UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

FILED
JUN 16 2016
MICHAEL GANS
CLERK OF COURT

COOPER TIRE & RUBBER COMPANY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	PETITION FOR REVIEW
	)	
NATIONAL LABOR RELATIONS BOARD,	)	16-2721
	)	
Respondent.	)	

Pursuant to Rule 15(a) of the Federal Rules of Appellate Procedure and Section 10(f) of the National Labor Relations Act, as amended, 29 U.S.C. 160(f), Cooper Tire & Rubber Company, Petitioner, petitions the United States Court of Appeals for the Eighth Circuit for review of the Decision and Order of the National Labor Relations Board entered on May 17, 2016 in the matter of *Cooper Tire & Rubber Company and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO/CLC*, Case No. 08-CA-087155. This decision is reported at 363 NLRB No. 194 and a copy is attached as Exhibit A. Petitioner seeks review of the Board's Order and requests that the Order be overturned or set aside.

This Court has jurisdiction to hear this petition because Petitioner has a tire manufacturing plant located within this Circuit, specifically at 3500 Washington Road, Texarkana, Arkansas 71854 and thus "transacts business" in this Circuit within the meaning of 29 U.S.C. 160(f).

Dated this 15th day of June, 2016.

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EIGHTH CIRCUIT

Respectfully submitted,

NANCY A. NOALL (0010974)
Email: nnoall@westonhurd.com
Direct Dial: 216-687-3368

MORRIS L. HAWK (0065495)
Email: mhawk@westonhurd.com
Direct Dial: 216-687-3270

WESTON HURD LLP
The Tower at Erieview
1301 E. Ninth Street, Suite 1900
Cleveland, Ohio 44114-1862
Phone: 216-241-6602 / Fax: 216-621-8369

Attorneys for Cooper Tire & Rubber Company

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 15th day of June, 2016, a true and correct copy of the foregoing Petition for Review was served by certified, first-class United States Mail, postage prepaid, upon the following:

Linda J. Dreeben
Deputy Associate General Counsel
Appellate and Supreme Court Litigation Branch
Office of General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, D.C. 20570-0001

Allen Binstock
Regional Director, Region 8
National Labor Relations Board
1695 AJC Federal Building
1240 East 9th Street
Cleveland, OH 44199

Kelly Freeman
Counsel for the General Counsel
National Labor Relations Board
1695 AJC Federal Building
1240 East 9th Street
Cleveland, OH 44199
Kelly.Freeman@nlrb.gov

James G. Porcaro
Schwarzwald, McNair & Fusco LLP
616 Penton Media Building
1300 East Ninth Street
Cleveland, OH 44114-1503
jporcaro@smcnlaw.com

Morris L. Hawk

Exhibit A

Cooper Tire & Rubber Company and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO/CLC, Case No. 08-CA-087155, reported at 363 NLRB No. 194, May 17, 2016

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Cooper Tire & Rubber Company *and* United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO/CLC. Case 08–CA–087155

May 17, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND MCFERRAN

On June 5, 2015, Administrative Law Judge Thomas M. Randazzo issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed answering briefs, and the Respondent filed reply briefs. In addition, the National Association of Manufacturers and the Equal Employment Advisory Council filed amici curiae briefs. The General Counsel filed a brief in response to the brief of amicus curiae National Association of Manufacturers.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Cooper Tire & Rubber Company, Findlay, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(c).

"(c) Compensate Anthony Runion for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 8 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for Anthony Runion."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. May 17, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose a representative to bargain with us on your behalf

[1] We agree with the judge that deferral is inappropriate based on his conclusion that the arbitrator's decision was "clearly repugnant" to the Act, including on the ground that the arbitrator's statement that employee Anthony Runion's conduct was "even more serious" because it occurred on a picket line is contrary to the Board's standard for evaluating picket-line misconduct under *Clear Pine Mouldings*, 268 NLRB 1044, 1046 (1984), enfd. 765 F2d. 148 (9th Cir. 1985), cert. denied 474 U.S. 1105 (1986). However, we do not rely on the parts of the judge's rationale that can be read to find that the arbitrator failed to adequately consider the unfair labor practice issue.

We further note that, contrary to the Respondent's assertions, *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), is distinguishable from the instant case on its facts. There, without reaching the legality of the alleged discriminatees' conduct, the Board deferred to the arbitral finding that the employer lawfully refused to reinstate four striking employees based on allegations that they persistently shouted profane insults, including racist slurs, at individuals over several days of picketing. Id. at 1082 & fn. 6. Here, in contrast, Runion made his two racially offensive statements about replacement workers after a closed van carrying those workers had passed.

Finally, in adopting the judge's findings, we do not rely on his citations to the administrative law judges' decisions in *Detroit Newspapers*, 342 NLRB 223, 268–269 (2004), and *Wayne Stead Cadillac*, 303 NLRB 432, 436 (1991), which the judge found "persuasive," but had not been subject to Board review.

[2] In accordance with our decision in *Advoserv of New Jersey, Inc.*, 363 NLRB No. 143 (2016), we shall modify the judge's recommended tax compensation and Social Security reporting remedy. We shall modify the judge's recommended Order and substitute a new notice to reflect this remedial change.

The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and positions of the parties.

Appellate Case: 16-2721 Page: 5 Date Filed: 06/16/2016 Entry ID: 4413727

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against you for engaging in union and/or protected concerted activities, including participation in picketing activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Anthony Runion full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Anthony Runion whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL compensate Anthony Runion for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 8, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for Anthony Runion.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Anthony Runion, and **WE WILL**, within 3 days thereafter, notify him in writing that this has been done and that his discharge will not be used against him in any way.

COOPER TIRE & RUBBER COMPANY

The Board's decision can be found at www.nlrb.gov/case/08–CA–087155 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Kelly Freeman, Esq., for the General Counsel.
Nancy Noall, Esq., for the Respondent.
James Porcaro, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

THOMAS M. RANDAZZO, Administrative Law Judge. The complaint in this case alleges that Cooper Tire & Rubber Company (the Respondent) violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by discharging Anthony Runion on or about March 1, 2012, because he engaged in union and/or concerted activities. The Respondent, in its answer, denied that it violated the Act as alleged.[1]

A hearing on the complaint allegations was originally scheduled on March 17, 2015. However, on March 16, 2015, the hearing was indefinitely postponed. On March 19, 2015, the parties filed a joint motion requesting a decision without a hearing based solely on a stipulated record. Consistent with Section 102.35(a)(9) of the Board's Rules and Regulations (the Rules), the motion included the parties' stipulation of facts with attached exhibits, statement of the issues, and short statements of position from the General Counsel, the Charging Party, and the Respondent.

By order dated March 26, 2015, I granted the joint motion and approved the stipulation of facts. The General Counsel, the Charging Party, and the Respondent subsequently filed briefs, which I have considered. Based on the entire stipulated record[2] and the briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Delaware corporation, with an office and place of business in Findlay, Ohio (the Findlay facility), as well as additional facilities located in Texarkana, Arkansas, and Tupelo, Mississippi, has been engaged in the business of manufacturing tires. Annually, the Respondent, in conducting its business operations described above, has derived gross revenues in excess of $500,000 and has purchased and received at its Findlay, Ohio facility goods and materials valued in excess of $50,000 directly from points located outside the State of Ohio.

The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

[1] The underlying charge was filed by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO/CLC and its Local 207L (collectively referred to as the Charging Party or the Union) on August 13, 2012, and amended on January 20, 2015. The complaint and notice of hearing issued on January 20, 2015.

