



LABOR, IMMIGRATION &  
EMPLOYEE BENEFITS DIVISION  

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U.S. CHAMBER OF COMMERCE

THE NATIONAL LABOR RELATIONS BOARD  
IN THE OBAMA ADMINISTRATION:  
WHAT CHANGES TO EXPECT

SEPTEMBER 2009



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PREPARED ON BEHALF OF THE  
U.S. CHAMBER OF COMMERCE

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## Foreword

For the last several years, most of the policy discussion related to labor-management relations and union organizing has properly been focused on the Employee Free Choice Act (EFCA), legislation that would radically alter the rules for union organizing and collective bargaining in ways that would ensure that labor unions would have the upper hand, to the detriment of both employees and employers.

However, the National Labor Relations Board (NLRB) has the power to significantly increase union power and leverage without intervention by Congress. Indeed, as this publication goes to press the President has nominated three individuals to the vacant seats on the NLRB. Assuming they win Senate confirmation, the stage will be set for sweeping policy changes that have received scant attention compared to the debate over EFCA.

The purpose of this publication is to provide an overview of how the law administered by the NLRB is likely to change during the Obama Administration. The vast majority of this analysis is focused on cases decided by the Board in recent years that Democratic Members of the Board dissented to and that organized labor has criticized. While some of these cases are high profile, such as the Board's decision in *Dana/Metaldyne* that effectively gives employees notice before a union and an employer can circumvent the law's secret ballot process for union recognition, others are much less well known. However, reversal of these technical rules, such as whether permanent strike replacement workers may be hired on an at-will basis, as discussed in *Jones Plastics and Engineering Co.*, collectively will increase union leverage in every aspect of labor-management relations.

It is also likely that the Board will revisit its traditional hesitancy to engage in rulemaking and could attempt to enshrine some of its more controversial policies by promulgating regulations, thus making it substantially more difficult for future administrations to undo the damage.

We hope that this analysis will be helpful both for policymakers considering the implications of nominees to the NLRB and for employers who wonder what the future may have in store for them. On behalf of the U.S. Chamber of Commerce, we wish to thank Harold P. Coxson and Christopher R. Coxson of the law firm Ogletree, Deakins, Nash, Smoak & Stewart, P.C. for their important work on this analysis.

Randel K. Johnson  
Senior Vice President, Labor, Immigration, and Employee Benefits  
U.S. Chamber of Commerce

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## Overview

Fasten your seatbelts. Big changes are coming to the National Labor Relations Board. After eight years of Republican majorities and relatively well-balanced NLRB decisions, most of which were accepted by the federal circuit courts of appeals, the Obama Administration will usher in a new Democratic, pro-union majority set to reverse Bush Board decisions and much more.

The changes will first come with the likely reversal of a number of critical Board decisions regarding such issues as:

- effects of an employer's voluntary recognition of a union following neutrality-card check agreements, and pre-recognition bargaining of contract terms for card check recognition (*Dana-Metaldyne, Dana Corporation, Shaw's Supermarkets*);
- whether an employer may voluntarily recognize a union where the employer has hired a core group of employees, but is not yet engaged in normal business operations (*Elmhurst Care Ctr.*);
- use of e-mail by employees at work for purposes of union organizing (*The Register Guard*);
- supervisory status and supervisory solicitation of union support (*Oakwood Healthcare, Harborside Healthcare*);
- representation (*Weingarten* rights) of non-union employees at disciplinary interviews (*IBM Corp.*);
- employee status of graduate school teaching assistants and disabled workers in rehabilitative facilities (*Brown University, Brevard Achievement Center*);
- expanding the use of extraordinary remedies, such as *Gissel* bargaining orders bypassing representation elections to remedy egregious unfair labor practices making a fair election impossible (*Abramson; Hialeah Hospital; Register Guard; First Legal Support Services LLC; Intermet Stevensville*);
- presumption as to the length of the back pay period for union salts on construction projects, and legal standards and burdens of proof for determining whether salts are bona fide applicants for employment (*Oil Capitol; Toering Electric*);
- standards for determining whether a bargaining unit is appropriate consisting of employees of one employer and employees of that employer and another employer (*Oakwood Care Center*);
- lawfulness of employer ride-alongs where employer officials accompany truck drivers in order to campaign against a union (*Frito-Lay*);

- whether a reasonably based but unsuccessful lawsuit filed with a retaliatory purpose against a union in defense of a corporate campaign is a violation of the National Labor Relations Act (*BE&K*);
- reasonableness of a discriminatee's efforts to mitigate damages (*Grosvenor Resort; St. George Warehouse*);
- whether an employer may withdraw recognition from a union and repudiate its collective-bargaining agreement, following the employer's acquisition of a non-union business and consolidation of union and non-union workforces of equal size (*Nott Co.*); and
- whether a contract provision requiring an employer to recognize a union at newly-organized stores is a mandatory or permissive subject of bargaining absent proof that it vitally affects the terms and conditions of employment of current bargaining unit employees (*Supervalu, Inc.*)

In addition to these prominent cases, there are scores of more routine decisions from the Bush Board affecting union organizing, collective bargaining, and protected concerted activity including the use of economic weapons, all of which will likely be reversed by the new Obama Board.

Also, expect rulemaking, something the Board has traditionally shied away from in favor of case-by-case decision-making. In the future, rulemaking may be used to avoid what Chairman Wilma Liebman has termed the "oscillation" of the Board by pendulum swings with each new political Administration.

Rulemaking also could be used for establishing broad parameters for union representation elections, and for limiting employer campaigning and other election conduct by, for example, reducing the time administratively for scheduling elections. Currently, the NLRB's time target for an election is 42 days from the filing of a petition for election, and most elections are held within 38 days. The Board could reduce the time target, withhold pre-election bargaining unit hearings and, if necessary, impound ballots.

The Board also could mandate off-site elections away from the employer's property, refuse to allow employer representatives to observe the election, and make other procedural changes such as those suggested by NLRB nominee Craig Becker. In his view, these changes would be consistent with his position that employers should have no role in union organizing campaigns and union representation elections.

Thus, while some changes would require congressional action, within the confines of the National Labor Relations Act the NLRB could enact labor law "reform" of its own by setting new standards not only to speed up elections and collective bargaining, but also speeding up the Board's own internal decision-making processes, and imposing extraordinary remedies, such as *Gissel* bargaining orders, for employer violations without necessarily requiring amendments to the National Labor Relations Act.

Most importantly, expect the new Board to attempt to significantly curtail an employer's role in organizing campaigns by limiting section 8(c) free speech rights based on findings that virtually any aggressive employer campaign contains ... a threat of reprisal or force or promise of benefit such that it is not protected.

All of this could result from a new, aggressive, pro-union majority at the National Labor Relations Board.

This Report provides an overview of what changes can be expected from the Obama NLRB and what the impact of those changes will be. Parts I and II describe the likely composition of the NLRB, including biographies of current and newly nominated members. Part II also includes a summary of the extensive writings on the NLRA by one of the new nominees, Mr. Craig Becker. Part III summarizes potential rulemaking at the NLRB, in particular focusing on a pending petition to require employers to bargain with unions that represent only a minority of employees in a bargaining unit. Part IV, the most extensive part of the report, reviews more than 50 decisions of the NLRB that may well be reversed by the new NLRB. Finally, Part V summarizes a few important cases that are currently pending before the NLRB and are ripe for decision as soon as it has a minimum of three members.

## **I. Labor Law Reforms at the NLRB**

On January 20, 2009, President Obama designated sitting Board Member Wilma Liebman to serve as the new Chairman of the 5-Member National Labor Relations Board, and since then has announced the nominations of union lawyers Craig Becker and Mark Pearce to fill the two vacant Democratic Board seats. On July 9, 2009, the President formally submitted the names of Mr. Becker and Mr. Pearce to the Senate for confirmation. He also submitted the name of Brian Hayes to fill the vacant Republican seat on the Board to accompany sitting Board Member Peter Schaumber, whose term expires on August 27, 2010.

If confirmed, the full composition of the NLRB and the dates that their terms would expire would be:

Peter Schaumber (R), August 27, 2010  
Wilma Liebman (D), August 27, 2011  
Brian Hayes (R), December 16, 2012  
Mark Gaston Pearce (D), December 16, 2013  
Craig Becker (D), December 16, 2014.

The current General Counsel is Republican Ron Meisburg, whose 4-year term expires in August 2010 as well. At that point, President Obama is expected to appoint a strongly pro-union Democrat to replace General Counsel Meisburg.

The NLRB has been under constant scrutiny and attack from organized labor throughout the Bush years. For example, the AFL-CIO filed a Complaint against the United States with the U.N.-affiliated International Labor Organization's Committee on Freedom of Association attacking the



Bush NLRB for alleged violations of freedom of association under ILO Conventions 87 and 98. The complaint itemized several dozen NLRB decisions, such that it became referred to as the “kitchen sink complaint.” That complaint was withdrawn upon the election of President Barack Obama.

Some in Congress also contributed to this attack. For example, in July 2006, Rep. George Miller (D-CA), then the Ranking Democratic Member of the House Committee on Education and the Workforce, issued a report entitled *Workers’ Rights Under Attack by Bush Administration: President Bush’s National Labor Relations Board Rolls Back Labor Protections*.<sup>1</sup> Likewise, the House and Senate Labor Committees conducted committee oversight hearings regarding Board decisions.<sup>2</sup> Most notably, supporters of organized labor introduced labor law “reform” in the version of the “Employee Free Choice Act”<sup>3</sup> allegedly, in part, because of the failings of the NLRB and of existing law.

And, the attack has come from within the Board as well. The two most prominent Democratic Members on the Bush Board—Wilma Liebman and Dennis Walsh—filed scores of dissents in which they attacked the majority’s decisions. Member Liebman also wrote several law review articles critical of the Bush Board and testified before Congress criticizing the Bush Board decisions from which she had dissented.<sup>4</sup>

## II. What To Expect

### Reversals of Bush Board Decisions and Rulemaking

It is clear that “change” is coming to the National Labor Relations Board. The two newest Democratic nominees to the Board—Craig Becker and Mark Pearce—are both union lawyers, as was Chairman Wilma Liebman prior to her government service.

Reading Mr. Becker’s law review articles, for example, as well as Chairman Liebman’s numerous dissents to Bush Board decisions, it is clear that to the extent possible short of legislative change, pro-union labor law “reform” will come through changes in Board policies. Many of the Bush Board decisions will likely be reversed either through decisions on a case-by-case basis or by rulemaking.

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<sup>1</sup> Available at <http://edlabor.house.gov/publications/NLRBreport071306.pdf>.

<sup>2</sup> See, e.g., *The National Labor Relations Board: Recent Decisions and Their Impact on Workers’ Rights*, Joint Hearing Before the Subcomm. on Health, Employment, Labor, and Pensions of the House Comm. on Education and Labor and the Subcomm. on Employment and Workplace Safety of the Senate Comm. on Health, Education, Labor, and Pensions, 110<sup>th</sup> Cong., 1<sup>st</sup> Sess. (Dec. 13, 2008) (hereinafter *Joint Hearing*).

<sup>3</sup> S. 560, H.R. 1409, 111<sup>th</sup> Cong., 1<sup>st</sup> Sess. (2009).

<sup>4</sup> See, e.g., Wilma Liebman, *Decline and Disenchantment: The Aging of the National Labor Relations Board*, 28 BERKELEY J. EMP. & LAB. L. 569 (2007).

## **The New NLRB**

### **Brief Biography of Board Members and Nominees**

#### *Wilma Liebman*

The NLRB's new Chairman, Wilma Liebman, has served on the Board since November 14, 1997, having been appointed by Presidents Clinton and Bush. Her current term expires on August 27, 2011.

Prior to joining the NLRB, Ms. Liebman served for two years as Deputy Director of the Federal Mediation and Conciliation Service (FMCS). Prior to joining FMCS in January 1994, Ms. Liebman was Labor Counsel for the Bricklayers and Allied Craftsmen from 1990 through 1993. She served as Legal Counsel to the International Brotherhood of Teamsters for nine years and as staff attorney with the NLRB from 1974 to 1980.

A native of Philadelphia, PA, Ms. Liebman holds a B.A. from Barnard College in New York City and a J.D. from the George Washington University Law Center.

Serving in the minority, she has been an outspoken critic of, and frequent dissenter to, many of the Bush Board decisions. Soon, with the confirmation of pro-union Democrats Becker and Pearce, she will have a majority of new Members to support her views.

#### *Peter Schaumber*

Mr. Peter Schaumber has been a Member of the National Labor Relations Board since September 1, 2005. He served as the Board's Chairman from March 19, 2008 until January 19, 2009. His current term expires on August 27, 2010.

