

No. 17-2882

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

DAWN TRUCKING, INC.

Respondent

**ON APPLICATION FOR ENFORCEMENT OF AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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STATEMENT OF JURISDICTION

This case is before the Court on the National Labor Relations Board's application to enforce its Order issued against Dawn Trucking, Inc. ("the Company"), reported at 365 NLRB No. 121, 2017 WL 3580357 (Aug. 17, 2017) (JA 175-185.)¹ In this case, the Board found that the Company committed unfair

¹ "JA" refers to the Joint Appendix. "Br" refers to the Company's opening brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

labor practices in response to the decision of its employees to elect the Building Material Teamsters Local 282, International Brotherhood of Teamsters (“the Union”) as their bargaining representative.

The Board had jurisdiction over this matter under Section 10(a) of the National Labor Relations Act (“the Act,” 29 U.S.C. §§ 151, 160(a)). The Board’s Decision and Order is final under Section 10(e) and (f) of the Act. 29 U.S.C. § 160(e) and (f). The Court has jurisdiction over this proceeding pursuant to Section 10(e) of the Act, 29 U.S.C. § 160(e), and venue is proper because the unfair labor practices occurred in Rosedale, New York. The application was timely; the Act imposes no time limit on such filings.

STATEMENT OF ISSUES

1. Does substantial evidence support the Board’s finding that the Company violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1), by discharging or otherwise discriminating against employees for supporting the Union?

2. Does substantial evidence support the Board’s finding that the Company violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1), by conditioning offers of reinstatement to employees upon rejection of the Union as their bargaining representative?

3. Does substantial evidence support the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by bypassing the Union and dealing directly with bargaining-unit employees with regard to the terms and conditions of their employment?

STATEMENT OF THE CASE

Acting on unfair-labor-practice charges filed by former Company employee Mickoy Holness, the Board's General Counsel issued a complaint alleging that the Company violated Section 8(a)(1), (3), and (5) of the Act by discharging its employees for electing the Union, violated Section 8(a)(1) and (3) by offering to reinstate some employees on the condition that they reject the Union, and violated 8(a)(1) and (5) by bypassing the Union and dealing directly with employees regarding their terms and conditions of employment. (JA 177; 114-19.)² After a one-day hearing, an administrative law judge issued a decision and recommended order finding that the Company violated the Act as alleged. (JA 177-85.) On review, the Board affirmed the judge's rulings, findings, and conclusions, and adopted the recommended Order, with modifications. (JA 175-76.) The Board's factual findings, and conclusions and order, are as follows.

² The General Counsel later withdrew the allegation that the Company violated Section 8(a)(5) by discharging the employees. (JA 177 & n.2.)

I. THE BOARD'S FINDINGS OF FACT

A. Background

The Company, which is owned by Henry Burey and based in Rosedale, New York, is engaged in the business of hauling dirt and other fill material to and from construction sites in its dump trucks. (JA 177-78; 112 ¶¶ 1, 4.) In 2015, Burey employed six full-time employee-drivers: Mickoy Holness, Clayton Thomas, Damien Coore, Jose Perez, Juan Rosario, and Kevin Wittier. (JA 175; 113 ¶ 9.) Burey had a seven-truck fleet and occasionally drove a truck himself. (JA 178; 21-22, 71.) Employees earned \$27 an hour, with the exception of Holness, who earned \$30 an hour; employees earned more on prevailing wage jobs. (JA 178; 27, 79, 112.) Burey's wife, Karlene Burey, worked for the Company running errands and handling office duties. (JA 178; 71-72.)

Burey was responsible for dispatching employees to jobsites. (JA 178; 19, 38.) Generally, at the end of each work day he would send a text message notifying each employee of the next day's assignment—the client, the start time, and the location of the work. (JA 178; 19-20, 37-39.) Burey would also send a text message to an employee if he had no work for the employee the next day. (JA 178; 15-20, 39.)

B. The Company Opposes a Union Organizing Campaign and Stops Dispatching Employees Immediately After They Unanimously Vote in Favor of Representation

In about September 2015, Holness contacted the Union and spoke with business agent Jay Strull. (JA 178; 22.) The Union then filed a petition with the Board seeking to represent the Company's six employee-drivers. (JA 178; 51.) The Board scheduled an election for November 5, 2015. (JA 178; 112 ¶ 7(a).)

Prior to the election, employees received with their paychecks a document from the Company setting forth bullet-pointed statements against union representation. (JA 178; 23-24, 41-42, 88.) For instance, the document stated “[t]he [C]ompany has been able to compete better against union competitors because it has not been restricted by union work rules that do not put money in your pocket;” and “[t]he [C]ompany does not presently have the client base that will continue to retain the [C]ompany if the union is voted in.” (JA 178; 88.) Additionally, the day before the election, Burey spoke with employees Thomas, Coore, and Wittier and told them he would shut the Company down if they voted in favor of union representation. (JA 178; 23, 33-36.)

