

Supreme Court of the United States.

CHURCH HOMES, INC., Congregational d/b/a
Avery Heights, Petitioner,
v.

NATIONAL LABOR RELATIONS BOARD, Re-
spondent.

No. 08-1211.

March 27, 2009.

On Petition For A Writ Of Certiorari To The United
States Court Of Appeals For The Second Circuit

Petition for a Writ of Certiorari

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QUESTIONS PRESENTED

Since this Court's 1938 opinion in *N.L.R.B. v. Mackay Radio & Telegraph Co.*, employers have been free, consistent with the National Labor Relations Act, to permanently replace employees who are engaged in an economic strike. This right is generally unfettered and has only one narrow restriction. In 1964, the National Labor Relations Board (the "Board") held that employers may not exercise this right for an "independent unlawful purpose." *Hot Shoppes, Inc.*, 146 N.L.R.B. 802 (1964). Until this case, the Board has never found an employer to have had such a motive. In this case, although employers are not required to notify a union of their hiring plans, the Court of Appeals for the Second Circuit held that the mere fact that the employer did not affirmatively give the union advance notice that it was hiring permanent replacements established that the employer had an independent unlawful motive. As the Board itself observed, the decision of the Court of Appeals effectively relieved the General Counsel of his burden of proof. Such a decision is unreasonable and arbitrary given the record in this case and presents the fol-

lowing questions:

1. Did the Board unlawfully shift the burden of proof from the General Counsel by holding that it would find Respondent acted for an independent unlawful purpose unless Respondent proved that it had a legitimate reason for not disclosing its hiring plans to the Union?
2. Did the Board err when it disregarded as hearsay the testimony of Dr. Miriam Parker as to why Respondent did not inform the union of its staffing plans and required: Respondent to produce actual evidence of the Union's potential for disruption?
3. Did the Board err, in light of the record, when it found that Respondent hired permanent replacements for an independent unlawful purpose?

*III PARTIES TO THE PROCEEDINGS

The parties to this proceeding are Petitioner Church Homes, Inc., Congregational d/b/a Avery Heights and Respondent the National Labor Relations Board. In addition, the New England Health Care Employees Union, District 1199, AFL-CIO, which represents certain employees of Church Homes, Inc., participated in the underlying appeal as an intervenor.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Church Homes, Inc., Congregational hereby states that it is a Connecticut non-stock corporation and is qualified as a not-for-profit corporation under [Internal Revenue Code Section 501\(c\)\(3\)](#). Petitioner has no parent corporation nor is there any publicly held corporation that holds ten percent or more of its stock.

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*1 PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully asks the Court to issue a writ of certiorari to review the final judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS AND JUDGMENTS BELOW

Following an economic strike, Intervenor New England Health Care Employees Union District 1199 (herein Union) filed a charge with Respondent National Labor Relations Board (herein “the Board”) claiming that Petitioner Church Homes,

Inc. d/b/a Avery Heights (herein “Avery”) engaged in certain unfair labor practices. The Board issued a complaint and rendered its original Decision and Order on December 16, 2004, which is reported at 343 N.L.R.B. 1301, and reprinted in the Appendix at App. 43-190. The Union appealed. The Court of Appeals for the Second Circuit granted the Union's petition for review and remanded the case to the Board for further review. *New England Health Care Employees Union v. NLRB*, 448 F.3d 189 (2d Cir. 2006), which is reprinted in the Appendix at App. 24-42. The Board issued its Supplemental Decision and Order in this matter on June 29, 2007, which is reported at 350 N.L.R.B. 214, and which is reprinted in the Appendix at App. 6-23. In its Supplemental Decision, the Board reversed itself and held that Avery had engaged in an unfair labor practice in violation of *229 U.S.C. § 158(a)(1) and (3). Avery then timely petitioned the Court of Appeals to review the Board's Supplemental Decision. The Board also cross-petitioned for enforcement of the Board's Supplemental Order. On December 29, 2008, the Court of Appeals denied Avery's petition and granted the Board's cross-petition for enforcement, which is unofficially reported at 2008 U.S. App. LEXIS 26600, and which is reprinted in the Appendix at App. 1-5.

STATEMENT OF JURISDICTION

The Court of Appeals had jurisdiction under 29 U.S.C. § 160(f) and issued a final judgment on December 29, 2008. This petition is timely filed under Supreme Court Rule 13(1), and this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 158 Unfair Labor Practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer -

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

***3** (3) 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: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement:

Provided further, that no employer shall justify any discrimination, against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated ***4** for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

29 U.S.C. § 160 Prevention of Unfair Labor Practices

(c) Reduction of testimony to writing; findings and orders of Board

The testimony taken by such member, agent, or agency or the Board shall be reduced in writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And *provided further*, That in determining whether a complaint shall issue alleging a ***5** violation of [subsection \(a\)\(1\) or \(a\)\(2\) of section 158](#) of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such

member, or such judge or judges as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

***6** (e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in [section 2112 of Title 28](#). Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such addi-

tional ***7** evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in [section 1254 of Title 28](#).