Prior to his appointment to the NLRB, Mr. Schaumber practiced as a labor arbitrator serving on a number of industry panels and through national arbitration rosters. Mr. Schaumber has also served as an Assistant Corporation Counsel for the District of Columbia, Assistant United States Attorney for the District of Columbia, Senior Trial Attorney and Associate Director of a Law Department Division in the Office of the Comptroller of the Currency. Upon leaving government service, Mr. Schaumber entered private law practice in Washington, D.C. and was director of his firm's Litigation Department. His practice included a wide range of trial and appellate civil litigation.

Mr. Schaumber received his J.D. from Georgetown University Law Center. He received his undergraduate degree from Georgetown University.

#### *Mark Pearce*

Mr. Mark Pearce, for many years, has practiced union-side labor law. Mr. Pearce is one of the founding partners of the Buffalo, New York law firm of Creighton, Pearce, Johnsen & Giroux where he practices union-side labor and employment law. Prior to that, Mr. Pearce practiced union side

labor law and employment law at Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria LLP. From 1979 to 1994, he was an attorney and District Trial Specialist for the NLRB in Buffalo, NY.

Mr. Pearce received his J.D. from the State University of New York, and his B.A. from Cornell University. He has taught labor studies at Cornell University's School of Industrial and Labor Relations.

*Brian Hayes*

Mr. Brian Hayes is currently the Republican labor policy director for the U.S. Senate Committee on Health, Education, Labor, and Pensions. Prior to that, he spent in excess of 25 years practicing labor and employment law representing management. He has represented employers in scores of cases before the National Labor Relations Board, the Equal Employment Opportunity Commission, and various state fair employment practice agencies.

Before entering private practice, Mr. Hayes clerked for the Chief Judge of the National Labor Relations Board and thereafter served as Counsel to the Chairman of the NLRB. In addition to his private practice Mr. Hayes was a member of the adjunct faculty at Western New England Law School where he taught classes in Labor Law, Collective-Bargaining, Arbitration and Employment Litigation

Mr. Hayes received his J.D. from Georgetown University Law Center and received an undergraduate degree from Boston College.

*Craig Becker*

Mr. Craig Becker has served as the Associate General Counsel to the AFL-CIO and the Service Employees International Union (SEIU). He is a 1978 graduate of Yale College and a 1981 graduate of Yale Law School where he served as an editor of the Yale Law Journal. He taught law at the UCLA Law School, as well as the University of Chicago and Georgetown law schools. For over 27 years, he has argued labor and employment cases in virtually every federal court of appeals and before the United States Supreme Court.

Mr. Becker is the author of numerous articles on labor law, including: *Labor Law Outside the Employment Relation*;<sup>5</sup> *Better Than a Strike: Protecting New Forms of Collective Work Stoppages Under the National Labor Relations Act*;<sup>6</sup> *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*;<sup>7</sup> *The Check is in the Mail: Timely Payment Under the Fair Labor Standards Act*;<sup>8</sup> *With Whose Hands: Privatization, Public Employment, and Democracy*;<sup>9</sup> and *Individual Rights and Collective Action: The Legal History of Trade Unions in America*.<sup>10</sup>

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<sup>5</sup> 74 TEX. L. REV. 1527 (1996).

<sup>6</sup> 61 U. CHI. L. REV. 351 (1994).

<sup>7</sup> 77 MINN. L. REV. 495 (1993).

<sup>8</sup> 40 UCLA L. REV. 1241 (1993).

<sup>9</sup> 6 YALE L. & POL'Y REV. 88 (1988).

<sup>10</sup> 100 HARV. L. REV. 672 (1987) (reviewing CHRISTOPHER TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960* (1985)).

It is unusual that a nominee to the NLRB has written so prolifically on the NLRA. Consequently, a review of his writings provides some insight as to how he might rule as a Board Member. The following summarizes some of Mr. Becker's writings.

### **Craig Becker's Writings on the NLRA**

#### *The Employer's Role in Union Organizing Campaigns and Union Representation Elections*

In his 1993 University of Minnesota Law Review article *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, Mr. Becker expresses the view that employers should have no role in union organizing campaigns and union representation elections. To an extent, he appears to argue that the law should revert to the 1935 Wagner Act where employers were found to have engaged in unlawful conduct by campaigning against a union. In his words, that would mean, for example, that the only parties to both pre- and post-election hearings would be employees and unions seeking to represent them. Employers should be denied party status.

Also, in his view, employers should be barred from placing observers at the polls to challenge ballots; should not be allowed to refuse to bargain after a union election victory (a "technical refusal to bargain") as a "tactic" to set up an Unfair Labor Practice charge (ULP) in order to re-litigate issues resolved (except for whether the unit contained supervisors, managers, or confidential employees); that employers should have no right to raise questions concerning voter eligibility or campaign conduct; that employers should no longer be permitted to conduct captive audience meetings at any time, not simply during the final 24 hours before an election; that employers should be bound to observe their own restrictions on solicitation and distribution or be required to create an open forum "to exactly the same extent that they use the workplace as a platform," and so on. He writes that all of this would return the law to its original intent, and would eliminate the problem of delay, since employees and unions alone would influence the Board's election scheduling.

In the article, he also advocates expanding the *Gissel* exception into becoming the general rule, so that an employer's expressions, lawful currently, would be viewed as eliminating the possibility of a fair election and thus warranting a bargaining order without an election.

And he warns that perhaps legislative amendments are unnecessary since Congress "entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." It is clear, therefore, that many employer statements and actions which are currently lawful under section 8(c) of the Act will be reinterpreted as being unlawful "threat[s] of reprisal or force or promise of benefit."

### *Supervisors*

In a 2003 article entitled *Toward a Rational Interpretation of the Term 'Supervisor' After Kentucky River*,<sup>11</sup> Mr. Becker advocates narrower statutory exclusions for certain categories of supervisors. He analyzes the statutory terms “to assign” and “responsibly to direct” in the section 2(11) supervisory exclusion as interpreted by the Supreme Court in *Kentucky River*,<sup>12</sup> and calls for the Board's application of these terms in a very restrictive manner so as to find protected status of nurses and others as “employees.” He argues that “to prevent the decision in *Kentucky River* from sweeping not only most nurses, but large numbers of other professional and skilled employees outside the Act's protections, the Board should impose a limiting construction on the terms ‘assign’ and ‘responsibly to direct.’”

Written before the NLRB's decisions on the subject in the *Oakwood Healthcare* trilogy of cases, and before introduction of the RESPECT Act in Congress,<sup>13</sup> Mr. Becker's article concludes that nurses, and other professional, technical and skilled employees should be “draw[n] ... out of the swirling waters of *Kentucky River* so that they can stand on the firm ground of statutory protection.”

It is fairly certain, therefore, that Mr. Becker would disagree with the Board's post-*Kentucky River* decisions in the *Oakwood Healthcare* trilogy, and would join with Chairman Liebman (who dissented in *Oakwood*) and potentially Member Pearce, should he and Mr. Becker be confirmed, in reversing that decision.

Depending on how broadly that reversal were worded, it could, like the RESPECT Act, function to sweep away the statutory exclusion not simply for “charge nurses,” but for the great many supervisors whose primary supervisory duties are “assigning” and “responsibly directing” other employees.

### *Strikes and Striker Replacements*

In his 1994 University of Chicago Law Review article entitled *Better Than a Strike: Protecting New Forms of Collective Work Stoppages Under the National Labor Relations Act*, Mr. Becker proposes an expanded right to strike, arguing that current interpretations of this right do not give employees a realistic opportunity to utilize the strike. Current law distinguishes between strikes that are economic and those that are based on an employer's unfair labor practices. If a strike is classified as an unfair labor practice strike, the employer is prohibited from hiring permanent strike replacement workers. If the strike is economic, however, under the *Mackay Radio* doctrine,<sup>14</sup> employers may replace the striking workers with permanent replacements. Becker is highly critical of this doctrine and characterizes the federal courts and the NLRB as having “gutted” the right to strike.<sup>15</sup>

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<sup>11</sup> Craig Becker and Diana Orantes Ceresi, *Toward a Rational Interpretation of the Term 'Supervisor' After Kentucky River*, 18 LAB. LAW. 385 (2003).

<sup>12</sup> NLRB v. Kentucky River Community Care, 532 U.S. 706 (2001).

<sup>13</sup> H.R. 1644, S. 969, 110<sup>th</sup> Cong. 1<sup>st</sup> Sess. (2007).

<sup>14</sup> See NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938).

<sup>15</sup> 61 U. Chi. L.Rev. 351, 353.

In his article, rather than taking on the 70 year old *Mackay Radio* doctrine, instead he argues that current law can be interpreted to permit repeated grievance strikes aimed at discrete grievances, deployed repeatedly, and typically for short duration do not lose their protected status as unprotected “intermittent” or “partial” strikes. Becker argues that legalizing these types of work stoppages would “not only provide a powerful counterweight to the striker replacement doctrine, but would also give labor a form of economic weapon better suited to teaching employers the value of the collective bargaining process.”<sup>16</sup>

#### *Labor Protections Under Contingent Work Relationships*

In his 1996 article in the University of Texas Law Review entitled *Labor Law Outside the Employment Relation*, Mr. Becker suggests that: “It is evident that the existing system of regulation premised on a stable contract of hiring between a single employer and its employees engaged in labor at a fixed location is anachronistic in a postindustrial and fiercely competitive global economy.” Instead, he suggests, first, that such work is “performed mainly by foreign laborers with little access to democratic institutions through which to influence working conditions” and second that “through diverse forms of contingent labor, workers are effectively removed from [union] representation in the system of ‘industrial democracy’ as constituted by labor law since the Wagner Act.” The result, in his view, is a form of contingent work separated as the “core from the periphery” for purposes of labor protections.

Thus, Mr. Becker suggests that current law as to contingent workers founded on the National Labor Relations Act should be replaced by “three lines of doctrine that impose duties on employers other than the direct employer of workers.” In his words, “the first arises under the Fair Labor Standards Act and links regulation to the chain of distribution of workers' products; the second arises under the NLRA and yokes legal duties to ownership of the workplace; and the third arises under state workers' compensation laws and extends liability based on the nature of the employees' work.”

#### *The Bush Board*

In a 2005 article that Becker article co-authored with Jonathan Hiatt, General Counsel of the AFL-CIO, entitled *At Age 70, Should the Wagner Act be Retired?*<sup>17</sup> Messrs. Hiatt and Becker attack many of the Board's decisions. They reserve for special criticism what they describe as the Bush Board's efforts “to revive and expand the moribund doctrine of the 1964 decision in *Majestic Weaving*,”<sup>18</sup> which held that it violates section 8(a)(2) of the Act for an employer and union to agree to terms and conditions of employment that will apply after a majority of employees support the union, even if the agreement is conditional on a showing of such support. In the context of “voluntary recognition,” employees may fear that this pre-recognition bargaining has traded employee free choice for a “sweetheart deal” between the employer and the union. Becker and Hiatt point to what they perceive to be the salutary effects of being able to present a contract to employees before a vote so that they know what their representation would mean.

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<sup>16</sup> *Id.* at 356.

<sup>17</sup> 26 BERKELEY J. OF EMP. & LAB. L. 293 (2005)

<sup>18</sup> 147 NLRB 859 (1964).

Messrs. Becker and Hiatt perceive the Board's renewed interest in *Majestic Weaving* as an attack on voluntary recognition. They point to the Board's 1975 decision in *Kroger Co.*,<sup>19</sup> where the Board enforced agreements arising out of an existing bargaining unit providing that the employer will recognize the union and apply the terms of the existing agreement in additional units upon a showing of majority support in those units. Yet, they refuse to acknowledge the distinction where, in *Kroger*, the parties rely on prior contracts from existing bargaining units and apply the terms of an existing agreement to new units (after acquired store clauses), versus where there is no such prior contract and the terms are newly negotiated.

In addition, Messrs. Becker and Hiatt criticize the Board's "drastic limitation of the coverage of the Act," specifically "graduate [school] assistants being paid to teach classes or perform research, handicapped individuals working as janitors, artists' models who provide their own robes or slippers, and, effectively, temporary employees working jointly for a supplier employer and a user client absent consent from both employers."<sup>20</sup>

They criticize Board decisions which they characterize as "limiting employees' section 7 rights, weakening penalties for employers who commit unfair labor practices, and otherwise expanding employer rights." By way of example, they cite the following Board decisions issued within a 15-month period:

(1) *Holling Press, Inc.*,<sup>21</sup> where the Board held that an employee's solicitation of a co-worker to testify before a state agency in support of her sexual harassment complaint was not "for mutual aid or protection" and was thus unprotected under the NLRA.

(2) *Alexandria Clinic*,<sup>22</sup> where the Board held that nurses were lawfully discharged for starting a strike at a later time than the time specified in their union's required 10-day notice to the employer had elapsed.

