on April 30, Cook, responding to a manager's question, said that "there were too many salaried workers and too many 'scabs' for it to be safe to work." (RE.27-28; Tr.298-99.) The following day,

Dresser-Rand suspended Cook without pay for "violating common decency or morality on company property," as punishment for saying "scabs" during the meeting. (RE.28; Tr.303, 317, JX.8.)

F. Dresser-Rand Denies Accrued Vacation Benefits to Strikers After They Return to Work

Under the collective-bargaining agreement in effect until the day before the strike began, employees accrued vacation time in the "calendar year," and they were due to be paid for the accrued time upon their return to work following a break in service. (RE.21, 34; Tr.224, GCX.25, JX.1 p.14-16.)[2] Interpreting the relevant collective-bargaining agreement provisions in a prior case involving the analogous situation of a layoff, an arbitrator determined that vacation eligibility should be calculated on the basis of the 12-month period preceding a break in service. He also determined that "an employee who had worked the requisite number of hours to be eligible for vacation in the calendar year of the layoff will, upon recall in a subsequent calendar year, be immediately eligible to take vacation." (RE.36; GCX.25 p.3.) Finally, he found that the accrued vacation benefit would remain frozen until the employee was recalled. (RE.36; GCX.25 p.3.)

[2] Section 14N of the agreement provided: "Anything herein contained to the contrary notwithstanding, an employee who has worked 900 or more hours in any calendar year . . . 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 . . . ." (JX.1 p.14-16, GCX.24.)

After the lockout ended and full-term strikers began returning to work, Dresser-Rand held meetings in which it told a number of them that they would not be eligible for vacation time if they had not been on the active payroll and worked 900 hours during the preceding 12-month period. (RE.20-21; Tr.344-49.) In August and September 2008, Dresser-Rand recalled approximately 23 full-term strikers, none of whom had worked in the preceding 12 months because during that period they were on strike, locked out, or waiting on the recall list. Under the terms of the expired collective-bargaining agreement, those 23 strikers had accrued vacation benefits before they went on strike. Even though they had worked the requisite hours and accrued vacation benefits before the strike, Dresser-Rand informed them, when they were recalled, that they were not qualified for the vacation time. (RE.20 n.55; Tr.244-43, 346-49, 1296-99.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Pearce and Member Hirozawa; Member Johnson dissenting in part) found, in agreement with the administrative law judge, that Dresser-Rand violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by "discouraging membership in the Union by locking out employees who participate[d] in a strike, while not locking out other bargaining unit employees." (RE.3, 9, 45-46.) The Board further found that Dresser-Rand, upon ending the lockout, violated Section 8(a)(3), (5), and (1) by

giving preferential recall treatment to employees who had crossed the picket line, and then unilaterally implementing a procedure for recalling the full-term strikers to work. (RE.3, 9-10, 46.) The Board also found that Dresser-Rand violated Section 8(a)(3) and (1) by suspending Marion Cook for his comments relating to the strike, by discharging Kelvin Brown for his participation in the strike, and by denying accrued vacation benefits to certain strikers. (RE.3, 9-10, 46.) Finally, the Board found that Dresser-Rand violated Section 8(a)(5) and (1) by unilaterally eliminating paid lunch breaks on voluntary weekend overtime shifts. (RE.3, 9-10, 46.) Accordingly, the Board ordered Dresser-Rand to cease and desist from engaging in those unfair labor practices and from, in any like or related manner, interfering with its employees' rights under Section 7 of the Act (29 U.S.C. § 157). (RE.3, 9-10, 46.)

Affirmatively, the Board's Order directs Dresser-Rand to make whole all employees who should have been recalled upon the Union's unconditional offer to return to work but who were instead unlawfully locked out. (RE.3.) Dresser-Rand must also make whole all employees who would have been recalled from the strike at an earlier date, if it is determined that they would have been recalled earlier but for the unilateral implementation of a recall procedure. Additionally, Dresser-Rand must offer reinstatement and make-whole relief to employees who have not been recalled, should it be determined that they would have been recalled but for

the unilaterally implemented procedure. (RE.3.) Dresser-Rand must rescind Cook's suspension and offer Brown full reinstatement, and make them whole. (RE.3.) Further, it must make strikers whole for accrued vacation benefits denied them because they participated in the strike; upon request, rescind the unilateral change in the practice of paid lunch breaks during weekend overtime shifts; and make whole all affected unit employees for any loss of earnings and other benefits. (RE.3.) Dresser-Rand must notify and, on request, bargain with the Union before making changes in unit employees' terms and conditions of employment. (RE.3.)

The Board's Order also requires Dresser-Rand to compensate employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to appropriate calendar quarters. (RE.3.) In addition, Dresser-Rand is required to post a remedial notice. (RE.3-4.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that Dresser-Rand violated Section 8(a)(3) and (1) of the Act by discriminatorily locking out employees who had struck to punish them for exercising their Section 7 rights. In finding that antiunion animus motivated Dresser-Rand's decision to lock out the strikers, the Board reasonably relied on independent evidence of unlawful motive, including Dresser-Rand's numerous violations of the Act in the aftermath of the

strike and the spurious reasons it offered to justify its actions. The antiunion motivation underlying the lockout rendered it unlawful even if—as the Board assumed without deciding—a legitimate business justification could be established for Dresser-Rand's facially discriminatory lockout of unit members who exercised their Section 7 right to participate in the strike, but not those unit members who served as replacement employees.

Ample evidence supports the Board's finding that the lockout and the ensuing unfair labor practices together displayed Dresser-Rand's anger toward the strike the Union had just ended. On the heels of the strike, just days after Dresser-Rand imposed and then abruptly ended the lockout, it granted a preferential right of recall to crossovers who had abandoned the strike, thereby overtly discriminating against employees who struck for the duration. In taking that discriminatory action, Dresser-Rand violated Section 8(a)(3) and (1), as the Board found. Dresser-Rand then violated Section 8(a)(5) and (1) by subjecting the full-term strikers to a unilaterally imposed recall procedure that exempted the newly reinstated crossovers. Substantial evidence supports the Board's finding that Dresser-Rand's disparately harsh and unilateral treatment of the full-term strikers was unlawful. Moreover, both unfair labor practices demonstrate Dresser-Rand's intent to punish them for their protected strike activity, as the Board reasonably found.

The Board also properly took into account Dresser-Rand's additional violations of Section 8(a)(3) and (1) of the Act by unlawfully suspending and discharging strikers. Dresser-Rand does not contest the Board's finding that it unlawfully suspended full-term striker Marion Cook for his comments about striker replacements. And substantial evidence supports the Board's finding that full-term striker Kelvin Brown did not engage in serious picket-line misconduct justifying his discharge.

Finally, in finding antiunion animus, the Board reasonably considered Dresser-Rand's denial of strikers' accrued vacation benefits in violation of Section 8(a)(3) and (1), as well as its violation of Section 8(a)(5) and (1) by unilaterally changing a longstanding practice regarding employees' paid lunch breaks. Substantial evidence supports the Board's finding that Dresser-Rand failed to establish legitimate reasons for depriving strikers of vacation benefits that had accrued before the strike began. And substantial evidence also supports the Board's finding that nothing in the terms of employment Dresser-Rand implemented at the end of the lockout permitted it to eliminate employees' paid lunch breaks on voluntary weekend overtime shifts.

As the Board noted, all of Dresser-Rand's unfair labor practices were either intimately related to the strike or occurred shortly after it ended. Considering the entire context, the Board reasonably found that Dresser-Rand's decision to

selectively lock out the strikers and its numerous subsequent acts which continued to penalize them were all of a piece, and motivated by the same antiunion animus.

STANDARD OF REVIEW

The Court recognizes "the Board's expertise in labor law" and will "defer to plausible inferences [the Board] draws from the evidence, even if [the Court] might reach a contrary result were [it] deciding the case de novo." *NLRB v. Thermon Heat Tracing Servs., Inc.*, 143 F.3d 181, 185 (5th Cir. 1998) (quotations omitted). "Motive is a factual matter to be determined by the Board," *NLRB v. Mini-Togs, Inc.*, 980 F.2d 1027, 1032 (5th Cir. 1993), and the Board's factual findings are conclusive "if supported by substantial evidence on the record considered as a whole." *Mobil Exploration & Producing U.S. Inc. v. NLRB*, 200 F.3d 230, 237 (5th Cir. 1999) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951)). Further, when "the Court "review[s] the legal effect of a given set of facts, the Board's determination must be upheld 'if reasonable, consistent with the Act, and based on findings supported by substantial evidence.'" *Nat'l Fabricators, Inc. v. NLRB*, 903 F.2d 396, 399 (5th Cir. 1990) (quoting *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176, 1181 (5th Cir. 1982)). As the Court has observed, "[o]nly in the most rare and unusual cases will an appellate court conclude that a finding of fact made by the . . . Board is not supported by substantial evidence." *Merchants Truck Line, Inc. v. NLRB*, 577 F.2d 1011, 1014 n.3 (5th Cir. 1978). Moreover, it is

settled law that the Court "do[es] not make credibility determinations or reweigh the evidence" when reviewing the Board's decisions. *NLRB v. Allied Aviation Fueling of Dallas LP*, 490 F.3d 374, 378 (5th Cir. 2007) (per curiam).

