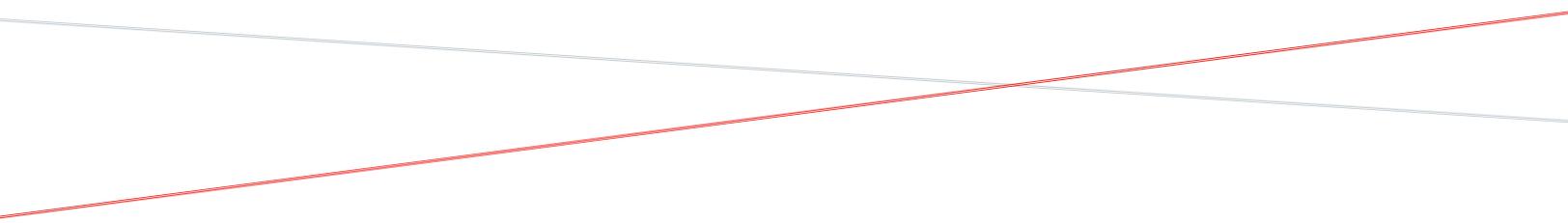


# The Record of the National Labor Relations Board in the Obama Administration: Reversals Ahead?

March 2017



**U.S. CHAMBER OF COMMERCE**  
Labor, Immigration & Employee Benefits



**U.S. CHAMBER OF COMMERCE**

Copyright © 2017 by the United States Chamber of Commerce. All rights reserved. No part of this publication may be reproduced or transmitted in any form—print, electronic, or otherwise—without the express written permission of the publisher.



---

U.S. CHAMBER OF COMMERCE

---

---

**The Record of the  
National Labor Relations Board  
in the Obama Administration:**

**Reversals Ahead?**

---

# Contents

---

Table of Cases.....	iv
Court Cases.....	iv
I. Forward (Randel Johnson).....	1
II. Preface (Hal Coxson).....	2
III. Introduction (Hal Coxson).....	3
IV. Changes in Board Composition and Their Effects: <i>New Process Steel</i> and <i>Noel Canning</i> (Hal Coxson).....	7
A. Board’s Lack of a Quorum: <i>New Process Steel</i> .....	7
B. Unconstitutional Recess Appointments: <i>Noel Canning</i> .....	8
C. Invalid Notice Posting Rule: <i>Chamber of Commerce v. NLRB</i> (4th Cir.) and <i>National Association of Manufacturers v. NLRB</i> (D.C. Cir.).....	9
Conclusion.....	9
V. The Power of a Dissenting Opinion (Brian Hayes).....	11
VI. The Ambush Election Rules.....	15
VII. Bargaining Units: <i>Specialty Healthcare</i> and Its Progeny.....	19
Overwhelming Community of Interest.....	19
Fractured Unit.....	20
Recent Micro-Unit Decisions.....	22
Interpretation of the National Labor Relations Act.....	23
VIII. E-Mail Policy: <i>Purple Communications</i> .....	25
IX. “Protected Concerted Activity” versus “Property Rights”.....	27
X. Protected Concerted Activity Cases.....	33
Introduction.....	33
Significant Cases.....	35
XI. Joint Employer Standard: <i>Browning-Ferris Industries</i> and <i>Miller &amp; Anderson, Inc.</i> .....	44
XII. Dues Checkoff.....	49
XIII. Waiver of Class & Collective Actions: <i>D. R. Horton</i> and Its Progeny.....	51
Background: Employers’ Increasing Use of Employment Arbitration Agreements With Class Action Waivers.....	51
<i>D.R. Horton</i> : The NLRB’s Decision.....	52
<i>D.R. Horton</i> : The Fifth Circuit’s Decision.....	54
Federal and State Courts’ Rejection of the NLRB’s <i>D.R. Horton</i> decision.....	56
<i>Murphy Oil</i> : The NLRB Tries and Fails Again.....	56

Courts of Appeals Rejecting <i>D.R. Horton</i> on Indirect Review.....	57
Courts of Appeals Following <i>D.R. Horton</i> on Indirect Review .....	57
Supreme Court Petitions .....	58
The Board’s Continued Application and Expansion of <i>D.R. Horton</i> .....	58
Conclusion .....	59
XIV. Deferral to Arbitration: <i>Babcock &amp; Wilcox</i> .....	60
The Traditional Standards for Arbitral Deferral: <i>Spielberg/Olin/Collyer</i> .....	60
The New <i>Babcock &amp; Wilcox</i> Standards for 8(a)(1) and 8(a)(3) Cases.....	61
Implications for Employers. ....	62
XV. Notification and Bargaining Obligations: <i>Alan Ritchey</i> .....	64
XVI. Successorship.....	66
XVII. GC Memoranda and Enforcement Policies .....	68
Memoranda Issued by General Counsel Solomon .....	69
GC Memo 10-07: Effective Section 10(j) Remedies for Unlawful Discharges in Organizing Campaigns (September 30, 2010).....	69
GC Memo 11-01: Effective Remedies in Organizing Campaigns (December 20, 2010) ....	69
GC Memo 11-06: First Contract Bargaining Cases (February 18, 2011).....	70
GC Memo 11-07: Back Pay Mitigation (March 11, 2011).....	71
GC Memo 11-11: Mandatory Submissions to Advice (issued April 12, 2011).....	71
GC Memo 11-13: Guidance Memorandum Concerning Parties’ Obligation in Collective Bargaining Related to Assertions Made in Collective Bargaining (issued May 17, 2011).....	72
Memoranda Issued by General Counsel Griffin.....	72
GC Memo 14-01: Mandatory Submission to Advice (February 25, 2014) .....	72
GC Memo 14-03: Affirmation of 10(j) Program (April 30, 2014).....	73
GC Memo 15-02: Guideline Memorandum Concerning Deferral to Arbitral Awards, the Arbitral Process, and Grievance Settlements in 8(a)(1) and (3) Cases (February 10, 2015) .....	73
GC Memo 15-04: Report of the General Counsel Concerning Employer Rules (March 18, 2015) .....	76
GC Memo 15-08 (Revised): Guidance Memorandum on Electronic Signatures to Support a Showing of Interest (October 26, 2015).....	78
GC Memo 16-01: Mandatory Submissions to Advice (issued March 22, 2016).....	79
GC Memo 16-03: Seeking Board Reconsideration of the <i>Levitz</i> Framework (issued May 9, 2016).....	80
OM Memo 17-03: Collecting Data in Connection with Fair Pay and Safe Workplaces Executive Order (issued November 7, 2016).....	81

Conclusion.....	81
XVIII. Jurisdiction: Graduate Teaching Assistants and Student Athletes ( <i>Northwestern University</i> ) .....	83
XIX. Off-Duty Access Cases.....	85
XX. Significant NLRB Decisions: In Brief .....	87
2010.....	87
2011 .....	94
2012 – 2013 .....	100
2014 – 2015 .....	111
2016 – Present .....	134
XXI. Related Issues .....	151
A. “Fair Pay and Safe Workplaces” E.O. 13673 .....	152
B. “Persuader Activity” .....	154
XXII. Conclusion: Reversals Ahead?.....	160

## Table of Cases

---

### Court Cases

#### Cases

<i>Associated Builders and Contractors v. NLRB</i> , 717 F. 3d 947 (D.C. Cir. 2013) .....	7
<i>AT&amp;T Mobility LLC v. Concepcion</i> , 563 U.S. 333 (2011) .....	51, 54, 56
<i>Blue Man Vegas, LLC v. NLRB</i> , 529 F.3d 417 (D.C. Cir. 2008).....	20
<i>Burns International Security Services</i> , 406 U.S. 272 (1972).....	126, 127
<i>Chamber of Commerce v. NLRB</i> , 879 F. Supp. 2d 18 (D.D.C. 2012) .....	15
<i>ConAgra Foods v. NLRB</i> , 2016 U.S. App. LEXIS 2838 (6th Cir. 2016) .....	117
<i>Detroit Edison v. NLRB</i> , 440 U.S. 301 (1979).....	130
<i>Erie Brush and Manufacturing Company v. NLRB</i> , NO. 11-1337, D.C. Cir., Nov. 27, 2012 .....	12
<i>Fall River Dyeing &amp; Finishing Corp. v. NLRB</i> , 482 U.S. 27 (1987).....	126, 127
<i>Johnmohammadi v. Bloomingdale’s, Inc.</i> , 755 F.3d 1072 (9th Cir. 2014).....	57
<i>Lakeland Health Care v. NLRB</i> , 696 F.3d 1332 (11th Cir. 2012) .....	13
<i>Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB</i> , 564 F.3d 469 (10th Cir. 2009).....	7
<i>Lechmere v. NLRB</i> , 502 U.S. 527 (1992) .....	92
<i>Mahon v. NLRB</i> , 808 F.2d 1342 (9th Cir. 1987).....	75
<i>National Ass’n of Mfrs. v. NLRB</i> , 717 F.3d 947 (D.C. Cir. 2013).....	9
<i>New Process Steel LP v. NLRB</i> , 560 U.S. 674 (2010).....	7, 8, 15
<i>New Process Steel, LP v. NLRB</i> , 564 F.3d 840 (7th Cir. 2009).....	8
<i>New York New York v. NLRB</i> , 313 F.3d 585 (2002).....	96
<i>New York New York v. NLRB</i> , 676 F.3d 193 (D.C. Cir. 2012) .....	96
<i>NLRB v. Catholic Bishops of Chicago</i> , 440 U.S. 490 (1979) .....	83, 117
<i>NLRB v. J. Weingarten</i> , 420 U.S. 251 (1975).....	73, 114, 122, 123, 124, 125
<i>NLRB v. Metropolitan Life Insurance Co.</i> , 380 U.S. 438 (1965) .....	24
<i>NLRB v. Noel Canning</i> , 573 U.S. ___, 134 S.Ct. 2550 (2014).....	7, 8, 14, 16, 50, 64, 121, 123, 124, 132
<i>NLRB v. Robbins Tire Co.</i> 437 U.S. 214 (1978).....	130
<i>NLRB v. Yeshiva University</i> , 444 U.S. 672 (1980) .....	117
<i>Owen v. Bristol Care, Inc.</i> , 702 F.3d 1050 (8th Cir. 2013) .....	57
<i>Pittsburgh Plate Glass Co. v. NLRB</i> , 313 U.S. 146 (1941) .....	24
<i>Prell v. NLRB</i> , 835 F.2d 1481 (D.C. Cir. 1987) .....	121
<i>Republic Aviation Corp. v. NLRB</i> , 324 U.S. 793 (1945) .....	96
<i>Richards v. Ernst &amp; Young, LLP</i> , 744 F.3d 1072 (9th Cir. 2013) .....	57
<i>SDBC Holdings, Inc. v. NLRB</i> , No. 10-3709, (2d Cir. 2013) ( <i>Stella D’oro Biscuit</i> ).....	12
<i>Southern New England Telephone Co. v. NLRB</i> , 649 F.3d 723 (D.C. Cir. 2015).....	13, 35
<i>Sutherland v. Ernst &amp; Young LLP</i> , 726 F.3d 290 (2d Cir. 2013) .....	57
<i>U.S. Chamber of Commerce v. NLRB</i> , 721 F. 3d 152 (4th Cir. 2013).....	7, 9
<i>University of Great Falls v. NLRB</i> , 278 F.3d 1135 (D.C. Cir. 2002) .....	83
<i>Wis. Dep’t of Indus., Labor &amp; Human Relations v. Gould, Inc.</i> , 475 U.S. 282 (1986) .....	154

## NLRB Cases

<i>200 East 81st Restaurant Corp. d/b/a Beyoglu</i> , 362 NLRB No. 152 (2015)	58
<i>Alan Ritchey, Inc.</i> , 359 NLRB No. 40 (2012)	64, 65, 73
<i>Alpha Beta</i> , 273 NLRB No. 1546 (1985)	61, 75
<i>American Baptist Homes of the West</i> , 360 NLRB No. 100 (2014)	85
<i>American Baptist Homes of the West d/b/a Piedmont Gardens</i> , 364 NLRB No. 13 (2016)	144
<i>Americold Logistics, LLC</i> , 362 NLRB No. 58 (March 31, 2015)	118
<i>Anheuser-Busch, Inc.</i> , 237 NLRB No. 982 (1978)	129, 130
<i>Arc Bridges, Inc.</i> , 362 NLRB No. 56 (March 31, 2015)	119
<i>Aroostook County Regional Ophthalmology Center</i> , 317 NLRB No. 218 (1995)	121
<i>AT &amp; T Connecticut</i> , 356 NLRB No. 118 (2011)	98, 139, 140, 141
<i>Atlantic Steel Co.</i> , 245 NLRB No. 814 (1979)	36, 112
<i>Babcock &amp; Wilcox Construction Co.</i> , 361 NLRB No. 132 (2014)	60, 61, 62, 63, 73, 74, 75, 76, 96
<i>Banner Estrella Med. Ctr.</i> , 362 NLRB No. 137 (2015)	124, 130
<i>Bethlehem Steel</i> , 136 NLRB No. 1500 (1962)	49, 106
<i>Browning-Ferris Industries, Inc.</i> , 362 NLRB No. 186 (2015)	44
<i>Brusco Tug and Barge, Inc.</i> , 359 NLRB No. 43 (2012)	107
<i>Buchanan Marine, L.P.</i> , 363 NLRB No. 58 (2015)	132, 138
<i>Building Contractors Association, Inc.</i> , 364 NLRB No. 74 (2016)	143
<i>Carpenters Local 1506 (Marriott Warner Center Woodland Hills)</i> , 355 NLRB No. 219 (2010)	93
<i>Carpenters Locals 184 and 1498 (Grayhawk Development, Inc.)</i> , 355 NLRB No. 188 (2010)	93
<i>Circuit City Stores v. Adams</i> , 532 U.S. 105 (2001)	51
<i>Collyer Insulated Wire</i> , 192 NLRB No. 837 (1971)	60, 61, 75
<i>Conagra Foods, Inc.</i> , 361 NLRB No. 113 (2014)	116
<i>Countrywide Financial Corp.</i> , 362 NLRB No. 165 (2015)	58
<i>D.R. Horton, Inc. v. NLRB</i> , 737 F.3d 344. (5th Cir. 2013)	54, 55
<i>D.R. Horton, Inc.</i> , 357 NLRB No. 184 (2012)	51, 52, 54, 55, 56, 57, 58
<i>Dana Corp.</i> , 351 NLRB No. 434 (2007)	94, 119
<i>Delta Brands, Inc.</i> , 344 NLRB No. 252 (2005)	97
<i>DHL Express, Inc.</i> , 355 NLRB No. 144 (2010)	90
<i>Dish Network Corporation World</i> , 359 NLRB No. 108 (2013)	37
<i>Durham School Services, LP</i> , 360 NLRB No. 108 (2014)	111
<i>E.I DuPont de Nemours &amp; Co., Inc.</i> , 362 NLRB No. 98 (2015)	122
<i>Erie Brush and Manufacturing Co.</i> , 357 NLRB No. 46	12
<i>Excelsior Underwear, Inc.</i> , 156 NLRB No. 1236 (1966)	102
<i>Finley Hospital</i> , 359 NLRB No. 9 (2012)	104
<i>Finley Hospital</i> , 362 NLRB No. 102 (2015)	123
<i>First Student, Inc.</i> , 355 NLRB No. 78 (2010)	89
<i>Fred Meyer Stores, Inc.</i> , 362 NLRB No. 82 (2015)	131
<i>Fresenius USA Manufacturing, Inc.</i> , 362 NLRB No. 130 (2015)	14, 132
<i>Fresenius USA Mfg.</i> , 358 NLRB No. 138 (2012)	13, 14, 40, 107

<i>Fresh &amp; Easy Neighborhood Market</i> , 361 NLRB No. 12 (2014) .....	42, 130
<i>Fresh &amp; Easy Neighborhood Market</i> , 362 NLRB No. 12 (2014) .....	124
<i>G4S Government Solutions, Inc.</i> , 363 NLRB No. 113 (2016).....	137
<i>Gilmer v. Interstate/Johnson Lane Corp.</i> , 500 U.S. 20 (1991).....	51
<i>Graymont PA, Inc.</i> , 364 NLRB No. 37 (2016) .....	148
<i>Greenhoot, Inc.</i> , 205 NLRB No. 250 (1973) .....	46, 47
<i>Guardsmark, LLC</i> , 363 NLRB 103 (2016).....	136
<i>GVS Properties, LLC</i> , 362 NLRB No. 194 (2015) .....	126
<i>Hacienda Hotel, Inc. Gaming Corp.</i> , 363 NLRB No. 7 (2015).....	50
<i>Hispanics United of Buffalo, Inc.</i> , 359 NLRB No. 37 (2012) .....	40
<i>Hyundai American Shipping Agency</i> , 357 NLRB No. 80 (2011) .....	124
<i>IMI South, LLC, d/b/a Irving Materials</i> 364 NLRB No. 97 (2016).....	145
<i>Independent Stave Co.</i> , 287 NLRB No. 740 (1987) .....	75
<i>IronTiger Logistics, Inc.</i> , 359 NLRB No. 13 (2012) .....	110
<i>J.W. Marriott</i> , 359 NLRB No. 8 (2012) .....	85
<i>Jimmy John's and Industrial Workers of the World</i> , 361 NLRB No. 27 (2014).....	38
<i>Jurys Boston</i> , 356 NLRB No. 114 (2011).....	33, 97
<i>Karl Knauz Motors, Inc.</i> , 358 NLRB No. 164 (2012) .....	35, 100
<i>Kathleen's Bakeshop</i> , 337 NLRB No. 1081 (2002) .....	110
<i>KenMor Electric Co.</i> , 355 NLRB No. 173 (2010).....	87
<i>Lafayette Park Hotel</i> , 326 NLRB 824 (1998), enfd 203 F.3d 52 (D.C. Cir. 1999).....	101
<i>Lakeland Health Care Associates, LLC, d/b/a/ Wedgewood Nursing</i> , 12-RC-9426, unpublished Order (12/6/10).....	13
<i>Lamons Gasket Co.</i> , 355 NLRB No. 157 (2010).....	94, 119
<i>Lee Lumber &amp; Building Material Corp.</i> , 334 NLRB No. 399 (2001).....	118, 119
<i>Leukemia and Lymphoma Society</i> , 363 NLRB No. 124 .....	138
<i>Lincoln Lutheran of Racine</i> , 362 NLRB No. 188 (2015) .....	49, 144, 145, 146
<i>Lutheran Heritage Village-Livonia</i> , 343 NLRB 646, 647 (2004) .....	33, 37, 101, 104
<i>M.B. Sturgis, Inc.</i> , 331 NLRB No. 1298 (2000) .....	46, 47, 48
<i>Macy's, Inc.</i> , 361 NLRB No. 4 (2014) .....	22, 23
<i>Mandalay Bay Resort &amp; Casino</i> , 355 NLRB No. 92 (2010) .....	90
<i>Manhattan Beer Distributors, LLC</i> , 362 NLRB No. 192 (2015) .....	125
<i>Manor Care Health Servs.</i> , 362 NLRB No. 68 (April 30, 2015) .....	120
<i>Mastec Direct TV</i> , 356 NLRB No. 110 (2011).....	100
<i>Menorah Medical Center</i> , 362 NLRB No. 193 (2015).....	128
<i>Mid-Atlantic Regional Council of Carpenters (Starkey Construction Co.)</i> , 356 NLRB No. 19 (2010) .....	93
<i>Midland National Life Insurance Co.</i> , 263 NLRB 127 (1982).....	111
<i>Miller &amp; Anderson, Inc.</i> , 05-RC-079249 .....	44, 46
<i>Murphy Oil USA v. NLRB</i> , 808 F.3d 1013, 2015 WL 6457613 (5th Cir. Oct. 26, 2015).....	57
<i>Murphy Oil USA, Inc.</i> , 361 NLRB No. 72 (2014) .....	51, 56, 58
<i>Murphy Oil</i> , 361 NLRB No. 72 at 36 n.5 .....	56
<i>MV Transportation</i> , 337 NLRB 770 (2002) .....	95
<i>Myers Industries</i> , 281 NLRB No. 882 (1986) .....	121
<i>New York New York Hotel &amp; Casino</i> , 356 NLRB No. 119 (2011).....	95, 96
<i>Nichols Aluminum</i> , 361 NLRB No. 22 (2014).....	13

<i>Northwestern University and Colleges Athletes Players Association (CAPA),</i> 362 NLRB No. 167 (2015) .....	83
<i>Oakwood Care Center</i> , 343 NLRB No. 659 (2004) .....	46, 47
<i>Oakwood Healthcare, Inc.</i> , 348 NLRB 686 (2006).....	107, 132, 133
<i>Odwalla, Inc.</i> , 357 NLRB No. 132 (2011) .....	21
<i>Olin Corp.</i> , 268 NLRB No. 573 (1984).....	60, 61, 73, 74, 75
<i>On Assignment Staffing Services, Inc.</i> , 362 NLRB No. 189 (2015).....	58
<i>Oregon Washington Telephone Co.</i> , 123 NLRB No. 339 (1953).....	136
<i>Pacific Lutheran University</i> , 361 NLRB No. 157 (2014).....	83, 117
<i>Parexel International, LLC</i> , 356 NLRB No. 82 (2011).....	41, 99
<i>Peacock Productions of NBC Universal Media, LLC</i> , 364 NLRB No. 104 (2016) .....	139
<i>Peerless Plywood Co.</i> , 107 NLRB No. 427 (1953) .....	136
<i>Piedmont Gardens</i> , 362 NLRB No. 139 (2015) .....	124, 129
<i>Pier Sixty</i> , 362 NLRB No.59 (2015).....	39
<i>Planned Building Services</i> , 347 NLRB No. 670 (2006).....	115
<i>Plaza Auto Center, Inc.</i> , 360 NLRB No. 117 (2014).....	40, 111
<i>Public Service Company of New Mexico</i> , 364 NLRB No. 86 (2016).....	146
<i>Pressroom Cleaners</i> , 361 NLRB No. 57 (2014) .....	114
<i>Provena St. Joseph Medical Center</i> , 350 NLRB No. 64 (2007).....	105
<i>Ralphs Grocery Company</i> , 361 NLRB No. 9 (2014).....	114, 125
<i>Register Guard</i> , 351 NLRB No. 1110 (2007).....	25, 128
<i>Relco Locomotives, Inc.</i> , 358 NLRB No. 37 (2012).....	109
<i>Remington Lodging &amp; Hospitality</i> , 359 NLRB No. 95 (2013).....	85
<i>Remington Lodging &amp; Hospitality, LLC</i> , 363 NLRB No. 112 (2016).....	136
<i>Ridgewood Country Club</i> , 357 NLRB No. 181 (2012) .....	102
<i>Sabo, Inc.</i> , 362 NLRB No. 81 (April 30, 2015).....	121
<i>Saint John's Health Center</i> , 357 NLRB No. 170 (2011).....	85
<i>Shadyside Hospital (UMPC)</i> , 362 NLRB No. 191 (2015) .....	127
<i>Sodexo America, LLC (Sodexo II)</i> , 361 NLRB No. 97 (2014) .....	85
<i>Sodexo America, LLC</i> , 358 NLRB No. 79 (2012) .....	85, 103
<i>Southern Bakeries, LLC</i> , 364 NLRB No. 64 (2016).....	140
<i>Southern New England Telephone Co.</i> , 356 NLRB No. 118 (2011).....	12, 34, 35
<i>Southwest Regional Council of Carpenters (Carignan Construction Co.)</i> , 355 NLRB No. 216 (2010) .....	93
<i>Southwest Regional Council of Carpenters and its Local 1506 (Ritchie's)</i> , 355 NLRB No. 227 (2010) .....	93
<i>Southwest Regional Council of Carpenters, Local 1506 (Held Properties)</i> , 356 NLRB No. 16 (2010) .....	93
<i>Specialty Healthcare</i> , 357 NLRB No. 83 (2011).....	19, 20, 24
<i>Spielberg Mfg. Co.</i> , 112 NLRB No. 1080 (1955).....	60, 61
<i>Spruce Up Corp.</i> , 209 NLRB No. 194 (1974) .....	126, 127
<i>St. Elizabeth Manor, Inc.</i> , 329 NLRB No. 341 (1999) .....	95
<i>Stabilus, Inc.</i> , 11-CA-20396, et al.....	91
<i>Starbucks Corporation</i> , 360 NLRB No. 134 (2014).....	112
<i>State Distributing</i> , 282 NLRB No. 1048 (1987).....	115
<i>Stella D'oro Biscuit Company, Inc.</i> , 355 NLRB No. 158.....	12, 13, 87

<i>Supply Technologies, LLC</i> , 359 NLRB No. 38 (2012) .....	103
<i>Taracorp, Inc.</i> , 273 NLRB No. 221 (1984) .....	122
<i>The Neiman Marcus Group, Inc. d/b/a Bergdorf Goodman</i> , 361 NLRB No. 11 (2014).....	22, 23
<i>The Research Foundation of the State University of New York at Buffalo</i> , 3-RC-11882, 355 NLRB No. 170 (2010) .....	92
<i>Total Security Management Illinois 1, LLC</i> , 364 NLRB No. 106 (2016) .....	141
<i>Transcare New York, Inc.</i> , 355 NLRB No. 56 (2010) .....	88
<i>Tri-County Medical Center</i> , 222 NLRB No. 1089 (1976).....	85, 86, 103
<i>Triple Play Sports Bar &amp; Grille</i> , 361 NLRB No. 31 (2014) .....	35
<i>UGL-UNICCO Service Co.</i> , 355 NLRB No. 144 (2010) .....	95, 118, 119
<i>UniQue Personnel Consultants, Inc.</i> , 364 NLRB No. 112 (2016) .....	144
<i>United Brotherhood of Carpenters and Joiners of America, Local 1506</i> ( <i>Eliason &amp; Knuth of Arizona, Inc.</i> ) 355 NLRB No. 159 (2010).....	93
<i>United Brotherhood of Carpenters and Joiners of America, Local 15086</i> ( <i>AGC San Diego Chapter</i> ), 355 NLRB No. 191 (2010).....	93
<i>United Technologies Corp.</i> , 268 NLRB No. 557 (1984) .....	75
<i>URS Federal Services, Inc.</i> , 365 NLRB No. 1 (2016).....	149
<i>Washington River Protection Solutions</i> , Case No. 19-CA-125339 (2014) .....	64
<i>Wheeling Island Gaming, Inc.</i> , 355 NLRB No. 127 (2010) .....	20
<i>Whole Foods Market, Inc.</i> , 363 NLRB No. 87 (2016) .....	134
<i>WKYC-TV, Inc.</i> , 359 NLRB No. 30 (2012) .....	50, 106
<i>Worldmark By Wyndham</i> , 356 NLRB No. 104 (2011).....	41, 99
<i>Wright Line</i> , 251 NLRB No. 1083 (1980) .....	113, 120, 132, 136

## **I. Forward (Randel Johnson)**

---

As the Trump administration takes control of the levers of power and the contours of a new National Labor Relations Board (NLRB or Board) take shape, we believe that this document, *The Record of the National Labor Relations Board in the Obama Administration: Reversals Ahead?*, will be invaluable in helping to chart a path forward in the labor relations arena. While there have been many commentaries on the distressing direction of the Obama NLRB over the past eight years, I am unaware of any analysis which brings together in one comprehensive place a detailed review of the ever-changing case law—most of it to the detriment of the employer community. This study fills that gap. I would like to express my thanks to the law firm of Ogletree Deakins, and my good friend Hal Coxson, for spearheading this project. Certainly, when we began many months ago, we did not anticipate the opportunities for change which now present themselves.

The Chamber looks forward to working in this new environment to shape the country's labor laws, whether through amicus briefs before the Board and the courts of appeals, hearings, legislation, appropriations riders, and other measures as may be appropriate. Stay tuned!

## II. Preface (Hal Coxson)

---

We are pleased to provide this publication as a service to the U.S. Chamber of Commerce and its members. It was not a small undertaking. The task was made more difficult especially given the historic extent to which the Obama administration's National Labor Relations Board (NLRB or Board) has reversed long-established labor law precedent and, in effect, rewritten the law to benefit organized labor to the detriment of both union and nonunion businesses. We have selected for analysis many, but by no means all, of the key decisions and actions by the Board and the General Counsel.

In 2009, we provided the Chamber with a treatise entitled *The National Labor Relations Board in the Obama Administration: What Changes to Expect*. It became an instant best seller; in some cases, it became required reading in the labor law curriculum of prominent laws schools. Some thought our predictions were too radical. In hindsight, most would now agree that, if anything, we were too conservative. Today, the only thing we can say is: "We told you so!"

### **Elections Have Consequences**

As this publication goes to press, Republican Donald Trump has been elected the 45th President of the United States. He has designated current Republican Board Member Philip Miscimarra as the agency's new acting chair, replacing Democrat Mark Pearce. Also, President Trump will be able to fill two vacant Board seats with Republican members which will convert the Board to a 3-2 majority and start the flow of more business-friendly decisions while reversing some of the anti-business decisions from the Obama Board described in this treatise. However, there are two caveats: first, Democratic General Counsel Richard Griffin will be able to serve until his term expires on November 4, 2017. That is significant because the General Counsel and the Board's regional offices will determine, for the most part, which cases get to the Board, and it is unlikely that General Counsel Griffin will seek to depart from recent legal precedent he helped establish.

Second, it will take time for unfair labor practice cases to rise within the NLRB's pipeline and reach the Board for consideration and possible decisions which return the law to legal precedent overturned by the Obama Board. The process in unfair labor practice cases starts with the filing of a charge, followed by the investigation and issuance of a formal complaint, and thereafter a trial before an administrative law judge (ALJ) and the decision.

The alternative, representation case (R-Case) route to the Board avoids the General Counsel through a granted request for review by the Board which might enable the new Board to consider issues, such as joint employer and "micro" bargaining units, more quickly in the representation election context.

All of this suggests the need for yet another sequel to this treatise. Perhaps it could be titled, "The National Labor Relations Board in the Trump Administration: What Changes to Expect?"

### **III. Introduction (Hal Coxson)**

---

Ogletree Deakins is proud to team with the U.S. Chamber of Commerce in this sequel to our 2009 treatise, entitled “The National Labor Relations Board in the Obama Administration: What Changes to Expect.” While that treatise was a look ahead at what the National Labor Relations Board (NLRB or Board) might do following the election of President Obama, this sequel is a record of what it actually did and presents a roadmap for policy changes by Trump-appointed Board.

Simply stated, the tumultuous record of the NLRB over the eight years of the Obama Administration has been unprecedented in reversing decades of legal precedent and launching revolutionary rule-making changes designed to benefit organized labor. Yet, at the end of the day, the Board has not reversed the continuing decades-long decline in union density. At the outset of the Obama Board in 2008, union density stood at 7.6 percent of the eligible private sector workforce; the latest statistics for 2015 reveal that union density in the private sector is only 6.7 percent.

Why is this so, when the Board has initiated myriad pro-union changes such as:

- Implementing “quickie” union representation (“ambush”) elections potentially within as few as 11 days from the date of the petition, and overturning union election losses based on a hyper-technical application of new election rules;
- Making changes in regards to the law concerning electronic card signing;
- Gerrymandering micro bargaining units petitioned for by unions to the extent of their ability to organize;
- Allowing employee access to employers’ email systems at work to campaign for unionization;
- Changing the law for joint employment and independent contractor status, and jeopardizing the franchise model;
- Authorizing “employee” status for graduate school teaching assistants and others so that they may join unions and bargain with their educational institutions;
- Changing the law of successorship to more often require bargaining obligations for successors before instituting new terms and conditions of employment;
- Prohibiting class and collective action waivers in employment arbitration agreements;
- Making deferral to labor arbitration awards more difficult;

- Making it more difficult to settle Board complaints by requiring future deferral in settlement agreements; and
- Routinely overturning union representation election losses based on hyper-technical parsing of rules and policies that, in the Board’s opinion, may have “chilled” employees’ concerted activity rights, but in many cases had never even been enforced.

These are but a few of the Obama Board’s radical changes covered in this treatise.

Unions continue to organize by pursuing devastating “corporate campaigns” to pressure employers to accept “card check” union organizing in lieu of secret ballot elections and otherwise capitulate to union bargaining demands. Thus far, most corporate campaigns have done little to reverse the union decline in density. Of course, the new representation election rules have been in effect since 2015 and may not have had sufficient time to percolate, although statistics thus far indicate a significant drop in the timing of elections but little change in the unions’ win rate. The Board, however, continues to overturn union election losses based on a hyper-technical application of the election rules. And, it takes many small, micro unit wins to make a difference in overall union density nationally.

Unions will argue that their dismal record in improving union density reflect the need for comprehensive labor law “reform” legislation to return the law to the 1935 Wagner Act era when, for example, there were no state right to work laws, there were no provisions prohibiting union’s unfair labor practices, recognitional picketing was permitted to shut down an employer until it recognized a union; and unions were allowed to pressure neutral employers through secondary boycotts. But unions have been unsuccessful in achieving labor law reforms in Congress. The 1978 omnibus labor law reform bill intended to shorten union representation elections among other things failed after a prolonged six-cloture vote Senate filibuster. More recently, in 2009, the “card check” union representation bill, euphemistically termed the “Employee Free Choice Act,” (EFCA) would have substituted card check certification in place of secret ballot elections and would have imposed first contracts by mandatory arbitration. That bill also failed. More recently, while continuing to promise reintroduction of the EFCA, unions have taken a different approach by introducing bills to provide for punitive sanctions in the form of monetary damages for employer violations during union organizing or other concerted activities, automatic injunctions to reinstate discharged employees, and employee lawsuits in federal court for damages and attorneys’ fees against employers found to have violated the National Labor Relations Act (NLRA). See the Workplace Action for a Growing Economy (WAGE) Act.

To give the union labor law “reform” measures a boost from the bully pulpit, on October 7, 2015, the White House hosted a summit on worker voice. Nevertheless, until unions gain a super-majority in Congress sufficient to overcome a filibuster, and regain the White House following President Trump’s election, it’s unlikely that the union version of labor law reform will be considered, much less enacted.

For the foreseeable future, therefore, Congressional labor law “reform”—from the perspective of organized labor—will be stalled. Elections have consequences. What remains is the continuing

fight to reverse the Obama Board's ever-more radical decisions overturning decades of well-settled Board precedent, and undoing the Obama executive orders and regulations, such as the government contractor "blacklisting" executive order (euphemistically termed the "Fair Pay and Safe Workplaces" Executive Order (EO) 13673). EO 13673 and its implementing regulations would deny the award of federal contracts to employers and their subcontractors based on violations of 14 federal labor and employment laws, including the NLRA (and unlitigated complaints from the NLRB's General Counsel) and their state law equivalents.

Another threat to labor policy would have been from the Labor Department's revisions to "persuader activity" reporting obligations under the Labor-Management Reporting and Disclosure Act of 1959, which have now been successfully blocked by a permanent nationwide injunction. The final persuader rule would have restricted an employer's access to legal advice from outside counsel during union organizing. That would have been especially devastating for small businesses which generally lack in-house labor relations expertise and who would be hard pressed to deal with the NLRB's "quickie" election rules, which require a formal, binding response before the NLRB within seven days of a union's petition for election.

The U.S. Chamber of Commerce has led the way for the business community on all of these aforementioned battles. Through advocacy before the White House, Congress, and the Executive Branch agencies; briefs filed with the NLRB or challenging the NLRB in federal courts; and written comments during rulemaking, the Chamber has always been the "Voice of Business."

Back in 2008, when the new Obama Board was installed, there was a great deal of uncertainty and angst from business as to just how far the Board would go in overturning Board precedent. The new chair, former union lawyer Wilma Liebman, was designated to lead the agency by President Obama on his first day in office. Liebman had served in the minority on the NLRB for most of her three terms over the previous decade, and she had written numerous strongly-worded dissenting opinions. She had been critical of the Board and what she viewed as shortcomings in the law in speeches and testimony before Congress. Thus, when the Chamber commissioned my son, Chris, and I to draft a treatise entitled "The National Labor Relations Board in the Obama Administration: What Changes to Expect," it was not difficult to make predictions. Our prediction was to simply turn every dissenting opinion by Wilma Liebman into a majority opinion. In fact, the changes have been even more extensive and more pro-union than we ever imagined, in some cases overturning precedent that had existed for over 50 years!

We have been asked to write a sequel that addresses the NLRB's actions from 2009 to the present. We're tempted to title it "The National Labor Relations Board in the Obama Administration: We Told You So!" Instead, we have simply titled it "The Record of the National Labor Relations Board in the Obama Administration: Reversals Ahead?" Once again, it is not difficult to predict the future changes under the Trump Board. Simply take all of the dissenting opinions from Board Members Miscimarra, Johnson and Hayes, and turn them into majority opinions.

This treatise covers major decisions and other actions by the NLRB Board and General Counsel on a year-by-year basis and in some cases has separate chapters written on specific topics. We are privileged to be joined in writing this treatise by our Ogletree Deakins colleague, Brian

Hayes, who served as a Senate-confirmed Board Member during a significant period in the Obama Board and was often forced to write dissenting opinions. Also, we are fortunate to be joined by many other lawyers from Ogletree Deakins, acknowledged below, whose writings have improved the product and lessened the burden significantly.<sup>[1]</sup> Finally, we wish to thank Randy Johnson, Senior Vice President of Labor, Immigration, and Employee Benefits, and his excellent staff of professionals at the U. S. Chamber, not only for their contributions to this treatise, but also for their leadership on labor and employment policy in Washington. I often tease Randy that I once had his job at the Chamber from approximately 1975–1980. However, the scope of his job is much broader and more comprehensive than I could have imagined. My hat is off to him!

---

<sup>[1]</sup> We wish to acknowledge the assistance of the following individuals without whom this project would not have been possible: Harold P. (Hal) Coxson, Christopher R. Coxson, C. Thomas Davis, Brian E. Hayes; Robert Bartel, Daniel R. Begian, John S. Bolesta, John Richard Carrigan, Dara L. DeHaven, Charles E. Engeman, Wade M. Fricke, Ruthie L. Goodboe, Mark G. Kisicki, David F. Loeffler, W. Gregory Mott, James J. Murphy, Christopher C. Murray, Todd M. Nierman, James C. Pennington, Sarah M. Rain, Cory E. Ridenour, Harry J. Secaras, Kenneth B. Siepman, Douglas M. Topolski, Elizabeth M. Townsend, Thornell Williams, Jr., and David L. Zwisler—all of Ogletree Deakins and all whom contributed to this treatise; James M. McGrew, Hera S. Arsen, KyraAnne Gates, Debi Anderton and the editorial staff at Ogletree Deakins; and Randel K. Johnson and James Plunkett of the U.S. Chamber of Commerce.

## **IV. Changes in Board Composition and Their Effects: *New Process Steel* and *Noel Canning* (Hal Coxson)**

---

Any discussion of the Obama Board from 2008 to the present must begin with the Board's two most significant failures. First, in President Obama's rush to install a union-friendly majority that would enact pro-union labor law "reforms," the Supreme Court of the United States held twice that the "recess appointments" were unlawful and that the Board therefore lacked a quorum necessary to act. The Court's rulings invalidated Board decisions issued by unlawfully-serving Board members or by members acting without a quorum. The result slowed the Board's momentum and required it to reconsider and re-decide the invalidated decisions. Many of the decisions that were invalidated were ones that reversed prior Board precedent. Most, but not all, of those decisions subsequently were reaffirmed on reconsideration by a fully-confirmed Board dominated by pro-union members. But at least it stalled the Board's rush to enact pro-union labor law reforms.

A second failure also set back the Board's rush to mandate pro-union labor law reforms—its failed attempt at rulemaking to promulgate a notice posting requirement for nearly every workplace throughout the country, which would give employees a one-sided road map for how to form or join a union and engage in collective bargaining and other concerted activities. The proposed rule exceeded the Board's statutory authority under the NLRA and was struck down by two federal circuit courts—the Fourth Circuit in *U.S. Chamber of Commerce v. NLRB*, 721 F.3d 152 (4th Cir. 2013), and the D.C. Circuit in *Associated Builders and Contractors v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013).

This chapter discusses each of these landmark decisions.

### **A. Board's Lack of a Quorum: *New Process Steel***

In December of 2007, the terms of three of the five sitting Board members were set to expire at the outset of the Obama Board, and President George W. Bush's nominees were blocked by Senate Democrats. Chairman Robert Battista's term expired on December 7, 2007, and on December 28, 2007, before the expiration of Members Peter Kirsanow and Dennis Walsh's terms at the end of the year, the four remaining Board members delegated the Board's authority to a panel of three members—Liebman, Kirsanow, and Peter Schaumber. The delegation assumed that when Kirsanow's recess appointment expired, the two remaining members—Liebman and Schaumber—would have the authority to decide cases and conduct business. Between January of 2008 and June of 2010, the two-member Board of Liebman and Schaumber issued nearly 600 decisions.

The Board's authority to decide cases with only two sitting members was challenged in numerous circuit courts of appeals. The First, Second, Fourth, Seventh, and Tenth Circuits upheld the Board's authority and enforced the Board's orders. The D.C. Circuit in *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (2009) ruled that the Board lacked authority to decide cases for lack of a quorum. The Supreme Court granted certiorari based on

the split in the circuits to review the Seventh Circuit’s decision in *New Process Steel, LP v. NLRB*, 564 F.3d 840 (2009).

In *New Process Steel*, the Supreme Court, in a 5-4 decision, ruled that the two-member Board lacked a quorum, despite the delegation, since Section 3(b) of the NLRA requires that: “three members of the Board shall, at all times, constitute a quorum of the Board.” 29 U.S.C. 153(b). The result was to invalidate the nearly 600 decisions issued by the two-member Board. *New Process Steel LP v. NLRB*, 560 U.S. 674. 160 S. Ct. 2635 (2010).

In so holding, the Court’s opinion, written by Justice Stevens, stated:

The Rube Goldberg-style delegation mechanism employed by the Board in 2007 — delegating to a group of three, allowing a term to expire, and continuing with a two-member quorum of a phantom delegee group — is a bizarre way for the Board to achieve authority to decide cases with only two members.

The Court found no evidence that Congress intended such a mechanism to contravene the required three-member quorum under Section 3(b) of the Act.

While the Court was not unsympathetic to the Board’s desire to keep its doors open, it was up to Congress to confirm Board members or amend the statutory quorum requirement. In a memorable phrase, the Court’s opinion stated: “Section 3(b), as it currently exists, does not authorize the Board to create a tail that would not only wag the dog, but would continue to wag after the dog died.”

Thus, the Obama Board got off to a rocky start.

## **B. Unconstitutional Recess Appointments: *Noel Canning***

That rocky start continued when the Obama Board was once again rebuked by the Supreme Court in *NLRB v. Noel Canning*, 573 U.S. \_\_\_, 134 S. Ct. 2550 (2014). Specifically, the Court affirmed the decision of the D.C. Circuit that President Obama’s three “recess appointments” to the Board in January 2012—Sharon Block, Richard Griffin, and Terence Flynn—were unconstitutionally appointed in violation of the Recess Appointment Clause to the United States Constitution since they were made when the Senate was not in “recess” but continuing to operate in pro forma sessions. The “recess” appointments were made during a three-day intrasession break. The Court ruled unanimously that, under the Recess Appointment Clause, the president has the authority to make recess appointments during both intersession and intrasession recess periods, but only so long as the break is of sufficient length and the Senate is in recess and unavailable to deliberate or conduct business.

As a result of the Court’s ruling, nearly 700 decisions issued by the Board between January 2012 and August 2013 were rendered invalid, including over 100 pending cases that challenged the Board’s authority to act for lack of a validly appointed quorum. Many of those decisions involved significant policy issues and were those in which the Board had reversed established legal precedent.

### **C. Invalid Notice Posting Rule: *Chamber of Commerce v. NLRB* (4th Cir.) and *National Association of Manufacturers v. NLRB* (D.C. Cir.)**

From the outset, the Obama Board decided to venture into rulemaking rather than pursue traditional administrative decision-making to mandate a general notice posting requirement. Since its creation, the Board has traditionally used rulemaking only sparingly, relying instead on case-by-case decisions to announce labor law policies.

On December 22, 2010, the Board issued a Notice of Proposed Rulemaking (NPRM) requiring most private sector employers to post in the workplace a “Notice of Employee Rights Under Labor Law” drafted by the Obama Board to inform employees how to form or join unions and engage in collective bargaining and other concerted activities. After receiving over 7,000 written comments, the Board issued a final rule on August 30, 2011, which was scheduled to take effect, after a series of delays, on April 20, 2012.

The Board’s authority to issue a general notice posting rule was challenged by the U.S. Chamber of Commerce and the South Carolina Chamber in federal district court in South Carolina, and by the National Association of Manufacturers (NAM) and others in federal district court in the District of Columbia. The U.S. District Court for South Carolina ruled that the Board lacked statutory authority to issue the rule, while the U.S. District Court for the District of Columbia upheld the Board’s authority. There followed appeals by the Board to the Fourth Circuit to reverse the U.S. Chamber of Commerce decision, and by NAM to the D.C. Circuit to reverse the decision in the U.S. District Court for the District of Columbia.

Both the D.C. Circuit and the Fourth Circuit struck down the notice posting rule, but on different grounds. The Fourth Circuit held that the Board lacked authority under Section 6 of the NLRA to issue the rule. *Chamber of Commerce v. NLRB*, 721 F.3d 152 (2013). The D.C. Circuit found that the rule was inconsistent with Section 8(c) of the NLRA, which provides employers with free speech rights to communicate or not communicate with employees regarding unionization. *National Ass’n of Mfrs. v. NLRB*, 717 F.3d 947 (2013). Two judges on the D.C. Circuit also found that the Board lacked authority to promulgate the notice posting requirement under Section 6 of the act. Thereafter, the Board called it quits and declined to file a petition for review with the Supreme Court.

Previously in January of 2009 the Obama administration issued Executive Order 13496 “Notification of Employee Rights under Federal Labor Laws,” effective in June of 2010, applicable to private sector government contractors and subcontractors. The executive order requires notice posting of employees’ rights under the NLRA, in language nearly identical to the failed NLRB notice, in workplaces where government contracts are being performed.

### **Conclusion**

Although making decisions without a quorum, operating under unconstitutional “recess appointments,” and invalid rulemaking were embarrassing missteps in the early years of the

Obama Board and slowed its progress, in the final analysis they were merely “bumps in the road.” The Board quickly recovered, “rubber-stamped” many of its invalid decisions on reconsideration, and progressed on its path of achieving pro-union labor law reforms. As discussed in more detail throughout this treatise, the Board accomplished much of this labor law reform through decisions reversing long-standing precedent and rulemakings to promulgate new, union-friendly so-called “ambush” or “quickie” representation election rules (R-Case Rules), which shortened the period between a union election petition and the vote to as little as 10-21 days.

Many of these decisions were accompanied by strongly worded dissenting opinions—the subject of the next chapter of this book.

## **V. The Power of a Dissenting Opinion (Brian Hayes)**

---

Former U.S. Supreme Court Chief Justice Charles Evans Hughes once famously observed that “a dissent ... is an appeal to the judgment of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court” has strayed. To many observers, the Obama Board has strayed deeply and repeatedly into error over the last six years. It should thus come as no surprise that the Board’s more recent jurisprudence has spawned an unprecedented number of dissents. In some instances, that hoped-for day, when the Board’s errors in judgment or construction will be corrected, soon arrives in the form of a circuit court’s agreement with the dissent and its refusal to enforce a wayward decision by the Board’s majority. More often, however, because of the limited scope of appellate review, and the reluctance of the federal courts to second-guess the Board’s “expertise,” or to interfere with the Board’s policy-making function, that “hoped-for day” is often found far down the road.

Dissents are thus written with two objectives and two audiences in mind. In the first instance they are designed to effectuate immediate appellate reversal of the majority decision and written for the members of the reviewing federal court. In the second instance, they are designed to advance an alternative interpretive or policy position, to provoke further discourse and debate, and to outline the theoretical or doctrinal foundation for a future reversal of the majority’s review. Such longer horizon purposes are aimed at a broader audience consisting of stakeholders, legislators, the public, and future Board members. The years of the Obama Board have certainly witnessed both varieties of dissenting opinions.

In terms of an immediate reversal of a wayward Board majority, there is probably no instance more illustrative than the Board’s ill-conceived “poster” rulemaking. The Board focuses almost exclusively on issuing case-by-case decisions, but under the National Labor Relations Act (NLRA or Act) it does have the authority to engage in general notice-and-comment rulemaking under the Administrative Procedure Act. In the Board’s more than 75 years of existence, it has used this rulemaking authority only in a handful of instances. In late December, 2010, however, a Board majority began the process of using this rarely exercised authority to require all employers covered by the NLRA to post a notice of “employee rights” in their respective workplaces. The rule requiring employers to post a “Notification of Employee Rights” (the “poster rule”) was first published as a proposed rule in the Federal Register on December 22, 2010. The Proposed Rule was supported by a Board majority but one member dissented, arguing essentially that the Board lacked statutory authority to require private employers to post government notices in their workplaces. After a period of public comment, the Board majority approved and promulgated a “Final Rule” on August 30, 2011. The Final Rule was substantially the same as the Proposed Rule and would have required the posting of an NLRB notice by all covered employers. A single Member again dissented from adoption of the Final Rule in an even longer opinion, arguing that in the absence of an express conferral of authority by the Congress, the NLRB simply had no statutory authority to impose the posting requirement on employers.

The application and enforcement of the Final Rule was delayed while the validity of the rule was litigated in the federal courts. In May of 2013, the U.S. Circuit Court of Appeals for District of Columbia Circuit struck down the rule on several grounds, including an argument concerning the Board’s lack of statutory authority which had been twice advanced by the dissenting Board

member. Shortly thereafter, on June 14, 2013, the U.S. Court of Appeals for the Fourth Circuit followed suit in striking down the rule. In this instance, the Fourth Circuit did so solely on the ground that the Board lacked statutory or Congressional authority to require the posting. In early January 2014, the Board essentially “threw in the towel” by announcing it would not seek Supreme Court review of either the D.C. or Fourth Circuit decisions, effectively acknowledging that the Board did not have statutory authority to require the posting—the exact position argued by the dissent some four years earlier.