The election was conducted after work on Thursday, November 5. (JA 178; 112 ¶ 7(a).) The employees voted 6-0 in favor of union representation. (JA 178; 112 ¶ 7(b).)

When Thomas arrived home on the evening of the election, he received a phone call from Burey. (JA 178; 45.) Burey stated, “[s]traight across the board, we’re done.” (JA 178, 182; 45.) Thomas had already received his work assignment for the following day, and he completed that assignment. (JA 178; 45.) Burey did not dispatch any further work to Thomas nor to any other employee. (JA 179; 25, 45-46, 77, 113 ¶ 9.) Burey continued to perform some work as a driver after the election. (JA 179; 72-74, 92.) He and his wife remained employed by the Company as of the December 15, 2016 hearing. (JA 180; 71-72, 113 ¶ 13.)

C. Burey Asks Several Employees To Return to Work Provided They Agree Not To Receive Union Wages or Benefits

In mid-January 2016, Burey called Thomas and stated he was interested in starting the Company back up. He explained that he was only interested in taking on two employees and that “he had found out who the terrorists were and he wasn’t interested in anyone else.” (JA 179; 46.) Thomas responded that he had obtained a different job and would not be available to work. (JA 179; 47, 82.)

On February 16, 2016, Burey sent the following text message to Holness, Coore, and Perez: “I want to start work again @ \$27.00 per hour, no union rates, no benefits, no prevailing wage Reply by tomorrow if interested 2/17/16 by 4:00 p.m.” (JA 179; 113 ¶ 10.) No one responded. (JA 179; 29-30, 77-79.)

On March 9, 2016, the Union sent a letter to Burey stating that the Union learned the Company had begun or was about to begin employing drivers again,

reiterating that it represented the Company's drivers, and asking to meet and bargain over the employees' terms and conditions of employment. (JA 179-80; 54-55, 91.) The parties met for one bargaining session in May but did not reach an agreement. (JA 180; 55, 64-65, 80.)

In August, the Company sent letters to former employees offering immediate reinstatement. (JA 180; 33-34, 113 ¶ 12, 93, 94.) None of the employees accepted the offer. (JA 180; 32, 49, 80.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On August 17, 2017, the Board (Chairman Miscimarra and Members Pearce and McFerran) concluded, in agreement with the administrative law judge, that the Company unlawfully discharged the employees because of their union activity, offered them reinstatement conditioned on their rejection of the Union as their bargaining representative, and bypassed the Union and engaged in direct dealing with bargaining-unit employees with regard to the terms and conditions of their employment. (JA 175.) To remedy those violations, the Board ordered the Company to cease and desist from the unfair labor practices found and from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by Section 7 of the Act, 29 U.S.C. § 157. (JA 175.) Affirmatively, the Board ordered the Company to offer the employees full reinstatement; make them whole for any loss of earnings and other benefits

suffered as a result of the Company's discrimination against them; compensate them for the adverse tax consequences, if any, of receiving lump-sum backpay awards; remove from its files any reference to the unlawful discharges; and post a remedial notice. (JA 175-76.)

SUMMARY OF ARGUMENT

In November 2015, immediately after the Company's six employees voted unanimously to be represented by the Union, company owner Burey stopped dispatching work to employees, thereby discharging them. The Company does not vigorously deny that its conduct was based on union considerations. By discharging them because they elected the Union, the Company discriminated against its employees in violation of Section 8(a)(3) and (1) of the Act.

In challenging that finding, the Company reiterates its arguments that it lawfully closed its business and alternatively that it merely locked out its employees in support of its bargaining position. Substantial evidence supports the Board's rejection of both arguments. The Board discredited Burey's testimony that he was in the process of retiring and closing the business before the Union activity began, and found that the Company's decision to offer some employees reinstatement in February 2016 further established the Company's desire to remain in business with an unrepresented workforce. Likewise, the Board found that the Company did not lawfully lockout its employees because it did not engage in

bargaining before it stopped assigning work to the drivers, and Burey testified that he stopped assigning work because he “was having health issues” and “just wanted to retire and stop the operation.” Moreover, the Company did not notify the Union of any bargaining position that the Union needed to accept in order to end the asserted lockout. Having rejected those defenses, substantial evidence supports the Board’s finding that the Company violated the Act by discharging the employees based on their union activity.

Substantial evidence also supports the Board’s finding that the Company unlawfully offered to reinstate certain employees in February on the condition that they reject the Union. The Board found that the offer to reinstate employees with “no union rates,” considered in the context of Burey’s prior antiunion statements and decision to only reinstate those who were not the “terrorists” he perceived were the union leaders, made it clear that the offer to reinstate employees for no union rates or benefits was a permanent condition of employment. In conditioning the offer on the employees’ rejection of the Union, the Company violated Section 8(a)(3) and (1) of the Act.

Finally, substantial evidence supports the Board’s finding that, in bypassing the Union and offering employees reinstatement according to certain terms, the Company engaged in unlawful direct dealing in violation of its obligation to bargain with the employees’ chosen representative. The Company’s actions tended

to erode the Union's position as the discharged employees' exclusive-bargaining representative, in violation of Section 8(a)(5) and (1) of the Act.

