

No. 08-1211

In the Supreme Court of the United States

CHURCH HOMES, INC., DBA AVERY HEIGHTS,
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
NATIONAL LABOR RELATIONS BOARD
IN OPPOSITION**

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably determined that petitioner violated the National Labor Relations Act by refusing to reinstate striking employees for whom petitioner had secretly hired permanent replacements.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1-5) is not published in the *Federal Reporter* but is reprinted in 303 Fed. Appx. 998. The earlier decision of the court of appeals remanding the case to the National Labor Relations Board (Pet. App. 24-42) is reported at 448 F.3d 189. The decision of the Board on remand (Pet. App. 6-23) is reported at 350 N.L.R.B. 214. The initial decision of the Board and the decision of the administrative law judge (Pet. App. 43-190) are reported at 343 N.L.R.B. 1301.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 2008. The petition for a writ of certiorari was filed on March 31, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The National Labor Relations Act (Act) makes it an unfair labor practice to “discriminat[e] in regard to hire” to “discourage membership in any labor organization.” 29 U.S.C. 158(a)(3). An employer commits such an unfair labor practice by failing to reinstate striking employees immediately upon their unconditional offer to return to work, unless the employer establishes a legitimate and substantial business justification for its conduct. *NLRB v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375, 378 (1967). The employer establishes such a business justification when it shows that it has filled the positions formerly occupied by the strikers with permanent replacements in order to “protect and continue [its] business.” *NLRB v. Mackay Radio & Tele. Co.*, 304 U.S. 333, 345 (1938). The employer, however, may not hire permanent replacements if motivated to do so by “an independent unlawful purpose.” *Hot Shoppes, Inc.*, 146 N.L.R.B. 802, 805 (1964).

2. Petitioner operates a nursing home and assisted living facility, Avery Heights (Avery), in Hartford, Connecticut. Since the early 1970s, New England Health Care Employees Union, District 1199, SEIU, AFL-CIO (Union), has represented the approximately 185 service and maintenance employees at Avery. Pet. App. 27, 106-107.

On October 31, 1999, a collective-bargaining agreement between petitioner and the Union expired. Negoti-

ations for a new agreement were not initially successful, and the Union struck the Avery facility on November 17, 1999. Nearly all of the bargaining unit employees participated in the strike. Petitioner continued to operate the facility using supervisory personnel and temporary replacements. Pet. App. 26, 45, 59, 107, 111-112, 144.

On about December 15, 1999, petitioner began hiring permanent replacements for the striking employees. Pet. App. 26, 59, 144. Petitioner did not give the Union or the striking employees advance notice, nor did it inform them when it actually began the hiring. In fact, petitioner took pains to keep the hiring of permanent replacements a secret. Among other things, petitioner did not identify itself in employment ads it ran, and it informed an employment agency that its plans were to be kept “hush-hush,” so that as many permanent replacements as possible could be hired before the Union found out. On December 31, 1999, Avery’s CEO sent his board of directors a confidential memorandum informing them that petitioner had begun to hire permanent replacements in a “well-executed surprise event. * * * We have [the Union] in a real bind at Avery.” *Id.* at 37, 60 (brackets in original); see *id.* at 26-27, 38, 145-147. The memorandum did not link the secrecy to any concern about union interference with the hiring process, which later became petitioner’s purported justification for it. *Id.* at 177-180.

By late December of 1999, the Union suspected that petitioner had begun hiring permanent replacements for the striking employees. Pet. App. 26-27, 152-153. On January 3, 2000, at a bargaining session with petitioner and a federal mediator, the Union asked petitioner whether it had hired permanent replacements. Petitioner acknowledged that it had. *Id.* at 27, 60, 155.

Two days later, the Union made an offer on behalf of the striking employees to return to work. Pet. App. 27; see *id.* at 65, 156. Petitioner replied that it had permanently replaced over 100 of the strikers. Petitioner also questioned whether the Union's offer was unconditional, but stated that it would reinstate the strikers in accordance with its legal obligations. *Id.* at 27, 156-157.

