

**Nos. 16-2721 & 16-2944**

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

**COOPER TIRE & RUBBER CO.**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

**and**

**UNITED STEEL, PAPER AND FORESTRY, RUBBER,  
MANUFACTURING, ENERGY, ALLIED INDUSTRIAL & SERVICE  
WORKERS INTERNATIONAL UNION, AFL-CIO/CLC**

**Intervenor**

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

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**RESPONSE TO PETITION FOR PANEL AND EN BANC REHEARING**

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## STATEMENT OF THE CASE

On August 8, 2017, a panel of the Court (Judges Benton and Murphy; Judge Beam, dissenting) enforced an Order of the National Labor Relations Board finding that Cooper Tire & Rubber Company violated the National Labor Relations Act. *Cooper Tire & Rubber Co. v. NLRB*, 866 F.3d 885. Cooper filed a petition for panel and en banc rehearing, and the Court directed a response. Because Cooper fails to identify a conflict with precedent, or any other basis for rehearing, the Court should deny the petition.

## THE BOARD AND COURT DECISIONS

The underlying Board decision found that Cooper violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1), by discharging employee Anthony Runion for making two racially charged statements on a picket line brought to protest Cooper's lockout of its union-represented employees during a labor dispute. The Board concluded, and the panel majority agreed, that the remarks uttered in that context did not deprive Runion of the Act's protection under the test for picket-line misconduct articulated in *Clear Pine Mouldings, Inc.*, 268 NLRB 1044 (1984), *enforced mem.*, 765 F.2d 148 (9th Cir. 1985), and approved by this Court in *NMC Finishing v. NLRB*, 101 F.3d 528, 532 (8th Cir. 1996).

1. After negotiations stalled for a new collective-bargaining agreement covering union-represented workers at Cooper's Findley, Ohio tire-manufacturing plant, Cooper locked out the employees, who then picketed outside the plant in protest. Cooper continued operations with replacement workers, many of whom were African-American. 866 F.3d at 889.

Throughout the evening of January 7, 2012, employees on the picket line yelled profanities and gestured with their middle fingers at vans carrying replacement workers towards the plant's main gate. At one point, 7 seconds after a van had passed by with the windows shut, Runion, while picketing, yelled, "Hey, did you bring enough KFC for everyone?" and 21 seconds later added, "Hey anybody smell that? I smell fried chicken and watermelon." Runion kept his hands in his pockets and made no gestures or physical movements. There is no evidence any replacement workers heard Runion's remarks. 866 F.3d at 889.

When Cooper began recalling locked-out employees, it discharged Runion for his picket-line statements. The Union filed a grievance alleging that his discharge violated the collective-bargaining agreement because it was not for "just cause." An arbitrator issued an award finding "just cause" for the discharge based, in part, on his view that Runion's comments "were even more serious" because they occurred on a picket line, not the workplace. (A.25-29,360-63.)

2. Finding Cooper's discharge of Runion unlawful, the Board explained, "a certain degree of confrontation is expected" during picketing. (A.413.) Accordingly, the Board noted (A.413-14), more leeway is given to picket-line misconduct than to misconduct on the job. *See, e.g., NMC*, 101 F.3d at 532 ("some obscenities hurled in the rough and tumble of an economic strike" may not take picketing outside the Act's protection); *Earle Indus., Inc. v. NLRB*, 75 F.3d 400, 406 (8th Cir. 1996).

The Board evaluated Runion's picket-line remarks under its long-established, judicially-approved *Clear Pine* test, which makes discharging an employee for picket-line misconduct unlawful unless it "reasonably tend[ed] to coerce or intimidate employees in the exercise of rights protected under the Act." 268 NLRB at 1046 (adopting *NLRB v. McQuaide, Inc.*, 552 F.2d 519, 527 (3d Cir. 1977)). *Accord NMC*, 101 F.3d at 531. The Board explained that Runion's fleeting remarks, while offensive, contained no overt or implicit threats and were not accompanied by threatening behavior. Further, Runion stood with his hands in his pockets and made the remarks only after the van had already passed by with its windows shut. (A.464.)