(3) *First Legal Support Services*,<sup>23</sup> where the Board held that special remedies were unwarranted for egregious employer conduct during an organizing campaign.

(4) *Hialeah Hospital*,<sup>24</sup> where the Board rejected the use of a *Gissel* bargaining order to remedy employer violations during a union organizing campaign.

(5) *Crown Bolt, Inc.*,<sup>25</sup> where the Board held that an employer's threats to a single employee are not simply presumed disseminated throughout a bargaining unit, but must be proven.

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<sup>19</sup> 219 NLRB 388 (1975).

<sup>20</sup> (citations omitted).

<sup>21</sup> 343 NLRB 301 (2004).

<sup>22</sup> 339 NLRB 1262 (2003).

<sup>23</sup> 342 NLRB 350 (2004).

<sup>24</sup> 343 NLRB 391 (2004).

<sup>25</sup> 343 NLRB 776 (2004).

(6) *Bunting Bearings Corp.*<sup>26</sup> and *Midwest Generation*,<sup>27</sup> where the Board found no violation of the Act when employers selectively locked-out employees.

(7) *Borgess Medical Center*,<sup>28</sup> where the Board refused to require an employer to turn over grievance-related information beyond the grievance period.

They also cited the Board's decision in *Harborside Healthcare, Inc.*,<sup>29</sup> where the Board held that solicitation of union authorization cards by supervisors, the employer's agents from whom the employer can demand undivided loyalty in matters of labor relations, is inherently coercive absent mitigating circumstances.

Ironically, in another co-authored article in 2000 entitled *Drift and Division on the Clinton NLRB*,<sup>30</sup> Messrs. Becker and Hiatt wrote that, looking back on the Clinton Board, "the doctrinal debate within the chambers of the National Labor Relations Board [have] too often become detached from the principles of equality and fairness that animated passage of the Act." Of course, the Act they were referring to was the original Wagner Act.

### **III. Rulemaking Regarding Members-Only Minority-Union Collective Bargaining**

The NLRB has traditionally eschewed rulemaking as a method of interpreting the NLRA, with the notable exception of the rules on bargaining units in the health care industry.<sup>31</sup> Instead, it interprets the NLRA almost exclusively through adjudication. However, Chairman Wilma Liebman has suggested that the Obama Board may give rulemaking another look. At a recent meeting of the American Bar Association, Liebman was reported as suggesting that "the Board could engage in rulemaking as a more coherent way to make policy changes rather than decisionmaking."<sup>32</sup>

While there are few specific proposals that Board Members or nominees have endorsed (Liebman has endorsed a proposal to require employers to post notices informing employees of their rights under the NLRA),<sup>33</sup> the most serious threat is a petition filed with the NLRB that would force employers to bargain with unions that represent only a minority of employees. Because the rulemaking demonstrates the type of approach an aggressive NLRB could take with respect to interpretation of the NLRA through rulemaking, we discuss this issue in some depth.

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<sup>26</sup> 343 NLRB 479 (2004).

<sup>27</sup> 343 NLRB 69 (2004).

<sup>28</sup> 342 NLRB 1105 (2004).

<sup>29</sup> 343 NLRB 906 (2004).

<sup>30</sup> 16 LAB. LAW. 103 (2000).

<sup>31</sup> During the rulemaking process, the Board reported that it heard from 144 witnesses and over 1800 commentators. See THE FIRST 60 YEARS, THE STORY OF THE NLRB 1935-95 at 42, available at [http://www.nlr.gov/nlr/shared\\_files/brochures/60yrs\\_41-45.pdf](http://www.nlr.gov/nlr/shared_files/brochures/60yrs_41-45.pdf).

<sup>32</sup> Susan J. McGolrick, *Chairman Liebman Tells ABA She Hopes Board Will Take More Dynamic Approach*, DAILY LAB. REP. (March 5, 2009).

<sup>33</sup> See Statement by Wilma Liebman, *Joint Hearing at 10* (supra note 2), available at [http://help.senate.gov/Hearings/2007\\_12\\_13/Liebman.pdf](http://help.senate.gov/Hearings/2007_12_13/Liebman.pdf).



## Introduction

On August 14, 2007 seven unions<sup>34</sup> (the Petitioners) filed a petition that is still pending before the NLRB requesting that the Board engage in a rulemaking process to adopt the following rule mandating members-only minority-union collective bargaining:

Pursuant to Sections 7, 8(a)(1), and 8(a)(5) of the Act, in workplaces where employees are not currently represented by a certified or recognized Section 9(a) majority/exclusive collective-bargaining representative in an appropriate bargaining unit, the employer, upon request, has a duty to bargain collectively with a labor organization that represents less than an employee-majority with regard to the employees who are its members, but not for any other employees.<sup>35</sup>

As discussed more fully below, the Petitioners make the argument that the Board must adopt the above rule primarily in light of the “unambiguous statutory text” and the “cogent legislative history” of the NLRA.

By way of background, the petition for rulemaking emanates as a result of the General Counsel’s refusal to issue complaint in *Dick’s Sporting Goods*.<sup>36</sup> In that case, the NLRB dismissed a charge alleging a Section 8(a)(5) violation where the Employer refused to recognize and bargain with a union alleging to represent less than a majority of the petitioned-for bargaining unit. The Charging Party alleged that the Employer had a duty to bargain with the minority of employees in the unit.

## Petitioners’ Statutory Construction Argument

The Petitioners highlight that the stated policy of the Wagner Act to encourage the practice and procedure of collective bargaining was reemphasized with the passage of the Taft-Hartley amendments in 1947. In support of the argument that this policy is not limited to majority union employees, the Petitioners argue that the plain language of Sections 7 and 8(a)(1) mandates employers to bargain collectively with members only, minority unions.

In that regard, the Petitioners first point to the “critical fourteen-word phrase” of Section 7 which provides that “[e]mployees **shall** have the **right** ... to bargain collectively through

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<sup>34</sup> The seven unions were the United Steelworkers, the IBEW, the CWA, the UAW, the IAM, the California Nurses Association, and the UE.

<sup>35</sup> Petition of the United Steelworkers to the National Labor Relations Board (August 14, 2007) at 4 (hereinafter *Minority Union Petition*).

<sup>36</sup> Case 6-CA-34821. That case was filed on August 10, 2005 and alleged that the employer violated Section 8(a)(1) and (5) when it refused to recognize and bargain with the charging party as the minority bargaining representative for its members. The Region submitted the case to the NLRB Division of Advice on September 30, 2005. On June 22, 2006, Advice made its recommendation that the Region dismiss the matter as the employer had no obligation under the Act to recognize the charging party in the absence of a Board election establishing that it represented a majority of the employees in the unit. Upon that recommendation, the Region issued a dismissal letter on July 26, 2006. The Union’s appeal was denied and the case was closed on September 13, 2006.

representatives of their own choosing.”<sup>37</sup> The Petitioners next point to the language of Section 8(a)(1) which specifies that “it is an unfair labor practice for an employer . . . to interfere with . . . employees in the exercise of the rights **guaranteed** in Section 7.”<sup>38</sup> The Petitioners conclude that the because there is no limitation on which employees “shall” be afforded the “right” to bargain collectively, and because this right is “guaranteed” in Section 7, an employer’s refusal to bargain with a members-only, minority union is, therefore, a violation of 8(a)(1).

The Petitioners next address the language of Sections 9(a) and 8(a)(5) concluding that in the absence of a “designated” or “selected” majority representative, neither of those sections of the Act places any limitations on an employer’s obligation, upon request, to bargain with a members-only, minority union.

With respect to the language of Section 9(a), the Petitioners submit that the section is merely a “conditional clause.” In that regard, the Petitioners argue that the Section 9(a) requirements are triggered only when a majority of employees in an appropriate unit designate or select a particular union for the purpose of collective bargaining. The Petitioners conclude that where there is no majority representative, Section 9(a) is inapplicable and the employer is saddled with an “unfettered” duty to bargain with a members-only, minority union.

The Petitioners focus on the language following the comma in Section 8(a)(5), “*subject to the provisions of Section 9(a),*” as clearly indicating that it is the “bargaining process” that is qualified by Section 9(a), not the representatives. In other words, it is the Petitioners’ position that 8(a)(5) reemphasizes an employer’s obligation to bargain, regardless of the majority or minority union status, but it also recognizes that such bargaining obligation in the context of majority union status, is subject to the qualifications set out in Section 9(a).

Lastly, the Petitioners argue that the Section 8(a)(3) proviso, which allows for “compulsory union agreements” where the union is a 9(a) representative, is evidence of Congressional “recognition” and “expectation” of minority-union bargaining since that proviso “expressly denies minority unions the right to enter into compulsory union agreements.”

### **Petitioners’ Legislative History Argument**

The Petitioners argue that the legislative history of the NLRA supports the Board’s adoption of the proposed rule. For example, the Petitioners discuss the origins of the NLRA and the fact that the drafters of the original 1935 Wagner Act “borrowed” much of the language that appears in Section 7, including the “critical fourteen-word phrase” discussed above, from the text of the National Industrial Recovery Act (NIRA) that was enacted in 1933 as part of F.D.R.’s New Deal legislative program. The Petitioners argue that because much of the text of the NLRA was taken from the NIRA, the borrowed statute rule of construction applies. Essentially, the borrowed statute rule provides that when Congress borrows a statute it adopts by implication the interpretation placed on the earlier statute. The Petitioners conclude, therefore, that because the labor boards that were designated to

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<sup>37</sup> Joint Petition at 16 (entire quotation emphasized in original).

<sup>38</sup> *Id.* (emphasis and ellipses in original).

decide cases under the NIRA had “continued to hold that employers had a duty to bargain with non-majority union workplaces where there had not been a majority determination through an election,” such interpretations should be adopted with regard to the NLRA under the borrowed statute rule.<sup>39</sup>

Another example of the Petitioners legislative history basis in support of the members-only minority union bargaining is the so-called smoking gun argument. The Petitioners argue that because two drafts of Section 8(a)(5) were presented to Congress for inclusion in the Wagner Act, and the version that did not exclude the duty to bargain with minority union was ultimately chosen, therein lies the “smoking gun.” The two versions of 8(a)(5) are as follows:

- (1) It shall be an unfair labor practice for an employer ... to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a) (version that was chosen), or
- (2) It shall be an unfair labor practice for an employer ... to refuse to bargain collectively with employees through their representatives, chosen as provided in Section 9(a) (“smoking gun” rejected version).<sup>40</sup>

The Petitioners contend that if the second version had been chosen, which would have limited the bargaining obligation under 8(a)(5) to unions “chosen as provided in Section 9(a),” employers would only be obligated to bargain with unions representing a majority of employees as an exclusive bargaining agent.

### **Significance**

It does not take much of an imagination to envision that such a rule would have the potential for forcing private sector U.S. industrial relations to undergo the biggest change since the 1947 Taft-Hartley Act, without any new laws being passed and without overturning any cases of the NLRB.

If adopted, the rule would certainly lead to a surge in unionization since unions would be able to organize and force an employer to recognize for purposes of collective bargaining small, non-majority groups of employees within a proposed bargaining unit who support the union. Employers could be confronted with scores of small, non-majority bargaining units.

It would also wreak havoc with collective bargaining by encouraging fractionalized bargaining within a single worksite, promoting needless conflicts, leap-frog collective bargaining, more numerous strikes and work stoppages, and so forth.

Finally, forcing employers to recognize and bargain with non-majority units of employees would lead to serious problems in administration of the numerous collective bargaining contracts for multiple small groups of employees, including for example check off of union dues by the employer.

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<sup>39</sup> *Id.* at 27.

<sup>40</sup> *Id.* at 33.

## IV. Bush Board Decisions Likely to be Reversed

### Top Prospects for Reversal

*Dana / Metaldyne*<sup>41</sup>

6-RD-1518, 6-RD-1519, and 8-RD-1976  
351 NLRB 434 (2007)

**ISSUE:** Application of the Board's "recognition-bar" doctrine. According to this doctrine, an employer's voluntary recognition of a union, in good faith and based on a demonstrated majority status, immediately bars an election petition filed by an employee or a rival union for a "reasonable period of time." A collective bargaining agreement executed during this insulated period generally thereafter bars Board elections for up to 3 years of the new contract's term.

**HOLDING:** The Majority modified the Board's recognition-bar doctrine and held that no recognition bar will be imposed after a card-based recognition unless (1) employees in the bargaining unit receive notice of the recognition and of their right, within 45 days of the notice, to file a decertification petition or to support the filing of a petition by a rival union, and (2) 45 days pass from the date of notice without the filing of a valid petition. If a valid petition supported by 30 percent or more of the unit employees is filed within 45 days of the notice, the petition will be processed. The requisite showing of interest in support of a petition may include employee signatures obtained before as well as after the recognition. These principles govern regardless of whether a card-check and/or neutrality agreement preceded the union's recognition.

