

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON D.C.**

DOUGLAS AUTOTECH CORPORATION

Respondent

and

CASE 07-CA-51428

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

Charging Union

**GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS
TO ADMINISTRATIVE LAW JUDGE'S DECISION**

Steven Carlson
Counsel for the General Counsel
National Labor Relations Board
Region Seven, Resident Office
Grand Rapids, Michigan

SUBJECT INDEX

Statement of the Case..... 2

Statement of Facts 3

Applicable Law and Argument8

 I. Introduction8

 II. Credibility.....9

 III. Unlawful Discharges.....14

 IV. Unlawful Refusal to Bargain21

 V. Remedy22

Conclusion25

TABLE OF AUTHORITIES

<i>ABC Automotive Products Corp.</i> , 307 NLRB 248 (1992).....	22
<i>Abilities and Goodwill</i> , 241 NLRB 27 (1979).....	22
<i>American Ship Bldg. Co. v. NLRB</i> , 380 U.S. 300 (1965)	16
<i>Ancor Concepts, Inc.</i> , 323 NLRB 742 (1997)	23
<i>Boghosian Raisin Packing Company, Inc.</i> , 342 NLRB 383 (2004)	14, 17, 18, 19
<i>Catalytic Industrial Maintenance</i> , 301 NLRB 342 (1991).....	20
<i>D&S Leasing</i> , 299 NLRB 658 (1990).....	20
<i>Daikichi Sushi</i> , 335 NLRB 623 (2001).....	9, 10
<i>Dayton Newspapers</i> , 330 NLRB 650 (2003).....	23
<i>Detroit Newspaper Agency</i> , 343 NLRB 1041 (2004).....	22, 23
<i>Fairprene Industrial Products</i> , 292 NLRB 797 (1989).....	14, 18, 19
<i>Freeman Decorating Co.</i> , 336 NLRB 1 (2001).....	20
<i>Hansen Bros. Enterprises</i> , 279 NLRB 741 (1986)	15
<i>Harter Equipment, Inc.</i> , 280 NLRB 597 (1986).....	16
<i>Harter Equipment Inc.</i> , 293 NLRB 647 (1989).....	16, 17
<i>Hickmont Foods</i> , 242 NLRB 1357 (1979).....	24
<i>Hormigonerera Del Toa, Inc.</i> , 311 NLRB 956 (1993).....	22
<i>International Paper Co.</i> , 319 NLRB 1253 (1995).....	16
<i>Martin A. Gleason Inc.</i> , 233 NLRB 1307 (1977)	17
<i>Metropolitan Edison Co., v. NLRB</i> , 460 U.S. 693 (1983)	20
<i>NLRB v. Great Dane Trailers</i> , 388 U.S. 26 (1967)	20, 21
<i>NLRB v. Town & Country Electric, Inc.</i> , 516 U.S. 85 (1995)	16

<i>Pavilions at Forrestal</i> , 353 NLRB No. 60 (2008).....	21
<i>Phelps Dodge v. NLRB</i> , 313 U.S. 177 (1941).....	16
<i>Schenk Packing Co.</i> , 301 NLRB 487 (1991).....	16
<i>Shelby County Health Care Corporation v. AFCSME</i> , 967 F.2d 1091 (6 th Cir. 1992)14, 15	
<i>Standard Dry Wall Products</i> , 91 NLRB 544 (1950).....	10
<i>Swift Independent Corp.</i> , 289 NLRB 423 (1988).....	20
<i>Tracer Protective Services</i> , 328 NLRB 734 (1999).....	20
<i>United Chrome Products</i> , 288 NLRB 1176 (1988).....	17
<i>United Technologies Corp.</i> , 310 NLRB 1126 (1993).....	13
<i>Wright Line</i> , 250 NLRB 1083 (1980).....	20

STATEMENT OF THE CASE

On February 25, 2009, the Regional Director of the Seventh Region issued a Complaint and Notice of Hearing alleging that Douglas Autotech Corporation (herein Respondent) violated Sections 8(a)(1) and (3) of the Act by discharging the entire bargaining unit employed at its Bronson, Michigan facility on or about August 4, 2008 [GC 1(e)].¹ The Complaint further alleges that on or about August 14, 2008, Respondent unlawfully withdrew recognition from International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, and its Local 822 (herein the Union), and since that date has failed and refused to meet and bargain collectively with the Union in violation of Sections 8(a)(1) and (5) [GC 1(e)].

Respondent filed its Answer to the Complaint about March 17, 2009, admitting the nature of Respondent's operation and the Board's jurisdiction in this matter [GC 1(n)]. Respondent denied, in whole or in part, every other allegation in the Complaint. Respondent also pleaded numerous "affirmative defenses" premised on the assertion that it had license to discharge the bargaining unit en masse because the employees were unprotected by the Act when the Union engaged in a strike without complying with Section 8(d)(3) of the Act.

A hearing was held in Grand Rapids, Michigan on June 24 and 25, and August 17, 18 and 19, 2009, before Administrative Law Judge Paul Buxbaum. At the hearing, Respondent amended its Answer to admit the Complaint allegations regarding the filing and service of the

¹ Throughout this brief the following references will be used:

ALJ Decision: ALJD (followed by page number)
Transcript: Tr (followed by page number)
General Counsel Exhibit: GC (followed by exhibit number)
Respondent Exhibit: R (followed by exhibit number)
Charging Party Exhibit: CP (followed by exhibit number)
Joint Exhibit: J (followed by exhibit number)
ALJ Exhibit: ALJ (followed by exhibit number)

amended charge [Tr at 9]. Respondent further amended its Answer to admit the Union's status as a labor organization within the meaning of Section 2(5), and the supervisory and agency status of R. Paul Viar, Jr., within the meanings of Sections 2(11) and (13) of the Act [Tr at 10-11].

