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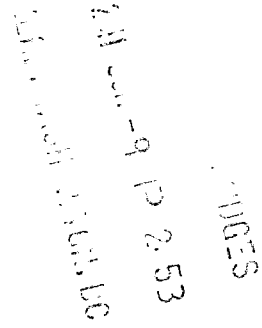
June 8, 2010



VIA FEDERAL EXPRESS NEXT DAY DELIVERY

National Labor Relations Board
Division of Judges
1099 – 14th Street, NW, Suite 5400 E
Washington, DC 20570-0001

Re: ***Douglas Autotech Corporation and UAW***
Case No. GR-7-CA-51428

To Whom It May Concern:

Enclosed for filing are an original and eight (8) copies of Douglas Autotech Corporation's Reply to General Counsel's Answering Brief to Respondent's Exceptions to Administrative Law Judge's Decision, Douglas Autotech Corporation's Reply Brief to Charging Party's Answering Brief to Respondent's Exceptions to Administrative Law Judge's Decision and Douglas Autotech Corporation's Response to Charging Party's Cross-Exceptions to the Decision of Administrative Law Judge.

If you have any questions, please contact me. Thank you.

Very truly yours,

VARNUM

Jeffrey J. Fraser

Jeffrey J. Fraser

Enclosures

c: Steven E. Carlson (w/enc.)
Samuel C. McKnight (w/enc.)
Maneesh Sharma (w/enc.)

3503818

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

DOUGLAS AUTOTECH CORPORATION,

Respondent-Employer,

and

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

Charging Party-Union.
_____/

Case No. GR-7-CA-51428

Administrative Law Judge
Paul Buxbaum

RESPONDENT, DOUGLAS AUTOTECH CORPORATION'S REPLY TO GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

I. INTRODUCTION

Pursuant to NLRB Rules and Regulations, §102.461, Douglas Autotech ("DAC") states the following as its Reply to General Counsel's ("GC's") Answering Brief to DAC's Exceptions:

II. ARGUMENT

1. Conspicuously absent from the General Counsel's ("GC") brief is any mention or reply to the uncontested fact that the UAW decided to and then hid their illegal strike from DAC. This is bad faith bargaining. Consistent with the NLRB case law DAC cited in its Exceptions Brief, the UAW should be precluded from asserting an 8(d) "reemployment" defense.

2. The GC also fails to acknowledge that on August 14, 2008, DAC, through counsel Bruce Lillie, did offer to bargain "effects" with Sam McKnight, the UAW's bargaining representative. That offer alone confirms that DAC still recognized the UAW as the bargaining agent for the DAC Bronson union employees. *See General Counsel's Answering Brief* at 21.

3. It is undisputed that DAC specifically told the UAW that it reserved all rights related to the illegal strike on at least May 21, 2008; July 24, 2008; and July 31, 2008. The GC's statement that DAC did not mention "discharging the former strikers" until July 24, 2008 is a misleading half truth. The seasoned UAW international representative and counsel for the UAW clearly knew that reserving all rights related to the illegal strike included "discharge." To state otherwise is intellectually dishonest. *See General Counsel's Answering Brief* at 18.

4. NLRB case law does not support the GC's argument that DAC "reemployed" the illegal UAW strikers through a lockout. In *Fairprene Industrial Products*, 292 NLRB 797 (1989), the union illegally struck the employer from April 1 to 3. Fairprene did not know the strike was illegal when it was bargaining with the union. The parties bargained, settled the strike and reached an agreement to reinstate the illegal strikers. Only then did Fairprene

determine that the strike had been illegal and terminated the strikers. Fairprene argued the illegal strikers had lost employee status under the NLRA. *See id* at 802.

Fairprene held in part that Fairprene's termination decision was illegal because "when the full strike settlement agreement was reached **and** the company *scheduled the employees to return to work*, the strike ended and the strikers were re-employed within the meaning of [Section 8(d)'s] provisions." *See id* at 803 (emphasis added). Significantly, the NLRB did not find that the **bargaining** between Fairprene and the Union during the illegal strike constituted "reemployment" under the Act. As the GC correctly notes, "the employer reemployed the strikers when, pursuant to a strike settlement agreement, it agreed to reinstate the strikers **and** scheduled them for work." (Emphasis added.) *See General Counsel's Answering Brief* at 14-15. Through *Fairprene*, the NLRB has held that **bargaining** during an illegal strike does not constitute "reemployment," even where the company has not reserved its right to terminate for the illegal strike.