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court ***8** of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in [section 2112 of Title 28](#). Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall

have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

STATEMENT OF THE CASE

Introduction

Located in Hartford, Connecticut, Petitioner Church Homes, Inc. d/b/a Avery' Heights (herein "Avery") is home to approximately 500 older adults, some of whom require nursing assistance. *Church Homes I*, 343 N.L.R.B. 1301, 1316 (App. 45, 106). For purposes of collective bargaining, the New England Health Care Employees Union, District 1199 AFL-CIO *9 (herein the "Union") represents the service and maintenance employees at Avery. *Id.* at 1301. (App. 45, 107). Over the years, Avery and the Union have negotiated several collective bargaining agreements.

During the 1995 negotiations, the Union demanded that Avery meet its "pattern" terms and conditions, while Avery fought to get off the pattern. As a result, the Union engaged in an economic strike for approximately five weeks. 343 N.L.R.B. at 1318 (App. 108). Ultimately, much to the Union's disappointment, a settlement was reached in December 1995 and the Union signed a four-year contract that was off the Union's pattern. *Id.* (App. 108); Tr.^[FN1] at pp. 70, 181-183 (App. 196-197, 201-205). As Union President Jerome Brown explained the deal, Avery "broke the pattern in substantial ways in 1995." Tr. at pp. 70, 181-183. *Id.*

FN1. Transcript of hearing before Administrative Law Judge, hereinafter "Tr."

As 1999 approached, the Union intended to get Avery back on the pattern. In 1998, a year before

Avery's labor contract even expired, Union President Brown warned Thomas Cloherty, Avery's labor attorney: "You know, it'll be different this time, the economy's different. It'll be harder to get people to come to work or come back to work." Tr. at p. 905 (App. 223-224).

There was never any allegation in this case that Avery bargained in bad faith. *10343 N.L.R.B. at 1319 (App. 112). In September 1999, Avery and the Union began negotiations for a new collective bargaining agreement and met numerous times prior to the strike. 343 N.L.R.B. at 1318-1319 (App. 111-112). At each of those meetings, the Union's unyielding position was repeatedly and clearly set forth: Avery must accept the Union's "pattern" or face a long economic strike. Tr. at pp. 910, 916, 920, 924, 926 (App. 225, 226-230).

Avery refused the Union's demands and a strike began on November 17, 1999. 343 N.L.R.B. at 1305, 1318 (App. 59, 111). During the first few weeks of the strike, Avery staffed the facility with a combination of non-bargaining unit employees performing mandatory twelve-hour shifts five or six days per week, volunteers, and temporary replacement workers. 343 N.L.R.B. at 1305 (App. 59); Tr. at pp. 1057-1064 (App. 223-241).

With regard to temporary employees, Avery used employees from agencies and workers hired directly on a temporary basis. Tr. at pp. 1057-1064 (App. 232-241). Not only were temporary employees costly, they were not as efficient as permanent employees, required more supervision, and, with high turnover, did not offer continuity of care to the residents. Tr. at pp. 1060-1064 (App. 235-241).

Volunteers were an "ephemeral" and limited staffing resource. Tr. at p. 1061 (App. 236-237). With limited training and many other activities in their lives, volunteers were not a steady and reliable source of workers. *Id.*

*11 This temporary system of covering for the employees on strike was just that - a temporary sys-

tem. By the end of November and the beginning of December, Avery began being concerned about the efficacy of these temporary arrangements. Tr. at pp. 1066, 1198-1204 (App. 242-243, 255-263).

Despite the strike, neither side made much movement in their positions during negotiations. Around December 2, 1999, Mr. Brown again warned Mr. Cloherty:

You know, this isn't going to be like the last time when people came back to work.... This is going to be a long strike. It'll go to New Year's and well beyond.

Tr. at p. 930 (App. 230-232); *see also* Tr. at p. 209 (App. 210-211). As Mr. Brown explained:

[W]e expected that the strike would last a while if the positions didn't change. And we expected that because the workers were out and they were determined, and I was trying to convey to him the mood of the employees who were really outraged at the fact that they were significantly behind other workers, and outraged that the proposals, that if I wanted to settle the strike on the conditions that Church Homes had offered, I would not have been able to have the members vote for it. I mean I was trying to convey that to him, that they were really a determined group of people here who felt that their conditions needed improvement, substantially, and that *12 this would go on if there were no change in either parties' position.

Tr. at pp. 101-102 (App. 197-200).

Reasonably believing that the strike would be lengthy unless it capitulated to the Union's demands, Avery began exploring the possibility of hiring permanent replacements in December. Tr. at pp. 1064-1065, 1193 (App. 240-242, 252-253). By the middle of the month, Avery had decided to change its staffing and to hire permanent replacements. 343 N.L.R.B. at 1305 (App. 59). Although it was anxious to have a stable workforce, Avery was nevertheless selective in the people it hired and did not hire all the people who were referred by the agencies. Tr. at pp. 267-275, 1067 (App. 212-222,

243-244).