The Board determined that deferral to the arbitrator's decision was inappropriate under *Olin Corporation*, 268 NLRB 573, 573-74 (1984) (no deferral if award is "palpably wrong"). Applying *Olin*, the Board declined to defer because

the arbitrator, contrary to *Clear Pine*, incorrectly judged Runion's picket-line statements more harshly than on-the-job misconduct. (A.457n.1,467.) The Board rejected Cooper's argument that because the arbitrator found "just cause" for Runion's discharge under the collective-bargaining agreement, his discharge was also "for cause" under Section 10(c) of the Act, 29 U.S.C. § 160(c). (A.422.)

3. The panel majority, following the Court's precedent, applied *Clear Pine* and upheld the Board's finding that Runion's statements were non-violent, non-threatening, and would not objectively be perceived as coercive or intimidating to replacement workers crossing the picket line. 866 F.3d at 891. The panel majority held that *NMC* supported the Board's position, not Cooper's, because there the Court likewise applied *Clear Pine* and recognized that if "offensive words" are, as here, "part of a package of verbal barbs thrown out during a picket line exchange," rather than a sustained attack on an individual employee, they might not cause the picketer to forfeit the Act's protection. 866 F.3d at 890 (quoting *NMC*, 101 F.3d at 532) (emphasis omitted)). The majority also held that the Board's finding was "not illogical or arbitrary" because the Board, with judicial approval, had found similar misconduct did not cause a picketer to lose the Act's protection. *Id.* (citing, *inter alia*, *Consol. Commc'ns, Inc. v. NLRB*, 837 F.3d 1, 6 (D.C. Cir. 2016) (upholding Board finding that picketer's obscene gestures and statements did not cause him to lose the Act's protection)).

The panel majority also rejected Cooper’s argument that reinstating Runion would conflict with Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 et seq., which makes racial harassment in the workplace actionable if it is “so ‘severe or pervasive as to alter the conditions of the victim’s employment and create an abusive working environment.’” 866 F.3d at 892 (internal citations omitted). The majority concluded that “Runion’s comments—even if they had been made in the workplace instead of on the picket line—did not create a hostile work environment.” *Id.*

Additionally, the panel majority held that the Board did not abuse its discretion by declining to defer to the arbitration award, noting the applicable standard that “the arbitrator’s decision must not be ‘clearly repugnant to the purposes and policies of the Act,’” 866 F.3d at 893 (quoting *Olin*, 268 NLRB at 573-74), or “‘inconsistent with the established law,’” *id.* at 893 (quoting *Local Union No. 884 v. Bridgestone/Firestone, Inc.*, 61 F.3d 1347, 1357 (8th Cir. 1995)). The majority agreed with the Board that “[t]he arbitrator’s view that Runion’s comments were ‘even more serious’ because they were made ‘in the context of the picket line’” clashed with *Clear Pine*, which treats picket-line utterances more leniently. *Id.* at 894 (internal citation omitted).

Finally, the panel majority rejected Cooper’s argument that reinstating Runion would contravene Section 10(c), which states that no Board order shall

require reinstatement of an employee discharged “for cause,” a term not defined by the Act. 866 F.3d at 893. Agreeing with the Board, the majority explained that “[t]here is no indication...[Section 10(c)] was designed to curtail the Board’s power in fashioning remedies when the loss of employment stems directly from an unfair labor practice.” *Id.* (quoting *Fiberboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203, 217 (1964)).

Dissenting, Judge Beam would have reversed the Board on all grounds. 866 F.3d at 894-98.

## ARGUMENT

### **I. The Panel Majority’s Holding that Runion’s Picket-Line Remarks Did Not Cause Him To Lose the Act’s Protection Aligns with Precedent**