The Board's new recognition-bar doctrine is based on the Majority's finding that the immediate post-recognition imposition of a bar based on an employer's voluntary recognition of the union does not give sufficient weight to the protection of the statutory rights of affected employees to exercise their choice on collective bargaining representation through the preferred method of a Board-conducted election.

In the Majority's view, permitting employees, based upon a petition filed by 30 percent or more of the employees, to file a decertification petition with the NLRB within 45 days of being notified of a voluntary recognition agreement, would strike the proper balance between the two important but often competing interests under the National Labor Relations Act: "protecting employee freedom of choice on the one hand, and promoting stability of bargaining relationships on the other."

**DISSENT:** Members Liebman and Walsh dissented. They argue that the appropriate balance was struck 40 years ago, in *Keller Plastics*,<sup>42</sup> and nothing in the Majority's decision justifies its radical departure from that well-settled, judicially approved precedent. The Board held in *Keller Plastics* that, when an employer voluntarily recognizes a union in good faith based on a demonstrated showing of

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<sup>41</sup> While this case is properly styled as *Dana Corp.* we refer to it as *Dana / Metaldyne* to more clearly distinguish it from another case we refer to as *Dana / UAW* that involves pre-recognition agreements.

<sup>42</sup> *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966).

majority support, the parties are permitted a reasonable time to bargain without challenge to the union's majority status.<sup>43</sup> The voluntary recognition bar, as consistently applied for the past four decades, promotes both interests: it honors the free choice already exercised by a majority of unit employees, while promoting stable bargaining relationships. By contrast, the Majority's decision subverts both interests: it subjects the will of the majority to that of a 30 percent minority, and destabilizes nascent bargaining relationships. In addition, in the Dissenters' view, the Majority fails to give sufficient weight to the role of voluntary recognition in national labor policy.

**SIGNIFICANCE:** If *Dana / Metaldyne* is reversed, the period of a recognition bar would revert to the amorphous "reasonable period" of time following recognition before the employees could file for a decertification election and vote in secret ballot on whether they want to be represented by the union. If the union truly represents a majority of employees, it should have nothing to fear from an election where the employer has voluntarily recognized the union without an election.

*Oakwood Healthcare Center, Inc.*

348 NLRB 686 (2006)

**ISSUE:** In light of the Supreme Court's decision in *NLRB v. Kentucky River Community Care*,<sup>44</sup> the Board reexamined its position on determining "supervisory status" under the National Labor Relations Act's section 2(11) statutory exclusion for supervisors. As part of its decision making process, the Board sought comments relating to: (1) the meaning of "assign," "responsibly to direct," and "independent judgment," as those terms are used in Section 2(11) of the Act; and (2) an appropriate test for determining the unit placement of employees who take turns or rotate as supervisors, such as "charge nurses."

Section 2(11) defines "supervisor" as:

any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Pursuant to this definition, individuals are statutory supervisors if: (1) they hold the authority to engage in any 1 of the 12 supervisory functions (e.g., "assign" and "responsibly to direct") listed in Section 2(11); (2) their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment;" and (3) their authority is held "in the interest of the employer."

**HOLDING:** The Majority found that the Employer failed to establish that its rotating charge nurses possess the authority to responsibly to direct employees within the meaning of Section 2(11).

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<sup>43</sup> *Id.* at 587.

<sup>44</sup> 532 U.S. 706 (2001).

However, the Majority also found that the Employer adduced evidence sufficient to establish that certain of its permanent charge nurses are supervisors based on their delegated authority to assign employees using independent judgment. Finally, the Majority also determined that the Employer failed to establish that its rotating charge nurses, as opposed to the 12 permanent charge nurses it found to be supervisors, spend a regular and substantial portion of their work time performing supervisory functions. Consequently, the Majority excluded only the 12 permanent charge nurses from the unit under the section 2(11) supervisory exclusion.

**DISSENT:** The Dissenters, Members Liebman and Walsh, argued that the language of the Act, its structure, and its legislative history all point to significantly narrower interpretations of the ambiguous statutory terms “assign ... other employees” and “responsibly to direct them” than the Majority adopts. However, since the Dissenters stated that they saw no way to resolve these issues except on a case-by-case basis, rather than through hypothetical examples, they took no view on the specific examples offered by the Majority, except to disagree that, in the health care setting, assigning patients to nursing personnel or making other task assignments confers supervisory status, even if it is done using independent judgment.

The Dissenters described the consequences of the Majority's decision as “among the most important in the Board's history,” depending on the extent to which employers seek to take advantage of it. They concluded by stating:

In our view, the Majority has followed a mistaken approach to statutory interpretation that, not surprisingly, leads it far beyond what Congress contemplated in 1947 when it addressed the unionization of foremen. The result could come as a rude shock to nurses and other workers who for decades have been effectively protected by the National Labor Relations Act, but who now may find themselves treated, for labor-law purposes, as members of management, with no right to pursue collective bargaining or engage in other concerted activity in the workplace.<sup>45</sup>

**SIGNIFICANCE:** Soon after the Board's decision, ostensibly to reverse *Oakwood Healthcare*, legislation was introduced in Congress to eliminate the statutory Section 2(11) duties to “assign” and “responsibly to direct” and to require that supervisors must spend a majority of work time performing the remaining statutory duties to qualify for the supervisory exclusion. That legislation, if enacted, would eliminate the vast majority of supervisors in all industries from the NLRA's supervisory exclusion, not simply charge nurses in the healthcare industry. If that were to happen, or even if the Board were to overturn *Oakwood Healthcare* and substitute a standard for determining supervisory status with greater emphasis on the performance of the other working duties, or require a higher percentage of work time on the other non-working duties, it would have a dramatic effect on labor relations.

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<sup>45</sup> *Oakwood Healthcare, Inc.*, 348 NLRB 686, 709 (2006).

*Oil Capitol Sheet Metal, Inc.*

17-CA-19714

349 NLRB 1348 (2007)

**ISSUE:** Whether the Board's rebuttable presumption that the back pay period should continue indefinitely from the date of the discrimination until a valid offer of reinstatement has been made should apply where the discriminatee is a union organizer or "salt."

**HOLDING:** The Majority held that the back pay presumption does not apply where the discriminatee is a salt and that the General Counsel cannot rely on this presumption to meet his burden of proving the reasonableness of a back pay period claimed for a salt/discriminatee. With regard to salts the Majority thus refused to apply the Board's *Dean General*<sup>46</sup> presumption that the employer must show, under its established policies, that an employee hired into a position like the one unlawfully denied the discriminatee would not have been transferred or reassigned to another job after the project at issue ended.

This presumption is arguably appropriate as a matter of fact and policy in a refusal-to-hire case that does not involve salts because job applicants normally seek employment for an indefinite duration. Consequently, the respondent employer is in the best position to demonstrate that a given job would have ended or a given employee would have been terminated at some date certain for nondiscriminatory reasons, and any uncertainty as to how long an applicant, if hired, would have worked for a respondent employer is primarily a product of the respondent's unlawful conduct.

Unlike other applicants for employment, however, salts often do not seek employment for an indefinite duration; rather, experience demonstrates that many salts remain or intend to remain with the targeted employer only until the union's defined objectives are achieved or abandoned.

In sum, the Majority held that the traditional presumption that the back pay period should run from the date of discrimination until the respondent extends a valid offer of reinstatement loses force both as a matter of fact and as a matter of policy in the context of a salting campaign.

Given the different considerations applicable where the discriminatee is a union salt, the Majority declined to apply a presumption of indefinite employment and instead shall now require the General Counsel, as part of his existing burden of proving a reasonable gross back pay amount due, to present affirmative evidence that the salt/discriminatee, if hired, would have worked for the employer for the back pay period claimed in the General Counsel's compliance specification.

The Majority's analysis also affects the Board's presumption that the salt/discriminatee, if hired at the site where he applied, would have been transferred to other sites after the project at the original site was completed. Indeed, even if it is undisputed that the targeted nonunion employer's practice is to transfer employees from site to site, the General Counsel must present affirmative evidence, as described above, that the salt/discriminatee would have accepted the transfer.

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<sup>46</sup> *Dean General Contractors*, 285 NLRB 573 (1987).

Also, under the Majority decision, if the General Counsel fails to prove by affirmative evidence the reasonableness of a claim that the back pay period should run indefinitely, then the salt/discriminatee also is not entitled to instatement (or reinstatement in discharge and layoff cases).

**DISSENT:** Members Liebman and Walsh dissented. They noted that the Majority had conceded that the Board’s prior rule—which required the employer to show that the back pay period should be reduced for salts, as for other victims of unlawful discrimination—was “within the Board’s discretion.” They stated that the Majority’s new approach, in contrast, not only violated the well-established principle of resolving remedial uncertainties against the wrongdoer, but also treats salts as a uniquely disfavored class of discriminatees, notwithstanding the Supreme Court’s ruling that salts are protected employees under the NLRA.<sup>47</sup>

The Dissent also objected to the Majority’s limitations on instatement and reinstatement for salts, which the Dissenters described as basic statutory remedies, essential to fully redress discrimination in hiring and firing, as the Supreme Court made clear more than 65 years ago.<sup>48</sup>

The Dissenters concluded:

We have little doubt that the Majority’s decision is grounded in hostility to the practice of salting and to unions’ increasingly successful use of salting as an organizing tool in the wake of the Supreme Court’s decision in *Town & Country Electric*. But that practice is—at least for now—protected by the statute. That employers who discriminate against salts are exposed to liability is no reason for the Board to retreat from enforcing the law. We cannot join that step backwards and so endorse what amounts to the Board’s own discrimination against salts.<sup>49</sup>

The Dissenters would have continued to apply the *Dean General* presumption to salt/discriminatees for purposes of extending back pay liability.

**SIGNIFICANCE:** This case is very significant for employers in the construction industry, and potentially other industries if the union organizing tactic of “salting” a workplace expands beyond construction. If the new Board reverses *Oil Capitol*, and applies the *Dean General* presumption to determine extended back pay liability, employers will have a very difficult time proving that “salt”/discriminatees should not be entitled to an indefinite period of ongoing back pay, and rights to transfer, instatement or reinstatement.

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<sup>47</sup> Citing NLRB v. Town & Country Electric, Inc., 516 U.S. 85 (1995).

<sup>48</sup> Citing Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).

<sup>49</sup> Oil Capitol Sheet Metal, 349 NLRB 1348, 1362 (2007).



*Palms Hotel & Casino*

28-CA-17853

344 NLRB 351 (2005)

**ISSUE:** Whether the employer's work rule contained in its employee policy manual prohibiting employees from engaging in "conduct which is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with" other employees or patrons, violates Section 8(a)(1) of the Act?

**HOLDING:** While finding other employer violations of Section 7 rights, the Majority held that an employer's policy manual that promulgated and maintained a rule prohibiting employees from engaging in "conduct which is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with" other employees or patrons, did not violate Section 8(a)(1) of the Act. The Majority applied the Board standard from *Lafayette Park Hotel*<sup>50</sup> and *Lutheran Heritage Village*,<sup>51</sup> and consistent with the DC Circuit in *Adtranz ABB Daimler-Benz Transp. N.A.*<sup>52</sup> that in finding a work rule to be in violation, the Board must give the challenged rule a "reasonable reading" and not read the rule in isolation or simply presume improper interference with employee rights. Thus, since the challenged rule in this case was not promulgated in response to union organizing and does not specifically address Section 7 activities, it was not a violation of Section 8(a)(1).

**DISSENT:** Member Liebman dissented, stating that the Board previously had consistently applied the standard that a challenged work rule which reasonably tends to chill employees from engaging in their Section 7 rights is a violation of Section 8(a)(1) based on whether the conduct is "subjectively offensive" to other employees and managers, not whether the protected activity would be subject to the sensitivities of other members of the workforce. In fact, Board law protects "robust and spirited" employee campaigning—within the limits of the employer's right to an orderly workplace—even where most protected solicitations annoy or disturb other employees. The Dissent concludes that the work rule in this case, which includes conduct that has the effect of being offensive or interfering with other employees, could be read by employees to include unwanted or persistent solicitation, which is protected activity.

**SIGNIFICANCE:** If *Palms Hotel & Casino* is reversed, employers would have to review work rules to determine whether such broad statements are present, and rewrite them so as to lawfully preserve management's legitimate rights to an orderly workplace while not infringing on employees' Section 7 rights under a much stricter regulatory regime.

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<sup>50</sup> 326 NLRB 824 (1998).

<sup>51</sup> 343 NLRB No. 75 (2004).

<sup>52</sup> 253 F.3d 19 (2001).