On January 5, 2010, ALJ Buxbaum issued his decision finding that Respondent unlawfully and discriminatorily discharged and refused to further employ the members of the bargaining unit, and unlawfully failed and refused to bargain with the Union [ALJD at 2]. ALJ Buxbaum recommended that the Board order Respondent to reinstate the unlawfully discharged employees and make them whole for any loss of earnings and benefits, and that it bargain with the Union upon request. ALJ Buxbaum further recommended a broad cease and desist order citing the "egregious nature and sweeping extent of Respondent's unfair labor practices, the likely persistence of ingrained opposition to the purposes of the Act due to the continuing tenure of the key management officials, and the depraved state of mind manifested by those officials in their conduct at trial." [ALJD at 44].

STATEMENT OF FACTS

Respondent is a corporation with offices and a place of business in Bronson, Michigan, where it manufactures steering columns, assemblies, and related products for the automotive industry [ALJD at 6; GC 1(e); Tr at 598]. Respondent and the Union have had a collective-bargaining relationship since 1941 [ALJD at 7; Tr at 77, 724]. The parties' most recent collective bargaining agreement was effective May 1, 2005 through April 30, 2008, and covered a unit of production and maintenance employees at the Bronson plant [ALJD at 7; GC 2; Tr at 77-78].

On January 24, 2008², the parties began negotiations for a successor agreement [ALJD at 8; Tr at 81]. On February 19, the Union provided Respondent with timely notice of its intent to terminate the parties' contract [ALJD at 8; Tr at 81-83; GC 5]. By April 30, when the contract expired, the parties had held several bargaining sessions but were still far apart on an agreement [ALJD at 8; Tr at 83]. On May 1, the Union began an economic strike [ALJD at 9; Tr at 84-87; GC 6].

On the afternoon of Friday, May 2, the Union realized that as the result of a clerical error it had not filed the notice required by Section 8(d)(3) [ALJD at 9; Tr at 87-90]. The Union took immediate action to correct its mistake. After advising the Local leadership of the situation, the Union held a membership meeting and decided to call an immediate end to the strike [ALJD at 10; Tr at 93]. In the early morning hours of Monday, May 5, the Union presented Respondent with an unconditional offer to return to work [ALJD at 10; Tr at 94-97; GC 7]. The Union had the entire complement of first shift employees at the Bronson facility ready to report for work [ALJD at 10; Tr at 97]. Also on the morning of May 5, the Union filed the required F-7 form with FMCS [ALJD at 10; Tr at 90; GC 3].

Upon Respondent's receipt of the Union's unconditional offer to return to work, the parties set up a meeting for 6:00 that evening [ALJD at 10; Tr at 98]. At the meeting, Respondent gave the Union's bargaining committee a letter, acknowledging that the Union's "offer to return to work was unconditional[,]" and advising that "effective immediately" Respondent was locking out the bargaining unit in support of its bargaining position [ALJD at 11; Tr at 99; GC 8]. Attached to the letter was a "synopsis" of Respondent's bargaining position and a proposal for a three-year contract [ALJD at 12; Tr at 99-101; 918-919; 1049-1050; GC 8].

² All dates hereafter are in 2008 unless otherwise indicated.

Respondent's letter further stated that, "when an Agreement has been reached ... employees can be expeditiously returned to work." [ALJD at 12; GC 8].

When Respondent met with the Union on May 5, Director of Administration Paul Viar and Director of Finance Glenn Kirk suspected that the Union had not filed an F-7 notice prior to beginning its strike [ALJD at 11; Tr at 637; 709; 842; 846]. Notwithstanding these suspicions, Respondent's representatives did not indicate to the Union that it would take action against the employees if they had engaged in an illegal strike. Instead, it chose to lock out the employees "effective immediately" and bargain with the Union.[ALJD at 15; GC 8]³

On May 21, the parties held their first of several post-lockout bargaining sessions [ALJD at 16; Tr at 104; J 1]. A mediator from FMCS was present at each session. [J 1]. At the May 21 meeting, the Union presented Respondent with a counterproposal to Respondent's May 5 proposal [ALJD at 16; Tr at 105-107; 989; GC 37]. Also at this meeting, Respondent's spokesperson, Bruce Lillie, stated that Respondent believed the Union's strike was illegal [ALJD at 16; Tr at 107]. Respondent's witnesses testified that Lillie also said that Respondent was not waiving any of its rights [Tr at 651; 851]. During his testimony, Union representative Philip Winkle denied that Lillie made any statement at this meeting regarding "waiver of rights" [Tr at 159]. In any event, it is undisputed that at the May 21 meeting, Respondent reviewed the Union's counterproposal and the parties continued to bargain toward a new collective bargaining agreement [ALJD at 16; Tr at 105-107; GC 37].

The parties held 11 post-strike bargaining sessions from May 21 through July 31 during which they exchanged proposals and bargained the terms of a successor agreement [ALJD at 16-

³ At the hearing, Respondent's witnesses testified that its attorney, Bruce Lillie made remarks at the May 5 meeting regarding the legality of the strike and reservation of rights. However, as set forth in the ALJD, the record makes clear that this testimony was a complete fabrication.

19; J 1; GC 37 through 43].⁴ During these sessions, Respondent repeatedly assured the Union and its bargaining committee comprised entirely of former strikers [Compare GC 48 and J 1] that the replacement employees Respondent was utilizing were temporary [ALJD at 17; Tr at 120-124; 128-129; 219-220; 877]. Indeed, in his June 23, 2008 position statement to the NLRB, Bruce Lillie stated: “Importantly, the replacement workers used during the course of the lockout have at all times been temporary replacements.” [Tr at 1035-1036; 1042-1046]. Also during the post-lockout bargaining sessions, Lillie, Viar and Glenn Kirk each reiterated Respondent’s May 5 assurance that the former strikers would be returned to work as soon as the parties reached agreement on a new contract [ALJD at 17; Tr at 120-124; 128-130]. At the July 2 bargaining session, Kirk and Lillie made reference to a transition plan to facilitate the return of the former strikers [Tr at 129-130; 220; 877].