Avery did not announce to the Union that it was planning to permanently replace striking workers. 343 N.L.R.B. at 1305, 1327 (App. 59, 151). Based on the Union's statements, Avery officials testified that they did not believe that such information would cause the Union to abandon the strike or even cause the return of a significant number of strikers. Tr. at pp. 101-102, 1066, 1143, 1205-1212 (App. 197-200, 242-243, 250-251, 263-272).

In addition, Dr. Miriam Parker, Avery's Administrator, testified that she believed that, if notified, the Union would interfere with Avery's ability to recruit replacement workers, and thus jeopardize Avery's ability to withstand the strike. Tr. at pp. 1068-1069 (App. 244-247). Dr. Parker testified that in the first *13 month of the strike, she received numerous reports of violence and intimidation attributed to the Union. Tr. at pp. 1068-1069. *Id.* These included reports of rocks being thrown at vehicles; eggs being thrown at vehicles and at least one temporary employee; a Union organizer spitting in a social worker's face; a Union organizer threatening a supervisor and the supervisor's daughter, telling the supervisor: "I know where you live. I've seen your daughter. I know what time she gets there;" slashing tires; and vandalism of the offices of a provider of temporary employees by Union Vice President Almena Thompson and some 40 other Union members. Tr. at pp. 1069-1071, 1164 (App. 245-249, 251-252). In the face of these reports, Avery believed that the Union would likely try to interfere and make hiring permanent replacements significantly more difficult if the Union was told of the plan. Tr. at pp. 1068-1070 (App. 244-248). As Union President Brown acknowledged, a major purpose in any strike is to discourage replacement workers of any kind and to make it more difficult for the employer to recruit and retain replacements. Tr. at pp. 200-204 (App. 205-210).

While Avery did not announce its staffing plans to the Union in advance, on January 3, 2000, in response to an inquiry of the Union, Avery did in-

form the Union that over 100 permanent replacement employees had been hired. 343 N.L.R.B. at 1305, 1319 (App. 60, 113). Despite the fact that Avery was still in the midst of recruiting replacement employees and had numerous applications to be processed, *14 Avery voluntarily agreed to a moratorium on hiring permanent replacement employees. 343 N.L.R.B. at 1329 (App. 158-159). After striking for two more weeks, the Union made an unconditional offer to return to work and ended its strike on January 20, 2000. *Id.* Subsequently, strikers were recalled to vacant positions as they became available. *Id.* All strikers have been recalled, and the Union remains the representative of the employees at Avery.

ARGUMENT FOR GRANTING THE PETITION

Introduction

For nearly seventy years, employers have had the broad right to respond to a union's economic strike by hiring permanent replacement employees. *N.L.R.B. v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345 (1938). Moreover, employers have never been required to disclose their hiring plans in advance to the union. The Board has specifically held that advance notice was not required. 343 N.L.R.B. at 1306 (App. 65-66). As the Board recognized in this case, just as the right to strike is a powerful tool available to a union to force an employer to yield to its demands, the right to hire permanent replacement employees is a powerful economic response available to employers to withstand a union's strike. *Id.* at 1306-1307 (App. 65-71). In this case, the Board, on remand from the Court of Appeals, materially interfered with that right by basing its finding of an *15 independent unlawful motive solely on the fact Avery did not disclose its plans to the Union, which it had no duty to do. This case gives the Court the opportunity to clarify an employer's right to hire permanent replacement employees and to address what evidence the General Counsel of the National Labor Relations Board must produce to establish that an employer has hired permanent replacement employees for an in-

dependent unlawful purpose.

The only restriction on an employer's right to hire permanent replacement employees during an economic strike is that an employer may not hire replacement employees for an "independent unlawful purpose." *Hot Shoppes, Inc.*, 146 N.L.R.B. 802, 805 (1964). What constitutes an independent unlawful purpose, however, has never been addressed by the Board or the courts. In *Hot Shoppes, Inc.*, in the face of the union's threatened strike, the employer specifically told its employees that if they went on strike, they would be permanently replaced. *Id.* at 803. Even before the strike, the employer began to process applications for permanent replacement employees. *Id.* Upon review of the employer's aggressive conduct, the Trial Examiner held that the employer had committed an unfair labor practice by hiring strike replacements because it acted pursuant to a "contrived scheme" designed "to penalize various of the strikers and to defeat their rights to reinstatement...." *Id.* at 835. The Board disagreed, rejected the Trial Examiner's findings, and held that, absent an "independent unlawful purpose," employers have "a legal right to *16 replace economic strikers at will," and dismissed the complaint. *Id.* at 805.