[2] No consideration has been given to any facts set forth in the briefs that are not supported by the stipulated record.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent and the Union, along with its predecessor local unions, have had a collective-bargaining history at the Findlay, Ohio facility for at least 70 years. At all times material, the Union and its Local 207L have been designated as the exclusive collective-bargaining representative of the unit consisting of approximately 1044 production and maintenance employees at the Findlay facility. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective by its terms from February 27, 2012, to February 28, 2017, and which has been extended by the parties until midnight, February 28, 2020.

The facts of the instant case, however, occurred at the time the previous contract expired. That previous collective-bargaining agreement was effective from 2008 to 2011 and expired on October 31, 2011. From approximately September 7, 2011, until February 23, 2012, the parties engaged in negotiations for a successor collective-bargaining agreement. On November 22, 2011, the Respondent made its last, best, and final offer, which the Union presented to its membership. However, that ratification vote failed. On November 28, 2011, the Respondent locked out the bargaining unit employees at the Findlay facility, and it began operating that facility with supervisors, managers, and replacement workers from its Tupelo plant, and it contracted with Strom Engineering to supply replacement workers.

The parties continued to bargain during the lockout and eventually reached a tentative agreement that was ratified by the union membership on February 27, 2012. The lockout ended on February 28, 2012, and the Respondent began recalling the locked out employees to work on or about March 3, 2012.

On December 6, 2011, the Union filed a charge in Case 08–CA–070209 alleging, inter alia, that the Respondent's lockout of the employees was unlawful. On March 30, 2012, the Regional Director dismissed the charge allegation that the Respondent's lockout of the employees violated the Act. On December 14, 2012, the Office of Appeals upheld the Regional Director's dismissal of that allegation.

B. The Facts

1. Anthony Runion's conduct on the picket line on January 7, 2012

As mentioned above, during the lockout the Respondent operated the Findlay plant with temporary replacement workers. The Union set up picket lines at the commencement of the lockout, and it manned six separate picket stations at and around the Findlay facility. Each picket station was staffed by various numbers of employees, both day and night. The Respondent hired security guards for the lockout, and much of the picketing activity was recorded on video by the Respondent's security guards.

Throughout the lockout, the Respondent and the Union communicated with each other to address any issues regarding conduct on the part of either the locked out workers or the replacement workers that might increase tensions in an effort to keep the picket lines peaceful. At no time during the lockout was there a court order or injunction limiting the number of picketers at the entrances to the Respondent's Findlay facility or otherwise regulating the conduct of picketing at the facility. In addition, it is undisputed that no physical violence occurred on the picket line on January 7, 2012, or at any time during the lockout.

During the lockout, the Respondent's nonunion employees and replacement workers crossed the picket lines when arriving at and leaving the facility each workday. Many replacement workers, both from the Respondent's Tupelo plant and those provided by Strom Engineering, were of African-American descent.

Anthony Runion, who started working for the Respondent in November 2006, was one of the bargaining unit employees locked out by the Respondent, and he was an active participant in the picketing throughout the lockout. On January 7, 2012, the local union held a hog roast for the locked out employees and their families at the union hall, which is located on Lima Avenue, approximately 50 yards from the Findlay plant's main entrance. Runion attended the hog roast with his girlfriend, and her young son, Collin. Many of the people who attended the hog roast joined the picket line that evening just outside the Respondent's main gate on the corner of Lima and Western Avenues. After the hog roast, at approximately 6 p.m., Runion joined the picketing outside the main entrance. The picketers stood along both sides of Western Avenue between the intersection and the main gate shortly before the plant's shift change when replacement workers began crossing the picket line. The picketing activity outside the Respondent's main entrance was video recorded by one of the Respondent's security guards, and is part of the record in this case (Co. Exh. 6).[3] The parties stipulate: to the authenticity of Company's Exhibit 6; that it contains true and accurate copies of video taken of activities on the picket line during the evening of January 7, 2012; and that it accurately reflects the picket line events during that evening shift change on January 7, 2012.[4]

The recording shows van loads of replacement workers with their windows closed being driven intermittently toward the main gate while groups of picketers on both sides of Western Avenue, between the intersection and the main gate, held up signs and yelled objections to the replacements entering the plant, which included profanity, name-calling, accusations that the replacement workers were un-American and were stealing the locked out employees' jobs, statements that the picketers did not want them there, and demands that they "go home" and "get out of here." The replacement workers in the vans and their activity cannot be seen on the video.

The video recording establishes that at the 5:10 time mark on

[3] The parties stipulate that a number of exhibits from the July 10, 2012 arbitration hearing for Runion's discharge grievance are included in this record. For simplicity, any exhibits from the arbitration hearing that are included in the stipulated record are identified by the exhibit numbers used at the arbitration hearing.

[4] Co. Exh. 6 is a DVD of the videos, consisting of a long version lasting 52 minutes and 12 seconds, and a shorter version lasting 22 minutes and 3 seconds. The shorter version consists of an excerpt of the longer video. References to time signature marks on the video pertain to the shorter version of the video.

the video, Runion and a young boy whom the parties stipulate is Collin, the son of Runion's girlfriend, walk from the east side of Western Avenue where a majority of the picketers are located, to the west side of Western Avenue, in front of and to the left of the security guard who is recording the video. Runion and Collin stand with two other locked out employees whom the parties stipulate are David Burns and Todd Carnes. At the 6:03 time mark, two vans carrying replacement workers to the plant's main entrance drive past the picketers and Burns holds up his picket sign and yells various comments, including "Go home," "Get out of here," and "Go back where you came from." Runion and Carnes display their middle fingers as the vans pass them. After the two vans pass by, someone yells "scab cabs are coming."

The next van carrying replacement workers crosses the intersection at Lima Avenue at approximately the 6:56 time mark. As the van travels towards the main gate and passes the picketers at the 6:58 time mark on the video, Runion and Carnes display their middle fingers. Burns holds up his sign and yells, "Piece of shit!" at approximately the 7:02 time mark on the video. After the van passes by, at approximately the 7:03 time mark on the video, Carnes yells, "Hope you get your fucking arm tore off, bitch!" At approximately the 7:04 time mark on the video, Runion, standing with both of his hands in his coat pockets, turns toward the main gate where the van had gone, and yells, "Hey, did you bring enough KFC for everyone?" After Runion makes the "KFC" statement, an unidentified individual yells, "Go back to Africa, you bunch of fucking losers." At approximately the 7:25 time mark on the video, Runion, standing with his hands still in his coat pockets, faces across the street toward the other picketers, and as his mouth and jaw are moving, the following statement can be heard on the video: "Hey, anybody smell that? I smell fried chicken and watermelon." Immediately after the statement is made, some of the picketers across the street from Runion can be heard on the video briefly chuckling and laughing.

The parties stipulate that Runion admitted he made the "KFC" statement, but he denied that he made the "fried chicken and watermelon" statement. Based on its review of the video, the Respondent attributed the "fried chicken and watermelon" statement to Runion, and it discharged him on March 1, 2012, solely on the basis that he made the "KFC" statement and allegedly the "fried chicken and watermelon" statement while on the picket line.

The record contains no stipulation as to whether Runion made the "fried chicken and watermelon" statement. Instead, the parties stipulate that the video footage of Runion's conduct and statements on the picket line "speaks for itself," thereby leaving the determination of whether Runion made the "fried chicken and watermelon" statement unresolved. Since there has been no hearing in this case with testimony from witnesses that may conflict, this case does not require the traditional credibility resolutions based on the witnesses' testimonial demeanor or the content of their testimonies. However, as the finder of fact, I must nevertheless determine whether Runion made the "fried chicken and watermelon" statement contrary to his denial, based on the videotape evidence which the parties have agreed is an accurate representation of what transpired on the picket line. Credibility determinations do not have to rely solely upon witness demeanor or the content of witness testimony. Determinations regarding the facts of a case may rely on a variety of factors, including the weight of the evidence, established or admitted facts, reasonable inferences drawn from the record as a whole, and the inherent probabilities of the allegations. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003).

