No. 05-1279

In the Supreme Court of the United States

MIDWEST GENERATION, EME, LLC, PETITIONER

v.

LOCAL 15, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, ET AL.

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an employer who locks out full-term strikers to bring economic pressure to bear in support of its lawful bargaining demands violates Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (3), by declining to lock out employees who either did not strike, returned to work during the strike, or agreed to return to work during the strike.

2. Whether the court of appeals incorrectly drew a distinction between defensive and offensive lockouts.

3. Whether the court of appeals erred in directing the National Labor Relations Board to consider on remand whether the collective bargaining agreement should be invalidated.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 429 F.3d 651. The decision and order of the National Labor Relations Board (Pet. App. 22a-46a) is reported at 343 N.L.R.B. No. 12.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 2005. The petitions for rehearing were denied on January 4, 2006 (Pet. App. 47a-48a). The petition for a writ of certiorari was filed on April 4, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 7 of the National Labor Relations Act (NLRA), 29 U.S.C. 157, gives employees the right to join labor organizations and to engage in other concerted activities for the purpose of collective bargaining, as well as the right to refrain from the activities. Section 8(a)(1) of the NLRA, 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 their Section 7 rights. Section 8(a)(3) of the NLRA, 29 U.S.C. 158(a)(3), makes it an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to * * * discourage membership in any labor organization."

In *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 301-302, 318 (1965), the Court held that an employer does not violate Section 8(a)(1) and (3) of the NLRA, when, after a bargaining impasse has been reached, it temporarily locks out its employees "for the sole purpose of bringing economic pressure to bear in support of his legitimate bargaining position." In a companion case, *NLRB* v. *Brown Food Store*, 380 U.S. 278 (1965), the Court held that members of a multiemployer bargaining group lawfully responded to a whipsaw strike against one member of the group by locking out their regular employees and using temporary replacements to carry on their business. While the Court recognized that the practice of using nonunion replacements rather than union members was discriminatory, it upheld that practice because it had a "comparatively insubstantial" impact on the exercise of protected rights. *Id.* at 288.

Relying on both *American Ship* and *Brown Food*, the National Labor Relations Board (Board) held in *Harter*

Equipment, Inc., 280 N.L.R.B. 597, 600 & n.10 (1986), aff'd *sub nom. Local 825, International Union of Operating Engineers* v. *NLRB*, 829 F.2d 458 (3d Cir. 1987), that, even absent economic action by the union, an employer acts for a legitimate business reason if it locks out union-represented employees and continues its business with temporary replacements solely to persuade the union to agree to the employer's lawful contract demands. As the D.C. Circuit has recognized, the approach in *Harter Equipment* is logically compelled by *American Ship* and *Brown Food*. See *International Bhd. of Boilermakers, Local 88* v. *NLRB*, 858 F.2d 756, 759 (1988) (*Boilermakers*).

2. On June 28, 2001, International Brotherhood of Electrical Workers, Local 15, AFL-CIO (the Union), commenced an economic strike against petitioner after the parties' good faith negotiation did not produce a new collective-bargaining agreement. Pet. App. 2a. With the exception of eight bargaining unit employees who continued working (the nonstrikers), the entire bargaining unit of approximately 1150 employees went out on strike. *Ibid.* Petitioner maintained operations through the efforts of supervisory personnel, contractors, and temporary replacement employees. *Id.* at 3a. In addition to the eight nonstrikers, a total of 53 other employees (the crossovers) returned to work or offered to return to work before August 31, 2001. *Id.* at 2a.

On August 31, 2001, members of the Union voted to terminate the strike and offered to return to work. Pet. App. 3a. Petitioner declined the offer and advised the Union that it would not allow striking employees to return to work until the parties had agreed upon a new contract. *Id.* at 3a-4a. Petitioner also informed the Un-

ion that it would not lock out the 61 non-strikers and crossovers. *Ibid.* The parties ultimately agreed on a new contract, and on October 22, 2001, petitioner ended the lockout and returned the formerly locked-out employees to its active payroll. *Id.* at 4a.

