

No. 12-9519

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

TEAMSTERS LOCAL UNION NO. 455

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

and

HARBORLITE CORPORATION

Intervenor

**ON PETITION FOR REVIEW OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

ORAL ARGUMENT NOT REQUESTED

ROBERT J. ENGLEHART
Supervisory Attorney

AMY H. GINN
Attorney

National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2978
(202) 273-2942

LAFE E. SOLOMON
Acting General Counsel

CELESTE J. MATTINA
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel
National Labor Relations Board

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Statement of Related Cases:
There are no prior or related appeals.

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**ON PETITION FOR REVIEW OF AN ORDER OF
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STATEMENT OF JURISDICTION

This case is before the Court on the petition of Teamsters Local Union No. 455 (“the Union”), for review of an Order of the National Labor Relations Board (“the Board”) issued against Harborlite Corporation (“the Company”). The

Board's Decision and Order issued on December 22, 2011, and is reported at 357 NLRB No. 151. (D&O 1-9.)¹ The Board's Order is final under Section 10(f) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(f)) ("the Act").

The Board had jurisdiction under Section 10(a) of the Act (29 U.S.C. § 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction over this proceeding pursuant to Section 10(f) of the Act (29 U.S.C. § 160(f)), because the events underlying the alleged unfair labor practices occurred in Antonito, Colorado and No Agua, New Mexico. The Union filed its petition for review on February 17, 2012. The Union's petition was timely; the Act places no time limit on the institution of proceedings to review Board orders. The Court granted the Company's motion to intervene on March 15.

STATEMENT OF THE ISSUE PRESENTED

Whether the Board reasonably dismissed the complaint allegation that the Company violated Section 8(a)(3) and (1) of the Act by locking out unit employees.

¹ Record references are to the original record filed with this Court on March 30, 2012. "D&O" refers to the Board's Decision and Order. "Tr" refers to the transcript of the hearing before the administrative law judge. "JX" refers to joint exhibits introduced at that hearing; "GCX" refers to exhibits introduced by the Board's General Counsel. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

STATEMENT OF THE CASE

Based on unfair labor practice charges filed by the Union, the Board's General Counsel issued a complaint alleging that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by threatening to lock out employees and permanently replace them. (D&O 6; GCX 1.) The complaint further alleged that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by thereafter locking out the employees. (D&O 6; GCX 1.) Following a hearing, an administrative law judge issued a decision finding that the Company violated the Act as alleged. (D&O 9.) The parties thereafter filed exceptions and cross-exceptions to the judge's findings. (D&O 1.)

The Board (Chairman Pearce and Members Becker and Hayes) adopted the judge's finding that the Company violated Section 8(a)(1) of the Act by threatening to lock out and permanently replace unit employees.² (D&O 1.) The Board (Members Becker and Hayes, Chairman Pearce dissenting), reversing the judge, dismissed the finding that the Company violated Section 8(a)(3) and (1) of the Act by subsequently locking out the unit employees because the unlawful threat was insufficient to warrant a finding that the otherwise lawful lockout violated the Act. (D&O 2.)

² Because the Company has complied with the Board's remedial order in this respect, the Board has not applied for enforcement of its order against the Company.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. The Company Operates a Mine and Warehouse Where the Union Represents a Unit of Employees; the Parties Engage in Bargaining Following Contract Expiration; the Employees Reject the Company's Final Offer

The Company operates a perlite mine in No Agua, New Mexico, and has a warehouse facility in Antonito, Colorado. (D&O 6; JX 1.) The Union represents 29 employees from the production, maintenance, and shipping departments at the No Agua mine and the Antonito facility. (D&O 6; JX 1.) The parties' most recent collective-bargaining agreement expired on June 30, 2009, with a subsequent extension until August 23. (D&O 6; JX 1, GCX 2.) Following the extension's expiration, the unit employees continued to work without a contract.

From June through August, the parties held approximately eight bargaining sessions. (D&O 1, 6; Tr 20, JX 1.) On August 21, the Company submitted its last, best, and final offer to the Union, which the union membership voted to reject. (D&O 1, 6; Tr 21-22, 26, GCX 3.)