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT DRESSER-RAND VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCRIMINATORILY LOCKING EMPLOYEES OUT TO PUNISH THEM FOR STRIKING

A. Applicable Principles

The Supreme Court has long recognized that the Act protects employees' right to strike. *NLRB v. Allis-Chalmers Co.*, 388 U.S. 175, 181 (1967); *NLRB v. Erie Resistor Corp*., 373 U.S. 221, 233 (1963). Section 7 of the Act grants employees the "right to self-organization, to . . . assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective-bargaining or other mutual aid or protection." 29 U.S.C. § 157. Section 13 further provides that nothing in the Act "shall be construed so as to either interfere with or . . . diminish in any way the right to strike." 29 U.S.C. § 163.

Section 8(a)(3) of the Act makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any other term or condition of employment to encourage or discourage membership in any labor organization." It is settled that "Section 8(a)(3) not only proscribes discrimination

that affects union membership, it also makes unlawful discrimination against employees who participate in concerted activities protected by section 7 of the Act." *Nat'l Fabricators*, 903 F.2d at 399. An employer, therefore, violates Section 8(a)(3) and (1) of the Act by discriminating against employees for their participation in a strike.[3] *Erie Resistor Corp.*, 373 U.S. at 233. *Accord NLRB v. Transp. Co. of Tex.*, 438 F.2d 258, 263 (5th Cir. 1971).

In *NLRB v. Great Dane Trailers, Inc.*, the Supreme Court set forth the framework for determining whether an employer has violated Section 8(a)(3) and (1) by imposing a lockout, withholding benefits, or otherwise taking adverse action against employees who have engaged in activity protected by Section 7. 388 U.S. 26, 32-35 (1967). *See, e.g.*, *Nat'l Fabricators*, 903 F.2d at 399-400 (upholding Board's finding, under *Great Dane*, that employer's layoff of employees who were expected to honor a picket line was unlawful). In cases where an employer's conduct is "inherently destructive of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations." *Great Dane*, 388 U.S. at 34 (internal quotation marks omitted). Where, as in this case, "the adverse effect of the discriminatory conduct on

[3] Because they interfere with employees' collective-bargaining rights, violations of Section 8(a)(3), like the violations of Section 8(a)(5) discussed below, produce derivative violations of Section 8(a)(1). *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *Nat'l Fabricators*, 903 F.2d at 398 n.1.

employee rights is comparatively slight, an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct."[4] *Great Dane*, 388 U.S. at 34 (internal quotation marks omitted). *See, e.g.*, *NLRB v. Great Atl. & Pac. Tea Co.*, 409 F.2d 296, 298 (5th Cir. 1969) (upholding Board's finding, under *Great Dane* framework, of unlawful motivation underlying employer's withholding of employment benefit from employees who would be voting on union representation); *Southcoast Hosps. Group, Inc.*, 363 NLRB No. 9, 2015 WL 5451459, at *2-3 (Sept. 16, 2015) (applying *Great Dane* to find unlawful employer's policy that deprived union-represented employees of job opportunities).

Accordingly, even if an employer articulates a legitimate business justification for locking out its union-represented employees, the lockout is unlawful if independent evidence demonstrates that it was motivated by antiunion animus. *NLRB v. Brown*, 380 U.S. 278, 287-88 (1965); *Great Dane*, 388 U.S. at 32-34. *Accord NLRB v. S. Beverage Co.*, 423 F.2d 720, 720 (5th Cir. 1970) (per curiam) ("[W]here the anti-union motivation for the lock-out is established by independent evidence, anti-union motivation will convert an otherwise ordinary

[4] Here, the General Counsel did not allege that Dresser-Rand's conduct was inherently destructive, and it is undisputed that the Board appropriately applied the "comparatively slight" analysis. (RE.9 n.1, 39.)

business act into an unfair labor practice."). *See also Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 315 (1965) (an employer does not violate the Act by locking out employees "for the *sole* purpose of bringing economic pressure to bear in support of [its] legitimate bargaining position" (emphasis added)).

"Because direct proof of motive is rarely possible," *Merchants Truck Line*, 577 F.2d at 1014, the Court has long recognized that the "Board may rely upon circumstantial evidence in drawing inferences about improper motive." *Marathon LeTourneau Co., Longview Div. v. NLRB*, 699 F.2d 248, 253 (5th Cir. 1983). *Accord NLRB v. Brookwood Furniture, Div. of U.S. Indus.*, 701 F.2d 452, 465 (5th Cir. 1983) ("Overt direct evidence of antiunion animus, a rarity at best, is not a prerequisite to a finding of improper motive."). Circumstantial evidence of unlawful motive may include the employer's commission of other unfair labor practices,[5] the timing of its actions in relation to employees' protected activities,[6]

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[5] *See Brookwood Furniture*, 701 F.2d at 468 (upholding Board finding of 8(a)(3) violation based, in part, on the employer's "commission of various other unfair labor practices in violation of Section 8(a)(1) which evidence its antiunion animus"). *See also, e.g., NLRB v. DBM, Inc.*, 987 F.2d 540, 543 (8th Cir. 1993) (an employer's "other unfair labor practices are highly relevant, since '[i]nference of an employer's unlawful motive [toward an employee] may be drawn from the employer's hostility toward the union" (quoting *Hall v. NLRB*, 941 F.2d 684, 688 (8th Cir.1991) (alterations in original))).

[6] *See Merchants Truck Line*, 577 F.2d at 1016 ("Given two competing inferences of equal plausibility, the Board is permitted to attach special significance to the timing and circumstances of the employer's anti-union campaign in choosing one."). *See also, e.g., NLRB v. Am. Geri-Care, Inc.*, 697 F.2d 56, 60 (2d Cir. 1982)

and its proffer of implausible or false reasons to explain its conduct.[7] Where, as here, circumstantial evidence permits a reasonable inference "that [a] lockout was designed to discipline" employees for engaging in protected activity, the lockout violates the Act. *Am. Ship Bldg.*, 380 U.S. at 308.

B. The Board Reasonably Relied on Dresser-Rand's Numerous Retaliatory and Unlawful Acts Toward the Strikers, as well as Its Spurious Reasons for Locking Them Out, in Finding that Dresser-Rand Violated Section 8(a)(3) and (1) of the Act by Discriminatorily Locking Out Employees Who Participated in the Strike

The Board, applying the foregoing principles, reasonably found that Dresser-Rand violated Section 8(a)(3) and (1) of the Act by selectively locking out only those employees who had previously exercised their statutorily protected right to strike. As an initial matter, Dresser-Rand does not contest the Board's finding (RE.39, 41) that by locking out employees who had participated in the strike, but not permanent replacements, it "engaged in discriminatory conduct which could have adversely affected employee rights to some extent." *Great Dane*, 388 U.S. at

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("An inference of anti-union animus is proper when the timing of the employer's actions is stunningly obvious." (quotation omitted)).

[7] *See NLRB v. S.S. Coachman & Sons*, 203 F.2d 109, 110-11 (5th Cir. 1953) (upholding Board finding of discrimination based in part on "the inconsistency between [the employer's] explanation of the employee's discharge and the facts revealed by the other evidence"). *See also, e.g.*, *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984) ("The presentation of implausible or shifting explanations for the alleged violation is a factor suggesting discrimination against union activity.").

33. After all, as the Board emphasized, both categories consisted of bargaining unit employees: the locked-out strikers, who retained their status as employees and their right to reinstatement;[8] and the permanent replacements, who "were bargaining unit members at the inception of the lockout." (RE.13, 41.) *See Leveld Wholesale, Inc.*, 218 NLRB 1344, 1350 (1975) ("[A] union represents all the employees in the bargaining unit. That includes both strikers and strike replacements."). *Accord C.H. Guenther & Son, Inc. v. NLRB*, 427 F.2d 983, 987 (5th Cir. 1970). Thus, as the Board observed, the partial lockout featured a "perfect correlation" between strike activity and locked out status: all unit members who had at any time exercised their Section 7 right to strike were locked out, while unit members who had never gone on strike were not. (RE.39, 45.) As the Board found (RE.39, 41), by targeting employees along Section 7 lines in that manner, Dresser-Rand engaged in discriminatory conduct that could have adversely affected employee rights under the analysis set forth in *Great Dane*, 388 U.S. at 33.

