UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 8

In the matter of:	:	
	:	
COOPER TIRE & RUBBER COMPANY	:	
	:	
and	:	Case No. 08-CA-087155
	:	
UNITED STATES STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO/CLC	:	

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF RESPONDENT COOPER TIRE & RUBBER COMPANY'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

In this brief, the National Association of Manufacturers ("NAM") supports Respondent Cooper Tire & Rubber Company's exceptions to Administrative Law Judge Thomas M. Randazzo's June 5, 2015 Decision (the "ALJ Decision") in this matter.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs over 12 million men and women, contributes roughly $2.1 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. Its mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth.

The NAM and its members believe that any form of discrimination or harassment, including that based upon race, has no place in the United States. NAM members, in furtherance of their interests in eliminating discrimination and in compliance with applicable laws, maintain and enforce non-discrimination and non-harassment policies to prohibit and remedy any discrimination and harassment in their workplaces. Finally, the NAM and its members are in need of certainty regarding their ability to effectuate their policies, and redress discriminatory and harassing behavior in their workplaces, regardless of whether the employees engaged in the discriminatory and harassing behavior were otherwise engaged in concerted, protected activity and regardless of the location of the activity.

The NAM has reviewed and fully supports the exceptions and brief submitted by the Respondent Cooper Tire & Rubber Company ("Respondent") and does not seek to repeat arguments made therein. The NAM is filing this short brief of its own in order to make three

narrow but significant additional points: (a) the Board is required to harmonize the National Labor Relations Act ("Act") with other federal laws, including, but not limited to, anti-discrimination and anti-harassment laws, like Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981; (b) the ALJ Decision's protection of racist comments on a picket line unjustifiably interferes with the Respondent's, and other NAM members', obligation to comply with federal law and policy by disciplining employees for making discriminatory or harassing comments; and (c) the "real world" experience of employers, including NAM's members, faced with the facts at issue here fully supports the Board reversing the ALJ Decision and determining that racist comments are not protected by the Act, even if uttered on a picket line.

As further explained below, the NAM believes that the Board should overturn the ALJ Decision in this matter. The NAM and it members believe racism, discrimination, and harassment serve no legitimate purpose in the workplace and should not be protected by the Act, in any way. The NAM believes that the ALJ Decision protects racial harassment under the guise that it is Section 7 activity, simply because it occurred on a picket line.

Such a decision cannot be allowed to stand. The Board must recognize the important purposes underlying federal anti-discrimination and anti-harassment statutes enacted by the United States Congress and acknowledge employers' obligations—both legal and moral—to protect employees' right to be free from discrimination and harassment in the workplace. Further, the Board should affirm its stance against racial discrimination and harassment, harmonize its interpretation of the Act with the clear federal policies prohibiting racism, and determine employees do not have any statutory right to engage in discriminatory and harassing conduct. For these reasons, which are discussed more fully below, the Board should overrule the ALJ Decision and determine that racist statements have no protection under the Act.

ARGUMENT

The ALJ framed the main issue of this case as whether the Respondent violated Section 8(a)(1) and 8(a)(3) of the National Labor Relations Act ("NLRA" or "Act") by discharging Anthony Runion ("Runion") on or about March 1, 2012 for his racist statements made on a picket line.

The ALJ determined that, even though Runion's "statements most certainly were racist, offensive, and reprehensible," they did not forfeit the protection of the Act. (ALJ Decision, pp. 11-12). However, as will be discussed below, this ALJ Decision cannot stand because the Act cannot and should not protect racist comments, regardless of where or when these comments are made. The Board cannot force employers to violate other federal statutes through its protection of racist speech used on a picket line, and employers need to be able to rely on and apply their legitimate anti-discrimination and anti-harassment policies.

I. THE BOARD HAS AN OBLIGATION TO HARMONIZE AND RECONCILE THE ACT WITH OTHER FEDERAL LAWS, INCLUDING TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AND 42 U.S.C. § 1981

The Board is required to accommodate its enforcement of the NLRA in a way that is consistent with other federal laws. *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 251 (1970); *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 144 (2002); *Southern Steamship Co. v. NLRB*, 316 U.S. 31 (1942) ("[T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives."). Indeed, "statutory interpretation requires more than concentration upon isolated words; rather, consideration must be given to the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions." *Boys Markets, Inc.*, 398 U.S. at 250.