B. The Company Informs the Union that It Will Lock Out and Permanently Replace Employees After a Set Deadline; the Company Restates Its Final Offer and Intention

On September 17, the Company sent the Union a letter stating that it was terminating a prior agreement between the parties not to engage in a strike or lockout without prior notification. (D&O 1, 6; Tr 23, GCX 4.) On September 30,

the Company sent the Union a message confirming upcoming bargaining sessions and further stating that if the parties did not reach an agreement by the end of the session on October 7, the Company would lock out employees beginning with the night shift at 11 p.m. that day. The Company went on to state that it would “immediately begin hiring permanent replacements for the locked out employees.” (D&O 1, 6; JX 1, GCX 6.)

On October 6, the parties met for a bargaining session and the Union presented a single proposal regarding overtime. Several hours later, the Company rejected the proposal and restated its “last, best and final offer.” (D&O 6; Tr 29.) The Company requested that its proposal, with no changes, be presented to the membership again and advised the Union that they had until 11 p.m. the next day to ratify the proposal. If the unit employees did not accept, labor relations manager Chris Bloyer stated that the Company would lock out and permanently replace the employees. (D&O 1, 6; Tr 29.)

C. The Employees Again Reject the Company’s Final Offer; the Company Locks Out Employees and Gives Them a Letter Stating It Will Hire Permanent Replacements Beginning in Four Days

The next day, October 7, plant manager Paul Sowards told two employees that they should reconsider the Company’s proposal and that they could not win a fight against the Company because they would be permanently replaced. (D&O 1,

6-7; Tr 54-55, 63-64, 106-07.) That same day the union membership again rejected the Company's offer. (D&O 6; Tr 30.)

Upon being informed of the members' decision in a meeting of the bargaining teams that day, the Company reaffirmed that it would begin to hire permanent replacements. (D&O 1, 6; Tr 32.) Also on October 7, the Company sent the Union a letter advising that the Company was locking out all unit employees as of 11 p.m. that day. (D&O 1, 7; JX 1, GCX 7.) The Company further stated that it would begin hiring permanent replacements on Monday, October 12. (D&O 1, 7; GCX 7.)

The Company locked out all unit employees beginning at 11 p.m. on October 7. (D&O 1, 7; JX 1.) On October 8, the Company gave a letter to employees as they arrived for their shifts explaining that the Company was locking them out and that, on October 12, the Company would begin hiring permanent replacements for locked out employees. (D&O 1, 7; Tr 34, 52, 62, 67, GCX 8.)

D. The Company States That It Is Hiring Replacements on a Temporary Basis; the Company Ends the Lockout and Employees Return to Work

On October 14, the Company sent a letter to the Union stating that it had begun the process of hiring replacements for the locked out employees but had decided to make those replacements temporary until further notice. (D&O 7; Tr

92, GCX 9.) The Company further indicated that it hoped the membership would be encouraged to accept its last, best, and final offer. (D&O 1, 7; Tr 36, GCX 9.)

On January 12, 2010, the Company informed the Union that it was ending the lockout after considering a request to do so from John Lewis, vice president of the International Chemical Workers Union Council, which represents employees at an enterprise related to the Company's mining business. (D&O 7; Tr 92, GCX 10.) The Company further cited the professional conduct of the locked out employees as a consideration in its decision. (D&O 7; GCX 10.) On January 16, the unit employees returned to work. (D&O 1, 7; JX 1.)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Members Becker and Hayes, Chairman Pearce dissenting) found, in relevant part, contrary to the administrative law judge, that the Company did not violate Section 8(a)(3) and (1) of the Act by locking out unit employees because the Company did not engage in conduct inconsistent with a lawful lockout. (D&O 3.) The Board accordingly dismissed the relevant complaint allegation. (D&O 1.)

SUMMARY OF ARGUMENT

The Board dismissed a complaint allegation against the Company because it reasonably determined, upon reviewing largely undisputed evidence, that the Company lawfully locked out its employees in support of a legitimate bargaining position. In doing so, the Board did not turn a blind eye to the Company's unfair labor practices. The Board found that the Company violated the Act by threatening to lockout and permanently replace the employees—threats that were unlawful because employers are only privileged to temporarily replace employees during an economic lockout. There is no dispute that the Company made that threat. Similarly, there is no dispute that the Company did not actually hire permanent replacements during the lockout. Not only did the Company fail to carry out its threat but, critical to the Board's analysis, the Company effectively withdrew the threat by informing the Union, in a letter, that replacements would be temporary until further notice. Moreover, the Company indicated that the employees could return to work if they accepted the terms of the Company's final offer.