STANDARD OF REVIEW

The Court's review of Board orders is "quite limited." *NLRB v. Katz's Delicatessen of Houston St., Inc.*, 80 F.3d 755, 763 (2d Cir. 1996). The Board's findings of fact are conclusive if supported by substantial evidence in the record. 29 U.S.C. § 160(e); see *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); accord *NLRB v. G & T Terminal Packaging Co.*, 246 F.3d 103, 114 (2d Cir. 2001). The Board's reasonable inferences may not be displaced on review even though this Court might justifiably have reached a different conclusion had the matter been before it de novo; as this Court has explained, "[w]here competing inferences exist, we defer to the conclusions of the Board." *Abbey's Transp. Servs., Inc. v. NLRB*, 837 F.2d 575, 582 (2d Cir. 1988); see also *Universal Camera*, 340 U.S. at 488. In other words, this Court will reverse the Board based on a factual determination only if it is "left with the impression that no rational trier of fact could reach the conclusion drawn by the Board." *G & T Terminal Packaging*, 246 F.3d at 114 (citation omitted); accord *Local 917, Int'l Bhd. of Teamsters v. NLRB*, 577 F.3d 70, 76 (2d Cir. 2009). Additionally, this Court will not disturb the Board's adoption of a judge's credibility determinations unless they are "hopelessly incredible or the findings flatly contradict either the law of nature

or undisputed documentary testimony.” *NLRB v. Thalbo Corp.*, 171 F.3d 102, 112 (2d Cir. 1999) (quotation omitted).

This Court “reviews the Board’s legal conclusions to ensure that they have a reasonable basis in law [, and] ... afford[s] the Board a degree of legal leeway.” *NLRB v. Caval Tool Div.*, 262 F.3d 184, 188 (2d Cir. 2001); *see also Office & Prof’l Emps. Int’l Union v. NLRB*, 981 F.2d 76, 81 (2d Cir. 1992) (“Congress charged the Board with the duty of interpreting the Act and delineating its scope.”). In its review, the Court “cannot displace the Board’s choice between two fairly conflicting views.” *Local 917*, 577 F.3d at 76-77 (quotation omitted).

Accordingly, this Court will only reverse the Board’s legal determinations if they are arbitrary and capricious. *Cibao Meat Prods., Inc. v. NLRB*, 547 F.3d 336, 339 (2d Cir. 2008). Indeed, legal conclusions “based upon the Board’s expertise should receive, pursuant to longstanding Supreme Court precedent, considerable deference.” *Caval Tool*, 262 F.3d at 188.

ARGUMENT

I. **SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY UNLAWFULLY DISCHARGED OR OTHERWISE DISCRIMINATED AGAINST EMPLOYEES FOR SUPPORTING THE UNION**

A. **Section 8(a)(3) of the Act Prohibits Employers from Discriminating Against Employees for Engaging in Union or Other Protected Activity**

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 term or condition of employment to encourage or discourage membership in any labor organization.” 29 U.S.C. § 158(a)(3). An employer violates Section 8(a)(3) by disciplining or discharging employees for engaging in union activity. *See NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 397-98, 403 (1983), *approving Wright Line, a Div. of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981); *accord NLRB v. G & T Terminal Packaging Co.*, 246 F.3d 103, 115-16 (2d Cir. 2001).³ In assessing discriminatory discharge cases, the critical inquiry is whether the employer’s action was unlawfully motivated. *See NLRB v. S.E. Nichols, Inc.*, 862 F.2d 952, 957 (2d Cir. 1988).

³ Such discrimination also derivatively violates Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1). *See Office & Prof’l Employees Int’l Union*, 981 F.2d at 81 n.4 (“A violation of 8(a)(3) in fact constitutes a ‘derivative violation’ of Section 8(a)(1) when ‘the employer’s acts served to discourage union membership or activities. . . . The same proof is therefore required to establish a violation of either section.’”) (citation omitted).

On review, if a court determines that substantial evidence supports the Board's finding that an employee's union activity was a motivating factor in an employer's decision discharge an employee, it will uphold the Board's finding that the employer violated the Act unless the record as a whole compelled the Board to accept the employer's affirmative defense that it would have taken the same action in the absence of protected activity. *See G & T Terminal Packaging*, 246 F.3d at 116. The Board's motive findings are afforded particularly deferential review because "the Act vests primary responsibility in the Board to resolve these critical issues of fact." *S.E. Nichols*, 862 F.2d at 956; *see also Laro Maint. Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1995) ("Drawing . . . inferences from the evidence to assess an employer's . . . motive invokes the expertise of the Board.").