Having carefully reviewed the video recording, I find that the undisputed record establishes that Runion made the "fried chicken and watermelon" statement, and any assertion by him in this record to the contrary is discredited. Even though Runion is not facing the camera when the "fried chicken and watermelon" statement is made, his mouth and jaw are moving in synchronization with the comment, his body tenses with the shout of the statement, and the voice of the person making the comment sounds like the voice of the person who made the "KFC" statement. In addition, based on the evidence in this stipulated record, I find it plausible that Runion made the statement based on Collin's reaction immediately after the statement was made. In this regard, immediately after the statement: "Hey, anybody smell that? I smell fried chicken and watermelon," Collin, who was standing directly in front of Runion, turned around to face Runion, he looked up at Runion and stated, "You know what I smell? You know what I smell? I smell (inaudible) scabs." Therefore, I find that the video clearly establishes that Runion made both the "KFC" and the "fried chicken and watermelon" statements.

After Runion's statements that lead to his discharge were made, Runion can be seen on the video at approximately the 14:45 time mark taking Collin by the hand and crossing the street against the light, which temporarily impedes a van driving towards the gate. At approximately the 15:58 time mark, a police officer walks across Lima Avenue and walks Runion back across Lima Avenue to the police officer's car, which is not seen on the video. The parties stipulate that off camera, Runion was given a citation for the jaywalking depicted in the video, and the parties agree that Runion's discharge was not based on the jaywalking infraction. The parties further stipulate that shortly after receiving the citation for jaywalking, Runion left the picket line.[5]

2. The Respondent's policies prohibiting racial harassment

The Respondent has maintained a harassment policy prohibiting unlawful harassment based upon race, color, religion, sex, age, or national origin. That policy dated December 1, 2002, provides its purpose is to outline ". . . the respect to which all Cooper employees are entitled as human beings; to work in an environment free of all forms of harassment and to be treated with dignity, respect and courtesy." (Co. Exh. 1.) The Respondent's policy provides that "[h]arassment consists of un-

[5] The parties also stipulated that after Runion left the picket line, at the 16:27 and 17:29 time marks, respectively, an unidentified person shouted, "fucking monkey scabs" and "fucking nigger scabs." (Stip. Facts at 74.) The parties are in agreement that the person who made those racist statements was not Runion.

welcome comments or conduct relating to race, color, religion, sex, age or national origin, which fails to respect the dignity and feelings of any Cooper employee." It further provides that "[h]arassment will not be condoned nor tolerated under any circumstances, whether committed by Cooper employees, vendors, customers or other visitors," and that "any Cooper employees found to be harassing others will be subject to disciplinary action, up to and including discharge." The parties stipulated that Runion signed his orientation check sheet acknowledging that he received a copy of the harassment policy and that he understood the policy.

3. The Respondent discharged Runion on March 1, 2012, solely on the basis of his racially charged statements on the picket line

During the week following the incident, the Respondent identified Runion on the recording and thereafter, Human Resource Manager Jodi Rosendale and Plant Manager Jack Hamilton decided to terminate Runion for making those racial comments on the picket line. On March 1, 2012, the Respondent discharged Runion for "gross misconduct" for his "KFC" and "fried chicken and watermelon" statements on the picket line on January 7, 2012.[6] The Respondent admits that it discharged Runion for these statements only, and not for any other conduct he engaged in on the picket line.

4. The Union filed a grievance alleging that Runion's discharge violated the collective-bargaining agreement and it processed the grievance to arbitration

As mentioned above, the parties reached a new agreement that was ratified by the union membership on February 27, 2012. On March 12, 2012, the Union filed grievance 2012–3 alleging that Runion's discharge was not for just cause, and therefore violated the terms of the collective-bargaining agreement. The Respondent and the Union agreed to arbitrate any grievances filed over the discharge of bargaining unit employees during the lockout, and they agreed that such arbitrations would be governed by the terms of the newly negotiated collective-bargaining agreement's contractual grievance-arbitration procedure.

On July 10, 2012, an arbitration hearing was held on Runion's discharge grievance before Arbitrator Roger C. Williams, in Findlay, Ohio. At the arbitration hearing, the Union and the Respondent stipulated that the issue before the arbitrator was whether Runion's discharge was for just cause and, if not, what the remedy should be. The parties have stipulated in this case that the grievance was properly before the arbitrator both procedurally and substantively, and that the procedure was fair and equitable.

[6] The parties stipulated that Runion was one of three employees terminated for alleged misconduct on the picket line during the lockout. The other two employees discharged were Dave Gilbert and Carl Bowers. Gilbert was discharged for standing in front of a van carrying replacement workers on January 7, 2012, which is recorded at approximately the 17.21 time mark of Co. Exh. 6. Bowers was terminated for allegedly making threatening remarks to a truckdriver on January 17, 2012, while on the picket line. Both Gilbert and Bowers had grievances filed and they were reinstated pursuant to a settlement between the Union and the Respondent whereby their discharges were reduced to suspensions.

On August 13, 2012, the Union filed the charge in this matter alleging, inter alia, that Runion was discharged in violation of Section 8(a)(3) and (1) of the Act. The Regional Director deferred consideration of the charge in this case to the grievance-arbitration procedure pending its resolution.

C. The Arbitrator's Award

The Arbitrator, in his Opinion and Award issued on May 14, 2014, found that Runion made the "KFC" statement, and the "fried chicken and watermelon statement." The Arbitrator also determined that Runion was "engaged in activity with a clear connection to his employment with the Respondent while he was on the picket line," and both statements violated the explicit terms of the Respondent's harassment policy because both statements were related to race and were disrespectful of the dignity and feelings of African-American replacement workers. The Arbitrator held that while the evidence proved that no violence occurred on the picket line, either on January 7, 2012, or on any other occasion during the lockout, the use of racial slurs on the picket line increased the possibility that the constant verbal exchanges between the picketers and the replacement workers would escalate into violence. The Arbitrator held that Runion's statements ". . . would have been serious misconduct in any context, but in the context of the picket line, where there was a genuine possibility of violence, his comments were even more serious." Despite the fact that the Union presented evidence that in August 2011, Cliff Baxter, an African-American bargaining unit employee and former union executive board member was suspended, but not discharged, by the Respondent for conduct that included making a racist remark, the Arbitrator determined that there was no evidence of disparate treatment. The Arbitrator therefore denied the grievance and upheld Runion's discharge as being for "just cause" under the collective-bargaining agreement.

After the Arbitrator issued his Award, the Union requested that the Regional Director refuse to defer to the Arbitrator's award upholding Runion's discharge. Thereafter, the Regional Director refused to defer, and complaint issued alleging that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Runion for engaging in union and/or concerted activities.

D. The Issues

The parties stipulate that the issues presented in this matter are whether the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Runion, and whether the Board should defer to the Arbitrator's decision that the Respondent discharged Runion for just cause.

E. The Contentions of the Parties

The General Counsel alleges that while the Respondent was entitled to be offended by Runion's racial comments, it was not privileged to discharge him under the Act. The General Counsel, citing, inter alia, the Board's decisions in *Airo Die Casting, Inc.*, 347 NLRB 810 (2006), and *Detroit Newspapers*, 342 NLRB 223 (2004), contends that the racially charged statements did not tend to coerce or intimidate employees in their Section 7 rights because they were not accompanied by threats or aggressive behavior, and the statements were not made until

after the vans had passed where Runion was standing. The General Counsel argues that Runion was discharged in violation of the Act, and that the Arbitrator only considered whether the discharge was justified under the harassment policy, not whether Runion's actions were protected by the Act. The General Counsel further argues that the Arbitrator's award is repugnant to the Act. On that basis, the General Counsel asserts that deferral to the Arbitrator's award is not appropriate.