Continuing to apply *Great Dane*, the Board assumed, without deciding, that Dresser-Rand could articulate a legitimate business justification for the partial

[8] *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345 (1938). *See also NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 380-81 (1967) (former strikers who make unconditional offers to return to work are entitled to immediate and full reinstatement, even if it requires dismissal of temporary replacements); *Laidlaw Corp. v. NLRB*, 414 F.2d 99, 103 (7th Cir. 1969) (full reinstatement upon the departure of permanent replacements).

lockout.[9] Nonetheless, the Board found the lockout unlawful because independent evidence warranted an inference that Dresser-Rand was motivated by antiunion animus in targeting only employees who had exercised their right to strike. (RE.1-2, 9 n.1.) *See Great Atl. & Pac. Tea Co.*, 409 F.2d at 298 ("It is unnecessary to decide whether the justification advanced by the Company would qualify as a substantial and legitimate business end . . . for we hold that substantial evidence supports the Board's finding of an unlawful motivation." (citation and internal quotation marks omitted)). As shown below, settled law and ample evidence support the Board's finding.

1. The nature and timing of Dresser-Rand's actions, as well as the spurious reasons it proffered to justify them, demonstrated its unlawful motive

As the Board explained (RE.1-2 & n.4), Dresser-Rand committed numerous unfair labor practices against the strikers—all directly tied to the strike itself or following closely on its heels. The Board reasonably found that "the nature and timing" of those violations "shed light on the motive for the lockout." (RE.2 n.4.)

[9] (*See* RE.9 n.1 ("[W]e find it unnecessary to pass on the judge's finding that [Dresser-Rand] articulated a legitimate business justification for locking out strikers and continuing operations using permanent strike replacements."), RE.1 (incorporating by reference the 2012 Decision and Order).) Dresser-Rand misreads the Board's decision when it asserts that the Board affirmed the administrative law judge's finding that Dresser-Rand "established a legitimate business purpose for the lockout." (Br.19.) As discussed below (pp.26-27), to the extent that the Board did address the rationalizations that Vice President and Chief Administrative Officer Elizabeth Powers and others offered for locking out the strikers and recalling crossovers first, the Board discredited them. (RE.2.)

In particular, just six days after it implemented the lockout, Dresser-Rand granted immediate preferential recall rights to employees who had previously crossed the picket lines. (RE.1-2 & n.5, 42-43.) In favoring the crossovers, Dresser-Rand overtly discriminated against the full-term strikers, whom it then subjected to an evaluation process that it unilaterally and unlawfully imposed. (RE.1-2 & n.6, 43-45.) As the Board found, Dresser-Rand's "unilateral institution of recall procedures that treated crossovers more favorably" demonstrated that it "intended to punish the strikers." (RE.2 n.6.)

Further, immediately after it ended the lockout, Dresser-Rand unlawfully refused to recall striker Kelvin Brown for engaging in union activity during the strike. (RE.1-2 & n.6, 29-30.). Subsequently, Dresser-Rand suspended striker Marion Cook for his legally protected comments about the replacement employees hired during the strike and retained during the lockout. (RE.1-2, 33-34.) Dresser-Rand also denied certain returning strikers vacation benefits they had accrued (RE.1-2, 34), and altered employees' lunch breaks without bargaining with the Union (RE.1-2, 35-37). The Board reasonably concluded that those violations, too, "reflect[ed] [Dresser-Rand]'s desire to punish the employees for engaging in a strike." (RE.2 n.4.)

As the Board found, Dresser-Rand's unfair labor practices were not only linked to the strike and the lockout, they had "an immediate and massive impact on

the unit." (RE.2 n.5, 9 n.1.) Indeed, the discriminatory recall which followed the lockout affected all of the strikers, as it "provided crossovers with a continuing advantage over those who remained on strike until its conclusion and delayed—and diminished—recall opportunities for all those" who struck for the duration. *Peerless Pump Co.*, 345 NLRB 371, 376 (2005).

As the Board further emphasized, the violations of strikers' rights were "all of a piece," Dresser-Rand's "angry reaction to a lengthy but lawful strike that ended with the Union's refusal to accede to [Dresser-Rand]'s bargaining proposals and without a new agreement." (RE.2.)[10] Viewing the pattern of retaliation and refusal to bargain in its entirety, it was eminently reasonable for the Board to conclude that the discriminatory lockout, like the unlawful acts that followed, was intended to punish strikers for their protected conduct. Those subsequent acts

[10] Dresser-Rand is mistaken to the extent it suggests that the Board applied a new legal standard by describing Dresser-Rand's unlawful conduct as "all of a piece." (Br.24.) The courts and the Board have long employed such language to describe the inference that distinct actions are closely related. *See, e.g.*, *NLRB v. Gen. Elec. Co.*, 418 F.2d 736, 757 (2d Cir. 1969) ("[The employer]'s conduct, as the Board's opinion points out, was all of a piece. It negotiated, to the greatest possible extent, by ignoring the legitimacy and relevance of the Union's position as statutory representative of its members."); *Wells-Lamont Smith Corp.*, 41 NLRB 1474, 1498 (1942) ("The discharges were all of a piece and were designed to placate Association officials who desired the removal of active Amalgamated members . . . ."). *See also Brown*, 380 U.S. at 285 ("[T]he compelling inference is that [the employers' use of temporary replacements to continue operations during a lockout] was *all part and parcel* of [their] defensive measure to preserve the multiemployer group in the face of the whipsaw strike." (emphasis added)).

therefore strongly support the Board's finding that Dresser-Rand targeted strikers for lockout because they had engaged in union activity.

In finding that antiunion animus motivated the lockout, the Board also properly relied on the spurious reasons Dresser-Rand offered for its actions. (RE.2.) It is well established that "an employer's proffer of a lawful, but false, reason for an alleged act of Section 8(a)(3) discrimination" permits the Board to infer "that the employer was shielding an illicit motive." *Tidewater Constr. Corp.*, 341 NLRB 456, 458 (2004) (citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966)). Here, as the Board explained, Dresser-Rand's representatives, including Vice President and Chief Administrative Officer Elizabeth Powers, "offered a number of reasons for deciding to lock out the strikers and recall the crossovers before the strikers that do not withstand scrutiny." (RE.2.)

First, the Board properly rejected as baseless Dresser-Rand's claim that it recalled crossovers before full-term strikers because it did not think the Union's offer to return was unconditional. (RE.2.) As the Board found, the Union had unambiguously offered to return on an unconditional basis on November 19, and it confirmed on November 29 that its offer "was and remains unconditional." (RE.43; GCX.2, 9.) Indeed, Dresser-Rand no longer argues otherwise. Second, the Board reasonably discredited Powers' unsupported claim that she feared the

Union would sabotage Dresser-Rand's operations if the full-term strikers were recalled after the strike. (RE.2, 39-40 & n.153.) And third, the Board appropriately rejected as a "rationalization that is not supported by the record" Dresser-Rand's contention that it feared returning strikers would disrupt production by concertedly using their accrued vacation time immediately upon recall. (RE.2, 39-40 & n.153.) Dresser-Rand's resort to discredited justifications for the lockout and subsequent recall support the Board's finding of unlawful motivation. *See NLRB v. Gen. Fabrications Corp.*, 222 F.3d 218, 228 (6th Cir. 2000) (upholding Board's finding that layoffs were motivated by antiunion animus in part because employer was unable to support its asserted economic justifications); *Alpo Petfoods, Inc. v. NLRB*, 126 F.3d 246, 253 (4th Cir. 1997) (employer's false testimony warrants inference that true motive was unlawful).

In sum, considering Dresser-Rand's course of conduct as a whole, the Board reasonably found that "the antiunion animus that underlay [its] discriminatory treatment in recalling the strikers and [its] other postlockout unlawful conduct . . . also motivated the decision to lock out the employees." (RE.2.) In light of the other post-strike violations of the Act, the timing of Dresser-Rand's most egregious acts punishing the strikers, and its resort to spurious reasons to explain its conduct, "[t]he record fairly permits the conclusion that anti-union motivation

lay behind [Dresser-Rand's] action." *NLRB v. Dell*, 283 F.2d 733, 736 (5th Cir. 1960).

