Case Nos. 16-2721, 16-2944

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

COOPER TIRE & RUBBER COMPANY,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner.

On Petition For Review From
The National Labor Relations Board
Case No. 08-CA-087155

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF MANUFACTURERS AND ASSOCIATION OF CORPORATE COUNSEL SUPPORTING COOPER TIRE & RUBBER COMPANY'S PETITION FOR REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT

Pursuant to F.R.A.P. 26.1, the National Association of Manufacturers ("NAM") and the Association of Corporate Counsel ("ACC") hereby certify that they are trade associations whose specific purposes are set forth below in the section of this brief entitled, "Identity and Interest of the Amici Curiae." They each certify that they do not have any outstanding shares or debt securities in the hands of the public. The NAM and ACC further certify that they do not have any parent companies, nor do any publicly held companies have a 10% or greater ownership interest in either association.

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IDENTITY AND INTERESTS OF THE *AMICI CURIAE*

The 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 more than 12 million men and women, contributes $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is a powerful voice for the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The ACC is a global bar association that promotes the common professional and business interests of in-house counsel. ACC has more than 42,000 members who are in-house lawyers employed by over 10,000 organizations in more than 85 countries. One of the principal activities of ACC is advocacy on public policy matters affecting ACC's members. As in-house counsel, many ACC members advise their employers on issues of labor and employment and discrimination law.

The *amici* believe any form of discrimination or harassment, including that based upon race, has no place in the United States. The *amici's* members maintain and enforce non-discrimination and non-harassment policies to prohibit and remedy any discrimination and harassment in their workplaces. They are in need

of certainty regarding their ability to effectuate anti-harassment policies and redress discriminatory behavior in their workplaces.

The *amici* have reviewed and fully support the Petition for Rehearing *En Banc* submitted by Cooper Tire and do not seek to repeat arguments made therein. The *amici* are filing this brief to emphasize the exceptional importance of this case to the business and legal communities. At a time when the country's workplaces, like the nation as a whole, have become increasingly polarized on issues of race and ethnicity, this Court should affirm its stance against racial discrimination and harassment, and harmonize the National Labor Relations Act (the "NLRA" or the "Act") with the clear federal policies prohibiting racism in the workplace. As discussed more fully below, the Panel Decision should be vacated, and this Court should hold that racist statements have no protection under the Act.

STATEMENT OF INDEPENDENCE OF *AMICI CURIAE*

The NAM, ACC, and the undersigned counsel are solely responsible for the content of this *amici curiae* brief. No counsel for any party to this matter authored this brief, in whole or in part. No party or its counsel contributed money intended to fund the preparation or submission of this brief. Similarly, no person, other than the NAM, ACC, and their members, contributed money intended to fund the preparation or submission of this brief.

ARGUMENT

I. INTRODUCTION

In enforcing the Board Decision ordering reinstatement of a striker who made statements to replacement workers that were, by the Board's own admission, "most certainly [] racist, offensive, and reprehensible" (Bd. Dec. p. 8), the divided Panel has "given refuge to conduct that is not only intolerable by any standard of decency, but also illegal in every other corner of the workplace." *Consolidated Communications, Inc. v. NLRB,* 837 F.3d 1, 20 (D.C. Cir. 2016) (Millett, J. concurring) (quoted favorably in both the majority and dissenting Panel opinions). The Panel reached this result by excessively deferring to the Board in an area of the law that is wholly outside the Board's field of expertise: the law of race discrimination. Such deference conflicts with previous decisions in this Circuit and with numerous holdings of the Supreme Court.

The Panel Decision should not be allowed to stand because the Act does not charge the Board or the courts with protecting racist comments by employees, regardless of where or when these comments are made. The Board cannot be allowed to force employers to violate other federal statutes and societal norms through its protection of racist speech used on a picket line.

II. BOTH THE BOARD AND THE PANEL MAJORITY OPINION HAVE FAILED TO HARMONIZE AND RECONCILE THE NLRA WITH STATE AND FEDERAL CIVIL RIGHTS LAWS

It is well settled that 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.").

Notwithstanding these clear directives from the Supreme Court, the Panel Opinion has allowed the Board to apply its governing Act as if in a vacuum. As Judge Beam found in his dissent, the Board improperly treated racist statements as protected merely because they were made during a strike, and gave short shrift to the rights of non-striking employees to work in a discrimination-free and harassment-free environment.