The Charging Party asserts that while it does not condone Runion's conduct, it believes his conduct was protected and that his statements, which were unaccompanied by threats or intimidation, were insufficient to lose the protection of the Act. On that basis, the Charging Party contends that Runion's discharge was unlawful. In addition, the Charging Party asserts that even if Runion's conduct was not protected by the Act, his discharge was nevertheless unlawful because the evidence shows that other employees violated the Respondent's harassment policy and were suspended, not discharged, including Baxter, an African-American employee who called his white supervisor a "dumb white hillbilly asshole." (CP Br. at p. 8.)[7] Finally, the Charging Party argues that since the Arbitrator only considered the just cause issue, and did not consider (and did not have the authorization of the parties to consider) the statutory issue, and because the Arbitrator's award is repugnant to the Act, the Board should not defer to the award.

To the contrary, the Respondent argues that Runion's comments specifically violated its harassment policy and therefore he was discharged for just cause. The Respondent contends that "while a certain amount of profanity or racial invective may be tolerated by the Act, it is not protected by the Act," and therefore, Runion's racist statements should not be considered "protected activity." (R. Statement of Position, p. 2.) In support of this argument, the Respondent contends that the award is susceptible to interpretation consistent with the Board's decision in *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979), and its progeny, which hold that even if an employee is engaging in protected activity, the employee can lose the protection of the Act if he also engages in unprotected offensive, vulgar, and/or racist statements during the course of his protected activity. (R. Br. at p. 29.)

The Respondent argues that deferral is appropriate because, contrary to the contentions of the General Counsel and the Charging Party, the Arbitrator adequately considered the statutory rights at issue as the "just cause" inquiry in the arbitration was "factually parallel" to the statutory issue in this case, and the Arbitrator was presented with those facts. Furthermore, the Respondent argues that the Arbitrator's award is not "clearly repugnant" to the Act because it is susceptible to an interpretation that is consistent with *Clear Pine Mouldings*, 268 NLRB 1044 (1984). The Respondent specifically contends that since the Arbitrator stated that the comments were "disrespectful of the dignity and feelings of African-American replacement workers," the statements coerced or intimidated employees in the exercise of their rights protected under the Act. In addition, the Respondent argues that the Arbitrator addressed the "coercive impact" of Runion's statements when he found that the comments "inspired more hate-filled racist speech," and it "increased the potential for violence." (R. Statement of Position, pp. 2–3.) Finally, the Respondent argues that the Arbitrator's conclusion that Runion was discharged for cause warrants deferral, not only under the applicable standard for deferral, but under Section 10(c) of the Act,[8] and that failure to defer should be contrary to public policy.

F. Analysis

It is well established that the Board has considerable discretion in determining whether to defer to the arbitration process when doing so will serve the fundamental aims of the Act. *Wonder Bread*, 343 NLRB 55 (2004), see *Dubo Mfg. Corp.*, 142 NLRB 431 (1963); *Collyer Insulated Wire*, 192 NLRB 837 (1971); and *United Technologies Corp.*, 268 NLRB 557 (1984). The Board's standard for deferring to arbitral awards is also solely a matter for its discretion, as Section 10(a) of the Act expressly provides that the Board is not precluded from adjudicating unfair labor practice charges even though they might have been the subject of an arbitration proceeding and award.

In *Spielberg Mfg. Co.,* 112 NLRB 1080 (1955), the Board held that it would defer to arbitral decisions in cases in which the proceedings appear to have been fair and regular, all parties agreed to be bound, and the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act. Id. at 1082. In *Olin Corp.*, 268 NLRB 573 (1984), the Board held that it will condition deferral on the arbitrator having adequately considered the unfair labor practice issue, which is satisfied if: (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. Id. at 574. The Board stated that it will not require an arbitrator's award to be totally consistent with Board precedent, however, deferral will not be found appropriate under the clearly repugnant standard where the arbitration award is "palpably wrong" or "not susceptible to an interpretation consistent with the Act." Id.[9] Under *Spielberg*, supra, and *Olin Corp.*, supra, the burden of proof is on the party—here, the General Counsel—who opposes deferral to the arbitration award. *Airborne Freight Corp.*, 343 NLRB 580, 581 (2004).

In the instant case, the parties have stipulated that the arbitra-

[7] The record reveals that while it is not entirely clear to whom this remark was addressed, it appears that Baxter directed it to his white manager, as well as members of the local union's executive board who were trying to calm him down. In this connection, the record establishes that Baxter yelled to the group, "You are all a bunch of white hillbilly assholes." (Arbitration Exh. S, at p. 2.)

[8] See R. Statement of Position, pp. 2–3, and R. Br. at pp. 18–23.

[9] It is important to note that in *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132 (2014), the Board recently modified its longstanding postarbitral deferral standards in Sec. 8(a)(3) and (1) cases. The Board specifically held, however, that it would apply this modified standard only "prospectively (in future cases)," and not "retroactively (i.e., in all pending cases)." Since the arbitration hearing in the instant case occurred on July 10, 2012, approximately 2-1/2 years before the *Babcock & Wilcox Construction Co.* decision issued, the Board's newly modified standard is not applicable to this case. Accordingly, the issue of deferral in this case is to be decided under the standard adopted in *Olin Corp.*, supra. See *Verizon New England, Inc.*, 362 NLRB No. 24, slip op. 1 at fn. 2 (2015).

tion proceeding has been fair and regular and that all the parties have agreed to be bound by the arbitration award. Thus, the only deferral factor in dispute is whether the arbitration award is "clearly repugnant" to the Act.

1. Whether Anthony Runion's discharge for his conduct during protected picketing activity constituted a violation of Section 8(a)(3) and (1) of the Act

Section 7 of the Act gives employees the right to peacefully strike, picket, and engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. In the instant case, it is undisputed that Runion was engaged in picketing activity, which was protected by the Act, and that he was discharged because of his conduct during that picketing activity. The Board has long held that an important feature of picketing is the posting by a labor organization of individuals at the approach to a place of business to accomplish a purpose which advances the cause of the union. . . ." *Verizon New England*, 362 NLRB No. 24, slip op. 4; quoting *Lumber & Sawmill Workers Local 2797 (Stoltze Land)*), 156 NLRB 388, 394 (1965). In other words, personal confrontation is a necessary element of picketing. *Verizon New England*, supra at slip op. 4; citing *Carpenters Local 1506 (Eliason & Knuth),* 355 NLRB 797, 802 (2010). However, even though the Act protects the right to picket during a strike, or in this case an employer's lockout, and a certain degree of confrontation is expected during those activities, it is clear that Congress never intended to afford special protection to all picket line conduct. The question is thus whether Runion's conduct while engaging in picketing was sufficient to warrant removal of the Act's protection.

The Board has long recognized a distinction between employee conduct in the workplace and employee conduct on the picket line. Unlike situations involving employee conduct in the working environment, picket line misconduct is governed by the Board's standards established in *Clear Pine Mouldings*, 268 NLRB 1044 (1984), enfd. 765 F.2d 148 (9th Cir. 1985), cert. denied 474 U.S. 1105 (1986). In that case, the threatening statements unaccompanied by acts of violence from striker Rodney Sittser who was denied reinstatement were: (1) that a nonstriking employee was taking her life in her hands by crossing a picket line and would live to regret it; (2) that a nonstriking employee's house or garage might be burned; (3) that the hands of certain employees should be broken; and (4) that an employee should be "straighten[ed] out." In *Clear Pine Mouldings*, the Board noted that "serious acts of misconduct which occur in the course of a strike may disqualify a striker from the protection of the Act." Id. The Board specifically addressed the issue of whether striker misconduct in the form of verbal threats, unaccompanied by physical acts, would be sufficient to remove the protection of the Act. In that case, the Board specifically rejected the proposition that words alone can never, without more, warrant a denial of reinstatement. Id. at 1045–1046. Instead, the Board adopted an objective test formulated by the United States Court of Appeals for the Third Circuit in *NLRB v. W. C. McQuaide, Inc.*, 552 F.2d 519, 527 (3d Cir. 1977), denying enf. in part to 220 NLRB 593 (1975), for determining whether verbal threats by strikers directed at fellow employees justify an employer's refusal to reinstate. According to that test, an employer can lawfully deny reinstatement to a striker if his misconduct is such that under the circumstances, it may reasonably tend to coerce or intimidate employees in the rights protected under the Act. Id. at 1046. In that case, the Board determined that the threatening statements were sufficient to remove the protection of the Act and warranted a denial of reinstatement. Id. at 1048.