On January 12, 2000, petitioner and the Union met with the mayor of Hartford. The mayor asked petitioner if it would agree to a 10-day moratorium on the hiring of additional permanent replacements. Petitioner agreed, but said that it would not discharge any of the permanent replacements it had already hired to make room for returning strikers. Pet. App. 16-17, 41 n.7, 104 n.1, 158-159.

On January 20, 2000, the Union renewed its offer to return to work, expressly making it unconditional. Pet. App. 27, 159. Afterwards, petitioner began recalling strikers to positions that had not been filled by permanent replacements, ultimately reinstating about 79 of them. *Id.* at 27, 159, 174.

3. a. Acting in response to charges filed by the Union, the National Labor Relations Board's General Counsel issued an unfair labor practice complaint alleging, *inter alia*, that petitioner violated the Act by refusing to reinstate the strikers upon their unconditional offer to return to work. Pet. App. 104-105, 168. After a hearing, an administrative law judge (ALJ) sustained the allegation. *Id.* at 43-44, 180-181. The ALJ found that the General Counsel established that petitioner had an "independent unlawful motive" for hiring the permanent replacements for the strikers. *Id.* at 180-181. In so finding, he rejected petitioner's arguments that it feared that the Union would have interfered with the

hiring of permanent replacements if it had known of petitioner's intent to do so, or that petitioner had some other good-faith basis for declining to inform the Union. *Id.* at 175-180. Rather, based on the evidence that petitioner sought to "replace a majority of the unit before the Union found out," the ALJ found that petitioner's motive was to "punish the employees for showing their support for the Union" and to "break the Union's solidarity." *Id.* at 178-181.

b. The National Labor Relations Board (Board) voting 2-1, reversed the ALJ and dismissed the allegation. Pet. App. 43-45, 71. The majority found that petitioner's failure to disclose its hiring of permanent replacements was not evidence of an unlawful motive, because petitioner had no obligation to make that disclosure. *Id.* at 63-64. The majority further found that the secret hiring of permanent replacements was simply petitioner's "economic counter-weapon, deployed with the lawful intended effect of forcing the strikers and their Union to yield." *Id.* at 68-71.

The dissenting member found that petitioner's conduct was not "economically motivated," that the reasons it advanced for hiring permanent replacements in secret were pretextual, and that it acted with an independent motive of undermining the Union. Pet. App. 93-99. The dissenting member rejected the majority's "economic counter-weapon" theory, on the ground that petitioner gained no bargaining advantage by engaging in hiring that was kept secret from the employees and the Union. *Id.* at 99-101.

c. The Union filed a petition for review in the court of appeals. The court of appeals vacated the Board's decision and remanded the case to the Board for further consideration. Pet. App. 24-25, 41-42.

The court of appeals “accept[ed] the Board’s premise that an employer has no legal obligation to inform striking workers before hiring permanent replacements.” Pet. App. 38. Nevertheless, the court determined that in this case, the Board failed to take account of petitioner’s secrecy:

[L]ogic suggests that an employer seeking to enhance its bargaining leverage * * * would have every incentive to publicize the [hiring of permanent replacements]. * * * Conversely, it would appear that employers with an illicit motive to break a union have a strong incentive to keep the ongoing hiring of permanent replacements secret. The replacement of over half of a unionized workforce with nonunion workers would devastate the union’s power and credibility. An employer seeking to land such a blow cannot simply announce the hiring of large numbers of replacements. * * * [A]n employer seeking to punish strikers and break a union therefore needs enough time to establish an employment relationship with a large number of permanent replacements before the union can react by offering to return to work, and will therefore have a strong incentive to keep the replacement program secret for as long as possible.

Id. at 39-40.