2. Contrary to Dresser-Rand's contentions, the Board properly relied on unfair labor practices committed just after the lockout or connected to the strike that precipitated the lockout

All of Dresser-Rand's challenges to the Board's decision fail. In particular, Dresser-Rand errs in asserting (Br.23-25) that the Board did not find a causal link between its state of mind in implementing a partial lockout targeting full-term strikers, and its many unfair labor practices, most of which it committed within days of the lockout. As explained above (pp.23-24), the Board appropriately relied on the "nature and timing" of Dresser-Rand's violations of the Act, as well as the unconvincing justifications it proffered for its handling of the lockout and recall, in finding that its post-lockout actions demonstrated its animus toward employees' strike activity. (RE.2 & n.4.) The causal relationship the Board inferred between Dresser-Rand's animus and the lockout is both obvious and reasonable: "the antiunion animus that underlay [the postlockout violations] also motivated the decision to lock out the employees." (RE.2.)

Because the Board expressly found (RE.2 & n.4) that all of Dresser-Rand's postlockout violations "reflect[ed] [its] desire to punish the employees for engaging in a strike" and were thus motivated by antiunion animus, Dresser-Rand further errs when it argues that "there was not a single finding" to that effect.

(Br.29.) In relying on Dresser-Rand's other violations to find that the lockout was unlawfully motivated, the Board fully recognized that certain violations of the Act may be established without regard to motive (RE.2 n.6), as the Court observed in *Valmont Industries, Inc., v. NLRB*, 244 F.3d 454, 463 (5th Cir. 2001). But as the Board explained, "it is both self-evident and well established" that the circumstances under which the employer engaged in those violations may nonetheless show hostility toward union activity. (RE.2 (citing *U.S. Marine Corp.*, 293 NLRB 669, 670-71 (1989), *enforced*, 944 F.2d 1305 (7th Cir. 1991) (en banc); *Raven Gov't Servs. Corp.*, 331 NLRB 651 (2000).) Well-established law supports the Board's application of that principle in this case.[11]

Further, contrary to Dresser-Rand's claims (Br.27-28), the Board has often evaluated a party's motivation in light of its later actions, with court approval. (RE.1 (citing *SCA Tissue N. Am. LLC v. NLRB*, 371 F.3d 983, 990 (7th Cir. 2004),

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[11] *See, e.g.*, *NLRB v. Roney Plaza Apartments*, 597 F.2d 1046, 1050 n.6 (5th Cir. 1979) (Board properly considered coercive interrogations which violated Section 8(a)(1) in finding discriminatory motivation for no-solicitation rule); *Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 424 (D.C. Cir. 1996) ("[S]urveillance of employees violates Section 8(a)(1) of the Act, and . . . violations of Section 8(a)(1) evidence anti-union animus."); *NLRB v. Gen. Elec. Co.*, 418 F.2d 736, 757 (2d Cir. 1969) ("Given the effects of take-it-or-leave-it proposals on the Union . . . , the Board could appropriately infer the presence of anti-Union animus, and in conjunction with other similar conduct could reasonably discern a pattern of illegal activity designed primarily to subvert the Union."); *Overnite Transp. Co.*, 335 NLRB 372, 376 (2001) (antiunion animus established based on circumstantial evidence such as unilaterally implemented policy that violated Section 8(a)(5)).

9 n.1 (citing *Postal Serv.*, 350 NLRB 441, 444 n.14 (2007); *K.W. Elec., Inc.*, 342 NLRB 1231, 1231 n.5 (2004); *Lynn's Trucking Co.*, 282 NLRB 1094, 1099 (1987), *enforced mem.*, 846 F.2d 72 (4th Cir. 1988)).) In *Merchants Truck Line, Inc. v. NLRB*, for example, the Court upheld the Board's finding that a layoff including union supporters was unlawfully motivated, in part because after the layoff, "[n]one of the pro-union employees were permitted transfer to other jobs within the company nor was any assisted in finding work elsewhere." 577 F.2d 1011, 1016 (5th Cir. 1978). In the same way, Dresser-Rand's treatment of strikers after the lockout indicates discriminatory intent. *See also S. Beverage Co.*, 423 F.2d at 720 ("[T]he circumstances surrounding the calling off of the lock-outs and the conditions placed upon the rehiring of former employees fully supported the Board's conclusion that this gave a retroactive coloration to the lockout.").

Similarly, in *Abbey's Transportation Services v. NLRB*, the Second Circuit upheld the Board's evaluation of an employer's "subsequent unlawful acts" in finding that its discharges of union supporters were unlawfully motivated. 837 F.2d 575, 580 (2d Cir. 1988). Although those acts—announcing the deferral of a wage increase and interrogating employees about their union affiliation in violation of Section 8(a)(1)—occurred in the weeks and months after the discharges, the court held that they "betray[ed] [the employer's] hostility toward the union campaign" and "showed its motives" for the earlier conduct. *Id.* Thus, there is no

merit to Dresser-Rand's categorical claim (Br.21) that the Board must ignore evidence of animus that arises after an employer has already penalized union members.

Equally unavailing is Dresser-Rand's reliance (Br.30) on the passage of time between the lockout and two of Dresser-Rand's violations—denying strikers' vacation benefits because of their strike activity and suspending a former striker for his statements in relation to striker replacements. The nature of those acts, which were inextricably bound up with the strike itself, supports the Board's conclusion (RE.2 & n.4) that they shed light on Dresser-Rand's motive in responding to the strike with its partial lockout. Moreover, as noted above, Dresser-Rand's other conduct demonstrating its intent to punish the strikers, including its discriminatory and unilaterally implemented recall procedure, came at the conclusion of the lockout, which was just days after the lockout was imposed. (RE.1-2 & n.4.) The timing of *those* violations, accordingly, provides particularly strong support for the Board's finding that the same purpose animated the lockout. *See, e.g.*, *Van Vlerah Mech., Inc. v. NLRB*, 130 F.3d 1258, 1264 (7th Cir. 1997) (upholding Board's finding of unlawful motivation based in part on "expressions of anti-union animus near the time of [an employee's] discharge").

Dresser-Rand is also wrong to assert (Br.29-30) that the Board could not rely on the postlockout violations because Vice President and Chief Administrative

Officer Powers made the final decision to lock out the strikers, and she played no part in subsequent events. Dresser-Rand overly minimizes undisputed evidence that Powers, far from acting alone, worked in consultation with a team of company officials and representatives, including Dresser-Rand's lead attorney, Louis DiLorenzo, Human Relations Project Manager Kevin Doane, Human Resources Manager Daniel Meisner, and other steering committee members, all of whom bore responsibility for the subsequent unfair labor practices. (RE.17, 18n.34, 19, 24, 28; Tr.1074-75, 1175.) The actions and motivations of those corporate officials and representatives are imputed to Dresser-Rand. *See NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 782 (8th Cir. 2013) (antiunion viewpoint of employer's CEO may reasonably be imputed to other senior managers who were the decisionmakers at issue); *Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 423-24 (D.C. Cir. 1996) (Board properly relied on antiunion animus expressed by one of employer's high-level managers in finding unlawful a discharge with which that manager was not personally involved). Moreover, as discussed above (pp.26-27), the Board took into account that Powers herself offered a justification for the lockout decision that did not withstand scrutiny, which was additional evidence of unlawful motivation. (RE.2, 40 n.153; Tr.1075.)

Finally, the Board reasonably discounted Dresser-Rand's protestations (Br.20-22) that, notwithstanding its unfair labor practices, it also took some actions

that suggested good faith. As the Board emphasized (RE.1-2), Dresser-Rand failed to negotiate in good faith as to the resolution of the lockout itself, instead choosing to discriminate against full-term strikers and unilaterally determine the terms of their recall.[12] Moreover, even if, as Dresser-Rand argues (Br.21), the partial lockout could have been legitimately imposed to support its bargaining position—an issue the Board did not decide (*see* above pp.22-23 & n.9)—the Board properly found that the lockout was, in fact, unlawfully motivated. *See Movers & Warehousemen's Ass'n v. NLRB*, 550 F.2d 962, 966 (4th Cir. 1977) (lockout unlawful if motivated by intent to interfere with employees' Section 7 rights, even if also in support of legitimate bargaining position); *O'Daniel Oldsmobile, Inc.*, 179 NLRB 398, 398 & n.1, 402 (1969) (lockout in support of employer's bargaining position was nonetheless unlawful because of disparate treatment of union adherents).