Since the *Clear Pine Mouldings* standard is an objective one, it does not involve an inquiry into whether any particular employee was coerced or intimidated. *Mohawk Liqueur Co.*, 300 NLRB 1075 (1990); *Detroit Newspapers*, 342 NLRB 223, 229 (2004). This standard also is applicable to misconduct directed at nonemployees such as supervisors, security guards, and independent contractors. *General Chemical Corp.*, 290 NLRB 76, 82 (1988); *Detroit Newspapers*, supra at 229.

While the remarks attributed to the striking employees in *Clear Pine Mouldings* were directly or indirectly threatening in character, the Board has also addressed whether profane epithets unaccompanied by an overt or indirect threat might also be coercive or intimidating. In *Catalytic, Inc.*, 275 NLRB 97 (1985), after the commencement of a strike, a striking employee called the home of a nonstriking employee and when his wife answered the phone, he stated, "[Y]ou God damned bitch," and immediately hung up the phone. Id. In determining whether that conduct reasonably tended to coerce or intimidate under the standard set forth in *Clear Pine Mouldings*, the Board noted that the profane epithet did not threaten her person or property, and it was not violent in character. Id. at 98. The Board determined that where a profane epithet was unaccompanied by an overt or indirect threat and there was no reasonable likelihood raised of an imminent physical confrontation, there was no tendency to coerce or intimidate within the meaning of *Clear Pine Mouldings*. Id. On that basis, the Board found in that case that the employer violated Section 8(a)(3) and (1) of the Act by discharging the striking employee.

Even though the *Clear Pine Mouldings* standard arose in the context of striker misconduct, those same principles apply to employees discharged when engaging in picketing activities following an employer's lockout of its bargaining unit employees. Thus, the standard articulated by the Board in *Clear Pine Mouldings* is applicable to the instant case where it is undisputed that Runion was discharged for his picket line statements, unaccompanied by threats or acts of violence, to presumably African-American replacement workers. As mentioned above, approximately 8 seconds after the replacement workers in the vans passed by Runion, he yelled: "Did you bring enough KFC for everybody?" Also, approximately 27 seconds after the replacement workers passed him, Runion, directing his comments to the picketers across the street, stated: "Hey, anybody smell that? I smell fried chicken and watermelon." The question before me is thus whether Runion's statements may reasonably tend to coerce or intimidate employees in their rights protected under the Act or whether those statements raised a reasonable likelihood of an imminent physical confrontation.

Based on the record evidence, I find that under the Board's *Clear Pine Mouldings* standard, Runion's conduct and statements did not tend to coerce or intimidate employees in the

exercise of their rights under the Act, nor did they raise a reasonable likelihood of an imminent physical confrontation. Runion's "KFC" and "fried chicken and watermelon" statements most certainly were racist, offensive, and reprehensible, but they were not violent in character, and they did not contain any overt or implied threats to replacement workers or their property. The statements were also unaccompanied by any threatening behavior or physical acts of intimidation by Runion towards the replacement workers in the vans. In fact, while making both statements, Runion stood with his hands in his coat pockets and he was not making any threatening gestures or movements when he made the statements. In addition, the statements were made after the replacement workers had passed by Runion. In this regard, the "KFC" statement was made 6 seconds after the van passed, and the "fried chicken and watermelon" statement was made 27 seconds after the replacement workers had passed, and it was directed not at the replacement workers, but the picketers across the street. The record evidence in this case does not establish that Runion's statements were coercive or intimidating to the exercise of employees' Section 7 rights, and it does not establish that the statements raised the likelihood of imminent physical confrontation.

While the Respondent has specifically alleged that Runion's statements had a "coercive impact" because they allegedly inspired more "hate-filled racist speech" and increased the potential for violence, such assertions are unsupported by the record. Although the record reveals that there were several racist statements made on the picket line by unidentified individuals after Runion made his "KFC" and "fried chicken and watermelon" statements, and after he left the picket line,[10] the record does not establish that those individuals were provoked or inspired to make those statements by anyone. In addition, there is certainly no evidence to establish that Runion in any way inspired or caused those persons to make those racist statements. There is likewise no evidence to establish that Runion's statements "Did you bring enough KFC for everybody?" and "Hey, anybody smell that? I smell fried chicken and watermelon," increased the potential for violence on a picket line where there was undisputedly no evidence of any picket line violence on that day, nor on any other day during the lockout. I find that even though Runion's statements were offensive and racist, and certainly may have been disrespectful to the dignity and feelings of African-American replacement workers, there is no evidence to establish that the statements contained overt or implied threats, that they coerced or intimidated employees in the exercise of their rights protected under the Act, or that they raised a reasonable likelihood of an imminent physical confrontation.

I note that my findings in this matter are consistent with well-established Board precedent. The Board has held that a striker's or picketer's use of even the most vile language and/or gestures, standing alone, does not forfeit the protection of the Act, so long as those actions do not constitute a threat. *Airo Die Casting, Inc.*, 347 NLRB 810 (2006); *Nickell Moulding*, 317 NLRB 826, 827–828 (1995); *Calliope Designs, Inc.*, 297 NLRB 510, 521 (1989). In *Nickell Moulding*, striking employee Cleata Draper carried a homemade sign on the picket line that read "Who is Rhonda F [with an X through the F] Sucking Today?" The sign made reference to Rhonda Yarborough, an employee who chose to work during the course of the strike. The employer discharged Draper based solely on the picket sign in question. The administrative law judge found that Draper's sign did not directly or indirectly threaten either Yarborough's person or property, it was not violent in character, and there was no showing of the likelihood of an imminent physical confrontation as a result of the sign. Id. at 828. In that case, the Board affirmed the administrative law judge's finding that although the sign in question was offensive, under the application of *Clear Pine Mouldings*, supra, it did not rise to the level that would justify the employer's denial of reinstatement to Draper. Id. at 828–829.

In *Calliope Designs, Inc.*, supra at 521, a striking employee called a nonstriker a "whore" and a "prostitute" and stated to her that she was having sex with the employer's president. He also called another nonstriker a "whore" and told her she could earn more money by selling her daughter, another nonstriker, at the flea market. The Board affirmed the administrative law judge's finding that the statements were "obscene, insulting and indecent," but not sufficient under the *Clear Pine Mouldings* standard to remove the striking employee from the protection of the Act. Id.

In *Airo Die Casting*, supra, a case that I find is directly on point with the instant case, the Board found in particular that racially charged comments of a similar nature to those of this case have been insufficient to remove the protection of the Act. In that case, the Board examined a picketer's racial slurs directed at African-American nonstriking employees. Shortly after a strike began, the employer hired replacement workers who were transported into the facility in vehicles past the picket lines at the main gate. The pickets frequently shouted obscenities and made obscene gestures at the replacements. The replacements responded with obscene gestures and calling the pickets names, often behind closed car windows. Id. at 811. Ronald Lawson, one of the picketing employees, came towards one of the cars carrying replacement workers and an African-American security guard. With both hands raised and extending his middle fingers, Lawson yelled, "[F]uck you nigger" at the security guard. Id. In that case, the Board found that Lawson's use of obscene language, gestures, and a racial slur, standing alone without any threats or violence, did not rise to the level where he forfeited the protection provided by the Act. Id. at 812.