Fairprene is not a lockout case, but clearly bargaining during an illegal strike without reserving rights to terminate is not "reemployment." Bargaining is more akin to "reemployment" than a lockout. Through bargaining, a company and union engage in an interactive process attempting to reach agreement. Yet *Fairprene* clearly holds bargaining during an illegal strike is not "reemployment" even where there has been no reservation of rights to terminate the illegal strikers. Lockout is not "reemployment."

5. *Shelby County Health Care Corp. v. American Federation of State County, and Municipal Employees Local, 1733*, 967 F2d 1091 (CA6 1992) also holds that bargaining during an illegal strike without reserving the right to terminate is not "reemployment" under the Act. *Shelby* clearly stands for the proposition that the protective mantle of the Act is not regained

through bargaining during an illegal strike even where the employer has no knowledge the strike is illegal. Again, "bargaining" clearly is more akin to "reemployment" than a lockout.

In *Shelby*, the illegal strike continued from April 25 through April 28. *Id* at 1093. By first shift on April 29, most employees had returned to work. On May 1, Shelby began issuing suspensions to those employees who participated in the strike. On May 4, after bargaining, Shelby and the union executed a settlement agreement regarding discipline for employees who participated in the illegal strike. Pursuant to this agreement, many employees were simply suspended for four days and then permitted to return to work. Those employees whom Shelby believed engaged in more serious strike misconduct remained suspended and subject to further discipline. These disciplinary steps were subject to protest through a grievance and arbitration procedure. *Id* at 1093.

When an arbitrator held that certain discipline issued to an illegal striker was too severe, Shelby attempted to terminate the striker pursuant to Section 8(d). The parties pursued the case through the Sixth Circuit Court of Appeals. The Sixth Circuit found that "[T]he NLRA does not infringe upon an employer's discretion in deciding to discharge or retain employees who have lost the protection of § 158(a)." *Id* at 1095. The Sixth Circuit stated:

> *Section 158(d) does not mandate the discharge of any individual participating in an illegal strike, it merely deprives that individual of certain statutory rights. The employer then has the discretion to either discharge or retain the employee. If the employer decides to retain the employee, that employee then regains the protection of the Act pursuant to §158(d) . . . The employee is unprotected only until the employer exercises the discretion implicitly granted by § 158. Id at 1096.*

The Sixth Circuit further found that, by entering into a strike settlement agreement, the employer, Shelby, voluntarily gave up some of its discretion in responding to the illegal strikers. "The law did not require [the employer] to enter into this agreement, but granted [the employer] unfettered discretion in resolving this matter." *Id* at 1097. As the employer had voluntarily entered into an agreement to reemploy the illegal strikers and submit longer term discipline to

arbitration, it could not renege on its express agreement. Notably, *Shelby* did not hold that the **bargaining** between Shelby and the union during the illegal strike constituted "reemployment."

6. *Fairprene* and *Shelby* do not so closely restrict an employer's discretion in responding to an illegal strike. The employers in *Fairprene* and *Shelby* were prohibited from terminating the illegal strikers because they reached an **agreement** with the union specifically limiting this authority. Once agreement was reached, the employer could not renege on the terms. The bargaining in *Shelby* and *Fairprene* during the illegal strike did not constitute "reemployment." Lockout cannot trigger "reemployment."

DAC did not bring the illegal strikers back to work. In fact, DAC and the Union never came close to resolving their differences through bargaining. Clearly, *Fairprene* is distinguishable from the present case. Section 8(d) states "but such loss of status for such employee shall terminate if and when he is reemployed by such employer." (Emphasis added.) It is irrelevant if and when the union calls an end to the illegal strike. Under the plain language of the Act, the employer must take the affirmative step to reemploy the illegal strikers in order for them to regain protected status. A settlement agreement, like those reached in *Fairprene* and *Shelby*, is distinguishable from locking out illegal strikers in order to negotiate terms of possible reemployment. A settlement agreement means that the parties have met, negotiated and reached agreement on reemploying illegal strikers. In contrast, a lockout is simply the background of negotiations where the parties are trying to reach a strike settlement agreement. Review of the purpose of a lockout proves this point; a lockout is a means for the employer to apply economic pressure in order to reach an agreement most favorable to its position. A lockout occurs before any agreement is reached.