The adoption of a dissenting view (and the vindication of a dissenting opinion) is rarely as prompt and pointed as was the case with the poster rule; however, given how far afield the Obama Board has strayed in recent years, it is not as rare as it used to be. For example, in *Stella D’Oro Biscuit*, a Board majority, over the dissent of then-Board Member Peter Schaumber, held that an employer’s claim at the bargaining table—that it needed financial concessions from the union to become more financially healthy, attract investment, and remain competitive—was the equivalent of claiming an “inability to pay” which, in turn, obligated the employer to produce audited financial data in response to a union informational demand to substantiate the claim. The majority held that the employer’s failure to produce the financial statements under such circumstances violated the Act. *SDBC Holdings, d/b/a Stella D’Oro Biscuit Co.*, 355 NLRB No. 158. The U.S. Court of Appeals for the Second Circuit, however, adopted the position of the dissent and refused to enforce the Board’s decision and order. *SDBC Holdings, Inc. v. NLRB*, No. 10-3709 (2d Cir. 2013).

In another important case in the bargaining context, a lengthy dissent sparked reversal of a Board decision involving the significant issue of what constitutes a bargaining impasse. *Erie Brush and Manufacturing Co.*, 357 NLRB No. 46 (2011). The determination of whether or not impasse has been reached in negotiations is extremely consequential. For example, in the face of a legitimate impasse, an employer is privileged to unilaterally implement its final bargaining offer. If, however, the employer does so without having reached impasse, such unilateral implementation violates the Act and can expose an employer to wide-ranging financial liability in instances where the implemented terms are less favorable than the pre-implementation ones. The majority in *Erie Brush*, in finding that impasse had not been reached, set an extremely high factual bar for ever finding impasse, and a very low bar for breaking an impasse in the event one ever actually arose. The majority decision made the prospect of ever attempting to unilaterally implement “post-impasse” an even more risky proposition than it already was. The dissent broke sharply with the majority on both the resolution of the case and on the high bar on impasse and the low bar on breaking impasse that the decision implied. The D.C. Circuit eventually sided with the dissenting Board Member in all respects. See *Erie Brush and Manufacturing Company v. NLRB*, No. 11-1337, D.C. Cir., Nov. 27, 2012.

Moving from the bargaining table to the issue of protected employee activity, a Board majority in *Southern New England Telephone Co.*, 356 NLRB No. 118 (2011), held that the employer had violated the Act by banning service employees who regularly visited customers’ homes from wearing “Prisoner/Inmate” shirts and disciplining employees who failed to comply with the ban. Wearing the shirts, the majority concluded, was a concerted attempt to protest the employer’s stance in ongoing bargaining negotiations. Then-Member Brian Hayes dissented, noting the likelihood that such apparel would frighten and alienate customers and that in light of such

“special circumstances,” the employer had every right to ban the shirts and discipline employees to enforce the ban. In a particularly caustic decision, the D.C. Circuit agreed with the dissent, refused to enforce the Board’s order, and rebuked the Board for failing to use “common sense” in reaching its decision. See *Southern New England Telephone Company v. NLRB*, No. 11-1099 (D.C. Cir., July 10, 2015).

Finally, in *Nichols Aluminum*, 361 NLRB No. 22 (2014), a well-reasoned dissent by then-Member Harry Johnson was embraced in its entirety by the Court of Appeals for the Eighth Circuit. In *Nichols*, the majority found that an employee who made a menacing gesture to a coworker while in the course of otherwise protected activity continued to enjoy the Act’s protection despite a legitimate employer rule against engaging in threatening behavior in the workplace. Member Johnson, certainly in the view of the reviewing court, persuasively argued that by virtue of his menacing behavior the employee lost the protections of the Act and was subject to employer discipline.

While *Nichols*, *Southern New England Telephone Co.*, and *Stella D’Oro* all involved lengthy and often impassioned dissents by a single Board Member, sometimes even a more muted and truncated dissent achieves the dissenter’s aim. For example, *Lakeland Health Care* was a representation case that came to the Board in late 2010 on a request for review. The request for review in this instance raised the issue of whether or not the Regional Director, in determining the appropriate bargaining unit, had properly concluded that the employer’s charge nurses were not statutory supervisors and therefore should be included in the requested bargaining unit. Most requests for review are dealt with in somewhat summary fashion, and only rarely elicit a detailed dissent (or any dissent at all). But in *Lakeland*, a single Board Member dissented from the order denying review, noting that the request properly raised the question of whether the record in the case supported the finding, and that review was therefore warranted. See *Lakeland Health Care Associates, LLC, d/b/a Wedgewood Nursing*, 12-RC-9426, unpublished Order, 12/6/10. On appeal, the order denying review exploded into a 52-page disquisition by a panel majority on the Eleventh Circuit. See *Lakeland Health Care v. NLRB*, 696 F.3d 1332 (11th Cir. 2012). The circuit court meticulously reexamined the underlying record and found the NLRB’s determination of nonsupervisory status was unsupported by the facts in the case, and on that basis refused to enforce the Board’s subsequent order.

Finally, on rare occasions, a strong dissenting opinion may actually influence the subsequent reconsideration of the same case, as it did in *Fresenius USA Manufacturing, Inc.*, 358 NLRB No. 138 (2012).

In *Fresenius*, during a decertification campaign, union literature with handwritten obscene, sexist threats directed at female employees scrawled on it was found in the break room. Several female employees complained to management about the vulgar threats, alleging sexual harassment and a hostile work environment, and management initiated an investigation as required by Title VII of the Civil Rights Act of 1964. When management questioned an employee suspected of making the threats, the employee denied any knowledge or responsibility. Subsequently, the employee phoned a number he assumed to be his union representative and confessed to being responsible while asking for advice. Unfortunately for the employee, the telephone number he had called was that of the company’s human resources (HR) department. The employee confessed before HR

had an opportunity to say anything. When informed of his error, the employee denied that he was the caller—in essence denying his own identity. Thereafter, the company suspended and later discharged the employee both for the sexually harassing misconduct and for his dishonesty during the investigation.

The Board majority held that the employee's conduct was protected concerted activity during a union decertification campaign which did not lose the Act's protections as a result of the obscene, sexually harassing writing. The majority found that the company had violated Section 8(a)(3) of the Act and ordered it to reinstate the employee with back pay. The majority held that an employee's lies to an employer about whether he was responsible for vulgar and offensive language written on union leaflets did not justify his termination. A strong dissent argued that while reasonable differences of opinion existed as to whether the obscene language might rise to the level necessary to lose the Act's protections, the termination for dishonesty was lawful.

The Board's original *Fresenius* decision was vacated by the Supreme Court in *NLRB v. Noel Canning*, supra, for lack of a quorum of validly appointed Board Members. On reconsideration, the Board partially reversed its earlier decision and agreed with the original dissent that the employer had a valid business reason for investigating the alleged misconduct even if it occurred in the context of concerted activity, and that the employee's dishonesty on two occasions during the investigation was a legitimate basis for suspension and termination. *Fresenius USA Manufacturing, Inc.*, 362 NLRB No. 130 (2015). The subsequent decision in *Fresenius*, however, over yet another dissent, reaffirmed the Board's earlier decision that the handwritten comments were protected under Section 7. Nevertheless, the original dissent served as the basis for reversing the Board's decision regarding termination for dishonesty.

Many of the Board's controversial decisions cited throughout this treatise contain dissenting opinions. Some of the dissents may lead the circuit courts to deny enforcement on review. Others may be influential in convincing future Boards to reverse policy. Either result is more difficult in the absence of a well-constructed dissenting opinion.

The next three chapters describe the Obama Board's revolutionary changes in decades of representation-election law making it far easier for unions to win representation elections and reverse the decline in union density. Failing to get the so-called Employee Free Choice Act (card-check certification in lieu of secret-ballot elections, and mandatory, binding arbitration of first contracts) enacted, unions turned to the next best thing through the Obama Board: gerrymandered bargaining units (*Specialty Healthcare*), campaigning using employer workplace email systems (*Purple Communications*), and new rules providing quickie "ambush" elections (R-Case Rules). The next three chapters detail those decisions by the Obama Board.

## VI. The Ambush Election Rules

---

The demise of the Employee Free Choice Act ended the Obama administration's hopes to expand unionization through new labor legislation. Amending the National Labor Relations Act (NLRA or Act), which would require passage by the House and Senate, was not a realistic prospect after the 2010 midterm elections. On the other hand, Congressional approval was not necessary for the administration to rewrite the National Labor Relations Board (NLRB or Board) regulations that governed the union election process. Revising these regulations through agency rulemaking would stir up opposition from the business community, but at the end of the day, the Obama NLRB could rewrite the rules all by themselves.<sup>1</sup>

Overhauling the Board's rules and regulations for representation cases (R-Cases) quickly replaced the EFCA as the top priority for the AFL-CIO and its allies in 2011. As part of their EFCA campaign, unions targeted the R-Case rules as an impediment to unionization. Unions popularized the view that the Board's procedures permitted employers to delay elections and frustrate union election campaigns. If the NLRB overhauled these rules, time-consuming proceedings could be avoided, elections would take place more quickly, and employers would be less able to affect the groupings of employees who would vote on union representation. A shorter election process also would advantage unions by reducing the opportunities for employers to challenge union rhetoric, refute union promises, and educate employees about the realities of the collective bargaining process.

In June 2011, the three Democratic NLRB appointees, Chair Wilma B. Liebman and Members Mark Gaston Pearce and Craig Becker, approved issuance of a notice of proposed rulemaking (NPRM) setting forth changes to "streamline" the NLRB's R-Case rules. The NPRM proposed to shorten the time period between the date an election petition is filed and the date the ensuing election is held. It condensed procedures and eliminated a variety of the steps traditionally embedded in the representation process. Notably, the NPRM's streamlined process allowed the NLRB's Regional Director in most cases to avoid pre-election litigation over the merits of whether the bargaining unit chosen by a petitioning union was appropriate.

The NPRM faced some hurdles. In August 2011, during the notice-and-comment period, Member Liebman's term expired, leaving only Pearce (who replaced Liebman as Chairman) and Becker to shepherd the regulations through the rulemaking process. In December 2011, by a 2-1 vote, then-Chairman Pearce and Member Becker, with Republican Member Brian Hayes dissenting, voted to approve a portion of the rules set forth in the NPRM. However, a federal court invalidated that approval because only the two Democratic members (Pearce and Becker) were present when it occurred, which failed to establish the three-member quorum required for valid NLRB action. *See Chamber of Commerce v. NLRB*, 879 F. Supp. 2d 18 (D.D.C. 2012).<sup>2</sup>

---

<sup>1</sup> The NLRB made this point clear in its comments accompanying the Final R-Case Rules: "To be clear, . . . all of the proposed changes could have been made without notice and comment – in part by adjudication, and in part by simply promulgating a Final R-Case Rule." 79 Fed. Reg. 74308, 74311 (Apr. 14, 2015). Elsewhere, the NLRB stated, "Representation case procedures are uniquely within the Board's expertise and discretion, and Congress has made clear that the Board's control of those procedures is exclusive and complete." *Id.* at 74314 (citations omitted).

<sup>2</sup> *See New Process Steel v. NLRB*, 130 S. Ct. 2635 (2010). Even if Pearce and Becker had taken the action in the presence of Member Hayes, the action nonetheless would have been invalidated later under *NLRB v. Noel Canning*,

The NLRB subsequently reissued the NPRM in February 2014. The Board’s three Democrats—Chairman Pearce and Members Nancy Schiffer and Kent Hirozawa—voted to issue a Final Rule in December 2014 (the Final R-Case Rules). The Final R-Case Rules adopted the majority of the changes originally outlined in the 2011 NPRM and took effect on April 14, 2015.

By any measure, the Final R-Case Rules radically changed the NLRB’s procedures for handling union elections. The Obama NLRB made no bones about its intent: The goal of the Final R-Case Rules was to ensure that elections are held as soon as practicable. For this reason, the Final R-Case Rules give the Regional Director the authority and discretion to hold a union election and certify the election results without having to rule on the issue of whether, under NLRB precedent, it is legally correct to include or exclude certain positions or employees in the bargaining unit requested by the union. This change made it possible for the Regional Director to rubber-stamp the petitioned-for bargaining unit. In one stroke of the pen, the Obama NLRB was able to eliminate what many practitioners have long viewed as the primary function of the NLRB’s pre-election procedures.

In the interest of speed, the Final R-Case Rules abbreviate, consolidate, or eliminate many steps in the NLRB’s pre-election process. For example, they tighten the process for filing and serving election petitions, obtaining the union’s showing of interest, and securing the parties’ positions on the appropriate unit. All these things now take place within seven days after the petition is filed so that, in most cases, the hearing officer commences the unit hearing on the eighth day. The Final R-Case Rules jettisoned the standard 25-day window between the Regional Director’s decision and direction of election (D&DE) and the election itself and eliminate a party’s right to file post-hearing briefs after unit hearings or post-election hearings. The Final R-Case Rules also have removed the proscriptions against holding an election if either a request for review or an unfair labor practice affecting the proposed unit is still pending as of the election date. In both situations, the regional director is free to move ahead with the election unless (in the case of a request for review) the NLRB decides to issue a specific order to the contrary.

By far, the most significant changes in the Final R-Case Rules—and those that attracted the most angst from the business community—concerned the near-complete elimination of the employer’s right to litigate inappropriate bargaining unit issues prior to a union election. Before the Final R-Case Rules took effect, the unit hearing routinely served a critical role in ensuring that employees voting in the election comprised a statutorily “appropriate” bargaining unit that conformed to NLRB precedent concerning which employees can or should be represented as part of the same bargaining unit. For decades, the unit hearing stood as a bulwark against gerrymandered petitions based solely on the extent of union organizing. Traditionally, the unit hearing gave employers and unions a chance to present witness testimony and evidence concerning the composition of the unit and to cross-examine witnesses from the opposing party. If the employer believed that the Regional Director’s decision on the appropriate unit was

---

573 U.S. \_\_\_\_ (2014). In that case, the Supreme Court interpreted the Recess Appointments Clause in a way that would have rendered President Obama’s recess appointment of Member Becker unconstitutional.

deficient, it had a right to obtain review by the full NLRB in Washington before the election was held.<sup>3</sup>

Since the Final R-Case Rules took effect in April of 2015, the employer's introduction of evidence at the unit hearing is usually confined to a written position statement and, if requested by the hearing officer, an oral or written "offer of proof." In many instances, the offer of proof is the employer's only opportunity to prove that the requested unit is not appropriate. If the Regional Director finds the offer of proof is "insufficient to sustain the proponent's position," the employer is not allowed to introduce further evidence or to call or cross-examine witnesses. See 29 CFR §102.66(c). Furthermore, the Final R-Case Rules authorize the Regional Director to treat most disputes not as "relevant to the existence of a question concerning representation," but as "individual eligibility and inclusion issues"<sup>4</sup> that "ordinarily need not be litigated or resolved before an election is conducted." 29 CFR §§ 102.64(a), 102.66(a).<sup>5</sup>

Under the Final R-Case Rules, employers have no more latitude to litigate unit challenges at a post-election hearing. Even where an employer timely renews its bargaining unit arguments by challenging ballots and/or election objections, the Final R-Case Rules allow the Regional Director to certify the bargaining representative without convening a full evidentiary hearing on the employer's challenges or objections. If the employer's ballot challenges are insufficient in number to change the vote count, they would never be considered—even under prior rules. Now, though, even where the number of challenged ballots or the election objections would be determinative, the Final R-Case Rules permit the Regional Director to refuse to hold a post-election hearing if he or she concludes that the evidence outlined in an employer's offer of proof is insufficient. As in the past, the employer can ask the NLRB to review the Regional Director's rulings, but by that point in the process, the organizing campaign and the election will already have taken place.

The comments accompanying the Final R-Case Rules provide a good look at the Obama NLRB's view on an employer's right to have a say in the appropriateness of the bargaining unit in which an election will occur. In those comments, the NLRB acknowledged that a pre-election hearing is required by Section 9 of the NLRA if "relevant to the existence of a question concerning representation." However, it flatly rejected the notion that the statute gives employers a right to litigate issues involving the inclusion or exclusion of employees or positions at the unit hearing. The NLRB characterized these issues generally as unnecessary and irrelevant sources of delay that are interposed to complicate matters and gain strategic advantage.<sup>6</sup> That view is a far cry from the perspective of most employers, for whom the unit hearing is the one shot they have at ensuring that a union's choice of bargaining unit satisfies the basic standards for an appropriate

---

<sup>3</sup> In most cases, the NLRB issued a decision before the election date. In certain circumstances where the request for review was not resolved prior to the date set for the election, the NLRB would take steps to "impound" the ballots until the NLRB reached a final decision.

<sup>4</sup> In the Final R-Case Rules, the NLRB declared that "individual eligibility and inclusion issues" include both whether an individual or group is covered by the terms used to describe a bargaining unit and whether an individual or group falls within a particular statutory exclusion that cannot be in the unit. 79 Fed. Reg. at 74384.

<sup>5</sup> The Board acknowledges that this approach does not apply in the case of professional employees, who are entitled to a separate procedure to determine whether they wish to be included in an otherwise appropriate unit containing nonprofessionals. *Id.*

<sup>6</sup> 79 Fed. Reg. at 74386-74389.

unit under NLRB precedent. It is telling that the NLRB decided not to adopt a bright-line standard that would have required the Regional Director to permit litigation of any eligibility or inclusion issue if its resolution would impact the size of the bargaining unit by 20 percent or more. Even under these circumstances, the Board saw preventing a delayed election as the more important interest to preserve. 79 Fed. Reg. at 74388.<sup>7</sup>

In the first six months after the Final R-Case Rules took effect, the average time between the petition filing and the ensuing election dropped to an average of about 24-26 days, compared to the NLRB's earlier standard of 42 days. The significance of this change is most apparent when reduced to concrete terms. Under the Final R-Case Rules, a petition filed on September 1, 2015 would result in an election on September 25. Excluding weekends, holidays, and the 24-hour rule, management would have a maximum of only 16 days to talk to employees about a petitioning union's campaign. In reality, the actual time for those communications to take place is much less. Assuming that it would take 3 to 4 days for a management team just to figure out what to do with an NLRB election petition, and business commitments would consume at least another couple of days, only about 8 to 10 workdays would remain for management to speak to employees about whether to unionize. With this limited window of time, most management teams encountering their first NLRB election petition would be unable to mount a meaningful response to union promises or effectively educate employees about the union or the realities of collective bargaining. This brief window sharply contrasts with the weeks and perhaps months that union organizers can take to galvanize employee support before a petition is filed. The fact that this situation reduces the opportunities for employers to educate their employees about untrue or inaccurate statements by union organizers is not a concern of the Obama NLRB. When presented with this concern in the comments to the reissued NPRM, the Board's response was that, unless forged documents are involved, it is willing to tolerate misrepresentations made to employees by union organizers during the election period. *See* 79 Fed. Reg. at 74325.

---

<sup>7</sup> The Board thought the 20 percent rule would "encourage parties to raise frivolous individual eligibility issues that they otherwise would not have raised just so the 20-percent ceiling was breached." 79 Fed. Reg. at 74388.

## VII. Bargaining Units: *Specialty Healthcare* and Its Progeny

---

The National Labor Relations Board’s (NLRB or Board) long-standing approach to bargaining unit analysis was fundamentally changed by its decision in *Specialty Healthcare*, 357 NLRB No. 83 (2011). *Specialty Healthcare* gave rise to the concept of “micro-bargaining units.” This case involved a nursing home and a union’s effort to have an election involving only certified nursing assistants (CNAs), excluding other similarly skilled employees working in the same facility (e.g., nonprofessional service employees like food and nutrition workers and environmental service employees—employees who under historic principles would have normally been included in the unit). Rejecting the employer’s effort to add these additional employees based on their shared community of interest, the NLRB articulated a new analytical standard for evaluating the appropriateness of bargaining units when an employer claims that additional employees or classifications must be added for the bargaining unit to be appropriate.

Specifically, in determining whether a petitioned-for bargaining unit is appropriate, the Board will first ask whether the employees included in the unit by the union are “readily identifiable as a group.” In conducting that analysis, the Board will consider the following factors:

- job classifications;
- departments;
- functions;
- work locations;
- skills; and
- similar factors.

If the Board concludes that the employees are readily identifiable based on these factors, it will next consider whether those employees share a community of interest using the factors identified above. If the Board finds that the employees are readily identifiable as a group and that they share a community of interest, the Board will find that unit to be “an appropriate unit.” As noted above, once a unit is found to be appropriate, “the Board proceeds no further.” 357 NLRB No. 83, slip op. at 8.

### **Overwhelming Community of Interest**

The Board majority then addressed the question of “what showing is required to demonstrate that a proposed unit consisting of employees readily identifiable as a group who share a community of interest [] is nevertheless *not* an appropriate unit because the smallest appropriate unit contains additional employees.” 357 NLRB No. 83, slip op. at 10.

The Board first addressed what is not sufficient. In that regard, the Board said that a unit is not inappropriate simply because the employees included in the unit share a community of interest with the employees who will be excluded. “The Board has held that the appropriateness of an overall unit does not establish that a smaller unit is inappropriate.” *Id.* Likewise, “because a proposed unit need only be an appropriate unit, and need not be the only or the most appropriate unit, it follows inescapably that demonstrating that another unit containing the employees in the

proposed unit plus others is appropriate, or even more appropriate, is not sufficient to demonstrate that the proposed unit is not appropriate.” *Id.*

A unit is also not inappropriate simply because it is small. “The fact that a proposed unit is small is not alone a relevant consideration, much less a sufficient ground for finding a unit in which employees share a community of interest nevertheless inappropriate.” *Id.* at 10. “A union is not required to request representation in the most comprehensive or largest unit of employees of an employer unless an appropriate unit compatible with that requested unit does not exist.” *Id.*

In order to successfully expand a unit containing employees readily identifiable as a group of individuals who share a community of interest, the employer must show that the “included” and “excluded” employees share an “overwhelming community of interest.” The Board characterized this as a “heightened showing” and said two groups have an “overwhelming community of interest” when the factors “overlap almost completely.” Citing the decision of the U.S. Court of Appeals for the D.C. Circuit in *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417 (D.C. Cir. 2008), the Board said “that the proponent of the larger unit must demonstrate that employees in the more encompassing unit share an overwhelming community of interest such that there is no legitimate basis upon which to exclude certain employees from it.” *Id.*

### **Fractured Unit**

Finally, the Board majority in *Specialty Healthcare* noted that a union cannot successfully petition for a “fractured” unit. A unit would be fractured if employees both inside and outside the requested unit “share an overwhelming community of interest” as discussed above. 357 NLRB No. 83, slip op. at 13. Stated another way, a bargaining unit would be fractured if it contains “an arbitrary segment” of what would be an appropriate unit or “a combination of employees ... too narrow in scope or that [has] no rational basis.” *Id.* Looking at the facts in *Specialty Healthcare*, for example, a unit containing some but not all CNAs—or CNAs working only the night shift or on the first floor—would constitute a fractured unit. As another example based on the facts from *Wheeling Gaming*,<sup>8</sup> a request for a unit including some but not all poker dealers, or poker dealers

---

<sup>8</sup> *Wheeling Island Gaming, Inc.*, 355 NLRB No. 127 (2010) involved an election petition in which the union sought to represent only poker dealers at a West Virginia casino. In response, the employer argued that the smallest appropriate unit should also include craps, roulette, and blackjack dealers, with which the NLRB majority (Board Members Liebman and Schaumber, a Democrat and a Republican) agreed. The dissent by then-Member Becker, however, is what is more insightful. Specifically, Becker noted that the petitioned-for unit contains all employees who do the same job at the same location. Becker observed that these employees performed the same duties (all having identical duties), worked in the same location (physically separated from the other dealers) under common separate supervision, and had a unique compensation system (direct tips instead of pooled tips) with unique training and certification. Because these employees were all in the same job and because they necessarily shared a community of interest—indeed, “virtually identical terms and conditions of employment,” the Board said—they were an appropriate unit. Becker said: “From the perspective of employees, this is one of the most logical and appropriate units within which to organize for the purpose of engaging in collective bargaining.” 355 NLRB No. 127 slip op. at 1. The fact that poker dealers shared a community of interest with the other dealers was irrelevant to Mr. Becker. “There is nothing in the statute which requires that the unit for bargaining be the *only* appropriate unit, or the *ultimate* unit, or the *most* appropriate unit; the Act only requires that the unit be ‘appropriate.’” *Id.* at 2. “One clearly rational and appropriate unit is all employees doing the same job and working in the same facility.” *Id.* While Becker’s position was not sufficiently persuasive to the majority in *Wheeling Gaming*, it was apparently more persuasive in *Specialty Healthcare*, in which the majority adopted Becker’s *Wheeling Gaming* dissent, albeit in slightly different terms.

and blackjack dealers but not all the game dealers employed by the employer, would be a fractured unit. The Board has implied that in those instances, there would be no “rational basis” for those unit configurations, which would make them fractured.

Insightful guidance on this fractured-unit analysis can be found in *Odwalla, Inc.*, 357 NLRB No. 132 (2011). That case involved a stipulated election agreement in which the parties agreed to a unit that included “route service representatives” who worked as sales and delivery drivers of the employer’s juice drinks; warehouse associates; “swing reps” who functioned both as relief drivers and warehouse workers; and cooler technicians who repaired juice coolers. In dispute were merchandisers, who did not work at the same location; the union wanted to exclude them, but the employer wanted them included. They voted subject to challenge and became the determinative votes.

At the regional level, a hearing officer concluded that the merchandisers lacked a sufficient community of interest with the other employees and excluded them from the stipulated unit. The NLRB (Pearce, Becker, and Hayes) disagreed. They held instead “that the merchandisers share an overwhelming community of interest with the employees the parties agreed should be in the unit, and therefore a unit excluding the merchandisers is not an appropriate unit.” 357 NLRB No. 132 (2011).

In analyzing this issue, the Board assumed without expressly stating that the stipulated unit (including route service representatives, warehouse associates, swing reps, and cooler technicians) included employees who were readily identifiable as a group and that they shared a community of interest. In its analysis, however, the Board focused on whether the merchandisers shared an overwhelming community of interest with all the employees already included in the unit agreed to by the union and the employer.

In finding that the merchandisers shared an overwhelming community of interest, the Board focused on an analysis as follows.

The agreed-upon bargaining unit was not configured by job classification, department, or function. Rather, the unit aggregated various classifications, departments, and functions. The agreed-upon unit also did not include employees all supervised by the same supervisor. The employees included in the unit reported to various supervisors (not just one) and some employees included in the unit, the route service representatives, had more supervisors in common with the excluded merchandisers than with some of the other included employees. Finally, the unit was not drawn along lines of compensation. There were multiple forms of compensation among some of the included employees and the excluded merchandisers. Likewise, the excluded merchandisers had similar compensation to that of the warehouse workers and the cooler technicians, both included in the unit. The Board also noted that the factors which distinguished the route service technicians from the merchandisers also distinguished the route service technicians from the other employees in the agreed-upon unit.

Based on these facts, the Board concluded that the unit, excluding the merchandisers, was fractured and lacked a logical basis. The following reasoning is a bit complicated but critical to applying the fractured unit analysis. While none of the categories of employees included in the

unit had an overwhelming community of interest with each other, all the employees in the stipulated unit shared a community of interest, which the merchandisers shared equally. That is, the community of interest factors that did exist “overlapped almost completely.” As a result, the merchandisers shared an overwhelming community of interest with the other employees in the unit. Thus, exclusion of the merchandisers would be arbitrary and lack a rational basis. This reasoning will be applicable when a union petitions for employees in more than one job classification but not all arguably related job classifications.

### **Recent Micro-Unit Decisions**

Two recent micro-unit decisions from the NLRB, *Macy’s, Inc.* and *The Neiman Marcus Group, Inc. d/b/a Bergdorf Goodman*, provide additional insight into how the Board majority approaches this issue. While both of these cases arose in the context of a retail store, the principles articulated apply generally.

In *Macy’s*, the United Food and Commercial Workers Union (UFCW) filed a petition seeking to represent a bargaining unit of fragrance sales employees—specifically, “employees working on the first floor in cosmetics and women’s fragrances and those employed on the second floor selling men’s fragrances.” This group constituted approximately 41 of 150 total Macy’s employees working at this store in Saugus, Massachusetts. In response, Macy’s argued that the smallest appropriate unit would include all 150 store employees working in 11 departments or, alternatively, all sales employees at the store. It was undisputed that these employees shared almost identical terms and conditions of employment, including their policy handbook, fringe benefits, time clock system, break room, and performance evaluation process. Critically, however, employees in this department were separately supervised and there were few documented instances of employee interchange between the 11 departments.

The NLRB concluded that the cosmetics and fragrances department employees were “readily identifiable” based on “classifications and functions.” They represented all the nonsupervisory employees in the department, a department that was organized by Macy’s. Critically, it was “not a sub-department,” of a larger department or “an arbitrary segment of a department.” Employees in this department worked under the common supervision of a single department manager, had a similar pay structure (i.e., base wage plus a percentage of sales commission), and performed an integrated function with the shared purpose of selling cosmetic and fragrance products to customers in two “defined work areas” that were on two floors but connected by an escalator. Likewise, they shared a community of interest.

The NLRB majority then found that Macy’s did not meet its burden of showing that these employees share an overwhelming community of interest with the larger group such that there is no legitimate basis upon which to exclude them. The employees that Macy’s sought to be added to the unit worked in other entirely separate departments for different front-line supervisors. Other than a “brief” all-employee morning meeting and “periodic inventory assistance,” the daily interaction between those in the petitioned-for micro-unit and other store employees was only “incidental.” No other store employees were assigned to sell cosmetic or fragrance products and the petitioned-for employees were not expected to sell products outside the cosmetics/fragrances department. Thus, the community of interest factors do not overlap almost completely.

In *Bergdorf*, the petitioned-for unit included 35 employees working in the “Salon Shoe Department” on the second floor and 11 women’s contemporary shoe sales employees who worked on the fifth floor as part of the larger “Contemporary Sportswear Department.”

The NLRB (5-0) found that this two department unit was not appropriate because, on balance, these employees lacked a community of interest. Specifically, the two groups of employees were organized into two departments located on separate floors. Here, the NLRB found that the petitioned-for employees “share some community of interest factors,” including “a common purpose, a common pay scheme as the only employees in the store to be paid on a draw” versus commission basis, and they share, along with other employees, the same handbook, hiring criteria, and evaluation process. Nonetheless, “the balance of the community of interest factors weigh against finding the petitioned-for unit to be appropriate.” In reaching that conclusion, the NLRB emphasized that, unlike *Macy’s*, here “the boundaries of the petitioned-for unit do not resemble any administrative or operational lines drawn by the employer.” Likewise, the employees had little contact, were separately supervised, and otherwise did not share sufficient interests to be grouped together for bargaining.

The NLRB noted that while the women’s salon shoes was a separate department, the unit requested by the union attempted to carve out women’s contemporary shoe sales employees from their larger contemporary sportswear department. The Board observed that while “[t]he petition’s departure from any aspect of the [e]mployer’s organizational structure might be mitigated or outweighed by other community-of-interest factors,” such as if the petitioned-for employees “shared common supervision despite being located in different departments,” which “would show that the departmental distinctions were relatively less important in the organization of the workforce,” here “[n]o such facts” were present. *Id.* Instead, the petitioned-for women’s salon and contemporary shoe sales employees worked under “different department managers, different floor managers, and even different directors of sales,” with the only shared supervision between the two groups being at the highest level of store management—the general manager. *Id.* The Board also found there was not “significant interchange” between the salon and contemporary shoe sales employees in the petitioned-for unit; contact among the petitioned-for employees was “limited to attendance at storewide meetings and incidental contact related to sharing the same locker room, cafeteria, etc.,” and while the record reflected that the employer encouraged employees to sell merchandise outside their own department, referred to as “interselling,” the Board noted this accounted for “less than one percent” of their overall sales. *Id.* at 4.

Under these circumstances, the Board unanimously concluded that the factors that favored finding a community of interest were outweighed “by the lack of any relationship between the contours of the proposed unit and any of the administrative or operational lines drawn by the [e]mployer (such as departments, job classifications, or supervision). That, combined with the complete absence of any related factors that could have mitigated or offset that deficit, led the NLRB to find the unit to be inappropriate.” *Id.*

### **Interpretation of the National Labor Relations Act**

Section 9(c)(5) of the National Labor Relations Act (NLRA or Act) provides that “the extent to which employees have organized shall not be controlling,” and the Supreme Court has made

clear “extent of organizing” may be considered as only one factor.<sup>9</sup> *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 442 (1965). “Congress intended to overrule Board decisions where the unit determined could *only* be supported on the basis of the extent of organization.” *Id.* at 441. As it acknowledges, the Board cannot stop with the observation that the petitioner proposed the unit but must proceed to determine, based on additional grounds, that the proposed unit is an appropriate unit. Both before and after the adoption of the 9(c)(5) language in 1947, the Supreme Court recognized that “[n]aturally the wishes of employees are a factor in a Board conclusion upon a unit.” *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 156 (1941). Interestingly, although the Board in *Specialty Healthcare* acknowledged that the petitioner’s preference that the proposed unit is an appropriate unit should not be controlling, the impact of this case seems to suggest it is.

In response to and in an attempt to reverse *Specialty Healthcare*, on March 19, 2015, U.S. Senator Johnny Isakson, R-Ga., re-introduced the Representation Fairness Restoration Act, which would prohibit unions from forming “micro-units” within the same company. The legislation seeks to reinstate the 77-year-old standard for determining which groups of employees should constitute an appropriate bargaining unit.

---

<sup>9</sup> The 1935 Wagner Act provides that appropriate bargaining units consist of groups of employees who share common interests in wages and working conditions. The statute directs the Board to make determinations regarding the appropriateness of a proposed bargaining unit on a case by case basis to “assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter.” 29 U.S.C. 159(b) (1994). Under the Wagner Act, the Board placed great weight on the extent to which the union had succeeded in organizing the employees. In response to this pro-union approach, the Taft-Hartley Act introduced a requirement that “the extent to which the employees have organized shall not be controlling.” 29 U.S.C. 159(c)(5) (1994).

## VIII. E-Mail Policy: *Purple Communications*

---

### *Purple Communications*

21-CA-095151

361 NLRB No. 126 (2014)

---

**ISSUE:** Whether employees are entitled to use their employer’s email system for Section 7 purposes.

**HOLDING** (Chairman Pearce and Members Hirozawa and Schiffer). The Board, with a 3-2 majority, reversed its 2007 *Register Guard* holding that employees had no statutory right to use employer email systems for organizing activities protected by Section 7 of the National Labor Relations Act (NLRA or Act). Instead, the majority found that “employee use of email for statutorily protected communications on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their email systems.” The majority found that email is the equivalent of a “natural gathering place,” the “new water cooler.” The Board held an employer may rebut a presumption that restrictions on Section 7 activity on its email servers violates the Act by demonstrating that special circumstances, necessary to maintain production or discipline, justify such restrictions. The majority, however, stated that “it will be the rare case where special circumstances justify a total ban on nonwork email use by employees.”

**DISSENT** (Members Miscimarra and Johnson). Member Miscimarra stated “the majority decision improperly presumes that limiting an employer’s email system to business purposes constitutes ‘an unreasonable impediment to self-organization.’” The fast-paced expansion and pervasive exposure to social media and other electronic communication tools “render implausible any suggestion that employees are unreasonably prevented from engaging in NLRA-protected communications absent a statutory right to conduct such activities on the employer’s business email system.” Similarly, Member Johnson argued that the majority decision “create[s] a sweeping new rule that interferes with an employer’s well-established right to restrict employee use of its property based on convenience” and violates employers’ First Amendment rights by requiring them to pay for speech they do not support.

**SIGNIFICANCE:** By reversing *Register Guard*, the Board made it much more difficult, if not impossible, for an employer to prohibit use of its computer systems for personal use, particularly in the case of union-related communications, concerted activity, and other Section 7 rights. The majority opinion also calls into question all restrictions on employee use of employer equipment for Section 7 purposes during non-work time. Indeed, Member Johnson’s dissent makes this point, stating that the majority’s “rationale extends beyond email to any kind of employer communication network.” It is likely that unions and others will use this decision to push challenges against employer policies banning non-work use of employer-provided phones, instant messaging, other communication technologies, and possibly even other employer provided equipment. Unions will also likely attempt to use this decision to press the issue of nonemployee access to employer communication systems. The majority’s opinion leaves many questions unanswered and its application will undoubtedly be tested.

**STATUS UPDATE:** After the Board ruling, the issue was remanded to an administrative law judge (ALJ). Contrary to his initial finding prior to the Board ruling, the ALJ found that Purple Communications' electronic communication policy was unlawful. Purple Communications has filed exceptions to the Board with the hope that the decision is found erroneous, but anticipates appealing the decision in court if the Board does not reverse its decision. The union has filed cross-exceptions, and the matter was fully briefed as of July 2015.

## **IX. “Protected Concerted Activity” versus “Property Rights”**

---

The fundamental purpose of the National Labor Relations Act (NLRA or Act) is to regulate conflict between labor and capital over the distribution of the product of the enterprise, and to establish internal workplace conditions. In 2016, a majority of the National Labor Relations Board (NLRB or Board) rendered decisions adjusting the pressures unions and employers could apply on each other, tilting conflict outcomes in favor of labor, contrary to established U.S. Supreme Court precedent.

### **The Sit-In Strike at *Wal-Mart Stores, Inc.*, 364 NLRB No. 118 (2016)**

The Board, in a split decision, legitimized an hour-and-a-half sit-in strike/protest within store areas where employees actively interacted with customers.

A grand reopening was scheduled for 6:00 a.m. at a store that had been closed for some time for remodeling. The group, Organization United for Respect at Walmart (“OUR Walmart”), a labor advocacy organization, founded and directed by the United Food and Commercial Workers union (UFCW), had its own agenda for the reopening. A previously agreed-upon plan, devised with the active assistance of UFCW staff, called for five temporary employees—hired explicitly and only for the remodeling projects—to cease working before the end of their late evening shift. They were joined by a regular employee maintenance man.

Thirty minutes before the reopening, they stopped work and moved to the customer service area within the store, adjacent to the main customer entrance. They took up positions along the customer side of a counter separating them from other employees who would work the service area for the benefit of customers seeking assistance—a strategic point from which to disrupt regular retail operations.

The group of six was immediately confronted by Walmart managers, including the manager of human resources, who told them she was prepared to follow the well-established Walmart policy of meeting with each person individually to discuss their particular grievances. Several weeks earlier, as a group, they had presented a written statement to management demanding that the field supervisor of the remodeling effort be removed from his position because of claimed abusive, racist behavior toward the temporary employees. They also demanded the temporary employees be elevated to permanent employee status as the remodeling effort was nearly completed, or be placed on a preferential hire list for permanent jobs when openings became available. These were the demands that OUR Walmart and UFCW organizers chose as the foundation for the sit-in strike/protest at the earlier planning stages of the direct action.

The six employees insisted on meeting with management as a group. The manager of human resources told them to return to work or clock out. They refused and continued to occupy the area in front of the service counter.

The store opened as scheduled at 6:00 a.m. Customers entered the building through the main entrance adjacent to the customer service area and from other access points. So did four non-

employees who were part of the OUR Walmart group who had been demonstrating on Walmart property outside the store. Media members were also present.

Inside, the ten people unfurled an eight-by-ten-foot banner in front of the customer service counter area, which identified OUR Walmart as the organizer of the sit-in strike/protest and announced the basic theme of the group: **“Stand Up, Live Better.”** After about five minutes, the group and the banner moved into the employee work area behind the service counter.

Some 19 to 20 non-employees, including UFCW staff, entered the store and congregated in the customer service area passing out green “OUR Walmart” t-shirts, and various signs. Photos were taken. All strikers and non-employee demonstrators talked to one another, creating a low-decibel buzz distracting to customers in the customer service area.

A Walmart security manager declared the group to be trespassers, and asked them to leave. Some remained in the customer service area. The six employees, and two non-employees, moved to a point near the main entrance through which customers had to pass to enter the main aisle of the store. Product displays were in this location. Three of the temps donned “OUR Walmart” t-shirts. The regular employee striker displayed a sign asserting, **“ULP Strike.”**

Walmart managers directed everyone to leave this critical access point and, preferably, to leave the building, but, at the least, to move to the customer service area because they were blocking customer movement into the main product areas.

Two uniformed police officers entered the building, and after some discussion between the police, management, and a non-employee representative of OUR Walmart, the protestors and the non-employees vacated. The six strikers clocked out at 7:00 a.m.

The protest continued outside the building, with the banner displayed and leaflets distributed. The full-time employee, UFCW staff, and OUR Walmart non-employee members participated.

## **The Decision and Rationale**

Walmart did not terminate any of the strikers. The company gave each a written warning letter, moving them up several notches on Walmart’s progressive discipline scale toward termination.

The Board majority found these warning letters to be violations of Section 8 (a)(1) of the NLRA and ordered Walmart to remove the letters from their personnel files and inform each person, in writing, of the removal.

The majority found all the employee conduct to be “protected concerted activity” within the meaning of Section 7 of the NLRA.

The majority repeatedly asserted an uncontroversial preposition: The statute grants employees the right to “withhold their labor.” True enough, said Board Member Miscimarra in dissent. But the statute, as interpreted by the Supreme Court, does not protect “withholding labor,” by any

means possible in any workplace context. Member Miscimarra cited *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939).

A majority of the Court in *Fansteel* had reversed the Board, and held that a sit-in strike was not protected, even though the strike was a response to the employer's serious unfair labor practices. In most circumstances, as an unfair labor practice striker, the employee could not be disciplined to any degree. Nonetheless, the majority held that employers had an unqualified property right, grounded in the common law and the Constitution, to exclude strikers and their supporters from the premises in order to maintain operations. The right to exclude entailed the right to terminate the strikers who refused to leave the premises when ordered to do so.

The Walmart majority "distinguished" *Fansteel*. The majority noted that the 90 minute sit-in strike and demonstration was short and that the occupation took control of only a small ratio of the big box store's square footage. There was no *direct* evidence produced by Walmart, that shoppers were denied stress-free access to the customer service area, and to product aisles. There was no *direct* evidence that shoppers did not enter the store, or quickly exited, when confronted by the organized hubbub within the store. And, finally, the strikers had no alternative means of presenting their grievances to management because Walmart would not meet with them as a group.

In the majority's view, the entire course of conduct was protected because of the minimal short-term adverse consequences for "production." No discipline, however mild, was permitted. "No harm, no foul" was the majority's rationale.

Member Miscimarra noted that the whole of the organized action was greater than the sum of its individual parts, which the majority broke into granular elements, meticulously timed to the minute. Miscimarra correctly observed that the concentrated intensity of the action, confronted each customer who approached and entered the store. The psychological reality experienced by the more than 50 customers who did enter could not be captured by *direct* evidence received in the litigation process. But the adverse impact, and the uncomfortable lingering effect of a bad experience, could be reasonably inferred.

Member Miscimarra's critical point was that employers have well-defined property rights that enable a firm to take preemptive steps to avoid stressful consumer experiences. These are rights defined by established Supreme Court decisional law. *Fansteel Metallurgical, supra*; see also *Hudgens v NLRB*, 424 U.S. 507 (1976).

### ***Capital Medical Center*, 364 NLRB No. 69 (2016): Picketing on the Property of a Health Care Provider**

A majority of the Board legitimized another "concerted" intrusion on employer property as a tactic in support of union demands for terms in a successor collective bargaining agreement.

The negotiations between Capital Medical Center, an acute care hospital, and the UFCW, had bogged down after some eight months of bargaining. No agreement in sight. Union leadership, with support of the employees in a technicians unit, decided to up the stakes.

After giving the required Section 9(g) 10-day notice to a health care provider of a direct action that had the potential of disrupting patient care, the union staff and some 20 to 30 off-duty employees began picketing on public property adjacent to the entrances to the hospital's main lobby, starting at 6:00 am. One non-duty employee distributed handbills, on hospital property, at an out-patient entrance. The action commenced one day before negotiations were to resume. The picket signs carried standard union messages, "**Fair Contract Now**" – "**Fair Wages**" – "**Respect Our Care.**" The content of the handbills focused on scheduling and compensation issues.

At about 4:00 p.m., the number of off-duty employee pickets on public property doubled. The UFCW staff, managing the demonstration, decided to escalate psychological pressure on management.

Two off-duty employee pickets moved on to the employer's property and took positions, with their signs and handbills, immediately adjacent to the main lobby. This was an area through which patients, their families, and friends regularly passed.

Management quickly confronted the off-duty employees, and asked them to cease picketing from that location, although they were permitted to handbill. They refused. UFCW staff joined the conversation, and after some further discussion over the legality of the picketing, the union withdrew the employees from the property, when a single uniformed police officer arrived on the scene.

During this exchange, management communicated to the union staff, and to at least one employee, that the picketers could be disciplined if they persisted. The police officer declined the employer's request to "remove the pickets" because he did not observe any obstruction of movement of anyone entering or leaving the facility. He urged the parties to resolve their differences and left. The incursion on the hospital's property lasted two hours.

The Board majority held that the hospital had violated Section 8(a)(1) by banning picketing on the property adjacent to the main lobby entrance in the absence of direct evidence that the picketing was "confrontational" and disturbing to patients, and, thus, obstructive to the health care operations. The majority also found that intimation of possible discipline, and the summoning of the police, violated the Act. Capital Medical Center was prospectively enjoined from repeating this conduct.

Again, Member Miscimarra strongly dissented. His premise was that Supreme Court decisional law, interpreting "protected activity" on the employer's property, gave substantial weight to the employer's common-law property right to ban on-premises conduct when the behavior potentially threatened efficient operations. *Lechmere Inc. v. NLRB*, 502 U.S. 105 (1992); *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956), *Fansteel, supra*. *Hudgens, supra*.

Member Miscimarra observed that *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), the majority's primary authority, involved oral and written communication between on-duty employees, during regular work hours, in non-work areas, on non-work time. This conduct did not obstruct on-going production, let alone impose psychological costs on third parties, like the patients and the families who regularly entered the picketing zone.

Member Miscimarra's second basic premise was that picketing is *always* aggressively "confrontational" and carries an implicit message of possible force, designed to alter the behavior of the person approaching the picketers. The Supreme Court has consistently recognized these facts. *Teamsters Local 695 v. Vogt*, 354 U.S. 284 (1957). *NLRB v. Retail Stores*, 447 U.S. 607 (1980). The placement of the pickets, where they were likely to interact with patients, was strategic, not blandly "informational," as the majority would have had it. Management was well-aware of the high probability of patient distress caused by observed confrontational conduct. Any health care provider would be strongly motivated to come to terms with a union to avoid patient stress. That, of course, was the goal of the picketing in the first place.

Member Miscimarra observed that the Board was not free to alter distributive outcomes by adjusting the weaponry available to the disputants. Health care providers have been granted considerable latitude to control the use of the firm's property in aid of protection of vulnerable third parties to whom medical services are provided. The convergence of Supreme Court decisional law, and the explicit text of Section 9(g) of the NLRA requiring advance notice of direct action that might impair patient care, gives management an unconditional right to ban picketing on hospital property under existing law.

### **Significance of the Trend in Board Decisions**

Well-defined property rights, firmly protected from unjustified appropriation by others, are the legal foundation for the efficient operation of markets in a capitalist economic system.

This is the background reality from which the Supreme Court's interpretation of the open-ended provisions of the NLRA has proceeded for nearly 80 years. In *NLRB v. Jones & Laughlin Steel Corporation*, 301 U.S. 1 (1937), the Court affirmed the constitutionality of the Act. The concept of "freedom of contract," entailed in Fifth Amendment substantive due process, was not significantly impaired by the basic provisions of the NLRA. In *Jones & Laughlin Steel*, an employer was compelled to recognize a union as the agent of its employees, chosen by a majority of those employees, in the statutory electoral process. The employer, then, was compelled to negotiate, in good faith, with that chosen agent, the terms of employment to be embedded in an employment contract. But, the law does not and, constitutionally, cannot compel the employer to accept specific terms mandated by the law.

The concept that the NLRA could not be interpreted to compel an employer to accept particular contract terms has been consistently reaffirmed by the Supreme Court. *H.K. Porter v. NLRB*, 397 U.S. 99 (1970), *NLRB v. Insurance Agents International Union*, 361 U.S. 477 (1960).

To be sure, the Court has affirmed that the NLRA positively reinforces employee efforts to unionize—attempts to monopolize the supply-side of labor markets and to exercise whatever monopoly power achieved through the strike. But these efforts cannot be conducted in a manner which prevents the employer from exercising constitutionally grounded property rights to maintain and continue the efficient operation of the production process. *Fansteel, supra. Lechmere, supra. Babcock & Wilcox, supra.*

The recent Board simply did not accept the social cost-benefit calculus embedded in the Supreme Court decisional law. The majority did not acknowledge that the Fifth Amendment provides a constitutional underpinning for the protection of legitimately acquired property rights.

This was, at bottom, a political decision taken without regard to the existing state of the law as determined by the Supreme Court. The decisional trend violates the rule of law.

What is to be done?

Within the litigation process, employers should develop positions which strongly emphasize that the timing and magnitude of direct action on employer property is limited by the potential effect on third parties—an effect that can have adverse mid-term and long-term consequences for employer earnings in competitive industries. This economic reality is a kind of “legislative fact” that cannot be established by conventional direct transactional evidence. But expert evidence can be presented. Employers should assume the burden of production and persuasion on all material issues, regardless of the formal allocation of these burdens.

The Board may be unmoved by evidence that short-term, but highly stressful occupation of employer property can impose substantial damage to the return on investment in that property. Many appellate courts, however, will pay close attention and read Sections 7, 8, and 9 of the NLRA in the shadow of Fifth Amendment property rights.

The employer, as always, has to anticipate what the form of the direct action will be, and take steps to mitigate short-term and long-horizon costs. Invoking law enforcement early on is a must to attempt to reach an accommodation with the union and advocacy group on ground rules. Failing that, employers should seek injunctions against intrusions on property in state courts. There is state court appellate authority relying upon *Sears Roebuck v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978), that such trespass actions are not preempted by the NLRA. *Walmart Stores Inc. v. United Food and Commercial Workers International Union*. Court of Appeals of the State of California Second Appellate District, B259926 (Decided 10/14/16 on rehearing).