Lillie testified that during all of the post-May 21 bargaining sessions he stated that Respondent was not “waiving any of its rights.” [Tr at 991]. But Respondent’s bargaining notes do not corroborate this testimony [R 4 – see notes for July 2, July 14, July 15, July 24, and July 25]. Instead, Respondent’s notes closely corroborate the testimony of the General Counsel’s witnesses on this point [Tr at 159-161; 256; see also testimony of Diane Hedgcock, Tr at 789-793]. Respondent did not offer into evidence its bargaining notes for the June 2, June 13, July 1, or July 28 sessions.

On July 24, there was an “ominous shift in Respondent’s thinking” [ALJD at 18]. In a sidebar conference, Bruce Lillie told the Union’s attorney, John Canzano, that Respondent was consulting new counsel about firing the bargaining unit employees [ALJD at 18; Tr at 227-228; 1006]. Lillie told Canzano that he (Lillie) was “afraid that he might be losing control of his

⁴ On July 2, the parties withdrew their pending unfair labor charges pursuant to an agreement to begin a cooling-off period regarding NLRB investigations [Tr at 217-219; GC 18].

client (Respondent)” [ALJD at 18; Tr at 228]. John Canzano refuted Lillie’s testimony that he (Lillie) made remarks regarding the legality of the strike and/or reserving Respondent’s rights to take action against the former strikers during sidebar discussions prior to July 24 [Tr at 1054-1055].

Lillie’s portentous comments to Canzano on July 24, notwithstanding, the parties continued bargaining and met for sessions on July 25, July 28 and July 31 [J 1]. Near the end of the July 31 session, Lillie announced to the Union’s bargaining committee: “We’ve made some progress here today. I’m going on vacation, but we’ve got another date scheduled, and I just have something I have to say, and that is by continuing to bargain, the Company is not waiving its right to fire people” [ALJD at 19; Tr at 241; 1011].

This was the parties’ last bargaining session. By letters dated August 4, Respondent fired every bargaining unit employee. Each member of Local 822, including the employees on layoff status and sick or disability leave during the strike, was sent a letter stating that their employment was “terminated effective immediately because of your participation in the illegal strike” [ALJD at 20; GC 47; Tr at 133-134; 279-281]. Respondent offered no evidence that it attempted to call back to work any one of the employees on layoff or approved leave during the strike. Paul Viar testified that he simply “presumed” that the employees on layoff or leave had joined the strike [Tr at 721].

On August 14, the parties attended a previously-scheduled bargaining session, but Respondent refused to meet with the Union [ALJD at 21; Tr at 136-137]. The Union’s counsel, Samuel McKnight, along with the Union’s representatives, and the FMCS mediator, went to Respondent’s caucus room in an effort to get Respondent to meet with the Union and bargain [ALJD at 21; Tr at 137; 697; GC 67]. McKnight entered Respondent’s caucus room and said:

“We would like for you to come bargain a contract with us.” Bruce Lillie replied: “We’re not going to come and bargain. All of the employees have been terminated.” [ALJD at 21; Tr at 138; GC 67]. McKnight told Respondent that the Union wanted to negotiate a responsible collective bargaining agreement, and again asked Respondent to bargain with the Union [Tr at 761]. Lillie refused [Tr at 139; GC 67].⁵ The parties have not met for formal bargaining since that date [ALJD at 21].

ARGUMENT AND APPLICABLE LAW

THE ADMINISTRATIVE LAW JUDGE’S RULINGS, FINDINGS OF FACT, AND CONCLUSIONS OF LAW ARE FULLY SUPPORTED BY CREDIBLE RECORD EVIDENCE AND ESTABLISHED LAW AND SHOULD BE AFFIRMED

I. Introduction

The Union’s strike ended on May 5, when it unconditionally offered to return to work. In response to the Union’s unconditional offer, Respondent chose to lock out the unit employees “effective immediately” in support of its bargaining position. At that moment, the employees who joined the strike ceased to be illegal strikers and became locked out employees entitled to the full protection of the Act. Respondent’s decision to lock out the employees was an affirmative act that brought the strikers back within the protection of the Act. Over the next three months, the parties bargained for a new contract and Respondent made repeated assurances that the locked out employees would be returned to work once the parties reached agreement on a contract. Respondent acknowledged the former strikers’ permanent employee status, and treated them as locked out employees.

⁵ Bruce Lillie testified that he had no recollection of anything that was said during the August 14 exchange in Respondent’s caucus room [Tr at 1015]. In contrast, the General Counsel’s witness, Philip Winkle, demonstrated a detailed recall of the events of the August 14 meeting [Tr at 138-139]. Winkle’s testimony was corroborated by notes he took immediately after the meeting ended [GC 67; Tr at 1015].

Nearly three months after the strike ended, Respondent fired every single member of the bargaining unit – including the 33 employees on layoff or approved leave who never engaged in the strike. Then, operating under the mistaken legal conclusion that it had depleted the unit, Respondent refused to bargain with the Union.

Respondent’s decision to terminate the employment of the bargaining unit employees violated Section 8(a)(3) of the Act. Respondent could not lawfully fire the employees who engaged in the strike because it “reemployed” them by locking them out in response to the Union’s unconditional offer to return. Respondent could not fire the 33 employees on layoff or approved leave because they did not “engage in a strike” within the meaning of Section 8(d) and thus never lost their protected status.⁶ The discharge of the bargaining unit en masse, without regard to whether or not individual employees engaged in a strike, was inherently destructive of Section 7 rights. The clear preponderance of the evidence establishes that the judge’s factual findings and his application of the relevant legal principles to those findings are correct.