7. The GC is off-base when he argues that the DAC facts more closely resemble *Fairprene* than *Boghosian Raisin*. Boghosian locked out the Union strikers. The GC does not contest the fact that Boghosian locked out the union members. Instead, the GC focuses on whether the union made a conditional or unconditional offer to return to work. This is a distinction without a difference. On October 2 the parties met but failed to resolve their dispute. Boghosian told the Union it was reserving its options under the NLRA including the right to discharge all the employees. Boghosian refused to let the illegal strikers return to work. This is a lock out. On October 4, the Union again agreed to unconditionally return to work under the pre-strike *status quo* conditions. Boghosian refused to let the strikers return to work. This is a lock out. On October 5, the Union unconditionally offered to return to work under the employer's last, best, final offer conditions. Boghosian refused to let the strikers return to work. This is a lock out. Boghosian then sent individual letters to the illegal strikers terminating their employment for engaging in the illegal strike.

The GC fails to address the fact that in *Boghosian Raisin*, the NLRB General Counsel, in its Brief to the Administrative Law Judge, specifically argued "E. The Union Made Repeated **Unconditional** Offers To Return To Work." (Emphasis added.) The NLRB GC stated: "To the contrary, the General Counsel contends that after Rabinowitz' [Union attorney] initial offer to return made in the 2:00 P.M. October 1 call between him and Sagaser [Company attorney], which Sagaser refused, the employees were not voluntarily withholding their services, they were in essence **locked out** by Respondent." (Emphasis added.) NLRB General Counsel Brief To The Administrative Law Judge at 30.[1] The NLRB GC made the "lock out" argument in *Boghosian.* The NLRB rejected the "lock out as re-employment" theory.

[1] DAC believes the NLRB should take judicial notice of the GC's Brief in the *Boghosian Raisin* case as it is a public record.

The NLRB affirmed the ALJ and held that the Union failed to timely file the F-7 notice with FMCS. As a result, the strike was illegal and the Union members lost their status as employees under the NLRA. Boghosian had locked out the illegal Union strikers. The Union offered to return to work unconditionally. The NLRB did not conclude that Boghosian had "re-employed" the illegal strikers through the "lock out" or through the termination letter.

Through *Boghosian Raisin*, the NLRB has already resolved this issue presented in the DAC facts. Lock out is not "reemployment" under NLRA, Section 8(d). This is true whether the Union made a conditional or unconditional offer to return to work.

8. The GC's argument about the *Detroit Newspaper Agency* case and remedy misses the point. *Detroit Newspaper Agency,* 343 NLRB 1041 (2004), stands for the proposition that when returning to the *status quo ante*, the NLRB must, as nearly as possible, reinstate employees to their lawful status the moment **before** the alleged illegal act occurred. From May 5, 2008 through August 3, 2008, DAC had lawfully locked out the UAW illegal strikers. The alleged illegal termination occurred on August 4, 2008. It is irrelevant what happened **on or after August 4, 2008** for purposes of crafting any remedy in this matter. DAC's lockout was **lawful** on August 3, 2008. DAC had told the UAW illegal strikers they were locked out and had confirmed to the illegal strikers the terms and conditions they must accept to return to work. A remedy requiring that the UAW strikers return to the same lawful position they held on August 3, 2008 (lockout), **prior** to the alleged unlawful act on August 4, 2008 is exactly what the Act requires. Certainly, if reinstated to the lawful lockout, the UAW illegal strikers are able to accept the same lockout terms they were able to accept on August 3, 2008 to end the lockout.

The GC cites lockout cases to make his remedy argument. The relevant issue in *Dayton Newspapers,* 339 NLRB 79 (2003), *enforced in relevant part* 402 F3d 651 (CA6 2005) and *Ancor Concepts,* 323 NLRB 742 (1997) *enforcement denied on other grounds* 166 F3d 55 (CA2

1999) was whether the original lockout imposed was lawful. In each case, the NLRB determined that the lockout was never lawful. As such, the remedy had to be reinstate the employees to their former positions and require a period of good faith bargaining before the employer could again declare a lockout. In the DAC matter, there is no dispute the lockout was legal from May 5, 2008 through August 3, 2008. DAC is not a lockout case. Contrary to the GC's assertion, the NLRB does not need to declare a lockout, DAC already lawfully implemented a lockout. The NLRB simply has to reinstate the alleged illegally terminated employees to the lawful lockout in effect on August 3, 2008. This is wholly consistent with the Act. Any remedy in this matter should not put the illegal strikers in a better position than they held on August 3, 2008.

9. The GC takes exception with DAC's statement that the Regional Director did not issue a complaint regarding lockout. *See General Counsel's Answering Brief* at 23. Instead, the GC argues that the UAW filed and then withdrew the illegal lockout allegation. Even better. The UAW has waived its right to file a charge regarding the lawful lockout. In either event, the DAC lockout in effect on August 3, 2008 was lawful.