The Panel majority thus failed to give sufficient weight to the competing federal anti-discrimination policies of the Civil Rights Act, thereby "enabling" the Board to give refuge to "sexually and racially demeaning misconduct" by striking employees. *Consolidated Communications*, 837 F.3d at 20. While purporting to agree with Judge Millett's concurrence in *Consolidated Communications* (slip op.

at 7), the Panel majority ignored Judge Millett's specific reference to the Board's decision against Cooper Tire in this case as being "oblivious to the dark history [discriminatory] words and actions have had in the workplace (and elsewhere)." 837 F.3d at 23.[1] The Panel majority opinion thus cannot be squared with Judge Millett's concurrence. By contrast, Judge Beam's endorsement of Judge Millett's concurrence "in its entirety" properly led him to dissent from the Panel decision. For the same reasons, the full Court should vacate the Panel Opinion and adopt Judge Beam's dissent.

Contrary to the Panel Opinion, reinstating Mr. Runion is tantamount to requiring that Cooper Tire risk violating federal anti-discrimination and harassment laws, including Title VII and Section 1981, as well as numerous other similar state and local laws. The law is clear that employers, including Cooper Tire, can be held liable for failing to redress discriminatory and/or harassing behavior. 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 occurs on a picket line. *See also Dowd v. United Steelworkers of Am.*, 253 F.3d 1093, 1102

[1] The Panel majority quotes approvingly Judge Millett's language above, including her reference to how the Board's decisions seem to be oblivious to the dark history of discriminatory words and actions. (Panel Opinion at p.7, n.1). But the Panel omits from the quotation Judge Millett's citation to the Board decision *in this very case,* which she specifically identified as one of the "oblivious" Board decisions. *Consolidated Communications*, 837 F.3d at 23.

(8th Cir. 2001) (finding hostile work environment based in part on racial abuse occurring on union picket line).

Whether a workplace environment is objectively hostile or abusive is supposed to be "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). But the Board and the Panel judged this question primarily from the perspective of the harasser, *i.e.,* the racist striking employee. Similarly, though 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,[2] the Panel distinguished Runion's conduct on the picket line from racist actions occurring inside the workplace. (Panel Op. at 11).

Contrary to the Panel majority, employers have previously been held liable for racist employee conduct similar to that engaged in by Runion. *Ellis v. Houston*, 742 F.3d 307, 325 (8th Cir. 2014) *citing Rodgers v. W.–S. Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993). *See also, Ellis*, 742 F.3d at 320 (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 &*

[2] *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.").

Gamble Mfg. Co., 556 Fed. App'x 421, 433 (6th Cir. 2014) (white employees' comments about "eating watermelon and fried chicken"); *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). This Court has also determined that, even though Section 7 may protect "impulsive, exuberant behavior" which occurs in the course of otherwise protected activity, intentional misconduct, which is "calculated" and "flagrant," like that of Runion, is not protected by the Act. *Earle Indus. Inc. v. NLRB*, 75 F.3d 400, 407 (8th Cir. 1996).

No employer can ever be sure whether a racist comment by an employee will result in litigation against the employer by other offended employees, or what the outcome of such litigation will be. Employers should be entitled to err on the side of caution by taking remedial action, up to and including termination, for any racist misconduct committed by employees. For this reason, the Panel missed the point by declaring that Mr. Runion's comments did not in and of themselves create a hostile work environment (Panel Op. at 9), and that "Cooper was under no legal obligation to *fire* Runion" (*Id*., emphasis in original).

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)). *See also Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765, (1998). Thus, contrary to the Panel Opinion, Cooper Tire was required to redress Runion's racist comments when they occurred, and, if it had failed to do so, Cooper Tire could have been held liable for claims of harassment and discrimination. Employers act at their peril if they fail to terminate employees who make statements of the sort that the striker made in this case.

III. THE COURT SHOULD GRANT THE PETITION IN ORDER TO MAKE CLEAR THAT RACIST STATEMENTS ON A PICKET LINE ARE NOT PROTECTED BY THE NLRA.

The Panel majority erred in deferring to the Board's characterization of racist statements on a picket line as protected in any way by the NLRA. As Judge Beam properly found, again quoting from Judge Millett's opinion in *Consolidated Communications*:

> While the law properly understands that rough words and strong feelings can arise in the tense and acrimonious world of workplace strikes, targeting others for sexual or racial degradation is categorically different. Conduct that is designed to humiliate and intimate another individual *because of and in terms of that person's gender or race* should be unacceptable in the work environment.