II. Credibility

Respondent excepts to certain credibility findings by ALJ Buxbaum (**Exceptions 21, 22, 24, 25, 26, 28, 30**). The Board has a long-standing policy of attaching great weight to an administrative law judge’s credibility findings unless the clear preponderance of all relevant evidence convinces the Board that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). It is apparent from the text of the judge’s decision that in making his credibility resolutions, the judge appropriately relied on his observation of the demeanor of each witness; established or admitted facts; inherent probabilities; and reasonable inferences drawn from the record as a whole. See *Daikichi Sushi*,

⁶ The ALJ did not make conclusions of law that those employees on layoff or approved leave at the time of the strike did not engage in a strike within the meaning of Section 8(d); and thus did not lose their protected status between May 1 and May 5, 2008. The General Counsel has filed cross-exceptions on this issue.

335 NLRB 622, 623 (2001). Here, the judge's credibility resolutions were painstakingly detailed, well reasoned, and anything but sweeping. The Board should reject Respondent's credibility exceptions.

The most significant credibility determinations in the instant matter involve the witness accounts of the May 5 meeting at which Respondent announced to the Union that it was locking out the employees. Respondent's witnesses testified that at the May 5 meeting, Bruce Lillie made statements regarding the legality of the Union's strike and reservation of Respondent's "rights." The General Counsel's witness, Philip Winkle, denied that Lillie made any such statement at the May 5 meeting [Tr at 158-159]. The judge correctly found that the record supports Winkle and that the testimony of Viar, Kirk and Lillie was a fabrication [ALJD at 12]. The hearing testimony of Respondent's witnesses was in direct contradiction to the sworn pre-trial affidavits given by Viar, Kirk and Lillie during the investigation of the underlying unfair labor practice charges, and entirely at odds with statements made in Respondent's Motion for Summary Judgment [ALJD at 12-15; 1(r)].

When asked at the hearing what Lillie said at the May 5 meeting, Viar testified: "You know, he advised the Local Union that we thought the strike was illegal. We had not waived any rights." [Tr at 642]. Kirk testified that Lillie said: "We have reason to believe the strike was illegal and that we were reserving all of the rights accorded to the Company under the Act." [Tr at 842].

On direct examination, Lillie gave varying accounts of what he said at the meeting [ALJD at 13-14; Tr at 976-978; 1018-1019]. On cross-examination, however, Lillie admitted that in a sworn affidavit he gave to an NLRB agent during the investigation of this case, he testified:

“On several occasions following the local strike, I declared to the Union that we felt that their conduct was illegal in that strike. I believe that I told the Union at the start of several but not all bargaining sessions that followed the 5/1-5/5/08 strike with that remark. I would tell them each time that we thought their conduct of the strike was illegal and that we were not waiving any of our rights in regard to that.

I did not make any such remarks of this kind in our 5/5/08 meeting since, at that time, we were not yet aware that the strike was, in fact, illegal.” (emphasis added) [ALJD at 13-14; Tr at 1021-1022].

Kirk admitted that in a sworn pre-trial affidavit he gave to an NLRB agent, he testified:

“The 5/21 meeting was not the only meeting in which Lillie told the Union that their strike was illegal and that our meeting with them was in no way a waiver of our rights. I believe Lillie made such announcement at all of the meetings I attended ***after*** the 5/21/08 meeting.” (emphasis added) [ALJD at 13; Tr at 899-903].

Kirk further acknowledged that his description of the May 5 meeting in his pre-trial affidavit makes absolutely no mention of *any discussion* about the strike being illegal or Respondent reserving its rights [ALJD at 13; Tr at 903]. Likewise, Paul Viar admitted that there was no mention of *any discussion* about the strike being illegal or Respondent reserving its rights in his pre-trial affidavit describing the events of the May 5 meeting [ALJD at 13; Tr at 712-713; 776].

The only documentary evidence Respondent offered to corroborate the hearing testimony of its witnesses as to the May 5 meeting also proved to be a sham [ALJD at 14-15]. Respondent offered into evidence what it purported to be Bruce Lillie’s notes from the May 5 meeting [R 7]. Lillie testified that as the May 5 meeting was getting started, he wrote: “*Master 6:00 p.m.*” in the upper right hand corner of a copy of Respondent’s lockout notice in order to identify the document as his original [Tr at 970-971]. Respondent’s Exhibit 7 includes handwriting that Lillie identified as: “*5/5/08, meet with union, not waiving rights.*” Lillie testified that he wrote these words on the document before meeting with the

Union [Tr at 973]. However, on cross-examination, Lillie was confronted with what appeared to be the identical “*Master 6:00 p.m.*” lockout letter attached to a position statement he submitted to the NLRB on June 23, 2008. [Tr at 1027, 1052]. Lillie admitted that the document submitted to the Board on June 23, did not include the “*5/5/08, meet with union, not waiving rights*” notation, nor any other hand written notes [Tr at 1027, 1052]. Respondent offered no explanation for this stunning discrepancy.

Further contradicting Respondent’s hearing evidence regarding statements purportedly made by Lillie at the May 5 meeting as to the legality of the strike or reservation of rights is Respondent’s Motion for Summary Judgment. Significantly, Respondent’s motion makes absolutely no mention of any such statements by Lillie at the May 5 meeting [GC 1(r) at 2]. Instead, Respondent’s motion states:

“DAC first became aware on or about May 20, 2008 (that the Union had gone on strike before submitting its F-7 notice) ... *As soon as* DAC knew that the Union had engaged in an illegal strike, DAC stated its position regarding the illegal strike to the Union and *then reiterated* its position in all *subsequent* bargaining sessions.” (emphasis added) [GC 1(r) at 3].