10. The GC argues that ALJ Buxbaum's statement that "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." ALJ Decision at 33 – 35. *See General Counsel's Answering Brief at 19 and footnote 10.* Unfortunately, the ALJ's statement is directly contrary to the established law that was in effect on May 5, 2008. An employer is "obligated to declare lockout before or in immediate response to the strikers' unconditional offers to return to work." *Ancor Concepts*, 323 NLRB 742 (1997) *enforcement denied on other grounds* 166 F3d 55 (CA2 1999) citing *Eads Transfer*, 304 NLRB 711, 713 (1991), *enforced* 989

F2d 373 (CA9 1993). DAC cannot be held to a legal standard that the ALJ believes "should" be in effect when on May 5, 2008 DAC did act, it acted consistent with then-current NLRB law.

III. CONCLUSION

As to the issues identified above, for the reasons stated above, the GC's Answering Brief has no merit.

Dated: June 8, 2010

By: Jeffrey J. Fraser

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

DOUGLAS AUTOTECH CORPORATION,

Respondent-Employer,

and

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

Charging Party-Union.

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Case No. GR-7-CA-51428

Administrative Law Judge
Paul Buxbaum

RESPONDENT, DOUGLAS AUTOTECH CORPORATION'S REPLY BRIEF TO CHARGING PARTY'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

I. Introduction

Pursuant to NLRB Rules and Regulations § 102.46, Douglas Autotech ("DAC") states the following as its Reply to Charging Party's ("CP's") Answering Brief to DAC's Exceptions:

II. Individual Responses

1. Conspicuously absent from the Charging Party's ("CP") brief is any mention or reply to the uncontested fact that the UAW decided to and then hid their illegal strike from DAC. This is bad faith bargaining. Consistent with the NLRB case law DAC cited in its Exceptions, the UAW should be precluded from asserting an 8(d) reemployment defense.

2. It is undisputed that DAC specifically told the UAW that it reserved all rights related to the illegal strike on at least May 21, 2008; July 24, 2008; and July 31, 2008. The CP implies that the UAW was not aware that DAC was reserving rights to terminate the illegal strikers. *See Charging Party's Answering Brief* at 4. The seasoned UAW international representative and UAW counsel clearly knew that reserving all rights related to the illegal strike included "discharge." To state otherwise is intellectually dishonest. Moreover, the CP alleges that on July 24, 2008, "[t]he Company did not say it was reserving its right to terminate employees for engaging in an illegal strike." *See Charging Party's Answering Brief* at 6. This is just not true. Even the General Counsel acknowledges that DAC's counsel, "Bruce Lillie told the Union's attorney, John Canzano, that Respondent was consulting new counsel about firing the bargaining unit employees." *See General Counsel's Answering Brief* at 6.

3. The CP's characterization of *Boghosian Raisin* is off base. *Boghosian Raisin Packing Co.,* 342 NLRB 383 (2004). Boghosian locked out the Union strikers. The CP does not contest the fact that Boghosian locked out the union members. Instead, the CP focuses on whether the union made a conditional or unconditional offer to return to work. This is a distinction without a difference. On October 2 the parties met but failed to resolve their dispute.

Boghosian told the Union it was reserving its options under the NLRA including the right to discharge all the employees. Boghosian refused to let the illegal strikers return to work. This is a lock out. On October 4, the Union again agreed to unconditionally return to work under the pre-strike *status quo* conditions. Boghosian refused to let the strikers return to work. This is a lock out. On October 5, the Union unconditionally offered to return to work under the employer's last, best, final offer conditions. Boghosian refused to let the strikers return to work. This is a lock out. Boghosian then sent individual letters to the illegal strikers terminating their employment for engaging in the illegal strike.

The CP also fails to address the fact that in *Boghosian Raisin*, the NLRB General Counsel, in its Brief to the Administrative Law Judge, specifically argued "E. The Union Made Repeated **Unconditional** Offers To Return To Work." (Emphasis added.) The NLRB GC stated: "To the contrary, the General Counsel contends that after Rabinowitz' [Union attorney] initial offer to return made in the 2:00 P.M. October 1 call between him and Sagaser [Company attorney], which Sagaser refused, the employees were not voluntarily withholding their services, they were in essence **locked out** by Respondent." (Emphasis added.) NLRB General Counsel Brief To The Administrative Law Judge at 30.[1] The NLRB GC made the "lock out" argument in *Boghosian.* The NLRB rejected the "lock out as re-employment" theory.

The NLRB affirmed the ALJ and held that the Union failed to timely file the F-7 notice with FMCS. As a result, the strike was illegal and the Union members lost their status as employees under the NLRA. Boghosian had locked out the illegal Union strikers. The Union offered to return to work unconditionally. The NLRB did not conclude that Boghosian had "re-employed" the illegal strikers through the "lock out" or through the termination letter.