Given these clear directives from the Supreme Court, the Board cannot consider cases and apply the Act in a vacuum. Rather, the Board must fully consider an employee's right to engage in protected concerted activity alongside other employees' right to work in a discrimination-free and harassment-free environment and an employer's duty to provide such a workplace. However, the ALJ Decision altogether failed to consider any other federal policies, when it held that an employee who makes racist comments on a picket line is engaged in protected concerted activity because he did not coerce or intimidate employees or raise a reasonable likelihood of an imminent physical confrontation. (ALJ Decision, p. 11).

II. CLEAR CONGRESSIONAL STATUTES AND POLICIES MANDATE THAT EMPLOYERS PROTECT EMPLOYEES FROM DISCRIMINATORY AND HARASSING COMMENTS

In the instant matter, reinstating Runion is tantamount to requiring that Respondent violate federal anti-discrimination and harassment laws, including Title VII and Section 1981, as well as numerous other similar state and local laws. Under Section 1981, "[a]ll persons within the jurisdiction of the United States shall have the same right ... to the full and equal benefit of all laws." 42 U.S.C. § 1981. Moreover, Title VII renders it "an unlawful employment practice for an employer ... to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e–2(a)(1). Title VII and Section 1981 embody federal policies prohibiting discrimination and harassment on many bases, including race. *See, e.g.*, *McDonald v. Santa Fe Transportation*, 427 U.S. 273 (1976).

An employer violates Section 1981 and Title VII by, among other things, requiring employees to work in a racially hostile environment. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65–67 (1986). A hostile environment exists "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the

conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) (internal quotation marks omitted). The law is clear that employers, including Respondent, can be held liable for failing to redress discriminatory and/or harassing behavior which creates a hostile work environment. Thus, under Title VII and Section 1981, an employer has a duty to redress racially motivated, discriminatory and harassing behavior in its workplace, even if it occurred on a picket line. *See also Dowd v. United Steelworkers of Am.*, 253 F.3d 1093, 1102 (8th Cir. 2001) (finding hostile work environment based in part on racial abuse occurring on union picket line).

To prevail on a Title VII claim that a workplace is racially hostile, a plaintiff need only show that there is: (1) unwelcome conduct; (2) that is based on the plaintiff's race; (3) which is sufficiently severe or pervasive to alter the plaintiff's conditions of employment and to create an abusive work environment; and (4) which is imputable to the employer. *See, e.g., Okoli v. City of Balt.*, 648 F.3d 216, 220 (4th Cir. 2011). The same test applies to a hostile work environment claim asserted under 42 U.S.C. § 1981. *See Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 184 (4th Cir. 2001). Whether the environment is objectively hostile or abusive is "judged from the perspective of a reasonable person in the plaintiff's position." *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75, 81, (1998). Again, as noted above, it is well settled that the hostile environment under Title VII can be created by conduct taking place outside the workplace. *Dowd*, 253 F.3d at 1102; *see also* Comment, *High Tech Harassment*, 87 Wash. L. Rev. 249 (The First, Second, Seventh, and Eighth Circuit Courts of Appeals have expressly indicated that harassment conducted outside the physical walls of the workplace is part of the totality of the circumstances for purposes of a hostile work environment claim.").

Under this established legal doctrine, an employee can seek damages against his or her employer if it fails to redress racist comments, like Runion's, regardless of whether it occurs on a picket line. In fact, employers have previously been held liable for conduct similar to that engaged in by Runion. The United States Court of Appeals for the Fourth Circuit recently held that an employer can be held liable for creating a racially hostile work environment when an employee was the subject of two racial slurs at work. *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 280 (4th Cir. 2015). The Court stated: "As we and several of our sister courts of appeals have recognized, perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet … ." *Id. citing Spriggs*, 242 F.3d at 185; *accord Ellis v. Houston*, 742 F.3d 307, 325–26 (8th Cir. 2014); *Ayissi–Etoh v. Fannie Mae*, 712 F.3d 572, 577 (D.C. Cir. 2013); *Rivera v. Rochester Genesee Reg'l Transp. Auth.*, 743 F.3d 11, 24 (2d Cir. 2012); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1116 (9th Cir. 2004).