3. In response to the Union's charge of an unfair labor practice, the Board's General Counsel issued an unfair labor practice complaint, alleging that petitioner's lockout of the strikers after they had made an unconditional offer to return to work violated the NLRA. Pet. App. 4a-5a. The parties jointly waived a hearing before an administrative law judge, and moved to transfer the proceeding to the Board on a stipulated record. *Id.* at 5a. The Board (by a 2-1 vote) determined that petitioner had not engaged in an unfair labor practice in violation of the NLRA and dismissed the unfair labor practice complaint. *Id.* at 22a-46a.

In evaluating the General Counsel's unfair labor practice charge, the Board applied the framework set forth in *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967):

> First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legiti-

> mate and substantial business justifications for the conduct.

Id. at 34 (quoting *Brown Food*, 380 U.S. at 289).

The Board observed that in *American Ship* this Court held "that a lockout for the 'sole purpose of bringing economic pressure to bear in support of [the employer's] legitimate bargaining position' is not unlawful and is not inherently destructive of employee rights." Pet. App. 30a (quoting *American Ship*, 380 U.S. at 318). Based on its assessment of the relevant evidence, the Board found that petitioner's lockout was for the purpose of bringing economic pressure to bear in support of its legitimate bargaining position. *Ibid.* The Board therefore concluded that the lockout was not "inherently destructive" of employee rights, but instead had a "comparatively slight" impact on such rights, requiring petitioner to produce a "legitimate and substantial business justification for its conduct." *Id.* at 31a (citation omitted).

The Board determined that petitioner had established such a legitimate and substantial justification for its conduct. Pet. App. 31a-34a. In particular, the Board concluded that petitioner reasonably extended the lockout to strikers, but not to non-strikers and crossovers, in order to pressure employees to abandon the Union's bargaining demands. *Id.* at 32a. The Board emphasized that it made "no difference" whether the non-strikers and crossovers abandoned the strike "because they no longer shared the Union's goals or because they simply could not afford to go without a paycheck." *Id.* at 36a. What mattered, the Board concluded, was that "it was no longer necessary for [petitioner] to place additional

pressure on [the non-strikers and crossovers] in order for [petitioner] to achieve its bargaining goals, for those employees had already eschewed the strike weapon during the strike." *Ibid.* The Board buttressed its conclusion with the observation that it was "self-evident that the [petitioner's] retention of the crossover[s] * * * and nonstrikers during the lockout augmented its effort to maintain continued production." *Id.* at 33a. While the Board recognized that employers are free to lock out all employees, including nonstrikers and crossovers, it held that employers are under no legal obligation to do so when they conclude that lesser pressure will suffice. *Id.* at 36a-37a.

4. On the Union's petition for review, the court of appeals reversed. Pet. App. 1a-21a. The court held that petitioner violated the NLRA by locking out full-term strikers, while not locking out non-strikers and crossovers. *Id.* at 5a, 21a.

The court began by observing that, under either the "inherently destructive" prong or the "comparatively slight" prong of *Great Dane*, the threshold issue is whether the employer can state a non-frivolous business justification for its action. Pet. App. 8a-9a. The court examined two potential justifications for petitioner's partial lockout: operational needs and pressuring holdouts to abandon their bargaining position. *Id.* at 9a-10a. The court concluded that petitioner had "offered no proof that its operational needs justified the partial lockout." *Id.* at 10a.

The court also rejected as inadequate petitioner's claim that "it allowed the non-strikers and crossovers to return to work because they 'had removed themselves from the Union's economic action,' making it unneces-

sary to pressure them into abandoning the Union's bargaining position." Pet. App. 14a (quoting *id.* at 29a). The court determined that petitioner's justification rested on an unsupported assumption that the non-strikers and crossovers had abandoned the Union's bargaining position. *Id.* at 15a-16a. The court found "no evidence in the record indicating why individual employees chose not to participate in the strike," or "to distinguish the motivation of those who offered to return to work before August 31 and those who offered to return to work after August 31." *Id.* at 15a.

The court held that, even if it were shown that nonstrikers and crossovers had abandoned the Union's bargaining position, petitioner could not discriminate between those employees and the full-term strikers. Pet. App. 16a-20a. The court stated that "[a]n employer's discriminatory lockout on the basis of a protected activity is unlawful even when it is supportive of an employer's bargaining position." *Id.* at 16a. The court viewed that principle as applicable because it determined that "[a]s of the time of the lockout, every employee had made an unconditional offer to return to work" and "[t]he *only* distinction between the two groups * * * was their participation in Union activities." *Id.* at 18a-19a. Having found that the partial lockout was unlawful, the court remanded the case to the Board to consider whether the partial lockout "coerced the Union and its members into ratifying [petitioner's] contract offer, thereby voiding the collective bargaining agreement." *Id.* at 21a.