The Union presents a variety of reasons why it disagrees with the Board's dismissal of the complaint allegation—none of which show that the Board erred. It argues that the lockout was unlawful because of the threat to permanently replace, which the Union considers no different from situations where employees were

informed that they were actually permanently replaced and where employers engage in unlawful bargaining practices preceding a lockout—neither of which occurred here. The Union also asserts that the threats were not fully repudiated by the Company. The Board agreed with this contention but disagreed with its import, finding that the threats alone did not render the lockout unlawful.

The Union also argues that the Company's letter did not clearly communicate to employees that they were not permanently replaced and could return to work if they accepted the Company's final offer. The Board fully considered and rejected this argument having drawn a plausible inference that the employees would have no reason to doubt, based on the Company's letter, that their jobs were waiting for them if they accepted the contract offer. Finally, the Union asks that this case be remanded to the Board. However, it provides no basis for doing so where the Board thoroughly and reasonably applied precedent to conclude that the Company did not engage in conduct inconsistent with a lawful lockout.

ARGUMENT**THE BOARD REASONABLY FOUND THAT THE COMPANY DID NOT VIOLATE SECTION 8(a)(3) AND (1) OF THE ACT BY LOCKING OUT ITS EMPLOYEES****A. Principles of Lawful Lockouts and Standard of Review**

An employer may lawfully lock out employees if it acts “for the sole purpose of bringing economic pressure to bear in support of [its] legitimate bargaining position.” *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965). The employer’s conduct of the lockout must be “reasonably adapted” to achieving its legitimate bargaining objectives. *Id. Accord Serv-Air, Inc. v. NLRB*, 395 F.2d 557, 562 (10th Cir. 1968).

In the use of this legitimate bargaining tactic the employer nonetheless commits an unfair labor practice in violation of Section 8(a)(1) of the Act “by discriminating against its employees for exercising their right under [Section] 7 to bargain collectively and to act together in mutual support.” *NLRB v. Ancor Concepts, Inc.*, 166 F.3d 55, 58 (2d Cir. 1999) (citing 29 U.S.C. §158(a)(1)). The employer also commits a violation of Section 8(a)(3) of the Act “by discriminating in regard to hire in order to discourage membership in a union.” *Id.* (citing 29 U.S.C. §158(a)(3)).

During a lockout conducted in aid of legitimate bargaining objectives, the employer may hire temporary replacement employees. *Harter Equipment, Inc.*,

280 NLRB 597, 597 (1986) (*Harter I*), *affirmed sub. nom.*, *Operating Eng'rs Local 825 v. NLRB*, 829 F.2d 458 (3d Cir. 1987). *Accord NLRB v. Brown*, 319 F.2d 7, 11 (10th Cir. 1963), *affirmed*, 380 U.S. 278 (1965). In the Board's view, the hiring of temporary replacements during a lockout has "only a comparatively slight adverse effect on protected employee rights," for "the Union or its individual members have the ability to relieve their adversity by accepting the employer's less favorable bargaining terms and returning to work." *Harter I*, 280 NLRB at 600. Accordingly, absent specific proof of antiunion motive, an employer is privileged to hire temporary replacements during a lawful lockout. The privilege presupposes that the lockout is conducted in a manner that allows "the union and the employees. . . [to] know what choices are left to them." *Eads Transfer, Inc.*, 304 NLRB 711, 713 n.17 (1991), *enforced*, 989 F.2d 373 (9th Cir. 1993).

However, the Board has determined that an employer's hiring of permanent replacements during a lockout is inherently destructive of employee rights. *See Harter Equipment, Inc.*, 293 NLRB 647, 648 (1989) (*Harter II*). Once permanent replacements have been hired, the employees no longer have the ability to "relieve their adversity" by accepting their employer's terms and returning to work. *Harter I*, 280 NLRB at 600. In contrast, where an employer has the option of acceding to the employer's bargaining demands and thereby being reinstated, the statutory goal

of “encouraging the practice and procedure of collective bargaining” is preserved.
29 U.S.C. § 151.