[1] DAC believes the NLRB should take judicial notice of the GC's Brief in the *Boghosian Raisin* case as it is a public record.

Through *Boghosian Raisin*, the NLRB has already resolved this issue presented in the DAC facts. Lock out is not "re-employment" under NLRA, Section 8(d). This is true whether the Union made a conditional or unconditional offer to return to work.

4. The CP also mischaracterizes the Respondent's arguments related to *Fairprene* and *Shelby*. The key distinguishing characteristic in both of these cases is that the parties reached an **agreement** to return the illegal strikers to work.

NLRB case law does not support the CP's argument that "DAC" "reemployed" the illegal UAW strikers through a lockout. In *Fairprene Industrial Products*, 292 NLRB 797 (1989), the union illegally struck the employer from April 1 to 3. Fairprene did not know the strike was illegal when it was bargaining with the union. The parties bargained, settled the strike and reached an agreement to reinstate the illegal strikers. Only then did Fairprene determine that the strike had been illegal and terminated the strikers. Fairprene argued the illegal strikers had lost employee status under the NLRA. *See id* at 802.

Fairprene held in part that Fairprene's termination decision was illegal because "when the full strike settlement agreement was reached **and** the company *scheduled the employees to return to work*, the strike ended and the strikers were re-employed within the meaning of [Section 8(d)'s] provisions." *See id* at 803 (emphasis added). Significantly, the NLRB did not find that the **bargaining** between Fairprene and the Union during the illegal strike constituted "reemployment" under the Act. The CP states that DAC "argues that the *Fairprene* Board held that it was the physical act of 'scheduling' former strikers to start work that constituted reemployment under the Act." *See Charging Party's Answering Brief* at 11. DAC has consistently argued that the agreement **and** scheduling triggered reemployment in *Fairprene.*

Through *Fairprene*, the NLRB has held that **bargaining** during an illegal strike does not constitute "reemployment," even where the company has not reserved its right to terminate for

the illegal strike. *Fairprene* is not a lockout case, but clearly bargaining during an illegal strike without reserving rights to terminate is not "reemployment." Bargaining is more akin to "reemployment" than a lockout. Through bargaining, a company and union engage in an interactive process attempting to reach agreement. Yet *Fairprene* clearly holds bargaining during an illegal strike is not "reemployment" even where there has been no reservation of rights to terminate the illegal strikers.

5. *Shelby County Health Care Corp. v. American Federation of State County, and Municipal Employees Local, 1733*, 967 F2d 1091 (CA6 1992) also holds that bargaining during an illegal strike without reserving the right to terminate is not "reemployment" under the Act. *Shelby* clearly stands for the proposition that the protective mantle of the Act is not regained through bargaining during an illegal strike even where the employer has no knowledge the strike is illegal. Again, "bargaining" clearly is more akin to "reemployment" than a lockout.

In *Shelby*, the illegal strike continued from April 25 through April 28. *Id* at 1093. By first shift on April 29, most employees had returned to work. On May 1, Shelby began issuing suspensions to those employees who participated in the strike. On May 4, after bargaining, Shelby and the union executed a settlement agreement regarding discipline for employees who participated in the illegal strike. Pursuant to this agreement, many employees were simply suspended for four days and then permitted to return to work. Those employees whom Shelby believed engaged in more serious strike misconduct remained suspended and subject to further discipline. These disciplinary steps were subject to protest through a grievance and arbitration procedure. *Id* at 1093.

When an arbitrator held that certain discipline issued to an illegal striker was too severe, Shelby attempted to terminate the striker pursuant to Section 8(d). The parties pursued the case through the Sixth Circuit Court of Appeals. The Sixth Circuit found that "[T]he NLRA does not

infringe upon an employer's discretion in deciding to discharge or retain employees who have lost the protection of § 158(a)." *Id* at 1095. The Sixth Circuit stated:

> *Section 158(d) does not mandate the discharge of any individual participating in an illegal strike, it merely deprives that individual of certain statutory rights. The employer then has the discretion to either discharge or retain the employee. If the employer decides to retain the employee, that employee then regains the protection of the Act pursuant to §158(d) . . . The employee is unprotected only until the employer exercises the discretion implicitly granted by § 158. Id at 1096.*

The Sixth Circuit further found that, by entering into a strike settlement agreement, the employer, Shelby, voluntarily gave up some of its discretion in responding to the illegal strikers. "The law did not require [the employer] to enter into this agreement, but granted [the employer] unfettered discretion in resolving this matter." *Id* at 1097. As the employer had voluntarily entered into an agreement to reemploy the illegal strikers and submit longer term discipline to arbitration, it could not renege on its express agreement. Notably, *Shelby* did not hold that the **bargaining** between Shelby and the union during the illegal strike constituted "reemployment."