In addition, in *Detroit Newpapers*, 342 NLRB 223, 268–269 (2004), the administrative law judge found that striker James Ritchie's use of vile and vulgar language on the picket line, including racial epithets such as "you fuckin' bitch, nigger lovin' whore," did not deprive him of the protection of the Act under *Clear Pine Mouldings*, so long as those actions did not constitute a threat. In that decision, the Board did not rule on that determination because Ritchie settled his charge allegation

[10] As mentioned above, the parties stipulated that after Runion left the picket line (at the 16:27 and 17:29 time marks, respectively), an unidentified person whom the parties agree was not Runion, shouted "fucking monkey scabs" and "fucking nigger scabs." (Stip. Facts at 74.)

before the Board issued its decision. Id. at 223–224.[11] Since the Board did not rule on that determination, I do not rely on it in support of my findings. I do, however, find it persuasive on the treatment of alleged misconduct in the form of racial slurs used on the picket line under the *Clear Pine Mouldings* standard.[12]

The Respondent argues in its Statement of Position that Runion's racist comments do not deserve the protection of the Act. The Respondent specifically asserts that it's "position on the 8(a)(1) and 8(a)(3) aspect of the complaint is very simple—making racist comments is not protected activity" and "[a]ccordingly, firing an employee because he makes racist comments cannot violate the Act."[13] In this connection, the Respondent asserts that the racist statements should not be protected and that Runion violated its harassment policy by making the racist statements, thereby requiring his discharge. I find this argument lacks merit as it infers that Runion's statements should be evaluated in isolation, as separate and distinct from his picketing activity, or that the statements should be evaluated in the context of the normal workplace environment. The Respondent correctly asserts that pursuant to its harassment policy, employees who violate it may be disciplined or discharged. Clearly, the Respondent has the authority to enforce company policy in the workplace. Contrary to Respondent's assertions, however, Runion's racist comments cannot be analyzed in a vacuum, separate from the fact that those statements were made during, and in the context of engaging in picketing activity protected by the Act. In this regard, the harassment policy makes no reference to conduct on the picket line in situations in which such policy violations occurred in the context of conduct protected by the Act. In addition, as mentioned above, the Board distinguishes between conduct occurring in the workplace and conduct occurring on the picket line. In *Airo Die Casting,* supra, the Board affirmed the administrative law judge's finding that the picket line comments in that case were repulsive and offensive, but they did not occur during his working time or in his workplace. The administrative law judge, with Board approval, stated that "Picket-line misconduct is accordingly evaluated by a different standard than similar conduct in a working environment." *Airo Die Casting*, supra at 812.

In its brief, the Respondent also argues that even if Runion was privileged to exercise his Section 7 rights by picketing, his racial invective took him out of the protection of the Act.[14] In support of this argument, the Respondent argues that Runion's conduct should be analyzed under the Board's decision in *Atlantic Steel*, 245 NLRB 814 (1979), and its progeny, in which the Board set forth a four-part test for determining whether an employee's outburst while engaging in protected concerted activity removes the employee from the protection of the Act and thereby justifies the discipline imposed. (R. Br. at p. 29.)[15] I find, however, that the Respondent's reliance on *Atlantic Steel* and it progeny is misplaced.

Atlantic Steel and the related cases cited by the Respondent are factually distinguishable from the instant case, as they all involved protected activity that occurred in the workplace, and not on the picket line. In *Atlantic Steel,* supra, an employee called his foreman a "lying son of a bitch" while engaging in protected activity on the shop floor. Id. Those facts are substantially different from the facts of the instant case, where Runion's statements occurred while engaged in protected activities on the picket line.[16] As mentioned above, the Board has recognized a distinction between protected conduct in the workplace, and protected conduct on the picket line, and it has evaluated picket line misconduct by a different standard than similar conduct in the work environment. See *Airo Die Casting*, supra at 812. In addition, the Board has specifically held in *Triple Play Sports Bar & Grille*, 361 NLRB No. 31 (2014), that the *Atlantic Steel* analytical framework "is tailored to workplace confrontations with the employer." In that case, the Board held that it would not apply the *Atlantic Steel* test to analyze the issue of whether employees' Facebook comments lost the protection of the Act, noting in particular that the framework of *Atlantic Steel* was utilized for balancing "employee rights with the employer's interest in maintaining order

[11] In the *Detroit Newspapers* decision, the Board granted the General Counsel's motion to sever the cases of all but 10 strikers from those proceedings, it approved the charging parties' request to withdraw the relevant charges, and dismissed the corresponding complaint allegations (Id. at fn. 4). The Board affirmed the judge's findings regarding the allegations pertaining specifically to those 10 remaining strikers, for the reasons stated in the judge's decision. Ritchie's name was not listed in that decision as being one of those 10 strikers whose allegations were addressed by the Board. Id. at 223–224.

[12] In addition, in *Wayne Stead Cadillac*, 303 NLRB 432, 436 (1991), a striking employee on the picket line grabbed his testicles and gyrated his hips back and forth while mouthing the words "fuck you" towards a nonemployee and his 8-year-old daughter who were in their car attempting to leave the employer's premises. In that case, the administrative law judge determined that the striker's conduct did not threaten the individuals and the employer's failure to reinstate him violated Sec. 8(a)(3) and (1) of the Act. The Board did not rule on that determination as the Respondent did not file exceptions to any of the 8(a)(3) and (1) violations found by the judge. Id. at 432, fn. 2. This case therefore has no precedential value on this issue, and I do not rely on it in support of my findings. I do, however, find it persuasive on this issue.

[13] R. Statement of Position at p. 1.

[14] R. Br. at pp. 28–35.

[15] In *Atlantic Steel,* supra, the Board found that even an employee who is engaged in protected concerted activity can, by opprobrious conduct, lose the protection of the Act. Id. at 816. Under that test, the Board examines four factors: "the place of the discussion; the subject matter of the discussion; the nature of the employees' outburst; and whether the outburst was, in any way, provoked by the employer's unfair labor practices." Id. at 816.

[16] I find that the other cases relied on by the Respondent similarly involve protected activity that occurred in the workplace, and are likewise distinguishable from the instant case. See *Foodtown Supermarkets,* 268 NLRB 630 (1984) (employee called employer's president "a son of a bitch" during the course of a discussion at work regarding the employee's grievance); *North American Refractories Co.*, 331 NLRB 1640, 1642–1643 (2000) (employee lost the Act's protection by calling his supervisor a "stupid mother fucker" during a meeting that otherwise constituted protected concerted activity); *Verizon Wireless,* 349 NLRB 640, 641–642 (2007) (employee otherwise engaged in protected activity lost the Act's protection by referring to a supervisor as "that bitch" and to other supervisors as "fucking supervisors").

in the workplace," and was "typically" applied "to analyze whether direct communications, face-to-face in the workplace, between an employee and a manager or supervisor constituted conduct so opprobrious that the employee lost the protection of the Act." Id. slip op. at 4.