Over the past forty years, neither the Board nor the courts have required an employer to justify its decision to hire permanent replacement employees: We, however, disagree with the Trial Examiner's premise that an employer may replace economic strikers only if it is shown that he acted to preserve efficient operations of his business. The Supreme Court's decision in *Mackay Radio & Telegraph Company*, and the cases thereafter, although referring to an employer's right to continue his business during the strike, state that *an employer has a legal right to replace economic strikers at will*. We construe these cases as holding that the motive for such replacements is immaterial, absent evidence of an independent unlawful purpose ...

... There are no cases in this Court that require a different conclusion. Indeed, as indicated above, in

Hot Shoppes, Inc., supra, the Board read *N.L.R.B. v. Mackay Radio & Telegraph Co.* [citation omitted] as holding that *the motive for hiring permanent replacements is irrelevant.*

Belknap, Inc. v. Hale, 463 U.S. 491, 504 n.8 (1983) (emphasis added) (internal citations omitted) (quoting *Hot Shoppes, Inc.*, 146 N.L.R.B. 802 (1964)). More recently, the Board affirmed its position on this issue in *Choctaw Maid Farms*, 308 N.L.R.B. 521, 528 (1992):

*17 If striking employees are economic strikers, the law allows an employer to hire permanent replacements. What [an employer's] state of mind might be in exercising that right is irrelevant.

I. The Board Improperly Shifted the Burden of Proof to Avery.

As the prosecutorial arm of the Board, the General Counsel bears the burden of proving, by a preponderance of the evidence, that a respondent has violated the Act and committed an unfair labor practice. 29 U.S.C. § 160(c); see *N.L.R.B. v. Transp. Mgmt. Corp.*, 462 U.S. 393, 401 (1983) (General Counsel must prove the elements of an unfair labor practice). In this case, Avery had the right to hire permanent replacement employees for any reason unless the General Counsel proved by a preponderance of the evidence that Avery hired such employees for an unlawful purpose. In this case, upon remand from the Court of Appeals, the Board majority reluctantly accepted the Court of Appeals' decision which effectively relieved the General Counsel of his burden of proof and imposed a presumption of unlawfulness upon Avery.

The General Counsel attempted to prove that Avery had an independent unlawful motive for hiring permanent replacement employees by offering: (1) evidence that Avery misrepresented its hiring plans; (2) a memorandum from Church Homes' President to its Board; and (3) evidence that Avery chose not to tell the Union of its hiring plans. *18343 N.L.R.B. at 1305-1308, 1333 (App. 61-66, 176-180). The Administrative Law Judge and the

Board rejected the General Counsel's claim that Avery had made any misrepresentations. *Id.* at 1331 (App. 167-168). The Board also rejected the Administrative Law Judge's characterization of the memorandum of Church Homes' President, Norman Harper. *Id.* at 1307 (App. 62-63, 67-68). These issues were not challenged. Finally, the Board also declined to examine Avery's decision not to disclose its hiring plans because Avery had no duty to disclose its plans. *Id.* at 1306 (App. 63-34). Although agreeing that Avery did not have a *duty* to disclose its hiring plans, the Court of Appeals held that Avery's silence could still be evidence of an unlawful motive and remanded the matter to the Board for further consideration.

Upon remand, the Board construed the Court of Appeals' decision as mandating a finding that Avery unlawfully hired its replacement employees unless Avery proved a lawful reason for its nondisclosure. Never before has such a burden been placed on an employer. In its Supplemental Decision, a majority of the Board, expressly stated that they understood the Court of Appeals' decision to "effectively relieve[] the General Counsel of its burden of establishing unlawful motive and improperly shifted the burden of proof to the employer to establish that it acted with a lawful motive." *Church Homes II*, 350 N.L.R.B. 214, 215 n.6 (App. 12-13). The majority of the Board disagreed with such a holding, but felt they were bound to do so by the court's decision. *Id.* With that understanding, the Board focused only upon Avery's *19 decision not to disclose its hiring plans and ignored the rest of the record. Without commenting on the other record evidence that it had previously considered, the Board held that Avery had not sufficiently proven a lawful reason for its nondisclosure and concluded that Avery acted for an independent unlawful motive. In doing so, the Board ignored substantial evidence in the record and acted unreasonably and arbitrarily.

In particular, without any explanation, in its Supplemental Decision, the Board failed to consider the

text of Mr. Harper's memorandum and its prior interpretation. Rather, the Board simply noted that Mr. Harper did not mention Avery's concerns about the Union disrupting its hiring plans in his memorandum and concluded that the memorandum "undercuts" Avery's position. 350 N.L.R.B. at 216 (App. 15). Not only is such a conclusion contradictory to the Board's prior interpretation, it is arbitrary and unreasonable given the language of the memorandum. The relevant inquiry is whether Mr. Harper's memorandum suggests that Avery sought to displace the Union as the bargaining representative of its employees. And it does not.