“Around noon on May 21, 2008, on or about the day after DAC learned that the Union engaged in an illegal strike, DAC specifically told the Union (in the first bargaining session since DAC learned that the strike was illegal) ... that DAC was not waiving any rights ...” and that “*as soon as DAC knew the strike was illegal, it told the Union it was preserving all its rights*” (emphasis added) [GC 1(r) at 8].

Respondent also states in its motion:

“DAC’s right to terminate is even more unassailable here because *from May 21, 2008 forward*, on or about the day after DAC learned the Union engaged in an illegal strike, DAC specifically told the Union the strike was illegal; and that DAC was not waiving any rights or remedies related to the illegal strike.” (emphasis added) [GC 1(r) at 11].

Clearly, if Bruce Lillie had actually made statements at the May 5 meeting purporting to reserve Respondent's "rights," Respondent would have said so in its affidavits, position statements, and motion prior to the hearing. It did not. Lillie's purported notes of the May 5 meeting would have been attached to Respondent's motion, or to Lillie's affidavit to the Board. They were not. [Tr at 1024-1025; See also testimony of Diane Hedgcock: Tr at 789]. It is well-established that an attorney's statements in pre-trial pleadings like Respondent's Motion for Summary Judgment are admissions that can be considered and weighed if they contain a statement or statements conflicting with the party's position. *United Technologies Corp.*, 310 NLRB 1126, 1127 fn. 1 (1993) enfd. mem. *NLRB v. Platt & Whitney*, 29 F.3d 621 (2nd Cir. 1994) (ALJ considered admissions in position letter attached to respondent employer attorney's unsuccessful motion to dismiss).

The evidence is overwhelming that the hearing testimony of Respondent's witnesses regarding Lillie's statements at the May 5 meeting is a fabrication; an obvious post hoc attempt by Respondent to rescind or qualify the statements it indisputably *did make* to the Union on May 5: (1) its acknowledgment that the Union's "offer to return to work was unconditional" and (2) that "effective immediately" it was locking out the bargaining unit in support of its bargaining position [GC 8]. The judge's credibility resolutions on this critical point are correct and should be affirmed.⁷

⁷ Indeed, the record is replete with Respondent's transparent attempts to recast indisputable facts of this case. At the hearing, Respondent's August 4 letter to the discriminatees notifying them that their employment was "terminated effective immediately" [GC 47] became a letter "confirming their status" [Tr at 279]. The "bargaining position," "synopsis" and "proposal" attached to the May 5 lockout letter [GC 8] became a return to work agreement in response to the union's unconditional offer [Tr at 742-750; 917-922; 977]. The ALJ's credibility determinations and factual findings as to these matters are clearly supported by the record and should likewise be affirmed

III. Unlawful Discharges of the Bargaining Unit Employees

Respondent has filed several exceptions challenging the ALJ's analysis of the legal issues and his application of the legal precedents to the facts of this case. **(Respondent Exceptions 1, 2, 3, 4, 5, 6, 13, 19)**. As set forth below, the judge correctly applied the law to the facts of this case and his decision should be affirmed.

A. Loss of Protected Status and Reemployment Under Section 8(d)

Section 8(d)(1) of the Act requires that a union seeking to terminate or modify a collective bargaining agreement provide notice to the employer sixty days prior to the contract expiration. Section 8(d)(3) requires the union to notify the FMCS and any state mediation agency of the existence of a dispute within thirty days thereafter. Any employee who strikes within these notice periods "shall lose his status as an employee of the employer ... for the purposes of sections 8, 9, and 10" of the Act.

However, "operation of the loss-of-status provision is not by its terms automatic and irrevocable." *Boghosian Raisin Packing Company, Inc.*, 342 NLRB 383, 392, fn. 11 (2004). Section 8(d) further provides that "such loss of status for such employee shall terminate if and when he is reemployed by such employer." See also *Shelby County Health Care Corporation v. AFCSME*, 967 F.2d 1091, 1096, 1097 (6th Cir. 1992) (Section 8(d) does not mandate termination).

In *Fairprene Industrial Products*, the Board held unlawful the discharge of employees who had struck without providing the requisite Section 8(d)(3) notice, because the employees had been "reemployed." 292 NLRB 797, 803-804 (1989), *enfd.* memo 880 F.2d 1318 (2d Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990). The employer "reemployed" the strikers when, pursuant to a strike settlement agreement, it agreed to reinstate the strikers and scheduled them

for work. When the employer later confirmed its suspicion that the union had failed to file the required Section 8(d)(3) notices, the employer reneged on the agreement and discharged some of the strikers. The discharge of these “reemployed” employees violated Section 8(a)(3) even though the employees had not yet actually returned to work. Id. at 804.

Consistent with the above Board precedents, in *Shelby County Health Care Corporation*, the Sixth Circuit interpreted Section 8(d) as giving an employer discretion in its response to an unlawful strike—including the right to terminate the illegal strikers, invite them back to their jobs without consequence, or decide on some compromise solution, but explained that “once the employer decides not to discharge the employee, that employee is once again brought under the protective mantle of the NLRA.” *Shelby* above at 1096.