The panel majority correctly stated that Section 7 of the Act, 29 U.S.C. §157, protects employees’ right to protest a lockout by picketing, 866 F.3d at 889 (citing *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 310 n.10 (1965)), and that because a “necessary condition[] of picketing is a confrontation in some form” between picketers and replacements, “impulsive behavior on the picket line is to be expected,” *id.* (citations omitted); *accord Earle*, 75 F.3d at 406. Keeping in mind the special circumstances of picket-line conduct, coupled with the fact that picketing typically occurs when employees are off-duty and off-site, this Court and others have recognized the propriety of the Board’s evaluation of picket-line

misconduct under the *Clear Pine* reasonably-tend-to-coerce-or-intimidate test. *See* pp. 3-5 above. Consistent with *NMC*, 101 F.3d at 531, which applied *Clear Pine* in evaluating picket-line misconduct, the panel majority correctly upheld the Board’s reliance on that standard, and agreed with the Board’s conclusion that Runion’s remarks, while offensive, were non-violent, non-threatening, and would not objectively be perceived by non-picketing employees as coercive or intimidating. *Id.* at 891.

As the majority explained, *NMC* supports its decision, contrary to Cooper’s claim (Pet.4-7). *Id.* at 890. To be sure, in *NMC* the Court inferred, contrary to the Board, that the picket-line misconduct there—continually parading with a sign that singled out a female non-striker by asking “Who is Rhonda FSucking now”—would reasonably tend to coerce and intimidate her. 101 F.3d at 531. But as the majority emphasized, *NMC* also recognized that “[h]ad the offensive words been part of a package of verbal barbs thrown out during a picket line exchange, we might have a different view.” 866 F.3d at 890 (quoting *NMC*, 101 F.3d at 532) (emphasis omitted). The panel majority took that different view here, concluding that Runion’s fleeting remarks were more akin to general verbal barbs, particularly because they were not directed at a specific individual or overheard by any replacement worker. *Id.*

Thus, the panel majority did not, as Cooper asserts, “sidestep” *NMC*, nor did it fail to explain how the Board’s order is “anchored in the policies of the Act.” (Pet.7.) As the decision makes plain, *NMC* itself recognizes that the statutory “policy in play” is expressed in *Clear Pine*, which balances picketers’ Section 7 rights against the interests of the employer and replacements in their being able to cross the picket line and work. 101 F.3d at 532. *Accord Consol.*, 837 F.3d at 7-8 (recognizing that *Clear Pine*’s balancing is anchored in the statute’s privileging of nonthreatening expressions of opinion by employees peacefully patrolling the premises). The Board adopted its *Clear Pine* standard for evaluating picket-line misconduct because it mirrors the union restraint-or-coercion standard in Section 8(b)(1)(A) of the Act, 29 U.S.C. § 158(b)(1)(A). *Clear Pine*, 268 NLRB at 1046.<sup>1</sup>

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<sup>1</sup> *Clear Pine* ties picketers’ reinstatement rights to their refraining from the type of union misconduct that states regulated before the 1947 Taft-Hartley Amendments, and that Congress subjected to a federal remedy in enacting Section 8(b). See *NLRB v. Drivers Local 639*, 362 U.S. 274, 282-290 & n.9 (1960). Because of that linkage to pre-existing state law, *Clear Pine* accords with Section 13 of the Act, 29 U.S.C. § 163, which expresses Congress’ intent that the 1947 Amendments “shall not be taken as restricting or expanding either the right to strike or the limitations or qualifications on that right, as these were understood prior to 1947, unless ‘specifically provided for’ in the Act itself.” *Id.* at 281 (quoting Section 13). See H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 42 (1947) (because restraint and coercion are not protected activity, employees discharged for such acts are not entitled to reinstatement).

Cooper’s proposed standard (Pet.7-9) is inconsistent with Section 13 because it would let employers deny reinstatement for picket line speech that, while offensive, does not amount to restraint or coercion. Nor, as discussed below, does

Nor, contrary to Cooper's further claim (Pet.7), does the panel's decision conflict with *Earle*, which involved misconduct on a plant floor and thus applied a different analysis. 866 F.3d at 891. Indeed, *Earle* recognized that an "industrial strike tends to bring out less than admirable conduct," and "acknowledged the need to excuse impulsive, exuberant behavior" on the picket line "as an inevitable concomitant of struggle." 75 F.3d at 405-06. *See NMC*, 101 F.3d at 532 (distinguishing *Earle* on this ground); *Consol.*, 837 F.3d at 8 (*Clear Pine* "offers misbehaving employees greater protection from disciplinary action than they would enjoy in the normal course of employment").