Nor does the fact that Dresser-Rand locked out crossovers and full-term strikers alike undermine the Board's finding of unlawful motivation, as Dresser-

[12] In any event, Dresser-Rand misunderstands *Horsehead Resource Development Co. v. NLRB*, 254 F.3d 328 (6th Cir. 1998), when it asserts (Br.22) that the Sixth Circuit views good faith bargaining as dispositive of the legality of a lockout. The court in *Horsehead* held that an employer had bargained in good faith before imposing a lockout. *Id.* at 338. The Board had found the lockout unlawful solely because it was in furtherance of bad faith bargaining, and the court's disagreement on that point was therefore "dispositive." *Id.* at 340. The court did not hold that prior good faith bargaining renders any lockout lawful notwithstanding other conduct establishing the employer's antiunion animus.

Rand insinuates. (Br.21.) Powers openly admitted (Tr.1075-77) that Dresser-Rand took that step only because it believed locking out the crossovers was the price it had to pay to lock out the full-term strikers—the employees whom the Board found Dresser-Rand intended to punish. As the Court has observed, an employer violates the Act by taking adverse action against a group of employees to discourage union activity "even though neutral or anti-union employees suffer in the process." *Merchants Truck Line*, 577 F.2d at 1016. *Accord Birch Run Welding & Fabricating, Inc. v. NLRB*, 761 F.2d 1175, 1180 (6th Cir. 1985); *NLRB v. Rich's Precision Foundry, Inc.*, 667 F.2d 613, 628 (7th Cir. 1981). In any event, Dresser-Rand's preferential recall of the crossovers ensured that they suffered little from the lockout. As explained below, that "helping hand was not extended to those who [showed that they] favored the union" by striking for the duration. *Merchants Truck Line*, 577 F.2d at 1016.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT DRESSER-RAND VIOLATED SECTION 8(a)(3), (5), AND (1) OF THE ACT BY UNILATERALLY IMPOSING A DISCRIMINATORY RECALL PROCEDURE THAT PUNISHED FULL-TERM STRIKERS FOR THEIR UNION ACTIVITY

A. Dresser-Rand Violated Section 8(a)(3) and (1) of the Act by Giving Preferential Recall Rights to Employees Who Crossed the Picket Line During the Strike

As noted above, it is unlawful under Section 8(a)(3) and (1) of the Act for an employer, by discrimination in regard to hire or tenure of employment, to

discourage employees from participating in protected concerted activity such as a strike. Substantial evidence supports the Board's finding that Dresser-Rand engaged in unlawful discrimination after the lockout when it immediately recalled only those employees who had previously abandoned the strike, while making employees who struck for the duration wait for reinstatement as they slowly moved up a recall list. (RE.1-2, 42-43.)

The evidence of discrimination is undisputed. Two classes of employees were not working during the lockout: the crossovers, who had crossed the picket lines in August or September and remained employed during the strike; and the full-term strikers, who had continued to strike until November 19, when the Union made an unconditional offer to return to work on their behalf. When Dresser-Rand ended the lockout on November 29, "all of the locked out employees had expressed a desire to return to work." (RE.2 n.6.) All of them were "entitled to be considered for recall on a nondiscriminatory basis, without regard to their previous relative levels of commitment to the strike." *Peerless Pump Co.*, 345 NLRB 371, 376 (2005).

As the Board found, however, Dresser-Rand "overtly discriminated against 97 percent of the unit by treating the crossovers more favorably than the full-term strikers." (RE.2.) On the afternoon of November 29, Dresser-Rand told the Union that not all the strikers would be able to return, as it would take some time to assess

Dresser-Rand's manpower needs. (RE.16-17.) But earlier that day, Dresser-Rand had already begun contacting the 13 crossover employees and returning them to work. It did not even furnish the Union with the details of its plan for recalling full-term strikers until December 2, after the crossovers were safely reinstated. (RE.43.) As the Board explained (RE.43), Dresser-Rand favored the crossovers not only by bringing them back first, but also by sparing them the seniority and performance ranking criteria it applied to full-term strikers.

Thus, from November 29, when Dresser-Rand ended the lockout, until it began recalling full-term strikers several days later, "[Dresser-Rand]'s system was based entirely on employees' relative levels of commitment to the strike: employees who abandoned the strike early were effectively rewarded, at the expense of those who held out." *Peerless Pump*, 345 NLRB at 376 n.15. Dresser-Rand offered no legitimate reason for treating employees who continued to exercise their Section 7 rights more harshly than those who abandoned the strike earlier. *See id.* at 376 ("Absent a legitimate and substantial business justification for using [a] facially discriminatory system, . . . [an employer]'s reinstatement preference for crossover employees following the conclusion of the strike violate[s] Section 8(a)(3) and (1) of the Act."). As explained above, the Board properly discredited Dresser-Rand's claim that it thought the Union had not yet made an unconditional offer to return to work, an assertion the company no longer

advances. (RE.2.) The legal arguments Dresser-Rand now offers to justify its discrimination are likewise meritless.

Dresser-Rand principally relies (Br.31-36) on *Trans World Airlines v. Independent Federation of Flight Attendants*, 489 U.S. 426 (1989) ("*TWA*"), to support its position that it could give preference to the crossovers. But the Board has recognized that *TWA* does not give an employer license to treat crossovers better than full-term strikers. *See Caterpillar, Inc.*, 321 NLRB 1130, 1130 (1996) (employer violated 8(a)(3) and (1) by subjecting reinstated full-term strikers but not crossovers to a restaffing operation), *vacated, but precedential value affirmed*, 332 NLRB 1116 (2000). Rather, in *TWA*, the Supreme Court merely held that an employer need not displace junior crossover employees who have already returned to work with more senior strikers who subsequently make an unconditional offer to return. *Id.* at 433-37. At the end of the strike, the Supreme Court reasoned, the posts occupied by crossovers are "simply not 'available positions' to be filled." 489 U.S. at 438.

That rationale has no application here. When Dresser-Rand ended the lockout, all of the unit positions were available, except for those held by permanent replacements. And the crossovers and strikers were in the same position, as both groups consisted of employees awaiting reinstatement after the lockout. *Peerless Pump*, 345 NLRB at 376. At that juncture, Dresser-Rand could not lawfully

discriminate in filling the available positions based on the extent of individual employees' prior participation in a strike.

Dresser-Rand's reliance on *NLRB v. Delta-Macon Brick & Tile Co.*, 943 F.2d 567 (5th Cir. 1991), is similarly misplaced. In that case, the Court held that the employer could lawfully recall permanent replacements from an economic layoff when its business improved, rather than reinstating strikers who had offered unconditionally to return to work. *Id.* at 575-76. That was so because, the Court determined, the economic layoff did not create vacancies for the strikers within the meaning of *Laidlaw*.[13] *Id.* Here, by contrast, Dresser-Rand did not temporarily lay the crossovers off for economic reasons. Rather, it wielded an economic weapon—the lockout—against everyone who had participated in the strike. As noted above, all of those employees were equally locked out, and every post not occupied by a permanent replacement was equally available to them. Yet, as the Board found (RE.43), Dresser-Rand discriminated against full-term strikers by bringing them back last and by applying its seniority and performance ranking system only to them. Nothing in *Delta-Macon* authorizes such discrimination.

In sum, because Dresser-Rand's preferential recall of crossovers constituted "discriminatory conduct carrying a potential for adverse effect upon employee

[13] (*See* p.22 & n.8 (discussing *Laidlaw Corp. v. NLRB*, 414 F.2d 99, 103 (7th Cir. 1969)).)

rights," and there is "no evidence of a proper motivation" for it, "the Board's conclusions [a]re supported by substantial evidence." *Great Dane*, 388 U.S. at 35.

B. Dresser-Rand Violated Section 8(a)(5) and (1) of the Act by Unilaterally Implementing a Procedure for Recalling Employees from the Strike and Lockout

Under Section 8(a)(5) of the Act, it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." 29 U.S.C. § 158(a)(5). Further, it is settled that an employer violates Section 8(a)(5) and (1) of the Act by altering employees' terms and conditions of employment without bargaining with their established representative. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991); *Strand Theatre of Shreveport Corp. v. NLRB*, 493 F.3d 515, 520-21 (5th Cir. 2007). Such a unilateral change "is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal." *NLRB v. Katz*, 369 U.S. 736, 743 (1962). *Accord A.H. Belo Corp. (WFAA-TV) v. NLRB*, 411 F.2d 959, 971 (5th Cir. 1969). Although a union may choose to waive its right to bargain, it is "well established that a union cannot be held to have waived bargaining over a change that is presented to it as a *fait accompli*." *Gulf States Mfg., Inc. v. NLRB*, 704 F.2d 1390, 1397 (5th Cir. 1983).