Moreover, federal courts have already determined that comments similar to Runion's two comments, "Hey, did you bring enough KFC for everybody?" and "Hey, anybody smell that? I smell fried chicken and watermelon," can be used to support hostile work environment claims against an employer. *See, e.g., Ellis v. Houston*, 742 F.3d 307, 320 (8th Cir. 2014) (comments regarding "fried chicken and watermelon, generally stereotyping them on the basis of race" supported hostile work environment claim under Section 1981); *Reed v. Procter & Gamble Mfg. Co.*, 556 Fed. App'x 421, 433 (6th Cir. 2014) *cert. denied*, 135 S. Ct. 84 (2014) (white employees' comments about "eating 'watermelon and fried chicken'" helped show conduct which was sufficiently severe or pervasive to alter the plaintiff's conditions of employment and create an abusive work environment); *Navarro v. U.S. Tsubaki, Inc.*, 577 F.Supp.2d 487, 510

(D. Mass. 2008) (co-worker's comment that employee "should be picking watermelons rather than working in a machine shop and describ[ing] him as a monkey" could show hostile work environment at trial).

In order to avoid vicarious liability for certain types of co-worker harassment, an employer must prove that it exercised reasonable care to prevent and promptly correct the harassment. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765, (1998). According to the Equal Employment Opportunity Commission, "[r]emedial measures should be designed to stop the harassment, correct its effects on the employee, and ensure that the harassment does not recur." *Walton v. Johnson & Johnson Servs., Inc.*, 347 F.3d 1272, 1288 (11th Cir. 2003) *quoting* EEOC Notice 915.002, at § V.C.1.f. (June 18, 1999)). Again, federal law dictates that Respondent must redress Runion's racist comments and, if it fails to do so, Respondent can be held liable for claims of harassment and discrimination.

Given the foregoing, there is a clear federal policy prohibiting discrimination and harassment, which requires employers to take affirmative steps to protect employees from, and altogether eliminate, discrimination and harassment in the workplace. Employers, like Respondent and NAM's members around the country, have an obligation to support these federal policies by enacting and applying policies prohibiting harassment and discrimination, like Respondent has in the instant matter. It is clear that, if unchecked, racist comments on a picket line could lead to liability for an employer.

III. THE ALJ DECISION FORCES EMPLOYERS TO VIOLATE ANTI-DISCRIMINATION STATUTES BY PROTECTING RACIST BEHAVIOR ON PICKET LINES

Despite the clear federal anti-discrimination and anti-harassment policies described above, the ALJ felt constrained to determine that "extant Board law establishes that Runion's

statements, while racist and offensive, were not sufficient to remove the protection of the Act from his protected picketing activity, and that his discharge violated the Act." (ALJ Decision, p. 20). Rather than allowing the clear policies supported by Title VII to stand, the ALJ determined that he was bound by the Board's decision in *Clear Pine Moulding,* 268 NLRB 1044 (1984), and subsequent cases applying that decision. (ALJ Decision, pp.10-13). At the outset, it must be noted that *Clear Pine Moulding* did not address the special circumstances created by racial epithets on picket lines but dealt only with non-racial offensive picket line misconduct. In addition, *Clear Pine Moulding* was decided before the United States Supreme Court first recognized that an employee could bring a Title VII claim for hostile work environment in *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986), and nearly a decade before the Court set forth the current test to determine whether a hostile work environment exists in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993). The Board was thus not aware in 1984 of the sea change that would occur in the law of discrimination and hostile work environment during the ensuing thirty years.

In addition, though the ALJ cited a number of cases applying *Clear Pine Moulding* to purportedly similar types of picket line misconduct, only a single case cited by the ALJ actually dealt with racial epithets on the picket line. That cited case, *Airo Die Casting, Inc*., 347 NLRB 810 (2006), does not bear the weight that the ALJ would have it carry. In *Airo Die Casting*, an employee was terminated for saying a racial epithet, not to co-workers crossing the picket line, but to a contract security guard. *Id.* at 811. The Board majority did not engage in any extensive analysis of the issues, and did not apparently consider the implications of Title VII jurisprudence, addressing the discharge decision in a footnote. *Id.* at 810, n. 3. More importantly, a majority of the Board stated that "there may well be circumstances, absent here, in which a picketing

employee's use of the [epithet] might cause the employee to lose the Act's protection." *Id.* But the majority found that the discharge violated Section 8(a)(3), apparently because the employer had failed to similarly discipline other employees who had used the epithet. *Id.* at 812.

