No. 16-279

In the Supreme Court of the United States

NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that a labor union violated Section 158 of the National Labor Relations Act, 29 U.S.C. 158, through contracts that gave preferences to workers with less seniority within the bargaining unit represented by the union, based on the workers' past employment as union workers with union-signatory employers.

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OPINIONS BELOW

The summary order of the court of appeals (Pet. App. 3a-9a) is not published in the *Federal Reporter* but is reprinted at 644 Fed. Appx. 16. The decision and order of the Board (Pet. App. 10a-160a) is reported at 361 N.L.R.B. No. 26.

JURISDICTION

The judgment of the court of appeals was entered on March 22, 2016. A petition for rehearing was denied on July 18, 2016 (Pet. App. 1a). The petition for writ of certiorari was filed on August 30, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 157 of the National Labor Relations Act (NLRA) gives employees the right to engage, or to refrain from engaging, in activities in support of col-

lective bargaining, such as "join[ing] * * * labor organizations." 29 U.S.C. 157. Section 158(a)(1) and (b)(1)(A) makes it unlawful for employers or unions, respectively, to "restrain or coerce" employees in the exercise of their Section 157 rights. 29 U.S.C. 158(a)(1) and (b)(1)(A). Section 158(a)(3) prohibits an employer from engaging in "discrimination in regard to * * * any term or condition of employment to encourage or discourage membership in any labor organization," subject to the sole limitation that an employer and a union may agree to require as a condition of continued employment that bargaining-unit employees maintain "membership" in the union, if membership is available to all and requires only "tender[ing] the periodic dues and the initiation fees uniformly required." 29 U.S.C. 158(a)(3). Section 158(b)(1) and (2) likewise provides that it is an unfair labor practice for a union "to restrain or coerce * * * employees in the exercise of the rights guaranteed by section 157," or to "cause or attempt to cause an employer to discriminate against an employee" in violation of 29 U.S.C. 158(a)(3). 29 U.S.C. 158(b)(1)(A) and (2).

2. a. Petitioner, a labor organization, has represented employees in the newspaper industry in the New York City metropolitan area since the early 1900s. Pet. App. 13a-14a, 80a. In the past, petitioner represented employees in two multiemployer associations that bargained collectively on behalf of all of their employer members. *Id.* at 14a. As the newspaper industry declined, however, the multiemployer associations became defunct. *Id.* at 17a.

Petitioner now has separate collective-bargaining agreements with individual publishers and wholesale

distributers, including the two companies involved in this case: City & Suburban Delivery Systems (C&S), a subsidiary of the New York Times Company, and the New York Post. Pet. App. 17a.

b. The collective-bargaining agreement between petitioner and the Post covered drivers and deliverymen who bid for work on a daily basis when the Post's regular workforce was insufficient to cover the employer's assignment needs. Pet. App. 17a. After the Post's regular workforce received assignments, the extra employees covered by the agreement "would bid for the remaining work according to their placement in one of four groups and their seniority within that group." *Id.* at 14a. The groups were arranged in descending order of priority, from Group 1 to Group 4. *Id.* at 14a-15a.

Petitioner served as the collective-bargaining agent for members of all four groups. Under the collective-bargaining agreement, members of Groups 1 and 2 were required to join the union. Members of Groups 3 and 4 were excluded from union membership, but were represented by petitioner in collective-bargaining negotiations and required to pay an agency fee to petitioner. Pet. App. 17a-18a.

The collective-bargaining agreement between petitioner and the Post allowed vacancies on the Group 1 list to be filled through several procedures, including through a priority for members of the union working for employers other than the Post. Pet. App. 18a. Specifically, the agreement provided that a regular employee of any other employer that had contracts with the union could apply to fill a vacancy on the Group 1 list if the employee held a position with the union-signatory employer for at least five years. In

addition, the union and employer agreed that if one of several designated signatory employers ceased operations, the Post would add to its Group 1 list a certain number of that employer's regular employees and Group 1 extras. *Ibid.* The agreement also provided a mechanism for Post employees on the Group 3 list to be elevated to fill Group 1 vacancies by action of a joint union-employer group. *Id.* at 20a. But petitioner refused to elevate any Group 3 employees using this procedure because it anticipated that C&S would close, and that C&S employees would want the vacant Group 1 positions. *Ibid.*