As Dresser-Rand concedes (Br.43), an employer's bargaining obligation includes the duty to negotiate with the union, upon request, about the procedure for

reinstating employees following a strike or lockout. *Bio-Science Labs.*, 209 NLRB 796, 796-97 (1974); *Food Serv. Co.*, 202 NLRB 790, 804-05 (1973). Substantial evidence supports the Board's finding that Dresser-Rand failed to meet that obligation. The credited testimony shows that on Thursday, November 29, union officials told company representatives that they were requesting bargaining over the recall process, taking the position that recall should be based on employee seniority. (RE.43.) The next day, Dresser-Rand informed the Union that it was developing a list that "will rank employees through a mixture of performance and seniority." (RE.18 (internal quotation marks omitted).) But it was not until Sunday, December 2, that Dresser-Rand sent the Union the details of its process and its preferential hiring list. (RE.18.) And at that time, Dresser-Rand stated that it "plan[ned] to contact employees being returned under this first phase today and tomorrow." (RE.18.) Dresser-Rand acknowledges (Br.11) that it set its plan in motion that day by contacting strikers and beginning to recall them based on the criteria and procedures that it had chosen unilaterally.

As the Board explained (RE.44-45), Dresser-Rand did not fulfill its duty to bargain in good faith when it began implementing its unilaterally devised recall process on the same day it gave the Union its formula and preferential hiring list. Instead, contrary to Dresser-Rand's assertion (Br.42), the Board properly found that Dresser-Rand "presented the return to work process to the Union as a fait

accompli." (RE.45.) In doing so, Dresser-Rand did not "afford a reasonable opportunity for counter arguments or proposals." *Intersys. Design & Tech. Corp.*, 278 NLRB 759, 759-60 (1986) (quoting *Gulf States Mfg.*, 704 F.2d at 1397 (internal quotation marks omitted)). Although Dresser-Rand invited questions from the Union, the Board reasonably found that it foreclosed bargaining by making clear its intention to immediately implement its plans. (RE.45.) *See Ciba Geigy Pharm. Div.*, 264 NLRB 1013, 1017-18 (1982) ("[I]f the notice is too short a time before implementation or because the employer has no intention of changing its mind, then the notice is nothing more than informing the union of a fait accompli."), *enforced*, 722 F.2d 1120 (3d Cir. 1983).

In asserting, incorrectly, that it allowed the Union a reasonable opportunity to bargain, Dresser-Rand erroneously cites (Br.36-37) distinguishable cases like *NLRB v. Citizens Hotel Co.*, 326 F.2d 501, 504-05 (5th Cir. 1964), where the bonus at issue was raised by the employer several months before it was implemented, and *Nabors Trailers, Inc. v. NLRB*, 910 F.2d 268, 270-72 (5th Cir. 1990), where the parties had several face-to-face negotiations and made multiple counter proposals. By contrast, Dresser-Rand, far from giving the Union a reasonable opportunity to present counter proposals, began calling employees according to its preferential hiring list on the same day it gave that list to the Union. (RE.19, 44.) Accordingly, this case is more like *Gulf States Manufacturing*, where the Court

upheld the Board's finding that a union lacked an adequate opportunity to bargain over layoffs it learned about just minutes before they took effect. 704 F.2d at 1397.

C. Dresser-Rand's Meritless Challenges to the Board's Remedial Order Are Premature

Dresser-Rand offers several baseless challenges to the Board's remedial order. As explained below, however, the details of the Board's remedy have yet to be worked out in compliance proceedings. At this stage, Dresser-Rand's arguments are not ripe for the Court's consideration.

As the Court has recognized, "[t]he Board enjoys broad, discretionary authority to formulate a remedy where an unfair labor practice has been committed." *NLRB v. Pilot Freight Carriers, Inc.*, 604 F.2d 375, 377 (5th Cir. 1979) (citing *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969)). The Supreme Court has explained that "[i]n fashioning its remedies . . . the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969). Thus, in arguing that the Board's remedy is outside its authority, Dresser-Rand has a heavy burden, which it fails to carry.

In remedying an unfair labor practice, the Board seeks "to restore, to the extent feasible, the status quo ante by restructuring the circumstances that would

have existed had there been no unfair labor practices." *NLRB v. KSM Indus., Inc.*, 682 F.3d 537, 549 (7th Cir. 2012) (quoting *Parts Depot*, 348 NLRB at 153). In a case like this one involving unlawful unilateral action, "'the Board's normal remedy is to order restoration of the status quo ante as a means to ensure meaningful bargaining,' a policy that 'has been approved by the Supreme Court.'" *Deming Hosp. Corp. v. NLRB*, 665 F.3d 196, 203 (D.C. Cir. 2011) (quoting *Porta–King Bldg. Sys.*, 310 NLRB 539, 539 (1993) (citing *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964)), *enforced*, 14 F.3d 1258 (8th Cir.1994)).

In this case, in order to "restor[e] the status quo ante, to the extent feasible, as a setting for bargaining" (RE.46), the Board properly ordered Dresser-Rand to make whole all of the employees it has already recalled, if they would have been recalled earlier but for Dresser-Rand's unilateral implementation of its discriminatory recall procedure (RE.3). The Board further ordered Dresser-Rand to offer reinstatement and make-whole relief to employees who have not yet returned to work, should it be determined that they would have been recalled but for the unilateral implementation. (RE.3.) The Board also issued an affirmative bargaining order, requiring Dresser-Rand to notify and, on request, bargain with the Union before changing employees' terms and conditions of employment. (RE.3, 46.)

Misunderstanding the Board's order, Dresser-Rand argues that the remedy is inappropriate because "the legality of [its] recall process was not challenged." (Br.43.) As explained above (pp.34-42), however, the Board found the recall unlawful for two separate reasons: (1) because Dresser-Rand acted unilaterally, and (2) because it discriminatorily recalled crossovers first and did not apply to them the same ranking criteria it applied to full-term strikers. (RE.1-3, 43.) Dresser-Rand again misapprehends the order in contending that it "does not task the parties with bargaining, but rather allows the Board to impose its chosen method of recall." (Br.44-45.) As noted above (p.13), the Board specifically adopted an affirmative bargaining order. (RE.3, 46.) Moreover, contrary to Dresser-Rand's claims (Br.43-44), the Board's deferral to the compliance stage of the details of its remedy does not compel agreement between the parties. It simply allows them to present evidence, in a subsequent proceeding, showing what would have occurred if Dresser-Rand had not discriminatorily granted immediate recall rights to crossovers and then unilaterally implemented a plan for recalling full-term strikers to the remaining vacancies.[14]

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[14] Dresser-Rand also misses the mark in attacking *Alaska Pulp Corp.*, 326 NLRB 522, 523 (1998), *enforcement denied in part sub nom. Sever v. NLRB*, 231 F.3d 1156 (9th Cir. 2000). (Br.44 n.15.) The Board merely cited *Alaska Pulp* for the undisputed proposition that compliance proceedings are intended to reconstruct the status quo ante. (RE.46 n.170.) Nor does *Sever* support Dresser-Rand's position. The Ninth Circuit rejected the recall-related determinations underlying the Board's backpay calculations because, given the union's decertification, the order of recall

Because the Board has yet to determine how any of the strikers would have fared under a nondiscriminatory, properly bargained recall procedure, Dresser-Rand's challenges are premature. The Board appropriately deferred to compliance proceedings the determination of what would have occurred but for Dresser-Rand's unilateral implementation of a recall procedure. It is the Board's normal, judicially approved practice to bifurcate its proceedings in that manner, leaving the particulars of certain remedial obligations to compliance proceedings, in which the parties can "offer concrete evidence" as to how the remedy should be tailored. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902 (1974) (approving the "Board's normal policy of modifying its general reinstatement and backpay remedy in subsequent compliance proceedings as a means of tailoring the remedy to suit the individual circumstances"). *See also NLRB v. Globe Mfg. Co.*, 580 F.2d 18, 21-22 (1st Cir. 1978) (upholding Board order leaving to compliance proceedings whether employee would have been recalled absent the discriminatory recall policy). The Board's practice is no less appropriate where a recall is at issue. *See, e.g.*, *KSM Indus.*, 682 F.3d at 549-50 (upholding Board's determination of an appropriate order of recall through compliance proceedings).