6. *Fairprene* and *Shelby* do not so closely restrict an employer's discretion in responding to an illegal strike. The employers in *Fairprene* and *Shelby* were prohibited from terminating the illegal strikers because they reached an **agreement** with the union specifically limiting this authority. Once agreement was reached, the employer could not renege on the terms. The bargaining in *Shelby* and *Fairprene* during the illegal strike did not constitute "reemployment." Lockout cannot trigger "reemployment."

DAC did not bring the illegal strikers back to work. In fact, DAC and the Union never came close to resolving their differences through bargaining. Clearly, *Fairprene* is distinguishable from the present case. Section 8(d) states "but such loss of status for such employee shall terminate if and when he is reemployed by such employer." (Emphasis added.) It is irrelevant if and when the union calls an end to the illegal strike. Under the plain language

of the Act, the employer must take the affirmative step to reemploy the illegal strikers in order for them to regain protected status. A settlement agreement, like those reached in *Fairprene* and *Shelby*, is distinguishable from locking out illegal strikers in order to negotiate terms of possible reemployment. A settlement agreement means that the parties have met, negotiated and reached agreement on reemploying illegal strikers. In contrast, a lockout is simply the background of negotiations where the parties are trying to reach a strike settlement agreement. Review of the purpose of a lockout proves this point; a lockout is a means for the employer to apply economic pressure in order to reach an agreement most favorable to its position. A lockout occurs before any agreement is reached.

7. The CP's argument about the *Detroit Newspaper Agency* case and remedy misses the point. *Detroit Newspaper Agency,* 343 NLRB 1041 (2004), stands for the proposition that when returning to the *status quo ante*, the NLRB must, as nearly as possible, reinstate employees to their lawful status the moment **before** the alleged illegal act occurred. From May 5, 2008 through August 3, 2008, DAC had lawfully locked out the UAW illegal strikers. The alleged illegal termination occurred on August 4, 2008. It is irrelevant what happened **on or after August 4, 2008** for purposes of crafting any remedy in this matter. DAC's lockout was **lawful** on August 3, 2008. DAC had told the UAW illegal strikers they were locked out and had confirmed to the illegal strikers the terms and conditions they must accept to return to work. A remedy requiring that the UAW strikers return to the same lawful position they held on August 3, 2008 (lockout), **prior** to the alleged unlawful act on August 4, 2008 is exactly what the Act requires. Certainly, if reinstated to the lawful lockout, the UAW illegal strikers are able to accept the same lockout terms they were able to accept on August 3, 2008 to end the lockout.

The CP cites no cases in support of its position. The CP relies on the General Counsel's ("GC") cited cases. The GC cites lockout cases to make his remedy argument. The relevant

issue in *Dayton Newspapers,* 339 NLRB 79 (2003), *enforced in relevant part* 402 F3d 651 (CA6 2005) and *Ancor Concepts,* 323 NLRB 742 (1997) *enforcement denied on other grounds* 166 F3d 55 (CA2 1999) was whether the original lockout imposed was lawful. In each case, the NLRB determined that the lockout was never lawful. As such, the remedy had to be reinstate the employees to their former positions and require a period of good faith bargaining before the employer could again declare a lockout. In the DAC matter, there is no dispute the lockout was legal from May 5, 2008 through August 3, 2008. DAC is not a lockout case. Contrary to the GC's assertion, the NLRB does not need to declare a lockout, DAC already lawfully implemented a lockout. The NLRB simply has to reinstate the alleged illegally terminated employees to the lawful lockout in effect on August 3, 2008. This is wholly consistent with the Act. Any remedy in this matter should not put the illegal strikers in a better position than they held on August 3, 2008.

8. DAC did not repudiate the bargaining relationship with the UAW on August 14, 2008. Instead, DAC confirmed to the UAW through Bruce Lillie that it would bargain "effects" of the termination with the UAW at their request. DAC acknowledged that the UAW still has a bargaining unit, but based on DAC's legal theory/position, limited the scope of the issues with which it would bargain with the UAW. Moreover, after August 14, 2008, when the UAW made requests for information, DAC replied. DAC is not responsible for the UAW's decision not to bargain effects or its decision to discontinue asking for relevant bargaining information. A bargaining unit exists at DAC. If DAC is correct that lockout does not result in reemployment under the Act, then DAC only has an obligation to bargain effects at the UAW's request. Until the lockout/reemployment legal issue is ultimately resolved, DAC has met its obligation to offer to bargain with the UAW regarding effects. *See Charging Party's Answering Brief* at 15.