Moreover, contrary to Cooper (Pet.4-6), the panel majority applied a well-established, multifaceted standard of review. It first stated the principle that courts will "enforce the Board's order if it has correctly applied the law and its factual findings are supported by substantial evidence on the record as a whole, even if we might have reached a different decision had the matter been before us de novo."

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Cooper's attempt to expand the grounds for denying reinstatement find support in the pre-Taft-Hartley law "that the Board should deny reinstatement to strikers who engaged in strikes which were conducted in an unlawful manner or for an unlawful objective." *Drivers*, 362 U.S. at 281 (citing, inter alia, *Southern S.S. v. NLRB*, 316 U.S. 31, 46 (1942) (strike in violation of federal statute)).

866 F. 3d at 890 (quoting *NLRB v. RELCO Locomotives*, 734 F.3d 764, 779-80 (8th Cir. 2013)). *Accord Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Next, quoting *NMC*, 101 F.3d at 532, the majority added that it “generally defer[s] to the Board’s discretion in ordering reinstatement,” and quoting *Earle*, 75 F.3d at 405, it correctly stated that courts will deny enforcement “if the Board’s determination is illogical or arbitrary.” 866 F.3d at 890. These settled principles of review are deeply embedded in the law of this Court. *See, e.g., NLRB v. Am. Firestop Sols., Inc.*, 673 F.3d 766, 768 (8th Cir. 2012) (Court upholds Board decisions that “correctly applied the law” and “defer[s] to the Board’s interpretation of the Act, so long as it is rational and consistent with that law”) (internal citations omitted).<sup>2</sup> The panel majority further noted that the Board is entitled to “judicial deference when it interprets an ambiguous provision of a statute that it administers,” 866 F.3d at 890 (citation omitted). Because the Act does not define restraint or coercion, the Board’s *Clear Pine* test is entitled to deference. *See Consol.*, 837 F.3d at 20 (Millet, J., concurring) (recognizing that “our deferential standard of review and the record” supported finding that a striker’s “offensive, but fleeting and isolated, obscene gesture did not amount to

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<sup>2</sup> *See also, e.g., Franklin v. INS*, 72 F.3d 571, 572 (8th Cir. 1995) (“on de novo review we must decide whether the BIA has reasonably interpreted its statutory mandate,” consistent with *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984), and if BIA’s interpretation is reasonable, “[we] cannot replace the agency’s judgment with [our] own”) (emphasis in original).

striker misconduct so egregious that it forfeited the protection of the National Labor Relations Act.”)

Cooper errs in asserting (Pet.4) that these principles conflict with the standard of review applied in *NMC*. *NMC* likewise employed a multifaceted standard, initially stating that whether picket-line misconduct is coercive under *Clear Pine* “involves a question of law (or at least a mixed question of fact and law) which we review de novo,” then proceeding to conclude that even if “review must be deferential to the Board’s discretion as stated in *Earle*...the Board...abused its discretion.” 101 F.3d at 532. Either way, the ultimate question is the reasonableness of the Board’s restraint-or-coercion inference. *See generally NLRB v. Gissel Packing Co.*, 395 U.S. 575, 620 (1969) (recognizing “the Board’s competence in the first instance to judge the impact of utterances made in the context of employer-employee relationships”); *Medallion Kitchens, Inc. v. NLRB*, 806 F.2d 185, 192 (8th Cir. 1986) (upholding “the inferences drawn by the Board as to the threatening nature” of employer statements as “warranted by substantial evidence in the record.”).

## **II. The Panel Majority Correctly Found No Conflict Between the Reinstatement Order and Title VII**

The panel majority properly rejected Cooper’s argument, echoed by its amici, that reinstating Runion conflicts with its obligations under Title VII. As the majority correctly stated, harassment is actionable under Title VII only if it is “so ‘severe or pervasive as to alter the conditions of the victim’s employment and create an abusive working environment.’” 866 F.3d at 892 (quoting *Sheriff v. Midwest Health Partners, P.C.*, 619 F.3d 923, 930 (8th Cir. 2010)). As the majority recognized, the Supreme Court has found that “‘offhand comments and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment.’” 866 F.3d at 892 (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998)). See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (Title VII does not enforce “a general civility code for the American workplace;” verbal harassment “is [not] automatically discrimination under Title VII”).