The trend line of the Board’s decisions reflects a political decision on “just” distribution of earnings between labor and capital. A clean, coherent reversal of the trend will probably entail a different political decision on what division shall be deemed “just.”

The outcome of the Presidential election strongly suggests that the direction of that trend will be reversed.

## X. Protected Concerted Activity Cases

---

### Introduction

The National Labor Relations Board (NLRB or Board) under President Obama has launched a persistent, sustained effort in scores of published decisions to rebuke common-sense workplace rules and to parse words in long-established handbook policies. These decisions represent what a bare three-member Board majority “might think that employees might think” would tend to discourage their right to engage in concerted activity, which is protected by Section 7 of the National Labor Relations Act (NLRA or Act) — even where the rule or policy has never been applied and where no employee has ever complained. The Board’s assault leaves employers fearful that their workplace rules and handbook policies will fall prey to the Board majority’s magnifying glass and be found under the standard in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) to constitute a violation of Section 8(a)(1) of the Act and constitute grounds to overturn union losses in representation elections. See, e.g. *Jury’s Boston Hotel*, 356 NLRB No. 114 (2011). Even absent representation elections, the Board’s effort to ferret out offending words or phrases forces every employer—in both union and nonunion workplaces, whether employees are represented by unions or not—to reconsider and rewrite common workplace rules and policies before the Board finds them to be in violation of Section 7 concerted-activity protections. However, such proactive measures to revise handbooks for legal compliance are difficult because there are few bright lines and no one can be certain as to what the Board may next determine to be a violation.

The *Lutheran Heritage* standard provides that workplace policies that employees would reasonably construe to prohibit Section 7 activity tend to “chill” the employees in the exercise of their protected concerted activity rights, and therefore violate Section 7 of the National Labor Relations Act. However, by fly-specking company rules and policies, the Obama Board has expanded the scope of *Lutheran Heritage* to previously unimagined degrees. See *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).

On March 18, 2015, the Board’s General Counsel, Richard Griffin, sought to provide guidance on protected concerted activity by issuing a report outlining several company rules found to be violations as well as rules the General Counsel found to be lawful. While helpful, the report only underscores the magnitude of the issue.

The report laid out the eight most common workplace rules and policies to come under Board attack:

- **Confidentiality Policies:** It is unlawful for employers to require employees to maintain confidentiality concerning wages, hours, working conditions, financial information, and disciplinary investigations, since that would restrict protected concerted activity. Employees have the right to discuss wages, hours, and other terms and conditions of employment among themselves and with others, including with union leaders, the media, and government officials. Employers may still protect certain confidential information from disclosure.

- **Employee Conduct Towards the Employer and Its Supervisors:** Workplace rules may not prohibit employee criticism directed at the company or its managers and supervisors—even if employees use inappropriate, disrespectful, negative, or profane language and conduct—since the Board considers criticism to be protected concerted activity. Still, on rare occasions the Board may find that such language or conduct “crosses the line” and loses the Act’s protections. Policies may also restrict disparagement of the company’s products.

- **Employee Conduct Towards Fellow Employees:** Company policies or rules may not restrict communications or interactions among employees, even where such conduct may become inappropriate since it could chill debates and arguments concerning unionization and other protected concerted activity. Policies may still prohibit harassment and discrimination and require professional and courteous treatment of fellow employees.

- **Employee Interaction With Third Parties:** It is unlawful to prohibit employees from communicating with the media, government agencies, or others outside the workplace concerning wages, hours, and working conditions. Employers may still require employees to indicate that such communications are unauthorized without company permission and are not expressed on behalf of the company.

- **Restrictions on the Use of Company Logos, Copyrights, and Trademarks:** Workplace rules and policies may not prohibit employee’s use of company logos, copyrights, and trademarks since they may lawfully be used on picket signs and other expressions of protected concerted activity. Policies may require employees to respect all copyright and trademark laws.

- **Restrictions on Leaving Work:** Workplace rules or policies restricting employees from leaving work, or leaving work without permission, are unlawful since they might discourage employees from engaging in protests, picketing, strikes or other forms of protected concerted activity. Policies may permit discipline for violations of attendance rules.

- **Restrictions on Photos and Recordings:** Workplace rules or policies that restrict employees from taking photographs of the workplace or recording workplace communications are unlawful.

- **Conflict of Interest Policies:** Workplace rules that require that “employees must operate in the best interest of the company” are overbroad and violate employees’ rights to engage in protected concerted activity.

Other common sources of Board challenges to workplace rules and policies are:

- **Social Media Policies:** Employees’ off-duty use of social media to criticize the company, its managers and supervisors, and fellow employees is protected concerted activity. Workplace policies restricting postings that reflect negatively on the company are overbroad. Even postings that use inappropriate, profane, or abusive language are protected, although on rare occasions they may “cross the line” and lose the Act’s protections.

In *Southern New England Telephone Co.*, which is discussed in an earlier chapter, the Board addressed dress and appearance policies. Specifically, the Board upheld the right of customer

service employees T-shirts on customer home calls to wear T-shirts—which on the front were labelled “INMATE,” and on the back said “PRISONER OF AT\$T”—with no other identification following a recent highly publicized home invasion by escaped prison inmates that resulted in a triple murder, rape, and arson. The union asserted that the T-shirts were intended to publicize a labor dispute in which employees believed they were prisoners of the company. But that was not expressed on the front of the T-shirts, which was the first thing customers would see upon opening the door. The company permitted employees to wear the T-shirt at work and other nonpublic areas but refused to allow them to wear the shirts when interacting with customers. The company issued 183 one-day suspensions when the rule was violated. The Board found that the company had violated the employees’ Section 7 rights to engage in protected concerted activity. *Southern New England Telephone Co.*, 356 NLRB No. 118 (2011) (Hayes, dissenting), enforcement denied, *Southern New England Telephone Co. v. NLRB*, 649 F.3d 723 (D.C. Cir. 2015). The U.S. Chamber of Commerce filed an amicus brief with the D.C. Circuit urging reversal.

The D.C. Circuit overturned the Board’s decision. It agreed that the T-shirts could damage the company’s reputation and business, and found that it fell within a “special circumstances” exception to the general rule that employees are permitted to wear union T-shirts, hats, and insignia. The court stated: “Common sense sometimes matters in resolving a legal dispute. This case is a good example.”

See the discussion in Chapter IV “The Power of a Dissenting Opinion” written by former Member Brian Hayes. For a discussion of an additional case where the Board considered whether a work rule reasonably tends to chill employees from the exercise of their Section 7 rights to engage in protected concerted activity, turn to Chapter XVII C. 2012-2013: *Karl Knauz Motors, Inc.* 353 NLRB No.164 (2012) (courtesy rule prohibiting “disrespectful conduct” and language which “injures the image or reputation” of the employer).

## Significant Cases

Below are a few significant Obama Board decisions which redefine and stretch the meaning of “protected concerted activity” under Section 7 of the Act. The cases discussed are by no means exhaustive and, for the most part, are confined to decisions with strong dissenting opinions.

### ***Triple Play Sports Bar & Grille***

**361 NLRB No. 31 (2014)**

**Aff’d 2015 U.S. App LEXIS 18493 (2<sup>nd</sup> Cir.)(Oct. 21, 2015)(Unpublished opinion)**

---

**ISSUE I:** The principal issue in the case was whether two employees of a sports bar and restaurant were unlawfully discharged for their off-duty, off-site participation in a Facebook discussion with current and former employees in which they criticized their employer. In the Facebook discussion that prompted the firings, a former employee complained in a Facebook status update that she owed more taxes than expected because of withholding mistakes by the employer. Specifically, the former employee stated, “Maybe someone should do the owners of Triple Play a favor and buy it from them. They can’t even do the tax paperwork correctly!!! Now I OWE money...Wtf!!!!” One employee commented on the status, “I owe too. Such an asshole,”

and was discharged. A second employee, who “liked” the former employee’s status, was discharged as well.

The National Labor Relations Board (NLRB or Board) concluded, in the context of the ongoing dialogue among employees about tax withholding, that the Facebook communications were “concerted activities” and that they were “for the purpose of . . . mutual aid or protection” within the meaning of Section 7. As for the second employee, the administrative law judge (ALJ) and the Board agreed that his clicking the “Like” button expressed his support for the others who were sharing their concerns and constituted sufficient participation in the discussion to rise to the level of protected concerted activity.

The Board concluded that the employees’ Facebook activities were not so disloyal as to lose the protection of the National Labor Relations Act (NLRA or Act) because they did not mention or disparage the company’s products or services, and were not defamatory because there was no basis to conclude that the statements were maliciously untrue. Significantly, the Board found that, as a general rule, the *Atlantic Steel* framework is not well-suited to address issues that involve employees’ off-duty, off-site use of social media to communicate with other employees or with third parties.

**ISSUE II:** Whether employees would reasonably construe the language of the employer’s Internet/blogging policy to prohibit Section 7 activity.

Triple Play maintained the following work rule as part of its Internet/blogging policy in its employee handbook:

The Company supports the free exchange of information and supports camaraderie among its employees. However, when internet blogging, chat room discussions, email, text messages, or other forms of communication extend to employees revealing confidential and proprietary information about the Company, or engaging in inappropriate discussions about the company, management, and/or co-workers, the employee may be violating the law and is subject to disciplinary action, up to and including termination of employment. Please keep in mind that if you communicate regarding any aspect of the Company, you must include a disclaimer that the views you share are yours, and not necessarily the views of the Company. In the event state or federal law precludes this policy, then it is of no force or effect.

Pointing to the “patent ambiguity” in the phrase “inappropriate discussions,” the Board found that employees would reasonably interpret the rule as proscribing any discussions about their terms and conditions of employment deemed “inappropriate” by Triple Play. The Board noted that the rule contained only one other prohibition—against revealing confidential information—and provided no illustrative examples of what Triple Play would consider inappropriate.

**CONCURRENCE/DISSENT:** Member Miscimarra dissented from the holding regarding the Internet/blogging policy, stating that “[t]he Respondent maintained a facially lawful Internet/Blogging policy to prevent disclosure of its proprietary or confidential information by its employees, to help ensure that unauthorized statements by employees would not be attributed to

Respondent, and to warn employees about ‘inappropriate discussions’ that could be unlawful and subject them to discipline.” He called for a reexamination of the current Board standard regarding allegedly overbroad rules and policies under the first prong of *Lutheran Heritage*, but felt that Triple Play’s rule was phrased in general common sense terms that precluded it from reasonably being considered unlawful under any standard.

He concurred in the holding on Issue I.

**SIGNIFICANCE:** The fact that the simple act of “liking” a Facebook comment can constitute participating in a protected workplace discussion illustrates the broad reach of protected concerted activity.

Furthermore, in the first Facebook case to reach a court of appeals, the Second Circuit affirmed and held that the Board properly applied *Jefferson Standard* and *Linn* in evaluating the discharge decisions and also concluded that the Board correctly identified the *Lutheran Heritage* framework as the governing rule on this question and reasonably applied that rule to the facts of this case.

\*\*\*

***Dish Network Corporation World***  
**359 NLRB No. 108 (2013)**

---

**ISSUE:** Whether the company’s social media, contact with the media, and contact with government agencies’ handbook policies violated Section 8(a)(1) of the National Labor Relations Act (NLRA or Act).

**HOLDING** (Chairman Pearce, and Members Griffin and Block). The company’s policy stated, in part, “You may not make disparaging or defamatory comments about Dish Network, its employees, officers, directors, vendors, customers, partners, affiliates or our, or their, products/services...” The rule also banned employees from engaging in negative electronic activity “on company time.” The National Labor Relations Board (NLRB or Board) majority determined that the company had violated the Act by maintaining a social media policy in its employee handbook which prohibited employees from electronically posting critical commentary about the company. The Board also found this limitation to be overbroad because it failed to clearly convey that solicitation can occur during breaks and other nonworking hours at the company.

Additionally, the Board ruled that the company violated the Act by maintaining a “Contact with the Media” policy which required employees to obtain prior authorization from management before speaking about it to news media outlets or at public meetings. This policy violated the Act because, according to the Board majority, preauthorization requirements unduly interfere with employees’ Section 7 rights to “improve terms and conditions of employment” by seeking assistance “outside the immediate employee-employer relationship” (citations omitted).

Similarly, the Board held that the company violated the Act by maintaining a “Contact with the Government Agencies” policy in its employee handbook which banned employees from

communicating with government agencies about it, without first obtaining management approval.

**SIGNIFICANCE:** This was one of several cases decided in recent years that involved employer policies that, in the Board's view, restricted employees' rights under Section 7 of the Act. When the Board views the rule as ambiguous, or a clause in the rule as ambiguous, the rule is deemed overbroad if employees would reasonably construe the language to prohibit Section 7 activity.

\*\*\*

***Jimmy John's and Industrial Workers of the World***  
**361 NLRB No. 27 (2014)**

---

**ISSUE:** Whether communications linking worker demands for sick leave with a message about the company's product were so reckless, disloyal, or maliciously untrue as to lose the protection of the National Labor Relations Act (NLRA or Act).

**HOLDING** (Chairman Pearce and Member Schiffer). The National Labor Relations Board (NLRB or Board) ruled that a restaurant franchisee violated the Act when it disciplined three employees and terminated six more for participating in a publicity campaign that sought support for employee sick leave benefits. The campaign involved distributing posters in the franchisee's stores and in public places in the surrounding neighborhood. The posters displayed side-by-side pictures of a sandwich, one described as made by a healthy Jimmy John's worker and the other made by a sick worker. The poster stated, "Can't Tell the Difference? That's too bad because Jimmy John's workers don't get paid sick days. Shoot, we can't even call in sick. We hope your immune system is ready because you are about to take the sandwich test. . . . Call the owner [name] at [telephone number] to let him know you want healthy workers making your sandwiches."

The Board held that the workers' actions did not constitute disloyalty or reckless disparagement so as to lose protection of the Act. The Board reasoned that the communications were expressly related to an ongoing labor dispute, at least some of the statements ("... workers don't get paid sick days") were true, and the employees did not make the express claim that any customer had become ill as a result of contaminated food, but merely suggested the potential for illness from the preparation of food prepared by sick workers. The majority reasoned that the poster's message "involves the kind of hyperbole expected and tolerated in labor disputes" and stated that "the mere fact that statements are false, misleading or inaccurate is insufficient to demonstrate that they are maliciously untrue."

**DISSENT:** Member Johnson strongly dissented, stating that "Section 7 does not confer on employees the unlimited right to disparage the quality of their employer's products with an intent to cause harm to their employer's reputation, or reduce its income, or with reckless disregard for such consequences of their actions, even if their efforts can be linked to a legitimate labor disputes." Contrary to the majority, Member Johnson felt that the sick leave poster purposefully disparaged the franchisee's signature product in a manner out of proportion to the sick leave dispute involved, was designed to attack the reputation and income of the franchisee and the national franchisor in the eyes of the public, and demonstrated reckless disregard for such inevitable, detrimental consequences. Member Johnson argued that the statement, "Shoot, we

can't even call in sick," was empirically false—a fact well-known to the employees, who published it anyway. The circumstances of this case further illustrated to Member Johnson a disloyal, malicious intent because use of the “nuclear bomb” of a tainted food product was so incommensurate with the sick leave grievance as to show that the purpose was to harm the employer in a manner unrelated to the labor dispute.

**SIGNIFICANCE:** This case illustrates the Obama Board's penchant to find employee communications that are patently disloyal and harmful to the employer's reputation and business to be protected so long as the communication is linked to an ongoing labor dispute.

\*\*\*

*Pier Sixty*

**02-CA-068612 and 02-CA-070797**

**362 NLRB No. 59 (2015)**

---

**ISSUE/HOLDING** (Chairman Pearce and Member McFerran). In *Pier Sixty*, the National Labor Relations Board (NLRB or Board) held that the employer violated Sections 8(a)(1) and (3) of the National Labor Relations Act (NLRA or Act) when it discharged an employee for profanely attacking and insulting a supervisor in a Facebook post two days before a union certification election. According to the majority opinion, a number of service employees at Pier Sixty had expressed interest in union representation, in part because of concerns that management repeatedly treated them disrespectfully and in an undignified manner. Two days before the union election, a 13-year employee, who was working as a server at a fundraising event, got upset at what he perceived to be the supervisor's disrespectful tone and comments towards the wait staff. He then took a break and while outside the employer's facility posted from his iPhone the following message on his personal Facebook page:

Bob is such a NASTY MOTHER F\*CKER don't know how to talk to people!!!!!!  
F\*ck his mother and his entire family!!!! What a LOSER !!!! Vote YES for the  
UNION!!!!!!!!!!

The post was visible to the employee's Facebook “friends,” which included some coworkers, and to others who visited his personal Facebook page. The employee deleted the post the day after the election.

The majority held that the Facebook comments, directed at a manager's asserted mistreatment of employees and seeking redress through the upcoming union election, constituted protected concerted activity and union activity. The panel also agreed that the employee's comments were not egregious enough to lose the protection of the Act and noted that the Pier Sixty workplace was rife with vulgarity.

In evaluating the posting under the totality of the circumstances, the Board considered the following factors:

1. whether the record contained any evidence of the employer's antiunion hostility;
2. whether the employer provoked the employee's conduct;
3. whether the employee's conduct was impulsive or deliberate;

4. the location of the Facebook post;
5. the subject matter of the post;
6. the nature of the post;
7. whether the employer considered language similar to that used by the employee to be offensive;
8. whether the employer maintained a specific rule prohibiting the language at issue; and
9. whether the discipline imposed upon the employee was typical of that imposed for similar violations or disproportionate to his offense.

The Board concluded that none of the factors weighed in favor of finding that the employee's comments were so egregious as to take them outside the protection of the Act.

**DISSENT:** Member Johnson argued that the Facebook comment went beyond what's shielded by the NLRA. "In condoning [the employee's] offensive online rant, which was fraught with insulting and obscene vulgarities directed toward his manager and his manager's mother and family, my colleagues recast an outrageous, individualized griping episode as protected activity. I cannot join in concluding that such blatantly uncivil and opprobrious behavior is within the Act's protection."

**SIGNIFICANCE:** This case is another example of the expansive scope of social media activities that Section 7 protects and the narrow limits the Board places on an employer's ability to discipline employees for work-related communications that take place online. As the Board's ruling makes clear, employee social media communications that relate to working conditions or unionization will often be protected even if they are offensive, obscene, or attack individual members of management personally.

Additional cases illustrate that even when common sense and courtesy seem to require termination for profane behavior, the offensive conduct may still be deemed protected by the Act when it arises in the context of discussions about protests concerning wages, hours, or other terms and conditions of employment. See Chapter XVII. For example:

- *Fresenius USA Mfg.*, 358 NLRB No. 138 (2012) (pro-union employee's scribbled "vulgar, offensive, and, in isolation, possibly threatening statements" on union newsletters with goal of encouraging coworkers to support union were not so egregious as to lose the protection of the Act);
- *Hispanics United of Buffalo, Inc.*, 359 NLRB No. 37 (2012) (profane statements that five employees posted on Facebook about a coworker after learning that the coworker criticized their work were protected); and
- *Plaza Auto Center, Inc.*, 360 NLRB No. 117 (2014) (profane verbal attack directed at owner of company was protected).

\*\*\*

*Parexel International, LLC*  
356 NLRB No. 82 (2011)  
*Review dism'd by Parexel Int'l, LLC v. NLRB,*  
2012 U.S. App. LEXIS 11036 (D.C. Cir., May 3, 2012)

---

**ISSUE:** Whether the employer violated the Act when it discharged an employee who had been inquiring about wage disparities before she discussed the alleged disparities with any of her fellow employees.

**HOLDING** (Chairman Liebman and Member Becker). The National Labor Relations Board (NLRB or Board) held that the employee's discharge was a preemptive strike to prevent her from engaging in protected concerted activity. The majority concluded that the discharge violated Section 8(a)(1) of the National Labor Relations Act (NLRA or Act) regardless of whether the initial conversations were themselves protected concerted activity. The administrative law judge (ALJ) had declined to find a violation and opined that Board law requires that an employee must have already engaged in protected concerted activity to support a decision that she was unlawfully discharged to prevent protected concerted activity. The Board disagreed, relying for the first time on a preemptive strike theory, stating: "If an employer acts to prevent concerted protected activity—to 'nip it in the bud'—that action interferes with and restrains the exercise of Section 7 rights and is unlawful without more."

**DISSENT:** Member Hayes dissented on the grounds the preemptive strike theory was not alleged in the General Counsel's complaint and was not fully litigated. He noted that the respondent had no notice that it would have to marshal a legal defense to a theory that the General Counsel did not urge before or during the hearing and that the judge conceded was unprecedented. Thus, no violation should be found on the preemptive violation theory "as a matter of fundamental due process."

Member Hayes did not address the merits of the preemptive violation theory since he found that a violation based on that theory was procedurally barred. However, he noted that finding an 8(a)(1) motivational discharge violation in the absence of any actual concerted activity is unprecedented and expressed serious reservations about the potential breadth of application of the theory in the future.

**SIGNIFICANCE:** This case also illustrates the Board's focus on protecting Section 7 activity, even when such activity has not occurred. As such, the Board considers the preemptive strike theory to be a logical extension of cases holding that an employer's maintenance of a rule against discussing wages interferes with Section 7 rights even if no employee has yet engaged in protected activity or been disciplined under the rule and other cases, such as those holding that adverse action based on an employer's belief that an employee engaged in protected concerted activity is unlawful even if the belief was mistaken and the employee did not engage in such activity.<sup>10</sup>

---

<sup>10</sup> See also, *Worldmark By Wyndham*, 356 NLRB No. 104 (2011) (employee engages in protected concerted activity when he inquires about a dress code in a group setting) which is discussed in Chapter XVIII B (2011).

\*\*\*

***Fresh & Easy Neighborhood Market***  
**31-CA-07704 and 31-CA-080734**  
**361 NLRB No. 12 (2014)**

---

**ISSUE:** The principal issue was whether a single employee engaged in “concerted activity” for the purposes of “mutual aid and protection” within the meaning of Section 7 of the National Labor Relations Act (NLRA or Act) when raising an individual sexual harassment complaint to her employer.

**HOLDING** (Chairman Pearce and Members Hirozawa and Schiffer). The National Labor Relations Board (NLRB or Board) ruled that the employee’s actions were both concerted and for mutual aid and protection. In this case, a cashier in the employer’s grocery store wanted to participate in a training program known as “TIPS” relating to the sale of alcohol. She wrote a message to her supervisor on a break room whiteboard, stating “.....could you please sign me up for TIPS training on 9/10/11?” Soon after, she noticed that the word “TIPS” had been changed to “TITS” and a picture of a worm or peanut had been added to her original whiteboard message. She asked her team leader about filing a sexual harassment complaint. She then copied the whiteboard picture and the altered message to a piece of paper and asked her team leader and two coworkers to sign the document. She was hostile and confrontational when making these requests. The employer promptly investigated the harassment claim, during which the co-employees stated that they believed they were only witnessing to the fact that the reproduction on the paper was correct, that they did not want to help her bring a sexual harassment complaint, and that they felt forced to sign the document, especially since she was being disruptive in front of customers. One of these co-employees even filed a complaint against the cashier for bullying her into signing the document. The cashier testified that she did not intend the statement to be a joint complaint. Upon completion of the investigation, the employer concluded that the whiteboard altercations were inappropriate, disciplined the offending employee for making the altercations, informed the cashier of the decision in writing, and assured her that she would be protected against retaliation.

In holding that the cashier’s conduct was concerted, the Board rejected the notion that she was raising a personal complaint not shared by others. Her initial conduct in approaching her coworkers to seek their support for her efforts regarding this workplace concern was enough to constitute concerted activity. The Board reasoned broadly that “concertedness is not dependent on a shared objective or on the agreement of one’s coworkers with what is proposed.” The Board went on to say that this would be the case even if the coworkers did not agree with the complaint or did not want to sign the document.

The Board then noted that a broad range of employee activities regarding terms and conditions of employment falls within the scope of the “mutual aid or protection” clause. Relying on a “solidarity” principle, the Board reasoned that when an individual employee solicits assistance from coworkers to raise his or her workplace issues to management, the solicited employees have an interest in helping out the aggrieved individual—even if the individual alone has an immediate stake in the outcome—“because next time it could be one of them that is the victim.” The Board quoted a nineteenth century labor organizing motto: “An injury to one is an injury to

all.” Accordingly, the Board held that the cashier was acting for the purpose of mutual aid and protection in soliciting her coworkers’ assistance in complaining to management about an incident of alleged sexual harassment.

**DISSENT:** Members Miscimarra and Johnson dissented. Although disagreeing on the threshold issue of concertedness, both rejected the Board’s “solidarity standard” because it assumes what must be proven, i.e., that the conduct at issue was “for the purpose of . . . mutual aid or protection” and agreed that the announced standard expands the protections of the Act to the point where it may undercut and hinder the ability of employers to fulfill their obligation to protect the rights of their employees under the numerous other federal or state labor and employment statutes. In particular, Member Miscimarra’s central point in his forcefully argued dissent was that the cashier did not engage in concerted activity under Section 7 and relevant Board and Court decisions because her conduct—asking coworkers to verify that she had correctly copied what was on the whiteboard—did not look toward group action and therefore was not concerted. He argued that by holding that any concerted activity regarding a single person’s complaint inherently involves “mutual aid or protection” if it implicates a non-NLRA statutory right—here, protections against sexual harassment in the workplace—the Board embraces a standard that eliminates the statute’s “mutual aid or protection” language. “

**SIGNIFICANCE:** This case illustrated the Board’s expansive reading of Section 7 protections for the actions of a lone employee. Although this case involved an individual complaint of sex harassment under Title VII, as Member Miscamarra succinctly stated, “I am concerned that the majority’s holding may be the source of an unprecedented expansion [of] Section 7 coverage broader than anyone can presently anticipate.”

\*\*\*

## **XI. Joint Employer Standard: *Browning-Ferris Industries and Miller & Anderson, Inc.***

---

### **THE NLRB IGNORES SETTLED LAW AND CREATES UNCERTAINTY IN THE LABOR MARKET CONTRACTING PROCESS**

The facts in the National Labor Relations Board's (Board) now-famous *Browning-Ferris* case are commonplace among businesses. Browning-Ferris Industries, Inc. (BFI) contracted with Leadpoint for the performance of a crucial labor-input in the production of recycled waste. Leadpoint hired employees, after testing relevant skills, and assigned them to assembly line-like jobs sorting waste moving on conveyor belts into categories according to potential resale value. A Leadpoint general manager and front-line supervisors actively managed on-the-ground performance, in all respects, on a continuous basis, over that four-year period. This very common relationship between two businesses laid the groundwork for one the Board's most controversial decisions in recent memory.

In a 3-2 decision, a majority of the Board found BFI to be a joint-employer of some 240 employees of Leadpoint, an independent business, which for some four years had actively managed and monitored the work of these employees performing tasks at a BFI recycling facility.

In so ruling, the majority overruled 30 years of Board precedent accepted by the federal courts and held that if the text of the service contract between the "user firm," BFI, and the "supplier firm," Leadpoint, reserved to the user "the right" to manage some crucial aspects of the employment relationship, the user firm was a joint employer, regardless of whether that right was ever exercised to any meaningful degree. Prior to this case, the actual exercise of reserved rights had been deemed a necessary condition of joint-employer status, at least within the meaning of the definition of an "employer" in the National Labor Relations Act (NLRA or Act). Absent that exercise of control, the relationship between user and supplier firms was that of an independent contractor (Leadpoint) to a principal (BFI). The principal was never deemed to be the employer of the employees of an independent contractor, regardless of relationship of the *work* of the contractors' employees to the production of the principal's product or service. In other words, prior to *BFI*, the Board required an entity to maintain direct and immediate control over employees at issue in order to be deemed a joint employer, and this direct control was generally understood to include the ability to hire, fire, discipline, supervise and direct. This is the view of the relationships affirmed by the Supreme Court of the United States for over 50 years, post enactment of the Taft Hartley Act in 1947, which excluded "independent contractors" from the definition of "employees" within the meaning of NLRA.

The Board majority turned this precedent on its head. The evidence at the hearing supported the conclusion that the dense supervisory structure Leadpoint had in place at the recycling facility provided the active monitoring and management of its employees on the line. Leadpoint managers and supervisors significantly outnumbered BFI's managerial presence at the site throughout the extended duration of the relationship. Nonetheless, the Board majority picked a few, obviously random, one-off examples of BFI on-the-ground interventions and concluded

that, indeed, BFI *did* exercise significant active control over the performance of Leadpoint's employees.

What is going on here?

The majority defended its joint employer finding by rationalizing that it was necessary to "meaningful collective bargaining," which, in turn, would yield "labor peace."

Significantly, there was absolutely no evidence that Leadpoint, (a business that performed the service of supply and management of a labor input for firms in addition to BFI) was so undercapitalized that no change in the conditions of the minimum wage recycling employees was remotely possible, unless BFI was brought to the table.

The *BFI* decision has serious negative consequences for employers, for example:

- The indirect joint employer will be liable for labor violations committed by the direct employer, even though the indirect joint employer exerts no control over the employees of the direct employer or how the direct employer manages its labor relations.
- If the direct employer is organized, then the indirect joint employer will be required to participate in collective bargaining. Depending on the circumstances, the putative joint employer could be dragged into bargaining relationships with hundreds of entities over whose day-to-day operations they have no control.
- The Act's prohibition on secondary boycott activity will be severely undercut, as unions will claim that entities that do business with their organizing target are really just one employer.

Worse, the Board's expansion of its joint employer status has caught on at other federal enforcement agencies. For example, on January 20, 2016, the Department of Labor's Wage & Hour Administrator, David Weil, issued an Administrator's Interpretation (AI) on joint employment under the Fair Labor Standards Act (FLSA) which explains when a joint employment relationship would exist such that both employers would be liable for wage and hour violations. Although the joint employer concept previously existed under the FLSA, the AI was evidence of DOL's effort to fortify and expand the doctrine. Moreover, the AI was intended to provide an enforcement roadmap for DOL investigators and set forth preferred targets for enforcement actions (these include "the construction, agricultural, janitorial, warehouse and logistics, staffing, and hospitality industries").

The Occupational Safety and Health Administration (OSHA) also sought to use the joint employer standard as a new enforcement tool. Shortly before the Board's decision in *BFI*, a memorandum from OSHA was leaked which detailed how inspectors could establish joint employment relationships in the franchise setting. The memorandum relies on the "economic realities" concepts used by the DOL and seeks to hold the brand name company liable for the OSHA violations of its franchise operators. Significantly, the joint employer standard set forth in the OSHA memorandum mirrors the standard established in *BFI* by focusing on "indirect" and

“unexercised potential” to control. This is why many in the business community view the memorandum as evidence that OSHA has been “deputized” as yet another enforcer of joint employer liability.

So what is to be done about the joint employer issue?

The courts, Congress, or a reconstituted NLRB will decide the ultimate fate of *BFI* and related cases. For now, employers that have service contracts with supplier firms similar to the relationship between BFI and Leadpoint, and employer that are contemplating such contracts, have difficult decisions to make.

How is quality of performance to be monitored and determined? The contract should be terminable at the will of either party. Joint periodic assessments of overall performance should be made, focused on agreed-upon performance criteria expressed in the text of the service contract. If there is a reasonably calculable cost advantage to contracting-out the labor input, the impulse to micro-manage on-the-ground performance should be resisted. At-will termination of the relationship should be sufficient control over costs and quality of the suppliers’ performance.

While a determination by the employer of the relative transaction costs of contracting-out, or internalizing management of labor inputs, is a firm-specific decision for each user employer, the cost of being deemed a joint-employer of the suppliers’ employees is a crucial variable in that calculation. Active consultation with counsel is a necessary condition of getting that assessment right.

\*\*\*

***Miller & Anderson, Inc.***  
**05-RC-079249**  
**364 NLRB No. 39 (2016)**

---

**ISSUE:** The appropriateness of bargaining units containing jointly and solely employed employees in a single bargaining unit absent all employers’ consent. The standard established in *Oakwood Care Center*, 343 NLRB 659 (2004), disallowed inclusion of solely employed employees in the same collective bargaining unit with jointly employed employees absent consent of all employers. The National Labor Relations Board (NLRB or Board) contemplated a return to the standard set forth in *M.B. Sturgis, Inc.*, 331 NLRB 1298 (2000), which permitted such mixed units without consent.

**HOLDING:** The Regional Director for Region 5 dismissed a petition filed by the Sheet Metal Workers International Association, Local Union No. 19, AFL-CIO seeking to represent “all sheet metal workers employed by [Miller & Anderson, Inc. and Tradesmen International, Inc.] as either single employers or joint employers on all job sites in Franklin County, Pennsylvania,” on the grounds that these two firms did not consent to multiemployer bargaining. In dismissing the petition, the Regional Director relied on long-standing precedent set forth in *Greenhoot, Inc.*, 205 NLRB 250 (1973), and reaffirmed by the Board in 2004 in *Oakwood Care Center*.

**STATUS:** The union requested review, urging the Board to resuscitate the standard announced in *M.B. Sturgis, Inc.*, 331 NLRB 1298 (2000), a standard the Board promptly revisited and overruled in *Oakwood*. Tradesmen International filed a petition to dismiss the matter as moot as the petitioned-for unit no longer exists. The Board issued a notice and invitation to file briefs, inviting the parties and *amici* to address one or more of the following questions:

1. How, if at all, have the Section 7 rights of employees in alternative work arrangements, including temporary employees, part-time employees, and other contingent workers, been affected by the Board's decision in *Oakwood Care Center*, 343 NLRB 659 (2004), overruling *M.B. Sturgis*, 331 NLRB 1298 (2000)?
2. Should the Board continue to adhere to the holding of *Oakwood Care Center*, which disallows inclusion of solely employed employees and jointly employed employees in the same unit absent the consent of the employers?
3. If the Board decides not to adhere to *Oakwood Care Center*, should the Board return to the holding of *Sturgis*, which permits units including both solely employed employees and jointly employed employees without the consent of the employers? Alternatively, what principles, apart from those set forth in *Oakwood* and *Sturgis*, should govern this area?

On July 2016, in a 3 to 1 decision, the Board returned to the rule established in *M.B. Sturgis, Inc.*, and reversed *Oakwood Care Center*. The decision holds that petitioners seeking to represent employees in bargaining units that combine both solely and jointly employed employees of a single user employer are no longer required to obtain employer consent.

**SIGNIFICANCE:** The Board initially applied the current standard for mixed bargaining units in 1973 in *Greenhoot, Inc.*, 205 NLRB 250 (1973). In that case, the Board found there was no legal basis for establishing a multiemployer unit, “absent a showing that the several employers have expressly conferred on a joint bargaining agent the power to bind them in negotiations or that they have by an established course of conduct unequivocally manifested a desire to be bound in future collective bargaining by group rather than individual action.” 205 NLRB at 251. Following the decision in *Greenhoot*, the Board permitted multiemployer bargaining units only where all of the employers consented to such a unit.

The standard in *Greenhoot* remained in effect until 2004 when the Board determined, in *M.B. Sturgis*, 331 NLRB 1298 (2000), that multiemployer bargaining units of jointly and solely employed employees could be included in a single bargaining unit without the employers' consent. The Board found that a traditional community of interest standard determined the appropriateness of such units and that they were not *per se* impermissible. In reaching this decision, the Board rationalized that a unit of jointly and solely employed employees was not a “multiemployer” unit prohibited under the National Labor Relations Act (NLRA or Act) and therefore, was appropriate provided the employees shared a community of interest.

This rationale was short-lived and effectively overruled in *Oakwood* when the Board again rejected attempts to include jointly and solely employed employees in the same bargaining unit

without employers' consent. The Board found that absent employers' consent, such units were coerced multiemployer bargaining units prohibited by the Act. The Board now seeks to return to the failed standard set forth in *Sturgis* and overrule *Oakwood*.

Now the Board has returned to *Sturgis* and consent is no longer required for bargaining units consisting of jointly and solely employed employees. As the Board has recently increased the likelihood that staffing agencies and their clients will be found to be joint employers under the Act by creation of the new joint-employer standard in *BFI*, the return to *Sturgis* has permitted the inclusion of these jointly employed employees in a single bargaining unit with the client's employees. This will create inherent tension in the bargaining relationship as jointly and solely employed employees have divergent interests in their employment relationships and the interests of all employees may not be served in a single bargaining unit. In addition, this creates tension between staffing agencies and their clients, as the companies may well be in conflict over their responsibilities related to collective bargaining.

In addition, resuscitating the overruled standard in *Sturgis* seriously undermines the Act's secondary boycott prohibitions, and thereby increases the potential for labor strife. Reverting to *Sturgis* likely entangles staffing firms in their client's labor disputes. Unions could take the position that staffing firms which refer their temporary employees to a unionized client are "primary" (rather than "secondary") employers within the meaning of the Act, and thus the unions may engage in picketing activities at other sites where staffing firm employees are located.

In a blistering dissent, Board Member Miscimarra noted that the majority's approach "compounds the plethora of unworkable bargaining issues created by the expanded *Browning-Ferris* joint-employer standard," which would make bargaining more complicated, more uncertain, and less stable.

In sum, because the Board has returned to the *Sturgis* standard, there will be wide-ranging implications on employers and employees alike. This decision appears to be a continuation of the Board's effort to expand the reach of the Act to alternative work arrangements and contingent workforces.

## XII. Dues Checkoff

---

*Lincoln Lutheran of Racine and Service Employees International Union Healthcare Wisconsin,*  
*SEIU-HCWI*  
**362 NLRB 188 (2015)**

---

**ISSUE:** Whether employers can unilaterally stop deducting dues from employees' paychecks after the expiration of the collective bargaining agreement.

**HOLDING** (Chairman Pearce and Members Hirozawa and McFerran). In another 3-2 decision, the National Labor Relations Board (NLRB or Board) overturned over 50 years of precedential history under *Bethlehem Steel, Co.*, 136 NLRB 1500 (1962), holding that employers could not unilaterally end dues checkoff at the expiration or termination of a collective bargaining agreement. The Board applied this new rule to all matters going forward, concluding that a retroactive application would cause "manifest injustice."

The Board explained that dues checkoff is a mandatory bargaining subject related to wages, hours, and other terms and conditions of employment within the meaning of Section 8(a)(5) and (d) of the National Labor Relations Act (NLRA or Act). As part of the collective bargaining agreement, the employer and union agree that union dues will be automatically deducted from the paychecks of union members. Therefore, the expiration of the agreement does not terminate an employer's obligation to continue its compliance with the terms and conditions under the agreement; these terms remain in place until a new agreement is reached or the parties arrive at an impasse in bargaining. Further, the Board stated that the employer's unilateral cancellation of dues checkoff undermines the union's status as the employees' chosen representative by cutting off the union's "financial lifeline." In addition, it also undermines employees' participation in the collective bargaining process.

**DISSENT:** Members Miscimarra and Johnson dissented, rejecting the majority's assertions that the new rule is necessary to protect the bargaining process. The dissent outlined several points in favor of maintaining long-standing Board precedent that stated that dues check off provisions did not survive expiration of the collective bargaining agreement. First, the dissent argued that the dues check off is a form of union security, which becomes revocable regardless of its terms if the employees vote to deauthorize the union. Second, the majority's comparison of dues check off to other voluntary check off agreements, such as an employee's savings accounts and charitable contributions, is a misinterpretation of the Act and should therefore not be afforded the same security. Third, employees are provided with several other options to pay union dues as opposed to dues check off, therefore the dissent argued that the majority "overstates the consequence of discontinuing dues check off." The dissent noted that with the changing patterns of industrial life, most employees have ready access to checking accounts and direct debit arrangements that could "direct the automatic payment of dues." Finally, the dissent states that the decision to overrule *Bethlehem Steel* "modifies one of the established substantive aspects of the bargaining process to an extent Congress has not countenanced," and such changes will have a severe effect on the bargaining process as it seeks to limit the employer's bargaining leverage.

The dissenters concluded that the likely outcome of the new rule is “entirely predictable [and] it will adversely affect current bargaining process that [], have promoted labor relations stability.” In fact, the practical implications of this new rule will “increase the difficulties parties will face when attempting to reach agreements in collective bargaining.” For instance, employers will now feel the need to bargain for a discontinuation of dues check off at the expiration of the contract, which will likely drag out the collective bargaining process. It will force the employer to consider utilizing lock-outs more often to counteract the loss of bargaining leverage that resulted from the cessation of dues check off at the expiration of the collective bargaining agreement.

**SIGNIFICANCE:** This decision marks a new era in dues checkoff jurisprudence but was not a surprising result given the Board’s prior decision in *WKYC-TV*, 359 NLRB No. 30 (2012), which had a similar holding but was overturned on procedural grounds by the U.S. Supreme Court in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). In both the *WKYC-TV* decision and *Lincoln Lutheran*, the Board, appointed under the Obama administration, made clear it was intent on being more union friendly.

For over 50 years, prior Boards have consistently held that union security provisions, such as a checkoff provision, cannot lawfully continue after the expiration of a collective bargaining agreement. The practical result of the majority’s new rule may cause more harm than good to the bargaining process by affecting other strategies in labor-management relationships. Employers now must carefully consider, at a minimum, whether to agree to any dues checkoff provision since it would continue potentially indefinitely after the expiration of the contract being negotiated, or whether to insist that the dues checkoff provision clearly and unmistakably state that it ends at the expiration of the collective bargaining agreement. As either option would be a difficult pill for most unions to swallow, “the majority’s position here is likely to produce a situation that resembles the dog in Aesop’s fable, which had a self-destructive ‘desire for more, rather than being content with what one has.’”

**SUBSEQUENT DECISION:** *Lincoln Lutheran* only applies prospectively, which means that in any cases pending as of the date of the NLRB’s decision, the Board will not require any make-whole remedy (i.e., dues reimbursement) as a result of following the old rule that dues checkoff provisions expire with the contract. *See Hacienda Hotel, Inc. Gaming Corp.*, 363 NLRB No. 7 (2015)(On the third remand from the United States Court of Appeals for the Ninth Circuit, the Board accepted the court’s remand, adopted its findings that the respondent violated Section 8(a)(5) and (1) of the NLRA by unilaterally ceasing dues checkoff in 1995 after the expiration of the parties’ collective-bargaining agreements without first bargaining to an agreement or impasse, and issued a cease and desist order. The Board, however, refused to impose any make-whole relief provisions on the respondent on the grounds that respondent had followed over 50 years of settled Board precedent at the time of its actions)(Member Hirozawa dissented and wanted a retroactive make-whole remedy that would have required respondent to reimburse the union for any dues the respondent failed to check off, with compound interest).

### **XIII. Waiver of Class & Collective Actions: *D. R. Horton* and Its Progeny**

---

Perhaps no issue better embodies the National Labor Relations Board’s (NLRB or Board) stubborn refusal to acquiesce to nearly universal federal circuit court disapproval of Board law than its decisions in *D.R. Horton*, 357 NLRB No. 184 (2012) and *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014). The Board’s intransigence flows from its policy of non-acquiescence to the law of individual federal circuit courts—“the law of the Circuit”—in contrast with “national” law as interpreted by the Board itself. The only higher legal authority to which the Board must adhere is the U.S. Supreme Court, which is “the law of the land.” But there comes a point where the Board’s blind adherence to its own discredited decision should yield to overwhelming rejection by the federal circuit courts.

In *D.R. Horton* and *Murphy Oil*, the Board held that employee waivers of class and collective action procedures pursuant to employee arbitration agreements violated employees’ Section 7 rights to engage in concerted activity. The Board’s decisions presented a novel interpretation of the National Labor Relations Act (NLRA or Act) and conflict with the strong preference for arbitration repeatedly expressed in decisions by the U.S. Supreme Court under the Federal Arbitration Act (FAA). See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Circuit City Stores v. Adams*, 532 U.S. 105 (2001); and *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011). Courts have almost universally rejected the Board’s interpretations of arbitration agreements under the NLRA and FAA; nevertheless, the Board continues to rule that mandatory employment arbitration agreements that contain waivers of class and collective actions are unlawful under Section 7 of the Act.

The U.S. Chamber of Commerce has been at the forefront of challenging the Board’s restrictions on mandatory arbitration agreements, both in Congress and federal court. This next chapter discusses the Board’s decisions in *D.R. Horton*, *Murphy Oil*, and their progeny.

#### **Background: Employers’ Increasing Use of Employment Arbitration Agreements With Class Action Waivers**

The last 15 years have seen a tremendous increase in class and collective actions asserted against employers, including wage and hour, discrimination, and other claims. In these lawsuits, the claims can cover all current and former employees who worked for a company over a three-year period or longer, making the potential total recovery quite large, and therefore an enormous risk for employers. In addition, the huge costs companies must incur to defend these class and collective action lawsuits can provide plaintiffs’ attorneys leverage to obtain substantial settlements even when the employees’ claims have no merit.

In an effort to avoid the costs of these class and collective actions, many employers have adopted arbitration agreements that include class action waivers. Under these agreements, employees agree that any dispute with their employer will be resolved through arbitration rather than in court; they also agree that their claims will be heard only on an individual basis and not in a class or collective action. The Supreme Court of the United States and the federal courts of appeals

have issued numerous decisions endorsing the use of arbitration agreements and class action waivers.

### ***D.R. Horton: The NLRB's Decision***

In January of 2012, in a case against national homebuilder D.R. Horton, the NLRB ruled for the first time that a class action waiver in an employment arbitration agreement violates the rights of employees under the NLRA to engage in concerted action. *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012). In essence, the NLRB decided that employees have a non-waivable statutory right under the NLRA to band together and pursue a class action against their employer.

D.R. Horton had used its mutual arbitration agreement (MAA) since 2006, and requires its employees to sign the MAA as a condition of employment. It was a typical employment arbitration agreement, and like many others, the MAA provided that its purpose was to “avoid the burdens and delays associated with court actions.” To that end, under the MAA, “the Company and Employee voluntarily waive all rights to trial in court before a judge or jury on all claims between them” in favor of submitting such claims to arbitration. The selection of the arbitrator was to take place by mutual agreement, and administrative details were to be handled according to the National Rules for the Resolution of Employment Disputes of the American Arbitration Association (AAA).

In addition, as is increasingly common for arbitration agreements, the MAA provided that it applied to employees’ “individual claims.” It stated that:

The parties intend that this Agreement will operate to allow them to resolve any disputes between them as quickly as possible. Thus, the arbitrator will not have the authority to consolidate the claims of other employees into a proceeding originally filed by either the Company or the Employee. The arbitrator may hear only Employee’s individual claims and does not have the authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding.

In late 2007, a former D.R. Horton employee, Michael Cuda, prepared to file a putative collective action against D.R. Horton under the Fair Labor Standards Act (FLSA), alleging that he and certain other employees had been misclassified as exempt. Cuda was represented by an attorney from a well-known FLSA collective action firm in Florida.

After Cuda’s attorney became aware of the MAA, he filed an unfair labor practice charge with the NLRB, alleging that D.R. Horton “maintained and enforced a rule prohibiting employees from maintaining a class action arbitration or otherwise joining their claims with other employees” in violation of the NLRA.

In handling Cuda’s charge, the NLRB demonstrated significant confusion. First, in August of 2008, the NLRB’s Regional Director partially dismissed the charge. She explained that “application of the class action mechanism is primarily a procedural device and the effect on Section 7 rights of prohibiting its use is not significant.” She reasoned:

While Section 7 prohibits the Employer from denying employees the ability to seek collective relief of their claims, the Employer is also not required to assist employees in bringing their collective claims via the procedural mechanism of class action arbitration.

The Regional Director refused to issue a complaint on the class-arbitration waiver claim. However, she also declined to dismiss Cuda's challenge to the rule to the extent it prohibited employees from joining their claims in arbitration.

Cuda appealed the Regional Director's partial dismissal of his charge. While Cuda's appeal was pending, the Regional Director issued a complaint against D.R. Horton on November 26, 2008. It alleged generally and vaguely that D.R. Horton maintained the MAA as a condition of employment and that this violated Section 8(a)(1) of the Act. Little happened in the case before Cuda sent a letter to the Regional Director in September 2009, seeking to withdraw his charge without explanation. The NLRB disregarded this request.

On June 16, 2010, the General Counsel's Office of Appeals finally ruled on Cuda's appeal. The General Counsel sustained the appeal in part, concluding that the MAA's general waiver of class action procedures warranted review because it could "be read as precluding employees from joining together to challenge the validity of the waiver by filing a class action lawsuit." However, the General Counsel denied the appeal otherwise, concluding that "[e]ven assuming that the Charging Party was acting in concert with other employees in filing a class action grievance, an employer is not required to litigate class action claims within the context of its own private dispute resolution system."

On that same date, June 16, 2010, the NLRB's General Counsel also issued Memorandum GC 10-06 (GC Memo 10-06) to all Regional Directors providing guidelines for unfair labor practice charges involving class action waivers in mandatory arbitration agreements. The General Counsel took the position that such class action waivers are not *per se* unlawful under the NLRA, although employees must retain the right to challenge the validity of such waivers by filing a class action lawsuit and employees must be informed of this right, and that employees who file class actions in breach of such waivers may not be retaliated against.

Following the General Counsel's resolution of Cuda's appeal, an administrative law judge (ALJ) conducted a trial on November 8, 2010. Consistent with Cuda's attempt to withdraw his charge, he did not testify, and Cuda's private attorney did not appear for or participate in the trial.

On January 3, 2011, the ALJ issued an opinion finding as a matter of law that the MAA's provision "restrict[ing] employees from joining arbitration claims or collectively seeking recourse outside of arbitration" did not violate Section 8(a)(1) of the NLRA "by unlawfully prohibiting employees from engaging in protected concerted activities."<sup>11</sup>

---

<sup>11</sup> The ALJ did find that the MAA violated Sections 8(a)(4) and 8(a)(1) of the Act "by leading employees reasonably to believe they cannot file charges with the NLRB."

The Acting General Counsel and D.R. Horton both filed exceptions to the ALJ's decision. Exception #10 of the Acting General Counsel argued D.R. Horton should be ordered to revise the MAA by including the disclosure language suggested in the GC Memo, i.e., informing employees they retained the right to file a class action lawsuit to challenge the validity of their class action waiver.

On March 25, 2011, the Service Employees International Union (SEIU) submitted an amicus brief (the SEIU Brief). The SEIU Brief disputed the Acting General Counsel's Exception #10. The SEIU Brief stated "the General Counsel is suggesting that the Board may permit D.R. Horton to reinstate its class action prohibition going forward if the company also includes the new disclosure language" suggested by the GC Memo.