Consistent with the Board's determination that picketing activity is evaluated by a different standard than workplace activity, the Board held in *Siemens Energy & Automation, Inc.*, 328 NLRB 1175 (1999), that alleged discharges for strike or picket line misconduct are not analyzed by the framework for alleged workplace discrimination under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). In that case, the administrative law judge recommended dismissal of the complaint alleging a striker was unlawfully suspended and subsequently discharged for engaging in serious strike misconduct (i.e., throwing roofing nails on the roadway at a vehicular entrance to the plant during the strike, and kicking a car as it passed through the picket line). Id. The Board, in adopting the judge's recommended dismissal of the complaint, found he inappropriately applied the analysis of *Wright Line*, and that in cases where the issue is whether an employer may lawfully refuse to reinstate (and thus discharge) an employee on the basis of alleged strike misconduct, the standard of *Clear Pine Mouldings* is applied as the first part of a two-part analysis. Id.[17]

Based on the standards of *Clear Pine Mouldings* and the well-established Board precedent discussed above, I find that Runion was discharged for engaging in picketing activity protected by Section 7 of the Act, and that his conduct on the picket line, while racist and offensive, was not violent in character, not accompanied by violent or threatening behavior, it did not raise a reasonable likelihood of an imminent physical confrontation, and it did not reasonably tend to coerce or intimidate employees in the exercise of their Section 7 rights. On that basis, I find that Runion's picket line statements were not sufficient under the standards of *Clear Pine Mouldings* to remove the protection of the Act. Therefore, I find that the Respondent discharged Runion on March 1, 2012, in violation of Section 8(a)(3) and (1) of the Act.

2. Whether deferral to the Arbitrator's award is appropriate

Having found that the Respondent violated the Act by discharging Runion, I must now determine whether it is appropriate to defer to the Arbitrator's award holding that Runion was discharged for just cause. For the reasons stated below, I find that deferral to the Arbitrator's award is not appropriate.

On the issue of deferral to an arbitrator's award, the Board noted in *Babcock & Wilcox Construction*, supra, that:

> An arbitrator applying the 'just cause' provision in the contract—and sustaining the discharge—may well depart from the standards that the NLRB would apply because they are issues of legal characterization, in light of the policies of the NLRA, and are therefore not likely to have been precisely addressed by the arbitrator. *Babcock & Wilcox Construction,* supra at slip op. 8, citing Robert A. Gorman & Matthew W. Finkin, *Basic Text on Labor Law* 1028 (2d ed. 2004).

In addition, in cases where arbitrators measure employee conduct against a standard which conflicts with or contradicts Board law, the Board has found the awards repugnant to the Act and has refused to defer. In *Union Fork & Hoe Co.,* 241 NLRB 907 (1979), the Board held that where an arbitrator ruled that an employee was discharged for just cause, but failed to consider well-established Board law regarding whether that employee's conduct was protected by the Act, such an award was found to be "repugnant to the Act." In that case, the arbitrator ruled that a union steward was insubordinate (and therefore was discharged for just cause), and failed to consider well-established Board law which holds that a steward is protected by the Act when fulfilling his role in processing grievances. On that basis, the Board reasoned that the arbitrator measured the steward's conduct against a standard which conflicted with Board law, and the arbitration award was clearly repugnant to the policies and purposes of the Act, and was not entitled to deference. Id. at 907–908.

Even though the Respondent in the instant case argues that the facts presented to the arbitrator were "factually parallel" to the unfair labor practice allegations,[18] the Arbitrator considered only whether Runion's discharge was for just cause under the collective-bargaining agreement, based on his alleged violation of the Respondent's harassment policy. The statutory rights at issue were clearly not considered by the Arbitrator, and he measured Runion's conduct on the picket line against a standard which conflicts with or contradicts Board law. In this re-

[17] In *Siemens*, the Board set forth the two-part analysis as follows:

> First, under the standard in Clear Pine Mouldings [citations omitted] an employer may lawfully deny reinstatement to a striker whose strike misconduct under the circumstances may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act. Second, under the framework for analysis in Rubin Bros., 99 NLRB 610 (1952), General Telephone Co., 251 NLRB 737 (1984), and Axelson, Inc., 285 NLRB 862 (1987), once the General Counsel has initially established that a striker was denied reinstatement for conduct related to the strike, the burden of going forward with the evidence shifts to the employer to establish that it had an honest belief that the striker in question engaged in the strike misconduct. If the employer establishes that, then the burden of going forward shifts back to the General Counsel to establish that the striker in question did not in fact engage in the alleged misconduct. [Id.]

As mentioned above, I find that under the Board's *Clear Pine Mouldings* standard, Runion's conduct and statements did not tend to coerce or intimidate employees in the exercise of their rights under the Act, and therefore the first part of the analysis has not been met.

The second part of the two-part test involves shifting burdens which attempt to determine if the striker in question did in fact engage in the picket line misconduct that was alleged. In the instant case, it is undisputed that Runion uttered the racist "KFC" statement, and the parties have stipulated that, with regard to the "fried chicken and watermelon" statement, the video recording was an accurate representation of that statement, and the recording speaks for itself. As mentioned above, I find based on the undisputed record evidence, that Runion had in fact made the "fried chicken and watermelon" statement. Since I have determined that Runion made both statements, there is no question as to whether he in fact engaged in the alleged misconduct. Therefore, I find it unnecessary to evaluate this case under the shifting burdens of the second part of the test.

[18] See R. Statement of Position at p. 3; R. Br. pp. 20–22.

gard, the Arbitrator failed to consider well-established Board precedent holding that picketing activity is protected by Section 7 of the Act, that the Board distinguishes between conduct in the workplace and conduct on the picket line, and that a picketer's use of even the most offensive language and/or gestures, standing alone, does not forfeit the protection of the Act, so long as those actions do not constitute a threat. In fact, the Arbitrator's award is devoid of any reference to the Act in any regard. In addition, contrary to the Board law establishing that conduct on the picket line is protected unless it is threatening to other employees' Section 7 rights, the Arbitrator held that Runion's statements ". . . would have been serious misconduct in any context, but in the context of the picket line, where there was a genuine possibility of violence, his comments were even more serious." (Jt. Exh. T, p. 12.) Such reasoning provides less protection for picket line conduct than the Act affords, and such a determination by the Arbitrator is inconsistent with the purposes and policies of the Act, and the well-established Board precedent. On that basis, I find that the award is "palpably wrong" and simply not susceptible to an interpretation that is consistent with the Act. Therefore, I find that the Arbitrator's award is "clearly repugnant" to the Act.

I note that the Board has recognized similar occasions where it has refused to defer to arbitration awards that upheld discipline or discharges under a "just cause" analysis for conduct protected by the Act, where such awards were repugnant to the Act. *Babcock & Wilcox Construction*, supra, slip op. 8; See, e.g., *Mobil Oil Exploration & Producing, U.S.*, 325 NLRB 176, 177–179 (1997), enfd. 200 F.3d 230 (5th Cir. 1999) (refusing to defer to arbitrator's decision where it upheld discipline based on employee's protected concerted activities—the employee was discharged for complaining that the employer intended to discharge him for his union activities); *Garland Coal & Mining Co.*, 276 NLRB 963, 964–965 (1985) (arbitrator's decision that union president's protected activity in refusing to sign a memo for the safety director which supported the employer's opposition to consolidation of the mine and safety committees, constituted insubordination upholding his suspension (but not discharge), was "repugnant to the Act"); see also *Cone Mills Corp.*, 298 NLRB 661 (1990) (arbitrator's finding that employee's suspension from filing a complaint under the contract was improper, but her refusal to leave the building as instructed constituted insubordination under the just cause doctrine and was sufficient to warrant denial of backpay, was "repugnant to the Act").

Based on the above, I find that the General Counsel has satisfied its burden of establishing that the Arbitrator's award does not satisfy the Board's standard for deferral under *Spielberg* and *Olin Corp.*, supra, and therefore the award is not entitled to deference.