The court of appeals acknowledged that there may be “legitimate explanations for secrecy,” but observed that the Board “made recourse to none.” Pet. App. 38-39. The court concluded that the Board had “failed to acknowledge the natural and logical implications of the facts it credited and the analytic framework it adopted.” *Id.* at 41. Accordingly, the court of appeals remanded

the case to the Board. The court expressly stated that nothing in its opinion “preclude[d] the Board on remand from reaching th[e] same conclusion through adequate reasoning.” *Id.* at 41. More specifically the court noted the presence of additional evidence cited by petitioner that “might suggest” that it did not possess an independent unlawful motive, and commented that the Board could decline to accept the ALJ’s credibility findings, provided the record supported such a reversal. *Id.* at 41 n.7.

d. On remand, the Board found that petitioner violated the Act by failing to reinstate all of the strikers upon their unconditional offer to return. Pet. App. 6-22. The Board recognized, as law of the case, the finding of the court of appeals that “the logical implication of [petitioner’s] secrecy was an illicit motive,” and found that the record evidence, including the facts highlighted by the court, was “insufficient to refute the inferred unlawful motive.” *Id.* at 12-13.¹

The Board expressly affirmed the ALJ’s credibility-based rejection of the testimony of one of petitioner’s officials that petitioner had hired permanent replacements covertly because it feared interference by the Union. Pet. App. 14-15. The Board observed that, not only was there no corroborating evidence for the testimony, but that other evidence, including petitioner’s confidential December 31, 1999 memorandum, cast doubt on it. That memorandum described in detail the covert hiring of

¹ Two Board members stated their belief that the court of appeals, by drawing an inference of illicit motivation from the secret hiring of replacements, improperly shifted the burden of proof from the General Counsel to petitioner. Pet. App. 12 n.6. The third Board member, expressing agreement with the court of appeals, stated that petitioner’s deliberate secrecy was probative of its motive. *Ibid.*

permanent replacements, but made “no mention of [petitioner’s] claimed fear of violence.” *Id.* at 15. The Board also noted petitioner’s failure to give any such explanation to the hiring agency through whom it sought to hire replacements, notwithstanding its instruction that the agency keep its activity “hush-hush.” *Ibid.* Observing that it had “affirmed this credibility determination in the underlying decision,” the Board stated that, “having carefully reviewed the record [again] we reaffirm that finding as consistent with the record as a whole.” *Id.* at 14-15.

The Board also reviewed petitioner’s other claims of its good faith and found them wanting. First, the Board rejected petitioner’s argument that its “lawful conduct at the bargaining table” showed that it lacked an unlawful motive when it covertly hired permanent replacements. The Board observed that there is no support in the law for petitioner’s “suggestion that because it did not violate its duty to bargain * * *, its unexplained secret hiring of permanent replacements could not have violated [the Act].” Pet. App. 16. Second, the Board declined to give weight to petitioner’s agreement to the 10-day moratorium on additional hiring, given that petitioner “had already permanently replaced more than half the bargaining unit” at the time of the agreement. *Id.* at 16-17. Third, and for the same reason, the Board rejected petitioner’s argument that its “lawful behavior with respect to the recall,” once the Union had learned of the covert hiring and made an unconditional offer to return to work, established that the hiring was lawfully motivated. *Id.* at 17.

Having found that the evidence failed to establish a lawful motive for its secret hiring of permanent replacements, the Board ordered petitioner to offer reinstatement.

ment and backpay to the employees whom petitioner had permanently replaced. Pet. App. 17-19.