As long as the Board’s rulings regarding national labor policy are “rational and consistent with the Act, they must be affirmed,” for the Board “has primarily responsibility for developing and applying” such policy. *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786-87 (1990) (citing cases). Where, as here, the Board finds that the General Counsel has failed to establish a violation of the Act, that determination “must be upheld unless it has no rational basis.” *Int’l Ladies’ Garment Workers Union v. NLRB*, 463 F.2d 907, 919 (D.C. Cir. 1972). *Accord East Bay Automotive Council v. NLRB*, 483 F.3d 628, 633 (9th Cir. 2007); *Williams v. NLRB*, 105 F.3d 787, 790 (2d Cir. 1996); *Kankakee-Iroquois County Employers’ Ass’n v. NLRB*, 825 F.2d 1091, 1093 (7th Cir. 1987); *Allbritton Communications Co. v. NLRB*, 766 F.2d 812, 817 (3d Cir. 1985).

Furthermore, this Court will affirm “an NLRB order when the agency has correctly applied the law and its findings are supported by substantial evidence in the record as a whole.” *NLRB v. Interstate Builders, Inc.*, 351 F.3d 1020, 1027 (10th Cir. 2003) (internal citation omitted). *Accord Int’l Guards Union of Amer., Local 69 v. NLRB*, 789 F.2d 1465, 1467 (10th Cir. 1986) (affirming Board order dismissing complaint where Board’s conclusion was supported by substantial evidence). “Substantial evidence,” for purposes of this Court’s review of factual

findings, consists of “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). This standard is satisfied if “it would have been possible for a reasonable jury to reach the Board’s conclusion.” *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 366-67 (1998). Thus, “it requires not the degree of evidence which satisfies the [reviewing] *court* that the requisite fact exists, but merely the degree that *could* satisfy a reasonable fact finder.” *Webco Indust., Inc. v. NLRB*, 217 F.3d 1306, 1311 (10th Cir. 2000) (quoting *Allentown Mack*, 522 U.S. at 377) (emphasis in Supreme Court’s opinion, but omitted by this Court.)

Accordingly, where the Board has made a “plausible inference from the evidence, [the Court] may not overturn its findings, although if deciding the case *de novo* [the Court] might have made contrary findings.” *MJ Metal Prod. v. NLRB*, 267 F.3d 1059, 1065 (10th Cir. 2001) (quoting *Webco Indus.*, 217 F.3d at 1311). *Accord Universal Camera Corp.*, 340 U.S. at 488. This standard of review does not change where the Board has disagreed with the administrative law judge. *Artra Group, Inc. v. NLRB*, 730 F.2d 586, 590 (10th Cir. 1984). Indeed, this Court gives “great deference to the inferences drawn by the Board” from credited testimony and stipulated facts because “Board members’ expertise and experience in labor-management relations is an invaluable asset to the task.” *NLRB v. Oil Capital Elec.*, 5 F.3d 459, 462 (10th Cir. 1993). *Accord Ann Lee Sportswear, Inc.*

v. NLRB, 543 F.2d 739, 743 (10th Cir. 1976) (“The Board, of course, is not bound by the findings and conclusions of [the judge], and is free to draw its own inferences, as well as conclusions, when its broader experience and expertise indicates that such is in order.”) (citing *Rocky Mountain Natural Gas Co. v. NLRB*, 326 F.2d 949 (10th Cir. 1964)).

B. The Company Lawfully Locked Out the Unit Employees in Support of Its Bargaining Position and Effectively Withdrew Its Threat to Permanently Replace Them

The Company undisputedly locked out the employees to bring “economic pressure to bear in support of [its] bargaining position.” *American Ship Bldg.*, 380 U.S. at 318. Notwithstanding the Company’s unlawful threat to permanently replace the unit employees, there is no evidence that the Company acted on that threat. To the contrary, the Company informed the Union that it had “decided to make the replacements temporary.” (D&O 2; GCX 9.) As the Board noted (D&O 2 n.3), “not all unlawful conduct by an employer during an otherwise lawful lockout renders that lockout unlawful.” *See Peterbilt Motors Co.*, 357 NLRB No. 13 (2011) (unlawful failure to provide requested information during a lockout did not convert the lawful lockout into an unlawful one). Additionally, the Board reasonably found that the Company’s threat that it was going to hire permanent replacements was “effectively withdrawn on October 14, *before* any permanent replacements were hired.” (D&O 2 (emphasis added).) The Board concluded that

employees could not have reasonably believed, after the October 14 letter, that they would not be able to return to work upon acceptance of the Company's final offer and, thus, the threat was withdrawn. (D&O 3.) Therefore, the Board concluded that the threat was "insufficient to warrant a finding that the otherwise lawful lockout violated the Act." (D&O 2.)