*Shaw's Supermarkets*

*1-CA-39764, 1-CA-39971, 1-CA-39972, and 1-CA-40139*  
*350 NLRB 585 (2007)*

**ISSUE:** The precise issue presented here, which seems to be an issue of first impression, is whether an employer may rely on evidence of actual loss of majority support to withdraw recognition from a union after the third year of a contract of longer duration. Thus the issue pits conflicting labor policies and competing Section 7 rights: employee free choice versus contract stability.

**HOLDING:** The employer and the union had a 5-year contract covering about 1600 full-time and regular part-time employees at 12 of the employer's stores. Following the employees filing a decertification petition, and based on over 900 signatures on a petition from the employees stating that they no longer wanted to be represented by the union, the employer withdrew recognition.

The General Counsel contended that a contract of more than 3 years' duration should continue to act as a "contract bar" for its entire term with respect to a withdrawal of recognition. The General Counsel urged the Board to reject any argument that *Levitz Furniture Co. of the Pacific*,<sup>53</sup> stands for the proposition that an employer is free to file an RM petition or to withdraw recognition after the third year of a contract for a longer period. *Levitz* held that that a union's majority status cannot be questioned during the life of a collective-bargaining agreement, up to 3 years.

The employer contended that it met the *Levitz* criterion in that it had actual proof of loss of majority support to support its withdrawal of recognition, and that the Board in *Levitz* had rejected the argument that an employer should never be permitted to withdraw recognition except after a Board-conducted election. *Levitz* held that an employer may unilaterally withdraw recognition from an incumbent union only where the union has actually lost the support of a majority of the bargaining unit.

The union argued that *Montgomery Ward*<sup>54</sup> and its progeny render unlawful the employer's withdrawal of recognition. In *Montgomery Ward*, the Board held that the contract-bar doctrine seeks to afford the contracting parties and employees a reasonable period of stability while also affording employees the opportunity at reasonable times to change their bargaining representative or cease being represented altogether.

The Majority held that the employer lawfully withdrew recognition from the union based on evidence that the union had actually lost the support of a majority of the bargaining unit employees. Before it withdrew recognition from the union, the employer was in possession of verified information indicating actual loss of majority support sufficient to meet the *Levitz* standard.

Also, the Board held, that while it is true that the employer could have awaited the outcome of the decertification election, the ready availability of blocking charges—which, indeed, were filed

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<sup>53</sup> 333 NLRB 717 (2001).

<sup>54</sup> 137 NLRB 346 (1962).

here—and the delay attendant upon their resolution rendered this course of action problematic where a union has actually lost majority support. “Continuing to recognize and deal with such a union is as deleterious to employee rights as failing to recognize a union that enjoys majority support.”<sup>55</sup>

**DISSENT:** Member Liebman dissented, arguing that the 40-year old rule in *Montgomery Ward* provides a balance of statutorily recognized interests that serves to protect the right of employees to self-determination and to promote the interests of labor stability by allowing a non-party (either employees or a rival union), with a sufficient showing of employee support, to file a petition and obtain an election to settle a question concerning representation. Instead, she argued, the Majority permits an employer to disregard its agreement and unilaterally withdraw recognition from the union during the agreement’s term, even though a valid employee-filed petition for an election was pending. The Majority's decision places employers’ freedom of action above both of the Act’s carefully-balanced goals: contract stability and the interest of employee self-determination.

**SIGNIFICANCE:** If *Shaw's Supermarkets* is reversed, it would prevent employers from unilaterally withdrawing recognition from a union based on actual evidence of loss of majority status, absent a decertification election filed by a non-party to the agreement.

*Toering Electric Company*

7-CA-37768, 39093, 39205  
351 NLRB 225 (2007)

**ISSUE:** The legal standard and burden of proving an unlawful Section 8(a)(3) refusal to hire or consider for hiring a “salt” applicant for employment.

**HOLDING:** First, the Majority defined an applicant entitled to statutory protection against hiring discrimination as someone genuinely interested in seeking to establish an employment relationship with the employer. Second, the Majority imposed on the General Counsel the burden of proving under *FES*<sup>56</sup> that an alleged discriminatee meets this definition.

The Majority stated that the absence of a clear and consistently applied requirement that the General Counsel must prove an applicant’s genuine interest in securing employment has opened the door to abusive tactics on the part of salts. By imposing this new requirement under *FES*, the Majority stated, “we shall prevent those who are not in any genuine sense real applicants for employment from being treated by the Board as if they were.”<sup>57</sup>

The Majority stated that the Board’s experience has shown that in some hiring discrimination cases, particularly those involving salting campaigns, unions submit batched applications on behalf of individuals who are neither aware of the applications nor interested in employment opportunities with the employer.

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<sup>55</sup> *Shaw’s Supermarkets, Inc.*, 350 NLRB 585, 588 (2007).

<sup>56</sup> *FES*, 331 NLRB 9 (2000), *enfd.* 301 F.3d 83 (3d Cir. 2002).

<sup>57</sup> *Toering Elec. Co.*, 351 NLRB 225, 225 (2007).

In other cases, individuals submit applications but are not interested in obtaining employment with the employer. Their applications, sometimes accompanied by conduct plainly inconsistent with an intent to seek employment, are submitted solely to create a basis for unfair labor practice charges and thereby to inflict substantial litigation costs on the targeted employer.

The Majority provided the following standard for proving an unlawful refusal to hire or consider for hire:

This requirement embraces two components: (1) there was an application for employment, and (2) the application reflected a genuine interest in becoming employed by the employer.

As to the first component, the General Counsel must introduce evidence that the individual applied for employment with the employer or that someone authorized by that individual did so on his or her behalf. In the latter instance, agency must be shown.

As to the second component (genuine interest in becoming employed), the employer must put at issue the genuineness of the applicant's interest through evidence that creates a reasonable question as to the applicant's actual interest in going to work for the employer.

[That is] once the General Counsel has shown that the alleged discriminatee applied for employment, the employer may contest the genuineness of the application through evidence including, but not limited to the following: evidence that the individual refused similar employment with the respondent employer in the recent past; incorporated belligerent or offensive comments on his or her application; engaged in disruptive, insulting, or antagonistic behavior during the application process; or engaged in other conduct inconsistent with a genuine interest in employment. Similarly, evidence that the application is stale or incomplete may, depending upon the circumstances, indicate that the applicant does not genuinely seek to establish an employment relationship with the employer.

Assuming the employer puts forward such evidence, the General Counsel ... must then rebut that evidence and prove by a preponderance of the evidence that the individual in question was genuinely interested in seeking to establish an employment relationship with the employer. Thus, the ultimate burden of proof as to the Section 2(3) status of the alleged discriminatee-applicant rests with the General Counsel.<sup>58</sup>

The Majority emphasized that proof of an applicant's genuine job interest is an element of the General Counsel's prima facie case under *FES*. Thus, if at a hearing on the merits, the employer puts forward evidence reasonably calling into question the applicant's genuine interest in employment, the General Counsel must prove the applicant's genuine interest by a preponderance of the evidence in order to prove that the applicant is an employee within the meaning of Section 2(3).

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<sup>58</sup> *Id.* at 233.

**DISSENT:** Members Liebman and Walsh dissented. They began by describing the Majority's decision as continuing the Board's "roll-back of statutory protections for union salts" who seek to uncover hiring discrimination by nonunion employers and to organize their workers, following the Board's earlier decision in *Oil Capitol Services*<sup>59</sup> which shifted the burden of proof to the General Counsel with respect to the length of the back pay period for salts. The Dissenters commented that "the Board, with the approval of the courts, has long treated salting as a legitimate tactic. But that era seems to be ending."<sup>60</sup>

The Dissenters argued that this case properly should have been decided under the analytical framework established by the Board in *FES* to govern refusal-to-hire and refusal-to-consider violations under Section 8(a)(3) of the Act. Under *FES* the burden is on the General Counsel, in a refusal to hire case, to show that the employer was hiring or had concrete plans to hire, that a union applicant had the relevant experience or training, and that antiunion animus contributed to the employer's decision not to hire the applicant. If the General Counsel carries that initial burden, the burden shifts to the employer to show "that it would not have hired the applicants even in the absence of their union activity or affiliation."<sup>61</sup>

The Dissent would not deviate from that standard of proof. Instead, the Dissenters conclude:

By any measure, today's decision represents a failure in the administration of the National Labor Relations Act. The Majority unnecessarily overturns carefully considered precedent and implements an untenable approach ... Worse, the Board now creates a legalized form of hiring discrimination, a step that would have been considered unthinkable by the *Phelps Dodge* Court when it held that the prevention of hiring discrimination against union members was 'the driving force behind the enactment of the National Labor Relations Act.' 313 U.S. at 186. Because we still believe that it is crucial to the Act's basic mandate to uncover and redress discrimination against union members, we dissent.<sup>62</sup>

**SIGNIFICANCE:** If *Toering Electric* is reversed by the new Board, it would return the law to a period when salting was unchecked by a requirement that the applicant have a genuine desire to work for the employer, rather than simply to organize its employees or promote litigation. By requiring the General Counsel to adduce proof that the salts have a genuine interest in employment, *Toering Electric* has reduced such abusive tactics as batched applications, improper forms of conduct at job interviews and past employment records which clearly demonstrate that the salts are not interested in, and would not accept, employment if offered, but simply want to organize the employer or foster litigation.

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<sup>59</sup> 349 NLRB 1348 (2007).

<sup>60</sup> *Toering Elec. Co.*, 351 NLRB 225, 238 (2007).

<sup>61</sup> *FES*, 331 NLRB at 12.

<sup>62</sup> *Toering Elec. Co.*, 351 NLRB 225, 245 (2007).

*The Register Guard*

351 NLRB 1110 (2007)

**ISSUE:** Employees' use of their employer's e-mail system for Section 7 purposes. First, whether the Employer violated Section 8(a)(1) by maintaining a policy prohibiting the use of e-mail for all non-job-related solicitations. Second, whether the Employer violated Section 8(a)(1) by discriminatorily enforcing that policy against union-related e-mails while allowing some personal e-mails, and Section 8(a)(3) and (1) by disciplining an employee for sending union-related emails. Finally, whether the Employer violated Section 8(a)(5) and (1) by insisting on an allegedly illegal bargaining proposal that would prohibit the use of e-mail for union business.

**HOLDING:** The Employer's employees had no statutory right to use the Employer's e-mail system for Section 7 purposes, and therefore the Employer's policy prohibiting employee use of the system for non-job-related solicitations did not violate Section 8(a)(1).

With respect to the Employer's alleged discriminatory enforcement of the e-mail policy, the Majority modified the Board's approach in discriminatory enforcement cases to clarify that discrimination under the Act means drawing a distinction along Section 7 lines, in other words, unlawful discrimination consists of disparate treatment of "communications of a similar character based on their union or other Section-7 protected status."<sup>63</sup>

Finally, the Employer did not insist on its bargaining proposal prohibiting the use of e-mail for "union business." Therefore, the Majority dismissed the allegation that the Respondent insisted on an illegal subject in violation of Section 8(a)(5) and (1).

The General Counsel argued that under *Republic Aviation Corp.*,<sup>64</sup> rules limiting employee communication in the workplace should be evaluated by balancing employees' Section 7 rights and the employer's interest in maintaining discipline. The General Counsel contended that e-mail cannot neatly be characterized as either "solicitation" or "distribution." Nevertheless, e-mail has become the most common gathering place for communications on work and non-work issues.

The Charging Party argued that while the employer may impose a nondiscriminatory restriction on e-mail communications during working time, it may impose additional restrictions only by showing that they are necessary to further substantial management interests. Since the Employer allowed personal use of e-mail generally, it violated the Act by enforcing the rule against the individual employee for sending union-related messages.

The Employer argued that there is no Section 7 right to use the Respondent's e-mail system. E-mail, as part of the computer system, is equipment owned by the Employer for the purpose of conducting its business. It noted that under Board precedent, an employer may restrict the non-business use of its equipment and that *Republic Aviation* and other cases dealing with oral solicitation

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<sup>63</sup> Register-Guard, 351 NLRB 1110, 1115 (2007).

<sup>64</sup> *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

are inapposite because they do not involve use of the employer's equipment. With respect to whether an employer has discriminatorily enforced its e-mail prohibition, the Employer argued that the correct comparison is not between personal e-mails and union-related e-mails; rather, it is whether the employer has banned union-related emails but has permitted outside organizations to use the employer's equipment to sell products, to distribute "persuader" literature, to promote organizational meetings, or to induce group action.