e. Petitioner then filed a petition for review of the Board's supplemental decision, and the General Counsel filed a cross-application for enforcement. The court of appeals denied the petition for review and enforced the Board's order. Pet. App. 1-5. The court found that, on remand, "[t]he Board appropriately recognized that the logical inference to be drawn from [petitioner's] secrecy, absent evidence of a legitimate purpose or credible explanation for the secrecy, was that [petitioner] intentionally concealed its hiring of permanent replacements to remove Union members from its workforce and thereby break up the Union." *Id.* at 4. The court further found that "[t]he Board reasonably determined that neither [petitioner's] assertion of good faith in bargaining nor its actions subsequent to the secret hiring of replacements effectively rebutted the inference" of unlawful motive "under the circumstances." *Ibid.* The court also expressly upheld the Board's rejection of petitioner's factual assertion that fear of union interference was the reason for its secrecy. The court affirmed the Board's determination not to credit the testimonial support for that claim, noting in particular that the December 31, 1999 memorandum undercut the fear of violence rationale. *Ibid.*

Finally, the court of appeals expressly rejected petitioner's argument that, by complying with the remand, "the Board improperly shifted the burden of proof onto it." Pet. App. 4. The court stated that the Board had "correctly placed the burden of proving a violation of the Act on the [Board's] General Counsel." *Id.* at 5. The court explained that "the General Counsel sustained his burden * * * by putting forth evidence of [petitioner's]

secrecy, which, when inadequately rebutted by [petitioner], supported an inference of independent unlawful purpose. *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. This Court's review is therefore unwarranted.

1. This case does not merit review because petitioner makes no claim that the decision of the court of appeals conflicts with any decision of this Court or of another court of appeals. Indeed, petitioner acknowledges (Pet. 15) that this is a case of first impression. Petitioner cites no previous case, and the Board is unaware of any, presenting the issue of whether an employer who secretly hires permanent replacements had an "independent unlawful purpose" (*Hot Shoppes, Inc.*, 146 N.L.R.B. 802, 805 (1964)) for the hiring of those replacements. Accordingly, this case presents neither a split of legal authority nor an issue of substantial importance to the administration of the Act.

2. Nor does this case present a dispute over the governing legal principles. Petitioner acknowledges (Pet. 15) that the Board's decision in *Hot Shoppes* states the applicable legal principle and does not challenge it.² Pe-

² Petitioner's citation (Pet. 28) of *Supervalu Inc.*, 347 N.L.R.B. 404 (2006), does not advance its case. In *Supervalu*, the Board applied *Hot Shoppes* but declined to find a violation on facts very different from those in this case. There the employer hired permanent replacements openly, followed its usual hiring practices, and did nothing supporting an inference of unlawful motivation. *Id.* at 419-420. In addition, the employer affirmatively dispelled any such inference by later making interim employment at its other facilities available to the replaced employees. *Id.* at 420.

petitioner's primary contention (Pet. 17-21) is that the court of appeals, in its initial decision, and the Board, in complying with that decision, improperly shifted the burden of proving unlawful motive from the General Counsel to petitioner. That argument, which the court of appeals correctly rejected (Pet. App. 4-5), presents no issue warranting review by this Court.

As the court of appeals explained in its second decision, it did not shift the burden to petitioner. Rather, the court found that petitioner's secrecy "supported an *inference* of an independent unlawful purpose through which the General Counsel could carry the burden of proving violation of the Act." Pet. App. 5 (citing *id.* at 38-40 (emphasis added)). In its initial decision, the court explained why an employer's secrecy supported such an inference: logically, any legitimate advantage in bargaining that could accrue from permanent replacement of strikers is dependent upon the striking employees being aware of it, while, conversely, "employers with an illicit motive to break a union have a strong incentive to keep the ongoing hiring of permanent replacements secret." *Id.* at 39.

Further, the court stated in its second decision that the Board reasonably found that the General Counsel sustained his burden of proof by putting forth evidence of petitioner's secrecy, "which, when inadequately rebutted by [petitioner], supported an inference of independent unlawful purpose." Pet. App. 5. Petitioner's disagreement with the court of appeals, therefore, turns not on the appropriate allocation of the burden of proof, but on its disagreement with the court of appeals' finding that the Board reasonably found that the record evidence of petitioner's unlawful motive outweighed the evidence to the contrary. *Id.* at 5, 12-13. That fact-

bound disagreement does not provide a basis for granting review.