In withdrawing its threat in the letter, the Company stated its hope that the Company's change in position "encourages the membership to accept the terms of our last, best and final offer" noting that "[s]uch action will end the lockout, bring the locked out employees back to work, and allow us to get back to meeting our goal." (D&O 2-3; GCX 9.) Importantly, as the Board explained (D&O 3), the Company's October 14 letter thus "allowed employees to unambiguously evaluate their bargaining position." *Compare Ancor Concepts*, 323 NLRB 742, 745 (1997) (unlawful lockout where employer told employees they were permanently replaced and consequently employees could not "intelligently evaluate their position"), *enforcement denied*, 166 F.3d 55 (2d Cir. 1999). If the union members accepted the Company's offer, they would go back to work—it was that simple.

Therefore, "[i]n light of the [Company's] effective withdrawal or, at least, deferral, of its threats of permanent replacement, and its assurances to the Union that the unit employees would be reinstated if the Union accepted the [Company's] terms," the Board found that the Company's prior statements "did not taint an

otherwise lawful lockout.” (D&O 3.) Because the Company “did not engage in conduct inconsistent with a lawful lockout,” the Board reasonably concluded (D&O 3) that the lockout did not violate Section 8(a)(3) and (1) of the Act and accordingly dismissed that portion of the complaint.

C. The Union’s Contentions Provide No Basis for Disturbing the Board’s Dismissal of the Complaint Allegation

The Union makes a series of contentions, none of which shows that the Board committed reversible error. First, the Union argues that, because the Company made, and never completely repudiated, its unlawful threats to permanently replace locked out employees, the lockout itself must be found unlawful. But not only were the threats never carried out and effectively withdrawn, the precedent the Union relies on for this proposition is readily distinguishable. Next, the Union raises several points regarding the contents of the October 14 letter, which do not comport with the Board’s findings or precedent. The Union then engages in speculation about what would have happened if the Company took different actions. The Union also unpersuasively attempts to use its own delay in informing the employees about the letter as a reason for questioning the Board’s analysis. Finally, the Union requests a remand to the Board without identifying a correct reason for a remand.

The Union describes (Br 12) *Ancor Concepts*, 323 NLRB 742 (1997), as the “key case” supporting its position that the lockout was unlawful because of the

Company's threat. However, the Board reasonably and thoroughly distinguished *Ancor*. (D&O 2-3.) In *Ancor*, employees went on strike in support of a union bargaining position. Upon their unconditional offer to return to work, the employer refused to take them back until a new collective-bargaining agreement was reached, thus effectively locking out the employees. During the lockout, the employer stated that the unit positions "have been filled by permanent replacements." *Id.* at 743. In other words, during an otherwise lawful economic lockout, the employer in *Ancor* "led the locked-out employees to believe that they had been permanently replaced and that they had lost the ability to automatically and immediately return to work even if they were to accept the employer's terms."³ (D&O 2.)

The *Ancor* Board found that the lawful lockout ended when the employer declared that it had hired permanent replacements. This was so because employees could not "intelligently evaluate their position" after their employer indicated "that they would *remain* replaced even if they yielded to [their employer's] bargaining demands." *Id.* at 745 (emphasis added). The Board concluded that "the employer's announcement that the employees *had been* permanently replaced

³ The Second Circuit disagreed with the Board's reading of the evidence in *Ancor* and denied enforcement of the Board's order after concluding that the Board erred by isolating two sentences from the employer's communication with the union and failing to consider the employer's other qualifying statements. *NLRB v. Ancor Concepts*, 166 F.3d 55, 58-59 (2d Cir. 1999).