9. The CP's reliance on *Zartic, Inc*, 277 NLRB 1478 (1986) is misplaced. *See Charging Party's Answering Brief* at 13. There was no union at Zartic. The Ku Klux Klan picketed in front of Zartic premises in an attempt to intimidate Hispanic workers from reporting to work. Some employees joined the illegal strike. Zartic requested illegal strikers to return to work. The NLRB did not find that Zartic's request for the illegal strikers to return to work was a sufficient positive action to merit "reemployment." *Zartic* is not a lockout case. The *Zartic* factual context is wholly distinguishable from the DAC facts.

III. Conclusion

As to the issues identified above, for the reasons stated above, the CP's Answering Brief has no merit.

Dated: June 8, 2010

By: Jeffrey J. Fraser

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UNITED STATES OF AMERICA
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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Douglas Autotech ("DAC") states the following as its Answering Brief Charging Party's ("CP's") Cross Exceptions:

I. Introduction

Charging Party ("CP") has filed two cross-exceptions to the Administrative Law Judge's ("ALJ") Decision. First, CP argues that the ALJ incorrectly dismissed the Complaint allegation that DAC repudiated the collective bargaining relationship. Second, CP argues that the ALJ incorrectly failed to award costs and attorney fees for litigating the present case. Both of these cross-exceptions are meritless.

II. Argument

A. The ALJ properly dismissed the Complaint allegation that DAC repudiated the collective bargaining relationship.

DAC did not repudiate the bargaining relationship with the UAW on August 14, 2008. Instead, DAC confirmed to the UAW through Bruce Lillie that it would bargain "effects" of the termination with the UAW at their request. DAC acknowledged that the UAW still has a bargaining unit, but based on DAC's legal theory/position, limited the scope of the issues with which it would bargain with the UAW. Moreover, after August 14, 2008, when the UAW made requests for information, DAC replied. DAC is not responsible for the UAW's decision not to bargain effects or its decision to discontinue asking for relevant bargaining information. A bargaining unit exists at DAC. If DAC is correct that lockout does not result in reemployment under the Act, then DAC only has an obligation to bargain effects at the UAW's request. Until the lockout/reemployment legal issue is ultimately resolved, DAC has met its obligation to offer to bargain with the UAW regarding effects. *See Charging Party's Answering Brief* at 15.

B. The ALJ properly did not award costs and attorney fees.

CP's assertion that the ALJ should have included an award of the General Counsel's and Union's costs and attorney fees for litigating this case is meritless. The NLRB will not assess litigation expenses against a respondent, "notwithstanding that the respondent may be found to have engaged in 'clearly aggravated and pervasive misconduct' or in the 'flagrant repetition of conduct previously found unlawful' where the defenses raised by the respondent are 'debatable' rather than 'frivolous.'" *See Heck's, Inc.*, 215 NLRB 765, 767 (1974).

> The fact that in retrospect a respondent is found to have engaged in a flagrant repetition of conduct previously found unlawful, otherwise characterized as aggravated and pervasive, does not in our judgment justify our discouraging that respondent from gaining access to an appropriate forum where the credibility of witnesses leaves an unfair labor practice issue in doubt. To do so would penalize the respondent and deny him protection under the law equal to that afforded another, similarly charged with having committed an unfair labor practice, merely because the former was no longer a "stranger" to the Board's processes.

Heck's, supra, at 768. Most cases do not meet the restrictive standard prescribed in *Heck's. Unbelievable, Inc., d/b/a Frontier Hotel & Casino,* 318 NLRB 847 (1995), enfd 118 F.3d 795 (DC Cir. 1997).

The NLRB considers several factors, including whether a respondent's defenses turn on issues of credibility and whether unusual or novel legal questions are raised, in determining whether a respondent's defenses are "debatable" rather than "frivolous." *Adam Wholesalers, Inc.*, 322 NLRB 313 (1996) (denying the union's request for legal fees because the respondent's defenses, though meritless, were not frivolous); *Heck's, supra,* at 768 (a respondent's defenses in a given case are "debatable," for example, where they are dependent upon resolutions of credibility); *Workroom For Designers, Inc.*, 274 NLRB 840, 842 (1985) finding that an award of legal fees and expenses would be inappropriate given the necessary credibility resolutions and the fact that several unusual legal questions were raised).

