No. 00-359

In the Supreme Court of the United States

LOCAL 702, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO AND INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 148, AFL-CIO, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD AND CENTRAL ILLINOIS PUBLIC SERVICE COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board permissibly concluded that an employer did not commit an unfair labor practice, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (3), by locking out union employees in response to "inside game" tactics during contract negotiations.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 215 F.3d 11. The decision and order of the National Labor Relations Board (Pet. App. 15a-262a) are reported at 326 N.L.R.B. 928.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 2000. On July 31, 2000, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 6, 2000, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 8(a)(1) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7 of the Act, 29 U.S.C. 157. The rights guaranteed in Section 7 include the right to bargain collectively and the right to engage in concerted activity for the purpose of collective bargaining. Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3), makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

This Court held in *American Ship Building Co.* v. *NLRB*, 380 U.S. 300 (1965), that employers do not violate Section 8(a)(1) or Section 8(a)(3) by locking out their employees in order to place economic pressure on the employees' union during a bargaining dispute. Such a lockout does not violate Section 8(a)(1) because "the employer's use of a lockout solely in support of a legitimate bargaining position is [not] in any way inconsistent with the [employees'] right to bargain collectively or with the right to strike." 380 U.S. at 310. Such a lockout also does not violate Section 8(a)(3) because "use of the lockout [in bargaining] does not carry with it any necessary implication that the employer acted to discourage union membership or otherwise discriminate against union members as such." *Id.* at 312. Therefore, when the employer's intention "is merely to bring about a settlement of a labor dispute on favorable terms, no violation of § 8(a)(3) is shown." *Id.* at 313.

In a companion case, *NLRB* v. *Brown*, 380 U.S. 278 (1965), the Court determined that there likewise is no per se violation when the employer, having lawfully locked out employees during a strike, takes the additional step of hiring temporary replacement workers. Hiring temporary replacement workers might discourage union membership, but that tendency is "comparatively remote," whereas the practice advances a "legitimate business end." *Id.* at 289. Any improper motivation of the employer therefore must be established by independent evidence, apart from the fact of the lockout and hiring of replacement workers. *Id.* at 288-289.

Based largely upon its holdings in *American Ship Building Co.* and *Brown*, the Court later articulated a two-step framework for analyzing alleged violations of Section 8(a)(3). See *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). The National Labor Relations Board (Board) may find a violation "if it can reasonably be concluded that the employer's discriminatory conduct was 'inherently destructive' of important employee rights"—regardless of the evidence concerning the employer's actual motivation. *Id.* at 34. If the employer engages in conduct that is discriminatory and "could have adversely affected employee rights to *some* extent," but is not so inherently destructive of employee rights that an unlawful motive can be presumed, then the employer can avoid a finding of a violation by proving a legitimate motive for its conduct. *Ibid.*[1]

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[1] The same principles apply to alleged violations of Section 8(a)(1) when, as is generally the case, the Section 8(a)(1) claim is derivative of a claim under Section 8(a)(3). See *NLRB* v. *Fleet-*

The present case involves the Board's application of those settled legal principles to an employer lockout during contract negotiations.

2. Respondent Central Illinois Public Service Company (CIPS) is a public utility that furnishes electricity and natural gas throughout central and southern Illinois. Some of CIPS's production, maintenance, and operational employees are represented by petitioner Local Union 702 of the International Brotherhood of Electrical Workers. Others are represented by petitioner Local Union 148 of the International Union of Operating Engineers. Pet. App. 17a.

CIPS's separate collective bargaining agreements with the two unions expired in June 1992. CIPS and the unions continued to negotiate new agreements. In March 1993, CIPS provided a "final" contract offer to each union. The employees in both unions voted to reject CIPS's offer. Rather than striking, however, the employees in both unions voted to remain on the job and pursue an "inside game" strategy designed to put pressure on CIPS to accede to the unions' bargaining demands. Pet. App. 2a-3a, 17a-18a. The inside game strategy consisted of refusals to work voluntary overtime and of "work-to-rule" tactics such as adhering strictly to all company rules, doing exactly and only what the employee had been told to do, reporting to work precisely on time, leaving work trucks at company facilities during non-duty hours (thus precluding responses to after-hours emergencies), presenting all grievances as a group, advising non-employees to report unsafe conditions, and advising customers of their rights to information from CIPS and to have their

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wood Trailer Co., 389 U.S. 375, 378 (1967); see also *Great Dane Trailers*, 388 U.S. at 30, 32.

meters checked annually for accuracy. *Id.* at 2a-3a. The union employees commenced their inside game campaign on April 24, 1993, and the parties continued to negotiate. *Id.* at 3a.