On April 25, 2011, the Acting General Counsel filed his reply brief, again focusing on the lack of disclosure language in the MAA:

Respondent is correct that "an individual employee's agreement not to utilize class action procedures in pursuit of purely personal individual claims does not involve a waiver of any Section 7 rights,[" and that no Section 7 right is violated when an employee possessed of an individual right to sue enters such a Gilmer agreement as a condition of employment and that agreement is later enforced. Thus, **Counsel for the Acting General Counsel does not contend that the language in paragraph 6 of Respondent's Mutual Arbitration Agreement (MAA) is per se unlawful... [A]n employer has the right to limit arbitration to individual claims – as long as it is clear that there will be no retaliation for concertedly challenging the agreement. The latter element is missing from the MAA** (emphasis added).

On January 3, 2012, a two-member panel of the Board issued the *D.R. Horton* decision, rejecting the substance of the Regional Director's partial dismissal of Cuda's charge, the Office of Appeals' decision, the GC Memo, the ALJ's decision, and the Acting General Counsel's Exception #10 and reply brief and instead adopted the position of the SEIU Brief, reversed the ALJ, and ruled that the MAA violated Section 7.<sup>12</sup>

### ***D.R. Horton: The Fifth Circuit's Decision***

D.R. Horton appealed the NLRB's decision to the Fifth Circuit. On December 3, 2013, the Fifth Circuit held that the NLRB's decision in *D.R. Horton* violated the Federal Arbitration Act. That statute generally requires courts to enforce arbitration agreements according to their terms, subject to limited exceptions. The court held that no exceptions applied in this case.

The Fifth Circuit rejected the NLRB's argument based on the U.S. Supreme Court's landmark decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). In that case, the Supreme

---

<sup>12</sup> One of the two members was Craig Becker, who was employed by the AFL-CIO and SEIU prior to his recess appointment and became general counsel for the AFL-CIO shortly after his appointment expired. Subsequent to the filing of the SEIU Brief, the Acting General Counsel withdrew Exception #10.

Court struck down a California state rule that banned class action waivers in consumer arbitration contracts. The high court explained that the FAA's purpose is to require that arbitration agreements be enforced according to their terms so as "to facilitate streamlined proceedings." The state rule requiring that class actions be allowed in consumer arbitration agreements would prevent a streamlined proceeding arbitration proceeding. Therefore, Supreme Court held that the state rule impermissibly conflicted with the FAA.

The Fifth Circuit held that the NLRB's theory of banning class action waivers in employment arbitration agreements had the same effect, stating "Requiring a class mechanism is an actual impediment to arbitration and violates the FAA."

In addition, the Fifth Circuit held that the NLRA did not contain any congressional command overriding the FAA. The court noted as a general rule that a claim under another federal statute may be subject to arbitration unless Congress has overridden the FAA's general mandate that arbitration agreements be enforced. To determine whether the FAA's mandate has been overridden, a court must find a congressional intent to do so in the other federal statute's text or in its history and purpose, or a court must find an inherent conflict between that statute and the FAA.

The Fifth Circuit held that the NLRA's text does not include any express command overriding the FAA and that the NLRA's legislative history contains no hint of any such command. The Fifth Circuit also rejected the NLRB's contention that there was an "inherent conflict" between the FAA and NLRA that could suggest that Congress intended to override the FAA. The court was not persuaded by the NLRB's claim that the NLRA granted employees a substantive right to file class actions because courts have long held that litigants do not have a substantive right to file class or collective actions under the Federal Rules of Civil Procedure or other federal statutes such as the Fair Labor Standards Act. In addition, the Fifth Circuit noted that the NLRA was enacted long before modern class action rules even existed.

Finally, the Fifth Circuit also noted that three other federal courts of appeal had already rejected the argument that class action waivers in employment arbitration agreements violate the NLRA, and stated that they would not defer to the NLRB's decision in *D.R. Horton*.<sup>13</sup>

On a separate issue, the Fifth Circuit found that D.R. Horton's arbitration agreement did not make sufficiently clear that employees retained a right to file unfair labor practice charges with the NLRB. The court noted that an arbitration agreement may not prohibit employees from filing unfair labor practice charges. It further observed that even if an agreement does not expressly ban the filing of such charges, it may nevertheless violate the NLRA if "employees would reasonably construe the language" of the agreement as doing so. In this case, the court concluded that D.R. Horton's arbitration agreement, even though it referred to employees' waiving the right to bring "court actions," could be misconstrued by employees as also waiving the right to file administrative charges—specifically, unfair labor practice charges with the NLRB. For this reason, the court affirmed the NLRB's order only to the extent it required D.R. Horton to modify

---

<sup>13</sup> The Fifth Circuit also favorably cited the Chamber of Commerce's amicus brief discussing the legislative history of the NLRA. *See* 737 F.3d at 361.

its arbitration agreement to make clearer that it does not affect employees' ability to file such charges.

The Board did not petition the Supreme Court of the United States to review the Fifth Circuit's decision.

### **Federal and State Courts' Rejection of the NLRB's *D.R. Horton* decision**

In addition to the Fifth Circuit, dozens of other federal and state courts have also refused to follow the NLRB's *D.R. Horton* decision. See *Murphy Oil*, 361 NLRB No. 72 at 36 n.5 (Johnson, dissenting) (collecting citations to dozens of federal and state courts rejecting *D.R. Horton*). These decisions occur in the context of employers filing motions to compel individual arbitration under their employment arbitration agreements, often in response to a class or collective action complaint filed in court in disregard of those agreements. In opposing these motions to compel, plaintiff employees have repeatedly invoked the NLRB's *D.R. Horton* decision. They argue the arbitration agreements, or at least their class action waiver provisions, are unlawful and unenforceable under the NLRA based on *D.R. Horton*. However, these arguments have been spectacularly unsuccessful. Nearly every state and federal court to consider these arguments has rejected them. These courts typically rely instead on the FAA and Supreme Court precedent such as *Concepcion* under the FAA to hold that *D.R. Horton* is wrong and unpersuasive and that the arbitration agreements, including the class action waivers at issue, are enforceable.

### ***Murphy Oil*: The NLRB Tries and Fails Again**

Despite the Fifth Circuit's rejection of *D.R. Horton*, the NLRB doubled down on it in its *Murphy Oil* decision issued on October 28, 2014. *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (Oct. 28, 2014). The Board majority (Chairman Pearce, Member Hirozawa, and Member Schiffer) repeated the reasoning of the Board's *D.R. Horton* decision, attempted to distinguish the adverse decisions of the Fifth Circuit and other courts, and announced the Board intended to pursue its practice of nonacquiescence. The slim majority declared the Board had no intention of deferring to Fifth Circuit or any other lower court that had criticized *D.R. Horton*, would continue to apply *D.R. Horton* in its own cases, and would acquiesce only if and when the U.S. Supreme Court issued a decision to the contrary. Members Miscimarra and Johnson issued lengthy, well-reasoned dissents.

Significantly, the Board went several steps further in *Murphy Oil* than it had in *D.R. Horton*. The Board held that if an employer files a motion in federal or state court to compel individual arbitration under an agreement with a class action waiver, the Board will deem the filing of that motion a separate unfair labor practice under the NLRA, *even if the federal or state court had found the agreement enforceable and granted the employer's motion to compel*. The Board thus ordered *Murphy Oil* not only to rescind its arbitration agreement, but also to reimburse employees for any attorneys' fees they had incurred in opposing the company's successful motion to compel arbitration. The Board further ordered *Murphy Oil* to inform the federal district court in which it had filed its successful motion to compel that it had rescinded the

arbitration agreement and no longer opposed federal court litigation on the basis of the agreement.

Murphy Oil appealed to the Fifth Circuit. On October 26, 2015, the Fifth Circuit, applying its own *D.R. Horton* precedent, yet again rejected the Board's reasoning in relevant part and largely refused to enforce the Board's order. *Murphy Oil USA v. NLRB*, 808 F.3d 1013, 2015 WL 6457613 (5th Cir. Oct. 26, 2015).

### **Courts of Appeals Rejecting *D.R. Horton* on Indirect Review**

Although the Fifth Circuit is the only court of appeals to date to address the NLRB's *D.R. Horton* case on direct review, several other circuits have considered and rejected *D.R. Horton* in appeals dealing with successful motions to compel individual arbitration. These cases include:

- *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013) (stating that the court owed no deference to, and declined to follow, the *D.R. Horton* decision).
- *Patterson v. Raymours Furniture Company, Inc.*, No. 15-2820-CV, 2016 WL 4598542, -- - Fed. App'x ---- (2d Cir. Sept. 14, 2016).
- *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013) (refusing to follow *D.R. Horton*).
- *Cellular Sales of Missouri, LLC v. N.L.R.B.*, 824 F.3d 772 (8th Cir. 2016);
- *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072 (9th Cir. 2014) (distinguishing *D.R. Horton* because the employer's arbitration agreement allowed employees to opt out).
- *Richards v. Ernst & Young, LLP*, 744 F.3d 1072 (9th Cir. 2013) (although not directly rejecting *D.R. Horton* because the issue was waived, the court noted "that the only court of appeals, and the overwhelming majority of the district courts, to have considered the issue have determined that they should not defer to the NLRB's decision in *D.R. Horton* because it conflicts with the explicit pronouncements of the Supreme Court concerning the policies undergirding the Federal Arbitration Act").

### **Courts of Appeals Following *D.R. Horton* on Indirect Review**

Although the overwhelming majority of state and federal courts have rejected the Board's *D.R. Horton* decision, two circuits have now followed it, at least in part, creating a circuit split. These are:

- *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016); and
- *Morris v. Ernst & Young, LLP*, No. 13-16599, 2016 WL 4433080 (9th Cir. Aug. 22, 2016).

## Supreme Court Petitions

As of December of 2016, there are now pending at least five petitions seeking Supreme Court review of cases involving the Board's *D.R. Horton* rationale. These include:

- *Epic Systems Corp. v. Lewis*, No. 16-285 (U.S.) (petition filed September 2, 2016; response due November 14, 2016);
- *Ernst & Young v. Morris*, No. 16-300 (U.S.) (petition filed September 8, 2016; response due November 14, 2016);
- *NLRB v. Murphy Oil USA, Inc.*, No. 16-307 (U.S.) (petition filed September 9, 2016; response due November 10, 2016);
- *Patterson v. Raymours Furniture Company, Inc.*, No. 16-388 (U.S.) (petition filed September 22, 2016; response due October 26, 2016); and
- *NLRB v. 24 Hour Fitness USA, Inc. et al.*, No. 16-689 (petition docketed Nov. 23, 2016).

In light of the circuit split and the numerous petitions, it seems likely the Supreme Court will grant the petition in one or more of these cases. If that happens, the Court would likely issue a decision by late June of 2017, hopefully deciding the issue once and for all. One additional uncertainty is the possibility the Supreme Court continues to have only eight justices, creating the risk of a 4-4 tie, which would leave in place the divergent rulings of the lower courts.

## The Board's Continued Application and Expansion of *D.R. Horton*

Following its decision in *Murphy Oil*, the Board has aggressively pursued its nonacquiescence policy. Despite the Fifth Circuit having twice rejecting the reasoning of *D.R. Horton*, the Board has continued to issue its own decisions applying and, in some instances, expanding *D.R. Horton* with increasing frequency. Indeed, the Board appears to be flooding the country with rulings applying *D.R. Horton* in hopes of finding federal courts that will adopt its reasoning.

As of press time, the Board had applied *D.R. Horton* in numerous cases. Many of these are now pending before U.S. Courts of Appeals in various jurisdictions. The Board has also expanded the reasoning of *D.R. Horton* in some respects. Some of the more significant cases are noted below:

1. *200 East 81st Restaurant Corp. d/b/a Beyoglu*, 362 NLRB No. 152 (July 29, 2015) (Expanding *D.R. Horton* by holding that a single employee's filing of an employment-related class or collective action is by definition concerted activity and thus protected by Section 7).
2. *Countrywide Financial Corp.*, 362 NLRB No. 165 (Aug. 14, 2015) (Expanding *D.R. Horton* by holding that an employer's motion to compel individual arbitration pursuant to an arbitration agreement that is *silent* on whether employees may file class or collective employment claims nevertheless violates *D.R. Horton* and *Murphy Oil*). Pending in Ninth Circuit as case number 15-72700.
3. *On Assignment Staffing Services, Inc.*, 362 NLRB No. 189 (Aug. 27, 2015) This case expands *D.R. Horton* by holding that an arbitration agreement with a class waiver that

contains a procedure for employees to opt out of the agreement nevertheless violates the NLRA. The Board held that the opt-out procedure was itself a condition of employment that significantly burdened employees' exercise of their Section 7 right to pursue collective or class litigation. The Board also concluded that, even assuming that the opt-out provision rendered the employer's arbitration agreement not a condition of employment, it was still unlawful because it required employees to prospectively waive their Section 7 right to engage in concerted activity. The case is pending in Fifth Circuit as case number 15-60642.

## **Conclusion**

In light of the Board's adamant refusal to acquiesce to the lower courts' repeated rejection of *D.R. Horton*, this issue appears destined to end up before the Supreme Court unless the change of administration leads the Board to finally abandon its intransigence. Unfortunately, until then, employers that adopt arbitration agreements containing class waivers will run a very substantial risk of needing to defend an unfair labor practice charge before the Board and then seeking appellate review of the Board's decision finding a violation.

## **XIV. Deferral to Arbitration: *Babcock & Wilcox***

---

Toward the end of 2014, the National Labor Relations Board (NLRB or Board) used the case of *Babcock & Wilcox Construction Co.*, 361 NLRB 132 (2014), to overhaul the long-standing rules governing when the Board will defer unfair labor practice charges to arbitration. In its decision, the Board adopted in large part the position advocated by former NLRB General Counsel, Lafe Solomon. See NLRB Gen. Counsel Mem. 11-05, *Guideline Memorandum Concerning Deferral to Arbitral Awards and Grievance Settlements in Section 8(a)(1) and (3) Cases* (Jan. 20, 2011). Although the Board did not adopt Solomon's position in full, its decision nonetheless raises significant obstacles for employers that want to prevent unions from relitigating arbitrated or settled grievances as unfair labor practices before the Board. In the absence of deferral, the filing of an unfair labor practice charge over a subject covered by a collective bargaining agreement's grievance and arbitration procedures deprives the non-filing party of the prompt and efficient resolution that such procedures are intended to achieve.

The *Babcock & Wilcox* decision is significant because a great many grievances covered by arbitration procedures involve actions that also can be characterized as unfair labor practices under the jurisdiction of the NLRB. For example, an employer's decision to change the terms of a benefit plan covering union-represented employees can lead to a grievance claiming that the change constituted a breach of the parties' CBA as well as to an unfair labor practice charge contending that the change constituted an unlawful refusal to bargain under Section 8(a)(5) of the National Labor Relations Act (NLRA or Act). Similarly, a union challenging the discharge of a union steward can grieve the discharge due to lack of just cause but also may file an unfair labor practice charge claiming that the discharge constituted an unlawful reprisal under Section 8(a)(3) and 8(a)(1). The potential for overlapping disputes is a recurring issue that employers must confront with some regularity.

### **The Traditional Standards for Arbitral Deferral: *Spielberg/Olin/Collyer***

The Board's deferral standards can be traced back to the case of *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). In *Spielberg*, the NLRB ruled that it would defer to arbitrator decisions on unfair labor practice charges where the proceedings before the arbitrator appeared to have been fair and regular, all parties agreed to be bound, and the arbitrator's decision was not clearly repugnant to the purposes and policies of the Act. *Id.* at 1082. The NLRB's approach to deferral vacillated during the following years but then grew more settled beginning in 1984 with the Board's decision in *Olin Corp.*, 268 NLRB 573 (1984), which remained in place until the Board revisited the issue in *Babcock & Wilcox*. In *Olin*, the Board declared that deferral to an arbitration award would be appropriate where the contractual issue before the arbitrator was "factually parallel" to the unfair labor practice issue, the arbitrator was presented generally with the facts relevant to resolving that issue, and the award is not clearly repugnant to the Act. In such circumstances, the Board would conclude that the unfair labor practice charge was considered by the arbitrator.

In *Collyer Insulated Wire*, 192 NLRB 837 (1971) and *United Technologies Corp.*, 268 NLRB 557 (1984), the Board established a similar standard for deferral when a grievance is awaiting arbitration under a collectively bargained dispute resolution process. Under *Collyer* and *United*

*Technologies*, pre-arbitral deferral was appropriate when: (1) the dispute arose within the context of a long and productive collective bargaining relationship; (2) there was no claim of animosity toward the employee's exercise of Section 7 rights; (3) the grievance-arbitration process provided for arbitration of the dispute; (4) the employer had expressed its willingness to utilize arbitration to resolve the dispute notwithstanding any timeliness or other procedural issues; and (5) the alleged unfair labor practice was at the center of the dispute.

## **The New *Babcock & Wilcox* Standards for 8(a)(1) and 8(a)(3) Cases**

In *Babcock & Wilcox*, the Board accepted the General Counsel's invitation to reconsider the deferral standards set out in *Spielberg*, *Olin*, and *Collyer* in cases involving alleged violations of Section 8(a)(1) and 8(a)(3).<sup>14</sup> The Board agreed with the General Counsel that the existing standards in these cases elevated the use of arbitration to resolve disputes involving collective bargaining agreements to the detriment of protecting individual rights. Specifically, the Board concluded:

The current standard creates excessive risk that the Board will defer when an arbitrator has not adequately considered the statutory issue, . . . or when it is impossible to tell whether he or she has done so. The result is that employees are effectively deprived of their Section 7 rights if disciplinary actions that are, in fact, unlawful employer reprisals for union or protected concerted activity are upheld in arbitration. . . .

We agree that the burden of proving that deferral is appropriate is properly placed on the party urging deferral. We also agree that deferral is appropriate only when the arbitrator has been explicitly authorized to decide the statutory issue, either in the collective bargaining agreement or by agreement of the parties in the particular case. . . . Our modified standard . . . will require that the proponent of deferral demonstrate that the parties presented the statutory issue to the arbitrator, the arbitrator considered the statutory issue or was prevented from doing so by the party opposing deferral, and Board law reasonably permits the award. On such a showing, the Board will defer.

361 NLRB No. 132 at 2.

Applying this rationale, the Board revised the standard for deferral of unfair labor practice charges alleging reprisal under Section 8(a)(1) and 8(a)(3). As set forth in greater detail below, the revised *Babcock & Wilcox* standards apply to post-arbitral deferral to an arbitrator's decision under *Olin*, pre-arbitral deferral to a collectively bargained dispute resolution process under *Collyer*, and deferral to a pre-arbitral grievance settlement under *Alpha Beta*, 273 NLRB 1546 (1985).

---

<sup>14</sup> The General Counsel did not urge the Board to revisit the deferral standard with respect to alleged violations of Section 8(a)(5), and the Board acknowledged that its *Babcock & Wilcox* decision does not address the standard for deferral in 8(a)(5) refusal-to-bargain cases. 361 NLRB No. 132, n. 2.

*Post-Arbitral Deferral to an Arbitrator's Decision.* The Board now will defer to an arbitrator's decision only if the arbitration procedures appear to have been fair and regular, the parties agreed to be bound, and the party supporting deferral can satisfy a three-part test by showing: (1) that the arbitrator was explicitly authorized to decide the unfair labor practice issue; (2) that the arbitrator was presented with and considered the statutory issue, or was prevented from doing so by the party opposing deferral; and (3) that Board law reasonably permits the award. Elaborating, the Board said the second prong of the test would be satisfied "when the arbitrator has identified [the statutory] issue and at least generally explained why he or she finds that the facts presented either do or do not support the unfair labor practice allegation." *Id.* at 7. With respect to the third prong of the test, the Board explained that the arbitrator need not reach the same result that Board would reach, only a result that a decision maker reasonably applying the Act could reach. *Id.*

*Deferral to a Pre-Arbitral Grievance Settlement.* The Board now will defer unfair labor practices to a pre-arbitral grievance settlement between the parties under *Alpha-Beta* only where the party supporting deferral can show "that the parties intended to settle the unfair labor practice issue; that they addressed it in the settlement agreement; and that Board law reasonably permits the settlement agreement." 361 NLRB No. 132 at 13.

*Pre-Arbitral Deferral to the Arbitral Process.* The Board now will defer to the parties' collectively bargained arbitral process under *Collyer* only where the party urging deferral can prove that the parties have explicitly authorized the arbitrator to decide the unfair labor practice issue, either in the collective-bargaining agreement or by agreement of the parties in a particular case. 361 NLRB No. 132 at 13.

In view of the significance of the changes wrought by its decision, the Board decided that the new *Babcock & Wilcox* standards would have prospective application only. On this point, the Board said, "We think that applying our new standard in pending cases would be unfair to parties that have relied on the current deferral standard in negotiating contracts and in determining whether, and in what manner, to process cases involving unfair labor practice issues through the grievance-arbitration process." *Id.* at 14. However, the Board also stated that it would apply its new standards where parties have already, either by contract or by case-specific agreement, authorized arbitrators to decide unfair labor practice claims. Where current labor agreements do not authorize arbitrators to decide specific unfair labor practice issues, the Board will not apply its new standards until either those contracts have expired or the parties have agreed to present statutory issues to an arbitrator. *Id.*

### **Implications for Employers.**

*Babcock & Wilcox* is not welcome news for employers. Because the holding, by definition, applies only to cases in which the party filing the charges with the NLRB is an employee or union, employers will be the parties that have to satisfy the heightened *Babcock & Wilcox* standards for deferral. Another effect of *Babcock & Wilcox* is that unions will be incentivized to file parallel unfair labor practice charges whenever they grieve a discharge because, by doing so, they increase their chances for "a second bite at the apple" in case the arbitrator sustains the discharge.

Employers considering settling grievances over discharge, discipline, or other actions that might be characterized as a form of reprisal under 8(a)(1) and 8(a)(3) also will need to take special steps to ensure the finality of the settlements under *Babcock & Wilcox*. Unless the applicable settlement agreement makes it clear that it is intended to resolve statutory claims, the union will have the opportunity to pursue the 8(a)(1) and 8(a)(3) charges before the NLRB even if the grievance settlement agreement purports to be “final and binding.”

Under *Babcock & Wilcox*, employers preparing to arbitrate a discharge or discipline grievance will face re-litigation of these actions as unfair labor practices unless: (1) the employer and the union expressly agree to authorize the arbitrator to adjudicate the statutory issues, and (2) the issues are, in fact, presented to and considered by the arbitrator. Whether a union can defeat the employer’s subsequent deferral request by refusing to consent to the arbitrator’s jurisdiction depends upon whether the employer can later establish to the Board that the union “prevented” the arbitrator from considering the statutory aspects of the claims. Employers that want to minimize the case-by-case risk of re-litigating grievances that have been arbitrated or settled will have to amend their grievance and arbitration procedures to encompass the resolution of statutory 8(a)(1) and 8(a)(3) claims. Of course, negotiations are a two-way street, and such changes would require the consent of the union during collective bargaining.

## **XV. Notification and Bargaining Obligations: *Alan Ritchey***

---

*Alan Ritchey, Inc.*

**359 NLRB No. 40 (2012)**

**Invalidated by U.S. Supreme Court's *Noel Canning* decision**

---

**ISSUE:** Whether an employer must notify and bargain with a union before imposing discretionary discipline on a unit employee.

**HOLDING** (Chairman Pearce and Members Griffin and Block). This issue arose during the period after a union had been voted in, but before the parties had agreed on a first contract or an interim grievance procedure. The National Labor Relations Board (NLRB or Board) held that discretionary discipline is a mandatory subject of bargaining and that employers may not impose certain types of discipline unilaterally. Unlike other mandatory subjects of bargaining, the Board carved out a more limited bargaining obligation over discretionary discipline. The Board recognized that an obligation of bargaining prior to imposing discipline may, in some cases, delay the employer's action or change the decision that it would have reached unilaterally. The Board ruled the following:

First, the preimposition of the discipline bargaining obligation applies only with regard to the discretionary aspects of certain disciplinary actions that have an inevitable and immediate impact on employees' tenure, status, or earnings, such as a suspension, demotion or discharge.

Second, where the preimposition duty to bargain exists, the employer's obligation is simply to provide the union with notice and an opportunity to bargain before discipline is imposed. The duty also entails providing the union with relevant information, if requested. However, the employer is not required to bargain to agreement or impasse at this stage. Rather, if the parties have not reached agreement, the duty to bargain continues after imposition of discipline.

Third, an employer may act unilaterally and impose discipline without providing the union with notice and an opportunity to bargain in any situation that presents exigent circumstances: that is, where an employer has a reasonable, good faith belief that an employee's continued presence on the job presents a serious, imminent danger to the employer's business or personnel.

Finally, an employer need not wait until an overall impasse in bargaining occurs before imposing discipline as long as it exercises its discretion within existing standards.

**SIGNIFICANCE:** The decision was invalidated by the Supreme Court in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014) and has yet to be ruled upon by a reconstituted Board having a validly appointed quorum. However, in *Washington River Protection Solutions*, Case No. 19-CA-125339 (October 14, 2014) (Advice Memorandum), the General Counsel asserted "*Alan Ritchey* was soundly reasoned and that the Board should adopt the *Alan Ritchey* rationale as its own." Additionally, General Counsel Memorandum 15-05 (March 18, 2015), states:

It is our view that the cases in which the Board endorsed the General Counsel's theory when the Board didn't, according to the Supreme Court's *Noel Canning*

decision, have a validly appointed quorum, were soundly reasoned and that the current Board should adopt the reasoning in those decisions as its own, such as the decision in *Alan Ritchey, Inc.*, 359 NLRB No. 40 (2012). Thus, we are authorizing complaints and urging the Board to adopt the reasoning set forth in these cases.

Members Pierce, Griffin, and Block attempted to create a new rule holding discretionary discipline, even if it follows existing practice, to now be a mandatory subject of bargaining. In practice, it will require bargaining more about the facts of an individual's conduct at the workplace than necessarily the rule itself. Virtually all discipline has at least some element of discretion to it. Short of a policy requiring automatic set discipline, any discretionary part of the policy would be subject to bargaining. For example, a policy that says an employee who is insubordinate may be suspended and/or terminated based on the particular situation involves discretionary discipline (suspension versus termination). The degree of discipline, according to the General Counsel, must now be bargained. It no longer will be a defense that the employer followed its past practice of discipline. The opportunity to bargain will have to be presented to the union.

A number of administrative law judge decisions remain in the pipeline concerning the issue of bargaining over preimposition "discretionary" discipline. It is expected that the Board will act and most likely affirm the rationale in *Alan Ritchey*. Clearly, we have not seen the end of this issue.

## XVI. Successorship

---

The rules of successorship have been well-established through decades of National Labor Relations (NLRB or Board) and federal circuit court decisions, including U.S. Supreme Court precedent. The Board, however, turned that well-settled precedent on its head.

In *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), the U.S. Supreme Court ruled that a successor employer is not bound to the terms of the predecessor employer's collective bargaining agreement and is ordinarily free to unilaterally set initial terms and conditions of employment. The Court ruled that a successor's duty to bargain over the initial terms and conditions of employment ordinarily will not arise because the union bargaining representative will not know whether it retains majority support among the new workforce prior to a full complement of employees being hired. The exception is where it is "perfectly clear" that the successor employer intends to retain all of the predecessor's employees, in which case the successor is obligated to consult with the predecessor employees' bargaining representative before the successor fixes terms.

The NLRB interpreted this "perfectly clear" exception in *Spruce Up Corp.*, 209 NLRB 194 (1974), *enf'd per curiam* 529 F.2d 516 (4th Cir. 1975). In *Spruce Up*, the Board held that a successor employer that expresses a desire to retain its predecessor's employees may not set initial terms of employment unless it makes clear to the employees that future employment will be on the basis of new terms and conditions. A "perfectly clear" successor must bargain with the union prior to setting any new terms and conditions of employment. That had been the law since 1975.

In *Nexeo Solutions*, 364 NLRB No. 44 (2016) (appeal pending before the Fifth Circuit), the Board restricted its 36-year old precedent in *Spruce Up* by holding, over its administrative law judge's decision and the strong dissent of Member Miscimarra, that a successor employer may be made a "perfectly clear" successor not based on its own statements, but based solely on statements of the predecessor employer which the successor did not authorize and over which the successor had no control. Further, in the opinion of the dissent, the Board majority incorrectly interpreted a statement by the successor that it was "not considering job reductions" and that it was "developing compensation and benefit terms" as an offer of employment.

Although the General Counsel urged the Board to overturn *Spruce Up*, it refused to do so instead limiting its application. As a result, the Board majority established a new obligation for successor employers to monitor the statements of the predecessor employer. The dissent predicts that this will create uncertainty and discourage successor employers as they can no longer be certain of their ability to set new terms of employment necessary to the future viability of the business. As a result, the dissent states, the decision will inure to the detriment of employees and unions in business transactions designed to salvage a failing business.

In *Creative Vision Resources LLC*, 364 NLRB No. 91 (2016) (appeal pending before the Fifth Circuit), the Board majority, over its administrative law judge and another strong dissent from Board Member Miscimarra, found that the successor employer was a "perfectly clear" successor which had failed to bargain with the predecessor employees' union before setting initial terms

and conditions of employment. The facts of the case reveal that before making the offer of employment to bargaining unit employees, the successor sent to the predecessor's employees new tax forms and informed 20 of the 70 bargaining unit employees of its intention to set new terms and conditions of employment. (Note: In other areas of Board law, an employer's communications to a single employee is considered sufficient notice to constitute communication with all unit employees. Clearly, the Board refuses to extend the same interpretation here.) Further, the union failed to demand bargaining until after the successor had offered employment to predecessor employees based on new terms and conditions. The dissent noted that under clear Board and Supreme Court precedent, the duty of a successor employer to bargain arises only after the union makes a demand for bargaining. (See the Supreme Court's decision in *Fall River Dyeing and Finishing*, 482 U.S. 27 (1987)). Once again, the Board's efforts to restrict the application of its precedent in *Spruce Up* through rigid and strained interpretation will only result in further uncertainty and confusion in the context of successorship.

**SIGNIFICANCE:** As a result of the Board's decisions in *Nexeo* and *Creative Vision Resources*, formerly well-settled Board precedent is unsettled. Even prior to a union's demand for bargaining, successor employers wishing not to be deemed "perfectly clear" successors must, at a minimum: (1) police all statements of the predecessor to its employees regarding the transaction, (2) clarify in terms that all employees understand that only the successor's statements are valid as they pertain to future employment, and (3) inform all employees when future employment will be under new terms and conditions of employment. Even meeting those additional burdens may not be enough to convince nervous successors that, given the newly unsettled Board precedent, taking over a risky or failing business operation in an asset purchase is worth the potential Board liability of reinstatement of all predecessor employees with back pay.

## **XVII. GC Memoranda and Enforcement Policies**

---

Sometimes lost to the public in the more heavily publicized controversial decisions issued by the National Labor Relations Board (NLRB or Board) are its internal actions—advice memos and operations memos— issued by the General Counsel and sent to the Board’s regional offices, which have a direct and immediate effect on the interpretation and enforcement of changing labor policies. It is, after all, the General Counsel who has unreviewable discretion in the issuance of complaints, setting the Board’s agenda, and advancing novel theories for Board consideration in overturning labor policies and precedents, as well as sole responsibility and supervision over the Office of General Counsel and the NLRB’s regional offices throughout the country. While the five-member Board is the adjudicatory body responsible for the Office of Representation Appeals, the General Counsel actually runs the agency in addition to conducting representation elections and prosecuting complaints arising from unfair labor practice charges.

In this chapter on the actions of the General Counsel during the Obama administration, the General Counsel’s critical role is considered.

The Democratic-leaning, pro-union governance at the NLRB reached the Office of the General Counsel in June 2010 when President Obama named Lafe Solomon as Acting General Counsel, effective June 21, 2010.<sup>15</sup> Solomon, a career NLRB attorney, served on the staffs of 10 Board members, including Members Gould, Fox, and Liebman (all of whom were appointed by Democrats) prior to being named Acting General Counsel. Solomon remained the Acting General Counsel until November 4, 2013, when Richard F. Griffin, Jr. was sworn in to begin a four-year term. Immediately preceding the start of his term as General Counsel, Griffin had served as a Board Member from January 9, 2012, through August 2, 2013, and was a recess appointment by President Obama. Prior to his recess appointment, Griffin had served as General Counsel to the International Union of Operating Engineers (IUOE) and as a member of the board of trustees of the IUOE Central Pension Fund.

The Office of the General Counsel is responsible for the investigation and prosecution of unfair labor practice cases, for conducting secret-ballot elections to determine whether employees desire union representation, and for the general supervision of NLRB field offices. As the chief prosecutor for the agency, the General Counsel provides policy guidance and direction to the NLRB field offices regarding investigative and prosecutorial objectives for the NLRB. Solomon and Griffin wasted no time in advancing the pro-labor agenda through the issuance of General Counsel Memoranda setting forth agency objectives. Below are summaries of the General Counsel Memoranda issued between June 2010 and September 2015 which articulate the aforementioned goals of Solomon and Griffin. All of these memoranda are available on the NLRB website, [www.nlr.gov](http://www.nlr.gov).

---

<sup>15</sup> Solomon was appointed to complete the term of Ronald Meisburg, who resigned to return to private practice. Meisburg served under a recess appointment by President George W. Bush beginning January 4, 2006, until confirmed by the Senate on August 3, 2006, for a four-year term beginning August 14, 2006.

## **Memoranda Issued by General Counsel Solomon**

### **GC Memo 10-07: Effective Section 10(j) Remedies for Unlawful Discharges in Organizing Campaigns (September 30, 2010)**

The first memo issued by Solomon reaffirmed the NLRB's increased use of Section 10(j) injunctive relief in unfair labor practice cases, but with an emphasis on securing remedies in cases involving unlawful discharges during union organizing campaigns. The memorandum's opening sentence leaves no doubt as to the goals of the new General Counsel: "An important priority during my time as Acting General Counsel will be to ensure that effective remedies are achieved as quickly as possible when employees are unlawfully discharged or victims of other serious unfair labor practices because of union organizing at their workplace." The memorandum outlines protocols for investigations with the overall objective being to make sure that the passage of time does not undercut the NLRB's ability to provide an effective remedy to employees and unions. To this end, regions are directed to identify "nip-in-the-bud" cases as soon as possible and to track these cases in the agency's CATS and NxGen systems to facilitate reporting on the number of such cases and their disposition.

Further, and most telling of Solomon's focus, the General Counsel announced that he would have direct responsibility for deciding whether 10(j) relief should be sought to further the purpose of the National Labor Relations Act (NLRA or Act), noting that a union's abandonment of a campaign and/or a discriminatee's lack of desire for reinstatement would not deter the General Counsel from seeking injunctive relief because either or both of these events reaffirm the chilling effect an employer's unlawful conduct can have on organizing.

Finally, the memorandum sets out "best practices" for all NLRB branches and regional offices in such cases, which include identifying necessary documents and/or neutral witnesses and using investigative subpoenas if the documentation or testimony is not forthcoming; using multiple agents to expedite the gathering of evidence and completion of an investigation; and opposing all requests or motions for postponements or extensions of time.

\*\*\*

### **GC Memo 11-01: Effective Remedies in Organizing Campaigns (December 20, 2010)**

In this memorandum the General Counsel articulated his commitment to the "protection of employee free choice" and providing effective remedies for unfair labor practices committed during union organizing. Identifying employer threats of plant closure or job loss and employer promises of increased benefits as conduct that chills employee free choice, the General Counsel confirmed a need to tailor remedies to "recreate an atmosphere that allows employees to fully utilize their statutory right to exercise their free choice" and "to best restore the status quo and recreate an atmosphere in which employees will feel free to exercise their Section 7 right to make a free choice regarding unionization." Thus, the memorandum encourages regions to consider certain extraordinary remedies for unfair labor practices committed during union organizing.

1. Notice Reading

In addition to notice posting, regions are encouraged to pursue a remedy requiring that a notice be read to employees either by a responsible management representative or by a Board agent in the presence of responsible management representatives. This public reading purportedly demonstrates to employees the employer's acknowledgment of wrongdoing and provides assurance to employees of the employer's commitment to comply with the NLRA. Moreover, according to the memo, a public reading to employees increases the number of employees receiving the notice's message, as many employees are not likely to read a posted notice.

2. Access Remedies

Regions are encouraged to consider the remedy of allowing union access to employer bulletin boards so that employees understand that the open communication of union information in the workplace is acceptable. Reducing impediments to union-employee communication caused by an employer's coercive conduct reassures employees that they really do have the right to seek union representation. In addition, regions are to consider whether an appropriate remedy should include the employer's providing a list of employee names and addresses to a union to facilitate the union's organizing effort. Citing *Heck's Inc.*, 191 NLRB 886, 887 (1971), *enforced as amended*, 476 F.2d 546 (D.C. Cir. 1973), the memorandum explains that providing employee names and addresses to a union can help "restart" the organizing campaign and "neutralize the effect of the [employer's] face-to-face restraint and coercion" by allowing employees access to union officials who can explain the union's point of view.

3. Other Remedies

Finally, this memorandum instructs regions to consult the Division of Advice regarding more aggressive remedies such as providing the union with access to non-work areas to meet with employees during non-work time, allowing union representatives to attend captive audience speeches and respond to the employer's statements, and allowing a union to conduct a captive audience meeting on the employer's premises.

\*\*\*

**GC Memo 11-06: First Contract Bargaining Cases (February 18, 2011)**

Citing the agency's success in securing extraordinary remedies in first contract bargaining cases, the General Counsel removed the required step for regions to consult the Division of Advice for permission to seek remedies requiring notice reading, bargaining on a prescribed or compressed schedule, periodic reports on bargaining, and extending the certification year for a minimum of six months. Allowing regions to pursue these remedies without consulting the Division of Advice is intended to expedite the processing of cases while pursuing full and appropriate remedial action.

The memorandum directs regions to continue to seek input from the Division of Advice to pursue remedies for reimbursement of collective bargaining expenses and for reimbursement of litigation expenses.

\*\*\*

### **GC Memo 11-07: Back Pay Mitigation (March 11, 2011)**

The General Counsel objects to the Board's decisions in *Grosvenor Resort*, 350 NLRB 1197 (2007) and *St. George Warehouse*, 351 NLRB 961 (2007), in which the Board established a two-week deadline for discriminatees to begin searching for new work and shifting the burden to the General Counsel to produce evidence of a discriminatee's reasonable, diligent job search. This memo provides an extensive, detailed legal analysis of NLRB precedent on back pay mitigation, encourages regions to identify cases in which the Board may be asked to overturn these decisions, and sets forth the protocol regions should follow to consistently apply existing Board mitigation principles during investigations. Thus, although extant Board law places the burden on the General Counsel to prove that an individual entitled to back pay has made an effort to mitigate those damages, the General Counsel is actively seeking to overturn these decisions to require the charged party to prove a failure to mitigate damages.

Also significant is that the General Counsel has empowered regions to accept back pay settlements which are amenable to all parties, including discriminatees. This changes the Board's long-standing policy of requiring at least 80 percent of back pay in case settlements and opens the door to settlement if all parties can agree on a back pay figure.

\*\*\*

### **GC Memo 11-11: Mandatory Submissions to Advice (issued April 12, 2011)**

The General Counsel periodically updates the list of cases that regions must submit to the Division of Advice for review prior to the issuance of a complaint or dismissal. In this memo, the General Counsel provides three categories of cases that must be submitted to the Division of Advice: (1) cases requiring a decision by the General Counsel because of the absence of precedent or because they involve identified policy priorities; (2) cases requiring development of a litigation strategy in light of adverse circuit court law or new Board precedent; and (3) cases presenting difficult legal issues. Cases falling within these categories include:

- cases involving extraordinary remedies in organizing campaigns including access to an employer's electronic communication system, access to non-work areas, and equal time to respond to captive audience speeches;
- cases involving remedies seeking reimbursement of bargaining expenses or of litigation expenses incurred in first contract bargaining;
- cases seeking to overturn Board precedent;
- cases involving employer rules prohibiting, or discipline of employees for engaging in, protected concerted activity using social media, such as Facebook or Twitter; and

- cases involving the rights of contractor employees who regularly work on another employer's property to have access to the premises to communicate with coworkers or the public.

\*\*\*

### **GC Memo 11-13: Guidance Memorandum Concerning Parties' Obligation in Collective Bargaining Related to Assertions Made in Collective Bargaining (issued May 17, 2011)**

Although this memo initially states that it is intended to implicate the obligation of both employers and unions to provide information made relevant by an assertion made during bargaining and authorizes regions to issue a complaint against the party refusing to provide relevant and necessary information, the memo focuses on distinguishing between an employer's limited bargaining claims, such as an inability to compete or secure new customers due to labor costs as opposed to a general "inability to pay." Succinctly, it is well settled that an employer claiming a general inability to pay during bargaining must, upon request, provide financial documentation to substantiate this claim. By this memo, though, the General Counsel asserts that an obligation exists to provide information, upon request, if related to specific claims made during bargaining even if the employer never asserts an inability to pay. Thus, for example, an employer might be required to provide information about its competitors to support a statement made during negotiations of an inability to compete or secure new work even if no claim of an inability to pay was made. Regions, therefore, must consider whether an information request is related to a specific claim that can be subject to specific, independent verification. Further, employers may be required to provide more detailed information addressing the specific claim made during negotiations.

\*\*\*

### **Memoranda Issued by General Counsel Griffin**

#### **GC Memo 14-01: Mandatory Submission to Advice (February 25, 2014)**

General Counsel Richard Griffin's first published memorandum updated the list of cases which regions must submit to the Division of Advice and, more importantly, delineated the issues of importance to him. In this memo, the General Counsel identifies three groups of cases: (1) cases involving General Counsel initiatives or areas of law and labor policy that are of particular concern to the General Counsel; (2) cases presenting difficult legal issues that are rare or where there is no precedent or the law is in flux; and (3) matters that have been traditionally submitted to the Division of Advice. These categories include:

- cases raising the question of whether a perfectly clear successor should have an obligation to bargain with the union prior to setting initial terms of employment;
- cases where it is alleged that the employer's permanent replacement of economic strikers had an unlawful motive;

- cases involving the duty to furnish information during bargaining either because the employer has asserted an inability to pay or where the employer has made a more specific financial assertion but refused to provide information in support of the assertion;
- cases involving the application of *Weingarten* principles in nonunionized settings;
- cases involving pre-recognition bargaining by a prospective successor with an incumbent union;
- cases seeking extraordinary remedies such as access to employer electronic communications systems, access to non-work areas, equal time to respond to captive audience speeches, and reimbursement of bargaining or litigation expenses;
- cases involving novel issues arising from the application of the Board’s decision in *Alan Ritchey*, 359 NLRB No. 40 (2012), specifically: (1) whether the employer has demonstrated exigent circumstances that permitted the unilateral discipline; (2) what the appropriate remedy is for a failure to engage in pre-discipline bargaining; and (3) what suffices for purposes of good faith bargaining in these circumstances; and
- cases involving the validity of partial lockouts.

\*\*\*

**GC Memo 14-03: Affirmation of 10(j) Program (April 30, 2014)**

The General Counsel in this memorandum articulates his priority to secure immediate relief in cases which present a high risk of “remedial failure.” The memo reaffirms the principles set forth in prior memoranda, in particular *GC Memo 11-06 (First Contract Bargaining Cases)* and *GC Memo 10-07 (Effective Section 10(j) Remedies for Unlawful Discharges in Organizing Campaigns)*, but extends the list of desired cases to include those involving a successor’s refusal to bargain and a successor’s refusal to hire. As stated, “In many ways, successor cases present the same need for protection as those with a newly certified union. In both, the status of the employees’ chosen collective-bargaining representative is particularly vulnerable to unfair labor practices.”

\*\*\*

**GC Memo 15-02: Guideline Memorandum Concerning Deferral to Arbitral Awards, the Arbitral Process, and Grievance Settlements in 8(a)(1) and (3) Cases (February 10, 2015)**

In *Babcock & Wilcox Construction Co.*, 361 NLRB No 132 (December 15, 2014), the Board revised the long-standing deferral standard articulated in *Olin Corp.*, 268 NLRB 573 (1984). (For a detailed discussion of the *Babcock* decision, see Chapter XII above.) The General Counsel contends in this memorandum that the Board, by modifying its post-arbitration deferral standard, also modified the pre-arbitral deferral standard and the deferral to grievance settlements, and sets forth the procedures regions are to follow in each of these circumstances.

## 1. Post-Arbitral Deferral

Initially, *Babcock* requires that an arbitrator be “explicitly authorized” to decide the statutory issue in order for deferral to the arbitrator’s award to be proper. Thus, the party seeking deferral must show “either that (1) the specific statutory right at issue was incorporated in the collective bargaining agreement, or (2) the parties agreed to authorize arbitration of the statutory issue in the particular case.” Explicit authorization is a threshold requirement and regions are directed to submit any question as to whether explicit authorization exists to the Division of Advice.

Next, *Babcock* requires the statutory issue to have been “actually presented” to and “actually considered” by the arbitrator. The parties must inform the arbitrator of the pending unfair labor practice allegation for it to be deemed presented, and the arbitrator must identify the issue and generally explain his or her determination to demonstrate that it was considered. Thus, for example, where the union or grievant contends that discipline was tainted because of the grievant’s support for the union, the Board no longer will defer to an arbitrator’s award that concludes only that “just cause” for discipline existed, but rather will look for an explicit finding that the employer’s action was not in retaliation for the employee’s protected activity. Again, the General Counsel directs regions to submit to the Division of Advice any questions concerning whether an issue was actually presented to and/or actually considered by the arbitrator. Furthermore, if a party argues that it was prevented from presenting the statutory issue to the arbitrator (such as when a union waits to file an unfair labor practice charge until after the arbitration hearing), the question should be sent to the Division of Advice.

Finally, because *Babcock* changed the “clearly repugnant” standard to one which requires evidence of a “reasonable application of the principles that would govern the Board’s decision,” the General Counsel explained that the focus should be on whether the arbitrator reasonably applied Board analysis even if the region believes the Board may have reached a different outcome. In short, the Board’s review is not de novo, but one of confirming that the decision-maker made a decision by reasonably applying the Board’s analysis. Regions are directed to submit to the Division of Advice any case where the arbitral ruling fails to meet this standard. Likewise, although regions are encouraged to defer to the arbitrator’s remedies (even when the arbitrator does not award typical Board remedies such as posting or reading of a notice), regions may submit to the Division of Advice any cases where the region believes that the arbitrator’s remedy is insufficient under the particular facts.

In *Babcock*, the Board expressed an intent for its decision to be applied prospectively, but in this memorandum, the General Counsel contends that a “more nuanced, hybrid approach” is required and directs the regions *not* to focus on the filing date of the unfair labor practice charge. Rather the following analysis should occur:

- If the **arbitration hearing** occurred on or before the *Babcock* decision was issued (December 15, 2014), the *Olin* standard should be applied.
- If the **collective bargaining agreement** under which the grievance arose was executed after the *Babcock* decision was issued, *Babcock* applies.
- If the collective bargaining agreement under which the grievance arose was executed prior to the issuance of *Babcock* but the arbitration hearing occurred after *Babcock* was

issued, the question is whether the arbitrator was explicitly authorized to answer the question. If the arbitrator was explicitly authorized to answer the statutory question, *Babcock* applies; if the arbitrator was not explicitly authorized to answer the question, *Olin* applies.

## 2. Pre-Arbitral Deferral

The Board in *Babcock* recognized that its new post-arbitral deferral rule would necessitate a change in pre-arbitral deferral as well. Thus, the pre-arbitral deferral standards of *Collyer Insulated Wire*, 192 NLRB 837 (1971), and *United Technologies Corp.*, 268 NLRB 557 (1984), are modified such that deferral will not occur unless the arbitrator is explicitly authorized to decide the statutory issue. Accordingly, the General Counsel instructs regions to notify cases currently deferred under *Collyer* and to issue letters advising parties of *Babcock* and that deferral decisions may be revisited to comply with this ruling. Likewise, regions are directed to send to the Division of Advice any question as to whether a statutory right has been incorporated into a collective bargaining agreement.

If the statutory right is not incorporated into the parties' collective bargaining agreement, the region may solicit an agreement authorizing the arbitrator to decide the statutory issue. This authorization should be in writing and the arbitrator's award will be reviewed for compliance with *Babcock*.

## 3. Deferral to Grievance Settlement

Regions are to consider grievance settlements affecting statutory questions using the *Babcock* deferral standard. Thus, the regions must confirm that: "(1) the parties intended to settle the unfair labor practice issue; (2) the parties addressed that issue in the settlement agreement; and (3) Board law reasonably permits the settlement agreement." The General Counsel advises that a settlement must meet the standards set forth in *Independent Stave Co.*, 287 NLRB 740 (1987): (1) whether all parties agreed to the non-Board settlement; (2) whether the proposed settlement is reasonable in light of the alleged violation, the risks of litigation, and the stage of the litigation; (3) whether the settlement is free of fraud, coercion, or duress; and (4) whether the respondent has a history of violations or breaching settlement agreements.

Regarding timing, the General Counsel states that questions involving grievance settlement should apply a parallel analysis to reviewing arbitral awards. Thus, the date on which the unfair labor practice charge is filed is irrelevant:

- For cases where the settlement agreement was entered on or before December 15, 2014 (the date on which *Babcock* was issued), the prevailing analysis of *Alpha Beta Co.*, 273 NLRB 1546 (1985), *enforced sum nom. Mahon v. NLRB*, 808 F.2d 1342 (9th Cir. 1987), applies.
- If the collective bargaining agreement under which the grievance arose was executed after *Babcock* was issued, *Babcock* applies.
- If the collective bargaining agreement under which the grievance arose was executed on or before *Babcock* was issued and the grievance settlement was executed after *Babcock*

was issued, the standard that applies will depend on whether the parties intended to resolve the unfair labor practice through arbitration or settlement.