B. The Company Unlawfully Discharged the Employees

Substantial evidence supports the Board's finding (JA 182) that the Company stopped assigning any work to its employees, and thereby discharged them, because they elected the Union as their bargaining representative. It is unrefuted that, the day before the election, Burey threatened employees Holness, Thomas, Coore, and Wittier that he would shut the Company down if the employees voted in favor of union representation and that he had no connections to get union work. (JA 178; 23, 33-36, 43.) Then, the evening after the election, Burey telephoned Thomas and told him: "Straight across the board, we're done."

(JA 178, 182; 45.) Making true on that promise, Burey did not assign any work to the bargaining-unit employees for several months after the election. (JA 179; 25, 45-46, 77, 113 ¶ 9.) But, as the Board found (JA 182), the Company was not “winding down,” and “the evidence did not establish that the [Company] had any difficulty obtaining work after the election.” Indeed, the Company’s February 16 reinstatement offer, contingent on the employees’ rejection of the Union, demonstrates its intent to continue operations, but only on a nonunion basis. Given these facts, the Board properly found that the Company discharged the employees to chill their union activity, and its true goal was to remain in business on a nonunion basis. (JA 182.)

As before the Board, the Company does not “vigorously deny” that its conduct was motivated by the employees’ union activity. (JA 182 & n.8). Instead, it insists (Br. 21-28) that it lawfully shut down its operations, and was free to do so regardless of whether that decision was based on antiunion considerations. Alternatively, it argues (Br. 28-32) that it lawfully locked out its employees to bring economic pressure in support of its bargaining position. Even if these conflicting and “factually incongruent” arguments could be reconciled (JA 182 n.7), substantial evidence supports the Board’s rejection of both.

1. The Company did not shut down its operations

In *Textile Workers Union of America v. Darlington Manufacturing Co.*, the Supreme Court held that an employer may fully and permanently close its business as a management prerogative for any reason, including out of union animus.

380 U.S. 263, 272 (1965). The Court reasoned that one purpose of the Act “is to prohibit the discriminatory use of economic weapons in an effort to obtain future benefits.” *Id.* An employer that opts to permanently and totally close a business, even for a discriminatory purpose, yields no future benefit and thus permanent closure “is not the type of discrimination” that the Act prohibits. *Id.*

A discriminatory partial closure of a business, by contrast, benefits an employer by providing leverage for discouraging protected Section 7 activity, and is therefore unlawful. *Id.* at 274-75. *Darlington Manufacturing*, therefore, does not apply to an employer’s partial or temporary cessation of business.

Substantial evidence supports the Board’s findings (JA 182-83) that the Company did not fully and permanently close its business but instead, after the election, “maintained an unlawful object of continuing in business with drivers as employees but without the Union that was elected to represent them.” Burey testified that he was in the process of retiring before the Union activity began and was simply acting in accordance with that intention by not assigning work after the election. The judge, however, (JA 182) discredited that testimony, pointing to

several facts showing that the Company was not “winding down” its business.

First, the Company included with the employees’ last paycheck before the election a notice that included the statement that the Company was more competitive as a nonunion company, indicating not that it was going to close, but rather sought to remain in business on a nonunion basis. (JA 182, 183; 18, 88.) Second, the Board noted (JA 182) that in late January 2016, Burey informed Thomas that he “was interested in starting back up his Company” and that only certain employees would be offered reinstatement because he had found out “who the terrorists were.” The Board reasonably inferred that “terrorists” referred to those who Burey perceived as primarily responsible for the Union organizing effort and who he was not interested in reinstating. Finally, in February 2016, Burey sent a text message to several discharged employees offering them reinstatement – an action contrary to his claimed intention to retire. (JA 179, 182; 113 ¶ 10.) While Burey testified (JA 84-85) that he only extended those reinstatement offers to limit backpay that may be due based on the unfair-labor-practice charge filed with the Board, the judge discredited that testimony (JA 182), explaining that the initial charge was not filed until weeks later, on March 7, 2016. Thus, contrary to the Company’s claim (Br. 21), the Board did not rely solely on the reinstatement offers to show the Company’s intent to remain in business on a nonunion basis. Rather, the notice and Burey’s statements to Thomas, in addition to the reinstatement offer, show that

the Company did not permanently close but was instead willing to reopen provided its employees rejected the Union. The Board reasonably found (JA 182), based on the facts discussed above, that the Company was not permanently closing, which would have been lawful under *Darlington*, but instead sought to remain in business with an unrepresented workforce. By offering reinstatement to some employees, but not the perceived “terrorists,” the Company made clear that, at most, it closed its business on a partial and temporary basis. Accordingly, the Company engaged in discriminatory conduct that did not evince an intention to close permanently, but rather to halt its employees’ union activity. Those findings are based on substantial evidence in the record and the Company’s conclusory assertions otherwise are far insufficient to establish that “no rational trier of fact could reach the conclusion drawn by the Board.” *G & T Terminal Packaging*, 246 F.3d at 114 (citation omitted).

2. The Company did not lock out the employees

In addition to insisting that it permanently closed its business, the Company also argues that it merely locked out its employees to bring economic pressure in support of its bargaining position. (JA 182 n.7.) As discussed below, however, a lockout is undertaken to support an employer’s bargaining position or to avoid a work stoppage, and is thus “factually incongruent” with the Company’s argument that it permanently closed its business.