While the fact that Avery bargained with the Union in good faith at all times during the 1999 negotiations may not be dispositive of its motive in hiring replacement employees, it also is some evidence that Avery was not pursuing a course of conduct to displace the Union. This is especially true since none of Avery's proposals ever sought to challenge the longstanding union security clause in the *20 labor contract, and there was no evidence Avery encouraged employees to decertify and "oust" the Union. 343 N.L.R.B. at 1307 (App. 66-68). On remand, the Board simply held that lawful bargaining conduct was "insufficient to negate the court's inference of an independent unlawful purpose...." 350 N.L.R.B. at 216 (App. 16). The Board's failure to recognize that this fact is inconsistent with a finding of unlawful motive, but is consistent with a lawful motive, and is unreasonable, especially when considered in light of the entire record.

It is also undisputed that Avery voluntarily agreed to stop hiring permanent replacements in January, several weeks before the Union made an unconditional offer to return to work. If Avery was truly set on displacing the Union, it would not have stopped hiring permanent replacements. If its goal was to eliminate the Union, Avery would have continued hiring replacements until it could no longer do so. Nevertheless, on remand, the Board held that this fact did not "establish the absence of an improper motive...." 350 N.L.R.B. at 216 (App. 16-17).

Again, the Board's failure to recognize that this fact is inconsistent with a finding of unlawful motive, but is consistent with a lawful motive, and is unreasonable, especially when considered in light of the entire record.

In sum, other than Avery's non-disclosure, there is absolutely *no* evidence that could suggest that Avery hired permanent replacement employees to displace the Union as the bargaining representative. *21 In contrast, the record does contain evidence, which taken as a whole, supports a finding that Avery had a genuine belief that if the Union learned of Avery's decision, the Union would disrupt Avery's hiring process and jeopardize Avery's ability to hire permanent replacement employees and to endure an indefinite strike. Therefore, the General Counsel did not satisfy its burden and there is no substantial evidence in the record that Avery acted for an independent unlawful reason.

On appeal, despite the express language of the Board majority, and without any justification, the Court of Appeals held that the Board placed the burden of proof on the General Counsel. 2008 U.S. App. LEXIS 26600 at *5-6. As a consequence, despite the other evidence in the record, the Court of Appeals approved the Board's finding that Avery had an independent unlawful motive due to its decision not to disclose its plans, which it had no duty to disclose. *But see* 29 U.S.C. § 160(e) and (f) (Board is to base its decisions on "substantial evidence on the record considered as a whole."). In presuming that Avery acted unlawfully and placing the burden of proof on Avery, the Board acted unreasonably and arbitrarily, and its order should not have been enforced.

***22 II. The Board's Rejection of Evidence of Avery's Lawful Reason of Its Secrecy Was Unreasonable and Arbitrary.**

Avery did offer undisputed evidence at the administrative hearing as to why it did not disclose its plans while it was recruiting replacement employees. The Board, however, compounded its error by refusing

to consider evidence of Avery's Administrator's state of mind in deciding to maintain secrecy.

At the hearing, Dr. Parker explained that she did not disclose Avery's hiring plans in advance to the Union because she had heard reports of the Union engaging in violent and threatening conduct, which she believed could disrupt Avery's ability to hire replacements. Tr. at pp. 1068-1070 (App. 244-248). The Board, however, failed to examine Dr. Parker's undisputed testimony, mischaracterizing it as hearsay. Moreover, the Board failed to consider Union President Brown's concession that, as a general practice, the Union endeavors to make it difficult for employers to hire replacement workers. Tr. at pp. 200-204 (App. 205-210). Accordingly, the Board's conclusion that Avery failed to offer a lawful reason for its non-disclosure is unreasonable and arbitrary in light of the whole record.

In this case, after the Union was on strike for several weeks, and with the prospect of a lengthy strike, Dr. Parker, who was responsible for Avery's operations, first raised the subject of maintaining operations with permanent replacement employees. *23 Tr. at pp. 1066, 1196, 1249 (App. 242-243, 254-255, 272-273). As he testified, Mr. Harper was also interested in getting "stability to the organization by having a critical mass of employees." Tr. at p. 1283 (App. 273-274). Mr. Harper did not consider using permanent employees as a threat to the Union because he believed the Union would not let the workers "back for a long period of time." Tr. at p. 1284 (App. 275-276).

Dr. Parker testified that prior to hiring any permanent replacement employees, she had received reports of the Union engaging in violent and threatening conduct. Specifically, Dr. Parker testified that she had heard reports of:

[R]ocks thrown at vehicles, eggs thrown at [Avery's] vans and also thrown at a temporary employee at a nurse a temporary nurse in a commuter parking lot. One of [Avery's] social workers who was working as a driver was spit at in the face by a union organizer. One of [Avery's] supervisors while

she was waiting to exit was told by a union organizer I know where you live. I've seen your daughter. I know what time she gets there. It was essentially a threat to her daughter. Tires were slashed. Vendors tires were slashed....