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in that case was entirely "at the discretion of the employer's business judgment." 231 F.3d at 1167-68. By contrast, Dresser-Rand concedes that it lacked such discretion because "the recall process [wa]s a mandatory subject of bargaining." (Br.43.) *Sever* also involved law-of-the-case considerations not present here. *Id.*

Ultimately, if compliance proceedings result in an outcome with which Dresser-Rand disagrees, its challenge will then come up for review "in a concrete factual context, shedding light on how the [Board's remedy] operates in practice." *Sheet Metal Workers Int'l Ass'n, Local 270 v. NLRB*, 561 F.3d 497, 501 (D.C. Cir. 2009). Until then, its speculative objections to the manner in which the Board's remedy will ultimately be tailored in compliance proceedings are not yet ripe for the Court's consideration. *See id.* at 500-02 (because Board's new evidentiary rule was to be applied during the compliance stage, challenges to it were not ripe); *NLRB v. Katz's Delicatessen of Houston Street, Inc.*, 80 F.3d 755, 771 (2d Cir. 1996) (finding premature employer's objection to a Board order to restore the status quo because "[t]he Board has yet to determine in compliance proceedings how [the employer]'s payments should be structured to best achieve that result").

III. THE COURT SHOULD SUMMARILY ENFORCE THE BOARD'S UNCONTESTED FINDING THAT DRESSER-RAND UNLAWFULLY SUSPENDED MARION COOK, AND UPHOLD AS SUPPORTED BY SUBSTANTIAL EVIDENCE THE BOARD'S FINDING WITH RESPECT TO KELVIN BROWN'S DISCHARGE

The Board properly found (RE.1, 29-30, 33-34) that Dresser-Rand violated Section 8(a)(3) and (1) by suspending Marion Cook and discharging Kelvin Brown, both full-term strikers, for protected conduct relating to the strike. As explained below, the Court should summarily enforce the Board's finding as to

Cook because Dresser-Rand does not contest it, and the Board's finding as to Brown is supported by substantial evidence.

A. The Court Should Summarily Enforce the Board's Finding that Dresser-Rand Violated Section 8(a)(3) and (1) by Unlawfully Suspending Marion Cook for Engaging in Protected Activity

The Board is entitled to summary enforcement of its finding (RE.1, 33-34) that Dresser-Rand unlawfully disciplined employee Marion Cook for comments he made relating to the strike. Dresser-Rand suspended Cook, a vocal and active union member and former striker, for calling permanent replacement employees "scabs"—an utterance plainly protected under the Act. *See Linn v. Plant Guard Workers Local 114*, 383 U.S. 53, 60-61 (1974); *Nor-Cal Beverage Co.*, 330 NLRB 610, 611 (2000). Dresser-Rand (Br.2) no longer challenges the Board's finding that it violated Section 8(a)(3) and (1) of the Act by disciplining Cook for using that word. Accordingly, Dresser-Rand has waived any challenge to that finding, and the Court should summarily enforce the relevant portion of the Board's Order. *See El Paso Elec. Co. v. NLRB*, 681 F.3d 651, 658 (5th Cir. 2012) (summary enforcement granted where employer failed to challenge issue in opening brief).

B. Substantial Evidence Supports the Board's finding that Dresser-Rand Violated Section 8(a)(3) and (1) of the Act by Discharging Kelvin Brown for His Union Activity

The Board reasonably found (RE.1, 29-30) that Dresser-Rand unlawfully discharged employee Kelvin Brown for his union activity. As explained above

(p.17), employees have a right to strike under Section 7 of the Act. Upon making an unconditional offer to return to work, strikers, who remain employees, are entitled to reinstatement to available positions. Although an employer can refuse to reinstate an employee who engaged in serious misconduct while on strike, such misconduct "must have had a tendency to coerce other employees in the exercise of their protected rights." *Richmond Recording Corp. v. NLRB*, 836 F.2d 289, 295 (7th Cir. 1987). If the employer fails to meet its burden of showing serious misconduct, its refusal to return the employee to work where a vacancy exists violates Section 8(a)(3) and (1) of the Act. *Medite of N.M.*, 314 NLRB 1145, 1146 (1994), *enforced*, 72 F.3d 780 (10th Cir. 1995).

Substantial evidence supports the Board's finding (RE.34) that Dresser-Rand unlawfully refused to reinstate Brown, effectively discharging him for participating in the strike. As the Board explained (RE.30), Dresser-Rand failed to meet its burden of showing that Brown engaged in serious misconduct that had a tendency to coerce employees. The evidence at most showed only that he either briefly stepped in front of a van, or leaned against its bumper for a moment. (RE.30 & n.124.) There was no damage to the van, no injury to person or property, and only a slight delay, if any, in the van's accessing the facility. (RE.30.) Although a town justice ultimately assessed Brown a mandatory $100 surcharge for "disorderly conduct," the justice did so merely because he concluded that Brown—like the

other pickets walking through the crosswalk—had put himself in a position where he could have been struck by a vehicle. (RE.27, 30 n.119; GCX.43 pp.95-98, RX.12.) Under Board law, Brown did not engage in serious misconduct justifying discharge. *See Medite*, 314 NLRB at 1146.

Dresser-Rand (Br.45-47) exaggerates the seriousness of Brown's conduct and embellishes the Board's findings. Contrary to Dresser-Rand's claims, the record does not show, and the Board did not find, that Brown intimidated, imperiled, or even noticeably delayed anyone. Accordingly, Dresser-Rand errs in relying on cases involving egregious misconduct. In *NLRB v. E-Systems, Inc.*, for example, the Court concluded that an employee engaged in disqualifying strike misconduct where she blocked the passage of a car by standing in front of it for 15 minutes and assaulted a non-striking employee. 642 F.2d 118, 119, 122-23 (5th Cir. 1981). Similarly, *CalMat Co.* involved an employee who deliberately put himself in front of a moving vehicle, and twice attempted to assault the driver and damage the truck. 326 NLRB 130, 135 (1998). Nothing of the sort occurred here.

Further, *Newport News Shipbuilding & Dry Dock Co. v. NLRB*, 738 F.2d 1404, 1411 (4th Cir. 1984), cited by Dresser-Rand (Br.47), only bolsters the Board's position. As the court noted there, the test is not whether police intervene but whether the misconduct tends to coerce nonstrikers. *Id*. at 1409-11 (describing numerous examples of police intervention that did not constitute serious

misconduct). Although the court, *id.* at 1411, upheld the discharge of one striker who actively blocked a gate and refused to move, preventing nonstrikers from entering the facility until police physically removed him, his conduct was qualitatively different from Brown's. As the credited evidence shows, Brown did not attempt to prevent anyone from accessing the facility, and there were no findings that police intervention was necessary to correct any problem. Accordingly, Dresser-Rand violated Section 8(a)(3) and (1) of the Act by refusing to reinstate Brown and effectively discharging him.

IV. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT DRESSER-RAND VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY UNLAWFULLY DENYING STRIKERS ACCRUED VACATION BENEFITS

The Supreme Court has held that refusing to pay striking employees vacation benefits that had accrued under a terminated collective-bargaining agreement is destructive of employee rights, and constitutes "discrimination in its simplest form." *Great Dane*, 388 U.S. at 32-34. In *Texaco, Inc*, 285 NLRB 241, 245-46 (1987), the Board set out the test for analyzing such refusals. First, the Board must show that the benefit had accrued, i.e., that it was "due and payable on the date the employer denied [it]." *Id*. Proof of accrual will often turn on the interpretation of the relevant collective-bargaining agreement. *Id*. Second, the Board must show that the benefit was withheld on the apparent basis of employee participation in a strike. *Id*. Once such discrimination is shown, the employer then

has the burden of establishing that the complained-of action was motivated by "legitimate objectives." *Great Dane*, 388 U.S. at 34. If discriminatory conduct is shown and the employer fails to present a legitimate business justification, the Board's finding of a violation will be upheld. *Id*. at 35; *Swift Adhesives, Div. of Reichhold Chems., Inc.*, 320 NLRB 215, 215-16 (1995), *enforced*, 110 F.3d 632 (8th Cir. 1997).

Applying this accepted framework, the Board reasonably determined that, under *Texaco*, the vacation benefit had accrued to the 23 strikers in question pursuant to the collective-bargaining agreement that expired the day before the strike began, and that Dresser-Rand withheld the benefit from them because they participated in the strike. (RE.36.) With respect to the first issue, the Board appropriately relied on the findings of an arbitrator in a prior case involving the same contract language. Applying that language in the context of a layoff, the arbitrator ruled that vacation eligibility accrued prior to the break in service. He concluded that under the agreement, vacation eligibility should be calculated on the basis of the 12-month period preceding the break, and "an employee who had worked the requisite number of hours to be eligible for vacation in the calendar year of the layoff will, upon recall in a subsequent calendar year, be immediately eligible to take vacation." (RE.36; GCX.25.) The arbitrator also determined that the accrued vacation benefit would remain frozen until a future recall. (RE.21.)