During the inside game campaign, CIPS's industrial relations manager, Charles Baughman, confronted a Local 702 representative with a union document outlining the work-to-rule activities and stated that CIPS "was not going to put up with" the activities. Later, after CIPS and Local 702 settled a particular grievance presented by union employees as a group, Baughman stated that he was "not going to tolerate these mass grievance meetings" in the future. Pet. App. 18a.

On May 20, 1993, CIPS locked out all employees in the bargaining units represented by the two unions. Baughman explained that CIPS's decision was a response to the unions' inside game activities. Pet. App. 18a-19a. In a form letter sent to Local 702 unit employees on May 20, CIPS's Chief Executive Officer elaborated on the reasons for the lockout, stating that:

> Based on the events of the last few weeks, I do not feel there is any other alternative. During this period, the Company has failed to receive what it is entitled to from employees represented by IBEW Local 702 in return for the wages and benefits which make it possible for you to provide your families with security and well-being. We have consistently encountered refusals to work overtime, excessive work-to-rule practices that have hurt productivity, and refusals to provide necessary information to supervisory personnel. These conditions are neither acceptable nor warranted.

Id. at 18a-19a. The form letter described the unsuccessful contract negotiations over the previous year,

and what CIPS had done to address union demands. *Id.* at 26a-27a. The letter stated that the unions' rejection of CIPS's latest contract proposal, together with an intensification of the inside game campaign, led to the lockout. The letter concluded:

> Like you, I am anxious to bring these issues to a successful conclusion and have you back at your jobs at the earliest possible date. I sincerely regret the disruption this decision will bring into your lives. My hope is that this aspect of our labor dispute is short-lived.

Id. at 27a. An attachment to the letter summarized the changes to the expired contract that CIPS and Local 702 had "agreed upon or which remain a part of the company's offer." *Ibid.* Employees represented by Local 148 received a similar form letter. *Ibid.*

After locking out the union employees, CIPS continued its operations without hiring replacement workers. Pet. App. 93a. CIPS continued to negotiate with both unions. On June 14, 1993, CIPS and Local 148 agreed on a new contract. After that agreement was signed on June 21, CIPS ended the lockout against Local 148, but the Local 148 employees refused to return to work as a show of support for Local 702. On August 25, 1993, CIPS ended the lockout of Local 702 employees, although CIPS and Local 702 did not reach agreement on terms for a new contract until January 1994. *Id.* at 19a.

3. The unions filed unfair labor practice charges with the Board, alleging in relevant part that the lockout violated Sections 8(a)(1) and 8(a)(3) of the Act. Pet. App. 3a. Following a hearing, an administrative law judge (ALJ) concluded that CIPS violated those provisions of the Act because the inside game campaign

constituted protected activity and the lockout was intended as punishment for that activity. *Id.* at 232a-248a.

The Board reversed the ALJ and dismissed the unions' claims regarding the lockout. Pet. App. 15a-35a. The Board assumed that the unions' inside game tactics were protected activity under Section 7 of the Act. *Id.* at 21a. But applying the analytic framework set out in *Great Dane Trailers*, *supra*, the Board concluded that CIPS's lockout did not violate Section 8. Pet. App. 21a-35a.

The Board first found, in accordance with *American Ship Building Co.*, that "the lockout in the instant case, standing alone, cannot be considered inherently destructive of employee rights." Pet. App. 23a-24a. The Board therefore proceeded to determine whether CIPS possessed a legitimate and substantial business justification for the lockout. *Id.* at 24a. Overruling the ALJ, the Board concluded that, even if the sole objective of the lockout had been to force the unions to cease their inside game activities, this was not an impermissible objective. The unions adopted their inside game strategy "in the midst of bargaining negotiations with the hope of securing agreement on their terms for new contracts." *Id.* at 25a. Under that circumstance, CIPS's decision to defend itself with a lockout, in order to force the unions to yield in the contract negotiations, was consistent with the principle "that the 'right to bargain collectively does not entail any "right" to insist on one's position free from economic disadvantage.'" *Ibid.* (quoting *American Ship Building Co.*, 380 U.S. at 309).