Beam, J. dissenting opinion at p. 16, quoting from *Consolidated Communications,* 837 F.3d at 20-21 (emphasis in original).

In deferring to the Board based upon its decision in *Clear Pine Moulding,* 268 NLRB 1044 (1984), the Panel majority ignored the fact that *Clear Pine Moulding* did not address the special circumstances created by racial epithets on picket lines, but dealt only with non-racial picket line misconduct. The Panel also failed to adhere to Circuit precedent, as Cooper Tire's Petition for Rehearing correctly shows. The Panel opinion cannot be squared with this Court's decision in *NMC Finishing v. NLRB*, 101 F.3d 528 (8th Cir. 1996), where the Court held that whether picket line misconduct tended to coerce or intimidate employees must be reviewed *de novo*, without deference to the Board.[3] In any event, as Judge Millett and Judge Beam have well explained, the 1984 *Clear Pine Moulding* decision itself has been rendered obsolete by the sea change that has occurred in the law of discrimination, harassment, and hostile work environment during the ensuing thirty years.

The Board has also 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*

[3] The Panel's attempt to distinguish *NMC Finishing* on the ground that the sexist statement in that case singled out an individual employee makes little sense. (Panel Op. at 5-6). By the Panel's logic, the more employees who are racially or sexually demeaned by a striker, the less an employer will have the ability to take corrective disciplinary action.

also, *Media Gen. Operations, Inc. v. NLRB*, 560 F.3d 181, 189 (4th Cir. 2009) (referring to a supervisor as a "f***king idiot" sufficient to lose protection of the Act); *Felix Industries, Inc. v. NLRB*, 251 F.3d 1051 (D.C. Cir. 2001).[4] *See also Sewell Mfg. Co.*, 138 NLRB 66, 71 (1962) (recognizing that appeals to racial prejudice have no place in NLRB electoral campaigns.[5]

This Court has already made clear that the ultimate question in this type of case is whether protecting a striker's picket line misconduct serves the purposes of the Act. *Earle Industries*, 75 F.3d at 405. It cannot be the purpose of the NLRA to protect racist comments and harassment. The Board's position is at odds with 21st century efforts to eradicate racism in all its forms, including the Black Lives Matter campaign; racial protests at professional football games, and threatened boycotts of corporations perceived to be insensitive to racial issues, to say nothing of the violence that has occurred in Charlottesville, St. Paul, Ferguson, and elsewhere. These and many other recent events have led to renewed efforts by

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[4] In the present case, the Panel majority 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. (Panel Op. at p. 11). As noted above, the Panel majority ignored settled law under Title VII finding that a hostile work environment can be created outside the physical walls of the workplace. *See Dowd*, 253 F.3d at 1102.

[5] For similar reasons, the Panel erred in not requiring the Board to defer to the arbitrator who found just cause for Runion's termination and in failing to find that Section 10(c) of the Act prohibited the Board from reinstating the employee after he was terminated for his racist conduct, not for engaging in protected activity. See Petition for Rehearing at pp. 12 - 16.

governmental agencies and corporate citizens, including many of the *amici's* most prominent members, to strictly enforce anti-discrimination policies so as to avoid even the appearance of endorsing racially discriminatory practices or statements. Cooper Tire was entitled to do the same in order to redress and prevent the insidious effects of racism in its workplace. The Board's decision to the contrary reflects a permissive attitude towards racism that should no longer be tolerated by this or any court.

IV. CONCLUSION

For the reasons stated above, and in Cooper Tire's Petition for Rehearing *En Banc*, the *amici* respectfully request that this Court grant the petition and refuse to enforce the Board's Order in this matter.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Certificate of Compliance with the Type-Volume Limitation, the Typeface Requirements, and the Type Style Requirements of Fed. R. App. P. 32(a) and with the Technical Requirements of 8th Cir. R. 28A(h).

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 2,593 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Respectfully submitted,

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CERTIFICATE OF SERVICE FOR DOCUMENTS FILED USING CM/ECF

I hereby certify that on September 29, 2017, I electronically filed the foregoing *Brief of Amicus Curiae National Association of Manufacturers* with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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