**DISSENT:** Members Liebman and Walsh dissented, stating that the Board's decision confirms that the NLRB has become the "Rip Van Winkle of administrative agencies." According to the Dissenters, "only a Board that has been asleep for the past 20 years could fail to recognize that e-mail has revolutionized communication both within and outside the workplace. In 2007, one cannot reasonably contend, as the Majority does, that an e-mail system is a piece of communications equipment to be treated just as the law treats bulletin boards, telephones, and pieces of scrap paper."<sup>65</sup>

Further, the Dissenters wrote that national labor policy must be responsive to the enormous technological changes that are taking place in our society. "Where, as here, an employer has given employees access to e-mail for regular, routine use in their work, we would find that banning all non-work-related 'solicitations' is presumptively unlawful absent special circumstances. No special circumstances have been shown here."<sup>66</sup>

Also, they dissented "in the strongest possible terms from the Majority's overruling of bedrock Board precedent about the meaning of discrimination as applied to Section 8(a)(1). Under the Majority's new test, an employer does not violate Section 8(a)(1) by allowing employees to use an employer's equipment or media for a broad range of nonwork-related communications but not for Section 7 communications."<sup>67</sup>

Finally, they also dissented from the Majority's finding that the Respondent did not insist on a bargaining proposal that codified the Respondent's unlawful discriminatory practice of prohibiting union-related e-mails while allowing other non-work-related e-mails.

**SIGNIFICANCE:** If reversed, it will be 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.

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<sup>65</sup> Register-Guard, 351 NLRB 1110, 1121 (2007).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

*Harborside Healthcare, Inc.*

8-CA-80592  
343 NLRB 906 (2004)

**ISSUE:** Under what circumstances the pro-union activity of a supervisor will constitute objectionable conduct so as to warrant a new election.

**HOLDING:** On remand from the Sixth Circuit, the Board restated its legal standard for determining when supervisory pro-union activity is objectionable conduct in that it interferes with employees' freedom of choice so as to materially affect the election outcome. It also reversed prior Board law with respect to the solicitation of union authorization cards by supervisors. It held that such supervisory solicitations are inherently coercive absent mitigating circumstances.

The Majority restated the two-factor analysis for determining whether pro-union supervisory conduct upsets the requisite laboratory conditions for a fair election. First, whether the supervisor's pro-union conduct reasonably tended to interfere with the employees exercise of free choice in the election; and second, whether the conduct interfered with freedom of choice to the extent that it materially affected the election outcome.

**DISSENT:** Members Liebman and Walsh dissented from what they characterized as the Majority's application of new legal rule on supervisory solicitation of union authorization cards where such solicitation is deemed to be inherently coercive and objectionable conduct, even by persons who are unaware that they are supervisors or where supervisory status was unclear. The Dissenters also objected to the Majority's failure to mitigate the supervisor's pro-union conduct in the context of the employer's anti-union campaign.

The Dissent states that “in our view, the employer's public stance bears on whether pronion supervisory conduct is objectionable at all, and not simply on whether the conduct affected the election. Prior decisions ... make clear that an employer's antiunion position is critical. In that context, a pronion supervisor acts against his employer's expressed interests, sometimes contrary to the employer's direct orders, and always at the risk of lawful discharge. In most workplaces, employees have little to fear from such a supervisor ... .”<sup>68</sup>

The Dissent concluded by stating that in its “disregard for prior decisions, its use of broad new language, and its neglect of workplace realities, the Majority's new test signals a radical break with the Board's established approach. It will result in unwarranted obstacles to union representation.”<sup>69</sup>

The Dissent also tied its disagreement to the Board's decisions regarding supervisory status. Citing the Supreme Court's *Kentucky River* decision, the Dissent observed that “the Act's definition of

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<sup>68</sup> Harborside Healthcare, Inc., 343 NLRB 906, 917 (2004).

<sup>69</sup> *Id.* at 915.



a supervisor sweeps in many workers whose authority is quite limited and whose legal status is highly debatable.”<sup>70</sup>

**SIGNIFICANCE:** Reversing *Harborside Healthcare* to require a finding of coercion in order for a supervisor's prounion conduct to be deemed to be sufficiently objectionable to overturn an election, and to take into account the employer's antiunion campaign as a mitigating factor, would result in greater incidents of supervisory prounion conduct. It would mean, for example, that supervisors could solicit signatures from employees on union authorization cards and campaign for the union. It is also important to remember that the number of supervisors subject to the Act's section 2(11) exclusion could be greatly reduced if the Board were to reverse *Oakwood Healthcare* or if Congress were to enact the RESPECT Act.

**RELATED CASES:**

- In *Chinese Daily News*,<sup>71</sup> Member Liebman dissented from the retroactive application of *Harborside*. The Board held, based on *Harborside*, that an election (four years before *Harborside* was decided) was tainted by supervisory solicitation of union authorization cards even absent evidence of coercive statements, threats or promises to employees, and ordered a new election.
- In *Millard Refrigerated Services, Inc.*,<sup>72</sup> Member Liebman dissented from the application of *Harborside*, stating that at most the evidence was that some supervisors gave union authorization cards to some employees, but that as the hearing officer found there was no evidence that any employees were coerced in any way as a result. Thus, under the Board standard prior to *Harborside*, the conduct would not have been objectionable so as to set aside the election.
- In *SNE Enterprises*,<sup>73</sup> Member Liebman dissented from the retroactive application of *Harborside*, where three out of twenty-one leads in a unit of 181 employees spoke positively of the union and two of them solicited union authorization cards.
- In *Madison Square Garden*,<sup>74</sup> Member Liebman dissented, stating that *Harborside* was wrongly decided, that the new rule in *Harborside* (supervisory solicitation of union authorization cards is inherently coercive absent mitigating circumstances) was now being applied as a *per se* rule, and that in *Madison Square Garden* such mitigating circumstances, which would have tempered any possible impact of the solicitation, were ignored.

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<sup>70</sup> *Id.* at 916.

<sup>71</sup> 344 NLRB 1071 (2005).

<sup>72</sup> 345 NLRB 1143 (2005)

<sup>73</sup> 348 NLRB 1041 (2006).

<sup>74</sup> 350 NLRB 117 (2007).

*IBM Corp.*

*341 NLRB 1288 (2004)*

**ISSUE:** Whether employees who are not represented by a union have a protected statutory right to have a coworker present during investigatory interviews.

**HOLDING:** The Majority decision overruled *Epilepsy Foundation* and returned to earlier Board precedent holding that the so-called *Weingarten* right does not extend to a workplace where, as here, the employees are not represented by a union. The Employer had urged the Board to overrule *Epilepsy Foundation*,<sup>75</sup> which held that nonunion employees have so-called *Weingarten* rights, and to return to the principles of *E. I. du Pont & Co.*<sup>76</sup> In the *du Pont* case, the Board refused to apply the principles of *NLRB v Weingarten*,<sup>77</sup> in a nonunionized setting to permit an employee to have a coworker present at an investigatory interview that the employee reasonably believed might result in discipline.

After reviewing the history of the Board's conflicting decisions on the issue, it held that the *Weingarten* right does not extend to the nonunion workplace because coworkers do not represent the interests of the entire work force as does a union representative who while accompanying a unit employee to an investigatory interview represents and "safeguards" the interests of the entire bargaining unit.

Also, the Board Majority reasoned, coworkers cannot redress the imbalance of power between employers and employees as would the presence of a union representative at a meeting with an employer, which puts both parties on a level playing field inasmuch as the union representative has the full collective force of the bargaining unit behind him. Their ongoing relationship has the benefit of aiding in the development of a body of consistent practices concerning workplace issues and contributes to a speedier and more efficient resolution of the problem requiring the investigation, which is not true in a nonunion setting. Unlike a union representative, a coworker chosen on an ad hoc basis does not have the force of the bargaining unit behind him.

Finally, after noting the increase in workplace investigations resulting from post-September 11 security concerns and the plethora of workplace investigations as a result of new workplace laws and regulations, the Board Majority stated that the presence of a coworker at an investigatory meeting may compromise the confidentiality of information legally required pursuant to a variety of Federal, State, and local laws, administrative requirements, and court decisions.

The Majority emphasized that that while employees have the right to seek such representation and they cannot be disciplined for asserting those rights.<sup>78</sup> However, the nonunion employer has no obligation to *accede* to the request, i.e., to deal collectively with the employees.

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<sup>75</sup> 331 NLRB 676 (2000), *enfd. in relevant part* 268 F.3d 1095 (D.C. Cir. 2001), *cert. denied* 536 U.S. 904 (2002).

<sup>76</sup> 289 NLRB 627 (1988).

<sup>77</sup> 420 U.S. 251 (1975).

<sup>78</sup> Citing *Electrical Workers Local 236*, 339 NLRB No. 156, slip op. at 2 (2003).

**DISSENT:** Dissenting Members Liebman and Walsh stated dramatically that “Today, American workers without unions, the over-whelming majority of employees, are stripped of a right integral to workplace democracy. Abruptly overruling *Epilepsy Foundation of Northeast Ohio*, a recent decision upheld on appeal as ‘both clear and reasonable,’ the Majority holds that nonunion employees are not entitled to have a coworker present when their employer conducts an investigatory interview that could lead to discipline.”<sup>79</sup>

Thereafter, in a scathing dissent, the Dissenters argued that nonunion workers are entitled to Section 7 rights for mutual aid and protection, and that “it is hard to imagine an act more basic to ‘mutual aid or protection’ than turning to a coworker for help when faced with an interview that might end with the employee fired.”<sup>80</sup>

The Dissenters observed that in its *Weingarten* decision, the Supreme Court recognized that union-represented workers have a right to representation, but that now the Board Majority rejects the same right for workers without a union because according to the Majority, nonunion workers are not capable of representing each other effectively and therefore have no right to representation. “With little interest in empirical evidence, the Majority confidently says that recognizing such a right would make it impossible for nonunion employers to conduct effective workplace investigations and so would endanger the workplace.”<sup>81</sup>

The Dissenters chided the Majority as implying that differences in the union and nonunion settings justify denying nonunion workers the right recognized in *Weingarten*, thus raising the real question of whether these differences mean that the right to representation can be grounded in Section 7 only where a union represents workers. However, from the perspective of Section 7, at least, “it makes no difference whether, like union representatives, coworker representatives (1) represent the interests of the entire workforce, (2) can redress the imbalance of power between employers and employees, or (3) have the skills needed to be effective. The Majority makes a powerful case for unionization, but a weak one for refusing to recognize the rights of nonunion workers.”<sup>82</sup>

In conclusion, the Dissenters argued that the Majority has neither demonstrated that *Epilepsy Foundation* is contrary to the Act, nor offered compelling policy reasons for failing to follow precedent, and they predict that the Majority’s decision will itself eventually be overruled. “[The Majority has] overruled a sound decision not because they must, and not because they should, but because they can. As a result, today’s decision itself is unlikely to have an enduring place in American labor law.”<sup>83</sup>

**SIGNIFICANCE:** If *IBM Corp* is overruled, nonunion employers everywhere will be required to allow employees to be accompanied by coworkers or, depending on the breadth of the Board’s decision, even outside representatives at any meeting or interview that the employee believes may possibly result in some form of disciplinary action.

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<sup>79</sup> 341 NLRB 1288, 1305 (2004).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 1308-09.

<sup>83</sup> *Id.* at 1311.

*Oakwood Care Center*

343 NLRB 659 (2004)

**ISSUE:** A petitioned for unit of nonprofessional employees at Oakwood's long-term residential care facility in Oakdale, New York included both employees who are solely employed by Oakwood, and employees who are jointly employed by Oakwood and a personnel staffing agency, N&W.

Oakwood argued, among other things, that the unit combining the two groups of employees is inappropriate under the Act. The jointly employed employees as well as those solely employed by Oakwood perform duties that are part of the normal functioning of the long-term care facility.

Oakwood refused to consent to the petitioned-for unit and urged the Board to overrule its decision in *M. B. Sturgis*,<sup>84</sup> in which the Board found that bargaining units that combine employees who are solely employed by a user employer and employees who are jointly employed by the user employer and a supplier employer are permissible under the Act.

For decades prior to *Sturgis*, the Board's decisions in *Greenhoot, Inc.*<sup>85</sup> and *Lee Hospital*<sup>86</sup> provided the controlling precedent regarding a unit that would combine groups of employees who had an employer in common but did not have identical employers because one or more groups had an additional, joint employer not shared by the others. In such cases, the Board relied on the principle that involuntary combinations of those employees (and their respective employers) constituted inappropriate bargaining units.

In *Sturgis*, the Board overturned these settled principles.

**HOLDING:** Contrary to the Board's decision in *Sturgis*, the Board in this case held that such units constitute multiemployer units, which, in accordance with the statute, may be appropriate only with the consent of the parties. Therefore, it overruled the Board's decision in *Sturgis*.

According to the Majority, in applying a novel definition of "employer," the *Sturgis* Board, for the first time in the history of the Act, stated that some units combining jointly employed and solely employed employees were nevertheless single employer units.

The Majority observed that the resulting bargaining structure contemplated in *Sturgis* gave rise to significant conflicts among the various employers and groups of employees participating in the process. These are precisely the types of conflicts that Section 9(b) and the Board's community-of-interest test are designed to avoid.