Petitioner's agreement with the Post also gave preference to longstanding union members through the Group 2 employee list. While the Group 1, Group 3, and Group 4 lists were organized according to seniority on the Post's workforce, the union maintained the Group 2 list itself, and accorded seniority by length of time as a regular employee or Group 1 member for any union-signatory employer. Pet. App. 15a. That structure enabled longstanding union members who had worked for other employers to obtain priority for work assignments over longtime members of the bargaining unit, such as longstanding members of Groups 3 and 4.

c. In 2008, petitioner and the New York Times Company bargained over the closure of C&S. Pet. App. 21a. Under the closure agreement, the New York Times Company agreed to hire 65 C&S employees and add them to the bottom of the Times Company seniority list. *Ibid.* In addition, the company agreed to pay buyouts to 140 C&S employees. *Ibid.* C&S employees who were not hired by the New York Times

Company and did not receive a buyout would receive a small severance package. *Id.* at 105a.

The closure agreement allocated the opportunity to apply for one of the 65 jobs or one of the 140 buyout offers to employees based on the length of their membership with petitioner while working for any union-signatory employer. Pet. App. 21a. And it provided that the New York Times Company would add former C&S employees to its seniority list not based on length of service with C&S or a C&S predecessor employer, but based on length of service with any union-signatory employer. *Id.* at 100a. As a result, an employee who had lengthy service with C&S might receive a lower priority than another employee who had been part of the bargaining unit for only a short period of time—as a result of the latter employee's prior membership in another (union-represented) bargaining unit.

3. Acting on charges by 16 employees, the General Counsel of the National Labor Relations Board (NLRB or Board) issued consolidated complaints alleging, *inter alia*, that petitioner violated Section 158(b)(1)(A) and (2) of the NLRA by causing or attempting to cause the Post, C&S, and the New York Times Company to discriminate by giving employment preferences based on union membership and prior employment with a union-signatory employer. Pet. App. 20a-22a. An administrative law judge (ALJ) concluded that petitioner had violated the NLRA as alleged. *Id.* at 12a; see *id.* at 68a-160a.

The Board upheld the ALJ in relevant part. Pet. App. 10a-67a. The Board explained that "'the basic rule of law' applicable here is that discrimination in hiring and promotion based solely on union considera-

tions (*i.e.*, union membership and/or prior employment with union-signatory employers) is unlawful." *Id.* at 22a-23a. The Board explained that both the Post contract and the C&S closure agreement contained discriminatory preferences. *Id.* at 23a. Specifically, the Post contract gave employees who were members of Group 2 by virtue of their status in a different bargaining unit at another union-signatory employer "priority in hiring over the Post's own Group 3 and 4 [employees] who had greater unit seniority," but either were not union members or had less seniority with the union. *Id.* at 23a-24a. In addition, the Board explained, petitioner's agreement with the Post afforded preference to union members at other union-signatory employers in filling vacancies in Group 1, even as petitioner prevented Group 1 slots from being filled through the promotion of Group 3 employees—nonunion members whom petitioner also represented. *Ibid.*

Similarly, the Board observed, under the C&S closure agreement, certain employees "received a preference in buyouts, transfers, and, once transferred, seniority within the Times bargaining unit over other C&S employees based on union membership and/or union-wide rather than unit-wide seniority." Pet. App. 25a. "By maintaining and applying these preferences for union members while disfavoring nonmembers," the Board explained, petitioner "caused the Post and the Times to discriminate against employees because of their prior lack of representation by a union." *Id.* at 26a.

4. The court of appeals enforced the Board's order in an unpublished summary order. Pet. App. 3a-9a. The court first noted the "highly deferential" standard

of review for Board orders, under which a court is obligated to enforce "the Board's order where its legal conclusions are reasonably based, and its factual findings are supported by substantial evidence on the record as a whole." *Id.* at 5a (citations omitted).

The court of appeals affirmed the Board's decision under that standard. It explained it was "well-established law that priority hiring preferences based on union membership violate[]" Section 158(b)(1)(A) and (2) of the NLRA. Pet. App. 6a. And it concluded that here, "[s]ubstantial evidence in the record as a whole also supports the Board's conclusion" that petitioner had caused or attempted to cause the Post, the New York Times Company, and C&S to adopt such discriminatory preferences, "by giving priority hiring preference to nonunit individuals based on their union membership or prior employment with a union-signatory employer." *Ibid.* In particular, the court explained, "the contractual provisions at issue in this case are discriminatory on their face, unlawfully favoring individuals who were union members or who had worked for union-signatory employers for a longer period of time over non-union members or individuals who had not worked for a union-signatory employer." *Id.* at 7a. The court therefore granted the Board's enforcement order in relevant part. *Id.* at 9a.