... There was an incident that occurred on December 9th. A number of union members, strikers and Almena Thomson [Union Vice President], went to the office of Star Med who was one of [Avery's] providers [of nursing staff] just totally 40 people in mass went *24 to the office and essentially threatened her and vandalized the office of Star Med.

Tr. at pp. 1069-1070 (App. 245-248). Accordingly, Dr. Parker testified that she believed that if the Union had advanced notice of Avery's plans, the Union would have disrupted Avery's recruitment and, without a permanent workforce, Avery might not be able to weather the Union's strike. Tr. at pp. 1068.-1070 (App. 244-248). Indeed, Union President Brown conceded as much during the hearing and stated that the Union's mission in a strike is to discourage replacement workers and make it difficult for the employer to recruit workers. Tr. at pp. 200-204 ,(App. 205-210). Accordingly, it was not material whether the Union actually engaged in such conduct, but whether Dr. Parker had a reasonable belief concerning possible disruption. The Board, however, mischaracterized Dr. Parker's testimony as hearsay and did not consider it.

The federal rules of evidence define hearsay as an out-of-court statement "offered in evidence to prove the truth of the matter asserted." *Fed. R. Evid. 801*. Testimony is not "hearsay" if it is offered to show the context in which the parties had been acting, or to show a party's motive or intent for behavior. *Ryder v. Westinghouse Elec. Corp.*, 128 F.3d 128, 134 (3d Cir. 1997); *Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419, 1434 (10th Cir. 1993); *United States v. Oguns*, 921 F.2d 442, 448-449 (2d Cir. 1990). The statements offered by Avery that are at issue in this case were not offered to prove the actual truth of the Union's *25 conduct,

but to show Avery's belief and motivation for not choosing to tell the Union of its plans to hire replacement employees. Accordingly, Dr. Parker's testimony should not have been dismissed as hearsay, but should have been given considerable weight.

This Court rejected a similar action by the Board over ten years ago in *Allentown Mack Sales & Serv., Inc. v. N.L.R.B.*, 522 U.S. 359 (1998). In that case, the Board needed to determine whether the employer had a "good faith doubt" as to employees' support of a union in order to permit the employer to poll employees. As part of its evidence, the employer presented testimony from a manager who was told that "the entire night shift did not want the Union." *Id.* The administrative law judge and the Board refused to credit the testimony because: "[the employee who made the report to the manager] did not testify and thus could not explain how he formed his opinion about the views of his fellow employees." *Id.* at 369. This Court, however, recognized

it is not the fact of disfavor that is at issue (the poll itself is meant to establish that), but rather the existence of a reasonable uncertainty on the part of the employer regarding that fact. On that issue, absent some reason for the employer to know that [the employee] had no basis for his information, or that [he] was lying, reason demands that the statement be given considerable weight.

Id. at 369-370.

*26 Contrary to the Board's and the Court of Appeals' suggestion, it has never been Avery's burden to prove that the Union actually engaged in acts of violence or that the Union would have actually disrupted Avery's hiring plans if the Union was informed. Rather, at most, it was Avery's burden to show that it had a reasonable belief that the Union might have done so, such that its nondisclosure was not suggestive of an unlawful motive. It was the General Counsel's burden to show by a preponderance of the evidence that Avery did not have such a belief and that Avery acted in fact for an unlawful

motive. Neither the General Counsel nor the Union offered any evidence to discredit Dr. Parker's belief or to suggest that Avery hired permanent replacements to remove the Union as the bargaining representative. For example, neither the Board nor the Union called Union Vice President Almena Thompson or anyone else to refute Dr. Parker's testimony. Indeed, counsel for the General Counsel did not even cross Dr. Parker as to why she did not give the Union advance notice of Avery's hiring plans. Counsel for the Union did cross Dr. Parker as to her concerns and she further elaborated that some of the incidents were on the picket line, but the others reportedly occurred at various locations: Some were picket line incidents. Some were commuter lot incidents. Some incidents such as a woman's gas tank being filled with sugar and car engine or top being painted red those occurred at residences. So the incidents occurred in the picket line, in the commuter lot, at people's homes, people *27 being followed from work to their homes, people being followed from their homes to work. There were a variety of incidents of threatening behavior. I believe there was one arrest of violence with one of our vendors that was reported to the police and an arrest was made.

Tr. at pp. 1208-1209, 1211-1212 (App. 267-272). Accordingly, the Board's rejection of Dr. Parker's testimony in its Supplemental Decision is unwarranted and unreasonable.

Given the fact that the Court of Appeals remanded the case back to the Board to consider whether Avery's failure to give advance notice to the Union was evidence of an unlawful motive, it was improper for the Board to summarily reject Dr. Parker's testimony as hearsay and not to consider Mr. Harper's testimony that he believed a "critical mass" of replacements was needed to operate for the longterm. Furthermore, the Board's failure to consider the entire record, including its prior evaluation of the evidence, and its improper dismissal of Dr. Parker's testimony, render the Board's Supplemental Decision defective as unreasonable and ar-

bitrary.