\*\*\*

**GC Memo 15-04: Report of the General Counsel Concerning Employer Rules (March 18, 2015)**

In this memorandum, the General Counsel elaborates on the criteria regions should apply when reviewing employer work rules and/or handbook provisions commonly challenged as being overly broad and restrictive of rights protected by Section 7 of the NLRA. The General Counsel's report is divided into two sections: the first discusses the provisions most often presented to the NLRB for review; the second describes how Wendy's International LLC agreed to modify several of its policies and handbook provisions pursuant to a settlement it reached with the Board.

This memorandum highlights the following rules or handbook provisions commonly challenged as violating Sections 8(a)(1) or (3) of the NLRA:

1. Confidentiality Rules.

Because Section 7 of the NLRA protects employee rights to discuss wages, hours, and other terms and conditions of employment with fellow employees and nonemployees, any language broadly limiting the disclosure of confidential information will be deemed unlawful. Thus, a rule that states, "Do not discuss customer or employee information outside of work including phone numbers and addresses" is overly broad and unlawful because of the general prohibition, whereas a more descriptive rule providing that "misuse or unauthorized disclosure of confidential information not otherwise available to persons or firms outside the company is cause for disciplinary action including termination" is lawful because it defines what information should be kept in confidence.

2. Employee Conduct Towards the Company or Supervisors.

Section 7 protects employees' rights to criticize or protest their employer's labor policies or their treatment by supervisors. Rules which in any way inhibit this protected activity will be found to be unlawful. However, a rule that requires employees to be respectful and professional to coworkers, clients, or competitors will be found lawful as protecting an employer's general business interest. For example, a rule that generally requires employees to "be respectful to the company, other employees, customers, partners, and competitors" is overly broad and unlawful, whereas a rule instructing employees to "not be discourteous or disrespectful to a customer or any member of the public while in the course and scope of company business" is lawful as it is limited only to non-employees.

3. Conduct Toward Fellow Employees.

Because employees possess a Section 7 right to "argue and debate with each other about unions, management, and their terms and conditions of employment," employers cannot generally

prohibit “negative” or “inappropriate” discussions. To this end, “anti-harassment rules cannot be so broad that employees would reasonably read them as prohibiting vigorous debate or intemperate comments regarding Section 7-protected subjects.” Hence, a rule that states, “Do not make insulting, embarrassing, hurtful, or abusive comments about other company employees online and avoid the use of offensive, derogatory, or prejudicial comments” is too broad because employees may interpret or understand terms such as “insulting,” “offensive,” or “derogatory” as limiting their ability to honestly discuss the terms and conditions of employment. Conversely, a rule prohibiting “threatening, intimidating, coercing, or otherwise interfering with the job performance of fellow employees or visitors” is lawful because it makes no mention of the company or management and the rule’s focus remains on job performance.

#### 4. Employee Interaction With Third Parties.

Section 7 permits employees to communicate with the news media, government agencies, and other third parties regarding wages, benefits, and other terms and conditions of employment. Rules and handbook provisions that can be read to limit such communication are unlawful. So, a rule that provides that “employees are not authorized to speak to any representative of the print and/or electronic media about company matters unless designated to do so by HR and must refer all media inquiries to the company media hotline” is overly broad and, therefore, unlawful because of its blanket prohibitions. However, a rule that states “Our company strives to anticipate and manage crisis situations in order to reduce disruption to our employees and to maintain our reputation as a high quality company. To best serve these objectives, the company will respond to the news media in a timely and professional manner *only* through the designated spokespersons” is lawful because the outside communication addressed by the rule pertains to non-Section 7 rights.

#### 5. Use of Company Logos, Copyrights, and Trademarks.

The General Counsel recognizes the need to balance a company’s intellectual property rights with respect to its name and logo against employees’ Section 7 rights to use the company name and logo on picket signs, leaflets, and other protected materials. A broad prohibition against using the company’s name and logo, therefore, will be deemed unlawful. In order to be lawful, a prohibition must be limited to respect the laws protecting a company’s interests, but permit fair use. An example of a lawful rule would be, “Respect all copyright and other intellectual property laws. For the company’s protection as well as your own, it is critical that you show proper respect for the law governing copyright, fair use of copyrighted material owned by others, trademarks, and other intellectual property, including the company’s own copyrights, trademarks, and brands.”

#### 6. Rules Restricting Photography and Recording.

Rules which completely ban photography and recordings, or that ban the use or possession of personal cameras or recording devices, are overbroad because they may be understood to prohibit taking pictures or making recordings during non-work time. Therefore, a broad rule such as “taking unauthorized pictures or video on company property is prohibited” is unlawful. However, a rule instituted in response to understood, strong privacy issues (such as a rule

prohibiting photography in patient areas of a medical facility) will likely be deemed lawful, particularly where employees will understand the rule as not limiting protected concerted activity.

#### 7. Restrictions on Employees Leaving Work.

Rules that regulate when employees may leave work are unlawful if employees reasonably can read them to forbid protected strike activity and work stoppages. However, rules that do not mention strikes, walkouts, disruptions, or similar conduct are lawful because employees will understand them as restricting their ability to leave their work stations or posts for reasons unrelated to protected concerted activity. Consequently, a general rule that prohibits “walking off the job during a scheduled shift” is unlawful. However, in certain contexts, such as in a healthcare facility, a rule that states that “walking off a shift, failing to report for a scheduled shift, and leaving early without supervisor permission are also grounds for immediate termination” is lawful because employees would understand that the rule was not intended to prohibit Section 7 rights, but rather related to healthcare responsibilities and ensuring that patients are not left without adequate care.

#### 8. Conflict-of-Interest Rules.

Rules which can be read as prohibiting concerted activity to improve the terms and conditions of employment are unlawful because Section 7 protects employees’ right to engage in such conduct even when such conduct conflicts with the employer’s interests. Normally, broad rules that prohibit employees from conduct “not in the best interest of the employer” are unlawful. A more specific rule, however, may be lawful where the rule likely is understood *not* to interfere with protected activity. For example, a rule that directs employees to “refrain from any activity or having any financial interest that is inconsistent with the Company’s best interest” or to refrain from “activities, investments, or associations that compete with the Company, interfere with one’s judgment concerning the Company’s best interests, or exploit one’s position with the Company for personal gain” is lawful because the activities specified are not among those protected by Section 7.

\*\*\*

### **GC Memo 15-08 (Revised): Guidance Memorandum on Electronic Signatures to Support a Showing of Interest (October 26, 2015)**

In April of 2015, the Board’s new rules designed to expedite the election process went into effect. In the rulemaking, the Board left open the possibility of electronic signatures being used to support the showing of interest needed to process an election petition. The General Counsel was charged with the responsibility of determining whether electronic signatures could be used reliably for this purpose. In this memorandum, the General Counsel provided his rationale for concluding that the Board standards that traditionally applied to handwritten signatures to support a showing of interest could be applied to electronic signatures, thereby allowing electronic signatures in support of a showing of interest. After reviewing extant Board law governing the evaluation of handwritten signatures to support a showing of interest, the General Counsel concludes in the memo that regions may accept electronic signatures for this purpose

where the party submitting such signatures provides prima facie evidence: (1) that an employee has electronically signed a document purporting to state the employee's views regarding union representation; and (2) that the petitioner has accurately transmitted that document to the region.

To be valid, submissions supported by electronic signature must include the signer's name, email address (or other known contact information such as a social media address), the signer's telephone number, the language to which the signer agreed, the date the electronic signature was submitted, and the name of the employee's employer. The party submitting electronic or digital signatures must submit a declaration that identifies what technology was used and how its controls: (1) ensure that the signature belongs to the signatory employee, and (2) ensure that the employee himself or herself provided the electronic signature. The declaration also must include that the electronically transmitted information regarding what was signed, and when the employees signed, is the same information seen and signed by the employee.

In the event that the electronic signature technology used does not support digital signatures that can be independently verified by a third party, the submitting party must submit evidence that once the electronic signature was obtained, the submitting party promptly transmitted a communication to the signing employee stating and confirming the signer's name, email address (or other known contact information), telephone number, the language to which the signer agreed, the date the electronic signature was submitted, and the name of the employee's employer. This "confirmation transmission" must be sent to an individual account provided by the sender. Individual accounts may include email, mobile phone text messaging, and social media accounts. If the submitting party receives any responses to the confirmation transmission, the responses also must be submitted to the region.

Finally, submissions may include other information such as work location, classification, home address, and alternate phone numbers, but may *not* contain dates of birth, social security numbers, or other sensitive personal information.

The memorandum also includes samples of what a Declaration to Support a Showing of Interest must contain and what a Confirmation of Submission should include.

\*\*\*

### **GC Memo 16-01: Mandatory Submissions to Advice (issued March 22, 2016)**

General Counsel Griffin updated the list of cases which regions must submit to the Division of Advice for review prior to the issuance of a complaint or dismissal. The General Counsel in this memo provides three categories of cases that must be submitted to the Division of Advice: (1) cases that involve General Counsel initiatives and/or priority areas of the law and labor policy; (2) cases raising difficult legal issues that are rare in any individual region or where there is no governing precedent or the law is in flux; and (3) matters involving issues traditionally submitted to the Division of Advice for review. Cases falling within these categories include:

- cases involving the application of *Purple Communications*, 351 NLRB No. 126 (2014), to electronic systems other than email, cases where the employer has provided specific evidence of special circumstances privileging denial of access to its email system, and

cases presenting the question of whether the employer engaged in unlawful surveillance of employee emails;

- cases involving the applicability of *Weingarten* principles (the right to representation during investigative interviews that may result in discipline) in non-union settings;
- cases involving allegations that “English-only” policies violate Section 8(a)(1);
- cases involving the employment status of workers in the on-demand economy;
- cases involving the question of whether the misclassification of employees as independent contractors violates Section 8(a)(1);
- cases raising the question of whether an impasse over a single issue in negotiation should constitute an overall impasse because the issue is critical to one or both parties;
- cases involving whether novel forms of conduct, such as coordinated “shopping,” excessive use of loudspeakers, or corporate campaigns, and seeking to determine if these actions constitute unlawful secondary activity or recognitional picketing; and
- cases where the employer has partially locked out employees.

\*\*\*

**GC Memo 16-03: Seeking Board Reconsideration of the *Levitz* Framework (issued May 9, 2016)**

In *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), the Board clarified when an employer may challenge the continuing majority support of an incumbent union. In that decision, the Board ruled that an employer may unilaterally withdraw recognition from an incumbent union when no collective bargaining agreement is in place *only if* the employer possesses evidence that clearly indicates that the union has lost majority support. The Board also decreased the showing required for an employer to secure an RM election by filing an RM petition.<sup>16</sup> In *Levitz*, the Board articulated a preference for an employee election to determine whether a union had lost majority support but did not foreclose an employer’s ability to unilaterally withdraw recognition and merely increased the employer’s burden to support the unilateral withdrawal.

In this GC Memo, the General Counsel opines that *Levitz* does not provide clarity on what evidence will be sufficient to support a unilateral withdrawal of recognition. The General Counsel describes the post-*Levitz* procedures as “problematic” and creating “peril for employers in determining whether there has been an actual loss of majority support for the incumbent union, has resulted in years of litigation over difficult evidentiary issues, and in a number of cases has delayed employees’ ability to effectuate their choice as to representation.” For these reasons, the General Counsel has directed regions to ask the Board to adopt a rule which would eliminate the unilateral withdrawal of recognition and require the outcome of either an RM election or an RD election (decertification election) to determine whether a union has lost majority support. Thus, regions are instructed to include an alternative 8(a)(5) allegation in

---

<sup>16</sup> An employer may file an “RM petition” for an election under certain circumstances to determine support for a new union or to determine whether there is continuing support for an incumbent union.

complaints that an employer unlawfully withdrew recognition from the union absent the results of a Board election.

For employers, the elimination of the ability to unilaterally withdraw recognition from an incumbent union, when it is clear that the union has lost majority support, takes an arrow out of the employer's quiver to act and adds another step in the process needed to shed a union. Moreover, the election process provides dormant unions with the ability to revitalize interest among employees where none may exist.

\*\*\*

### **OM Memo 17-03: Collecting Data in Connection with Fair Pay and Safe Workplaces Executive Order (issued November 7, 2016)**

In July of 2016, the Office of the General Counsel, in OM Memo 16-23, set forth how the NLRB would comply with the Fair Pay and Safe Workplaces executive order signed by President Obama in July of 2014. In OM 16-23, the General Counsel instructed regional offices to collect four additional informational items in all unfair labor practice cases:

1. if the charged party is or has been a federal contractor, its Commercial And Government Entity (CAGE) number;
2. the charged party's Data Universal Number System (DUNS) number;
3. the charged party employer four character DUNS number suffix (DUNS +4); and
4. the charged party's Employer Identification Number (EIN) or Taxpayer Identification Number (TIN).

On October 24, 2016, the U.S District Court for the Eastern District of Texas issued an order which preliminarily enjoined the implementation of several aspects of the executive order. In response to this court order, the General Counsel, in OM 17-03 announced that it will not share information with other agencies as contemplated by the executive order, but that regions should continue to collect the CAGE, DUNS, DUNS+4, EIN, and TIN data from charged parties. Thus, employers will be asked to provide this information in NLRB investigations notwithstanding the preliminary injunction entered by the court.

\*\*\*

## **Conclusion**

The Office of the General Counsel controls the prosecutorial objectives of the National Labor Relations Board by directing the regional offices as to what cases are of particular interest to the reigning General Counsel—either to create precedent or overturn undesirable decisions from the Board. As illustrated by the General Counsel memoranda issued since June 2010, when the General Counsel's office was staffed by pro-labor appointees, the recent directives contain a distinct focus on favoring unions at the expense of employers. Both General Counsel Solomon and General Counsel Griffin made this goal clear by including a more aggressive use of injunctive relief and requests for extraordinary remedies, particularly in cases of employer unfair labor practices during organizing or first contract bargaining. General Counsel Griffin's four-

year term runs through August 2017, so even though a change in administration following the 2016 national elections might help to curb the aggressive pro-union stance of the NLRB, any change in prosecutorial objectives will require additional time.

## **XVIII. Jurisdiction: Graduate Teaching Assistants and Student Athletes (*Northwestern University*)**

---

*Higher Education: Two out of three ain't bad (but in this case it is)...*

### **The NLRB established a new test to assert jurisdiction over religiously affiliated institutions of higher education.**

In *Pacific Lutheran University*, 361 NLRB No. 157 (December 16, 2014), the National Labor Relations Board (NLRB or Board) reexamined the standard it applies to determine, under *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), whether to decline to exercise jurisdiction over faculty members at self-identified religious colleges and universities. The NLRB announced that it would assert jurisdiction unless an institution: (1) currently holds itself out as “providing a religious educational environment” and (2) “holds out” the petitioned-for faculty “as performing a specific role in creating or maintaining the university’s religious educational environment.” The NLRB held that Pacific Lutheran did not sufficiently demonstrate that its “contingent” (non-tenure track) faculty performed a religious function. Pacific Lutheran had argued under *University of Great Falls v. NLRB*, 278 F.3d 1135 (D.C. Cir. 2002), that it was exempt as a religious organization from the NLRB’s jurisdiction. The NLRB rejected *Great Falls*, in favor of its new test, which the NLRB declared to be “faithful to the holding of *Catholic Bishop*.” That conclusion is likely to be contested, based on *Catholic Bishop*, in which the U.S. Supreme Court foresaw “no escape from conflicts flowing from the Board’s exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment questions that would follow.” 440 U.S. 490, 504 (1979)

### **The NLRB punted the question of employee status for scholarship athletes of private universities.**

*Northwestern University and Colleges Athletes Players Association (CAPA)*, 362 NLRB No. 167 (August 17, 2015), presented a question of first impression which the NLRB declined to answer: whether scholarship athletes in revenue producing sports at private universities are employees under the National Labor Relations Act (NLRA or Act). The Regional Director in Region 13 had held that Northwestern University’s scholarship football players were employees under the NLRA because their scholarships were compensation for services performed, special rules applied to them, their time commitment to the sport was substantial, they contributed revenue to the university, and the university controlled their activities. Northwestern, supported by many amici, argued that student athletes should not be considered employees.

Northwestern is a private university and competes with state-run colleges and universities over which the NLRB does not have jurisdiction. The NLRB voted unanimously not to assert its jurisdiction in the matter, holding that asserting jurisdiction would not promote labor stability due to the nature and structure of the NCAA Division I Football Bowl Subdivision (FBS), in which 108 of the roughly 125 FBS teams are state-run and outside NLRB jurisdiction. However, the NLRB said that its decision did not “preclude reconsideration of this issue in the future.”

**The NLRB ruled that student assistants (graduate and undergraduate) at private universities are employees under the NLRA.**

On August 23, 2016, the NLRB ruled that graduate and undergraduate student assistants (including assistants engaged in research funded by external grants) at Columbia University are employees who have the right to unionize. *Columbia University*, 364 NLRB No. 90 (2016). In so doing, the NLRB reversed its 2004 holding in *Brown University*, 342 NLRB 483 (2004), which was decided by a Board dominated by President Bush appointees, and reverted to its holding in *New York University (NYU)*, 332 NLRB No. 1205 (2000), which had been decided by a Clinton-era Board.

The NLRB's reversal came as no surprise. Since the appointment of a Democratic majority to the NLRB, many expected *Brown University* to be overturned, particularly when the NLRB specifically invited amici in the *Northwestern* case to brief whether the NLRB should "adhere to, modify, or overrule" the *Brown University* decision and declined to assert jurisdiction without resolving the question of employee status.

In *Columbia University*, the NLRB majority stated, "[t]he Board has the statutory authority to treat student assistants as statutory employees, where they perform work, at the direction of the university, for which they are compensated. Statutory coverage is permitted by virtue of an employment relationship; it is not foreclosed by the existence of some other, additional relationship that the Act does not reach," concluding that providing student assistants with collective bargaining rights did not engender any "cognizable, countervailing harm to private higher education." The majority dismissed Member Miscimarra's concerns about the disruption a potential labor dispute would have on the academic setting, noting that "labor disputes are a fact of economic life – and the Act is intended to address them."

Public universities will not be directly affected by this decision, but private universities must consider not just union organizing efforts, but also the application of the National Labor Relations Act to handbooks, rules, disciplinary proceedings, and other aspects of educational administration.

## **XIX. Off-Duty Access Cases**

---

When it came to off-duty employee access to an employer's property, for nearly 40 years the National Labor Relations Board (NLRB or Board) applied the rule set forth in *Tri-County Medical Center*, 222 NLRB 1089 (1976) — a rule barring off-duty access is valid only if it: (1) limits access solely to the interior of the facility; (2) is clearly disseminated to all employees; and (3) applies to off-duty access for all purposes, not just union activity.

In a series of cases decided between December 2011 and November 2014, the Board, relying on the third prong of the “Tri-County Rule,” struck down several off-duty access rules. In each case the Board interpreted the employer's rule to allow employer discretion and held that only a complete ban on off-duty access will comply with *Tri-County Medical*.

In *Saint John's Health Center*, 357 NLRB No. 170 (2011), the employer permitted off-duty employees to access the building only to attend employer-sponsored events, “such as retirement parties and baby showers.” The Board found the rule unlawful because it broadly excepted all events sponsored by the employer. According to the Board, the third prong of *Tri-County Medical* requires a uniform ban on *all* access with no exceptions, except perhaps a narrow one justified by “special circumstances.” In dissent, Member Hayes argued that *Tri-County* prohibits discrimination against off duty employees engaging in union activity, but does not mandate a complete ban.

In *Sodexo America, LLC*, 358 NLRB No. 79 (2012) (*Sodexo I*), the employer's access rule permitted employees to enter the facility to visit a patient, receive medical treatment, or to conduct hospital-related business. The rule defined the latter to be the “pursuit of the employee's normal duties or duties as specifically directed by management.” The Board did not have any problem with the exceptions for patient visits or treatment, as they were unrelated to employment. But the Board found the final exception fatal to the rule. According to the Board, the rule allowed management unfettered discretion as to when to allow access.

*Sodexo I* was among those cases invalidated by the U.S. Supreme Court's *Noel-Canning* case. In November 2014, the Board considered anew its 2012 *Sodexo I* decision and reversed its position on the hospital's exception for conducting hospital related business. This time, the Board reasoned that the “exception” was really not an exception at all, but rather a clarification that employees may access the facility to perform work on shifts outside their normal shifts. *Sodexo America, LLC*, 361 NLRB No. 97 (2014) (*Sodexo II*).

In *J.W. Marriott*, 359 NLRB No. 8 (2012), the employer's rule prohibited off duty access to the facility without prior approval of management. The Board, relying on *St. John's Health Center*, struck down the rule because it was not a uniform ban on access, but rather allowed management “broad—indeed, unlimited—discretion to decide when and why employees may access the facility.” In dissent, Member Hayes argued that the majority was misreading *Tri-County Medical* as prohibiting commonsense employer exceptions. *See also, Remington Lodging & Hospitality*, 359 NLRB No. 95 (2013) and *American Baptist Homes of the West*, 360 NLRB No. 100 (2014) (both cases in which the employer had an access rule requiring an employee to have management's approval to enter the facility off-duty).

Under these cases interpreting *Tri-County Medical*, an employer wanting to limit off-duty access by its employees to its workplace must either completely bar access for any purpose or allow unlimited access.

## XX. Significant NLRB Decisions: In Brief

---

The following chapters select several significant decisions from the National Labor Relations Board from 2010–2016. The discussions contain the majority opinion and any dissenting opinions, as well as a brief notation on the “significance” of the decision for labor policy and on day-to-day labor relations.

### 2010

#### *Stella D’oro Biscuit Company, Inc.* 355 NLRB No. 158 (2010)

---

**ISSUE:** Whether the employer is required to provide the union with audited financial statements because the employer asserted during contract negotiations that its survival was linked to obtaining concessions from the union.

**HOLDING** (Chairman Liebman and Member Pearce). The majority found that the employer’s statements effectively amounted to a claim of a present inability to pay, and thus required the employer to provide the union with financial information.

**DISSENT:** Member Schaumber would have found that the employer was not required to provide the financial information because its comments simply demonstrated its unwillingness to pay, not its inability to do so.

**SIGNIFICANCE:** While the National Labor Relations Board (Board) has always scrutinized an employer’s words at the bargaining table to determine, for example, whether it has communicated an inability to meet union economic demands—as opposed to an unwillingness to do so—this decision demonstrates that the Board will be more likely to interpret an employer’s words to require production of financial information.

\*\*\*

#### *KenMor Electric Co.* 355 NLRB No. 173 (2010)

---

**ISSUE:** Whether member companies’ use of an applicant referral service provided by their trade association violated the National Labor Relations Act (NLRA or Act).

**HOLDING** (Chairman Liebman and Member Pearce). The majority ruled that the “referral system in its totality” violated the NLRA. In reaching that decision, the majority found that the system as a whole operated to disadvantage union applicants and salts. In that regard, the majority noted that the trade association, essentially acting as a middleman in the application process, “limited access to prospective employers [and] clearly operated to the detriment of union applicants, the large majority of whom had not previously worked for the trade

association's employers and were therefore unknown to them." The majority also noted that the imposition of a \$50 filing fee for each application filed within 30 days after filing the first free application would constitute an "imposition" on salts and union applicants who would otherwise be able to "file a new application every few days." The majority continued that the "timing of the fee" several years after the union campaign began "further indicates that it was aimed at reducing the number of union-affiliated applications."

**DISSENT:** In his dissent, Member Schaumber criticized several aspects of the majority's decision. For example, he criticized the majority's finding that the referral system "in its totality" violated Section 8(a)(1) of the Ac because that theory was neither pleaded nor litigated, thereby denying the respondent companies due process in responding to the charge. He also described how, despite the fact that the referral policy applied to all applicants regardless of union affiliation and that it had been in place for many years prior to the union organizing campaign, the majority nonetheless found it violative "largely because the process allegedly reduced the number of successful applicants," thus creating an unprecedented disparate impact analysis for unfair labor practice charges.

**SIGNIFICANCE:** The most obvious takeaway from this decision is that the National Labor Relations Board was interested in strengthening salting efforts and union organizing campaigns. It also created precedent for unions to challenge neutral hiring policies where they can show the policies disparately impacted union members.

\*\*\*

***Transcare New York, Inc.***  
**355 NLRB No. 56 (2010)**

---

**ISSUE:** Whether to grant a union's request for a hearing on its objections to alleged employer surveillance close to voting sites.

**HOLDING** (Chairman Liebman and Member Becker). The majority reversed the Regional Director's decision and ordered that a hearing be held on the surveillance issue for all four voting sites. The majority determined that the union's evidence, if credited, warranted setting aside the election. In reaching that decision, the majority relied on assertions that senior managers "stationed themselves outside the polling areas."

**DISSENT:** Member Schaumber, in dissent, argued that even if credited, the allegations of the union would not be sufficient to constitute objectionable surveillance sufficient to overturn an election. Member Schaumber observed that the union's:

position statement alleges only that two identified witnesses observed various managers and supervisors standing on street corners approximately 150 feet from the facilities where voting was to occur. . . . There is no representation that the managers or supervisors stood in any designated no-electioneering zone, that they had direct views of the polling area, or that they were otherwise positioned to ascertain whether the employees entering the facility were doing so to vote rather

than for job related or other purposes. Nor, at least in the sections of the position statement that recite[] facts as to which identified witnesses would testify, is there any representation that employees had to pass by any manager in order to vote; indeed that seems inherently implausible given the distance at which the managers were standing from the buildings where voting occurred.

**SIGNIFICANCE:** This case was just one of many demonstrating that the National Labor Relations Board (Board) has held employers to a higher standard of scrutiny with regard to election day conduct. Employers are cautioned that simply avoiding the “no polling zone” established by the Board agent will not be sufficient to avoid a union objection and a potential Board-ordered second election in the event of a union loss. To the extent feasible, supervisors and managers should remain completely out of sight of the polling and pathways leading to the polling area. Employers are also well advised to carefully select the voting site at the outset so as to avoid potential claims of surveillance.

\*\*\*

***First Student, Inc.***  
**355 NLRB No. 78 (2010)**

---

**ISSUE:** Whether the employer’s election observer, a substitute bus driver and trainer, could reasonably be viewed by a unit of bus drivers as closely identified with management so as to warrant setting aside the union’s election loss and ordering a new election.

**HOLDING** (Chairman Liebman and Member Pearce). The majority answered the above issue in the affirmative and ordered a second election. Although the observer was not a Section 2(11) supervisor or a management employee, the National Labor Relations Board (Board) found that she could reasonably be understood to be closely identified with management. Among other things, the Board took notice of the fact that the employer’s observer was the only employee to sit in an enclosed office that she shared with a supervisor, and was occasionally “the only representative of the employer with whom some applicants deal during the application and training process.”

**DISSENT:** Member Schaumber, dissenting, recounted the Board’s original rule excluding only statutory Section 2(11) supervisors and those “inextricably linked to the employer.” Member Schaumber also noted that “[t]he Board has proceeded down a slippery slope, setting aside elections while incrementally restricting the employer’s selection of its observers and the Section 7 rights of employees who would serve in that capacity.” He also noted that the Board has not similarly prohibited employees who are closely aligned with a union from serving as observers and “has also found unobjectionable the service of non-employee officials, including union officers ... who could have actively participated in the union organizational campaign.”

**SIGNIFICANCE:** The majority’s decision reflects its disfavoring management observers at union representation elections, even though their presence is important to prevent voter fraud and improper electioneering at the polls. The decision also demonstrates the double standard in imposing greater restrictions on the selection of management observers versus union observers.

Employers are well counseled to select, whenever possible, observers who are included in the bargaining unit.

\*\*\*

***Mandalay Bay Resort & Casino***  
**355 NLRB No. 92 (2010)**

---

**ISSUE:** Whether “focus meetings” held during the critical period prior to an election, at which the employer entertained complaints about its overtime policy, constituted a new practice or significantly altered an existing practice of entertaining employee grievances sufficient to warrant setting aside the union’s election loss and ordering a new election.

**HOLDING** (Chairman Liebman and Member Pearce). The majority determined that a new election was warranted because it found that the employer did not have a past practice of soliciting grievances and implicitly promising to remedy them. In addition, the majority found that the employer had not previously addressed employee complaints or issues pertaining to the union campaign at the regularly scheduled “pre-shift” meetings.

**DISSENT:** Member Schaumber argued in dissent that the union “failed to prove that certain indefinite and ambiguous remarks about the overtime policy made to employees at two meetings on indeterminate dates constituted objectionable solicitations and implied promises to remedy grievances.” Member Schaumber also noted that the employer had an established past practice that predated the filing of the petition of conducting regular shift meetings with employees where the employees could, and in fact did, raise concerns relating to their employment.

**SIGNIFICANCE:** This case is another example of the National Labor Relations Board’s (Board) propensity to overturn union election losses and reschedule new elections based on disputed facts and hyper-strict application of Board rules.

\*\*\*

***DHL Express, Inc.***  
**355 NLRB No. 144 (2010)**

---

**ISSUE:** Whether an employer unlawfully surveilled union handbilling activities such that a union election loss should be overturned and a new election ordered.

**HOLDING** (Chairman Liebman and Member Pearce). The National Labor Relations Board (Board) majority overturned the results of an election the union lost by an 82-vote margin and ordered a rerun election. Central to the Board’s decision to order a rerun election was its finding that the employer unlawfully surveilled its employees’ handbilling activities when the employer’s security guards were “standing among or near handbillers while police investigated the presence of nonemployee union agents on the edge of the respondent’s premise[s].” The employer’s security guards had called the police officers in to investigate the presence of the

nonemployee union organizers (which in itself was not alleged to be a violation). However, the Board determined that the presence of the employer's security guards among the handbillers was "unusual, out of the ordinary, and unconnected to the legitimate concerns of the [employer]."

**DISSENT:** In dissent, Member Schaumber argued that he would not find unlawful surveillance took place and would not overturn the election results—noting, among other things, that the employer's security guards only remained in the area during the time that the police were on the scene investigating the nonemployee union organizers' presence, "confirming that the guards were concerned only with the fulfillment of their assigned security duties." Member Schaumber further stated in his dissent that, contrary to the majority's assertion, it was not unusual for the employer's security guards to patrol the area where the handbillers had gathered, which included the sidewalk area connecting the parking lot to the facility entrance.

**SIGNIFICANCE:** The majority's concept of what constitutes unlawful surveillance is so broad that employers must question whether its security guards could *ever* be allowed to be in the vicinity of organizing activity without violating the act, even if there is a security concern in the area. Following this case, employers were on notice that the Board will be quick to find unlawful surveillance and readily overturn even landslide election losses on that basis.

\*\*\*

***Stabilus, Inc.***

**355 NLRB No. 161 (2010)**

---

**ISSUE:** Whether an employer unlawfully enforced its dress code policy to prohibit employees from wearing pro union T-shirts and insignia during a union organizing campaign and, if so, whether the union election should be overturned and a new election ordered.

**HOLDING** (Chairman Liebman and Member Becker). The majority answered the above issue in the affirmative and ordered a second election. It is well understood that, in general, employees have a right to wear union insignia on their employer's premises absent a showing of "special circumstances." *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801-03 (1945). The National Labor Relations Board (Board) has utilized the same analysis for clothing. Choosing to avoid the analysis of whether this case involved special circumstances, the Board instead determined that the employer violated employees' Section 7 rights by enforcing its dress code in a manner both discriminatory and overbroad.

**DISSENT:** In dissent, Member Schaumber argued that the majority, for the first time, had held that the well-recognized right of employees to display union insignia also extends to "substituting a pro-union T-shirt for a required company uniform." He emphasized that under this theory, "employees can cavalierly disregard preexisting and consistently enforced uniform policies and, presumably, show up to work dressed head-to-toe in clothing touting union causes." Further, he noted that "even if an employer could carry the 'special circumstances' burden, my colleagues will still find a violation on disparate enforcement grounds if the employer has ever permitted isolated exceptions to its uniform policy, as, for example, to celebrate Halloween or commemorate the 9-11 tragedy." Member Schaumber noted that the administrative law judge

found that the employer consistently enforced its dress code policy except when the Carolina Panthers went to the 2004 Super Bowl, on Halloween, and on the anniversary of the September 11, 2001 terror attacks. Member Schaumber, like the administrative law judge (ALJ), did not believe that those few exceptions, which were made with regard to all employees, established disparate enforcement sufficient to support a finding of a violation. Member Schaumber described the majority opinion as representing a radical rebalancing of the relevant interests and a sharp curtailment of legitimate management prerogatives.

**SIGNIFICANCE:** It is blackletter law that employers may not enforce workplace policies in a manner that discriminates against pro-union employees. However, employers are well-counseled to uniformly and without exception apply dress code policies to avoid adverse Board rulings.

\*\*\*

***The Research Foundation of the State University of New York (SUNY) at Buffalo***  
**355 NLRB No. 170 (2010)**

---

**ISSUE:** Whether an employer’s conduct in excluding non-employee union business representatives from the employer’s premises was unlawful and warranted setting aside a union election loss and ordering a second election.

**HOLDING** (Chairman Liebman and Member Pearce). The National Labor Relations Board (Board) answered the above issue in the affirmative, set aside the election that the union had lost, and ordered a rerun election. Its basis for ordering the rerun was the majority’s conclusion that the employer did not have the authority to exclude the non-employee union business agent from the employer’s premises.

By way of background, during its organizing campaign, the International Brotherhood of Teamsters, Local 50, arranged to meet with an employee at the employee’s office on the SUNY campus. After obtaining advice from a SUNY official, the employee’s manager informed the union business agent that she was on private property and that she would have to leave or else he would call the police to have her removed. The Board’s analysis of this case was fundamentally a property rights analysis, questioning the employer’s right to exclude a non-employee union business agent from New York State public property. The Board majority determined that the employer had no such property rights as contemplated in the Supreme Court’s decision in *Lechmere v. NLRB*, 502 U.S. 527 (1992), where the Court limited union access to private property. The Board went on to argue that where, as here, an employer cannot establish a sufficient property right, it violates Section 8(a)(1) of the National Labor Relations Act (“Act”) by excluding union agents from the property. As such, the majority concluded that the employer’s conduct was objectionable and warranted setting aside the election and ordering a new election.

**DISSENT:** Member Schaumber, in dissent, noted that the isolated event of a supervisor informing a non-employee union agent—who was on the property in violation of state regulations—to leave the premises was clearly not an incident that would rise to such a level so as to interfere with employee free choice affecting the results of the election.

In support of his position that the election results should be sustained, Member Schaumber first argued that the majority applied the wrong legal standard. In Member Schaumber's view, the *Lechmere* analysis only applies if a concurrent unfair labor practice charge is also filed. However, in this case, objections to the election were filed without any allegations of an unfair labor practice, so the proper test for setting aside the election is "whether the alleged objectionable conduct taken as a whole, warrants a new election because it has 'the tendency to interfere with the employees' 'freedom of choice' and 'could well have affected the outcome of the election.'" Applying that legal standard to this case, Member Schaumber argued that the complained-of conduct could not realistically have impacted the election outcome.

Member Schaumber next argued that even assuming, hypothetically, that the *Lechmere* line of cases regarding an employer's property interest in the context of Section 8(a)(1) allegations actually did apply in this case, the union had not met its burden of establishing that it had no other reasonable means of communicating with the employees such that it had the right to gain access to the property for the purpose of communicating with those employees.

Finally, Member Schaumber argued that contrary to the majority, he would find that the employer had a sufficient property interest to eject a nonemployee union business agent because: (1) the employer was a rightful occupant performing contract services for SUNY; (2) it was the employer's employee, not SUNY's employee, with whom the union agent sought to meet; and (3) the employer ejected the union agent from the property after the employer received permission from a SUNY official to do so.

**SIGNIFICANCE:** In this case, the majority eschewed the Board's traditional analysis for determining whether employer conduct warrants setting aside an election when no unfair labor practice charge has been filed and instead replaced that standard with one that allows the Board, *sua sponte*, to determine if the complained-of conduct, in its opinion, violated the Act even where no unfair labor practice charge has been filed. This decision demonstrates that the Board will set aside the election and order a rerun election even where the conduct is not disseminated beyond a single employee and clearly would have no tendency to interfere with the unit employees' free choice to such an extent as would affect the outcome of the election.

\*\*\*

**2010 Bannering Cases:** See e.g., *United Brotherhood of Carpenters and Joiners of America, Local 1506 (Eliason & Knuth of Arizona, Inc.)*, 355 NLRB No. 159 (2010) (unions may lawfully display large stationary banners in front of a neutral employer's business in order to alert the public that the neutral employer is doing business with a nonunion employer with whom the union has a dispute); See also, *Carpenters Locals 184 and 1498 (Grayhawk Development, Inc.)*, 355 NLRB No. 188 (2010); *United Brotherhood of Carpenters and Joiners of America, Local 15086 (AGC San Diego Chapter)*, 355 NLRB No. 191 (2010); *Southwest Regional Council of Carpenters (Carignan Construction Co.)*, 355 NLRB No. 216 (2010); *Carpenters Local 1506 (Marriott Warner Center Woodland Hills)*, 355 NLRB No. 219 (2010); *Southwest Regional Council of Carpenters and its Local 1506 (Ritchie's)*, 355 NLRB No. 227 (2010); *Southwest Regional Council of Carpenters, Local 1506 (Held Properties)*, 356 NLRB No. 16 (2010); *Mid-Atlantic Regional Council of Carpenters (Starkey Construction Co.)*, 356 NLRB No. 19 (2010).

\*\*\*

## 2011

***Lamons Gasket Co.***  
**357 NLRB No. 72 (2011)**

---

**ISSUE:** Whether the National Labor Relations Board (Board) should modify or overrule its decision in *Dana Corp.*, 351 NLRB 434 (2007)—which held that the voluntary recognition bar does not commence until an employer provides notice that it has recognized a union, followed by a 45-day period during which employees may petition for a secret-ballot election.

**HOLDING** (Chairman Liebman and Members Becker and Pearce). The majority solicited briefs from interested parties to address the issue. One year later, after receiving briefs from various *amici*, the Board ultimately reversed the decision of *Dana Corp.* and held that a decertification petition will be barred “for a reasonable period of time after voluntary recognition.” In addition, the Board clarified the standard for determining a “reasonable period of time” in connection with this analysis “to be no less than 6 months after the parties’ first bargaining session and no more than 1 year.”

**DISSENT:** Member Hayes argued that the “electoral option” afforded employees subject to representation through voluntary recognition “did no more than level the playing field by providing an electoral option similar to that already available to employees whose employer relied on a petition signed by a majority of unit employees to withdraw recognition from an incumbent union.” The dissent then recounted statistics showing that since the *Dana* case issued, regional offices had received “1,111 requests for voluntary recognition notices, 85 election petitions were filed, 54 elections were conducted, and in 15 of those elections employees voted against the voluntarily recognized union, including 2 elections in which a petitioning union was selected over the recognized union.” The dissent concluded that these statistics demonstrate that “we already have empirical evidence showing that *Dana* has served its purpose of protecting employees’ free choice without discouraging voluntary recognition or the overall process of collective bargaining. There is not a scintilla of objective evidence to the contrary.”

**SIGNIFICANCE:** The Board’s decision makes it more difficult for employees to challenge a union’s status as their exclusive bargaining representative in the workplace, subjugating the desires of employees in favor of strengthening union representational status in the context of voluntary recognition.

\*\*\*

***UGL-UNICCO Service Co.***  
**357 NLRB No. 76 (2011)**

---

**ISSUE:** Whether the National Labor Relations Board (Board) should modify or overrule its decision in *MV Transportation*, 337 NLRB 770 (2002), and restore the holding in *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999), that when a successor employer recognizes an incumbent union as the representative of its employees, that union is entitled to represent the employees for a reasonable period of time without challenge to its representative status.

**HOLDING** (Chairman Liebman and Members Becker and Pearce). The Board solicited briefs from interested parties to address the issue. After receiving briefs from various *amici*, the Board reversed *MV Transportation* and held that a “[t]he ‘successor bar’ will apply in those situations where the successor has abided by its legal obligation to recognize an incumbent union, but where the ‘contract bar’ doctrine is inapplicable. . . . In such cases, the union is entitled to a reasonable period of bargaining, during which no question concerning representation that challenges its majority status may be raised through a petition for an election filed by employees, by the employer, or by a rival union; nor, during this period, may the employer unilaterally withdraw recognition from the union based on a claimed loss of majority support, whether arising before or during the period.”

**DISSENT:** In his dissent, Member Hayes noted, among other things, that the majority “fail[ed] to provide any reasoned explanation why the policy they advocate is preferable to the reasonable policy established in the precedent [*MV Transportation*] they now overrule.”

**SIGNIFICANCE:** The Board’s decision makes it more difficult for employees to challenge a union’s status as their exclusive bargaining representative in the workplace—subjugating the desires of employees in favor of strengthening union representation status in successor situations.

\*\*\*

***New York New York Hotel & Casino***  
**356 NLRB No. 119 (2011)**

---

**ISSUE:** Balancing property rights and Section 7 rights: Whether a property owner can bar its on-site contractor’s employees from handbilling on the employer’s private property. U.S. Supreme Court and National Labor Relations Board (NLRB or Board) precedent prohibited property owners from restricting its own employees from handbilling union-related materials on its property, but did not prevent the property owner from prohibiting non-employees from handbilling union-related materials on the owner’s property. This case examines the rights of a property owner to control the conduct of its contractor’s employees on the owner’s property.

**FACTS:** This case took nearly a decade to resolve. In 1997 and 1998, New York New York Hotel and Casino in Las Vegas had the police remove off-duty employees of one of its on-site contractors, Ark Las Vegas Restaurant Corporation (“Ark”), who were handbilling union-related materials outside the entrance to Ark’s restaurant calling for Ark to sign a union contract. The union filed an unfair labor practice charge with the NLRB alleging that the owner’s conduct

violated Section 8(a)(1) of the National Labor Relations Act (“Act”), which makes it an unfair labor practice to “interfere with, restrain or coerce employees from engaging in” Section 7 rights such as concerted activity. The Act defines “employee” as “any employee, and shall not be limited to the employees of a particular employer.” 29 USC § 152(3).

Ark was a large contractor of New York New York with over 900 employees providing food service to New York New York’s guests and customers at three sit-down restaurants and a food court, all of which were open 24 hours per day, 7 days a week. In 1997 and 1998, a number of off-duty employees of Ark handbilled outside of two Ark restaurants inside New York New York and outside New York New York’s porte-cochère entrance calling on Ark to sign a union contract. When the Ark employees refused New York New York’s request to cease handbilling, New York New York called in the police, who removed the Ark handbillers on charges of trespassing. The union filed 8(a)(1) unfair labor practice charges against New York New York for “interfering with, restraining, or coercing employees” from engaging in Section 7 concerted activity rights.

**BOARD DECISIONS:** In 2001, the NLRB upheld an administrative law judge’s (ALJ) decision which found an 8(a)(1) violation. *New York New York Hotel and Casino*, 334 NLRB 762 (2001) and 334 NLRB 772 (2001). On appeal, the U.S. Court of Appeals for the District of Columbia Circuit remanded the case back to the Board so it could undertake the balancing test required by the Supreme Court’s decisions in *Lechmere* and *Babcock and Wilcox* weighing property interests against individual Section 7 rights, and to determine whether there were other nontrespassatory means for the Ark employees to communicate their message. *New York New York v. NLRB*, 313 F.3d 585 (2002). In 2011, the Board issued its decision, over the partial dissent of Board Member Brian Hayes. *New York New York*, 356 NLRB No. 119 (2011). The Board’s decision (Chairman Liebman and members Becker and Pearce) held that New York New York violated Section 8(a)(1) and, in effect, that the *Republic Aviation* rights of employees *and* nonemployees to distribute literature to a property owner’s customers in non-work areas on non-work time, subject only to the property owner’s need to maintain production and discipline, were virtually coexistent. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

The D.C. Circuit deferred to the Board’s decision, denied New York New York’s petition for review, and granted the Board’s application for enforcement. *New York New York v. NLRB*, 676 F.3d 193 (D.C. Cir. 2012).

**PARTIAL DISSENT:** While Board Member Hayes found a violation of 8(a)(1) for New York New York’s restraint of Ark’s off-duty employees handbilling outside New York New York’s porte-cochère entrance as a less trespassory means of communicating their message, his dissent criticized the majority for failing to engage in the balancing of Section 7 rights and property rights required under *Lechmere* and *Babcock & Wilcox*. He predicted that under the *New York New York* decision, the Board will, in the future, always conflate the rights of nonemployees with the rights of employees, or even find nonemployees’ rights exceed those of employees, to engage in hand billing.

Member Hayes dissented that the majority’s decision gave “far too much weight to the locus of the work, far too little weight both to their lack of an employment relationship with the property

owner and to the interests of the property owner, and no weight to whether reasonable alternative means exist[ed] for communicating the organizational message to the employees' intended audience."

He predicted: "The inevitable result of the majority's analysis represents no real accommodation of competing interests. There will be no case-by-case balancing. The contractor's employees' rights to engage in organizational activity will trump the property owner's rights every time, subject only to the suggested possibility that, in some future case, a property owner may be able to justify the imposition of "reasonable, non-discriminatory, and narrowly-tailored restrictions on the access of contractors'" greater than those imposed on the owner's employees.

**SIGNIFICANCE:** Once again, where property rights are to be balanced with Section 7 rights, the Board favored Section 7 rights. As this case demonstrates, that is true even for non-employees.

\*\*\*

***Jurys Boston***  
**356 NLRB No. 114 (2011)**

---

**ISSUE:** Whether employees' vote to decertify the union should be overturned because the employer maintained overly broad rules in its employee handbook.

**HOLDING** (Chairman Liebman and member Pearce). The National Labor Relations Board (Board) determined that the employees' vote to decertify the union should be overturned based on its finding that the employer maintained three overly broad rules pertaining to solicitation, loitering, and the wearing of emblems and buttons in its employee handbook.

The majority reached this decision despite the administrative law judge's (ALJ) finding that although the rules were indeed overly broad, that fact did not warrant the setting aside of the election "because they were promulgated before the Employer recognized the Union, were not enforced or cited by the Employer during the critical period, and were not shown to have deterred any employee from exercising Section 7 rights." The Board majority disagreed and found that the results of the election "might well have been affected by the rules at issue." Although the majority noted that there was some evidence that maintenance of the no-loitering rule chilled employees in the exercise of their Section 7 rights, it stated that "Board precedent does not require such evidence" and that there is precedent for setting aside elections based on the employer's mere maintenance of objectionable rules. The majority distinguished this case from *Delta Brands, Inc.*, 344 NLRB 252 (2005), a case in which an objectionable but unenforced rule in an employee handbook was not sufficient to overturn a 10-8 election result. In discussing that case, the majority argued that *Delta Brands* must be limited to its specific facts and that the case at hand was distinguishable because: (1) there were three objectionable rules, rather than just one; (2) there was some evidence that one of the rules had a chilling effect; and (3) a single vote decided the election.

**DISSENT:** In dissent, Member Hayes stated that the majority "strain[ed] to avoid controlling precedent and a record clearly indicating that none of the Employer's rules ... could reasonably

have affected the election.” He further noted that the union failed to meet its burden of showing that maintenance of the rules had a reasonable tendency to affect the outcome of the election.

**SIGNIFICANCE:** While the Board did not expressly overrule *Delta Brands*, it certainly limited it. This case is another example of the Board going to great lengths to provide unions with another bite at the apple in union election losses.

\*\*\*

***AT&T Connecticut***  
**356 NLRB No. 118 (2011)**

---

**ISSUE:** Whether the employer lawfully prohibited employees visiting customers at their homes from wearing white T-shirts the front of which bore the word “INMATE” and a simulated “inmate number,” and the back of which sported the phrase “PRISONER OF AT&T” sandwiched between black vertical stripes resembling prison cell bars.

**HOLDING** (Chairman Liebman and Member Becker). The National Labor Relations Board (Board) majority held that special circumstances did not exist to justify the employer’s decision to prohibit employees from wearing the “prisoner” T-shirts while visiting customers’ homes. In so holding, the majority reasoned that the T-shirt “would not have been reasonably mistaken for prison garb” and that “even if a customer would not immediately realize that the shirt was connected to an ongoing labor dispute, the totality of circumstances would make it clear that the technician was one of [AT&T’s] employees and not a convict.”

**DISSENT:** The first paragraph of Member Hayes’ dissent best captures the problems with the majority’s decision and rationale:

Imagine that you are a customer of AT&T Connecticut awaiting a service call. The doorbell rings. You open it, and the first thing you see is someone wearing a T-shirt bearing only “INMATE #” on its front. Would you hesitate to let that person in your home, particularly if you lived in a state where there had been a highly publicized and horrific home invasion and murder? What would you think about a company that permitted its technicians to wear such shirts when making home service calls? Even if you knew about an ongoing labor dispute at AT&T, why would your initial thought when opening the door to your home be “Oh, of course, this person is simply an AT&T technician exercising a right to express his view about the labor dispute”?

Member Hayes also noted that the Board has found “special circumstances” to exist where, as here, union apparel may “unreasonably interfere with a public image, and where an employer has a legitimate interest in preserving customer relationships.” Member Hayes also pointed out that aside from prohibiting employees from wearing the T-shirts when “in the presence of customers, [it] otherwise allow[ed] employees to wear them at the [employer’s] facility.”

**SIGNIFICANCE:** This case is one example of the Board’s proclivity to place union interests over employer interests in even the most extreme cases. Here, despite the fact that the employer only prohibited employees from wearing the “prisoner” T-shirts at times when they were in the presence of customers, and despite the fact that it is probably not a stretch to assume customers might be intimidated by a stranger appearing at their door wearing such a T-shirt, the majority nonetheless found that “special circumstances” did not exist and that the wearing of the T-shirt was protected concerted activity.

\*\*\*

***Worldmark By Wyndham***  
**356 NLRB No. 104 (2011)**

---

**ISSUE:** Whether an employee was engaged in protected concerted activity when he asked the employer, in front of coworkers, about a new dress code.

**HOLDING** (Chairman Liebman and Member Becker).The National Labor Relations Board (Board) majority found that the activity was concerted, noting that he used language such as “we” and “us” when voicing complaints, and that after he began the conversation, a coworker joined in. The majority also considered the employer’s written warning to the employee, which indicated that the employee was disciplined “precisely because he chose a forum that was likely to induce group action.”