In any event, petitioner is not correct in asserting (Pet. 20) that “other than [petitioner’s] non-disclosure, there is absolutely *no* evidence that could suggest that [petitioner] hired permanent replacement employees to displace the Union as the bargaining representative.” Petitioner overlooks that where, as here, the issue is one of illicit motivation, there is a material difference between mere “non-disclosure” and active concealment. In this context, therefore, it is telling, as the court of appeals observed in both of its decisions (Pet. App. 3-5, 26-27), that petitioner made a “conscious decision” to keep the hiring of permanent replacements a secret, both from the Union and from the employees being replaced, and “took active measures to keep the replacement campaign a secret while hiring as many permanent workers as it could before the Union caught on.” *Id.* at 8-9, 26-27. The record evidence of petitioner’s active concealment provided ample support for an inference of unlawful motive.

3. Petitioner’s additional contentions raise only fact-bound questions that do not warrant further review by this Court. Petitioner argues (Pet. 22-27) that the Board and the court of appeals disregarded the justifications it offered for maintaining secrecy by improperly characterizing as hearsay the testimony of petitioner’s administrator, Dr. Miriam Parker, who testified that she kept the hiring secret because she feared the Union would engage in picket line violence or otherwise impede the hiring efforts. Pet. App. 14-15, 159-160. The ALJ, however, discredited Dr. Parker’s testimony about this and other allegations not on hearsay grounds, but rather based on demeanor, the absence of corroborating evi-

dence, and record evidence, including documentary evidence, that undercut it. *Id.* at 14-15, 105, 125-128, 177-180. The Board, in each of its decisions, affirmed that credibility determination. *Id.* at 14-15, 49, 61-62. In its second decision, in which it set forth its reasoning in detail, the Board expressly relied on each of the ALJ's reasons for discrediting the testimony, but made no mention of excluding or discounting Dr. Parker's testimony as hearsay. *Id.* at 14-15. The court of appeals, in its second decision, found that substantial evidence supported that credibility resolution. *Id.* at 4. Accordingly, neither the decision of the Board nor the decision of the court of appeals turns on the asserted evidentiary error.³

Petitioner's assertion (Pet. 19-21, 33-34) that the Board and the court of appeals disregarded its evidence of lawful motive equally fails to demonstrate any basis for granting certiorari. Petitioner's real claim is that the Board erred when it considered petitioner's evidence but found it insufficient to negate the inference of an "independent unlawful motive" (Pet. App. 16), and that

³ Petitioner's attempt (Pet. 25) to compare this case to *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359 (1998), is wide of the mark. *Allentown* concerned the circumstances under which an employer may poll its employees about support for their incumbent union. *Id.* at 361-363. The Court criticized the Board for applying a standard that ostensibly considered the employer's "good-faith doubt" of the union's majority status, but that in fact considered the objective circumstances of the employees' union support. *Id.* at 372-379. In the present case, petitioner complains (Pet. 24-27) that what was critical was, not whether the Union would engage in interference or violence, but whether Dr. Parker thought it would. Neither the Board nor the court of appeals, however, viewed the question differently. The Board, affirmed by the court of appeals, simply found (Pet. App. 14-15) that Dr. Parker was not telling the truth.

the court of appeals erred in affirming that factual finding (*id.* at 4). Petitioner repeats its factual argument (Pet. 20), for example, that more weight should have been accorded to its agreement to a brief moratorium on additional permanent hiring, once the Union learned of it. But as the Board observed (Pet. App. 16-17), by that time, petitioner had permanently replaced well over half of the bargaining unit employees. In light of the harm already done to the employees and the Union, the Board and the court of appeals reasonably declined to view petitioner's agreement to cease hiring permanent replacements as establishing a lawful motive for its earlier hiring, let alone evidence outweighing credible evidence of petitioner's illicit motive.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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