III. The Board's Finding That Avery Hired Permanent Replacement Employees For an Independent Unlawful Purpose Is Unreasonable and Arbitrary.

Since 1938, employers have had a broad right to hire permanent replacement employees in response to *28 a union's economic strike. In 1964, the Board held that employers may generally exercise their right to hire permanent replacement employees at will, except that they may not do so for "an independent unlawful purpose." *Belknap*, 463 U.S. at 504 n.8; *Hot Shoppes*, 146 N.L.R.B. at 805. Over the past four decades since the *Hot Shoppes* decision, the Board, however, has never elaborated upon what constitutes an "independent unlawful purpose." Not only has the Board never before held that an employer has violated the Act by hiring permanent replacement employees for an independent unlawful purpose, the Board has never held that simply failing to disclose hiring plans can presumptively establish an independent unlawful motive.

Recently, in *Supervalu, Inc.*, 347 N.L.R.B. No. 37, 2006 NLRB LEXIS 244 (June 13, 2006), the employer permanently replaced most of the striking employees the day after the union went on strike. *Id.* at *4-7. Despite the fact that the employer acted immediately to replace most of its workforce by promoting parttime employees to full-time positions and hiring new employees, the Board held that the General Counsel had not shown that the employer had acted for an "independent unlawful purpose." *Id.* at *86-88.

As the Board has previously recognized in this case, during labor negotiations parties often engage in "economic warfare":

To win that battle, the Union deployed its strike weapon in the midst of bargaining *29 negotiations, with the hope of securing agreement on its terms for a new contract.

In essence, [Avery] had two options. It could either capitulate the Union's demands, or it could employ

economic weapons of its own [including hiring permanent replacement employees.]

343 N.L.R.B. at 1307 (App. 69). Accordingly, the Board originally observed an important distinction "between seeking to prevail over the Union and seeking to oust the Union as bargaining representative." *Id.* (App. 66-67). The General Counsel and the Union argued that Avery hired permanent replacements to eliminate the Union. In reviewing the record, in its original decision, the Board properly found that Avery had acted to prevail over the Union in the labor dispute and not to eliminate the Union as the bargaining representative. In its Supplemental Decision, after shifting the burden of proof to Avery, but without any evidence that Avery had acted to eliminate the Union, as opposed to withstanding the strike, the Board unreasonably and arbitrarily reversed itself and concluded that Avery had violated the Act.

The Board must base its decisions on "substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e) and (f). In an attempt to prove an independent unlawful purpose, the General Counsel and the Union relied upon four pieces of evidence: (1) Norman Harper's alleged statement to Union President Jerome Brown concerning Avery's intentions *30 regarding permanent replacement employees; (2) Avery's failure to notify the Union before hiring permanent replacement employees; (3) Gayle McAllister's alleged statement to Scott Cohen concerning the secrecy of Avery's hiring; and (4) Harper's statements in his December 31, 1999 memorandum to the Church Homes Board of Directors. 343 N.L.R.B. at 1305-1308, 1333 (App. 61-69, 176-180).

As to the first piece of evidence, the Administrative Law Judge and the Board rejected the testimony of Union President Brown concerning his alleged conversation with Mr. Harper regarding Avery's intentions of hiring permanent replacements. Mr. Brown testified that Mr. Harper told him that Avery had no intention of hiring permanent replacements. 343 N.L.R.B. at 1330, 1331 (App. 163-168). Mr. Harper

denied any such statement. *Id.* Upon review of the competing evidence, the Administrative Law Judge found Mr. Harper's denial more credible than Mr. Brown's statement and neither the General Counsel nor the Union took exception to this finding. *Id.* at 1331 (App. 167-168).

With respect to the three other pieces of evidence, the Board held that they, either separately or in any combination, did not establish an unlawful motive in hiring permanent replacement employees. 343 N.L.R.B. at 1306 (App. 63). The Board began its original analysis by reaffirming its long standing precedence that an employer is not obligated to inform a union of its plans to hire permanent replacement employees. *Id.*; *31 *Armored Transfer Serv., Inc.*, 287 N.L.R.B. 1244, 1251 n.21 (1988); *American Cyanamid Co.*, 235 N.L.R.B. 1316, 1323 (1978). Because Avery did not have an obligation to disclose to the Union its intentions to hire permanent replacements, the Board held that the fact that Avery did not inform the Union of its hiring plans and the fact that Cohen testified that a manager at Avery asked him to keep the hiring "hush-hush," did not prove an unlawful purpose. *Id.* at 1306 (App. 63-64).