A lockout is “the refusal by an employer to furnish available work to his regular employees.” *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 321 (1965) (Powell, J., concurring). An employer may lawfully lock out its employees to avert a threatened or imminent work stoppage, *id.* at 306, or for “the sole purpose of bringing economic pressure to bear in support of [its] legitimate bargaining position,” *id.* at 318; *accord NLRB v. Martin A. Gleason, Inc.*, 534 F.2d 466, 471 (2d Cir. 1976) (discussing “defensive” lockouts designed to avoid work stoppages and “offensive” strikes” designed to exert economic pressure on union).

In sanctioning such lockouts, the Supreme Court reasoned that the impact of a lockout on an employee’s Section 7 rights Act is slight given that a union can end the dispute at any time by agreeing to the employer’s legitimate terms and returning to work. *American Ship Bldg.*, 380 U.S. at 309; *Harter Equip., Inc.*, 280 NLRB 597, 599-600 (1986), *aff’d sub. nom.*, *Local 825, Int’l Union of Operating Eng’rs v. NLRB*, 829 F.2d 458 (3d Cir. 1987). Thus, a “fundamental principle” underlying any lawful lockout is that the employer must clearly and fully inform the union of its bargaining demands, and do so in a timely manner, to allow the union to evaluate whether to accept those terms. *Dayton Newspapers, Inc.*, 339 NLRB 650, 656 (2003), *enforced*, 402 F.2d 651 (6th Cir. 2005); *see also Dietrich Indus., Inc.*, 353 NLRB 57, 60 (2008). Those prerequisites to a lawful lockout exist whether the employer calls an “offensive” or “defensive” lockout.

See Alden Leeds, Inc., 357 NLRB 84, 93 (2011), *enforced*, 812 F.3d 159 (D.C. Cir. 2016). A lockout that is used to discourage union membership, evade an employer's bargaining obligation, or compel acceptance of an unfair labor practice is unlawful. *See Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 350 (D.C. Cir. 2011); *Teamsters Local Union No. 639 v. NLRB*, 924 F.2d 1078, 1085 (D.C. Cir. 1991) (citing *American Ship Bldg.*, 380 U.S. at 318); *see also Int'l Bhd. of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers, AFL-CIO, Local 88 v. NLRB*, 858 F.2d 756, 761 (D.C. Cir. 1988).

Substantial evidence supports the Board's finding (JA 183) that the Company did not lock out the employees. Burey violated the fundamental principle of any lockout by failing to inform the employees or the Union that he was implementing a lockout. Although the Company states (Br. 29) that around November 6, Burey notified the employees "that he was discontinuing operations and until such time as the [employees] were offered reinstatement operations remained discontinued," the Company provides no record support for that assertion and indeed there is none. Nor did he tell anyone what his bargaining-related objectives were in refusing to dispatch employees after the election, or what the Union could do to end the alleged lockout. Instead, Burey testified that he "lock[ed] out" the employees because he "was having health issues" and "just wanted to retire and stop the operation." (JA 183; 77, 83-84.) This claim

establishes that Burey was not acting to advance a legitimate bargaining objective, and solidifies the Board's finding that the Company did not, in fact, lockout the employees.

Nevertheless, even if the Company's decision to stop assigning work to employees could be considered a lockout, substantial evidence supports the Board's finding that it was not a lawful one. As the Board explained (JA 183), the Company stopped assigning work to the [employees] before negotiations began, so the lockout was not in support of any bargaining proposal." Likewise, because the Company and Union had not yet engaged in collective bargaining, the Company did not inform the Union of its bargaining demands that the Union would need to accept in order to avoid or end a lockout. While the Company suggests that it locked out the employees to preempt a work stoppage, the record, as found by the Board (JA 183), contains no indication that the newly elected Union had considered taking any such action. *See Wayneview Care Ctr.*, 664 F.3d at 352 (affirming Board's finding that employer failed to show that it locked out employees to avoid work stoppage). Moreover, Burey's reinstatement offer – made only to employees whom Burey deemed not "terrorists" and conditioned on accepting terms of employment not negotiated by the Union – demonstrates that the lockout was based on discriminatory considerations and unilaterally imposed terms, further undermining the Company's claim of an exculpatory lawful

“lockout.” Based on those findings, the Board reasonably rejected the Company’s claim that it lawfully locked out, rather than discharged, its employees.⁴

The Company’s remaining arguments lack merit. The Board’s rejection of the Company’s lockout claim does not turn, as the Company suggests (Br. 32), on whether the Company was hostile to the Union, attempted to interfere with the Union’s right to engage in collective bargaining, or used the lockout to discipline employees for supporting the Union. As discussed, the Company’s claim turns on whether it sought to advance a legitimate bargaining position or prevent a work stoppage, neither of which was the case here.⁵

In sum, substantial evidence supports the Board’s finding that the Company’s decision to discharge its employees immediately after they voted for the Union was motivated by the Company’s union animus. While the Company

⁴ The Company (Br. 28) mischaracterizes the Board’s decision by asserting that the Board found that the Company violated the Act by locking out its employees. The Board only rejected the Company’s defense that it did not unlawfully discharge the employees but instead locked them out.