**DISSENT:** Member Hayes, in dissent, noted that the majority accurately described precedent, but:

As in the recent *Parexel* decision, [the majority] then reduces to meaninglessness the *Meyers* distinction between unprotected individual activity and protected concerted activity. In *Parexel*, the majority held that even when an employee has not engaged in concerted activity, an employer violates the [National Labor Relations] Act by discharging the employee to prevent the possibility that he or she might engage in such activity in the future. In the present case, the majority essentially holds that any employee who voices a complaint in a group setting about working conditions is engaged in concerted activity, thus impermissibly conflating the concepts of a group setting and group complaints.

**SIGNIFICANCE:** Taken in conjunction with the *Parexel* decision (see discussion of this decision in Chapter X), employers are on notice that it will be significantly more difficult to successfully argue that employee activity is not concerted.

\*\*\*

***Mastec Direct TV***  
**356 NLRB No. 110 (2011)**

---

**ISSUE:** Whether pro-union employees' threats of physical violence and retribution against other employees for voting against the union communicated shortly before a union representation election constituted grounds to set aside a union election victory that it won by only two votes.

**HOLDING** (Chairman Liebman and Member Becker). The majority held that the employer's objection did not warrant overturning the union's election win. The majority found that pro-union employees' threats to "bitch slap" and "whip [other employees'] f\_\_in' ass" if they "cost us the election, "sabotage [an employee's] work," "get even with [an employee] if he backstab[ed] us," and "whip [a supervisor's] ass if the Union lost" were not "so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible."

The majority continued that while "we do not condone the sorts of statements made by the employees here, nevertheless, the burden of proof on a party seeking to have a Board supervised, secret ballot election set aside is a heavy one," and thus, "the Employer has failed to satisfy the standard for overturning an election based on third-party conduct."

**DISSENT:** Member Hayes noted that while "the Board must apply a more stringent standard for setting aside an election based on conduct of persons who are not subject to an employer or, in this case, a union's direct control ... the objective collective impact of the threats in this case was serious and likely to intimidate prospective voters to cast their ballots in a particular manner."

Member Hayes also noted that this case is significant as employers are under pressure to prevent workplace violence from occurring or being threatened, "particularly at a time when workplace violence is on the rise nationally and employer efforts to restrain it trend towards zero tolerance."

**SIGNIFICANCE:** Given the Obama Board's propensity to uphold union objections and overturn union election losses, it is certainly not a leap to suspect that the case would have turned out differently had the threats come from an anti-union employee directed at one or more pro-union employees.

\*\*\*

**2012 - 2013**

***Karl Knauz Motors, Inc.***  
**358 NLRB No. 164 (2012)**

---

**ISSUE:** This is another in a long series of work rule cases in which the National Labor Relations Board (Board) considered whether a rule reasonably tends to chill employees from the exercise of their Section 7 rights to engage in protected concerted activity. This case considered an employer's "courtesy rule" prohibiting "disrespectful" conduct and "language which injures the image or reputation of the employer," a car dealership.

**FACTS:** The “courtesy rule” in question encouraged workplace civility and discouraged disrespectful, profane, or injurious language. The rule read:

Courtesy: Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership.

The event that precipitated the charge in this case was an “Ultimate Driving Event” to introduce a newly redesigned model of BMW. The dealership served hot dogs, chips, cookies, and fruit (apples and oranges) at the event. One of the sales representatives, Robert Becker, sarcastically complained on his Facebook account that the food was inappropriate for such an event. He also posted a photograph of a car from an adjacent Land Rover dealership (also owned by the Karl Knauz BMW dealership) which had accidentally rolled into a pond, throwing a salesperson into the water. Becker also posted comments accompanying the photograph that mocked the dealership.

After a meeting at which Becker refused to acknowledge wrongdoing, he was terminated for violating the company’s “courtesy rule.” Becker subsequently filed an unfair labor practice charge alleging that the employee handbook, which contained the courtesy rule, violated Section 8(a)(1) of the National Labor Relations Act (Act). An administrative law judge (ALJ) determined that the handbook was a Section 8(a)(1) violation under the standards of the Board’s decision in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) as “reasonably tend(ing) to chill employees in the exercise of their Section 7 rights.”

**HOLDING** (Chairman Pearce and Member Block). The Board affirmed the ALJ’s ruling that the employer’s maintenance of the courtesy rule violated Section 8(a)(1). The majority decided that the language of the rule could reasonably be interpreted by employees to prohibit statements—whether to coworkers, supervisors, managers, or third parties—objecting to the employees’ working conditions or seeking the support of others in improving those conditions. The majority cited as controlling authority *Lafayette Park Hotel*, 326 NLRB 824 (1998), enfd 203 F.3d 52 (D.C. Cir. 1999) and *Lutheran Heritage Village-Livonia*.

**DISSENT:** Member Hayes argued that “reasonably construed and read as a whole, the rule is nothing more than a common-sense behavioral guideline for employees. In short, by its [courtesy rule,] the respondent sought to promote civility and decorum in the workplace and prevent conduct that injures the dealership’s reputation—purposes that would have been patently obvious to respondent’s employees, who depend on the dealership’s image for their livelihoods. Hayes also asserted that the majority changed the test, supplanting its view for that of the employees:

Purporting to apply an objective test of how employees would reasonably view rules in the context of their particular workplace and employment relationship, the analysis instead represents the views of the Acting General Counsel and Board members whose post hoc deconstruction of such rules turns on their own labor relations “expertise.” In other words, the test now is how the Board, not affected employees, interprets words and phrases in a challenged rule. Such an abstracted

bureaucratic approach is in many instances, including here, not “reasonably defensible.” It is clearly unnecessary for the protection of employees’ Section 7 rights and impermissibly fetters legitimate employer attempts to fashion workplace rules.”

**SIGNIFICANCE:** This decision, like other Board decisions involving policy statements and workplace rules, makes it more difficult for employers to craft standards of civility and decorum in the workplace.

\*\*\*

***The Ridgewood Country Club***  
**357 NLRB No. 181 (2012)**

---

**ISSUE:** Whether an election must be set aside based on the regional office’s failure to timely provide the union with the *Excelsior* list of eligible voters’ names and addresses within 10 days of the election, even in the absence of any specific showing of prejudice by the union.

**HOLDING** (Chairman Pearce and Member Becker). The majority sustained the petitioner’s objection and overturned the election (which the employer had won, 20-16). The objection alleged that the election be set aside based on the regional office’s failure to timely provide the petitioner with the *Excelsior* list of eligible voters’ names and addresses. First, prejudice can be presumed when the list is not received outside the minimum 10-day period. The majority also concluded that a party objecting to not receiving the eligibility list at least 10 days before an election does not bear the burden of proving that it took reasonable steps to obtain the list.

**DISSENT** (Member Hayes). Noting that the majority relied on two-member plurality opinions in National Labor Relations Board (Board) panel decisions that arguably obviate the need for specific proof of prejudice resulting from the late receipt of the list, Member Hayes contended that the “better view, based on prior cases that have never been expressly overruled by the affirmative vote of three Board members, is that a petitioner must show that it was materially prejudiced in its ability to communicate with unit employees, thus interfering with the purpose behind the *Excelsior* rule.” The dissent further noted that the union made no effort to postpone the election once it received the list, and the actions taken by the union after it received the list failed to establish that the late receipt of the list had any significant impact on the union’s ability to communicate with eligible voters. The dissent concluded that “[n]o valid purpose is served by allowing a union to sit on its rights when minimal due diligence by it could avoid this result without sacrificing the important Board policy that the *Excelsior* rule seeks to assure.”

**SIGNIFICANCE:** As noted by the dissent, the Board’s decision unfortunately encourages gamesmanship by placing a union in a no-lose situation whenever the *Excelsior* list is even a day late, even when the union suffers no measurable prejudice from the delay.

\*\*\*

***Sodexo America, LLC***  
**358 NLRB No. 79 (2012)**

---

**ISSUE:** Whether the respondents, Sodexo America LLC and USC University Hospital, violated Section 8(a)(1) of the National Labor Relations Act (Act) by maintaining a rule permitting off-duty employees to enter the hospital only if they were visiting patients, were patients themselves, or were conducting “hospital-related business.”

**HOLDING** (Chairman Pearce and Member Griffin). Relying on *Tri-County Medical Center*, 222 NLRB 1089 (1976), the Board found the respondents’ rule overbroad. *Tri-County* held that a “no-access” rule was unlawful unless it: (1) limits the access restriction solely to the interior of the facility; (2) is clearly disseminated to all employees; and (3) applies to all off-duty access, not just union activity. The Board held that the Sodexo rule violated the third prong of the *Tri-County* mandate because it allowed off-duty employees back on the property to conduct “hospital-related business.” In the Board’s view, this allowed management discretion to allow virtually any access to the property for business reasons that management approved.

**DISSENT:** Member Hayes dissented, finding that the hospital’s off-duty no-access rule did not violate the third prong of the *Tri-County* test, which requires that such rules apply to off-duty access “for any purpose” and not just for union activity. “For the reasons I stated in my dissent in *Saint John’s*, the majority’s unduly restrictive interpretation of the *Tri-County* test is not supported by Board law or principles. This is even more evident here where the end result of the majority’s holding is that a hospital cannot maintain a valid off-duty access rule if it also allows employees to engage in innocuous activities such as picking up paychecks, completing employment-related paperwork or filling out patient information. This was undoubtedly not a scenario intended by the Board in *Tri-County*.”

**SIGNIFICANCE:** The Board’s ruling will make it difficult, if not impossible, for an employer to have a valid “no access” rule for off-duty employees if they are allowed any access to the interior of the facilities for any reason beyond what is available to the general public. As the dissent pointed out, if such a rule allows employees to re-enter the interior of the workplace for such simple tasks as picking up a paycheck or completing work-related paperwork, it will violate the Act to not allow them access to engage in union activity.

\*\*\*

***Supply Technologies, LLC***  
**359 NLRB No. 38 (2012)**

---

**ISSUE:** Whether the employer’s alternative dispute resolution agreement committing employees to use its arbitration program violated Section 8(a)(1) of the National Labor Relations Act (Act) by prohibiting or restricting employees’ Section 7 right to file unfair labor practice charges or otherwise access the National Labor Relations Board’s (Board) processes.

**HOLDING** (Members Griffin and Block). The majority concluded that the grievance arbitration program violated the first prong of the test set forth in *Lutheran Heritage Village-Livonia*, 343

NLRB 646, 647 (2004), because employees would reasonably construe its language to prohibit filing Board charges or otherwise accessing the Board’s processes, activities which are protected by Section 7. The language of the arbitration agreement specifically identified the three types of claims excluded from the grievance arbitration program—criminal matters, claims for workers’ compensation, and claims for unemployment compensation benefits—and emphasized that these are “the only claims [employees] can bring against Supply Technologies outside of the . . . program . . .” The arbitration agreement also provides language that “[b]oth Supply Technologies and [the employee] can still file a charge or complaint with a government agency” and “are free to cooperate with a government agency that might be investigating a charge or complaint.” In contrast to the language naming the statutes preempted by the program, no statute or government agency is named here. Finding that the language leaves the scope of the program ambiguous, at best, the majority concluded that the language did not adequately countermand the plain meaning of the agreement’s opening paragraphs: that all claims under a federal statute relating to the employee’s employment—which would, of course, encompass claims under the Act—must be arbitrated. Because the employer, and not the employees, designed and drafted the documents that defined the scope of the arbitration program, the majority concluded that the ambiguity in those documents is properly resolved against the drafter.

**DISSENT** (Member Hayes). Noting that the arbitration program documents do not expressly restrict employees’ rights to file charges with the Board and that, to the contrary, both the “Agreement to Use” and the accompanying “Question and Answer” document expressly state that an employee can still file a charge or complaint with a government agency and is free to cooperate with an agency in the investigation of a charge or complaint, Member Hayes argued that the language necessarily encompasses the Board’s processes. Member Hayes concluded that the majority’s analysis will find an individual mandatory arbitration agreement for the resolution of employment disputes ambiguous and unlawful unless (a) it expressly exempts claims arising under the Act from its coverage, or, possibly, (b) it covers such claims but expressly states without qualification that employees may still pursue such claims and gain relief through the Board’s processes. In other words, if the arbitration agreement fails expressly to guarantee the right to file unfair labor practice charges with the Board and to access the Board’s processes, it will be found unlawful.

**SIGNIFICANCE:** This case further illustrates the Board’s current disdain for private mandatory dispute resolution programs in the nonunion setting, and forces employers to insert language in their mandatory arbitration agreements that (as the dissent argues) provides employees with a clear road map for exercising their Section 7 rights. Absent such language, it is doubtful such agreements will be found unambiguous and lawful.

\*\*\*

***Finley Hospital***  
**359 NLRB No. 9 (2012)**

---

**ISSUE:** The key issue decided by the Board in this case was whether an employer violates Section 8(a)(5) and (1) of the National Labor Relations Act (Act) by unilaterally discontinuing

the annual pay raises provided for in the parties' collective bargaining agreement upon expiration of the agreement.

**HOLDING** (Chairman Pearce and Member Block). The term and condition of annual pay increases in specified amounts, and the employer's duty to continue to pay such increases pending negotiation of a successor agreement, was established in the parties' expired collective bargaining agreement. The issue here is whether the terms of that contract, as agreed to by the union, also negated the employer's statutory duty to maintain the status quo by continuing to grant annual pay increases after the agreement expired. Although a union may waive its right to maintenance of the status quo as to a particular term or condition, the majority concluded that such a waiver, like any waiver of a statutory right, must be "clear and unmistakable." It follows that language in a collective-bargaining agreement may intentionally preclude a provision from having any contractual force after expiration of the contract. But given the employer's statutory duty to maintain the status quo post-expiration, such language will not permit a unilateral change of a term established by the same contract unless it also amounts to a clear and unmistakable waiver of the union's separate statutory right to maintenance of the status quo. Here, although there are multiple references to the term of the agreement, which clearly limit the contractual obligation and preclude the assertion of the contractual right for any period after contract expiration, these references fail to "unequivocally and specifically express [the parties'] mutual intention to permit unilateral employer action with respect to [the annual wage increases]." *Provena St. Joseph Medical Center*, 350 NLRB at 811. What matters is that annual raises defined the status quo under well-established law. The dissent quite simply fails to acknowledge the existence of the familiar "dynamic status quo" doctrine, and therefore the majority found that that the union did not waive its right to bargain over the discontinuance of the annual wage increase, and that the employer's unilateral action violated Section 8(a)(5) and (1).

**DISSENT** (Member Hayes). Although the majority framed the issue as one of "waiver," Member Hayes argued that this case really need have nothing to do with interpreting whether the parties' contract waived the union's right to bargain about a change in unit employees' wages upon expiration of the contract. Rather, the proper inquiry is to identify the statutory status quo for wages that the employer was obligated to maintain pending bargaining for a successor contract. Here, the majority believes that the employer's one-year commitment set out in article 20.3 of the parties' initial bargaining agreement has morphed into a statutory obligation to maintain a "status quo" of change. Rather than maintaining wage levels as they were on the final day of the contract, the employer (according to the majority) is supposed to continue to give employees annual three percent wage increases until the parties negotiate a successor agreement or reach impasse. Not only does their opinion contradict precedent governing an employer's post-expiration statutory obligation, it abnegates language of limitation in article 20.3 ("during the term of this Agreement") that is consistent with the statutory obligation.

**SIGNIFICANCE:** This case imposes an obligation on employers to give non-negotiated post-contractual wage increases. Employers will need to carefully bargain for unequivocal language expressly providing that no increases will be paid beyond a contract term or face the consequences of having to continue those increases until they reach agreement on a successor contract or impasse.

\*\*\*

**WKYC-TV, Inc.**  
**359 NLRB No. 30 (2012)**

---

**ISSUE:** Whether the National Labor Relations Board (Board), in addressing the long-standing rule established by *Bethlehem Steel*, 136 NLRB 1500 (1962), should adopt a new standard for determining when an employer's obligation to check off union dues from employees' wages can terminate.

**HOLDING** (Chairman Pearce and Members Griffin and Block). The majority concluded that an employer's obligation to check off union dues continues after expiration of a collective bargaining agreement that establishes such an arrangement, thereby overturning the Board's *Bethlehem Steel* decision, which had stood for 50 years. Concluding that the Board's holding in *Bethlehem Steel* is unsupportable because it is based on questionable reasoning, is inconsistent with established policy generally condemning unilateral changes in terms and conditions of employment, is contradicted by both the plain language and legislative history of the only statutory provision addressing dues checkoff, and finds no justification in the policies of the Act, the majority overruled *Bethlehem Steel* and its progeny (although the majority declined to apply the new rule retroactively to the parties in this case).

**DISSENT:** Member Hayes dissented, concluding that the *Bethlehem Steel* holding is consistent with the Board's longstanding, commonsense recognition that a union security clause operates as a powerful inducement for employees to authorize dues checkoff and that it is unreasonable to think that employees generally would wish to continue having dues deducted from their pay once their employment no longer depends on it. Member Hayes was not persuaded to abandon *Bethlehem Steel* by the majority's assurances that the revocability of checkoff authorizations sufficiently protects employees' Section 7 rights, explaining that it is unlikely that employees will recall the revocation language in their authorizations and less likely still that they will understand that their obligation to pay dues as a condition of employment terminated as a matter of law once the contract expired. Even if they do remember and understand, checkoff authorizations typically permit revocation only during brief annual window periods, and the wording of the revocation language may be difficult to understand. Member Hayes further argues that dues checkoff, no-strike/no lockout, and arbitration provisions are all "uniquely of a contractual nature" and "cannot exist in a bargaining relationship until the parties affirmatively contract to be so bound." Accordingly, dues checkoff and other uniquely contractual terms are "sui generis" and "cannot be compared to the terms and conditions of employment routinely perpetuated by the constraints of *Katz*."

**SIGNIFICANCE:** This case represents a departure from long-standing precedent, alters the playing field by stripping employers of a vital economic weapon when bargaining for a successor agreement, and will now force employers to include the elimination of dues checkoff in its final proposal to the union in order to establish impasse.

\*\*\*

***Brusco Tug and Barge, Inc.***  
**359 NLRB No. 43 (2012)**

---

**ISSUE:** Whether the employer's tug boat mates are employees (and not supervisors) within the meaning of Section 2(11) of the National Labor Relations Act (Act), and therefore properly included in the unit.

**HOLDING** (Chairman Pearce and Member Griffin). The majority held that the employer failed to meet its burden of establishing that the tugboat mates are statutory supervisors based on the statutory criteria of assignment and responsible direction as set forth in the Board's decision in *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006). Specifically, the majority concluded that (1) the employer failed to meet its burden of showing supervisory status based on the mates' alleged assignment authority; and (2) conclusory assertions of the mates' accountability for the deckhands' work will not establish responsible direction. Notably, the majority discounted pre-*Oakwood* authority, stating that "[t]he existence of such precedent notwithstanding, *Oakwood Healthcare*, decided after the tugboat cases cited [by the employer and the dissent], articulates the Board's current test for determining supervisory assignment and responsible direction."

**DISSENT:** Member Hayes in dissent concluded that the mates are supervisors and that the employer established that the mates assign and responsibly direct crewmembers and have complete authority over the vessel's crew during their watch. Moreover, the dissent argued that the mates are licensed officers entitled under federal law to exact obedience from crewmembers under them. The dissent noted that the majority's contention that *Oakwood* set out a new standard for determining supervisory status is incorrect and that, regardless, the National Labor Relations Board's (Board) prior tugboat cases are not inconsistent with *Oakwood's* principles, even if they do not use the same terminology. Member Hayes further noted that "nothing in *Oakwood* suggests that the Board contemplated that it was sweepingly overruling 50 years of precedent establishing the supervisory status of tugboat pilots and mates whose duties and powers were identical to those of the mates here, and whose authority flows from Federal maritime law and is of an entirely different nature than that of putative supervisors in a hospital or on a shop floor."

**SIGNIFICANCE:** As noted above, while these cases are entirely dependent on the specific facts of each case, the Board's decision is in line with the Board's decisional trajectory over the last few years. During that time, the Board majority has issued a number of decisions broadening the coverage of the NLRA to individuals ranging from tug boat mates to community orchestra musicians to electrical utility dispatchers under facts that arguably would have previously supported a finding of supervisory status.

\*\*\*

***Fresenius USA Mfg.***  
**358 NLRB No. 138 (2012)**

---

**ISSUE:** Whether an employer's discharge of an employee violated the National Labor Relations Act (Act), where the employee, who was an open and active supporter of the union,

anonymously scribbled vulgar, offensive, and possibly threatening statements on several union newsletters left in an employee break room in an undisputed attempt to encourage his fellow employees to support the union in an upcoming decertification election. The handwritten statement on the first newsletter read, “Dear Pussies, Please Read!” The handwritten statement on the second newsletter read, “Hey cat food lovers, how’s your income doing?” The third newsletter bore the handwritten statement, “Warehouse workers, RIP.”

**HOLDING** (Members Griffin and Block). Although the National Labor Relations Board (Board) unanimously agreed that neither the employer’s investigation nor its questioning of the employee violated the Act, the majority concluded that the employer did violate the Act by suspending and discharging him. First, the majority noted that the employee’s handwritten comments encouraged warehouse employees to support the union in the decertification election, and, in writing them, the employee was therefore engaged in protected union activity. Second, the majority concluded that the employee’s comments were not so egregious as to cause him to lose the protection of the Act, stating that “[b]oth labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language” and analyzed the statements under the four-factor test set forth in *Atlantic Steel Co.*, 245 NLRB No. 814 (1979). Finding that the location of the employee’s comments, the subject matter of the comments, and the nature of his comments favored continued protection (with the provocation factor being neutral in these circumstances), the majority concluded that the employee’s comments did not lose the protection of the Act under *Atlantic Steel*. The majority further concluded that “[a]lthough Grosso’s comments were vulgar, offensive, and included the phrase ‘RIP,’ there is no basis for concluding that Grosso’s comments would reasonably be perceived by employees as a threat of physical harm.”

**DISSENT:** Member Hayes in dissent would have found the employee’s statements were not protected by the Act, disputing the majority’s “implication that greater latitude must be accorded to misconduct occurring in the course of organizational activity than for other Section 7 activity, that profanity in the course of labor relations is the presumptive and permissible norm in any workplace, that remarks by one employee to another which would be unprotected on the shop floor should be protected if made in the break room, that comments which coworkers reasonably view as harassing and sexually insulting are not disruptive of productivity, and that threatening speech alone cannot warrant loss of statutory protection. Taken as a whole, these pronouncements confer on employees engaged in Section 7 activity a degree of insulation from discipline for misconduct that the Act neither requires nor warrants.”

**SIGNIFICANCE:** Although reasonable minds can differ on whether the underlying statements made here were sufficiently offensive to lose protection of the Act, the Board’s decision invites employees to utter similar and even more provocative statements in the name of Section 7 activity and (as suggested by Member Hayes) undoubtedly restricts the ability of employers to comply with the requirements of other labor laws and to maintain civility and order in their workplace.

\*\*\*

**ISSUE:** Whether an employer violated Section 8(a)(1) of the National Labor Relations Act (Act) by firing five employees for comments that they posted on Facebook after learning that a coworker had criticized their work performance.

**HOLDING** (Chairman Pearce and Members Griffin and Block). The majority found that the Facebook postings were concerted and protected, and because it is undisputed that the respondent employer discharged the five employees based solely on their postings, the majority concluded that the discharges violated Section 8(a)(1). Notably, the National Labor Relations Board (Board) inferred that the employees contemplated group action for their mutual benefit or protection, even though the employees never discussed bringing the original employee poster's comments to management or taking any action at all. Citing *Relco Locomotives, Inc.*, 358 NLRB No. 37 (2012), the Board reiterated established precedent that the "object or goal of initiating, inducing or preparing for group action does not have to be stated explicitly when employees communicate." The majority further held that "[e]ven absent an express announcement about the object of an employee's activity, 'a concerted objective may be inferred from a variety of circumstances in which employees might discuss or seek to address concerns about working conditions....'" The Board further found that the concerted activity was protected, notwithstanding the company's assertion that the Facebook exchange violated its anti-harassment and anti-bullying policies. First, the Board held that the exchange did not constitute harassment under the company's policies. Second, the Board held that if the company had maintained policies that prohibited this type of communication, and even if such comments were found to be covered by such a policy, the employer could not lawfully apply its policy without reference to Board law.

**DISSENT** (Member Hayes). Arguing that the Facebook exchange was nothing more than griping around the "virtual water cooler," Member Hayes concluded the subject postings failed to constitute protected activity under *Meyers Industries II* because the conduct "must be both concerted and engaged in for the purpose of 'mutual aid or protection.'" Member Hayes further noted that the employees' Facebook discussions about their colleague's criticisms were not undertaken for the purpose of their "mutual aid and protection" because "the mere fact that the subject of discussion involved an aspect of employment—i.e., job performance—is not enough to find concerted activity for mutual aid and protection. There is a meaningful distinction between sharing a common viewpoint and joining in a common cause."

**SIGNIFICANCE:** This case demonstrates that even when common sense and common courtesy seem to require termination for profane behavior, the offensive conduct may still be deemed protected by the Act when it arises in the context of discussions about or protests concerning wages, hours, and other terms and conditions of employment. Further, the Board's decision complicates employers' ability to enforce anti-harassment or anti-bullying policies, especially when (1) the conduct at issue involves communications about terms and conditions of employment and (2) the communications are merely unpleasant or embarrassing for the company. Even if conduct clearly violates such a policy, it is possible that the Board will find the

communications are protected if there is any possible argument that the subject employees might be considering group action or communicating with management.

\*\*\*

***IronTiger Logistics, Inc.***  
**359 NLRB No. 13 (2012)**

---

**ISSUE:** Whether the employer violated Section 8(a)(5) and (1) of the National Labor Relations Act (Act) by failing to timely respond in any manner to the union’s request for information. (In the majority’s view, the issue is more accurately described as whether the employer violated the Act by failing to respond in any manner to the union’s request for *presumptively* relevant information relating to the employees).

**HOLDING** (Chairman Pearce and Member Block). The employer violated Section 8(a)(5) and (1) of the Act by not timely responding *in some manner* to the union’s request for information concerning bargaining unit employees. Because the information request was related to unit employees’ assigned loads and thus sought information that was presumptively relevant to the union’s ability to represent those employees, the employer was required to timely provide that information or to timely present the union with its reasons for not doing so, the majority held, citing *Kathleen’s Bakeshop*, 337 NLRB 1081 (2002). Even the dissent “acknowledges there are good policy reasons for the rule we apply here, not the least of which is encouraging the parties themselves to address potential disputes before they disrupt the collective-bargaining relationship and burden the parties and the public with the cost of administrative investigation and litigation.”

**DISSENT** (Member Hayes). “The Act imposes no obligation on an employer to provide requested information that is not relevant to a union’s performance of its responsibilities as the exclusive collective bargaining representative of bargaining unit employees.” Member Hayes further argued that “the Board has never held that there is an independent statutory duty to respond to a request for presumptively relevant information, even if that presumption was rebutted in litigation ... Ultimately, requested information is either legally relevant to a union’s representative duties, or it is not. If it is not relevant, then the statutory duty to bargain in good faith is not implicated by the request or the employer’s failure to respond timely to the request.”

**SIGNIFICANCE:** This case demonstrates that an otherwise justifiable refusal to respond to a request for information can be rendered illegal if the justification is not timely communicated to the union requesting the information.

\*\*\*

## 2014 – 2015

### *Durham School Services, LP* **360 NLRB No. 108 (2014)**

---

**ISSUE:** Whether a flyer distributed by the union containing pictures of voters that misrepresented the pictured employees' intent to vote for the union constitutes objectionable conduct sufficient to overturn a union election victory.

**HOLDING** (Chairman Pearce and Member Schiffer). The majority began by stating that it is well established that the National Labor Relations Board (Board) will not probe into the truth or falsity of a party's campaign statements and will not set aside an election on the basis of misleading statements unless "a party has used forged documents which render the voters unable to recognize propaganda for what it is." *Midland National Life Insurance Co.*, 263 NLRB 127, 133 (1982). This standard applies to literature identifying employees as union supporters. The employee who complained about use of her picture signed a release allowing the union to use her picture. Even if the employee did not support the union, there was no forgery. Therefore, it was appropriate for the Regional Director to overrule the objection without a hearing.

**DISSENT** (Member Miscimarra). Member Miscimarra would remand the matter for a hearing on whether the complaining employee and others expressly consented to the public disclosure of how they intended to vote. An unauthorized flyer that accurately discloses an employee's intended vote can be just as objectionable as a flyer that falsely represents support for the union. The Board zealously protects ballot secrecy. The Board should adopt a test that finds conduct objectionable when it publicizes how specific employees intend to vote unless the party obtained express permission from the employees to disclose how they intended to vote.

**SIGNIFICANCE:** This case confirms that the Board will continue to refrain from probing into the truth of campaign propaganda even in cases where voter preferences are misrepresented and voter likenesses are misused. Voters need to be aware that they should not assume that the law requires the parties to be accurate or truthful in their messaging.

\*\*\*

### *Plaza Auto Center, Inc.* **360 NLRB No. 117 (2014)**

---

**ISSUE:** Whether a profane verbal attack directed at the owner of a company while discussing wages and other working conditions constitutes protected concerted activity under the National Labor Relations Act (Act).

**HOLDING** (Chairman Pearce and Member Hirozawa). Upon remand from the Ninth Circuit, the majority concluded that while the verbal outburst at issue was profane, it was not physically aggressive or menacing. Applying what they called the applicable objective test, the majority concluded that stating that the owner would regret it if the employee was fired was not a threat of physical harm. The employee pushing his chair back in a small office while uttering this

ambiguous statement was not objectively menacing, physically threatening, aggressive or belligerent conduct. Moreover, calling the owner to his face a “f\*\*\*ing mother f\*\*\*\*\*r,” a “f\*\*\*ing crook,” an “a\*\*hole,” and “stupid,” among other things, did not warrant discharge under the circumstances. Utilizing the four-part test set out in *Atlantic Steel Co.*, 245 NLRB 814 (1979), the majority conceded that the nature of the statements weighed in favor of termination. On the other hand, the National Labor Relations Board (Board) said that facts related to the other factors militated against discharge. These included the facts that the employee had no disciplinary history nor a history of violence; was discussing a term or condition of employment (pay); made the comments in an isolated area where very few other employees were exposed to the outburst; received hostility from the owner to the employee’s comments about the protected subject; and was illegally told that he should not complain about pay and should quit. Therefore, the employee’s outburst did not lose the protection of the Act and terminating him violated Section 8(a)(1) of the Act.

**DISSENT** (Member Johnson). The majority finds a clearly justified employee discharge to be unlawful. They improperly reversed the administrative law judge’s (ALJ) credible findings to conclude that the employee’s conduct was not threatening in violation of applicable Board law and the Ninth Circuit’s remand instructions. While the law does permit some leeway to excuse impulsive behavior, it does not require substantial or maximum leeway and it certainly does not require unrestrained freedom. The conduct at issue went far beyond the vulgarities and obscenities used in the realities of industrial life, as “employees do not typically curse each other and their superiors like characters in a Scorsese film.” Whatever the workplace context, there is a major distinction to be drawn between commonly used language and “repeated, sustained ad hominem profanity” that amounts to insubordination when directed toward management. Further, it is essential that employers proscribe profanity that under applicable law might be viewed as harassing, bullying, or creating a hostile work environment. Extending protection of the Act to the conduct in this case disserves the Board’s statutory policy of encouraging industrial peace and labor relations stability.

**SIGNIFICANCE:** This case demonstrates that even when common sense and common courtesy would require termination for profane and insubordinate behavior, the offensive conduct may still be deemed by this Board as protected by the Act when the conduct arises in the context of discussions about or protests concerning wages, hours, and other terms and conditions of employment.

\*\*\*

***Starbucks Corporation***  
**360 NLRB No. 134 (2014)**

---

**ISSUE:** Whether a retail employee can be terminated for a profane off-duty outburst made in front of customers.

**HOLDING** (Members Hirozawa and Schiffer). This case was remanded to the National Labor Relations Board (Board) from the Second Circuit. The court concluded that the *Atlantic Steel* factors were not applicable to evaluate an employee’s use of obscenities in the presence of the

employer's customers. In its remand, the Second Circuit stated that the Board should have the opportunity to reevaluate the discharge by deciding what standard should apply when an employee, while discussing employment issues, utters obscenities in the presence of customers. The majority declined to address this issue. Instead, it found that the discharge was unlawful under the Board's *Wright Line* test. The employee was terminated for engaging in a profanity-laced conversation with an assistant manager that occurred in front of customers. Both were off duty and the assistant manager did not work in the store where the altercation took place. The employee said to the assistant manager, "You can go f\*\*k yourself, if you want to f\*\*k me up, go ahead, I'm here." The employee was terminated for insubordination and threatening the store manager. The write-up noted "Partner strongly supported the IWW union." The majority assumed that the conduct was not protected by the Act but noted that mixed-motive cases are governed by *Wright Line*. Here, the employee was a known union supporter. Moreover, the employer had demonstrated antiunion animus through the commission of several unfair labor practices. Thus, it was incumbent upon the employer to show that it would have terminated the employee notwithstanding his union activities. The employer failed to do so. The termination notice expressly noted that the employee's strong support for the union would be a reason why he was ineligible for rehire. Additionally, the record showed that other employees who engaged in similar or worse conduct were not terminated. The employee's conduct was provoked by the assistant manager, who had also used profanity. The employer could not identify who made the termination decision. The employer presented an exaggerated rendition of events. Finally, the employer failed to establish that the employee received a copy of the final warning that preceded the termination.

**CONCURRENCE:** Member Miscimarra concurred in the conclusion that the discharge was justified under *Wright Line* since the facts were undisputed, including the fact that the discharge papers expressly referred to the employee's union activities and the record showed that others were treated more leniently for less severe conduct. Member Miscimarra would have addressed the issues of whether the conduct was protected and what test should be applied to make this determination. Member Miscimarra would find that retail employees lose the protection of the National Labor Relations Act (Act), to the extent it is otherwise available, if they enter a retail establishment while off duty and, while inside the store, engage in disruptive conduct in the presence of customers. The conduct at issue in this case would have been unprotected under this standard.

**SIGNIFICANCE:** This case demonstrates that an otherwise legal termination can be rendered illegal by admissions contained in documentation or failure to apply discipline evenly. It also provides some guidance into how the Board might evaluate disruptive conduct by retail employees should the issue arise again in the future.

\*\*\*

***Ralphs Grocery Company***  
**361 NLRB No. 9 (2014)**

---

**ISSUE:** Whether an employer may terminate an employee for refusal to take a drug and alcohol test because the employee could not exercise *Weingarten* rights to obtain union representation before deciding whether to submit to the test.

**HOLDING** (Chairman Pearce and Member Schiffer). The employer violated Section 8(a)(1) of the National Labor Relations Act (Act) when it required the employee to submit to a drug and alcohol test notwithstanding his request for union representation. The employer further violated the Act by suspending and terminating the employee for refusing to take the test without union representation. The majority rejected the employer's argument, i.e., that the employee's refusal to take the test was grounds for discipline because it reflected both insubordination and an automatic positive. The cause for the discipline was "inextricably linked" to assertion of *Weingarten* rights. Because there is no way to divorce the refusal to take the test from the assertion of *Weingarten* rights, the defense of an automatic positive and insubordination was not valid; the refusal to take the test based upon assertion of *Weingarten* rights could not be used against the employee. The interest in avoiding delay given the time-sensitive nature of sobriety tests does not privilege employers to take actions against employees based upon invocation of their Section 7 rights. There was no evidence that the discipline was based upon information the employer already had, as the termination report made no reference to any observed behavior.

**DISSENT** (Member Johnson). The employee was terminated because the employer believed he was intoxicated, not due to any hostility toward a request for union representation. The employer was not required to postpone its investigation indefinitely simply because, through no fault of its own, it was unable to comply with the employee's request for union representation. The employer had a legitimate interest in proceeding with its investigation without delay, particularly in light of the time-sensitive nature of sobriety test results. The union failed to provide any evidence that the automatic positive policy was not previously established or was enforced in a discriminatory manner. Therefore, the make-whole remedy of reinstatement and back pay was not appropriate in this case.

**SIGNIFICANCE:** This case shows that discipline resulting from existing and evenly applied policies may still be deemed to violate the Act if denial of *Weingarten* rights is implicated. This is true even where obvious safety and security considerations are present.

\*\*\*

***Pressroom Cleaners***  
**361 NLRB No. 57 (2014)**

---

**ISSUE:** Whether, when a successor employer has violated Section 8(a)(5) and (1) of the National Labor Relations Act (Act) by unilaterally changing the predecessor's terms and conditions of employment, the make-whole remedy should include restoration of the predecessor's terms and conditions until the parties bargain in good faith to agreement or impasse.

**HOLDING** (Chairman Pearce, Members Hirozawa and Schiffer). The majority held that when a successor employer has violated Section 8(a)(5) and (1) by unilaterally changing the predecessor's terms and conditions of employment, the make-whole remedy will include restoration of the predecessor's terms and conditions until the parties bargain in good faith to agreement or impasse. An employer may no longer attempt to prove what the terms and conditions would have been had it complied with its obligation to bargain. *Planned Building Services*, 347 NLRB 670 (2006) was overruled to the extent inconsistent with this holding. *Planned Building Services* had allowed employers, in a compliance proceeding, to present evidence that it would not have agreed to the monetary conditions in a predecessor's collective bargaining agreement and to further establish one of the following: (1) the date upon which the parties would have bargained to agreement or (2) the date upon which it would have bargained to impasse and implemented its own monetary proposals. The majority recognized that this was an effort to balance two competing principles: placing the burden of the uncertainty on the wrongdoer and avoiding a potentially punitive remedy. Continuing back pay at the predecessor's rate is not punitive. The rule in *Planned Building Services* was not consistent with refusal-to-bargain cases. It led to speculative results and prolonged litigation by greatly complicating the compliance phase and discouraging meaningful bargaining. The better practice, the majority held, is not to permit the wrongdoer to establish by speculation what the terms and conditions would have been if the employer had not violated its duty to bargain. The standard announced is a return to the practice outlined in *State Distributing*, 282 NLRB 1048 (1987). Because the change relates to remedies and not the adoption of a new standard concerning whether certain conduct is unlawful, the majority held the decision should be applied retroactively.

**DISSENT** (Members Miscimarra and Johnson). The dissent is based upon several cardinal principles imbedded in the Act. Under Section 10(c), the National Labor Relations Board's (Board) authority is remedial and not punitive. Section 8(d) prohibits the Board from imposing any term or condition on the parties to a collective bargaining relationship. Successor employers are not required to adopt a predecessor's collective bargaining agreement and may unilaterally establish initial terms and conditions without bargaining. *Planned Building Services* recognized that punitive remedies were beyond the Board's authority, which in turn allowed the employer to prove when it would have reached an agreement or implemented terms upon impasse. The dissent pointed out the majority's position has been rejected by many courts of appeals and is inconsistent with statutory principles or case law establishing the rights of successors. *Planned Building Services* appropriately balanced the competing interests of resolving uncertainty against a party whose conduct violates the Act while recognizing blackletter legal principles that constrain the Board's remedial authority, the dissent said.

**SIGNIFICANCE:** This case overturns precedent and greatly increases the potential liability of successor employers that guess wrong about whether an obligation to bargain with the union exists. It demonstrates that this Board will return to previously questioned standards when the majority deems these rejected standards as consistent with its view of the Act.

\*\*\*

**ISSUE:** Whether an employee may discuss signing authorizations with two other employees where all the employees in question are in a work area and on work time and the employer has a solicitation policy.

**HOLDING** (Chairman Pearce and Member Schiffer). The majority concluded that even though the employer's solicitation policy was lawful on its face, it had been applied unlawfully because the conduct in which the employee engaged was not solicitation. One employee had placed authorization cards in the locker of the other two. She subsequently approached one employee who was waiting for her machine to start, and approached the other while she was cleaning. The employee told both of the others that she had left authorization cards in their locker. There was no attempt to have any employee sign a card during these conversations. All the conversations took place in work areas, and on work time. The National Labor Relations Board (Board) has consistently held that solicitation for a union usually means asking someone to join the union by signing his or her name to an authorization card at the time of the conversation. Therefore, merely stating that cards were left in the locker was not solicitation. There is no support—in case law or in logic—for the dissent's view that merely providing information to coworkers constitutes solicitation. Nor does a momentary interruption in work, or even a risk of interruption, subject an employee to discipline for conveying union-related information. The National Labor Relations Act (Act) allows employees to make union-related statements which do not occupy enough time to be treated as a work interruption in most work settings. Therefore, the employer issuing the employee a warning for violating the solicitation policy violated the Act. The employer also violated the Act when it posted a letter stating that “discussions about the union” was “covered” by the solicitation policy. This was too broad because, among other things, not all discussions about a union are solicitations and the policy allows other non-work-related matters to be discussed on working time. Finally, the Board granted the union's motion for a default judgment because these unfair labor practices constituted the breach of a settlement agreement containing default language reached in a previous case.

**DISSENT** (Member Miscimarra). The majority's decision adopted definitions of “solicitation” and “working time” that departed from decades of precedent. The majority's decision made it impossible for anyone to know in advance whether, where, and what type of solicitation would be lawful. Courts have rejected the majority view that solicitation only occurs when cards are present during a conversation. The decision thus redefined no-solicitation policies two ways. First, although a policy may state that it prohibits solicitation during work time, it must be interpreted to permit solicitation on work time except when authorization cards are present. Second, although solicitation is lawfully prohibited during working time, it is permitted when a production line is not actually in motion or if there is only a brief interruption of work. Employers should be allowed to insist that employees work during work time. They should not have to make extensive inquiries as to the “who, what, when, and where” before deciding whether something is solicitation. Investigating these fact-specific inquiries may itself constitute illegal interrogation and surveillance. Further, the letter the employer posted was legal. The Act does not prohibit general statements about lawful policies, and the letter did no more than remind employees to adhere to the lawful policy set out in the letter.

**SIGNIFICANCE:** This case adds confusion to the analysis of what constitutes solicitation that can be prohibited by an otherwise lawful policy. Employers may now be required to make inquiries about the detail of conversations about unions, which in turn can have the effect of exposing them to more claims of illegal interrogation and surveillance.

**APPELLATE REVIEW:** In *ConAgra Foods v. NLRB*, 2016 U.S. App. LEXIS 2838 (6th Cir. decided Feb. 19, 2016), the court rejected the Board's conclusion that the conversation on the production floor was not solicitation. Among other things, the court observed that the Board does not always require the presence of an authorization card at the conversation for solicitation to take place. Such a requirement would be contrary to the Act's policy of balancing the rights of employees to organize with the employer's right to maintain production and discipline. It would also be patently unreasonable. Relying on the duration of the conversation also disrupted the balance between employees' right to organize and an employer's right to run the business. Thus, neither the presence of a card nor the duration of the conversation (or both taken together) was dispositive of whether the conversation in question was solicitation. The court concluded that the conversation in this case was solicitation because it was part of a prolonged effort of soliciting union support from the employees engaged in the conversation. Therefore, the discipline imposed under the lawful solicitation policy was also valid. The matter was remanded to the Board for further proceedings.

\*\*\*

***Pacific Lutheran University***  
**361 NLRB No. 157 (2014)**

---

**ISSUE:** Whether the National Labor Relations Board (Board), in accordance with *NLRB v. Catholic Bishops of Chicago*, 440 U.S. 490 (1979), should adopt a new standard for determining when it should decline to exercise jurisdiction over faculty members at self-identified religious colleges and universities; and whether the Board, in accordance with *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), should adopt a new standard for determining when faculty members are managerial employees whose collective bargaining rights are not protected by the Act.

**HOLDING:** (Chairman Pearce and Members Hirozawa and Schiffer). In a lengthy decision, the majority concluded that when a college or university argues that the Board cannot exercise jurisdiction over the petitioned-for unit of faculty members because the university is a religious one, the university must first demonstrate, as a threshold requirement, that First Amendment concerns are implicated by showing that it holds itself out as providing a religious educational environment. Once that threshold requirement is met, the university must then show that it holds out the petitioned-for faculty members themselves as performing a specific role in creating or maintaining the college or university's religious environment, as demonstrated by its representations to current or potential students and faculty members and the community at large.

The majority also decided to revise its analysis for determining the managerial status of university faculty. Ultimately, the analysis is designed to answer the question of whether faculty

in a university setting actually or effectively control decision-making pertaining to central policies of the university such that they are aligned with management. In making this determination, the Board will examine the faculty's participation in the following areas of decision-making: academic progress, enrollment-management policies, finances, academic policies, and personnel policy decisions. Greater weight will be given to the first three factors. The examination will be considered in the context of the university's decision-making structure and administrative hierarchy, as well as the nature of the employment relationship of the faculty in issue. Using these tests, the university did not hold its petitioned-for faculty members out as performing any religious function and they did not exercise managerial authority on behalf of the university.

**CONCURRENCE AND DISSENT** (Members Miscimarra and Johnson). In equally detailed separate concurring and dissenting opinions, the dissenters concluded, *inter alia*, that the majority erred by holding that the exemption of religious schools applies only if the faculty members are held out as performing religious functions. Member Miscimarra generally agreed, with some exceptions, with the framework outlined by the majority to determine whether faculty members are managerial employees. Member Miscimarra would apply the three-part test from *Great Falls*. Member Johnson's opinion details his disagreement with both tests articulated by the majority.

**SIGNIFICANCE:** This case represents departure from precedent and an expansion of the Board's jurisdiction over university faculty.

\*\*\*

***Americold Logistics, LLC***  
**362 NLRB No. 58 (2015)**

---

**ISSUE:** Whether the recognition bar prohibiting the filing of representation petitions after voluntary recognition for a period of between six months and one year as required by *Lamon Gaskets Co.*, 357 NLRB No. 72 (2011), begins upon the date of recognition or the date of the first bargaining session.

**HOLDING** (Chairman Pearce and Member Hirozawa). "We make clear here that the 'reasonable period of bargaining' under the recognition bar is a minimum of 6 months and a maximum of 1 year, measured from the date of the first bargaining meeting between the Union and Employer." *Americold*, 362 NLRB No. 58, sl. op at 2. Nothing in *Lamon Gaskets* supported the Regional Director's finding that the recognition bar begins on the date of recognition. In a similar case, the National Labor Relations Board (Board) concluded in *UGL-UNICCO Service Co.*, 357 NLRB No. 72 (2011) that the "successor bar" defined a reasonable period of bargaining as a minimum of six months and maximum of one year measured from the date of the first bargaining session between the union and the employer. Thus, while the recognition bar takes effect upon recognition, it does not end until reasonable time for bargaining has expired. This can be between six months and one year from the date of the first bargaining session. The Board will apply the five factor test from *Lee Lumber & Building Material Corp.*, 334 NLRB 399 (2001), enf'd 310 F.3d. 209 (2002), to determine how long is reasonable in a given case.

**DISSENT** (Member Miscimarra). Among other things, Member Miscimarra stated that the Board should not have overruled *Dana Corp.*, 351 NLRB 434 (2007) because *Dana Corp.* appropriately balanced employees’ right to participate in a Board-conducted election against the Board’s interest in fostering collective bargaining. Even if applying *Lamons Gasket* is proper, the Board should have adhered to its pre-*Dana* case law establishing that the recognition bar begins to run from the date of recognition. The dissent found it incongruous to deny employees the right to file an election petition for a longer period after a union receives voluntary recognition than the one-year period after a union is certified by the Board. The majority’s reliance on the *Lee Lumber* factors to define the “reasonable” bargaining period was not proper because *Lee Lumber* was designed to address illegal failures or refusals to bargain. The majority decision failed to provide concrete guidelines, which the Board has found desirable in the context of processing petitions. The majority extends the troubling trend exhibited in *Lamon Gaskets* and *UGL-UNICCO* of treating the Board’s bar doctrines as essential means to protect unions from decertification and rival unions. Under any standard, the reasonable period for bargaining had expired in this case because, *inter alia*, the parties had reached a complete tentative agreement that had even been signed.

**SIGNIFICANCE:** This is a case of first impression. It makes clear that the end of the recognition bar can extend beyond a year from the date of recognition and depends upon the circumstances of each case. This extension, in turn, affects when representation petitions can be filed related to the recognized unit. In this case, the extended recognition bar had the effect of barring a decertification petition for the third time. The company had voluntarily recognized the union on June 18, 2012, and the first bargaining session took place on October 9, 2012. The parties concluded bargaining and scheduled a ratification vote for June 29, 2013, and a decertification petition was filed on June 28, 2013. Applying the holding of the case and the *Lee Lumber* factors, the majority concluded that the petition was barred because a reasonable time for bargaining had not expired when measured from the date of the first bargaining session.

\*\*\*

***Arc Bridges, Inc.***  
**362 NLRB No. 56 (2015)**

---

**ISSUE:** Whether the employer violated Sections 8(a)(1) and (3) of the National Labor Relations Act (Act) when it withheld a wage increase from represented employees during collective bargaining negotiations, but gave it to unrepresented employees.

**HOLDING** (Chairman Pearce and Member Hirozawa). On remand from the D.C. Circuit,<sup>17</sup> the majority concluded that withholding the raise from bargaining unit employees while granting it

---

<sup>17</sup> The National Labor Relations Board originally concluded that the employer’s practice—reviewing its finances each June and providing across-the-board increases in July if funds permitted—was an established condition of employment. Failure to provide the increase to represented employees was deemed inherently destructive to their Section 7 rights without proof of antiunion motivation. The D.C. Circuit concluded that the raise was not an established condition of employment and remanded the case to the Board to determine whether withholding the raise violated the Act under the *Wright Line* Standard. See *Arc Bridges, Inc., v. NLRB*, 662 F.3d 1235 (D.C. Cir. 2011), denying enforcement of and remanding *Arc Bridges, Inc.*, 255 NLRB 1222 (2010).

to non-bargaining-unit employees was unlawfully motivated under the Board's *Wright Line* test. The majority recognized that employers may treat represented and unrepresented employees differently. In this case, the record showed that the employer intended to give represented employees an increase—until the employees went and voted for the union. Thus, this was not a case where the employer had lawfully withheld the increase as part of a bargaining strategy. The employer made comments that blamed the union for the increase being withheld. Further, the employer's comments suggested that the wage was being withheld because the end of the certification year was approaching. The other arguments offered by the employer were rejected, and the majority also rejected the idea that its holding placed the employer in a no-win situation.