As to the fourth piece of evidence the General Counsel and the Union relied upon in an attempt to prove an unlawful purpose, the Board closely examined Mr. Harper's December 31 memorandum and reasonably concluded that it did not demonstrate an unlawful purpose. On December 31, 1999 Mr. Harper wrote to members of Avery's Board of Directors stating in relevant part:

As a well-executed surprise event the day before Christmas, we began to permanently replace striking workers at Avery. These new employees have some distinct advantages: they are very pleased to have the job for the money that we currently pay; they have fine work ethics; they want to learn; they are less expensive than temporary workers; and they bring predictable stability for the future, when the strike is over, because they say they want to work here for a long time. So far, we have hired

104 permanent replacements at Avery, replacing 60% of those on strike. If Mr. Brown refuses to seriously negotiate in good faith, we plan to add one or *32 more permanent replacements each day. We have them in a real bind at Avery.

Id. at 1305, 1330 (App. 60, 161-163, 191-195).. The Administrative Law Judge relied extensively on Mr. Harper's memorandum and referred to it as a "smoking gun." *Id.* at 1334 (App. 180). The Board, however, rejected the Administrative Law Judge's interpretation, found that "[t]he evidence is the case, including Harper's memorandum, simply does not establish some kind of nefarious scheme to punish striking employees by hiring permanent replacements," and concluded that the memorandum reflected Avery's desire to gain the advantage in the ongoing contract negotiations insofar as being able to withstand the strike in order to avoid capitulating to the Union's demands. *Id.* at 1307 (App. 66-69). As stated in the memo, and as the Board originally recognized: Avery was hiring permanent replacements because the Union "refuses to seriously negotiate in good faith...." *Id.* Accordingly, by its express terms, the memorandum states that Avery sought to have the Union bargain in good faith, which is antithetical to an intent to displace the Union. As the Board originally recognized, and then ignored, because Avery was able to hire a significant complement of permanent replacement workers, its ability to endure an indefinite strike was enhanced. Consequently, Avery had placed the Union in a "real bind," which was not unlawful. *Id.* Neither the Union nor the General Counsel challenged the Board's interpretation of Mr. Harper's memorandum.

*33 Although Mr. Harper's December 31 memorandum did not discuss a concern of violence, it also did not discuss any desire to eliminate the Union. Rather, it stated that if the Union "refuses to seriously negotiate in good faith" Avery would continue to hire permanent replacements. 343 N.L.R.B. at 1305, 1330 (App. 60, 161-163, 191-195). Accordingly, the memorandum reflected Avery's desire to

have the Union move off its demand for a pattern contract so that a new contract could be reached. As the Board previously held, the “bind” in which Avery had the Union, was the fact that it would be able to sustain the strike with a permanent workforce, which is not an unlawful purpose. *Id.* at 1307 (App. 66-69).

As Mr. Harper testified, he did not intend to use the hiring of permanent replacements as a “threat” or a “negotiating lever”, but as a means to maintain quality operations at Avery over an extended period during the strike. Tr. at pp. 1284-1286 (App. 275-278). Both Mr. Harper and Dr. Parker testified that in response to the Union's repeated threats that the strike would be much longer than the 1995 strike Avery began to hire permanent replacement employees so that it could operate for the long-term in a cost efficient and quality manner. Tr. at pp. 101-102, 209, 930, 1058, 1066, 1143, 1198-1204 (App. 197-200, 230-234, 242-243, 250-251, 255-262). Dr. Parker offered detailed testimony regarding the means Avery used during the initial weeks of the strike and why those methods were not effective over an extended period. *34 *Id.* The Board specifically recognized that such a motive is lawful:

... hiring strike replacements enhances the employer's position ... the employer can operate during the strike and can thus “hold out” longer than the strikers ...

343 N.L.R.B. at 1306 (App. 64). Moreover, the Board, as the agency primarily responsible for labor policy, held that in an economic strike, an employer's desire to break the Union's solidarity is also not an unlawful objective. 343 N.L.R.B. at 1307 (App. 66-69).

In its Supplemental Decision, the Board ignored its prior rejection of the General Counsel's evidence and improperly held that Avery violated the Act simply by not disclosing its hiring plans in advance. As such, in light of the record, the Board's Supplemental Decision and Order is unreasonable and arbitrary. The record does not support a finding' that

the General Counsel has proven that Avery hired permanent replacements for an unlawful purpose. Accordingly, this Court should reverse the Court of Appeals' decision and direct the court to vacate the Board's Supplemental Decision and Order and direct the Board either to dismiss the charge against Avery or to review all of the evidence in the record, including Dr. Parker's testimony.

*35 CONCLUSION

For the above reasons, Avery respectfully submits that in its Supplemental Decision the Board improperly shifted the burden of proof to Avery to disprove that it had not violated the Act and that its finding that Avery exercised its right to hire permanent replacement employees for an independent unlawful motive was irrational and unwarranted. Therefore, this Court should grant Avery's Petition for Certiorari.

Church Homes, Inc. v. N.L.R.B.

2009 WL 852271 (U.S.) (Appellate Petition, Motion and Filing)

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