Applying this standard, the panel majority correctly concluded that “Runion’s comments—even if they had been made in the workplace instead of on the picket line—did not create a hostile work environment.” 866 F.3d at 892 (citing, inter alia, *Reed v. Proctor & Gamble Mfg. Co.*, 556 F. App’x 421, 433 (6th Cir. 2014) (comments about fried chicken and watermelon insufficient)).

Cooper counters (Pet.9-10) that it has never claimed Runion’s remarks alone would subject it to Title VII liability. Instead, seconded by its amici, it asserts (Pet.2) a legal obligation to apply its anti-harassment policy to offensive picket-line statements. As the panel majority aptly recognized, however, Cooper “was under no legal obligation to *fire* Runion.” 866 F.3d at 892 (original emphasis). Rather, an employer need only “take prompt remedial action reasonably calculated to end the harassment,” for example by counseling or warning the employee. *Id.* (quoting *Bailey v. Runyon*, 167 F.3d 466, 468 (8th Cir. 1999)).

The panel majority correctly distinguished cases Cooper cites (Pet.10-11) to manufacture an intra-circuit conflict. 866 F.3d at 892. Thus, *Dowd v. United Steelworkers*, 253 F.3d 1093, 1102 (8th Cir. 2001), held that Title VII authorizes hostile-work-environment claims by replacement employees against a *union* for picket-line misconduct if it condones, encourages, or ratifies picketers’ repeated racial slurs and threats of violence. *Ellis v. Houston*, 742 F.3d 307 (8th Cir. 2014), states that a *supervisor’s* fried-chicken-and-watermelon comments could create a prima-facie showing of workplace harassment because “such behavior by a supervisor tacitly endorses racist remarks by subordinates and indicates to other officers that this type of joke or remark is acceptable.” *Id.* at 322. Nor is there an inter-circuit conflict, contrary to amici. Thus, *Castleberry v. STI Group*, 863 F.3d

259, 264 (3d Cir. 2017), involved allegations that a supervisor accompanied his on-the-job racist slur about subordinates with threats of discharge that were carried out. *Alamo v. Bliss*, 864 F.3d 541, 549-51 (7th Cir. 2017), involved allegations of racist taunts over a two-year period, combined with physical assaults, some by superiors, who were told about the incidents but did nothing.

Amici also err in relying on *Consolidated*. They overlook that Judge Millett, writing for the majority, *upheld* the Board's finding that a picketer did not lose the Act's protection by making obscene gestures and remarks. 837 F.3d at 12. Although her separate concurrence urged the Board to "think long and hard" about revising its *Clear Pine* analysis when evaluating sexually and racially offensive picket-line statements, she recognized that task is for the Board to undertake. *Id.* at 23. *See Chevron*, 467 U.S. at 843 (agency's role is to interpret ambiguous statutory terms). The panel majority (866 F.3d at 891n.1) agreed with that conclusion.

Finally, because Runion's isolated picket-line utterances did not create a hostile work environment under Title VII law, the Board's reinstatement order does not "trench upon" Title VII, as the panel majority correctly found. 866 F.3d at 899. Thus, the cautions of *Southern Steamship*, 316 U.S. at 47, and *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 144 (2002), that the Board may not "wholly ignore" or "potentially trench upon" other federal statutes, are inapposite.

### **III. The Panel Majority Correctly Upheld the Board’s Determination that Deferral Was Inappropriate**

The panel majority correctly held that the Board acted within its discretion in not deferring to the arbitrator’s award, because deferral is inappropriate where, as here, the award is “‘clearly repugnant to the purposes and policies of the Act,’” 866 F.3d at 893 (quoting *Olin*, 268 NLRB at 573-74), or “‘inconsistent with the established law.’” 866 F.3d at 893 (quoting *Local Union No. 884*, 61 F.3d at 1357). As the majority explained, “[t]he arbitrator’s view that Runion’s comments were ‘even more serious’ because they were made ‘in the context of the picket line’” is inconsistent with *Clear Pine*, which treats picket-line utterances more leniently. 866 F.3d at 894 (internal citation omitted). Nor do the panel majority and Board decisions undermine federal policy favoring arbitration, contrary to Cooper’s claim (Pet.12-14). Cooper does not dispute that there are judicially-approved limits on deferral, as reflected by *Olin*, one of which is to decline deferral where the award applies a standard inconsistent with Board law.