⁵ The Company’s reliance on *Cofire Paving Corp.*, 359 NLRB 180 (2012), to support its lockout argument is misplaced. In that case, no party excepted to the judge’s finding that the employer lawfully locked out employees; hence that finding has no precedential value and is not binding on the Board. *See Stanford Hosp. and Clinics v. NLRB*, 325 F.3d 334, 345 (D.C. Cir. 2003) (citing *Colgate-Palmolive Co.*, 323 NLRB 515, 515 n.1 (1997)). In any event, the facts in *Cofire* are distinguishable from the facts here. Specifically, the employer informed the union, only after lengthy collective-bargaining negotiations broke down, that it was shutting down operations “for now,” but stated its “wish to continue negotiating with the [union] representatives and hope to come to an agreement.” 359 NLRB at 197-98.

could have permanently closed even if it did so out of antipathy for the Union, or locked out the employees in support of a legitimate bargaining position, the record establishes that it did neither, but instead remained in business and unlawfully discharged the employees in a misguided and unlawful attempt to remain in business on a nonunion basis.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY UNLAWFULLY OFFERED EMPLOYEES REINSTATEMENT ON THE CONDITION THAT THEY REJECT THE UNION

Section 8(a)(3)'s prohibition against discrimination based on union activity encompasses an employer's attempt to extract from employees an agreement to forestall future union activity. The Board has consistently found that an employer's attempt to condition reinstatement of laid-off employees on their agreement to reject a union is "clearly discriminatory" and "inimical to the collective-bargaining process," in violation of Section 8(a)(3) and (1) of the Act. *Clemson Bros., Inc.*, 290 NLRB 944, 945 (1988); *see also Pratt Towers, Inc.*, 338 NLRB 61, 64 (2002) (employer violated Act by conditioning reinstatement of former strikers on renunciation of union); *Penn Tank Lines, Inc.*, 336 NLRB 1066, 1067 (2001) (employer violated Section 8(a)(3) and (1) by conditioning employees' reinstatement on agreement to refrain from engaging in union activities).

Substantial evidence supports the Board's finding (JA 181-82) that the Company unlawfully offered to reinstate certain employees on the condition that they reject the Union. After immediately discharging employees when they unanimously voted for union representation on November 6, Burey sent a text to three employees on February 16 stating "I want to start work again @ \$27.00 per hour, no union rates no benefits, no prevailing wage Reply by tomorrow if interested 2/17/16 by 4:00 p.m." (JA 179; 113 ¶ 10.) The Board found (JA 181) that the literal meaning of "no union rates" meant employees had to agree to work under terms not negotiated by the Union. The Board also found that the context supported that meaning. Specifically, Burey sent that text after having previously told employees that the Company could not obtain union work, would have no work for the employees if they voted for the union, and would rather shut down than go union. The Board also credited employee Thomas's testimony that Burey admitted he was only offering reinstatement to those who were not the "terrorists," which the Board reasonably inferred were the employees most responsible for the Union's organizing efforts. (JA 179, 181; 46.) Based on those statements, and lacking any indication to the contrary in the text message, drivers would reasonably interpret the "no union rates" condition of the message as a permanent condition of reinstatement. (JA 181.) Employees would thus reasonably interpret the "no union rates" offer as a permanent condition of employment. (JA 181.)

Accordingly, substantial evidence supports the Board's finding that the Company unlawfully conditioned reinstatement on the employees' agreement to reject the Union.

The Company's conclusory assertions attacking the Board's findings (Br. 33-34), and its characterization of the text message as "not artfully worded," (Br. 34, 36), fall far short of establishing that the Board's findings lacked substantial evidence. The Company argues (Br. 33-34) that there was no evidence that the Company asked employees to reject or withdraw their support for the Union or that the "no union rates" portion of the offer was a permanent condition of employment. It also argues that the judge merely substituted his interpretation of the reinstatement offer for that of the employees. Those claims ignore the substantial evidence, discussed above, establishing the reasonableness of the Board's finding that employees would interpret the "no union rates" reinstatement offer as conditioned on their permanent rejection of the Union. *See Karsh's Bakery*, 273 NLRB 1131, 1132 (1984) (finding that successor employer's statement that it would operate "non-union" "clearly conveyed" to employees that they had to waive union representation even though employees were not told so directly). Indeed, nothing in the record, including Burey's own testimony, suggests that the "no union rates" offer was anything but a permanent condition of employment.