‘could have reasonably caused the strikers confusion in evaluating their bargaining strength.’” (D&O 2 (quoting *id.*)) See also *Eads Transfer, Inc.*, 304 NLRB 711, 712-13 (1991) (striking employees could not intelligently evaluate their options and decide whether to end the strike because their employer failed to notify them for over 2 months that it was refusing their offer to return to work based on an economic lockout), *enforced*, 989 F.2d 373 (9th Cir. 1993).

As the Board found (D&O 2), however, the rationale for finding an unlawful lockout in *Ancor* is not applicable here. Unlike in this case, the employees in *Ancor* were informed by their employer that they had already been permanently replaced. Therefore, the employees had no way to “immediately and automatically” return to their jobs, even if they accepted their employer’s terms. (D&O 2.) Here, the Company did not tell the employees that they had been permanently replaced. Rather, the Company told them the opposite—that it had *not* permanently replaced them and that it would not do so without further notice. (D&O 3.) Furthermore, the Company made no statement to the employees that their jobs were unavailable, or that their return to work was in any way tenuous, if they accepted the Company’s final offer. Thus, unlike the employees in *Ancor*, the unit employees here could not have “reasonably believed” after the October 14 letter that they would be precluded from returning to work if they accepted the Company’s final offer. (D&O 3.) As shown, despite the Union’s insistence

otherwise (Br 13), the Company “refrain[ed] from conduct inconsistent with a lawful lockout.” *Ancor*, 323 NLRB at 744.

The Union’s reliance (Br 14-15) on *Globe Business Furniture, Inc.*, 290 NLRB 841 (1988), *enforced*, 889 F.2d 1087 (6th Cir. 1989), and *KLB Indust., Inc.*, 357 NLRB No. 8 (2011), *petition for review pending* (D.C. Cir. Nos. 11-1280, 11-1332), is also misplaced. In both of those cases, employers locked out employees without reaching a good-faith impasse in bargaining because they had refused to provide relevant information requested by the unions in negotiations and, thus, the lockouts were tainted by unremedied bargaining unfair labor practices. *Globe Business*, 290 NLRB at 841 n.2, 854 (employer also engaged in direct dealing with employees); *KLB Indust.*, 357 NLRB No. 8, slip op. at 1, 4-5. *See also Teamsters Local No. 639 v. NLRB*, 924 F.2d 1078, 1085 (D.C. Cir. 1991) (a lockout is unlawful when an employer “locks out its employees for the purpose of evading its duty to negotiate with the employees’ bargaining representative”). Thus, the lockouts in *Globe* and *KLB* did not occur after a good-faith bargaining impasse whereas here there is no dispute that the Company had made a last, best, and final offer and no allegation that the unlawful threat tainted the contract negotiations. *See American Ship Bldg.*, 380 U.S. at 318. Therefore, the Board made no finding that a good-faith bargaining impasse had not been reached.

The Union further asserts (Br 16-17) that the Company did not properly repudiate its unlawful threat and, thus, the lockout was unlawful. In support of this contention the Union relies on the standard for repudiating unlawful conduct set forth in *Passavant Memorial Hospital*, which requires, among other things, that the party repudiating its unlawful conduct provide assurances that it will not interfere with employee rights in the future. 237 NLRB 138, 138-39 (1978). By arguing that the Company did not provide such assurances in its October 14 letter and therefore did not repudiate its unlawful threat (Br 18), the Union misses the point. The Board *agreed* (D&O 3 n.4) with the Union's contention that the Company did not meet the standard of *Passavant* to repudiate its unlawful threat of permanent replacement and, for that reason, the Board found the Company violated Section 8(a)(1) of the Act by making such threats. However, as explained more fully above, the Board reasonably concluded that "the threats did not render the lockout unlawful." (D&O 3 n.4.)

The Union makes a series of arguments about the Company's October 14 letter, none of which undermine the Board's findings. First, the Union relies on (Br 16) the Company's statement in the letter that it had "begun the process of hiring replacements" as evidence that the Company, after the lockout began, was carrying out its threat to permanently replace the unit employees. But, later in the same paragraph, the Company states that "we have decided to make the

replacements temporary until further notice.” (D&O 2; GCX 9.) Thus, the evidence demonstrates that the Company had started only the process of hiring temporary replacements as of October 14, which was its lawful right. *See Harter I*, 280 NLRB at 597. The Union can point to no evidence that the Company hired or made an offer to hire any replacement worker on a permanent basis.