**DISSENT** (Member Miscimarra). believed that it would have been illegal to grant the raise. The majority switched the basis for its findings from the rejected argument that the raise was an established practice to concluding that withholding the raise had an unlawful antiunion motivation. None of the evidence relied upon by the majority was sufficient to establish this illegal motivation. The practical effect of the majority's decision was to put the employer in a no-win situation.

**SIGNIFICANCE:** This case demonstrates the dangers inherent in decisions to grant or withhold wage increases during collective bargaining for an initial contract. It is quite possible that employers, unions, the National Labor Relations Board, and the courts can all reach different conclusions using the same or different legal theories applied to a common set of facts. Absent bright lines, these types of decisions can amount to very expensive gambles with little ability to reliably predict the odds and results.

\*\*\*

***Manor Care Health Servs.***  
**362 NLRB No. 68 (2015)**

---

**ISSUE:** Whether it was objectionable conduct for the employer to reveal the amounts of, and payout for, the first-time preapproved market adjustments during the critical period created by a representation petition.

**HOLDING** (Chairman Pearce Member Hirozawa). The employer engaged in objectionable conduct by announcing to voting-unit employees the amount of their hourly increases or lump-sum payments during the critical period. It was also illegal to then pay out these amounts for the first time during the critical period. The majority recognized that the wage adjustments had been approved two days before the petition was filed. The exact amounts of the increases or bonuses were announced by individually addressed letters to each voter. The amounts appeared in their paychecks three days later. The union lost the election 33 to 28. The majority noted that even if all the amounts of each raise or bonus were determined before the petition was filed, the employees were not informed of their specific amounts until within the critical period.

**DISSENT AND CONCURRENCE:** Member Miscimarra dissented in part and concurred in part. The case involved two kinds of conduct. The wage increases did not warrant overturning the election because they were both announced and effective before the critical period. On the

other hand, the employer’s post-petition wage comparisons, which reflected increases given with the intention of affecting the election, were objectionable. While it is lawful to compare the wages of represented and unrepresented employees, this case is different because the comparison included an upward adjustment that was given for the purpose of affecting the election.

**SIGNIFICANCE:** This case demonstrates that employers can no longer assume that it is legal to implement wage increases during the critical period after an election petition is filed when the increases were approved and established prior to the filing of an election petition. Further, even if otherwise legally implemented, the dissent demonstrates that mentioning their impact can still constitute objectionable conduct.

\*\*\*

***Sabo, Inc.***  
**362 NLRB No. 81 (2015)**

---

**ISSUE:** Whether two employees’ conversations related to job security that were not engaged with the intent of initiating, inducing, or preparing for group action were nevertheless “inherently concerted” for purposes of establishing protection under the National Labor Relations Act (Act).

**HOLDING** (Chairman Pearce and Member Hirozawa). Upon reconsideration after the Supreme Court’s decision in *NLRB v. Noel Canning*, 134 S. Ct. 2250 (2014), the majority reiterated that it was applying the doctrine of “inherently concerted activity” to the conversation at issue relating to employee job security. The doctrine is consistent with the holding of *Myers Industries*, 281 NLRB 882 (1986) affd. sub nom. *Prell v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied., 487 U.S. 1205 (1988). The two have coexisted for more than 20 years. The majority said that, like wages, job security is a vital term and condition of employment and “the grist on which concerted activity feeds.” *Sabo*, 362 NLRB No. 81, sl. op. at 1 n.1 quoting *Aroostock County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995), enf. denied in part on other grounds, 81 F3d 201, 214 (D.C. Cir. 1996). The decision is not meant to expand to other subjects. The record shows that two employees discussed job security, a subject of mutual and obvious concern and directly linked to their interests as employees.

**DISSENT** (Member Miscimarra). The notion that conversations about certain subjects are inherently concerted is irreconcilable with *Myers Industries*. There must be evidence that the conversation appears at the very least to have been engaged in with the object of initiating, inducing, or preparing for group action or that it had some relation to group action in the interest of employees. There is no wiggle room in this language. The majority erases this distinction with a test that sweeps within the phrase “inherently concerted” all conversations regarding wages, work schedules, or job security—even if there is no group action and the conversation is mere griping. The courts have rejected this theory, with the D.C. Circuit calling it “nonsensical.” As to the conversation at issue, merely discussing an individual concern that the employee might be laid off and provoking the other party to that conversation to ask the employer’s owners if he would be laid off is not concerted activity.

**SIGNIFICANCE:** The theory of “inherently concerted” subjects means that employers can never be sure whether any conversation related to wages, hours, or other terms and conditions of employment might rise to the level of protected concerted activity even when no group action is contemplated at any level. Adverse actions based upon such conversations can provoke costly litigation that will likely take years to resolve because relief cannot be expected until the case reaches a federal court of appeals.

\*\*\*

***E.I DuPont de Nemours & Co., Inc.***  
**362 NLRB No. 98 (2015)**

---

**ISSUE:** Whether to provide make-whole relief to an employee discharged for misconduct that occurred during an unlawful interview that violated the employee’s *Weingarten* rights.

**HOLDING:** (Chairman Pearce and Member Hirozawa). A make-whole remedy can be awarded in a *Weingarten* case when: (1) an employer, in discharging an employee, relies at least in part on the employee’s misconduct during an unlawful interview; and (2) the employer is unable to show that it would have discharged the employee absent the purported misconduct. This test does not violate Section 10(c)’s prohibition against awarding reinstatement and back pay to employees terminated “for cause.” The majority found that the case before it was different than the usual *Weingarten* case where the misconduct occurred before the illegal interview. In this matter, the employee may have been terminated for dishonesty that occurred during the illegal interview. Thus, the new rule fills a gap in the National Labor Relations Board’s (Board) precedent that had not been addressed previously. The rule does not interfere with an employer’s right to take action against an employee based upon preexisting misconduct brought to light only through an illegal interview. The majority merely holds that in the very different situation where an employer discharges an employee for misconduct that is caused in the first instance by the employer’s persisting in an unlawful interview, the remedy for the unlawful interview should include make-whole relief for the discharged employee. The matter was remanded to the administrative law judge (ALJ) to determine whether the employee’s discharge was based in part on conduct occurring during one or both unlawful interviews. If so, then the employer would need to show it would have discharged the employee regardless of any conduct during the two unlawful interviews.

**DISSENT** (Member Johnson). The appropriate remedy for a violation of 8(a)(1) of the National Labor Relations Act based upon denial of *Weingarten* rights is a cease-and-desist order. The only question that should be asked is whether the discharge was motivated, at least in part, by the protested request for representation. In this case it clearly was not. Therefore, longstanding law set forth in *Taracorp, Inc.*, 273 NLRB 221 (1984) precluded an award of reinstatement and back pay. The majority’s rule would allow for reinstatement and back pay if the misconduct upon which a discharge is based occurred after the denial of *Weingarten* rights and during, as opposed to before, the unlawful interview. This could preclude termination even for criminal conduct like punching a supervisor during the illegal interview. Further, the new rule may open the door to use of “fruit of the poisonous tree” logic to prevent discharge for disclosures of previously unknown misconduct such as theft or drug dealing.

**SIGNIFICANCE:** The majority saw this as a case of first impression and an opportunity to fill a gap in the Board’s jurisprudence. It creates a new test for assessing liability for a *Weingarten* violation and provides for make-whole relief where it did not exist before. Further, it calls into question for what infractions an employee may be terminated based upon whether the infraction occurred, or was merely discovered, during an interview where *Weingarten* rights were denied.

\*\*\*

***Finley Hospital***  
**362 NLRB No. 102 (2015)**

---

**ISSUE:** Whether the employer violated Section 8(a)(5) of the National Labor Relations Act (Act) when it discontinued an annual three percent pay raise upon expiration of the collective bargaining agreement, which contained a clause requiring the raise be in place during its term.

**HOLDING** (Chairman Pearce and Member McFerran). Upon reconsideration after the Supreme Court’s decision in *NLRB v. Noel Canning*, 134 S. Ct. 2250 (2014), the majority reiterated that it was a violation of the Act to discontinue the pay increases. The majority stated that regardless of what the collective bargaining agreement said, the employer had a statutory duty to bargain under 8(a)(5). This duty requires that employers make no changes to existing terms and conditions of employment unless they bargain new terms or reach a legal impasse. Even if a contractual right to a term or condition of employment does not survive expiration of an agreement, the statutory right typically does. Thus, contractual language precluding a provision from having any effect after expiration will not permit a unilateral change unless the contract contains a clear and unmistakable waiver of the union’s right to maintenance of the status quo. Since the contract at issue contained no such waiver, and the annual raise defined the status quo, the unilateral discontinuation of that raise violated Section 8(a)(5). Notifying employees that the raise was to be discontinued was a separate violation of Section 8(a)(1).

**DISSENT:** Member Johnson joined Member Hayes’ dissent to the original decision. The status quo is defined by the terms of the agreement, not the concept of waiver. The increase under the terms of the contract was to last only for the term of the agreement. Under the majority’s logic, concessions may also be required to continue after the expiration of the contract. The majority’s requirement that employers provide non-negotiated perpetual wage increases after an agreement expires replaces the status quo with something the employer never agreed to accept. This is not consistent with Act’s conception of the National Labor Relations Board as an overseer and referee of the collective bargaining process that leaves the results to the bargaining strengths of the parties. Finally, progressively divorcing all ordinary meaning from language opens the door to a decision-making process that is inherently subjective and contingent upon who is making the decisions rather than the intent of the parties or a clearly defined objective standard.

**SIGNIFICANCE:** This case places new obligations on employers that did not exist prior to the decision. To avoid unknown or unbargained-for obligations after contract expiration, detailed language concerning waivers will need to be included throughout collective bargaining agreements for each potentially troublesome contract provision. This is likely to slow down or

derail the bargaining and ratification processes when prudent employers seek to protect against all possible forms of exposure.

\*\*\*

***Banner Estrella Med. Ctr.***  
**362 NLRB No. 137 (2015)**

---

**ISSUE:** Whether Section 8(a)(1) of the National Labor Relations Act (NLRA or Act) is violated by giving employees a form asking them to refrain from discussing the contents of an investigatory interview until after the investigation is completed.

**HOLDING** (Members Hirozawa and McFerran). Upon reconsideration after the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S. Ct. 2250 (2014), the majority reiterated that the use of these forms violate the Act. An employer may restrict these types of discussions only when it shows that it has a legitimate and substantial business justification that outweighs the employee's Section 7 rights. The majority affirmed the standard announced in *Hyundai American Shipping Agency*, 357 NLRB No. 80 (2011). It is the employer's responsibility to first determine whether, in any given investigation, witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, or there is a need to prevent a cover up. Only when the employer determines that such corruption of its investigation would likely occur without a confidentiality agreement is the employer then free to prohibit its employees from discussing the contents of their interviews among themselves.

**DISSENT** (Member Miscimarra). The majority's holding represents a disappointing extension of the National Labor Relations Board's (NLRB or Board) treatment of workplace investigations. These include *Piedmont Gardens*, 362 NLRB No. 139 (2015), in which the Board changed existing law and held that employers have an 8(a)(5) obligation to disclose witness statements, and *Fresh & Easy Neighborhood Market*, 362 NLRB No. 12 (2014) (see discussion of this decision under Chapter X), in which the Board majority found that an individual employee's complaint involving a statute unrelated to the NLRA subjected a workplace investigation to the full panoply of NLRA restrictions and requirements applicable to NLRA protected concerted activity. The form in *Banner Estrella* was narrowly tailored. It did not prevent discussions with union representatives. The request did not target, prevent, or penalize specific NLRA-protected concerted activity that has actually occurred. No discipline was imposed based upon disclosures involving actual protected concerted activity. No *Weingarten* violations occurred.

**SIGNIFICANCE:** The case continues a trend in the NLRB jurisprudence of creating rules and restrictions that place significant barriers to maintaining the integrity and security of employer investigations into employee conduct that should otherwise result in discipline.

\*\*\*

**ISSUE:** Whether the employer violated Section 8(a)(1) of the National Labor Relations Act (Act) when it denied an employee the right to have in-person union representation before deciding whether to submit to a reasonable suspicion drug and alcohol test.

**HOLDING** (Members Hirozawa and McFerran). The majority concluded that the employer violated the act when it insisted upon proceeding with the interview rather than waiting for a shop steward to appear in person. An employee is entitled to union representation when his or her employer insists that he or she take a drug and/or alcohol test as part of an investigation into misconduct. When an employee requests union representation before participating in a disciplinary investigation, the employer has three clearly established options: (1) grant the employee's request; (2) give the employee the option to proceed without representation; or (3) discontinue the interview and make a disciplinary decision based on the information it has available. The employer did none of these things. It insisted on continuing the interview. It was not enough that the employee spoke to the shop steward by phone. Physical presence is essential to representation. The employee's discharge for refusing to take the test without the presence of the shop steward also violated Section 8(a)(1).

This case is like *Ralphs Grocery Co.*, 361 NLRB No. 9 (2014). In that case, the National Labor Relations Board (Board) agreed with the administrative law judge that the employer violated Section 8(a)(1) of the Act by discharging an employee for refusing to take a drug test without the presence of a shop steward. The employer said it discharged the employee for insubordination and refusing to take a drug test, noting that the refusal to take the test counted as an automatic positive. The Board observed that by relying on the employee's refusal to take the test as a basis for discipline, it penalized the employee for refusing to waive his *Weingarten* rights irrespective of whether it considered the refusal to be insubordination or an automatic positive. The same is true in this case. The refusal to take the test without a steward present was treated as an automatic positive result for which the employee was discharged. Thus, the refusal to take the test was inextricably linked to the employee's assertion of *Weingarten* rights.

**DISSENT** (Member Johnson). The majority decision paints companies seeking to maintain safe, drug free workplaces into corners by unnecessarily foreclosing their ability to take reasonable steps to confirm whether an employee has reported to work under the influence of drugs or alcohol. Unlike the decision in *Ralphs*, in this case, the employee did in fact consult with a union steward and obtained advice before deciding not to take the test. The right to representation in a traditional interview contemplates a "knowledgeable" union representative who can provide advice and active assistance" to the employee. Logic dictates that this role is more limited in drug or alcohol testing situations. The presence of a third party in the midst of the physical administration of the test presents risks of inaccuracy and adulteration. Once the employee has the opportunity to confer about whether to submit to the test, the union representative no longer has a role to play.

The decision of the majority allows for delays that have a real probability of altering the results of tests. The delays, in turn, allow the employees to get extra time to find ways to beat the test.

Further, the discharge was legal because it was based upon the reasonable suspicion that the employee reported to work under the influence as well as the failure to overcome that suspicion by taking and passing a drug test. Moreover, no violation occurs when an employer has a pre-existing policy or practice that a discharge will occur if potentially exculpatory evidence is not provided by a drug test. The decision also subjects the employer to other legal challenges. The employer could lose arbitration hearings if discharges are based only upon the subjective observations of a supervisor. Some policies and state laws may prohibit discharges based upon perception alone. Finally, the decision creates an incentive for union representatives to make themselves unavailable to avoid the consequences of a positive test.

**SIGNIFICANCE:** This is another in a long line of cases making it very difficult for employers to investigate employee misconduct. Moreover, the holding calls into question an employer's ability to lawfully administer a timely reasonable suspicion drug test.

\*\*\*

***GVS Properties, LLC***  
**362 NLRB No. 194 (2015)**

---

**ISSUE:** Whether an employer that is required to hire its predecessor's employees under a state or local mandatory retention statute is a *Burns* successor.

**HOLDING** (Chairman Pearce and Member Hirozawa). The new employer became a *Burns* successor with an obligation to recognize and bargain with the union when it assumed control of the predecessor's business and hired its employees. There is no merit to the argument that the determination could not be made until after the mandatory retention period created by local law had expired. The U.S. Supreme Court in *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972) and *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987) defined the bargaining obligations associated with purchasing a business and hiring the employees of the purchased business. Those cases observed that if a buyer makes a "conscious decision" to maintain generally the same business and hires a majority of employees of the predecessor, then the bargaining obligation of 8(a)(5) of the National Labor Relations Act (NLRA or Act) is activated. The majority concluded that the buyer made a conscious decision when it purchased the buildings and took over the business of the predecessor with full knowledge of the retention obligation created by local law. This conclusion is not affected by the temporary nature of the requirements of the retention statute that compel employment for only 90 days. Successorship determinations are not affected by the temporary or probationary status of the predecessor's employees.

The majority holding does not imply, much less require, a conclusion that all new successors subject to retention statutes are "perfectly clear" successors that must adopt the terms of existing collective bargaining agreements. The National Labor Relations Board's (Board) standard in *Spruce Up Corp.*, 209 NLRB 194 (1974), 529 F.2d 516 (4th Cir. 1975) states the contrary—that a new employer that expresses a willingness to hire its predecessor's employees while at the same time announcing that will pay significantly less was not a "perfectly clear" successor under

*Burns*. There is no likelihood that the majority holding will result in retention statutes being preempted by the NLRA.

**DISSENT** (Member Johnson). The majority decision upsets the balance struck by the Supreme Court in *Burns* and *Fall River*. The Supreme Court recognized that a buyer may be willing to take on moribund business only if it can make changes to corporate structure, composition of the work force, and other aspects of the business. The coercive nature of the statute necessarily negates the voluntariness upon which the successorship doctrine is based. By forcing an employer to recognize and bargain with a union based upon a decision it was coerced to make by the retention statute, the majority allows a local government to place its thumb on the scale in favor of incumbent unions simply because they are incumbent unions. This decision will have far reaching consequences. It could prove to be the death knell of retention statutes. By allowing local statutes to control a matter of federal labor law, the majority paves the way for these statutes to run headlong into the Supremacy Clause of the United States Constitution. The decision also limits the rights of potential successors. Buyers will have no opportunity to set initial terms and conditions of employment as allowed by *Burns* unless the statute allows this and the buyer states the intent to do so before agreeing to purchase the business. The decision about whether a buyer is a successor should not be made until after the worker retention period has run. Because the buyer did not maintain a majority of the predecessor's employer's after the retention period expired, Member Johnson would conclude that the buyer was not a *Burns* successor and had no obligation to bargain with the union of the predecessor's employees.

**SIGNIFICANCE:** This is a case of first impression. It makes purchasing a business and retaining the right to set the initial terms and conditions of employment more difficult for purchasing employers. Moreover, it is worth noting that while the majority bases the rationale of its holding on *Spruce Up*, the Board has recently indicated that it might be willing to overrule that case.

\*\*\*

***Shadyside Hospital (UMPC)***  
**362 NLRB No. 191 (2015)**

---

**ISSUE:** Whether the holding of *Purple Communications* should extend to acute care settings in hospitals.

**HOLDING** (Chairman Pearce and Member Hirozawa). The *Purple Communications* presumption will be extended to the healthcare environment. The hospital failed to show that there are special circumstances justifying the restrictions on email use set out in its communications policy. The policy at issue, in relevant part, precluded use of the hospital's electronic messaging systems to distribute any form of literature not related to UMPC business or staff duties at any time in any work, patient care, or treatment areas.

The majority rejected the invitation to overrule *Purple Communications*. It stated that the policy at issue clearly included the use of email. It also observed that *Purple Communications* made clear that its holding would be applied to all pending cases. Thus, the employees had a

presumptive right to use employer email to engage in Section 7 activities—protected communications during nonworking time. The majority also said that the hospital had adequate notice of the obligation to litigate the issue of special circumstances and the opportunity to do so. Even though *Purple Communications* had not been decided, the hospital argued in answering briefs that special circumstances would justify its policy even if the standard in *Register Guard* was overruled. The hospital relied on studies showing a correlation between distractions and patient safety, specifically identifying computers and other electronic communication devices as sources of distraction. The majority stated that while they do not doubt that the email system may be a distraction during work time, this concern does not justify a policy that prohibits use of email for only one type of communication, namely solicitation. Having failed to rebut the presumption, the majority found the policy at issue to be illegal.

**DISSENT** (Member Johnson). Member Johnson dissented in part. He stated that the majority expands *Purple Communications* to the acute care hospital setting despite compelling reasons for not doing so, and rejects the hospital’s arguments that it should be allowed to litigate the issue of special circumstances. Member Johnson repeated his view that *Purple Communications* was wrongly decided. The majority’s holding effectively requires the employer to permit use of its email system for union and other employment related matters even during worktime, while ignoring multiple other modes of communications including face-to-face discussions.

Member Johnson would also find that special circumstances exist that preclude applying the *Purple Communications* presumption to the hospital setting. The email system in a hospital is effectively a work area. One cannot control solicitations during work time in this work area unless the majority agrees that employers can prohibit employees from sending emails to coworkers when the recipients are working. Patient care issues demand high levels of concentration. Requiring hospitals to permit union organizing and other Section 7 solicitations on its email system risks disrupting efforts to limit distractions. Further, at the very least, the case should be remanded to allow the hospital to establish special circumstances justifying its policy.

**SIGNIFICANCE:** This case extends the employees’ presumptive right to use employer email to engage in communications protected by Section 7 during nonworking time to acute care hospital settings. It also demonstrates how difficult it will be to show special circumstances weighty enough to erode or overcome the *Purple Communications* presumption.

\*\*\*

***Menorah Medical Center***  
**362 NLRB No. 193 (2015)**

---

**ISSUE:** Whether an employer violated Section 8(a)(5) of the National Labor Relations Act (Act) by refusing to give the union requested documents related to nursing peer review committee proceedings when state law required that such documents be kept confidential.

**HOLDING** (Chairman Pearce and Member Hirozawa). The hospital failed to establish a legitimate and substantial confidentiality interest in the documents requested. It therefore violated the Act by failing to provide the documents. The union sought documents concerning

the workings of the committee, discipline issued by the committee, and the location where discipline records were placed. The hospital refused to produce the data on the grounds that the data sought was confidential because deliberations of peer review committees are privileged under state law. The majority found that documents concerning the structure and function of the committee do not touch on deliberations. The same is true with respect to information relating to allegations against nurses summoned by the committee and information utilized by the committee in making allegations. Requesting discipline letters created a closer issue. In this case, the letters did not address the internal deliberative process. Since none of the requested data went to the deliberative process, it was not protected by the state law. Thus, the needs of the union outweighed the confidentiality interests of the hospital. The hospital was ordered to produce all the data.

**DISSENT** (Member Johnson). The state law states that all records submitted to or generated by the committee are protected from disclosure. Therefore, Member Johnson would conclude that copies of employee discipline are protected from disclosure by state law. Additionally, any records specifically created for and submitted to the committee for purposes of decision making are also logically excluded. The majority does not give enough weight to the confidentiality concerns raised by the state law. The purpose is to encourage frank and open discussions within the peer review committees. The union's interest in ensuring that the process is not abused is weak by comparison, particularly when no adverse action is taken. The public's interest in candid review also outweighs the union's need for the documents. However, the fact that some documents might have been withheld legally does not end the matter as the hospital still had a duty to bargain with the union about accommodating the union's request for information. There is no absolute privilege from disclosure at issue. The failure to bargain with the union over accommodating the confidentiality concerns violated the Act. Therefore, the remedy is not disclosure of the documents, but rather an order to engage in accommodative bargaining over the privileged information.

**SIGNIFICANCE:** This case is another in a continuing trend of this National Labor Relations Board to require disclosure of what many would view as clearly confidential or privileged information. It also serves a cautionary tale and a reminder to engage in accommodative bargaining even when the requested evidence appears to be clearly confidential or privileged.

\*\*\*

***Piedmont Gardens***  
**362 NLRB No. 139 (2015)**

---

**ISSUE:** Whether employers are required to disclose to unions written witness statements upon request.

**HOLDING** (Chairman Pearce and Members Hirozawa and McFerran). The majority decided to overrule the blanket rule exempting witness statements from disclosure announced in *Anheuser-Busch, Inc.*, 237 NLRB 982 (1978). Instead, when an employer argues that it has a confidentiality interest in protecting witness statements from disclosure, the National Labor Relations Board (Board) will use the balancing test set out in *Detroit Edison v. NLRB*, 440 U.S.

301 (1979). The Board will balance the union's need for the requested information against any legitimate and substantial confidentiality interests established by the employer. Establishing a legitimate and substantial confidentiality interest will require more than a generalized desire to protect the integrity of an employer's investigation. An employer must determine whether, in any given investigation, witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, or there is a need to prevent a cover up. Even if the Board concludes that the confidentiality interest outweighs the requestor's need, the party asserting confidentiality may not simply refuse to provide the information. Instead, it must seek an accommodation that would allow the requestor to obtain the information it needs while protecting the confidentiality interests. In so concluding, the majority rejected the assumption that witness statements are fundamentally different than other types of information. It distinguished Board proceedings, in which witness statements were protected from disclosure because the Freedom of Information Act contains an exemption for records compiled for law enforcement proceedings (*see NLRB v. Robbins Tire Co.* 437 U.S. 214 (1978)) from arbitration proceedings where policy considerations favor disclosure in matters related to the bargaining relationship. The Board did not apply the rule retroactively and thus did not require the production of two witness statements. It did, however, require the production of a third statement under the *Anheuser-Busch* rule because the employee was not expressly promised confidentiality at the time it was taken.

**DISSENT** (Members Miscimarra and Johnson). Neither Member would overrule *Anheuser-Busch*. Member Johnson stated that the current rule has protected the integrity of the arbitration process. The U.S. Supreme Court has endorsed the Board's nondisclosure policy, recognizing the inherent dangers in prehearing disclosure of witness statements. The *Anheuser-Busch* rule enabled effective investigations and legal compliance by employers. The old rule did not interfere with a union's ability to investigate grievances.

The new balancing test will have inconsistent and unpredictable results, leading to more litigation. The balancing test will impair employers' investigations of workplace misconduct. Finally, the disclosure of witness statements will interfere with employers' rights to exercise their work product privilege over investigatory materials.

Member Miscimarra joined Member Johnson's dissent and added his own comments. He stated that the case completed a trilogy of decisions (along with *Fresh and Easy Neighborhood Market*, 361 NLRB No. 12 (2014) (see discussion of this decision in Chapter X) and *Banner Estrella Medical Center*, 362 NLRB No. 137 (2015))(see discussion on page 124) in which the Board is substantially undermining workforce investigations to the detriment of employers and employees alike. Member Miscimarra believes that the Act requires the Board to balance the importance of taking reasonable measures to foster confidentiality regarding workforce investigations. The *Anheuser-Busch* rule protects witnesses from the very real risks of coercion, intimidation, harassment, and retaliation. The new confidentiality standard will never be satisfied except in extremely narrow, infrequent circumstances. The new standard is likely to increase litigation. Member Miscimarra disagrees with the proposition that a statement can only be a witness statement subject to confidentiality if it was given with the express assurance of confidentiality. Finally, a request for the identities of everyone involved in the investigation, as opposed to the request for witnesses, is too broad.

**SIGNIFICANCE:** This case overrules a precedent that had stood for nearly 40 years. It exchanges an easily understood and applied bright line test for a much less clear balancing test. As noted by Member Miscimarra, it is another in a continuing series of cases making it more difficult for employers to perform effective investigations of workplace misconduct.

\*\*\*

***Fred Meyer Stores, Inc.***  
**362 NLRB No. 82 (2015)**

---

**ISSUE:** Whether the employer unlawfully changed the parties' longstanding and contractually based practice of allowing union representatives to engage in short conversations with employees on the selling floor.

**HOLDING** (Chairman Pearce and Member Hirozawa). The employer's conduct violated the visitation provision in the collective bargaining agreement and thus violated the National Labor Relations Act (Act). Past practice and interpretation of the contract and policy permitted brief discussions between on duty employees and union representatives on the sales floor if the employees were not dealing with customers and the conversations were kept to a minute or two. The union sent eight representatives in talk to employees. Two went to the information desk to announce their presence to the manager on duty (MOD). The others immediately began speaking to employees. After about five minutes, the MOD arrived and stated that conversations would be limited to introductions and that any additional conversations would need to take place in the break room. The union representatives disagreed and offered a copy of the policy. The MOD angrily addressed the union representatives, saying that they only wanted dues and that the employees did not need a union. Eventually, the police were called and two union representatives were arrested for refusing or failing to leave the employer's premises. The majority held that the employer violated the Act by limiting store access, telling employees not to talk to union representatives, disparaging the union, threatening the union representatives with arrest, and then having them arrested. In particular, the angry comments made by the MOD about the union in the context of the other unfair labor practices made the comments unlawful disparagement.

**DISSENT:** Member Johnson agreed that it was unlawful to tell employees that they could not speak to union representatives at all. That violation did not spawn a right to persistently argue with managers on the sales floor for 45 minutes and refuse police requests to leave. It also did not excuse attempts to get employees to sign petitions while on the sales floor. The employer was well within its rights to minimize disruption. There was no unilateral change because the union had never attempted to test the limits of the access policy by engaging in what looked like a staged confrontation. Finally, the free speech provisions of Section 8(c) permit the comments made by the MOD.

**SIGNIFICANCE:** This case demonstrates that even union conduct that is disruptive and intentionally provocative can be deemed protected when unions seek to test the limits of an established policy.

\*\*\*

***Fresenius USA Manufacturing , Inc.***  
**362 NLRB No. 130 (2015)**

---

**ISSUE:** Whether discharging an employee for lying to an employer while the employer investigates claims of harassment that might also implicate protected conduct violated the National Labor Relations Act (Act).

**HOLDING** (Chairman Pearce and Members McFerran and Johnson). In a previous decision vacated by *NLRB v. Noel Canning*, 134 S. Ct. 2250 (2014), the Board held that an employee's lies to an employer about whether he was responsible for vulgar and offensive language written on union leaflets did not justify his discharge. Upon reconsideration, the Board assumed without deciding that the offensive statements written on the union literature were protected statements. It stated that the employer had a valid business interest in investigating the facially valid complaints of harassment and threats, even if that conduct took place during the exercise of the investigated employee's Section 7 rights. The investigation was conducted in a manner consistent with its purpose. When the employee asked why he was being questioned, he was told truthfully that other employees complained about the vulgar, offensive, and intimidating character of the written statements. The employee was never asked about his or anyone else's Section 7 activities. Other than the instruction not to talk to others about the investigation, there was no credible evidence of hostility to protected activity. The dishonesty during the investigation was a legitimate basis for the suspension and discharge. The employer met its burden under *Wright Line* by showing it would have taken the same action in the absence of any protected activity. The discipline was consistent with what had been done in other cases.

**DISSENT:** It was mentioned in a footnote that Member Johnson would have found the handwritten comment unprotected.

**SIGNIFICANCE:** This case is a rare example of the National Labor Relations Board reversing a decision that had been invalidated by *Noel Canning*. Practically, this case demonstrates that narrowly tailored investigations and consistently applied discipline can reduce the risk of liability even where the conduct investigated implicates activity protected by Section 7 of the Act.

\*\*\*

***Buchanan Marine, L.P.***  
**363 NLRB No. 58 (2015)**

---

**ISSUE:** Whether tugboat captains are supervisors as defined by Section 2(11) of the National Labor Relations Act (NLRA or Act).

**HOLDING** (Chairman Pearce and Member Hirozawa). The Regional Director correctly relied upon the standard articulated in *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006) to conclude that tugboat captains are not supervisors as defined in NLRA Section 2(11). Pre-*Oakwood* cases finding that tugboat captains are supervisors did not define what kind of accountability was necessary to establish supervisory status or whether a showing of accountability was required to

prove responsible direction. The majority does not dispute that captains are accountable under *Oakwood* if the employer holds them responsible for the errors of crew members, but the employer bears the responsibility of showing that this is the case rather than merely assuming that this is the case. The employer cannot rely upon the assertion of maritime law to show accountability without demonstrating that the employer at issue holds its captains accountable when deckhands violate these laws.

The question is not whether tugboats are operated on the high seas without any person aboard whose commands must be obeyed. The sole question is whether the party asserting supervisory status has proved that the person issuing commands possesses one or more of the indicia set forth in Section 2(11). A finding that a captain is not a 2(11) supervisor does not mean that the captain's commands need not be obeyed by the crew or that the employer may not discipline the crew for a failure to obey the captain. It means only that captains may vote on the question of whether they wish to be represented for purposes of collective bargaining and be part of a unit that selects a bargaining representative.

**DISSENT** (Member Miscimarra). The majority in this case is perpetuating what the Supreme Court called the National Labor Relations Board's (Board) "running struggle to limit the impact of 'responsibly direct' on the number of employees qualifying for supervisory status." The majority's analysis is contrary to the Act and its legislative history, Board case law, court of appeals precedent, and uncontroverted record evidence. Concluding that tugboat captains are not supervisors fails the test of common sense. The history of the Act shows that the distinction drawn between employees and supervisors is central to the functioning of the collective bargaining process. The Board must recognize that businesses cannot function without a reasonable number of people exercising supervisory authority at a particular facility, during a particular shift, or in relation to a particular function. The Board in every case should take into account: (1) the nature of the employer's operations, (2) the work performed by undisputed statutory employees, and (3) whether it is plausible to conclude that all supervisory authority is vested in persons other than those whose supervisory status is in dispute. The majority concludes that captains are not supervisors even though the record shows that the captain is the only person present on the boat to address, in real time, all major issues concerning operation of the vessel and how the crew will go about their duties. This is contrary to decades of prior precedent.

Additionally, *Oakwood* did not change Section 2(11) of the act nor did it overrule all prior Board precedent regarding supervisory status. Thus, there is no sound basis for the majority's broad assertion that that all pre-*Oakwood* precedent regarding supervisory status is "of limited precedential value." Further, the record shows that captains are supervisors. For example, every captain that testified clearly stated that he was responsible for everything that happened on the boat. The majority should not dismiss this uncontroverted testimony as insufficiently specific merely because the evidence could have been stronger, more detailed, or supported by more examples. Finally, the Board should always consider the three factors mentioned above. These do not comprise a new test for supervisory status but a guide as to how to apply the indicia set out in 2(11) of the Act.

**SIGNIFICANCE:** This case advances the Board's ongoing effort to decrease the number and type of employees who are statutory supervisors as defined in Section 2(11) of the Act and thus

expand the scope of NLRA coverage. The majority decision also appears to place a new evidentiary burden on employers to show by some unspecified quantity and quality of evidence that supervisors are in fact held accountable for the errors of those they supervise; un rebutted testimony that this is the case may not be sufficient.

\*\*\*

## 2016 – Present

### ***Whole Foods Market, Inc.*** **363 NLRB No. 87 (2016)**

---

**ISSUE:** Whether work rules prohibiting employees from recording company meetings or conversations with coworkers are lawful.

**HOLDING** (Chairman Pearce and Member Hirozawa). The National Labor Relations Board (Board) found that it is unlawful for an employer to adopt work rules that prohibit employees from recording company meetings or conversations with coworkers absent a valid legal or business justification. The majority determined that employees would reasonably interpret the language of the policies at issue in this case as tending to “chill” the exercise of their Section 7 rights to engage in protected concerted activity, and therefore held that the policy violated Section 8(a)(1) of the National Labor Relations Act (Act).

The first work rule at issue in the case was a “Team Meetings” policy that prohibited employees from recording company meetings:

It is a violation of [company] policy to record conversations, phone calls, images or company meetings with any recording device (including but not limited to a cellular telephone, PDA, digital recording device, digital camera, etc.) unless prior approval is received from your Store/Facility Team Leader, Regional President, Global Vice President or a member of the Executive Team, or unless all parties to the conversation give their consent. Violation of this policy will result in corrective action, up to and including discharge.

The second rule prohibited employees from recording conversations with each other:

It is a violation of [company] policy to record conversations with a tape recorder or other recording device (including a cell phone or any electronic device) unless prior approval is received from your store or facility leadership. The purpose of this policy is to eliminate a chilling effect on the expression of views that may exist when one person is concerned that his or her conversation with another is being secretly recorded.

The majority ruled that Whole Foods Market’s policies were unlawful. The majority stated, however, that it did not intend to prohibit all workplace recording policies, but that absent a sufficient rationale such policies would violate the Act. The majority acknowledged that Whole

Foods Market’s business justifications for prohibiting recording during annual town hall meetings and termination-appeal peer panels were “not without merit,” but found that these narrow circumstances could not justify a broad, unqualified restriction on recording. The majority failed to give any guidance or otherwise explain what type of rationale would be sufficient to justify a no-recording policy.

**DISSENT:** Member Miscimarra stated that the Board has permitted policies that prohibit recording or taping in other contexts, such as during collective bargaining. He also argued that the Whole Foods Market policy quoted above had a limited scope, and could even be interpreted as *protecting* discussion of union views and employees’ Section 7 rights to engage in protected concerted activity. Member Miscimarra also expressed his “disagreement with the first prong of the *Lutheran Heritage* standard, under which a workplace rule is deemed unlawful where the rule was neither promulgated in response to nor applied to restrict Section 7 activity if ‘employees would reasonably construe the language [of the rule] to prohibit Section 7 activity,’ without regard to an employer’s legitimate reasons unrelated to the NLRA for maintaining the rule.”

**SIGNIFICANCE:** While the Board majority states that its decision in *Whole Foods* does not prohibit all workplace recording and taping, it provides no guidance as to policy language that would be acceptable. Thus, the decision leaves employers in a difficult position in developing compliant rules.

**ADDENDUM:** As this treatise was being completed, *William Beaumont Hospital*, 362 NLRB No. 162 (April 13, 2016) was decided. The Board majority, applying the *Lutheran Heritage* standard, determined that the hospital’s code of conduct policy was unlawful. This triggered a strong dissent from Member Miscimarra; he reiterated his concerns from *Whole Foods Market* about the first prong of the *Lutheran Heritage* standard which makes unlawful all employment policies, work rules, and handbook provisions whenever an employee “would reasonably construe the language to prohibit Section 7 activity.” Member Miscimarra wrote:

Under *Lutheran Heritage*, reasonable work requirements have become like Lord Voldemort in *Harry Potter*: they are ever-present but must not be identified by name.

Member Miscimarra then enumerated “multiple defects [that] are inherent in the *Lutheran Heritage* test” and proposed that it be overruled by the Board or repudiated by the courts and replaced with a new standard that, among other things, strikes a “proper balance” between an employer’s justifications for the rules and the risk that a rule might discourage Section 7 activity. Miscimarra described the *Lutheran Heritage* standard as “impos[ing] a form of blindness on the Board, requiring that we ignore every important consequence associated with our decision in this area and with employment policies, work rules and handbook provisions, *except* their potential impact on the NLRA.”

Of course, the Board majority in *Beaumont* refused to accept Member Miscimarra’s challenge to adopt a balancing standard in place of the blind application of *Lutheran Heritage*. Thus, until a reviewing court decides otherwise, the Board will continue to parse words and flyspeck

handbooks and personnel policies searching for any potential Section 7 violations—no matter how attenuated. .

\*\*\*

***Guardsmark, LLC***  
**363 NLRB No. 103 (2016)**

---

**ISSUE:** Whether, in the case of a mail ballot election, the 24-hour period in which “captive audience” meetings cannot be held should run from the time the ballots are mailed or beginning 24 hours before the ballots are mailed.

**HOLDING** (Chairman Pearce and Members Hirozawa and McFerron). The majority chose the latter and overruled the 63-year precedent first established in *Oregon Washington Telephone Co.*, 123 NLRB 339 (1953). In *Oregon Washington Telephone Co.*, the National Labor Relations Board (Board) held that employers were prohibited from holding a “captive-audience” meeting with employees when the mail ballots are scheduled to be mailed. The majority stated that this rule was “counter-intuitive” because the rule for manual ballots was to prohibit these meetings 24 hours before the election began. *Peerless Plywood Co.*, 107 NLRB 427 (1953). In order “[t]o avoid perpetuating the confusion,” the mail ballot rule needed to be more closely aligned with the manual-ballot rule.

**DISSENT:** Member Miscimarra noted in his dissent that this case arose because the Regional Director failed to adhere to extant Board law when he prohibited captive audience speeches 24 hours before the ballots were to be mailed to eligible voters. Miscimarra states: “Ironically, my colleagues deal with the region’s error by making the region’s mistake into a new requirement applicable to all future mail-ballot elections.” The dissent stated that the *Oregon Washington Telephone* rule better adheres to the rationale in *Peerless Plywood* because in a mail ballot election “the employees receipt of the mail-ballot — which occurs, at the earliest, the day after the ballots are mailed by the regional office — effectively constitutes the start of the election.”

**SIGNIFICANCE:** This case demonstrates the further erosion of employer free speech rights as provided by Section 8(c) of the National Labor Relations Act.

\*\*\*

***Remington Lodging & Hospitality, LLC***  
**363 NLRB No. 112 (2016)**

---

**ISSUE:** Whether subcontracting hotel housekeeping work was illegal when the record did not support a showing that the subcontracting tended to encourage or discourage union membership.

**HOLDING** (Chairman Pearce and Member Hirozawa). The majority concluded that the subcontracting violated the National Labor Relations Act (Act) under the Board’s *Wright Line* test. The general counsel met his initial burden: union animus was shown by employer knowledge of the union’s organizing activity and proof of unlawful interrogations about it, while the employer failed to show that it would have subcontracted the work in the absence of the

employee's union activity. To the contrary, the proffered reason for the subcontracting – low customer service scores – and failure to obtain adequate staffing levels, did not withstand scrutiny. Customer service scores were low from the time the employer began operating the hotel. Subcontracting did not occur, however, until the employer learned of the union activity. Moreover, when the subcontract ended just months after it began, the employer recruited and trained an entire new staff in secret. This undercut the argument that the inability to staff justified the subcontracting.

The majority disagreed with the dissent's view that the subcontracting did not violate the law because it did not tend to encourage or discourage union membership. Even though almost all the existing employees were hired and were paid at a higher wage rate, some were not. The Act does not require specific, independent evidence of a tendency to encourage or discourage union membership. If the general counsel establishes that the discharges were motivated by union animus, and the employer fails to meet its burden of establishing that it would have taken the same action in the absence of union activity, the violation has been established "as a matter of black letter law." The degree of harm goes to the remedy, not whether a violation occurred. Finally, creation of a joint employer relationship did not matter. Even though the employer understood that it might have a bargaining obligation if the employees selected a union, the employees would have no such knowledge.

**DISSENT** (Member Miscimarra). While Member Miscimarra agreed that the mass refusal to rehire the employees after the subcontract ended abruptly was "egregious misconduct," he disagreed that the original decision to subcontract violated the Act. Proof of unlawful motivation must be based on record evidence. The record, in this case, failed to support an inference that the subcontracting tended to "encourage or discourage" union membership. Virtually everyone remain employed at the same location with the same supervisors. The first election petition was filed after the subcontracting took place. The employer remained a joint employer after the subcontracting by virtue of its continued supervision of the employees. Further, mere interrogation about possible union conduct does not mean that the employer knew of the union conduct. Other facts in the record disregarded or discounted by the majority supported the finding that the subcontracting at issue was not motivated by anti-union animus.

**SIGNIFICANCE:** This case demonstrates that employers must always be cautious when deciding to subcontract during unionization efforts. It is important to be able to establish clear business objectives for the decision which is supported by persuasive evidence.

\*\*\*

***G4S Government Solutions, Inc.***  
**363 NLRB No. 113 (2016)**

---

**ISSUE:** Whether lieutenants of a security force guarding a nuclear power plant are supervisors under Section 2(11) of the National Labor Relations Act.

**HOLDING** (Chairman Pearce and Member Hirozawa). No, the lieutenants do not qualify as supervisors. The lieutenants do not responsibly direct their subordinates, and the record does not

show that they are held accountable for the errors of their subordinates. Additionally, there was only one example of such accountability and it was vague as to whether the lieutenant was disciplined for his own inadequate performance or that of his subordinate. There was only one conclusory statement by a captain in support of this position. Further, lieutenants do not use independent judgment in directing tactical or nontactical situations; the employer has detailed security orders, post orders, and standard directives. The majority again rejected the suggestion that it can consider factors like those proposed by Member Miscimarra in *Buchanan Marine supra*.

According to the majority opinion, the question is not whether the nuclear power plant is without sufficient personnel whose command must be obeyed in the event of an attack. The sole question the Board must answer when making supervisory determinations is whether the party asserting supervisory status has proved that the person issuing the commands possesses one or more of the indicia set forth in Section 2(11) of the Act. This does not include other considerations, such as whether it is plausible to conclude that all supervisory authority is vested in persons other than those whose supervisory status is in dispute. Paraphrasing the statement in *Buchanan Marine*, the majority reiterates that its conclusion does not mean that lieutenants need not be obeyed in the event of an attack. The decision only permits the lieutenants to vote on whether they want to be represented by a union. The majority went on to conclude that the record does not support a finding that lieutenants have authority to assign or discipline.

**DISSENT** (Member Miscimarra). The lieutenants clearly are supervisors. Their direction of security forces determines whether a tactical response succeeds or fails. The chain of command above them is sparse. While 46 lieutenants supervise 330 personnel, there are only 3 or 4 individuals above them on any given shift. The testifying captain who issued discipline against a lieutenant testified that the discipline was issued for the poor performance of the subordinates. It “does violence” to the preponderance of evidence standard to disregard evidence merely because the majority believes the employer should have introduced more evidence. This case illustrates the troublesome aspect of many National Labor Relations Board (Board) decisions relating to supervisory status. The Board tends to evaluate 2(11) factors in isolation and then construe each one so narrowly as to compel a conclusion that nobody is a supervisor. The factors suggested in the dissent of *Buchanan Marine* show that these lieutenants are supervisors.

**SIGNIFICANCE:** This case demonstrates that the current Board majority will continue to go great lengths to conclude that employees are not supervisors. These determinations will be made in defiance of business circumstances and burdens of proof to the contrary. Employers need to be prepared to introduce overwhelming volumes of evidence to establish supervisory status.

\*\*\*

*Leukemia and Lymphoma Society*  
**363 NLRB No. 124 (2016)**

---

**ISSUE:** Must the general counsel provide admissible evidence to defeat a motion for summary judgment?

**HOLDING** (Chairman Pearce and Member Hirozawa). No, the general counsel is not required to provide such evidence. In denying the respondent’s motion for summary judgment, the majority stated in a footnote that they relied on the allegations of pleadings to conclude that a genuine issue of fact existed as to whether the worker at issue was an employee as defined in the National Labor Relations Act (Act). The respondent’s “lengthy ‘record’ providing its version of the facts” did not warrant summary judgment because the region reasserting its position “summarily but sufficiently” complied with the National Labor Relations Board’s (Board) regulations.

**DISSENT** (Member Miscimarra). The dissent would issue notice to show cause as to why the motion should not be granted. The respondent put forth documents and sworn declarations to support its motion. The general counsel responded with arguments claiming that genuine disputes of fact exist. Where a party files a motion that fairly establishes the absence of a genuine dispute of material fact, the general counsel must respond with something more meaningful than conclusory statements that there needs to be a hearing. While the Board’s regulations do not require oppositions to be supported with affidavits or documentary evidence, the general counsel must at least explain, in reasonably concrete terms, why a hearing is required. This would normally require the general counsel to identify material facts that are genuinely in dispute.

**SIGNIFICANCE:** This case demonstrates how difficult it is for an employer respondent to get a summary judgment motion considered under recognized summary judgment standards, much less granted on the merits. The Board majority takes the position that conclusory denials and a restatement of the allegations in the pleadings by the general counsel are sufficient to overcome undisputed sworn affidavits and otherwise admissible evidence.

\*\*\*

***Peacock Productions of NBC Universal Media, LLC***  
**364 NLRB No. 104 (2016)**

---

**ISSUE:** Whether freelance and “run-of-show” producers are statutory supervisors under Section 2(11) of the National Labor Relations Act (Act).

**HOLDING** (Chairman Pearce and Member Hirozawa). The Board held, despite evidence of performing particular tasks such as researching a storyline, preparing a draft production schedule, and purchasing props, the performance of “discrete tasks” do not rise to the level of “significant overall duties” justifying the finding of supervisory status. The majority reasoned, “the authority to assign tasks to an employee does not establish supervisory status if there is ‘only one obvious and self-evident choice.’” The majority goes on to discount the assignment of extra time to crew shifts because, “The sporadic exercise of this authority is simply not a major part of the producers’ job duties.” Finally, the majority found no supervisory status because the employer failed to present evidence that producers were held responsible for the performance of others or that producers were disciplined or suffered any adverse consequences for the deficient performance of those being supervised.

**DISSENT** (Member Miscimarra). Member Miscimarra encapsulates his dissent stating, “[y]et the Regional Director and my colleagues find that the Producers, the highest-in-command individuals assigned to each production, do not supervise any of the workers who work under them.”

Member Miscimarra reminds the majority that Section 2(11) of the Act only requires a statutory supervisor possess the authority to effectively recommend any one of the 12 actions enumerated in the Act. Somewhat tongue in cheek, the dissent finds, “To state the obvious, television programs do not create themselves. Rather, they are produced, and for each individual episode, the person in charge of everything and everybody is—no surprise—the Producer.” Contrary to the majority, Member Miscimarra finds that the employer must only prove the putative supervisor was delegated the authority to direct work (and take corrective action) if necessary and there is a prospect of adverse consequences against the putative supervisor if he or she does not take the necessary steps.

Member Miscimarra restated his position that the determination of supervisory status should take into account the following considerations: “(i) the nature of the employer’s operations, (ii) the work performed by undisputed statutory employees, and (iii) whether it is plausible to conclude that all supervisory authority is vested in persons other than those whose supervisory status is in dispute.” Member Miscimarra laments the majority’s finding which results in a determination that the person responsible for the “production” of the product does not qualify as a supervisor thereby leaving no one on the production site with supervisory authority.

**SIGNIFICANCE:** This case is an example of a decision that, in Member Miscimarra’s words, “fails the ‘test of common sense.’” Unrebutted evidence of producers performing some of the Section 2(11) criteria was discounted by the majority because it could have been more detailed or supported by additional facts. The majority reaches the untenable conclusion that no one on the job site serves as a supervisor or is responsible for the day-to-day success of the production process. The majority seems to reject the “preponderance of the evidence” standard and hold the employer responsible for a burden greater than otherwise required.

\*\*\*

***Southern Bakeries, LLC***  
**364 NLRB No. 64 (2016)**

---

**ISSUE:** Whether the respondent violated Section 8(a)(1) of the National Labor Relations Act (Act) by allegedly disparaging the union, threatening plant closure, and stating that bargaining would be futile.