The record thus establishes that the Company discriminated against certain employees by conditioning reinstatement of the unlawfully discharged employees on their agreement to permanently reject the Union. Doing so violated Section 8(a)(3) and (1) of the Act.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY ENGAGED IN UNLAWFUL DIRECT DEALING WHEN IT OFFERED SEVERAL EMPLOYEES REINSTATEMENT, PROVIDED THEY ACCEPT CERTAIN TERMS OF EMPLOYMENT NOT NEGOTIATED BY THE UNION

A. An Employer Violates Section 8(a)(5) and (1) of the Act by Dealing Directly With Union-Represented Employees About Terms and Conditions of Employment Not Negotiated by the Union

Section 8(a)(5) of the Act makes it 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).⁶ Section 9(a) of the Act, in turn, provides that a bargaining representative “shall be the exclusive representative[] of all the employees” in a bargaining unit, 29 U.S.C. § 159(a), which “exact[s] the negative duty” on an employer “to treat with no other,” *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 684 (1944). Because “the Act requires an employer to meet and bargain exclusively with the bargaining representative of its employees,” an employer

⁶ An employer that violates Section 8(a)(5) also derivatively violates Section 8(a)(1). See *NLRB v. HeartShare Human Servs. of N.Y., Inc.*, 108 F.3d 467, 470 (2d Cir. 1997); *NLRB v. United Aircraft Corp.*, 490 F.2d 1105, 1111 n.7 (2d Cir. 1973).

violates Section 8(a)(5) by “deal[ing] directly with its unionized employees . . . regarding terms and conditions of employment.” *Allied-Signal, Inc.*, 307 NLRB 752, 753 (1992); *see also Medo Photo Supply*, 321 U.S. at 683-84 (“it is a violation of the essential principle of collective bargaining and an infringement of the Act for the employer to disregard the bargaining representative by negotiating with individual employees”) (citing *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944)); *accord Stroehmann Bakeries, Inc. v. NLRB*, 95 F.3d 218, 223 (2d Cir. 1996). As this Court explained in *NLRB v. General Electric Co.*, an employer’s direct dealing with represented employees is “inherently divisive . . . make[s] negotiations difficult and uncertain; [and] subvert[s] the cooperation necessary to sustain a responsible and meaningful union leadership.” 418 F.2d 736, 755 (2d Cir. 1969).

The Board will find unlawful direct dealing when an employer (1) communicates directly with represented employees, (2) for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the union’s role in bargaining, and (3) does so without notice to, or to the exclusion of, the union. *Vincent/Metro Trucking, LLC*, 355 NLRB 289, 295 (2010). The central question is whether the employer’s action “is likely to erode the Union’s position as exclusive representative,” *Allied-Signal*, 307 NLRB at 753 (internal quotations omitted), by “creat[ing] the impression that the employer

rather than the union is the true protector of the employees' interests," *Texas Elec. Coop, Inc.*, 197 NLRB 10, 14 (1972) (internal quotations omitted).

B. The Company Unlawfully Bypassed the Union When It Offered Employees Reinstatement if they Accepted Certain Terms and Conditions of Employment

Substantial evidence supports the Board's finding (JA 180-81) that the Company unlawfully dealt directly with some bargaining-unit employees, to the total exclusion of the Union, when it offered them reinstatement in February 2016. As discussed above, on February 16, Burey sent a text message to three employees, but not the Union, stating "I want to start work again @ \$27.00 per hour, no union rates no benefits, no prevailing wage Reply by tomorrow if interested 2/17/16 by 4:00 p.m." The Board explained (JA 181) that the "critical phrase" in that message, "no union rates no benefits," indicated that the Company wanted to deal directly with the employees regarding their compensation without bargaining with the Union. By offering those terms directly to employees, while bypassing the Union, the Company's actions tended to erode the Union's position as the discharged employees' exclusive-bargaining representative. *See Medo Photo Supply*, 321 U.S. at 684 (bypassing union and bargaining directly with employees "would be subversive of the mode of collective bargaining which the [Act] has ordained, as the Board, the expert body in this field, has found"); *Gen. Elec.*, 418 F.2d at 755 (direct dealing violates Act regardless of whether employer or

employees first bypass union or whether offer made to employees was no better than what was offered union); *Cent. Mgt. Co.*, 314 NLRB 763, 767 (1994) (employer engaged in unlawful direct dealing by making offer about terms of employment to employees, which it conditioned on employees' abandonment of union).

The Company (Br. 37) challenges the Board's finding of a direct-dealing violation by relying principally on *U.S. Ecology Corp.*, 331 NLRB 223 (2000), which the Board (JA 181) here distinguished. In that case, an employer sent letters to striking employees in response to their inquiries about returning to work, stating they could return and, "for the time being," receive the same wages and benefits as they had before the strike. *Id.* at 226. Although the letter was sent directly to employees, the union responded the following day and accepted the employer's offer. *Id.* Moreover, because the parties had not reached impasse in their pre-strike bargaining, the employer could only offer to return strikers on the same terms and conditions as prevailed before the strike. Therefore, the Board explained that merely stating that fact to employees could not reasonably be found to have "eroded the Union's position as exclusive representative." *Id.*