Here, Respondent “reemployed” the former strikers by locking them out and thereafter continuing to treat them as reemployed. Upon receipt of the Union's unconditional offer and even after it confirmed the Union's failure to provide timely Section 8(d)(3) notice, Respondent engaged in a course of conduct that evidenced reemployment of the striking employees. Thus, on May 5, by acknowledging that the employees had made an unconditional offer to return, Respondent recognized that the strike had terminated. Instead of explicitly reserving judgment and waiting to find out if the requisite 30-day notice had been provided, Respondent locked out the employees “effective immediately.”⁸

Respondent argues that the ALJ misapplied *Hansen Bros. Enterprises*, 279 NLRB 741 (1986), enf. 812 F.2d 1443 (D.C. Cir 1987), cert. denied 484 U.S. 845 (1987) to the instant matter (Exception 6). Respondent misses the point. The ALJ cites *Hansen Bros.* for the purpose

⁸ Respondent’s argument that the Union did not make an unconditional offer to return to work on May 5 is preposterous. The offer was unconditional on its face [GC 7], and Respondent acknowledged it as such upon receipt [GC 8]. As set forth above, Respondent’s attempt at the hearing to transform its lockout bargaining position “synopsis” and three-year contract proposal as a return to work agreement is yet one more canard that did not withstand the scrutiny of cross-examination [Tr at 918-919; 1049-1051].

of explaining an employer's general legal obligations when presented with an unconditional offer to return to work [ALJD at 27]. As the judge makes clear, what is material is the legal effect of Respondent's actions in response to the Union's unconditional offer in this case. The ALJ did not find that the strikers were reemployed by making an unconditional offer to return – he concluded that they were reemployed based on what Respondent did and said in response to the unconditional offer [ALJD at 36].

By locking out the employees, Respondent changed their status from “illegal strikers” not entitled to the full protections of the Act to “locked out” employees. A fundamental principle underlying any lawful lockout is that the locked-out employees have “permanent employee status.” *Harter Equipment Inc.*, 293 NLRB 647, 648 (1989) enfd. sub nom. *Operating Engineers Local 825 v. NLRB*, 829 F.2d 458 (3d Cir. 1987); *Harter Equipment, Inc.*, 280 NLRB 597, 600 (1986); *International Paper Co.*, 319 NLRB 1253, 1269, 1270 (1995). See also *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 321 (1965) (White, J., concurring) (“A lockout is the refusal by an employer to furnish available work to his *regular employees.*”) (emphasis added). (See also Section 2(3) of the Act: “The term ‘employee’ ... shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute ...”).⁹

Consistent with their permanent employee status, locked out employees have well established Section 8 and 9 rights. For example, an employer cannot target certain employees for lockout with anti-union animus, i.e., with the intent of discouraging union membership. *American Shipbuilding v. NLRB*, 380 U.S. 300 (1965). An employer cannot lock out only those employees who engage in protected activity. *Schenk Packing Co.*, 301 NLRB 487 (1991)

⁹ The Supreme Court has consistently held that the term “employee” should be interpreted broadly and consistent with the Act's purpose of protecting employees' rights. *Phelps Dodge v. NLRB*, 313 U.S. 177 (1941); *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85 (1995).

(employer couldn't condition reinstatement on resigning from the Union); *Martin A. Gleason Inc.*, 233 NLRB 1307, 1309 (1977). Locked out employees are the only employees that have a right to vote in a Section 9 decertification election. *Harter II*, 293 NLRB 647, 648 (1989) (replacement employees are not eligible decertification election voters). Most significantly for this case, locked out employees have the right to be reinstated with seniority intact at the conclusion of the lockout. *United Chrome Products*, 288 NLRB 1176 (1988).

In the instant case, even after Respondent confirmed that the strike had been unlawful, certainly by the time of the May 21 meeting, Respondent continued its lockout and repeatedly assured the Union and its bargaining committee during negotiations in June and July that the replacement employees were temporary and that the former strikers would return to work once the parties reached agreement on a new contract. [ALJD at 17; Tr at 120-124; 128-130; 219-220; 877].

The Board interpreted the provisions of Section 8(d)(3) strictly in *Boghosian Raisin Packing Co.*, holding that an employer acted lawfully when it discharged employees who had engaged in a strike without providing the requisite Section 8(d)(3) notice. *Boghosian* at 387. In that case, when the employer learned that the union had not complied with Section 8(d)(3), the employer notified the union that its strike was illegal. The union then made a *conditional* offer to return to work, which the employer did not accept. The union continued to strike, and the parties thereafter met but failed to resolve the dispute. Five days into the strike, the employer terminated all of the striking employees. *Id.* at 384. The Board found that “even after the Union knew full well that the notice had not been sent,” it made only conditional offers to return to work. “Thus, ... the Union continued its unlawful strike, and the strikers lost their status as statutory employees.” *Id.* at 385. In concluding that the “public interest” was best served by

strict enforcement of Section 8(d) notice requirements, the Board expressly relied upon the union's failure to promptly call for an unconditional end to the strike once it learned that the strike was unlawful, finding “less basis for lenience in view of this continuing misconduct.” *Id.* at 386.

The instant case is more like *Fairprene Industrial Products* than *Boghosian Raisin Packing*. Unlike in *Boghosian*, once the Union here realized it had not filed the required FMCS notice, it took immediate action. The Union ended the strike, made an unconditional offer to return to work, had the first shift employees present at the facility ready to report for work, and submitted a late notice to the FMCS. Thus, this case is distinguishable from *Boghosian*, where the Board emphasized as “very significant” the union's continued strike after learning of its mistake and its failure to unconditionally offer to return to work. *Boghosian* at 385, 386, and 387. Indeed, in *Fairprene*, the Board recognized that “once an unlawful strike has ended, there is no longer any reason to deprive employees of the protections of the Act.” *Fairprene* at 802.

Boghosian is also distinguishable from the instant matter in that the employer in that case immediately and expressly reserved: “all options ... up to and including discharge” of all the strikers. *Boghosian* at 384. Here, it is undisputed that Respondent did not state that it was considering taking any action against the former strikers at the May 5 meeting, its suspicions regarding the legality of the strike notwithstanding. Instead, Respondent decided to lock out the unit and told the Union that the employees would be returned to work once the parties reached agreement. Even after Respondent confirmed that the strike was illegal, it did not mention that discharging the former strikers was even a possibility until the July 24 meeting. The absence of any timely and express reservation of an option to discharge, especially in light of Respondent’s contrary statements and actions – locking out the employees “effectively immediately” in

support if its bargaining position and repeatedly telling the Union that employees would be returned to work once the parties reached an agreement – is a critical distinction between *Boghosian* and the instant matter.