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<sup>84</sup> 331 NLRB 1298 (2000).

<sup>85</sup> 205 NLRB 250 (1973).

<sup>86</sup> 300 NLRB 947 (1990).

The Majority concluded that permitting a combined unit of solely and jointly employed employees, as the Board did in *Sturgis*, contravenes Section 9(b) by requiring different employers to bargain together regarding employees in the same unit. Thus, the Majority held that combined units of solely and jointly employed employees are multiemployer units and are statutorily permissible only with the parties' consent.

Thus the Majority held that the petitioned-for unit is a multiemployer unit, and because neither Oakwood nor N&W had consented to bargaining with the other in a multiemployer unit, the petition must be dismissed.

**DISSENT:** The Dissent (Members Liebman and Walsh) caustically observed that “the Board now effectively bars yet another group of employees—the sizeable number of workers in alternative work arrangements—from organizing labor unions, by making them get their employers’ permission first.”<sup>87</sup>

The Dissent argued “That result is surely not what Congress envisioned when it instructed the Board, in deciding whether a particular bargaining unit is appropriate, ‘to assure to employees the fullest freedom in exercising the rights guaranteed by th[e] Act.’ 29 U.S.C. §159(b).”<sup>88</sup> And, “Protecting employers who choose to create alternative work arrangements—and who now are essentially encouraged to do so, to frustrate union organizing—is not the Act’s overriding concern.”<sup>89</sup>

In the words of the Dissent, the alternative work arrangements involved here depart from the so-called “traditional relationship” but involve the rights of temporary and part-time workers and other contingent workers seeking to improve their working conditions through union representation.

The Dissent maintains that “under the Board’s law, the two employers are joint employers of the supplied workers, and the supplied workers and their coworkers share a community of interest.”<sup>90</sup>

Finally, the Dissent maintained that if the Majority were correct, and *Sturgis* exceeded the Board's statutory authority, the NLRA itself would not be able to guarantee an important, and growing, segment of American workers the right to collective bargaining.

**SIGNIFICANCE:** If *Oakwood Care Center* is overruled, the common use of temporary staffing employees together with traditional employees at worksites across the country would result in combined bargaining units. The result could be multiple bargaining conflicts for the employees and their employers.

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<sup>87</sup> *Oakwood Care Center*, 343 NLRB 659, 663 (2004). The dissenters were referring to university graduate student employees and disabled workers in rehabilitative employment in what they described as a legal underclass who, in previous decisions, were found not to be protected by the NLRA. See *Brown University*, 342 NLRB 483 (2004) (graduate teaching assistants); *Brevard Achievement Center*, 342 NLRB 982 (2004) (disabled workers in a rehabilitative setting).

<sup>88</sup> *Id.* at 664.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

*Brown University*

*1-RC-21368.*

*342 NLRB 483 (2004)*

**ISSUE:** Whether student graduate school teaching assistants for whom supervised teaching or research is an integral part of their academic development must be treated as “employees” for purposes of unionization and collective bargaining protections under section 2(3) of the NLRA.

**HOLDING:** In a 3-2 decision, the Board reversed its previous decision in *New York University*,<sup>91</sup> and held that graduate student assistants are primarily students and not statutory employees. The Board found that graduate student assistants are performing services in connection with their studies, and that they have a predominantly academic, rather than economic, relationship with their schools.

**DISSENT:** Members Liebman and Walsh dissented, stating that the Majority decision is “woefully out of touch with contemporary academic reality” and demonstrates “a troubling lack of interest in empirical evidence.”<sup>92</sup> They state that the Majority “disregards the plain language of the Act which defines ‘employees’ so broadly that graduate students who perform services for, and under the control of, their universities are easily covered.”<sup>93</sup> The Dissent states that the Majority has made a policy decision that “rightly belongs to Congress.”<sup>94</sup> In a colorful phrase, the Dissenters accuse the Majority of erring by “seeing the academic world as somehow removed from the economic realm that labor law addresses—as if there is no room in the ivory tower for a sweatshop.”<sup>95</sup>

The dissenters would apply what they characterize as the plain meaning of section 2(3) and its broad definition of employee which “reflects the common law agency doctrine of the conventional master-servant relationship.” Thus, the dissenters would find graduate school teaching assistants are employees as defined by section 2(3) of the Act.

Citing empirical evidence of mature collective bargaining relationships at more than a dozen major universities, the Dissent rejects the Majority finding that issues related to the terms and conditions of graduate student employment are “not readily adaptable to the collective bargaining process” and that imposing collective bargaining will harm academic freedom and the quality of higher education.

The Dissent concludes that “the Majority has overstepped its authority, overlooked the economic realities of the academic world, and overruled *NYU* without ever coming to terms with the rationale for the decision. The result leaves graduate students outside the Act’s protections and without recourse to its mechanisms for resolving labor disputes. The developments that brought graduate students to the Board will not go away ....”<sup>96</sup>

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<sup>91</sup> 332 NLRB 1205 (2000),

<sup>92</sup> *Brown University*, 342 NLRB 483, 493 (2004).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 494.

<sup>96</sup> 342 NLRB 483, 500 (2004).

**SIGNIFICANCE:** If *Brown University* is reversed, thousands of graduate school teaching assistants will be eligible for protected concerted activities in forming or joining a union, bargaining collectively, and striking or engaging in other forms of work stoppages.

*Brevard Achievement Center*

342 NLRB 982 (2004)

**ISSUE:** Whether disabled janitorial employees of a private sector rehabilitation center who perform the same services for the center's clients as non-disabled employees but whose work is primarily rehabilitative in nature are protected as statutory "employees" under the National Labor Relations Act.

**HOLDING:** The Board majority held that the individuals in question are not statutory employees under the Act.

For nearly half a century, the Board has declined to assert jurisdiction over employment relationships, such as sheltered workshops or rehabilitative vocational programs, which are primarily rehabilitative in nature.

In *Goodwill Industries of Southern California*,<sup>97</sup> in response to the 1974 Healthcare Amendments, the Board began asserting jurisdiction over nonprofit employers, but held that it would not assert jurisdiction over disabled individuals working in sheltered workshop arrangements that were primarily rehabilitative in nature. Thus, although the Board's focus shifted from the employer to the disabled individuals, the result remained the same: the Board would not assert jurisdiction over relationships that were primarily rehabilitative.

In the case-by-case factual analysis applied to assess whether disabled individuals working in a primarily rehabilitative setting are statutory employees, the Board examines the nature of the relationship between the individuals and their employer. If that relationship is guided primarily by business considerations, such that it can be characterized as "typically industrial," the individuals will be found to be statutory employees; alternatively, if the relationship is primarily rehabilitative in nature, the individuals will not be found to be employees. In conducting this analysis, the Board examines numerous factors including, inter alia, the existence of employer-provided counseling, training, or rehabilitation services; the existence of any production standards; the existence and nature of disciplinary procedures; the applicable terms and conditions of employment (particularly in comparison to those of nondisabled individuals employed at the same facility); and the average tenure of employment, including the existence/absence of a job-placement program.

In this case, Brevard Achievement Center (BAC) provides training, counseling and rehabilitative services for its disabled clients and applies different disciplinary standards to disabled and nondisabled employees. Although the disabled employees work the same hours, receive the same wages and benefits, and perform the same tasks under the same supervision as the nondisabled

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<sup>97</sup> 231 NLRB 536 (1977).

employees, they work at their own pace, and are not subject to disciplinary actions for failure to perform. For example, counseling and training was made available to clients who forgot their duties. Thus, the majority held, the relationship between BAC and its disabled employees is primarily rehabilitative, not motivated principally by economic considerations, and therefore they are not statutory employees under the Act.

**DISSENT:** Members Liebman and Walsh chide the majority for missing the “perfect opportunity to revisit longstanding precedent governing disabled workers in light of a legal and policy landscape that has evolved dramatically in the last 15 years” that provides disabled persons the same opportunities available to everyone else in our society, including the chance to participate fully in the workplace. They describe the majority's decision as bad policy since it leaves the employer's disabled employees without any protections under the Act, which segregates them into second-class citizenship.

Further, the dissenters attack the majority's methodology. The dissenters state:

Section 2(3) commands that “[t]he term ‘employee’ shall include any employee.” There is no ambiguity. As noted by the Supreme Court, the “breadth of § 2(3)’s definition is striking: the Act squarely applies to ‘any employee.’” *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984). The scope of Section 2(3) is circumscribed only by the narrowly defined categories of workers expressly exempted from the Act’s coverage. See *Sure-Tan*, supra at 891–892. Accordingly, there are only two relevant questions: (1) are the Employer’s disabled janitors “any employee[s]”; and (2) if so, are they nonetheless expressly exempted from the Act’s coverage?<sup>98</sup>

The dissenters argue that the Supreme Court has made clear that the first question is governed by the common-law agency doctrine of the traditional master-servant relationship.<sup>99</sup> Thus, as is the case here, an “employee” is one who performs services for another, under the other’s control, and in return for compensation.

The second question recognizes that Section 2(3) expressly exempts several classes of workers from the Act’s coverage: agricultural laborers, domestic servants, individuals employed by a parent or spouse, independent contractors, supervisors, and employees covered by the Railway Labor Act. An individual who falls into an excluded class is not covered by the Act, even though the individual otherwise meets the definition of “employee.” Thus, disabled employees are not excluded from the Act.

Here, the Employer’s disabled and nondisabled janitors work side-by-side. They earn the same hourly wage and benefits, and have the same working hours. The disabled and nondisabled janitors also work under the same supervision, and are subject to the same production and quality standards. The disabled janitors are subject to discipline as well, just not the same discipline as the nondisabled employees. Further, training and rehabilitation activities are not a regular or significant component of the disabled janitors’ daily routine.

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<sup>98</sup> Brevard Achievement Center, 342 NLRB 982, 990 (2004).

<sup>99</sup> See *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 94 (1995).



The Dissent emphasizes that the “typically industrial / primarily rehabilitative” test for exclusion for disabled employees does not exist anywhere in the Act. The majority thus relegates the Employer’s disabled janitors and all similarly-situated workers to the economic sidelines, in the Dissent’s words, “making them second-class citizens both in society and in their own workplaces.”

**SIGNIFICANCE:** This case reflects a difficult policy decision as to the purposes of the NLRA: whether the Act is strictly designed to regulate labor relations in the private economic sector, or whether it is designed to go beyond economic activity into areas covered by other federal and state laws. If the decision in *Brevard Achievement Center* is reversed, rehabilitative service organizations and their disabled employees throughout the country would be subject to unionization and collective bargaining, as well as other forms of protected concerted activity, such as strikes and picketing, even where their employment is primarily rehabilitative rather than economic.

*BE & K Construction Co.*

351 NLRB 451 (2007)

**ISSUE:** Whether a party that files a reasonably based but ultimately unsuccessful lawsuit that is filed for a retaliatory reasons constitutes a violation of the NLRA.

**HOLDING:** The case was before the Board on remand from the U.S. Supreme Court. In discussing the above issue, the Court found that there was nothing in text of the Act indicating that Section 8(a)(1) reaches all reasonably based but unsuccessful suits filed with a retaliatory purpose. The Court stated that if such suits constituted an 8(a)(1) violation, it would burden the First Amendment right to petition. In support of this assertion, the Court opined that making such suits violative of the Act would deter prospective plaintiffs who would be faced with the possibility of Board remedies, including a cease and desist order, posting a notice (which “poses the threat or reputational harm”) and the imposition of defendant’s legal expenses.

The majority determined, based on the Court’s findings, that completed suits that are reasonably based but ultimately unsuccessful do not violate the Act.

**DISSENT:** Members Liebman and Walsh would find that not all reasonably based lawsuits are immune from the Act. The minority would require that a balancing test of First Amendment and Section 7 rights is required and that in some cases the Board could find unlawful an unmeritorious, retaliatory lawsuit despite the fact that the suit is reasonably based.

**SIGNIFICANCE:** Should the minority view prevail with the new Obama Board, employers will have to consider the possibility that lawsuits against unions will be scrutinized and potentially be found to violate the Act even where the suit is grounded in reasonable bases.

*Delta Brands, Inc.*

32-RC-5055

344 NLRB 252 (2005)

**ISSUE:** Whether an unlawful rule in the Employee Policy Manual disseminated shortly before a union representation election that restricted workplace solicitation was sufficient to set aside the election results.

**HOLDING:** Consistent with its decision in *Safeway, Inc.*,<sup>100</sup> the mere maintenance of an arguably overbroad rule will not be the basis for overturning an election where an incumbent union is in a position to advise employees of their rights. In *Delta Brands* the majority held that a union engaged in an organizational campaign, like an incumbent union, is fully capable of advising employees of their rights, which would negate the effect of an unlawful rule.