The NLRB also finds the success of some of the respondent's defenses significant. *See Houston County Electric Cooperative, Inc.*, 285 NLRB 1213, 1217 (1987) (reversing the ALJ's

grant of litigation expenses and finding that, although the respondent's behavior was unlawful, the Board's reversals of some of the ALJ's findings indicate that some of the respondent's defenses were not only not frivolous, but meritorious).

In the present matter, DAC's defenses are clearly "debatable" under the NLRB legal standard to avoid attorney fees and costs. First, both DAC's counsel and the General Counsel agreed, on the record at hearing, that this case involved issues of first impression for the NLRB related to the interpretation of Section 8(d). *See ALJ Decision* at 23. Clearly, unusual and unsettled legal issues were involved in the present matter which, pursuant to NLRB precedent, render DAC's defense "debatable" rather than "frivolous." Second, the ALJ found that the General Counsel failed to meet its burden of proving that DAC withdrew recognition from the Union and dismissed this complaint allegation. *See ALJ Decision* at 2. Obviously, some of DAC's defenses were not only not frivolous, but were meritorious.

The cases the Union cites are distinguishable from the present matter. *Care Manor of Farmington, Inc.*, 318 NLRB 330 (1995) involves a situation where, despite the union's uncontested election and certification as the exclusive bargaining representative of the respondent's employees, the respondent refused to bargain with the union or respond to the union's information request for more than four months. *Id.* The respondent had filed no objections to the election, nor did it allege any newly discovered evidence or special circumstances warranting re-examination of the union certification. Simply put, the respondent had no basis on which to challenge its obligation to bargain with the union and failed to present any witnesses in support of its position or raise any factual issues or issues turning on credibility at the hearing. *Id.*

Unlike *Care Manor*, DAC has a good-faith, debatable legal defense in the present matter. Indeed, both DAC counsel and General Counsel agree that the present matter involves an

unusual issue of first impression related to the interpretation of Section 8(d). *See ALJ Decision* at 23. Moreover, DAC clearly had a basis to challenge the Complaint as the ALJ found that the General Counsel failed to meet its burden of proving that DAC withdrew recognition from the Union and dismissed this allegation of the complaint. *See ALJ Decision* at 2.

In *Frontier Hotel & Casino*, the NLRB found it significant that the respondent's sole defense to the most serious complaint allegation of surface bargaining consisted solely of the respondent's only negotiator and counsel. *See Frontier Hotel & Casino, supra.* The NLRB noted that "whereas the typical case involves the good faith presentation of witnesses by counsel, the witness in this case was not only respondent's sole agent in bargaining, but also counsel in preparing and presenting much of the case. Therefore, he was in the unusual position of being able to determine from personal knowledge that the respondent's defense lacked credibility as well as merit." *Id.* at 861. The NLRB also found that, although two minor complaint allegations were dismissed, this was insufficient to defeat the union and General Counsel's motions for litigation expenses. *Id.*

Unlike *Frontier Hotel & Casino* which involved fairly settled legal issues relating to alleged surface bargaining, the present matter involved an unusual issue related to interpretation of Section 8(d). Also, unlike *Frontier Hotel & Casino*, Counsel who represented DAC at trial was in no way directly involved with the conduct giving rise to the unfair labor practice charges and resulting Complaint. Rather, this was the typical case where DAC's counsel did not have personal knowledge of the facts at issue. Additionally, contrary to *Frontier Hotel & Casino*, the ALJ dismissed a major allegation of the Complaint – that DAC withdrew recognition from the Union. *See ALJ Decision* at 2.

In *Alwin Manufacturing Co., Inc.,* 326 NLRB 646 (1998), *enf'd* 192 F3d 133 (DC Cir. 1999), the respondent refused to comply with a prior remedial obligation imposed by the NLRB.

Rather, it continued to enforce unlawfully implemented policies and, absent valid impasse, unilaterally implemented its final contract proposal embodying and continuing the illegally implemented terms. The NLRB found that the respondent demonstrated bad faith in its actions giving rise to the instant litigation by its failure to remedy the unfair labor practices of a prior case and thereby forcing the General Counsel and union to prepare and try a matter that concerns conduct that had previously been adjudicated. *Id.*

Unlike *Alwin*, there is no history of adjudicated continuing unfair labor practices in the present matter. Rather, DAC presented "debatable" defenses on an unusual legal issue that resulted in the ALJ dismissing an allegation of the Complaint.

III. Conclusion

As to the issues identified above, for the reasons stated above, the CP's Cross Exceptions have no merit.

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