ARGUMENT

Petitioner contends (Pet. 4-8) that the court of appeals erred in ordering enforcement of the Board's order concluding that petitioner had committed unfair labor practices. The court of appeals' decision is correct, and does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. The court of appeals correctly ordered enforcement of the Board's order, because the Board reasonably concluded that petitioner procured agreements that "discriminat[e] in regard to * * * any term or condition of employment to encourage or discourage membership in any labor organization," in violation of the NLRA, 29 U.S.C. 158(a)(3).

As the Board and the court of appeals explained, petitioner's agreement with the Post embodied such discrimination by giving union members outside of the bargaining unit preferred treatment over employees who had greater unit seniority but either were not union members or had less seniority with the union. For instance, petitioner's agreement with the Post enabled union members outside of the bargaining unit—who worked for other employers—to fill spots on the Group 1 list that received a high priority for work assignments, even as petitioner refused to elevate the Group 3 workers whom it represented to fill vacancies on the Group 1 list. Pet. App. 18a, 20a. In addition, petitioner maintained a Group 2 list that enabled union members to obtain priority for work assignments based on prior employment in union positions with other union-signatory employers, with the result that less senior members of the bargaining unit received priority for work assignments over more senior employees within the unit, due to prior service in other union-represented positions. *Id.* at 15a.

Similarly, under petitioner's agreement with the New York Times Company regarding the closure of C&S, some members of the bargaining unit received preferred treatment over other members, in the allocation of closure benefits, as a result of their prior service in union-represented positions with other em-

ployers. Pet. App. 21a. In addition, when former C&S employees were added to the New York Times Company's payroll, former C&S employees again received benefits based on prior service in union-represented positions for employers other than C&S and its predecessors, with the company adding workers to the New York Times Company seniority list based on length of service with any union-signatory employer. *Ibid.*

Petitioner errs in suggesting (Pet. 6) that the Board's conclusion that these provisions discriminated in a manner that encourages union membership in violation of Section 158 is inconsistent with prior decisions of this Court. This Court provided guidance concerning the construction of Section 158(a)(3) in the context of a similar union preference in *Radio Officers' Union of Commercial Telegraphers Union, A.F.L.* v. *NLRB*, 347 U.S. 17, 46-48 (1954). The Court explained that a violation of Section 158(a)(3) could be established based on evidence that an employer's motive in adopting a particular labor practice was to encourage or discourage union membership. *Id.* at 42. Alternatively, the Court wrote, "specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership," because it is presumed that an employer intends the natural consequences of its conduct. *Id.* at 45. Applying that principle, the Court explained that Section 158(a)(3) barred an employer from entering into a contract with a union representing both union members and other employees in which union members received higher pay than other employees, even without evidence concerning the employer's motive. *Id.* at 47-48. That decision of this Court supports the Board's conclusion here, because as the court of ap-

peals observed, "the contractual provisions at issue in this case" are also "discriminatory on their face," granting preferential treatment to "individuals who were union members or who had worked for union-signatory employees for a longer period of time over non-union members or individuals who had not worked for a union-signatory employer." Pet. App. 7a.

The decisions of this Court that petitioner invokes (Pet. 6) are not germane. None indicated that an employer and union may bargain for terms that treat some members of the bargaining unit more favorably than others because of union membership or prior service with a union-signatory employer. Rather, the decisions that petitioner cites each addressed the tools that employers may use to advance their positions in the context of collective-bargaining disputes, and reflect the principle that Section 158(a)(3) should not be construed to prohibit employers from bringing economic pressures to bear when labor disputes exist. See *NLRB* v. *Brown*, 380 U.S. 278, 283 (1965) (stating that "[i]n the absence of proof of unlawful motivation, there are many economic weapons which an employer may use that * * * are in some degree discriminatory and discourage union membership, and yet the use of such economic weapons does not constitute conduct that is" prohibited under Section 158(a)(3) because the Board is not meant to be an "arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands") (citation omitted). In particular, *American Ship Building Co.* v. *NLRB,* 380 U.S. 300 (1965), concluded that an employer's use of a lockout did not constitute unlawful discrimination to discourage union participation because the NLRA contemplated that employers would

be able to take steps "to bring about a settlement of a labor dispute on favorable terms," and expressly "contemplate[d] that lockouts will be used in the bargaining process in some fashion." *Id.* at 313-315. *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938), found that an employer violated Section 158(a)(3) when it declined to rehire particular employees after a strike "with the purpose to discriminate against those most active in the union," but also stated that an employer was not "bound to displace men hired to take the strikers' places in order to provide positions for" the returning strikers. *Id.* at 347. And *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967), found that an employer had violated Section 158(a)(3) based on its refusal to pay vacation benefits to strikers, when there was no evidence the company's conduct stemmed from any motivation other than to harm the union. *Id.* at 34-35.