Contrary to Cooper’s further claim (Pet.12-13), the panel majority’s decision does not conflict with *Doerfer Engineering v. NLRB*, 79 F.3d 101 (8th Cir. 1996), which involved the fundamentally different question of arbitral authority to resolve a dispute. Moreover, in emphasizing (Pet.12) that the parties agreed to arbitration, Cooper ignores that the Board “may proscribe conduct which is an unfair labor practice even though it is also a breach of contract remediable as such by

arbitration.” *NLRB v. Strong*, 393 U.S. 357, 360-61 (1969). *See* Section 10(a) of the Act, 29 U.S.C. § 160(a) (Board’s authority to remedy unfair labor practices “shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement”).

#### **IV. The Panel Majority Correctly Held that Section 10(c) Does Not Bar Runion’s Reinstatement**

The panel majority correctly rejected Cooper’s argument, repeated here (Pet.15-16), that it discharged Runion “for cause” under Section 10(c), and therefore the Board could not order his reinstatement. 866 F.3d at 893.

Section 10(c) grants the Board authority, upon finding a violation of the Act, to order an employer “to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of [the Act].”

Although Section 10(c) further provides that “[n]o order of the Board shall require the reinstatement of any individual...who has been...discharged...for cause,” *id.*, it does not define the term “for cause.” Cooper (Pet.15) does not contest the panel majority’s recognition that the Board, exercising its authority to interpret this ambiguous term, has found that it “‘effectively means the absence of a prohibited reason.’” 866 F.3d at 893 (citation omitted). Nor does Cooper dispute that Section 10(c) does not “‘curtail the Board’s power in fashioning remedies when the loss of employment stems directly from an unfair labor practice as in the case at hand.’” 866 F.3d at 893 (citation omitted).

Instead, Cooper (Pet.16) conjures a conflict by citing distinguishable cases like *NLRB v. Potter Electric Signal Company*, 600 F.2d 120, 123 (8th Cir. 1979), where employees were discharged for participating in an on-the-job physical fight that was unrelated to the unfair labor practice, and *NLRB v. IBEW Local 1229*, 346 U.S. 464, 468 (1953), where employees were terminated for unprotected conduct—distributing a handbill critical of the employer’s business that had “no discernible relation” to the labor controversy. As those cases illustrate, the “for cause” proviso to Section 10(c) bars reinstatement only when the unfair labor practice “had no effect on the discharge decision,” and the discharges are “independent of the employer’s unlawful conduct.” *Hyatt Corp. v. NLRB*, 939 F.2d 361, 376 (6th Cir. 1991). That is not the situation here.

## CONCLUSION

The Board respectfully requests that the Court deny the rehearing petition.

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October 2017

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

COOPER TIRE & RUBBER CO.	)	
	)	
Petitioner/Cross-Respondent	)	
	)	Nos. 16-2721 & 16-2944
v.	)	
	)	Board Case No.
NATIONAL LABOR RELATIONS BOARD	)	08-CA-087155
	)	
Respondent/Cross-Petitioner	)	
	)	
and	)	
	)	
UNITED STEEL, PAPER AND FORESTRY,	)	
RUBBER, MANUFACTURING, ENERGY,	)	
ALLIED INDUSTRIAL & SERVICE	)	
WORKERS INTERNATIONAL UNION,	)	
AFL-CIO/CLC	)	
	)	
Intervenor	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its response contains 3,883 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010, and the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

Dated at Washington, DC  
this 25th day of October, 2017

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WORKERS INTERNATIONAL UNION,	)	
AFL-CIO/CLC	)	
	)	
Intervenor	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on October 25, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all 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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