ARGUMENT

1. Petitioner seeks review (Pet. 10-14) of the court of appeals' holding that a lockout that is designed to put

pressure on a union to accede to the employer's legitimate bargaining demands violates the NLRA, when the lockout applies to strikers, but not to non-strikers and crossovers. A majority of the Board agrees with petitioner that the court of appeals erred in holding that petitioner acted unlawfully. Review of the court's decision is not warranted, however, because the decision does not directly conflict with any decision of this Court, there is no conflict in the circuits, and the question has not arisen with sufficient frequency to warrant review in the absence of a conflict.

a. The court of appeals in this case held that petitioner's lockout was unlawful because it discriminated between employees who were involved in the protected activity of striking and those who were not. Pet. App. 16a. The court apparently viewed such a distinction as per se impermissible under the NLRA, even when it reflects an employer's reasonable business judgment concerning the amount of pressure necessary to persuade a union to accede to its legitimate bargaining demands. *Id.* at 16a-19a.

A majority of the Board agrees with petitioner that the court of appeals erred in reaching that conclusion. As the Board explained in its decision, under *American Ship*, a lockout that is designed to pressure a union into acceding to an employer's legitimate bargaining demands is a legitimate economic weapon, and an employer's use of that legitimate tool is not transformed into a violation of the NLRA simply because the employer permits non-strikers and crossovers to continue to work. Pet. App. 30a, 35a-37a.

The Board also agrees with petitioner that the Court's decision in *TWA* v. *Independent Federation of*

Flight Attendants, 489 U.S. 426 (1989), provides support for the Board's decision. In *TWA*, the Court held that an employer did not act unlawfully under the Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.*, when, at the end of a strike, it refused to displace crossovers who worked during the strike in order to reinstate striking employees with greater seniority. The Court reasoned that the RLA protects the right not to strike as well as the right to strike, *TWA*, 489 U.S. at 436, and that the Act therefore did not require an employer to "penalize[] those who decided not to strike in order to benefit those who did," *id.* at 438. The Court saw "no reason why those employees who chose not to gamble on the success of the strike should suffer the consequences when the gamble proves unsuccessful." *Ibid.*

Under the court of appeals' ruling, an employer that engages in a legitimate lockout of strikers may be required to extend the lockout to crossovers as well. The effect of such a policy, however, would be to penalize employees who exercised their right not to strike and to require employees who chose not to gamble on the success of the strike to suffer the consequences of the strikers' unsuccessful gamble. The Board's conclusion that the NLRA does not require that result (Pet. App. 33a-34a) is fully consistent with *TWA*.

b. While the court of appeals erred in its ruling, review is not warranted. Three considerations support that conclusion.

First, there is no direct conflict between the decision below and any decision of this Court. As discussed above, *TWA* provides support for the Board's decision. Contrary to petitioner's contention, however, *TWA* does not squarely conflict with the decision below. The hold-

ing of *TWA* is that an employer is not required to displace crossovers who worked during the strike in order to reinstate striking employees with greater seniority. The decision below does not require an employer to displace crossovers from their jobs and give their jobs to full-time strikers. Instead, it prohibits an employer from locking out strikers, but not crossovers, when members of both groups have made offers to return to work, and when, in the court's view, the sole proffered justification for permitting only crossovers to work is the assumption that they have abandoned the union's bargaining position. Thus, *TWA* does not directly control the question presented in this case.[1]

Second, the decision below does not conflict with any decision of another court of appeals. Indeed, this is the first court of appeals to address the question whether a lockout of full-term strikers in order to pressure a Union to accede to the employer's lawful bargaining demands is unlawful because the lockout does not apply to non-strikers and crossovers.