**HOLDING** (Chairman Pearce and Member McFerran). The National Labor Relations Board (Board) held the respondent’s campaign statements must be read in context of other unfair labor practices thereby elevating certain statements to unlawful threats. During a decertification campaign, the respondent labeled the union’s campaign statements as “incredible,” “false,” “misleading,” and “frightening.” The respondent highlighted a recent labor dispute resulting in the closure of the targeted business and stated the Union “appears to have plans to take [the

employer's] employees out on strike.” The majority held the statements, read in context, threatened the union would “recklessly place jobs in jeopardy and that continued representation would lead to strikes and plant closure.”

The majority found the respondent's captive audience speech included statements linking the union to the closure of other companies, characterizing the union as untrustworthy and powerless in negotiations, labeling the union as prone to engaging in strikes resulting in job losses, and blaming the union for the represented employees receiving lower wages than non-represented employees. The majority found these kinds of statements in aggregate would reasonably be understood as a threat of plant closure.

The majority also determined the respondent's description of the union as powerless, capable of making only empty promises, and dependent on what the respondent would “voluntarily” give contrasted against the process of good faith negotiations, read in context, were unlawful statements of futility.

Finally, the majority held the respondent's orally requesting to be informed of any harassment or threats, whether employees were for or against the union, was an unlawful rule promulgated in response to union organizing activity and limiting of the employees' right to engage in legal organizing activity.

**DISSENT:** Member Miscimarra reiterated the protections of Section 8(c) of the Act which provides “[t]he expressing of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.” His dissent criticizes the majority's opinion for improperly inferring unlawful motivation where the respondent accurately shared facts and permissibly expressed opinions. Member Miscimarra criticizes the opinion for punishing the employer because of inferences employees may draw from otherwise legal statements.

**SIGNIFICANCE:** The Board significantly curtails employer protections provided in Section 8(c) allowing employers to share views, arguments, and opinion. Longstanding precedent protects employers' rights of free speech as long as the communications do not contain threats of reprisal or force or promise of benefit. The decision gives the Board leeway into finding violations of the Act based upon unstated conclusions employees may extrapolate from an employer's otherwise protected campaign communications.

\*\*\*

***Total Security Management Illinois 1, LLC***  
**364 NLRB No. 106 (2016)**

---

**ISSUE:** Whether the employer violated the National Labor Relations Act (Act) by discharging three employees who were represented by a union but not yet covered by a collective-bargaining agreement without first giving the union notice and opportunity to bargain about the discharge.

**HOLDING** (Chairman Pearce, Members Hirozawa and McFerran). An employer violates Section 8(a)(5) of the Act by unilaterally changing terms and conditions of employment for employees represented by a union. “The imposition of discipline on individual employees alters their terms or conditions of employment and implicates the duty to bargain if it is not controlled by preexisting, nondiscretionary employer policies or practices.” An employer with a certified or recognized union must provide “notice and the opportunity to bargain” to the union before imposing discretionary discipline on individual employees unless the parties have negotiated a collective bargaining agreement or otherwise agreed to a disciplinary process. In exigent circumstances where an employer has a “reasonable, good-faith belief that an employee’s continued presence on the job presents a serious, imminent danger to the employer’s business or personnel,” the employer may impose the discipline prior to bargaining provided the employer provides immediate notice to the union with an opportunity to bargain over the disciplinary decision and its effects.

The pre-imposition obligation to bargain only arises for “serious” disciplinary actions such as suspension, demotion, and discharge. Post-imposition bargaining is required over lesser disciplinary actions insofar as they have a “material, substantial, and significant impact” on the terms and conditions of employment.

**DISSENT** (Member Miscimarra, concurring in part and dissenting in part). Member Miscimarra denounced the decision articulating that the majority created a “discipline bar” and “discipline bargaining” governed by “complicated rules, qualifications, and exceptions.” The decision creates a complicated system leaving many unanswered questions, which will result in additional uncertainty and conflict. The decision precludes the application of unchanged disciplinary standards and creates an obligation to bargain resulting in a process that is more restrictive than the typical process in a negotiated collective bargaining agreement.

The National Labor Relations Board (Board) left unanswered critical questions, which will undoubtedly lead to more, not less, industrial harmony. Without guidance, employers must answer the following questions:

- (i) what constitutes a sufficient opportunity for pre-implementation discipline bargaining;
- (ii) what constitutes a ‘fixed’ versus ‘discretionary’ aspect of discipline;
- (iii) whether a ‘progressive disciplinary system’ exists, in situations involving ‘lesser’ discipline, that requires pre-implementation discipline bargaining rather than post-implementation discipline bargaining;
- (iv) in what circumstances does an employee’s continued presence involve ‘a serious, imminent danger to the employer’s business or personnel’ (permitting post-implementation discipline bargaining); and
- (v) where, for example, an employee has killed, assaulted, or raped a coworker, resulting in the employee’s immediate discharge, in what way does the Board majority contemplate the employer can ‘immediately’ engage in post-implementation bargaining in good faith about ‘the possibility of rescinding’ the discipline?

**SIGNIFICANCE:** Employers with recently certified unions that have not yet reached a collective bargaining agreement must scrutinize every disciplinary action to determine when, if, and how discipline will be imposed.

\*\*\*

***Building Contractors Association, Inc.***  
**364 NLRB No. 74 (2016)**

---

**ISSUE:** Whether a group of employers that designated a third party to negotiate and enter into Section 8(f) collective bargaining agreements should be considered an appropriate bargaining unit for the purposes of a representation election under Section 9(b) of the National Labor Relations Act (Act).

**HOLDING** (Chairman Pearce and Member Hirozawa). The National Labor Relations Board (Board) denied review of a Decision and Direction of Election permitting an election in “a multiemployer unit consisting of all employees employed by member-employers of the Association who designated the Association to bargain on their behalf with respect to the Petitioner.” The majority determined the members of the association had expressed their “unequivocal intent” to be bound by group bargaining without distinguishing between an 8(f) and a 9(a) bargaining relationship. Because the agreement to be represented for the purposes of collective bargaining was not limited to an 8(f) relationship, there was a long history of being represented by the association, and the association agreement acknowledged a union could convert an 8(f) relationship into a 9(a) relationship by showing of majority status, the petitioned-for unit was appropriate.

**DISSENT** (Member Miscimarra). Member Miscimarra dissented arguing the Board should have granted review of the Decision and Direction of Election. The evidence did not reveal an “unequivocal intent” to be bound for the purposes of 9(a) bargaining and the association had specifically rejected a union proposal converting the relationship into a 9(a) relationship during the last two rounds of negotiations. Further, the proposed unit included 16 members of the association who did not employ any bargaining unit employees at the time of the petition.

The Decision and Direction of Election ignores the principle that “the appropriate unit normally will be the single employer’s employees covered by the agreement.” The merger of employers into a multi-employer unit for the purposes of election and bargaining does not protect the individual employer’s employees’ right of a free choice of representation. The decision ignores the meaningful distinctions between an 8(f) bargaining relationship and a 9(a) relationship.

**SIGNIFICANCE:** Employers in multi-employer 8(f) bargaining groups need to be aware of the potential impact of the relationship. Members of such associations must review the terms and conditions of the association’s agreement as well as the terms and conditions of the collective bargaining agreements to identify any indications of possible conversion of the 8(f) bargaining relationship into a 9(a) relationship.

\*\*\*

***UniQue Personnel Consultants, Inc.***  
**364 NLRB No. 112 (2016)**

---

**ISSUE:** Whether an employee seeking advice from a coworker about how to respond to discipline the employee received for violating the dress code was protected concerted activity shielding the employee from interrogation and termination.

**HOLDING** (Chairman Pearce and Member Hirozawa). The charging party's conduct was both concerted and protected and, therefore, her interrogation and termination violated Section 8(a)(1) of the National Labor Relations Act (Act). Because the charging party sought advice from a coworker about how to respond to a discipline stemming from a policy that applied to *all* employees, the National Labor Relations Board (Board) determined the conduct was "concerted." The Board also found the activity to be "protected" because the "goal" of the activity was to improve the terms and conditions of employment.

**DISSENT** (Member Miscimarra). Section 8(a)(1) makes it illegal "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." Section 7 protects "concerted" activity for the "purpose" of "mutual aid or protection." The charging party did not "initiate, induce, or prepare for group action." Because the charging party's conduct was exclusively for only her benefit and for seeking advice only for how she should respond to her discipline, the activity was neither concerted nor protected. Member Miscimarra refers back to the standards under which protected concerted activity is measured. To find concerted activity, "It must appear at the very least it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees." Further,

Activity which consists of mere talk must, to be protected, be talk looking toward group action. If its only purpose is to advise an individual as to what he could or should do without involving fellow workers or union representation to protect or improve his own status or working position, it is an individual, not a concerted, activity, and, if it looks forward to no action at all, it is more than likely to be mere griping.

**SIGNIFICANCE:** Individual actions which may, on the surface, be limited to a single employee's issue, must be assessed in light of the Board's lenient standards finding protected concerted activity.

\*\*\*

***American Baptist Homes of the West d/b/a Piedmont Gardens***  
**364 NLRB No. 13 (2016)**

---

**ISSUE:** Whether the employer violated the National Labor Relations Act (Act) by hiring permanent replacements for bargaining unit employees who engaged in an economic strike.

**HOLDING** (Chairman Pearce and Member Hirozawa). A 2-1 National Labor Relations Board (Board) majority found that an employer violated Sections 8(a)(1) and (3) of the Act by hiring permanent replacements for employees who participated in an economic strike. The majority

relied on evidence that the employer wanted to teach the strikers and the union a lesson and hoped to avoid future strikes to conclude that the employer had hired the replacement workers for an “independent unlawful purpose,” which rendered unlawful the employer’s otherwise protected right to replace permanently economic strikers. Chairman Pearce and Member Hirozawa opined that Board and Supreme Court precedent do not require the General Counsel to demonstrate the existence of an unlawful purpose extrinsic to the strike at issue, but must only present evidence that the employer’s decision to hire permanent replacements was motivated by a purpose prohibited by the Act.

**DISSENT:** Member Miscimarra dissented pointing out that the Supreme Court and the Board had previously recognized an employer’s legal right to replace economic strikers at will, and that for more than 50 years, the Board had found the motive for such replacements immaterial, absent evidence of an independent unlawful purpose. Member Miscimarra explained that an “independent unlawful purpose” “must relate to something other than the employer’s sentiments and objectives concerning the strike itself.” Member Miscimarra said the majority was conflating the rule with the exception by making an employer’s motive *relevant*, ignoring “the reality that—when engaging in warfare, including economic warfare—the opposing camps *intend to injure one another* in hopes of forcing the other side to surrender” and essentially overruling decades of Board precedent. Member Miscimarra felt the majority was improperly changing the balance of interests struck by Congress in the Act in a way that would sharply curtail the use of permanent replacements as a legitimate economic weapon.

**SIGNIFICANCE:** This is another decision that effectively overrules decades old precedent. It signals that an employer resorting to hiring permanent replacements may no longer rely on the established rule that its reasons for doing so are irrelevant. Employers must now be prepared to defend the motives for such decisions under Board scrutiny and possibly have the hiring of permanent replacements deemed by the Board to have been improper because of an “unlawful purpose.”

\*\*\*

***IMI South, LLC, d/b/a Irving Materials***  
**364 NLRB No. 97 (2016)**

---

**ISSUE:** Whether the employer violated the National Labor Relations Act (Act) by refusing to reinstate employees who engaged in an economic strike but made an unconditional offer to return to work.

**HOLDING** (Chairman Pearce and Member Hirozawa). A 2-1 National Labor Relations Board (Board) majority held that an employer violated Sections 8(a)(1) and (3) of the Act by failing to reinstate employees who had participated in an economic strike. The union made an unconditional offer for the striking employees to return to work, but the employer refused to reinstate them. The employer had transferred some of the work performed by the striking employees to another location and permanently replaced other employees. Unlike the administrative law judge (ALJ) who concluded the union had waived its right to bargain over the transfer of work and credited the testimony of the employer’s witnesses regarding the permanent

nature of the replacement workers, the majority held the union had not clearly and unmistakably waived its right to bargain. The majority also discredited the employer's witnesses and concluded the employer had failed to prove that the employees hired during the strike were permanent replacements because it did not show that there was a mutual understanding between the employer and the replacement workers that the nature of their employment was permanent. According to the majority, the employer's subjective intent is not sufficient to meet its burden. As a remedy, the majority ordered the employer to rescind the transfer of work, to reinstate with back pay the bargaining unit employees who had been replaced, and to bargain with the union over any similar future decisions.

**DISSENT** (Member Miscimarra). Member Miscimarra dissented and found the employer's transfer of work was not a mandatory subject of bargaining because labor costs played no role in the decision. Even if the transfer were a mandatory subject, Member Miscimarra concluded that the record evidence supported the ALJ's conclusion that the union had waived any right to bargain over the decision or effect of the work transfer, including the loss of bargaining unit work. Finally, Member Miscimarra noted that the majority ignored the General Counsel's express concession that the workers hired by the employer were permanent replacements.

**SIGNIFICANCE:** This decision highlights the Board's efforts to protect the integrity of bargaining units and promote "meaningful" collective bargaining. Employers considering decisions that may eliminate or diminish a bargaining unit, even if not motivated by labor costs, may wish to provide the union with notice before implementing the decision. Moreover, employers contemplating the use of permanent replacement employees should ensure there is a written record denoting the permanent nature of their employment.

\*\*\*

***Public Service Company of New Mexico***  
**364 NLRB No. 86 (2016)**

---

**ISSUES:** Whether the employer had a duty to provide the union with a copy of its agreement with a supplemental labor provider and whether the employer was obligated to provide the union with documents created by its in-house counsel during an investigation of employee misconduct.

**HOLDING** (Chairman Pearce and Member Hirozawa). A 2-1 National Labor Relations Board (Board) majority held that the employer violated Section 8(a)(5) of the National Labor Relations Act (Act) by failing to provide a union with a copy of its contract with a company that provided the employer with supplemental workers. The collective bargaining agreement allowed the employer to use supplemental workers for up to four months at a time, so long as such workers' pay was consistent with that of bargaining unit employees. The union suspected the employer had utilized a sole supplemental worker for more than four months and, therefore, requested payroll records for that worker *and* a copy of the employer's contract with the supplemental labor provider. The employer provided the payroll records but not a copy of its contract, contending the contract was not relevant to the subject matter of the union's grievance, i.e., the duration of the supplemental worker's employment.

The General Counsel conceded, and the administrative law judge (ALJ) found, that the employer's contract with the supplemental labor provider was not presumptively relevant. The judge then concluded the General Counsel had failed to establish its relevance to the grievance, particularly given there was no evidence of collusion between the employer and the supplemental labor provider and there was "a complete absence of evidence of an on-going pattern of similar . . . use of supplemental employees." The majority nonetheless reversed and endorsed the union's claim that the contract might have "shed light" on whether the employer had exceeded the four-month limit intentionally or negligently, which the majority felt was relevant to the union's decision whether or not to pursue the grievance.

In addition, the majority found, contrary to the ALJ, that the employer violated the Act by failing to provide information, including interview notes and the investigation report created by and at the direction of the employer's in-house counsel while investigating an incident where a union steward engaged in undeniably insubordinate and disruptive conduct by interfering with an employee training session and refusing to comply with multiple management requests that he leave the training.

Even though the Board found the employee's conduct unprotected by the Act, and the reason for the subsequent investigation was apparent to everyone, the majority nevertheless agreed with the General Counsel's assertion that the information was needed to allow the union to assess whether the employer's investigation "was initiated and undertaken to discriminate against [the employee] in violation" of the collective bargaining agreement, a claim which the ALJ had discredited. The majority further concluded that the employer had failed to timely raise or establish that the requested interview notes and investigation report were protected from disclosure by the work product privilege. According to the majority, while the employer's managers had always maintained that the documents were "confidential," the in-house labor and employment counsel herself had not "designated the notes and reports as protected at an earlier state in the investigation." The majority found the fact that the investigation was directed by counsel insufficient to demonstrate that it was not routine or undertaken in the normal course of business. Finally, without explaining what would have been sufficient, the majority found based on the in-house counsel's hearing testimony (which the judge had credited), that from the outset of the investigation, her role was to determine the appropriateness of discipline and to limit the potential legal liability related to the employee's threatened legal action and a pending unfair labor practice charge by the union was not enough to establish the work product privilege.

**DISSENT** (Member Miscimarra). In dissent, Member Miscimarra agreed with the ALJ's conclusions that the General Counsel and the union had failed to establish that employer's contract with a supplemental labor provider was relevant to any of the union's functions as the employees' bargaining representative, particularly given the narrow allegation of the grievance that a sole supplemental worker had been employed beyond the four-month limitation contained in the parties' collective bargaining agreement. Member Miscimarra also dissented from the majority's finding of a violation in the employer's refusal to provide documents it felt were "confidential" and protected by the work product privilege. Member Miscimarra agreed with the judge that the union's initial request was premature, but he found it unnecessary to pass on the question of whether the documents were privileged. Citing Board precedent, he explained that because the union had filed an unfair labor practice charge after its initial request, its renewed

request constituted an inappropriate attempt at discovery in what had become a Board matter, therefore obviating the employer of any duty to provide the information.

**SIGNIFICANCE:** This case serves as an example of how far the Board is willing to go to construe facts in a manner that supports a union's right to obtain access to an employer's information and documents, even those of marginal, if any, relevance and those seemingly protected by privilege. Employers should be mindful of the Board's predisposition, and to the extent possible, consider all potentially palatable compromises when faced with broad and intrusive union information requests.

\*\*\*

***Graymont PA, Inc.***  
**364 NLRB No. 37 (2016)**

---

**ISSUE:** What specificity is required in management rights clauses to constitute a "clear and unmistakable" waiver of future bargaining obligations.

**BACKGROUND:** In addition to "no strike" clauses insuring labor peace, one of the few benefits an employer derives from a collective bargaining agreement is a broad "management rights clause" that authorizes the employer to take certain unilateral actions without first bargaining with the union. Naturally, in negotiating collective bargaining agreements, unions want to limit the scope of management rights clauses while employers seek rights to take unilateral action as broad as possible. Subsequently, employers argue that terms negotiated constitute the union's "clear and unmistakable" waiver of bargaining.

In *Graymont*, the collective bargaining agreement contained a broad management rights clause that provided, in part that, relying on the language of the management rights clause, Graymont announced its intention to unilaterally institute changes to its work rules, absenteeism policy, and progressive discipline which were outside the collective bargaining agreement. The employer agreed to meet with the union to discuss the proposed changes to existing policy, but denied that it had an obligation to bargain or provide information about those changes requested by the union. As a result of the discussions, Graymont made a few changes requested by the union and thereafter instituted the new policies.

The union filed charges with the National Labor Relations Board (Board) alleging violations of Section 8(a)(1) and (5) of the National Labor Relations Act (Act) for failure to bargain and provide requested information for bargaining.

**HOLDING** (Chairman Pearce and members Hirozawa and McFerran). The Board majority sustained the union's charges over the dissent of Board Member Miscimarra. The Board found that even given the broad management rights clause, the union had not "clearly and unmistakably" waived its right to bargain. The Board found that in the management rights language that the fact that the employer had reserved "the right to make and enforce rules," including standards of conduct and progressive discipline, did not contain sufficient specificity to constitute the union's clear and unmistakable waiver to bargain such terms and conditions. The

Board based its decision on the fact that the management rights clause did not specifically reference work rules, absenteeism, or progressive discipline, and there was no evidence that the parties discussed such policies. Because the Board found a duty to bargain, it also found a duty to provide the requested information.

Further, the Board overturned its decision in *Raley's Supermarkets and Drug Centers*, 349 NLRB 26 (2007) and its progeny that required a complaint allegation that an employer failed to inform the union that it did not have bargaining information sufficient to meet the union's request before finding a violation of the Act.

**DISSENT:** In dissent, Member Miscimarra argued that the broad language of the management rights clause agreed to by the union in collective bargaining justified the employer's decision to unilaterally institute policy changes.

**SIGNIFICANCE:** Employers frequently make concessions in collective bargaining to attain a broad "no strike" clause and broad management rights. If such language does not mean what it says, employers are less likely to agree to other bargaining demands. The Board's decision strikes at the heart of collective bargaining and what constitutes "clear and unmistakable" waivers. The Board's decision forces employers to be even more explicit as to what exactly is included as "management rights" in collective bargaining agreements and to be able to demonstrate that all subjects were discussed.

\*\*\*

***URS Federal Services, Inc.,***  
**365 NLRB No. 1 (2016)**

---

**ISSUE:** Whether hyper-technical non-compliance with the National Labor Relations Board's (Board) new representation election rules regarding service of the *Excelsior* list, where the union suffered no prejudice, should be sufficient considered alone to overturn the union's overwhelming election loss?

**FACTS:** The Board's revised representation case (R-case) election rules, which became effective on April 14, 2015, require, among other things, that when an employer receives a union petition for election the employer must transmit electronically within two business days before a stipulated election agreement or direction of an election, a list of eligible voters – commonly referred to as the "*Excelsior*" list – to the Regional Director and "other parties", including the petitioning union.

In this case, the employer submitted the *Excelsior* list to the Regional Director early, even before the two day requirement, but failed to submit it to the petitioning union. The Regional Director informed the employer of its oversight and forwarded the *Excelsior* list to the union which was received on the day it was due, before the two day deadline expired. In other words, the union received timely service of the *Excelsior* list and thus could have suffered no prejudice.

The union lost the election overwhelmingly by an employer vote of 91 – 54, and thereafter filed a timely objection based on the technical failure of the employer to serve the union directly with the *Excelsior* list. The Regional Director dismissed the union’s objection since the union received the *Excelsior* list the day it was due, and therefore suffered no harm from this technical violation of the Board’s new election rules, and especially in light of the overwhelming magnitude of the employees’ votes in the union's election loss.

**HOLDING** (Chairman Pearce and Member McFerran). The Board Majority reversed the Regional Director's decision and by 2 – 1, over Board Member Miscimarra’s Dissent, overturned the election results and scheduled a new election. The Board Majority held that the new election rules are “mandatory” and therefore the Regional Director had no discretion to excuse the employer's technical violation.

**DISSENT.** Board Member Miscimarra dissented, arguing that the new election rules did not overturn long-standing *Excelsior* law precedent nor the Board’s traditional reluctance to overturn election results lightly. He further argued that since the petitioning union timely received the list of voters the day it was due, it could demonstrate no harm or prejudice resulting from the fact that it was sent by the Board's regional office rather than the employer. Therefore, he concluded, the Regional Director properly exercised his discretion in excusing the technical violation.

**SIGNIFICANCE:** The Board’s decision in this case is a perfect demonstration of its “form over substance” bias in favor of overturning union election losses, and scheduling re-run elections, wherever possible even for minor, technical violations where the union can prove no harm. The future Trump Board may be a little more flexible, but until then employers are advised not to deviate from a strict interpretation of the election rules.

## **XXI. Related Issues**

---

In addition to case law decisions and regulations issued directly by the National Labor Relations Board (NLRB or Board) there were several federal regulations developed by other agencies during the Obama administration that involved the National Labor Relations Act. First were the implementing regulations under the so-called “Fair Pay and Safe Workplaces” Executive Order 13673, which would force government contractors to report labor law violations under 14 different laws and executive orders (and equivalent state laws) that occurred within the previous three years from the time of bidding on the federal contract. Sometimes referred to as the “blacklisting rule,” this meant that government contractors would have had to report National Labor Relations Act (NLRA or Act) violations, as well as alleged violations in NLRB complaints as “administrative merits determinations” for the consideration of officers with bids for the award of federal contracts. Such NLRA “violations,” as well as violations of any of the other 13 federal labor and employment laws enumerated in the regulation, would have been considered by the government’s federal contracting officers for purposes of determining eligibility for the award of federal contracts, or for suspension or debarment from future contracts. The Federal Acquisition Regulatory Council (FAR Council) and the Department of Labor (DOL) issued final regulations and guidance, respectively, on August 24, 2016.

The second regulatory issue relating to the NLRA would have revised the “advice exemption” under Section 203(c) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA) to broaden the disclosure and reporting requirements for all employers, as well as outside third parties, such as law firms, consultants, and even trade associations. The new rule greatly expanded the scope of “persuader activities” that triggered reporting, and a great deal of the advice provided to employers potentially relating to “persuasion” would have been reportable, whether the attorney or consultant had direct communications with employees (as previously required) or not. Moreover, reporting would have been required for “all labor relations services for all clients,” even those services that did not involve communications with employees, under penalty of criminal law and even imprisonment. The new “persuader rule” was issued on March 24, 2016.

The mandatory reporting of employer confidences without clients’ informed consent violated the American Bar Association’s Code of Professional Responsibility and the codes of most state bar associations, thereby subjecting lawyers to bar association discipline up to and including disbarment. However, failure to report fully would have exposed lawyers to criminal prosecution under the LMRDA. By making it more difficult for employers to find legal counsel willing to undergo this “Hobson’s Choice,” the proposed regulations would have deprived employers—especially small businesses without in-house legal and labor relations counsel—of critically needed services to respond to union election petitions within seven days under the NLRB’s new “quickie” election rules and to receive counsel on lawful communications with employees during the election campaign.

Both of these regulations are considered in more depth below.

## **A. “Fair Pay and Safe Workplaces” E.O. 13673**

### **THE OBAMA ADMINISTRATION’S CONTRACTOR BLACKLISTING PROGRAM FOR LABOR LAW “VIOLATIONS”**

President Obama’s 2014 “Fair Pay and Safe Workplaces” Executive Order (EO 13673) – often referred to as the “blacklisting” regulation – aimed to disqualify federal contractors, on business integrity and ethics grounds, from being awarded government service and construction contracts or continuing to perform contracts they would otherwise be presently “responsible” to perform, due to “violations” of 14 enumerated federal employment laws.<sup>18</sup> The blacklisting regulation imposed new reporting requirements on contractors and threatened to distort and reshape the existing enforcement relationship between federal employment agencies and government contractors. As set forth in more detail below, the overly-broad definition of “violations” and potential union and NLRB pressure to settle cases made government contractors covered by the NLRA particularly vulnerable to the blacklisting regulation.

#### The Blacklisting Reporting Process

Pursuant to the blacklisting regulation, as a condition of bidding on most General Services Administration, Department of Defense, and National Aeronautics and Space Administration service, and construction projects in excess of \$500,000, government contractors would have to report on a government website every violation of the 14 laws – including NLRA violations – rendered against them in the three years prior to their bids. Failure to report these violations or to provide violation-related, follow-up information requested by the contracting agency would constitute a basis for disqualifying the bidder. Moreover, reported violations would provide a basis to pass over the bidder or recommend that debarment proceedings be initiated against it. Contractors awarded work would also have a continuing duty to update their violation status and report new violations every six months during the life of the project. These supplemental disclosures would be evaluated by the contracting agency and could provide a basis for cancelling the contract.

Thus, contracting agencies with no expertise in private-sector labor relations and no authority to enforce statutes such as the NLRA would be charged with quickly evaluating the severity of each bidder’s reported violation(s) by applying a set of severity standards described in accompanying DOL guidance — “repeated,” “serious,” “willful,” and “pervasive” — that are not contained in the NLRA or the other 13 laws (with some very rare exceptions). Contracting agencies would be in the business of sorting bidders (and existing contractors) into categories based on their reported violations (i.e., “responsible,” “non-responsible,” and “needs improvement”). Given the

---

<sup>18</sup> The 14 laws are the National Labor Relations Act (NLRA); Fair Labor Standards Act (FLSA); Occupational Safety and Health Act (OSHA); Migrant and Seasonal Agricultural Worker Protection Act; Davis-Bacon Act; Service Contract Act; Executive Order 11246; Section 503 of the Rehabilitation Act of 1973; Vietnam Era Veterans’ Readjustment Assistance Act; Family and Medical Leave Act (FMLA); Title VII of the Civil Rights Act of 1964; Americans with Disabilities Act of 1990 (ADA); Age Discrimination in Employment Act of 1967 (ADEA); Executive Order 13658 (establishing a Minimum Wage for Contractors).

unprecedented breadth of the program, most firms would have found themselves in the last category, which amounts to procurement limbo.

Bidders (and existing contractors) would be afforded the opportunity, through the submission, for example, of a “responsibility” position statement, to make the case that they should be permitted to compete for the contract (or continue performing) despite their reported violation(s). At the same time, however, the contracting agency would be required to consider information from “any other source,” including materials furnished by a third party that may be designed to undercut the bidder’s (or existing contractor’s) claim that it is a “responsible source.” The “any other source” mandate provided unions with a powerful tool to channel information and gain access to the contracting agency for purposes that had little to do with federal procurement and business ethics, while the contracting agency determined the “responsibility” of a bidder that was the target of an organizing campaign or a union signatory enmeshed in contentious contract negotiations.

### Labor Compliance Agreements

Bidders in procurement limbo would also be afforded the opportunity to enter into labor compliance agreements (LCA) with enforcement agencies like the NLRB to remedy and mitigate their reportable violations. The LCA provided an off ramp through which a contracting agency could pull back from having to make a difficult and expeditious responsibility determination and instead find that the contractor had a satisfactory record of integrity and business ethics provided that it entered into or enhanced an existing LCA.

The LCA mechanism could have had the effect of pressuring firms to abandon potentially viable defenses to reportable violations if the firms wanted to stay in contention for new government construction or service work, or continue their work on previously-awarded contracts. Firms would face substantial pressure to “negotiate” LCAs that surrendered their legal rights to continue defending reportable violations.

Significantly, references above to the reporting of labor law “violations” include not just arbitration awards and civil judgments involving violations of the enumerated federal laws, but also include non-adjudicated “administrative merits determinations,” as well. Such “administrative merits determinations” are essentially the first step in the administrative enforcement process and would include: OSHA citations, EEOC cause findings, OFCCP notices to show cause, Wage and Hour Division findings, and NLRB complaints, among others.

### Issues Specific to Alleged NLRA Violations

Reporting of “administrative merits determinations” would have been particularly troublesome in the NLRA arena. This is because the NLRB General Counsel – in an effort to reverse, change or shape the law – often issues complaints that are not supported by, or are directly contrary to, the law. *See, e.g., Purple Communications*, 361 NLRB No. 43 (2014). Additionally, the NLRB oftentimes issues decisions that directly contravene the law as found by reviewing federal circuit courts. *See, e.g., Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014). Further, in order to obtain judicial review of critical matters decided under Section 9 of the NLRA (e.g., whether the NLRB

has correctly determined a proposed bargaining unit, whether individuals or entire classifications of workers are included within a bargaining unit, or even fall within the NLRA's jurisdiction), the NLRA actually requires the employer to commit a "technical" unfair labor practice by refusing to bargain and awaiting an enforcement action by the NLRB for violation of the NLRA. *Wis. Dep't of Indus., Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 288 n.5 (1986). The proposed regulations do not provide a safe harbor from having to report these "violations."

Moreover, companywide NLRA "violations" must be reported, even if the violations are not connected to the bidder's work in the public sector. And it is unclear if an affiliate's violations must be reported along with the bidding firm's own violations. Finally, labor unions would have been able to considerably increase the pressure on government contractors to enter into early settlements of alleged NLRA violations solely to avoid the reporting requirement and its potential negative consequences.<sup>19</sup>

### Blacklisting's Demise

Because the blacklisting rule treads upon well-established doctrines of due process and separation of powers – among other legal infirmities – it was only a matter of time before it was challenged in federal court. On October 24, 2017 – before the initial components of the rule went into effect – Marcia Crone, U.S. District Judge for the Eastern District of Texas, granted a preliminary injunction blocking the government from enforcing most aspects of the blacklisting rule. Although the government has appealed this decision, the Trump Administration is not expected to defend the regulation further. Indeed, by the time this treatise goes to press, it is anticipated that President Trump will sign a Congressional Review Act resolution to rescind the blacklisting regulation in its entirety.<sup>20</sup> As a result, not only will the blacklisting regulation be completely repealed, but the federal government will be precluded from issuing a "substantially similar" regulation in the future.

## **B. "Persuader Activity"**

On March 24, 2016, the U.S. Department of Labor (DOL) issued final regulations revising the "advice exemption" and requiring employers and consultants (including lawyers) to report labor relations advice and services under the Labor-Management Reporting and Disclosure Act's "persuader activity" regulations. The effective date of the new regulations was April 25, 2016. The rule was to be applicable to arrangements and agreements as well as payments (including reimbursed expenses) made on or after July 1, 2016.

---

<sup>19</sup> There are other troubling aspects of the blacklisting regulations. For example, the regulations would bar employers seeking contracts of \$1 million or more from requiring their employees to enter into mandatory arbitration agreements to resolve disputes "arising out of Title VII of the Civil Rights Act or any tort related to or arising out of sexual assault or harassment." The regulations also require federal contractors to provide their employees information concerning their hours worked, overtime hours, pay, and any additions to, or deductions made, from their pay, as well as requiring employers to notify any worker in writing whether they are being treated as an independent contractor rather than an employee.

<sup>20</sup> The DOL Guidance will also have to be rescinded, but that can be done with very little difficulty since it is only guidance

The new regulations greatly expanded the scope of reportable persuader activity for employers and outside labor relations consultants, including lawyers, and significantly limited the advice exemption from reporting contained in the LMRDA.

### **Public Disclosure of “Persuader Activity”**

“Persuader activity” as defined by Section 203(b) of the LMRDA must be reported by labor relations “consultants” (including lawyers, law firms, public relations firms, and even trade associations) on Form LM-20 within 30 days of the engagement or agreement to provide persuader services, and by “employers” on Form LM-10 within 90 days after the end of the fiscal year in which the employer engaged persuader services. Failure to file, or the filing of false or incomplete information, exposes the consultant and employer to civil and criminal penalties.

### **The History of Reportable “Persuader Activity” and the Advice Exemption**

The persuader rule significantly narrowed the LMRDA Section 203(c) “advice exemption” from mandated disclosure and reporting by employers and outside labor relations consultants. The rule dramatically expanded the scope of reportable persuader activity far beyond its original meaning when the LMRDA was enacted in 1959.

For over 50 years, the LMRDA persuader activity regulations required reporting *only* when labor relations consultants were hired to communicate *directly* with employees to persuade them concerning unionization. The regulation, consistent with the original intent of Congress, was designed to prevent the deceptive practice whereby “middlemen” were hired to pose as employees—when, in fact, their role was to “persuade” fellow employees not to join a union—in order to report the results back to the employer. These former persuader activity regulations worked—they prevented undisclosed persuader activities where outside consultants communicate directly with employees.

Congress also included Section 203(c), which exempted the reporting of “advice” to employers by outside consultants. This “advice” included legal services by lawyers that did not involve direct communications with employees and that an employer was free to accept or reject.

### **What the New Rule Would Make Reportable**

The new revisions to the persuader regulations would require consultants that were formerly exempt from reporting under Section 203(c) to report a broad scope of labor relations advice and services, even though they do not involve direct communications with employees. Reportable advice and services would now include:

#### *I. Direct Persuasion*

According to the final rule, “[t]he obligation to report direct persuasion by consultants remains.” An example of direct persuasion is direct communication with an employee with an object to persuade the employee about how to exercise his or her representation or collective bargaining rights.

## *II. Indirect Persuasion*

**1. Planning, Directing, or Coordinating Supervisors or Managers.** According to the final rule, it is a reportable activity for a consultant to plan, direct, or coordinate activities (including meetings or less structured interactions with employees) that supervisors undertake if the consultant's object was to persuade.

**2. Providing Persuader Materials.** The final rule states that it is a reportable activity for a consultant to provide materials to or communicate with an employer, with an object to persuade, for dissemination or distribution to employees.

### *Reportable Examples:*

- drafting or selecting persuader materials for an employer to disseminate or distribute to employees; and
- revising (including editing, adding, or translating) employer-created materials “only if an ‘object’ of the revisions is to enhance persuasion, as opposed to ensuring legality.”

### *Nonreportable Examples:*

- The use of persuader materials, which were not created specifically for the employer, “such as videos or stock campaign literature” is not reportable unless the consultant helps the employer select materials.
- The use of literature that a consultant created previously, without any knowledge of the employer, labor union, industry, or employees is not reportable if the consultant also does not have a role in disseminating the literature.

**3. Conducting a Seminar for Supervisors.** The final rule includes a number of reporting rules related to seminars that cover a “labor-management relations matters, including how to persuade employees concerning their organizing and bargaining rights.”

### *Reportable Examples:*

- *Labor relations consultants* are required to report their activity if they develop or assist employers attending such seminars “in developing anti-union tactics and strategies for use by the employer, the employers’ supervisors or other representatives.”
- *Trade associations* are required to report their activity surrounding seminars “if they organize and conduct the seminars themselves, rather than subcontract their presentation to a law firm or other consultant.”

### *Nonreportable Examples:*

- The final rule does not impose a reporting obligation on employers whose representatives attend such seminars.

- The final rule does not impose a reporting obligation on consultants who conduct a seminar without developing or assisting employer-attendees in developing a plan to persuade their employees.
- The final rule does not impose a reporting obligation on a consultant who “merely makes a sales pitch to employers about persuader services it could provide.”

**4. Developing or Implementing Personnel Policies or Actions.** The final rule states that reporting is required if a “consultant develops or implements personnel policies or actions for the employer with an object to persuade employees.”

*Reportable Examples:*

- Consultants must report their identification of employees for discipline, reward, “or other targeting” on the basis of the employee’s “involvement with a union representation campaign or perceived support for the union.”
- Consultants must report their “development of a personnel policy during a union organizing campaign in which the employer issues bonuses to employees equal to the first month of union dues.”

*Nonreportable Examples:*

- The final rule clarifies that a consultant’s activity will only be considered reportable if the consultant’s object is to persuade employees, “as evidenced by the agreement, any accompanying communication, the timing, or other circumstances relevant to the undertaking.” Thus, the final rule states that the following activity would not be reportable:
- “[A] consultant’s development of personnel policies and actions are not reportable merely because they improve the pay, benefits, or working conditions of employees, even where they could subtly affect or influence the attitudes or views of the employees.”

Once a labor relations consultant reports on Form LM-20 a single instance of “persuader” advice or services, the consultant then must disclose “all labor relations advice and services” on Form LM-21, filed annually, even though the advice and services do not involve persuader activity.

The employer will also have to file its own report. The employer’s report must be filed on Form LM-10 within 90 days of the end of the employer’s fiscal year. It must disclose:

1. the date of each reportable arrangement and the date and amount of each transaction made pursuant to that arrangement;
2. the name, address, and position of the person with whom the agreement or transaction was made; and
3. “a full explanation of the circumstances of all payments made, including the terms of any agreement or understanding pursuant to which they were made.” This includes attaching a copy of any written agreement between the employer and the persuader.

## **Undefined “Labor Relations Services” Under Form LM-21**

Although the final regulation provides examples of the broadened definition of “persuader activity” reportable on Form LM-20, it does not define “all labor relations advice or services,” which form the basis for receipts and disbursements that are reportable on Form LM-21. The final regulation did not comment on the scope of reporting for Form LM-21. Instead, the DOL stated that the issue would be addressed in bifurcated rulemaking to revise Form LM-21 that was scheduled to start in September of 2016. Until that happens (if ever), it would be difficult for consultants, including lawyers, who engage in what is now classified as persuader activity to know the extent that they must provide information pertaining to receipts and disbursements relating to labor relations advice and services.

### **Attorney-Client Confidences**

The American Bar Association (ABA) and the Association of Corporate Counsel, as well as numerous state attorneys general, strongly opposed the DOL revisions to the advice exemption because the mandated disclosure would force lawyers to reveal attorney-client confidences in violation of their ethical obligations under the ABA’s Model Rules and Annotated Model Rules of Professional Conduct and would interfere with access to legal counsel.

The U.S. Department of Labor insists that the new “persuader regulations” do not require the disclosure of attorney-client confidences and that the attorney-client privilege is protected by Section 204 of the LMRDA. Yet disclosing a client’s identity, financial arrangements, and services rendered are all attorney-client “confidences,” which attorneys are not at liberty to disclose pursuant to their ethical obligations under state bar rules, without the client’s informed consent. This ethical concern and the federal government’s interference with the attorney-client relationship, both of which result from the new rule, are the reasons the American Bar Association strongly opposes the new persuader regulations.

### **Problems for Small Business**

To the extent that the persuader regulations impose a burden on small businesses that do not have in-house legal and labor relations staff, these businesses would have difficulty responding to a union organizing campaign and lawfully communicating with their employees. This difficulty with access to counsel would pose a problem especially within the shortened seven-day time frame for an employer’s response to a union petition for a representation election imposed by the National Labor Relations Board’s new R-Case (Representation Election) rules. Employers should note that legal advice provided by their attorneys continues to be protected and is not reportable.

### **One-Sided Application**

Unions, their law firms, and their outside consultants are not covered by the persuader activity reporting and disclosure requirements. Even if a union was to engage in the types of deceptive practices that the LMRDA originally targeted in 1959, the final rule would not require it to disclose the identity of its paid “salts” or the existence of a “union front organization.”

## What's Next?

The new “persuader activity” rule, which would have applied to arrangements and agreements as well as payments made on or after July 1, 2016, has been challenged by employers and attorneys in Congress and the courts.

Several lawsuits were filed challenging the new rule. In one of these, several trade organizations along with 10 states sued the DOL in the Northern District of Texas. *See National Federation of Independent Business et al. v. Perez et al.*, Case No. 5:16-cv-00066-C (N.D. Tex.). On June 27, 2016, three days before the rule would begin to affect employers and their consultants, that court issued a preliminary injunction that halted it nationwide. In its preliminary injunction order, the court found:

[T]he New Rule is defective to its core because it entirely eliminates the LMRDA’s Advice Exemption. In whatever manner DOL defines “advice,” it must do so consistent with the statute and therefore must actually exempt advice, including advice that has an object to persuade. The New Rule not only fails to do that, it does the exact opposite: it nullifies the exemption for advice that relates to persuasion. The New Rule therefore fails to provide notice to employers, lawyers, and consultant of what activities relating to persuasion are covered by the Advice Exemption. Such advance notice is necessary to allow employers, lawyers, and consultants to order their affairs accordingly. As demonstrated by the evidence in this case, many employers, lawyers and trade associations want to avoid engaging in activities that trigger reporting under the LMRDA for various reasons, including due to their ethical obligations and their privacy concerns. Moreover, as a criminal statute, LMRDA must provide fair notice of what conduct is required and prohibited. The New Rule, which is contrary to the LMRDA, completely fails to do that. It leaves employers, lawyers, consultants, and trade associations – not to mention unions, employees, DOJ prosecutors, DOL investigators, and other interested parties – to guess what activities with an object to persuade fall within the LMRDA’s Advice Exemption.

Preliminary Injunction Order, ¶ 175.

On November 16, 2016, the court granted summary judgment in favor of the plaintiffs and permanently enjoined the new rule nationwide.

What happens next remains unclear. The DOL may appeal the decision to the Fifth Circuit. If the DOL does not pursue such an appeal under the new administration, or if it loses on appeal, the new rule will remain permanently enjoined. For now, the prospects for the new rule ever going into effect appear dim.

## **XXII. Conclusion: Reversals Ahead?**

---

Of course, with the outcome of the 2016 elections, pro-union executive orders from the White House, and substantive pro-union labor law “reform” legislation in Congress, new pro-union regulations by the U.S. Department of Labor (DOL) and decisions by the National Labor Relations Board (NLRB or Board) now appear remote. In fact, the Trump administration promised to rescind, withdraw, and scale back many of the regulatory excesses over the past eight years. In some cases, as with executive orders stemming from the first days of the Obama administration, it will only take the stroke of a pen. In other cases, it may take longer for cases to reach the NLRB for decision or for reverse Administrative Procedure Act “notice and comment” rulemaking at the DOL and other agencies.

At the NLRB, for example, it will take time to reverse course. Following the designation of a new chair with control over the agenda and the appointment and Senate confirmation of two new Board Members to constitute a majority, the new Board will still be saddled with current General Counsel Richard Griffin whose term will not expire until November 4, 2017. He will most likely complete his term and continue to call things as he sees fit in the Board’s regional offices, which means it is unlikely he will send cases to the Board that could serve as vehicles to overturn policies he has advocated. Then, even once the pipeline of cases is filled, it will take a while before those cases reach the Board. One way to expedite Board consideration is through the representation appeals route (R-Cases), which—unlike unfair labor practice cases (C-Cases)—does not involve the general counsel. A granted request for review of a representation case may afford the new Board majority an earlier opportunity to reconsider recent Obama Board precedent.

Of course there are other obstacles to be overcome by the incoming Trump administration. Among them, the federal courts, which review federal regulations and administrative agency decisions, may no longer be as receptive to employer concerns. Of the 12 federal circuit courts of appeals, currently only four retain a majority of judges appointed by Republican presidents. A change in Senate procedure (the “nuclear option”) no longer permits filibusters of administration or judicial appointments and Senate confirmation now only requires a simple majority. The Obama administration used this to confirm scores of appointees to the federal bench. Of course, the U.S. Supreme Court is the exception; Supreme Court nominations may still be held up by filibuster. President-elect Trump will have an opportunity to test the system by nominating a candidate for the vacancy to the ninth, and potentially tie-breaking, open seat on the Court, as well as scores of vacancies in the lower federal courts. His appointments will help determine the future of federal labor policy.

There are also right-to-work laws. Currently, 28 states have enacted right-to-work laws, including West Virginia (2016), once a bastion for organized labor, and more recently, Kentucky (2017) and Missouri (2017). National right-to-work legislation is pending in Congress.

Beyond that, following the death of Justice Antonin Scalia, the Supreme Court deadlocked 4-4 in *Friedricks v. California Teachers Association*, No. 14-915 (March 29, 2016), which challenged the right of public sector unions to demand payment of union dues as a condition of employment. The case was tabled and remanded to the Ninth Circuit Court of Appeals which had

upheld that right. Adding to union worries, with the addition of a tie-breaking vote to the Supreme Court, it's conceivable that the issue may work its way back up to the Court.

Until then ... what's next? Will there be reversals ahead?

## REVERSALS AHEAD?

For eight years the Obama National Labor Relations Board has waged an all-out assault on long-established labor law precedent replacing it with blatantly pro-union decisions. One recent study released on December 6, 2016 by the business-oriented Coalition for a Democratic Workplace counted up the years of precedent overturned, weighing the number of years overturned by each decision, and arrived at the conclusion that over eight years the Obama Board overturned a total of 4,559 years of labor law precedent, and counting! In some cases it overturned 50 and 60 year-old precedent dating from the earliest days of the National Labor Relations Board! There is no doubt that the answer to the question posed by the study's title : " Was the Obama NLRB the Most Partisan Board in History?" is an emphatic YES!

Given that the NLRB is precluded from issuing advisory opinions and must wait for a " live case" to come before it on which to rule, it's obvious that it will not be simple to turn the ship around. Once a new Chairman is installed and two new Members confirmed, probably not until the Spring of 2017, and the Board becomes the new Trump Board, it must still await the term expiration of current General Counsel Richard Griffin in November 2017 before it can truly get started. In the meantime, employers must continue to struggle with many of the radical policies of the Obama Board. That's the bad news- the good news is that at least the continued assault will cease.

Here are a few of the critical questions to be addressed by the new Trump Board:

- Handbooks and Work Rules: *Lutheran Heritage* and its Ubiquitous Progeny - Will the New Board Adopt a Different Analysis?
- Joint Employer: *BFI; Miller & Anderson; McDonalds* - Who is the Statutory "Employer"?
- Supervisors and Independent Contractors: *FedEx, Lancaster Symphony, Veolia Transportation, Buchanan Marine* - Who is Covered and Who is Not?
- Bargaining Units: *Specialty Healthcare* and its Offspring - Will the New Board Abandon the "Overwhelming Community of Interest" Test?
- Access to Company E-Mail: *Purple Communications* - Where is the Line Between Property and Section 7 Rights?
- Access to Company Property: *St. John's, Hillhaven, Rite Aide, Walmart, New York New York Casino, Alcoa* - Is a Re-Balancing of Rights on the Horizon?
- Graduate Assistants: *Columbia University* - How Will the New Board Define "Employee"?

- Employers' Post-Expiration Prerogatives: *E.I. Dupont* (Management Rights), *Lincoln Lutheran* (Dues Checkoff) - Will Employer's Leverage be Restored?
- Economic Weaponry: *Piedmont Gardens*, *Walmart* - Will the New Board Restore Clarity to Right to Replace Economic Strikers, and the Right to Strike?
- Remedial Authority: *King Soopers*, *Camelot Terrace* - How will the New Board Define "Make Whole"?
- The Limits of Protected Conduct: *Pier Sixty*, *Plaza Auto Sales* - When is Enough, Enough?
- Administering the Collective Bargaining Agreement: *Babcock & Wilcox* (Arbitral Deferral), *Piedmont Gardens* (Confidential Witness Statements) - Will the New Board Stay Out of the Bargaining Relationship?
- Administering the Collective Bargaining Process, Part Deux: *Graymont*, *Finley Hospital*, *Provena St. Joseph* - Contract Coverage Versus Waiver - Where Will the New Board Come Out?
- Mergers, Purchases and Acquisitions: *CVS Properties*, *Nexeo Solutions*- Will the "Perfectly Clear" Exception Continue to Swallow the Spruce Up Rule?
- Labor Disputes and Lawsuits: *Millum Textile Services*, *J.R. Croson* - Where Does the NLRA Properly Trump the First Amendment?
- Waiver of Class and Collective Actions in Mandatory Arbitration Agreements: *D.R. Horton*, *Murphy Oil* – What will the Supreme Court rule? Will the new Board Continue to Refuse to Acquiesce to Circuit Court Reversals?
- Settlement Agreements: Will the new General Counsel Continue to Insist on Full Default Language?
- Representation Without Selection: *Lamons Gasket*, *UGL-UNNICO*, *Dana Corp.* - How Will the New Board Resolve the Tension Between "Stability" and "Employee Free Choice"?

The long road back to Board neutrality will be a more pleasant journey.



**U.S. CHAMBER OF COMMERCE**  
Labor, Immigration & Employee Benefits

1615 H Street, NW | Washington, DC 20062-2000  
[www.uschamber.com](http://www.uschamber.com)