The Respondent also argues in its brief that the Arbitrator's award is consistent with Section 10(c) of the Act, and that Runion can be denied reinstatement and backpay, even if the employer interfered with the employee's Section 7 rights, so long as the employee was discharged for his misconduct and not for any protected activity.[19] In support of this argument, the Respondent, citing *Anheuser-Busch, Inc.*, 351 NLRB 644 (2007), asserts that the Arbitrator found that Runion was discharged "for cause" because he "engaged in misconduct by yelling racist statements at African-American replacement workers."[20]

Section 10(c) of the Act provides, in relevant part, that "[n]o order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." In *Anheuser-Busch, Inc.*, 351 NLRB 644, the Board noted that in an earlier case[21] it initially held that the employer violated Section 8(a)(5) and (1) of the Act by failing to give notice and bargain with the union prior to installing and using hidden surveillance cameras. The Board, however, relying on Section 10(c), denied a make-whole remedy to the employees whom it discharged or suspended for misconduct discovered through the use of those cameras. Id. The United States Court of Appeals for the District of Columbia Circuit affirmed the Board's decision that the employer violated Section 8(a)(5) and (1), but it remanded the case to the Board to further address if the remedy should include make-whole relief for the employees disciplined by the employer for engaging in the misconduct discovered through the use of the cameras. See *Brewers & Maltsters Local 6 v. NLRB*, 414 F.3d 36 (D.C. Cir. 2005). On remand, in its Supplemental Decision and Order, the Board upheld its denial of the make-whole remedy for those employees, finding that the employees in that case were all disciplined "for cause." Id. at 646–647. In that case, the Board explained the reasons why Section 10(c)'s prohibition of a make-whole remedy where discipline was "for cause" should be interpreted as including the situation in that case, where the misconduct in question was uncovered through unilateral and unlawfully implemented means. Id. at 647. The Board found that the legislative history of Section 10(c) showed that Congress' purpose in enacting Section 10(c) was to insure that employees who engaged in misconduct were subject to discipline for that misconduct. Id., citing *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 217 (1964).

In analyzing the Respondent's argument, it is important to note that the Arbitrator did not find that Runion was discharged "for cause" as the Respondent alleges, rather, he found that the discharge of Runion was upheld as ". . . having been for *just cause* in accordance with the [collective-bargaining] agreement." (Arbitrator's Opinion and Award, Exh. A, p. 14) (emphasis added). In *Anheuser-Busch, Inc.*, supra, the Board noted that Congress did not explicitly define the term "for cause." The Board has, however, explained that in the context of the Act, the term "for cause" referred to discipline "that is not imposed for a reason that is prohibited by the Act." Id. at 647. The Board stated:

> Cause, in the context of Sec. 10(c), effectively means the absence of a prohibited reason. For under our Act: "Management can discharge for good cause, bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific, definite qualification: it may

[19] R. Statement of Position at p. 3; R. Br. at pp. 36–38 and 48.

[20] R. Br. at p. 37.

[21] 342 NLRB 560 (2004).

not discharge when the real motivating purpose is to do that which [the Act] forbids." Id. at 647; citing *Taracorp Industries*, 273 NLRB [221,] at 222 fn. 8 [(1984) (quoting *NLRB v. Columbus Marble Works*, 233 F.2d 406, 413 (5th Cir. 1956))].

The Board further noted that "[i]t is important to distinguish between the term 'cause' as it appears in Section 10(c) and the term 'just cause' . . . . Just cause encompasses principles such as the law of the shop, fundamental fairness, and related arbitral doctrines. Cause, in the context of Section 10(c), effectively means the absence of a prohibited reason." Id. at 647; *Taracorp Industries*, supra at 222 fn. 8; accord: Elkouri & Elkouri, *How Arbitration Works 974* (6th ed. 2003) ("'[c]ause' as used in Section 10(c), should not be confused with 'just cause' as the term is used by arbitrators").

I find the facts of the instant case are distinguishable from *Anheuser-Busch*, where the discipline was not imposed for a prohibited reason, and was "for cause." In the instant case, despite the Arbitrator's determination that there was "just cause" for Runion's discharge in accordance with the contract, the evidence establishes that Runion was discharged for a prohibited reason—the protected activity of engaging in picketing. The fact that his picketing activity included the use of two racist statements was simply insufficient under extant Board law to remove the protection from his picketing activity, and he was therefore discharged for engaging in protected activity. The Board specifically held in *Anheuser-Busch, Inc.*, that "[a] termination of employment that is motivated by protected activity is unlawful under Section 8(a)(1) and/or (3), and is not 'for cause,' and as the termination is unlawful, 'the Board can order reinstatement and backpay.'" Id. at 648. On that basis, I find the Respondent's argument lacks merit, and that Section 10(c) of the Act does not prohibit the Board from ordering reinstatement and a make-whole remedy for Runion. In fact, as the Board recently held in *E.I. Dupont*, 362 NLRB No. 98 (2015), such relief ". . . is not only within the Board's 'broad' remedial discretion under Section 10(c) [citing *NLRB v. Seven-Up Bottling Co. of Miami*, 344 U.S. 344, 346 (1953)], but is necessary to 'restore as nearly as possible the situation that would have prevailed but for the unfair labor practices.'" Id. slip op. at 5; citing *State Distributing Co.*, 282 NLRB 1048 (1987).

Finally, the Respondent argues that "it is contrary to public policy for the Board to continue to tolerate racism on the picket lines and to provide employees making racist statements the same level of protection under the Act as employees uttering curse words or making other vulgar statements."[22] As discussed above, however, extant Board law establishes that Runion's statements, while racist and offensive, were not sufficient to remove the protection of the Act from his protected picketing activity, and that his discharge violated the Act. I am bound to apply established Board precedent which the Supreme Court has not reversed, leaving "for the Board, not the judge, to determine whether that precedent should be varied." *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984); accord: *Pathmark Stores, Inc.*, 342 NLRB 378, 378 fn. 1 (2004); See also, *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979), enfd. 640 F.2d 1017 (9th Cir. 1981); and *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616 (1963), enfd. in part 331 F.2d 176 (8th Cir. 1964).

Based on the record evidence in this case, and the well-established Board law discussed above, I find that the Arbitrator's award is palpably wrong and not susceptible to an interpretation that is consistent with the Act, and it is therefore "clearly repugnant" to the Act. Accordingly, deferral to the Arbitrator's award is inappropriate, and I find that by discharging Runion for engaging in union and protected concerted activities on the picket line, the Respondent violated Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO/CLC is a labor organization within the meaning of Section 2(5) of the Act.
3. By discharging its employee Anthony Runion on March 1, 2012, for engaging in union and/or protected concerted activities, including his participation in picketing activities, the Respondent violated Section 8(a)(3) and (1) and of the Act.
4. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having unlawfully discharged employee Anthony Runion in violation of Section 8(a)(3) and (1) of the Act, must offer him reinstatement and make him whole for any loss of earnings and other benefits he may have suffered as a result of the discrimination against him. Backpay shall be computed on a quarterly basis, less any interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. The Respondent shall also compensate Runion for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[23]

[22] R. Br. at p. 48.

[23] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Cooper Tire & Rubber Company, Findlay, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees for engaging in union and/or protected concerted activities, including participating in picketing activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Anthony Runion full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed,

(b) Make whole Anthony Runion for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(c) Compensate Anthony Runion for 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 the appropriate calendar quarters for said employee.

(d) Within 14 days from the date of this Order, remove from its files any references to its unlawful discharge of Anthony Runion, and within 3 days thereafter notify said employee in writing that this has been done and that the discharge will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of the Order.

(f) Within 14 days after service by the Region, post at its facility in Findlay, Ohio, copies of the attached notice marked "Appendix."[24] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 1, 2012.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 5, 2015

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union

Choose a representative to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against you for engaging in union and/or protected concerted activities, including participation in picketing activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Anthony Runion full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Anthony Runion whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL compensate Anthony Runion for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters for said employee.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Anthony Runion, and WE WILL, within 3 days thereafter, notify said employee in writing that this has been done and that his discharge will not be used against him in any way.

COOPER TIRE & RUBBER COMPANY

[24] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/08–CA–087155 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.