The Board's assumption that the inside game strategy constituted protected activity did not change the analysis. The Board noted that the employees' strike in

Brown was protected under Section 7, yet the *Brown* Court determined that the employer's responsive lockout and hiring of replacement workers did not violate Section 8. Pet. App. 25a-26a.

The Board further found that forcing the unions to end their inside game tactics was not the only objective of CIPS's lockout. Contrary to the ALJ, the Board determined that "a fair reading of" CIPS's May 20 letter to union employees showed that the goal of the lockout was not only to stop the inside game, but also to obtain a "resolution of issues that were dividing the parties in their bargaining negotiations." Pet. App. 26a. "The message conveyed," the Board found, was that CIPS "wanted employees to be allowed to review and consider its most recent contract proposals." *Id.* at 28a. The Board held that "application of economic pressure in support of [CIPS's] bargaining position constitutes a legitimate and substantial business justification for the lockout." *Ibid.* Moreover, there was no evidence to suggest that the lockout was intended to undermine the collective bargaining process; CIPS's good-faith contract negotiations and history of accepting the unions' representative status were in fact inconsistent with an inference of antiunion animus. *Id.* at 33a-35a.[2]

Board Member Liebman dissented. She agreed with the ALJ that the lockout was motivated by antiunion animus and was not justified by legitimate and substantial business objectives. Pet. App. 43a-66a.

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[2] The Board found that CIPS violated Section 8 by terminating health insurance coverage and failing to pay certain workers' compensation benefits during the lockout, and by failing to provide information Local 702 requested. These violations, however, did not support an inference that the lockout was motivated by unlawful considerations. Pet. App. 36a-40a. CIPS did not appeal the Board's findings that CIPS violated Section 8 in these respects.

4. The court of appeals denied the unions' petitions for review. Pet. App. 2a. The court found reasonable the Board's conclusion that CIPS's use of a lockout in response to the economic pressure of inside game tactics was justified. *Id.* at 8a. The May 20 form letters and other evidence also supported the Board's determination that CIPS legitimately sought to resolve the contract negotiations through the lockout. *Id.* at 8a-10a, 13a. Finally, the record did not contain other evidence establishing antiunion animus. *Id.* at 10a, 12a-14a.

Citing *American Ship Building Co.* and *Brown*, the court of appeals rejected the argument that the lockout was necessarily unlawful because it was intended, at least in part, to end the unions' assumedly protected inside game activities. Pet. App. 11a. The court of appeals also rejected the unions' claim that the Board had departed from its prior decisions. *Id.* at 11a-12a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with decisions of this Court or of any other court of appeals. Nor is there any inconsistency in the Board's own decisions. Further review therefore is not warranted.

1. Petitioners do not dispute (Pet. 9 n.6) that CIPS locked out its union employees at least in part to support CIPS's bargaining position in contract negotiations —without regard to the unions' inside game activities. Petitioners instead seek to distinguish CIPS's admittedly lawful use of the lockout to advance its bargaining position from CIPS's allegedly unlawful use of the lockout as "retaliation" (Pet. 13) for the unions' inside game strategy. Yet the Board rejected the ALJ's finding of retaliation (Pet. App. 240a, 242a) because it was incon-

sistent with the record evidence. *Id.* at 28a-35a. The Board explained that the inside game strategy was "an economic weapon used in support of the Unions' bargaining position and against [CIPS's] bargaining position." Insofar as the lockout was directed at ending the inside game strategy, it was an "economic weapon in response to the Unions' economic weapon." *Id* at 28a. No evidence suggested antiunion animus. *Id.* at 30a-35a.

The court of appeals upheld the Board's assessment of the record evidence (Pet. App. 10a, 12a-13a), and petitioners have not sought review on that issue. In fact, petitioners accept that "this Court does not sit to resolve evidentiary disputes." Pet. 10 n.6. This case accordingly is governed by the Court's holding in *American Ship Building Co.* that a lockout designed "merely to bring about a settlement of a labor dispute on favorable terms" is not an unfair labor practice. 380 U.S. at 313; see *Brown*, 380 U.S. at 284 (same).

The Board did not "privileg[e] employer lockouts in reprisal for employee protected, concerted activity." Pet. (i); see also Pet. 10-13. Rather, the Board, affirmed by the court of appeals, found that CIPS locked out its employees (1) to neutralize the unions' economic weapon in the contract negotiations, and (2) to resolve the contract issues that were dividing the parties. Pet. App. 25a-26a, 28a-30a. The lockout was "in opposition to the Unions' bargaining position," not in opposition to the employees' right to engage in protected Section 7 activity. *Id.* at 30a.