As in *Fairprene*, while the Union’s illegal strike continued, each of the strikers here lost his or her status as an employee of the employer as mandated by Section 8(d) of the Act. During this time, Respondent was privileged to discharge any of the strikers it chose. But when the Union called an end to its strike with its unconditional offer to return, Respondent chose instead to lock out the employees and continue bargaining with the Union. Respondent did so without any reservation of rights, its suspicions regarding the Union’s compliance with 8(d) notice requirements notwithstanding. Accordingly, the striking employees in the instant case were reemployed within the meaning of Section 8(d) and Respondent could not lawfully fire them.¹⁰ Thus, the Board should reject Respondent’s Exceptions 1, 2, 3, 4, 5, 6, 13, 19.

C. Termination of the Bargaining Unit Employees

Because Respondent “reemployed” the former strikers, the loss-of status provision does not apply here. Respondent thus had no license to discriminate. Accordingly, the Judge correctly found that August 4 termination of the bargaining unit en masse violated the Act, regardless of Respondent’s motive.

Under Section 8(a)(3), liability for an adverse action against an employee turns on whether the employer acted with union animus. Usually, the General Counsel has the burden of

¹⁰ In Exception 13, Respondent argues: “the ALJ’s decision means that on or about May 5, 2008, (Respondent) should have immediately terminated the illegal strikers instead of coming to bargain.” [Respondent Brief in Support of Exceptions at 32]. This cannot possibly be Respondent’s reading of the judge’s decision. If it is, then Respondent should refer to pages 33-35, of the ALJD where the judge states: “I agree with counsel for the Company that there may be circumstances where the Board should give effect to an employer’s reservation of rights. If an employer has a genuine doubt about the notice issue and is seeking a brief period in which to obtain the required information, it makes sense to permit it to reserve its rights *before formulating a response to the Union’s behavior.*” (Emphasis added.)

showing an unlawful motive. *Wright Line*, 250 NLRB 1083 (1980) enfd. 662 F.2d 899 (1st Cir.) 1981), cert. denied 455 U.S. 989 (1982). However, it is well established that some employer actions may be so “inherently destructive” of Section 7 rights that the Board may infer unlawful animus directly from those actions. *Metropolitan Edison Co., v. NLRB*, 460 U.S. 693, 701 (1983); *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33-34 (1967); and *Tracer Protective Services*, 328 NLRB 734 fn. 2 (1999).

In *D&S Leasing*, 299 NLRB 658 (1990), the Board held: “With regard to what conduct may be characterized as ‘inherently destructive,’ we have described such conduct as the type ‘which would inevitably hinder future bargaining or create visible and continuing obstacles to the future exercise of employee rights.’ Id. at 661 citing *Swift Independent Corp.*, 289 NLRB 423, 427 (1988), remanded sub nom. *Esmark, Inc. v. NLRB*, 887 F.2d 739 (7th Cir. 1989).

The Board has previously found that such actions include terminating all of the employees in a bargaining unit because they are affiliated with a union. *Freeman Decorating Co.*, 336 NLRB 1, 9 (2001), enf. denied sub nom. *IATSE Local 39 v. NLRB*, 334 F.3d 27 (D.C. Cir. 2003) citing inter alia, *Catalytic Industrial Maintenance*, 301 NLRB 342 (1991) (“It is clear beyond peradventure that the discharge of all employees of a particular craft because of their affiliation with and referral from, a union as was the case here, creates continuing obstacles to the future exercise of employee rights”).

In the instant matter, it is undisputed that the common denominator shared by the discriminatees was that they were active members of the Union at the time they were discharged [Tr at 134-135; GC 48]. Respondent made no distinction between those employees that engaged in the strike and those that did not. Instead, Respondent chose to terminate the employment of

every Union member. Based on the authority cited above, it is appropriate to infer unlawful union animus from Respondent's actions.

Upon a showing that Respondent engaged in conduct inherently destructive of employees' Section 7 rights, under *Great Dane Trailers*, supra, the burden shifts to Respondent to establish it was motivated by "legitimate objectives," 388 U.S. 26 at 34. Respondent offered no such evidence here. Simply put, Respondent fired the bargaining unit en masse because it decided it could. Respondent rested on the assertion that that the employees had lost the protection of Section 8(a)(3). However, as set forth above, because Respondent "reemployed" the former strikers; (and because the employees on layoff and leave did not "engage in a strike," and thus never lost their protected status)¹¹ the loss-of status provision does not apply here, and the employees were protected by the Act. Thus, Respondent's actions violated Section 8(a)(3), motive notwithstanding.

IV. Unlawful Refusal to Bargain

The record evidence is clear that since August 14, Respondent has failed and refused to bargain with the Union on the grounds that all the unit employees have been discharged.

(Respondent Exception 18). On August 14, Respondent's representative Bruce Lillie rejected the Union's repeated requests to bargain stating: "[w]e're not going to come and bargain. All of the employees have been terminated." [ALJD at 21; Tr at 138; GC 67]. The parties have not met for formal bargaining since that date [ALJD at 21].

The ALJ correctly found that Respondent's conduct constitutes "a dereliction of the overall duty 'to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment or the negotiation of an agreement' as required by Section 8(d). [ALJD at 40 citing *Pavilions at Forrestal*, 353 NLRB No. 60 slip op. (2008)].

¹¹ See General Counsel's Cross-Exceptions.