Third, the question presented has not arisen with sufficient frequency to warrant the Court's review in the absence of a clearly developed circuit conflict. In the 40

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[1] In *TWA*, moreover, the employer, as an "incentive for individual strikers to return to work," 489 U.S. at 437, promised crossovers that they would retain the desirable position they obtained during the strike, even after more senior employees returned to work. The Court held that the employer's promised inducement to crossovers was "fairly within the arsenal of economic weapons available to employers during a period of self-help." *Id.* at 438. The Board made no findings of analogous promises to crossovers in this case (such as a promise that they would retain their jobs in the event of a lockout), and accordingly the court of appeals did not express any view on the validity of an employer's decision to honor such promises in the event of a lockout.

years since *American Ship* and *Brown Food* upheld employer lockouts as a legitimate economic weapon, the legality of an employer's retention of crossover employees during an otherwise lawful bargaining lockout has arisen only rarely. Review of petitioner's first question is therefore not warranted.

2. Petitioner next contends (Pet. 16-17) that the court of appeals relied on a distinction between defensive lockouts and offensive lockouts, and that its decision therefore conflicts with the D.C. Circuit's statement in *Boilermakers* that a distinction between offensive and defensive lockouts is unworkable. See 858 F.2d at 768. That contention is based on a mischaracterization of the court of appeals' decision. Nowhere in its opinion did the court of appeals use the terms "offensive" or "defensive." Nor did it say anything else to suggest that its decision turned on such a distinction. There is therefore no conflict between the decision below and the statement in *Boilermakers* that the lawfulness of a lockout does not depend on whether it is offensive or defensive.

In any event, the actual holding of *Boilermakers* is that an employer does not violate the NLRA by locking out the entire unit and continuing to operate with temporary replacements to pressure its employees' union to accept the employer's bargaining demands. 858 F.2d at 764, 769. *Boilermakers* did not involve a partial lockout of only full-term strikers, and, accordingly, that decision does not address the partial lockout issue presented in this case.

Petitioner contends (Pet. 17) that the court of appeals improperly limited the circumstances in which a lockout could be justified to "extreme business exigencies." But the court referred to extreme business exi-

gencies only in connection with its discussion of when a partial lockout could be justified by "operational needs." Pet. App. 11a. The court did not state that justifications other than operational needs would be subject to an "extreme business exigencies" test.

Indeed, it is not even clear that the court of appeals adopted "extreme business exigencies" as the test for determining when a partial lockout is justified by operational needs. While the court stated that certain Board cases "illustrate the extreme business exigencies necessary to justify a partial lockout based upon operational needs," Pet. App. 11a, the court also stated that "to justify a partial lockout on the basis of operational need, an employer must provide a reasonable basis for finding some employees necessary to continue operations and others unnecessary." *Id.* at 13a.

Whatever the court of appeals' view of the appropriate standard for determining when a lockout is justified by operational needs, however, it does not provide a basis for granting review in this case. Petitioner has not argued that its partial lockout is justified by operational needs. And, as the court of appeals explained, petitioner did not introduce any evidence that would support an operational needs justification. Accordingly, this case does not present the question of what standard should apply when an employer seeks to justify a partial lockout based on operational needs.

3. Finally, petitioner contends (Pet. 23-24) that the court of appeals erred in directing the Board to consider whether petitioner's unlawful lockout coerced employees into ratifying the collective bargaining agreement, thereby invalidating the agreement. That contention does not warrant review.

Petitioner argues (Pet. 23-24) that, under *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99, 102 (1970), the Board lacks authority to invalidate a collective-bargaining agreement. In *H.K. Porter*, however, the Court held only that the Board is "without power to compel a company or a union to agree to any substantive contractual provision of a collective-bargaining agreement." *Ibid.* *H.K. Porter* did not address the question whether the Board has authority to invalidate a collective bargaining agreement that has been secured through coercion.

In any event, review of that question at this stage would be premature. On remand, the Board may decide not to invalidate the collective bargaining agreement. Moreover, if the Board voids the agreement, petitioner could seek review of that order before an appropriate court of appeals (see 29 U.S.C. 160(f)), and ultimately this Court. See generally *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (Supreme Court has the authority to consider questions determined in earlier stages of the litigation when certiorari is sought from the most recent judgment of the court of appeals); *Reece* v. *Georgia*, 350 U.S. 85, 87 (1955). Because petitioner's collective bargaining agreement may never be invalidated, and because petitioner would have an opportunity to seek review at a later stage if it is invalidated, there is no reason to review that issue now.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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