In the present case, the ALJ did not claim that the Respondent discriminated against Runion by tolerating similar workplace racist remarks. In addition, the ALJ treated *Air Die Casting* as compelling an unfair labor practice finding in this case, even though the Board majority in that case expressly limited it to its facts. The ALJ also declined to consider or address the conflicting policies of Title VII, and treated *Clear Pine Moulding* as determining the outcome here, even though that case never addressed the development of Title VII law to cover racist statements as creating hostile work environments. Thus, the gravamen of the ALJ Decision is that, as long as employees are otherwise engaged in protected concerted activity on a picket line, this strike activity "trumps" other employees' rights to be free from racist, harassing remarks. According to the ALJ Decision, Runion's right to shout racist comments during a strike outweighs federal policies prohibiting discrimination and harassment.

In so holding, the ALJ Decision has eviscerated employers' ability to enforce their legitimate anti-discrimination, anti-harassment policies on a picket line. Under the ALJ's Decision, Runion's racist utterances cannot be redressed and the employees who heard these comments have no recourse regarding these comments or any other racist behavior on a picket line, all in apparent violation of civil rights laws. To the contrary, employees and members of the public should not have to be subjected to racist comments and there is no legitimate reason for such comments to be protected by the Act. As a result, employers must be allowed to apply their non-discrimination, non-harassment policies, even to behavior on a picket line.

Nothing in the NLRA requires that the Board allow racist remarks on a picket line. Indeed, the Board has previously held that even if an employee is engaging in protected activity, the employee can lose the protection of the Act if he also engages in unprotected offensive, vulgar, and/or racist statements during the course of his protected activity. *See Atlantic Steel Co.*, 245 NLRB 814, 816 (1979); *see also*, *Media Gen. Operations, Inc. v. NLRB*, 560 F.3d 181, 189 (4th Cir. 2009) (referring to a supervisor as a "fucking idiot" sufficient to lose protection of the Act); *Felix Industries, Inc. v. NLRB*, 251 F.3d 1051 (D.C. Cir. 2001) (calling a supervisor a "fucking kid" weighed against protection by the Act);[1] *Sewell Mfg. Co.*, 138 NLRB 66, 71 (1962) (recognizing that appeals to racial prejudice have no place in NLRB electoral campaigns). Like *Sewell*, racial comments on a picket line "inject an element which is destructive of the very purpose of the [strike and] … which have no purpose except to inflame racial feelings." *Id.*

One need only look to the current state of society to see the impact of racism and understand that racist epithets should not be protected by the Act. Indeed, the Black Lives Matter campaign, the protests in Ferguson, Missouri, the massacre at the Emanuel African Methodist Episcopal Church in Charleston, and the decision of leading corporate citizens, including Walmart, eBay, Sears (which owns and operates Kmart stores), Target, and Amazon, to end the sales of merchandise with the Confederate flag all demonstrate our current societal values, as well as the impact and divisiveness that racism and racist comments have.

It is time for the Board to modernize its outdated jurisprudence to reflect the realities of federal law and social values which hold that racial discrimination and harassment have no place

[1] The ALJ improperly distinguished the *Atlantic Steel* doctrine on the ground that different standards apply within the four walls of a workplace than apply outside on a picket line. (ALJ Dec., p. 14-16). The ALJ again ignored settled law under Title VII finding that a hostile work environment can be created outside the physical walls of the workplace. See *Dowd v. United Steelworkers of Am*., 253 F.3d at 1102.

in our society. The Board must distinguish between racist statements and other non-racist invectives on a picket line and clarify that, under *Clear Pine Moulding* and its progeny, discriminatory and harassing comments or actions are not protected by the Act. The Board should clearly hold that there is no protection for racism, discrimination, or harassment under the National Labor Relations Act.

IV. CONCLUSION

As explained above, there should be no statutory protection for racist statements made on a picket line. Further, protecting such statements is contrary to the clear federal policy against discrimination and harassment. For the foregoing reasons, the Board should overturn the ALJ Decision in this matter and determine that Respondent's discharge of its employee for his racist statements did not violate the Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing *Brief Of* Amicus Curiae *National Association Of Manufacturers In Support Of Respondent Cooper Tire & Rubber Company's Exceptions To The Administrative Law Judge's Decision* was electronically filed on August 20, 2015 through the Board's website, is available for viewing and downloading from the Board's website, and will be sent by means allowed under the Board's Rules and Regulations to the following parties:

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