The Board specifically did not address "a situation where a lockout is in response to protected activity that is unrelated to a union's bargaining position." Pet. App. 30a n.18. Likewise, this case does not present a situation in which an employer's legitimate economic moti-

vation for a lockout was mixed with antiunion animus. Under the facts presented here, petitioners' recognition that "a true employer bargaining lockout is lawful" (Pet. 10 n.6) resolves the case.

2. As explained above, the Board properly applied both *American Ship Building Co.* and *Brown*. The Board's decision also is in accord with *Lodge 76, International Ass'n of Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976). In that case, the Court held that the Act preempted a State from interfering with employees' concerted refusal to work overtime during a bargaining dispute. In so ruling, the Court noted that the employer had legitimate economic tools of its own. For instance, even if the employees' refusal to work overtime constituted a protected Section 7 activity, the employer could have responded with a lockout in order to put economic pressure on the union. *Id.* at 152-153. The option suggested by the Court in *Machinists Lodge 76* is the very one CIPS implemented in this case.

Nor is there any conflict between the court of appeals' decision in this case and decisions of other courts of appeals. Because the Board determined that CIPS did not act with an antiunion motive, the retaliation cases cited by petitioners (Pet. 14-15, 17 n.9) are inapposite. As petitioners themselves suggest, those cases address "adverse employer action based on an improper motive." Pet. 14; see, *e.g.*, *Molon Motor & Coil Corp.* v. *NLRB*, 965 F.2d 523 (7th Cir. 1992) (discharge motivated by antiunion animus); *Movers & Warehousemen's Ass'n.* v. *NLRB*, 550 F.2d 962 (4th Cir.) (lockout motivated in part by desire to influence union's procedure for ratifying contract), cert. denied, 434 U.S. 826 (1977); *NLRB* v. *Zelrich Co.*, 344 F.2d 1011, 1014 (5th Cir. 1965) (Christmas bonuses withheld

to discourage membership in the union, and as retaliation for employees' majority vote for the union); see also *Reno Hilton Resorts* v. *NLRB*, 196 F.3d 1275, 1282-1285 (D.C. Cir. 1999) (contracting out motivated by antiunion animus).[3]

Finally, there is no inconsistency in the Board's own decisions—an issue that would not warrant a grant of certiorari in any event. Petitioners rely on Board determinations that "employer lockouts in reprisal for employees' concerted, protected activities do[] violate §§ 8(a)(1) and 8(a)(3)." Pet. 15. Yet the Board found in this case that CIPS's lockout was not a "reprisal," but rather an economic weapon used in support of CIPS's bargaining position and in opposition to the unions' chosen economic weapon. As the court of appeals noted (Pet. App. 11a-12a), that finding renders inapposite the Board precedents relied upon by petitioners (Pet. 15-16).

In *Highland Superstores, Inc.*, 314 N.L.R.B. 146 (1994), for example, the Board found a Section 8 violation where the employer punished union employees for handbilling in support of a consumer boycott, and "there [wa]s no merit to the Company's claim that it locked its employees out to pressure the Union at the bargaining table." *Id.* at 148. In *Riverside Cement Co.*, 296 N.L.R.B. 840 (1989), the Board found that a lockout was unlawful because the employer had not acted "to support a legitimate bargaining position," but rather, to enforce a new workplace rule that was inconsistent

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[3] For the same reason, this case is not governed by *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393 (1983). See Pet. 14 n.7. That case addressed situations in which "a discharge or other adverse action [was] based in whole or in part on antiunion animus." 462 U.S. at 401.

with the governing terms of employment. 296 N.L.R.B. at 842 & n.10. Finally, in *Thrift Drug Co.*, 204 N.L.R.B. 41 (1973), enforced, 491 F.2d 751 (3d Cir. 1974), the employer suspended only a lone employee whose picketing on behalf of the union had stopped deliveries, while taking no action against other picketing employees whose picketing did not have that effect. This singling-out was discriminatory and reflected that the employer's real concern was stopping the employee from picketing at the delivery entrance, not advancing the employer's position in the ongoing collective bargaining negotiations with the union. 204 N.L.R.B. at 41 n.2, 42-43. *Thrift Drug* thus did not present the question "whether an employer may or may not lock out its employees in a unit for the purpose of bringing economic pressure to bear on the employees to accept the employer's collective-bargaining position" (*id.* at 43), which is the issue in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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