The Union then claims (Br 9) that the Company’s October 14 letter “implicitly perpetuated” the Company’s prior threat of permanent replacement because it stated the Company’s opinion that it could legally permanently replace the locked out employees. A lawful lockout in support of a bargaining position is not rendered unlawful simply because a party takes an erroneous legal position that it does not act upon. The Union is able to cite no authority in support of that proposition.

Similarly flawed is the Union’s contention (Br 21) that the October 14 letter created ambiguity about the employees’ position. However, the Board read the letter and “simply disagree[d]” that the letter was confusing to employees. (D&O 3 n.4). The Board applied its expertise in labor relations to this task. *See MJ Metal Prod. v. NLRB*, 267 F.3d 1059, 1065 (10th Cir. 2001) (court will not overturn Board’s plausible inferences from the evidence).

The Board further disagreed that the “until further notice” language, following the Company’s statement that it was hiring temporary replacements,

confused the message about employees' "*current* status." (D&O 3 n.4 (emphasis added).) As the Board explained, "employees were assured that they were temporarily replaced, and they remained temporarily replaced until the lockout ended . . . [d]uring this period, they were free to continue the lockout or agree to the [Company's] terms and return to work, and they had no reason to believe otherwise." (D&O 3 n.4.)

The Union then engages in (Br 19) speculation about what would have happened had the Company proceeded with the lockout and its hiring of replacements without sending the October 14 letter informing the Union that it those replacements were temporary. There is no end to the speculation about what employees would have surmised in the absence of the Company's assurance that they could return to their jobs upon acceptance of its last, best, and final offer. However, such musings where the Board reasonably determined (D&O 3) that the assurances in the letter "allowed employees to unambiguously evaluate their bargaining position."

The Union relies (Br 18) on its own failure to notify the employees of the Company's October 14 letter that indicated that replacements would be hired on a temporary basis. The Company met its obligation by communicating with its employees' chosen representative. Any delay in the employees' learning of the

Company's position is attributable to the Union and provides no basis for questioning the Board's analysis.

Finally, the Union asks (Br 23-24) that this case be remanded to the Board for reconsideration. The Union's claim (Br 24) that the Board has not explained its departure from its own precedent is wholly incorrect. The Board fully distinguished (D&O 2-3) *Ancor Concepts*, 323 NLRB at 745, where it found an unlawful lockout where an employer stated that it *actually* hired permanent replacements, from this case where the Company's threat to do so was never implemented and effectively withdrawn. In sum, the Board's decision is consistent with its precedent, and that of the Supreme Court, holding that an employer can engage in a lawful lockout in support of its bargaining position. *See American Ship Bldg.*, 380 U.S. at 318. The Union has identified no basis for remanding this case to the Board.

STATEMENT REGARDING ORAL ARGUMENT

The Board believes that this case involves the application of well-settled principles to straightforward and undisputed facts and that argument would therefore not be of material assistance to the Court. However, if the Court grants the Union's request for oral argument, the Board asks that it be permitted to participate.

CONCLUSION

The Board respectfully requests that the Court enter a judgment denying the Union's petition for review.

/s/ Robert J. Englehart
ROBERT J. ENGLEHART
Supervisory Attorney

/s/ Amy H. Ginn
AMY H. GINN
Attorney
National Labor Relations Board
1099 14th Street, NW
Washington DC 20570
(202) 273-2978
(202) 273-2942

LAFE E. SOLOMON
Acting General Counsel

CELESTE J. MATTINA
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

July 2012

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

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v.)	
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)	Board Case No.
Respondent)	27-CA-21386
)	
and)	
)	
HARBORLITE CORPORATION)	
)	
Intervenor)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 5,266 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 31st day of July, 2012

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CERTIFICATE OF SERVICE

I certify that on July 31, 2012, I electronically filed the Board’s brief in this case with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. I further certify that I served the Board’s brief on the following counsel through the CM/ECF system:

Michael J. Belo
Berenbaum Weinshienk PC
370 17th Street
Suite 4800
Denver, CO 80202

J. Thomas Kilpatrick
Wes Reid McCart
Alston & Bird LLP
1200 West Peachtree Street
Atlanta, GA 30309

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 31st day of July, 2012