Here, by contrast, the discharged employees did not ask the Company about reinstatement, and the Union did not accept the employer's offer. Moreover, despite its protestations otherwise, the Company did not "merely . . . stat[e] the

only employment conditions it could lawfully offer under the circumstances” (Br. 37), or “communicate that [it] did not have prevailing wage rate work available” (Br. 34). Rather, it conditioned the employees return to work on an agreement that they would be paid \$27.00 per hour with no union rates, no union benefits, and no prevailing wages. Nor did the Company indicate, as in *U.S. Ecology Corp.*, 331 NLRB at 226, that the offer was only “for the time being” pending bargaining. Instead, the Board properly construed the message in light of the Company’s recent statements that it did not have a “client base that w[ould] continue to retain the [C]ompany if the [U]nion [was] voted in,” and would have no work if the employees voted for the Union. In that context, the Board correctly determined (JA 181) that employees reasonably would interpret the offer of “no union rates” as a permanent condition of reemployment. Likewise, the employer in *U.S. Ecology Corp.* did not condition the employees’ return on an agreement that they reject the union. 331 NLRB at 226 n.23 (distinguishing *Cent. Mgt.*, 314 NLRB at 767, in which employer offered employees more favorable terms than it had offered union on the condition that they abandon union); *see also Dayton Newspapers, Inc.*, 339 NLRB 650, 653 (2003) (finding employer engaged in unlawful direct dealing by promising locked out employees they could return to work if they promised not to engage in future strikes or picketing), *enforced in relevant part*, 402 F.3d 651 (6th Cir. 2005).

The Company (Br. 36-37) suggests that it cured any unlawful direct dealing by communicating with the Union weeks later, in March 2016, after the Union sent a letter demanding to bargain with the Company. Those communications, which took place after employee Holness filed the initial unfair-labor-practice charge with the Board on March 7, and which did not involve discussions about the Company's unlawful reinstatement offers, do not furnish a defense to the Company's previous actions in excluding the Union and offering some employees reinstatement. *See Mercy Health Partners*, 358 NLRB 566, 567 n.12 (2012) (subsequent effects bargaining with union did not cure earlier direct dealing violation); *Detroit Edison Co.*, 310 NLRB 564, 565 (1993) (direct dealing not remedied by subsequent communication with union).

The Company's decision to exclude the Union when it offered to reinstate certain employees provided they accept terms and conditions not negotiated by the Union is the antithesis of the system of collective bargaining established by the Act. In so doing, the Company violated Section 8(a)(5) and (1) of the Act.

Finally, the Company's attempt to mitigate its damages by relying on its February 16 reinstatement offer is misplaced and misreads the Board's decision. The Company proffers (Br. 38-40) various reasons why its February text message was a valid reinstatement offer and tolled its backpay liability. This argument ignores that because the Board found the reinstatement offer unlawful, it found it

unnecessary to address whether the offer was otherwise valid for the purpose of tolling backpay. Rather, as the Board explained (JA 184 & n.10), if its finding that the offer was unlawful direct dealing is overturned, any issues regarding the offer's validity for backpay tolling purposes may be addressed in a compliance proceeding.⁷ Likewise, the Board found (JA184) that the employees' decisions not to respond to the Company's unlawful reinstatement offer does not, as the Company seems to suggest (Br. 36, 39-40), terminate their right to backpay. *See A.P. Painting & Improvements, Inc.*, 339 NLRB 1206, 1208 n.9 (2003) ("a reinstatement offer containing what amounts to a violation of the Act is not a valid offer"); *see also Holo-Krome Co. v. NLRB*, 947 F.2d 588, 595 (2d Cir. 1991) ("employer bears the burden of making a specific, unequivocal, and unconditional job offer to satisfy its obligation to reinstate the injured employee"). Simply put, the Company cannot benefit by tolling its backpay obligation based on the employees' refusal to accept reinstatement that was unlawfully conditioned on their rejection of the Union. As for whether the August 2016 reinstatement offer

⁷ Upon finding that a party committed an unfair labor practice, it is the Board's general practice to leave certain details of its remedy to a subsequent compliance proceeding. *See NLRB v. G & T Terminal Packaging Co.*, 246 F.3d 103, 125 (2d Cir. 2001) (discussing Board's practice of leaving the details of a Board remedy to the Board's subsequent compliance proceedings); *see also Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902 (1984) ("[T]he Board's normal policy [is to] modif[y] its general reinstatement and backpay remedy in subsequent compliance proceedings as a means of tailoring the remedy to suit the individual circumstances of each individual discharge.")

tolled the Company's backpay liability, the Board also reserved determination of that issue to a compliance proceeding.

CONCLUSION

The Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

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National Labor Relations Board
April 2018

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

NATIONAL LABOR RELATIONS BOARD)	
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Petitioner)	
)	No. 17-2882
v.)	
)	Board Case Nos.
DAWN TRUCKING, INC.)	29-CA-171337
)	29-CA-174915
Respondent)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 7,328 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC
this 3rd day of April, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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Dated at Washington, DC
this 3rd day of April, 2018