Petitioner also contends (Pet. 6-7) that a collective-bargaining agreement cannot violate Section 158 simply because it encourages membership in a union, because "to the extent there is any encouragement to be represented by the Petitioner, * * * all provisions of the collective bargaining agreement * * * provide such encouragement," including lawful provisions. Pet. 7. But the Board did not conclude that the agreements here violated the NLRA simply because benefits secured under the agreement might provide incentives to join a union. Rather, the Board concluded that the agreements violated Section 158 because the agreements violated "the basic rule of law * * * that discrimination in hiring and promotion based solely on union considerations" is unlawful. Pet. App. 22a-23a (internal quotation marks omitted). As this Court

explained in *Radio Officers' Union*, such discrimination is a touchstone of a Section 158 violation, because Section 158(a)(3) "does not outlaw all encouragement or discouragement of membership in labor organizations" but rather only such encouragement or discouragement of union participation "as is accomplished by discrimination." 347 U.S. at 42-43.

Lastly, petitioner is incorrect in suggesting (Pet. 7) that Section 158(a)(3) could not have been violated because, under the arrangement negotiated by petitioner, members of Groups 3 and 4 "do not have an option to bid into Groups 1 or 2 unless a position opens in such groups." *Radio Officers' Union* makes clear that whether a preference for union employees violates Section 158 depends on whether "an inherent effect of [the] discrimination is encouragement of union membership," regardless of whether there exist limitations on who may join the union at a particular time. 347 U.S. at 51; see *id.* at 51-52 (noting that "admission policies are not necessarily static and that employees may be encouraged to join when conditions change"). Here, the discriminatory preferences that the collective-bargaining agreement systematically affords to some employees because of their union membership with non-unit employers is the type of discrimination that encourages union membership. Under *Radio Officers' Union*, that is all that is necessary to constitute forbidden discrimination. *Ibid.*

2. The unpublished summary order in this case does not present any conflict warranting this Court's review. Petitioner errs in asserting (Pet. 5) a conflict with the 1965 decision of the First Circuit in *NLRB* v. *Whiting Milk Corp.*, 342 F.2d 8. *Whiting Milk* involved a milk company that was part of a multiem-

ployer bargaining association and acquired additional facilities, some of which were union-represented facilities and some of which were not. The union and employer agreed that employees from the acquired companies who had not been represented by the union would be placed on the bottom of the seniority roster following the acquisition. The court of appeals concluded that the agreement did not violate Section 158(a)(3), emphasizing that the employees in the acquired facilities had not been represented by the union, and that the union had simply "bargained for benefits for all employees within the units it represented without at the same time bargaining for similar benefits for employees for whom it had no authority to speak." *Id.* at 11. The court contrasted that case with "a case in which the Union bargained for preferential benefits for members of the Union in the unit it represented relegating non-union employees in the unit to an inferior status." *Ibid.* The instant case does not conflict with *Whiting Milk* because it involves the very circumstances that *Whiting Milk* distinguished: Petitioner bargained for "preferential benefits for members of the Union in the unit it represented," and relegated other employees for whom petitioner was also the bargaining agent "to an inferior status." *Ibid.*; cf. *Radio Officers' Union*, 347 U.S. at 47 (expressing "no opinion as to the legality" of provisions that awarded higher pay to union members when the union represents only union members, but finding a violation of Section 158(a)(3) based on such terms when the union was the "exclusive bargaining agent for both member and nonmember employees").

Nor is petitioner correct in asserting (Pet. 5) that this Court's review is warranted on the ground that

the summary order below conflicts with the Second Circuit's prior decision in *NLRB* v. *New York Typographical Union No. 6*, 632 F.2d 171 (1980). In finding no unlawful preference for union members in *Typographical Union*, the court of appeals relied on circumstances not present here, emphasizing that the class of individuals whose preference was disputed was entirely "closed to new members," and that the class both excluded some union members and included some individuals who were not members of the union. *Id.* at 182; see Pet. App. 28a n.16 (explaining that *Typographical Union* presented a circumstance "materially different from the situation here" and that "the Second Circuit [in *Typographical Union*] relied especially on the fact that" the class of preferred employees "was a closed class"). In any event, any intracircuit conflict between that decision and the unpublished order below would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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