V. **Remedy**

The ALJ correctly recommended that the Board order Respondent to offer the unlawfully discharged bargaining unit employees reinstatement and to make them whole for any loss of earnings and other benefits. **(Respondent Exceptions 7, 8, 9, 10, 11, 27)**. As the ALJ noted “there can be no material difference in remedy based on the fact that the bargaining unit members in this case were locked out rather than engaged in a strike at the time of their unlawful discharges.” [ALJD at 41 citing *ABC Automotive Products Corp.*, 307 NLRB 248, 249 (1992), enf. 986 F.2d 500 (2d Cir. 1992) citing *Abilities and Goodwill*, 241 NLRB 27 (1979), enf. denied on other grounds 612 F.2d 6 (1st Cir. 1979).

In its exceptions, Respondent argues that under *Detroit Newspaper Agency*, 343 NLRB 1041 (2004), the unlawfully discharged employees here are entitled only to be returned to lockout status. Respondent’s reliance on *Detroit Newspaper Agency* is misplaced. *Detroit Newspaper Agency* involved economic strikers who were permanently replaced prior to their unlawful discharges. In such an instance, the Board concluded that rights to reinstatement and backpay are contingent on the departure of the employees who lawfully permanently replaced them. *Id.* citing *Hormigonera Del Toa, Inc.*, 311 NLRB 956, 957-958 fn. 3 (1993).

The instant matter, however, does not involve lawful permanent replacements of economic strikers. The employees here were locked out and their replacements were at all times temporary. The lockout ended on August 4, when Respondent terminated the employees, effectively withdrew its bargaining demands, and refused to bargain with the Union.

Given Respondent’s unlawful discharge of the entire bargaining unit, it is not in the good faith posture necessary to justify a lockout. Rather, Respondent must put the unlawfully discharged employees back to work until it can get into a good-faith posture before it would have

a right to impose another lockout. This is consistent with the Board's reinstatement remedy in situations where employees were lawfully locked out prior to an employer's illegal actions. See, e.g., *Dayton Newspapers*, 330 NLRB 650 (2003), *enfd. in rel. part* 402 F.3d 651 (6th Cir. 2005) (reinstatement ordered where lawful lockout became unlawful because after employees made unconditional offer to return, employer did not specify terms to be accepted to end the lockout); *Ancor Concepts, Inc.*, 323 NLRB 742 (1997), *enf. den. on other grounds* 166 F.3d 55 (2d Cir. 1999) (Board ordered reinstatement where lawful lockout converted to unlawful one when, after employees made unconditional offer to return, employer informed them that the replacements were permanent).

Moreover, a fundamental principle underlying a lawful lockout is that the union must be informed of the employer's demands so that the employees can evaluate whether to accept the terms and obtain reinstatement. *Dayton Newspapers* at 658. As Respondent has had no lawful bargaining position on the table since August 2008, there is no lockout to which the employees may be returned.

The remedy suggested by Respondent would effectively require the Board to declare a lockout on Respondent's behalf thus negating any meaningful remedy in this matter. This is absurd. Respondent's argument that *Detroit Newspaper Agency* requires reinstatement to lockout status is entirely without merit.¹²

Finally, the ALJ correctly recommended a broad cease and desist order as an essential element of the remedy in this case. **(Respondent Exceptions 14, 15, 16, 17, 22, 26, 28, 29 and**

¹² Respondent falsely asserts in its exceptions that the Regional Director "declined to issue complaint" in Case 7-CA-51235, a charge alleging that the lockout was illegal [Respondent's Exceptions at 26]. The record is clear that the charge in Case 7-CA-51235 was withdrawn by the Union on July 2, 2008, pursuant to the parties agreed to "cooling off" period [GC 18; ALJD at 17]. The cooling off period expired on August 2, 2008. On August 4, Respondent fired the unit en masse, thus ending the lockout. The Regional Director never "declined to issue complaint" regarding the legality of the lockout.

30). The Board has long held that such an order is warranted when a respondent has “engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees’ fundamental statutory rights.” *Hickmont Foods*, 242 NLRB 1357, 1358 (1979).

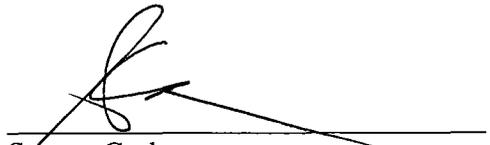
In the instant matter, ALJ Buxbaum thoroughly analyzed the totality of the circumstances and cited in detail several factors requiring the imposition of a broad cease and desist remedy. The factors cited by the judge include the sweeping impact of Respondent’s unfair labor practices – the discharge of the entire bargaining unit workforce, regardless of whether each individual had participated in the strike or not, and the blanket refusal to engage in any further negotiations with the Union regarding the terms and conditions of employment. The ALJ also cited the likely persistence of ingrained opposition to the purposes of the Act due to the continuing tenure of the key management officials, and the depraved state of mind manifested by those officials in their conduct at trial – including fabricated testimony by two high-ranking Company officials and Respondent’s labor counsel, Bruce Lillie.

The ALJ was correct in finding this to be “strong evidence of Respondent’s hostility to the purposes underlying the Act and to their ingrained proclivity to engage in conduct designed to frustrate those purposes.” The ALJ’s recommendation of a broad-cease and desist order is clearly supported by the record and should be upheld. The Board should reject Respondent’s Exceptions 14, 15, 16, 17, 22, 26, 28, 29 and 30.

CONCLUSION

It is respectfully submitted that the credible evidence on the record and the applicable law establish that Respondent violated Sections 8(a)(1), (3) and (5) of the Act, as set forth in the decision of Administrative Law Judge Paul Buxbaum. The Board should affirm the judge's rulings, findings, and conclusions, as set forth herein, and adopt the recommended Order.

Dated at Grand Rapids, Michigan, this 26th day of May, 2010.


Steven Carlson
Counsel for the General Counsel
National Labor Relations Board
Region Seven, Resident Office
Gerald R. Ford Building
110 Michigan Street, NW, Room 299
Grand Rapids, MI 49503-2363
steven.carlson@nlrb.gov