Applying the arbitrator's interpretation of the relevant contract language to the analogous situation of a break in service caused by a strike, the Board reasonably found that the employees in question—all of whom had worked the requisite 900 hours in 2007 before going on strike (Tr.348-49)—had likewise accrued the vacation benefit under the terms of the prior agreement. (RE.36.) The accrual, under the arbitrator's award, should have been frozen until the strikers were recalled. (RE.36.) Those facts constitute substantial evidence supporting the Board's conclusion that the vacation benefit was due and payable to the strikers upon their recall. *See Great Dane*, 388 U.S. at 32 (vacation benefits were accrued because employees met conditions specified in expired employment contract, despite fact that strike created a delay in being able to claim them); *NLRB v. Swift Adhesives*, 110 F.3d 632, 634 (8th Cir. 1997) (same).

Dresser-Rand suggests (Br.50) that the Board should not have looked to the terms of the collective-bargaining agreement in effect when the strike began, as interpreted by an arbitrator, to determine whether the strikers had accrued vacation benefits. As the Board explained, however, the question was whether the benefits had already accrued under the prior agreement; if so, they could not be unilaterally divested by Dresser-Rand's subsequent changes. (RE.36 (citing *Swift Adhesives*, 320 NLRB at 216).) And in answering that question in the affirmative, the Board properly relied on a binding arbitral construction of the contract. (RE.36.) *See*

Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593, 599 (1960) ("[T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator[,] [because] [i]t is the arbitrator's construction which was bargained for."). Indeed, the Board has recognized that an arbitrator's award does not merely help explain the parties' agreement; "the arbitrator's interpretation is the parties' agreement." *Penn. Am. Water Co.*, 359 NLRB No. 142 (2013), *incorporated by reference*, 362 NLRB No. 18 (2015), *pet. for review pending*, Nos. 15-1694 & 15-1917 (3d Cir.) (citing *E. Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57, 62 (2000)).

It is beyond dispute, furthermore, that after the benefits had accrued, Dresser-Rand withheld them on the basis of a strike. *Texaco*, 285 NLRB at 245. Dresser-Rand admits (Br.49) that it denied the benefit to the 23 strikers recalled in August and September 2008 because they had not worked 900 hours in the 12 months preceding their return to work. That was so only because they were either on strike, locked out, or waiting to be recalled. Accordingly, as the Board found, Dresser-Rand "would have deemed the strikers eligible for the benefit, except for the strike." (RE.36.) Dresser-Rand's withholding of the benefit was therefore discriminatory, even though, as it notes, it did not subject all of the strikers to the same deprivation. "[T]he 'discrimination' prohibited by Section 8(a)(3) is not limited simply to distinctions between strikers and nonstrikers." *Caterpillar, Inc.*,

321 NLRB at 1131-32. Rather, "Section 8(a)(3) 'discrimination' includes the difference between conduct that takes place because of a strike and conduct that would not have taken place in the absence of a strike." *Id.*

Moreover, as the Board found, Dresser-Rand failed to meet its burden of showing a substantial business justification for denying the accrued benefit to the 23 strikers. *See Great Dane*, 388 U.S. at 34. Dresser-Rand fails to demonstrate that its interpretation was reasonable by merely noting its disagreement with the Board's reading of the pertinent language, and it does nothing to discount the independent arbitrator's interpretation of those terms.

Finally, Dresser-Rand errs in relying (Br.51) on *Vesuvius Crucible Co. v. NLRB*, 668 F.2d 162 (3d Cir. 1981), where the employer took the view that no employee, striking or otherwise, accrued vacation under the expired contract. Unlike the employer in *Vesuvius*, it cannot be disputed that Dresser-Rand denied the 23 strikers their accrued vacation benefit as a direct result of the strike. *See Texaco*, 285 NLRB at 246 (denial of accrued benefits on basis of strike warrants inference of unlawful conduct). Nor does Dresser-Rand (Br.52) help itself by citing *NLRB v. Alamo Express, Inc.*, 420 F.2d 1216 (5th Cir. 1969) (per curiam), a factually distinguishable contempt case in which this Court upheld a special master's determination that benefits were not due to an employee who requested vacation pay while he was on strike. *Id.* at 1219. That case does not undercut the

Board's finding that Dresser-Rand unlawfully denied accrued vacation to 23 strikers upon their recall.

V. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT DRESSER-RAND VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY CHANGING ITS PRACTICE REGARDING PAID LUNCH BREAKS DURING WEEKEND OVERTIME SHIFTS

As noted above, an employer violates Section 8(a)(5) and (1) of the Act by unilaterally changing employees' terms and conditions of employment, including lunch breaks. *See Ford Motor Co. v. NLRB*, 441 U.S. 488, 498 (1979). It is undisputed that for years Dresser-Rand gave employees a paid 20-minute lunch break period when they worked weekend overtime shifts of 7 hours or more. That benefit existed as a past practice independent of the collective-bargaining agreement. *See Bonnell/Tredegar Indus., Inc. v. NLRB*, 46 F.3d 339, 344 (4th Cir. 1995) (employer's past practice can become an implied employment term that cannot be modified without the parties' mutual consent). It is also undisputed that Dresser-Rand changed that longstanding practice when its employees returned to work—immediately after the strike and lockout—by eliminating paid lunch breaks on weekend overtime shifts. (RE.1.) Dresser-Rand failed to notify and bargain with the Union before making that change, as the law required. *See, e.g., El Paso Elec. Co. v. NLRB*, 681 F.3d 651, 659 (5th Cir. 2012) (employer violated Section

8(a)(5) and (1) by unilaterally changing rules for when employees could take their breaks).

Dresser-Rand claims (Br.59) that it was privileged to make the change based on the terms that it implemented following impasse. But the Board reasonably found the implemented terms did not modify the parties' past practice. Section 6D of the terms Dresser-Rand implemented after the strike provided a 20-minute paid lunch break for "[e]mployees that work more than four (4) hours of overtime in any given day." (JX.2 p.4). Under the prior collective-bargaining agreement, employees were entitled to a 20-minute paid lunch break if they "perform[ed] overtime work in excess of two (2) hours in any day." (JX.1 p.23-24.) Neither provision said anything about weekend work, all of which is overtime, let alone whether employees receive a paid lunch break when working 7 hours of weekend overtime. (RE.19, 34 n.140.) Accordingly, as the Board found (RE.34), there is no merit to Dresser-Rand's suggestion (Br.53-55) that it was free to ignore the parties' longstanding past practice because it had inserted the word "given" before the word "day" in the new contract provision. The Board reasonably found that the terms implemented after impasse did not privilege Dresser-Rand to change the established practice unilaterally. (RE.34.)

Further, the record does not support Dresser-Rand's claim (Br.55-56) that it notified the Union of the proposed elimination of weekend paid lunch breaks but

the Union chose not to bargain over it. Dresser-Rand merely cites testimony about general discussions concerning its implementation of the imposed terms, including Section 6D. (RE.20; Tr.343-48.) There is no credited evidence to support Dresser-Rand's assertion that during those general discussions, it notified the Union and provided an opportunity to bargain about the parties' past practice regarding weekend paid lunch breaks before implementing the change. (RE.34.)

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court deny Dresser-Rand's petition for review and enforce the Board's Order in full.

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National Labor Relations Board

December 2015

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DRESSER-RAND COMPANY	:
	:
Petitioner	:
	: Case No. 15-60474
v.	:
	: Board Case No.
NATIONAL LABOR RELATIONS BOARD	: 3-CA-26543
	:
Respondent	:

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,330 words of proportionally spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

/s/ Linda Dreeben
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1015 Half Street, SE
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Dated at Washington, DC
this 11th day December 2015

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CERTIFICATE OF SERVICE

I hereby certify that on December 11, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Linda Dreeben
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Dated at Washington, DC
this 11th day December 2015

United States Court of Appeals

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December 15, 2015

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No. 15-60474 Dresser-Rand Company v. NLRB
USDC No. 03-CA-026543
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USDC No. 03-CA-026711
USDC No. 03-CA-026943

Dear Mr. Jost,

The following pertains to your brief electronically filed on 12/11/2015.

You must submit the seven (7) paper copies of your brief required by 5TH CIR. R. 31.1 within five (5) days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

Sincerely,

LYLE W. CAYCE, Clerk

/s/ Sabrina Short
By: _____
Sabrina Short, Deputy Clerk
504-310-7817

cc: Ms. Julie Brock Broido
Mr. Arthur Tracy Carter
Ms. Linda Dreeben
Mr. Alfred John Harper III
Mr. Jeremy Daniel Kernodle
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