The majority found that the union failed to meet its burden of proving that (1) the policy manual that contained the unlawful rule was actually given to multiple employees during the critical period of union organizing; (2) the employer actually enforced the rule or called the attention of employees to it; and (3) the employees were, in fact, influenced in voting or deterred by the rule from engaging in Section 7 activity.

**DISSENT:** Member Liebman dissented arguing that it is well settled that the employer's mere maintenance of an unlawful rule is not only objectionable conduct, but also sufficient grounds to set aside an election. In her view, this result flows from the reasonable tendency of the rule to interfere with employees' free choice, by inhibiting them from engaging in the conduct prohibited by the rule. She stated that the no-unauthorized-solicitation rule in this case was facially unlawful and that there is no basis in the Board's case law for the three new standards of proof announced by the majority. Yet, in any event, she contends that using the Board's traditional analysis, there was sufficient proof that the rule reached enough employees, recently enough, to make a potential difference in the election results.

**SIGNIFICANCE:** If *Delta Brands* is reversed, employers must more closely review all rules and policies which, if unlawful, will constitute objectionable conduct sufficient to set aside an election even where there is little or no evidence that the employees were, in fact, influenced in voting or deterred from Section 7 activities.

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<sup>100</sup> 338 NLRB 525 (2002).

*Crown Bolt*

21-CA-33846, 33850, 33915 and 21-RC-20192  
343 NLRB 776 (2004)

**ISSUE:** Standards for determining whether an unlawful threat to close a plant is disseminated.

**HOLDING:** The majority overturned *Springs Industries*<sup>101</sup> and earlier Board precedent which had created a rebuttable presumption of dissemination throughout the workforce of an employer's unlawful threat to close the plant if the union prevailed in a representation election, and that to rebut the presumption the employer was required to prove non-dissemination among employees. While acknowledging that the threat of plant closing is a serious violation, the majority held that it would no longer simply presume dissemination of the threat which was made to a single employee, in this case by a production supervisor, and that then union is in a better position to produce evidence that, in fact, the threat had been disseminated.

**DISSENT:** Members Liebman and Walsh dissented, arguing that Board law has consistently been that an employer's unlawful threat to close a plant if the union wins a representation election is presumed to “make the rounds” of the workplace. They assert that the majority's decision is an unexplained departure from that long-standing precedent regarding the presumption of dissemination. They argue that unlawful threats of a plant closing, no matter how casually made, are “so explosive, implying such serious and wide-ranging consequences for the lives of employees and their families, that it will almost certainly be talked about no matter where the thereafter stands in the corporate hierarchy or how casually he or she drops it into the conversation.”<sup>102</sup>

**SIGNIFICANCE:** If *Crown Bolt* is reversed, the Board law will return to the standard of a rebuttable presumption that plant closing threats are disseminated, requiring the employer to prove non-dissemination. In as much as an alleged threat of a plant closing may be the act of a single conversation between a supervisor and a single employee, it will be much more difficult for the employer to prove that the threat was not disseminated by that employee to others in the workplace sufficient to affect the outcome of the representation election.

*LeMoyne-Owen College*

26-CA-20953  
345 NLRB 1123 (2005)

**ISSUE:** Whether faculty members are covered employees or managerial employees excluded from coverage under the NLRA and by the U.S. Supreme Court's decision in *Yeshiva University*.<sup>103</sup>

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<sup>101</sup> 332 NLRB 40 (2000).

<sup>102</sup> *Crown Bolt, Inc.*, 343 NLRB 776, 781 (2004).

<sup>103</sup> 444 U.S. 672 (1980).

**HOLDING:** On remand from the DC Circuit, the majority held that the faculty at LeMoyne-Owen College are managerial employees excluded from coverage under the NLRA. The majority, applying the standards of *Yeshiva University*, found that through individual faculty members, the curriculum committee, academic standards committee, and faculty assembly, the faculty members make or effectively control decisions with regard to curriculum, courses of study and course content, degrees and degree requirements, majors and minors, academic programs, academic divisions, adding and deleting courses, course content, teaching methods, selection of honors, admission standards, syllabi, and textbooks.

**DISSENT:** Member Liebman dissented, stating that Board precedent requires that statutory exclusions must be interpreted narrowly to avoid denying rights which the NLRA is designed to protect. She believes that at LeMoyne-Owen College, faculty members do not have the authority to effectively control the academic decisions of the institution, and that the College failed to meet its burden of proof that they have such authority. She would find that the faculty members are not managerial employees excluded from NLRA coverage.

**SIGNIFICANCE:** Although the NLRB cannot overrule the U.S. Supreme Court's decision in *Yeshiva University*, if the Board reverses *LeMoyne-Owen College* and interprets *Yeshiva* more narrowly, it will signal closer scrutiny in future cases with the object of interpreting the managerial exclusion much more narrowly so as to find coverage of faculty members.

*Jones Plastic and Engineering Co.*

26-CA-20861  
351 NLRB 61 (2007)

**ISSUE:** Whether employees hired on an at-will basis may be found to be permanent replacements for striking employees.

**HOLDING:** The majority held that the employer lawfully declined to reinstate former economic strikers because it had hired permanent replacements for them. The majority overruled the Board's earlier decision in *Target Rock Corp.*<sup>104</sup> to the extent that it is inconsistent with this decision.

In this case, the replacements were required to sign a statement stating that they were permanent replacements, but that they could be “terminated . . . at any time, with or without cause.” The statement then stated, “I further understand that my employment may be terminated as a result of a strike settlement agreement . . . or by order [of] the National Labor Relations Board.”<sup>105</sup>

Federal labor law establishes an employer’s right to hire employees to replace economic strikers and to retain them after the strike if the employer can prove a mutual understanding with the replacement employees that they will not be discharged to make room for returning strikers.<sup>106</sup>

<sup>104</sup> 324 NLRB 373, 374 (1997), *enfd.* 172 F.3d 921 (D.C. Cir. 1998).

<sup>105</sup> *Jones Plastic & Engineering Co.*, 351 NLRB 61, 62 (2007).

<sup>106</sup> *See, e.g., Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-46 (1938).

In *Target Rock Corp.*, a Board majority stated that proof of at-will employment “obviously” did not support the employer’s position that its striker replacements were permanent. Here, the majority in *Jones Plastic and Engineering Co.* held, however, that at-will employment does not speak to whether a mutual understanding exists about job retention vis-à-vis returning strikers. As such, it does not detract from an employer’s otherwise valid showing that it has hired permanent replacements.

The *Target Rock* majority opinion suggests that the employer’s at-will disclaimers informing employees that their employment was for “no definite period” and could be terminated for “any reason” and “at any time, with or without cause” detract from its showing of permanent replacement status.

The AFL-CIO argued in its amicus brief in this case that for replacement employees to be permanent, there must be a contractual promise of permanent employment. If an employer has reserved the right to terminate the employee at any time with or without reason (i.e., employment at will), then it has not made a contractual promise of permanent employment.

The majority disagreed and held that *Target Rock* must be overruled to the extent that it suggests that at-will employment is inconsistent with or detracts from an otherwise valid showing of permanent replacement status.

**DISSENT:** Members Liebman and Walsh dissented. The Dissent states that “each step in the majority’s analysis is erroneous. *Target Rock* does not state that an employer’s declaration that replacements are ‘at-will employees’ precludes a finding that those replacements are permanent. Nor has that ever been the law. Rather, the question is whether the employer can establish that it and the replacement employees shared a mutual understanding that the replacements were ‘permanent’ within the meaning of *Belknap, Inc. v. Hale*,<sup>107</sup> and other applicable precedent.”<sup>108</sup>

The dissenters would have held that where the employer’s “offer of permanent employment” to replacement workers is one that in actuality provides that the replacements “could be fired at the will of the employer for any reason,” it will not justify a refusal to reinstate strikers.

Thus, because the employer failed to establish a mutual understanding between itself and the replacement workers here, the Dissenters would find that its refusal to reinstate the strikers violated Section 8(a)(3) and (1) of the Act.

**SIGNIFICANCE:** Reversing *Jones Plastic and Engineering Co.* would make it unlawful for an employer to refuse to reinstate an economic striker who was an at will employee, unless the employer and employees reached a mutual understanding that the replacements are “permanent” under *Belknap*.

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<sup>107</sup> 463 U.S. 491 (1983).

<sup>108</sup> *Jones Plastic & Engineering Co.*, 351 NLRB 61, 67 (2007).

*Alladin Gaming, LLC.,*

*28-CA-18851 and 28- CA- 19017*  
*345 NLRB 585 (2005)*

**ISSUE:** Whether the employer engaged in unlawful surveillance when supervisors observed employees talking about union matters while in the employee dining room and interrupted those employees to provide the employer's perspective.

**HOLDING:** The managers' interruption of employees engaged in Section 7 rights, where employees on company property were discussing the union and seeking signatures on union authorization cards and managers briefly interjected company's views on unionization, was not a violation of Section 8(a)(1) as unlawful surveillance. The Employees were off-duty and having lunch in the employees' dining room. The majority held that surveillance is only unlawful where it is out of the ordinary thereby making it coercive. Indicia of coerciveness include the length of the surveillance, the distance from employees while observing them, and whether there was other coercive behavior during the observation. Under those indicia, the majority held that the supervisors' conduct was not coercive surveillance and was protected speech under Section 8(c) of the Act.

**DISSENT:** Member Liebman in dissent cited a 1949 Board decision that "inherent in the very nature of the rights protected by Section 7 is the concomitant right of privacy in their enjoyment—'full freedom' from employer intermeddling, intrusion, or even knowledge."<sup>109</sup> She argued that the majority's apparent endorsement of such conduct—which stifles employees' free speech—is wrong. She noted that the concept of "surveillance" has been applied to bar employer's efforts to intrude on employees' private conversations—both passively and actively—in a manner that inhibits Section 7 rights.

**SIGNIFICANCE:** Under a Democratic-majority, it is likely that the Board will be much more stringent in protecting employees' Section 7 rights during union organizing. If *Alladin Gaming* is reversed, employers will be much more likely to be found in violation of the Act for relatively routine communication with employees, this creating a chilling effect on the exercise of employer free speech rights under section 8(c).

*Elmhurst Care Center*

*345 NLRB 1176 (2005)*

**ISSUE:** Whether voluntary recognition of a Union is premature, and therefore unlawful in violation of Sections 8(a)(1), (2), and (3) and 8(b)(1)(A) and (2) of the Act, where the Employer has not: (1) employed a substantial and representative complement of its projected workforce, and was not (2) engaged in its normal business operations.

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<sup>109</sup> *Alladin Gaming, LLC, 345 NLRB 585, 588 (2005)* (citing *Standard-Coosa-Thatcher Co., 85 NLRB 1358, 1360 (1949)*).

**HOLDING:** The majority held that the Respondent Employer extended, and the Respondent Union Local 300S accepted, recognition prematurely, thereby violating Sections 8(a)(1), (2), and (3) and 8(b)(1)(A) and (2) of the National Labor Relations Act, respectively. Recognition was extended and accepted before the employer was engaged in normal business operations.

An employer may grant a union voluntary recognition if the union presents evidence of majority support in an appropriate unit. However, a grant of recognition when the union does not have majority support is unlawful because it violates the principle of majority rule, embedded in Section 9 of the Act.

The Board seeks to have the choice of bargaining representative made, not by a small, unrepresentative group of employees, but by a group that adequately represents the interests of the anticipated full complement of the unit employees—all of whom will be bound, at least initially, by the choice of those who were hired before them. Thus, the Board has long held that an employer's voluntary recognition of a union is lawful only if, at the time of recognition, the employer: (1) employed a substantial and representative complement of its projected workforce, and (2) was engaged in its normal business operations.

**DISSENT:** Member Liebman in dissent noted that “when the Employer recognized the Respondent Union, 54 percent of its ultimate employment complement was working, in 100 percent of the Employer's job classifications. This was a ‘substantial and representative complement’ of workers ... [so that] permitting recognition, then, would adequately protect the interest of later-hired employees in having a voice in selecting their representative, while promoting the interest of current employees in promptly securing representation.”<sup>110</sup>

As to the second part of the test, whether the employer was engaged in its normal business operations, Member Liebman observed that the requirement has been discarded in representation cases, but retained in unfair labor practice cases and serves no clear statutory purpose. She also argued that “in any event, the requirement was satisfied here. While the Employer's facility, a nursing home, was not yet open for business, some employees were effectively doing their jobs already.”<sup>111</sup> As to other employees, she maintains that substantial full scale training and preparation should be sufficient to constitute normal business operations.

In the final analysis, Member Liebman concludes that such reasons “are not a basis to repudiate a voluntary bargaining relationship chosen by [the] work force and embraced by their employer.”<sup>112</sup>

**SIGNIFICANCE:** This is another example of why NLRB-supervised secret ballot elections are preferable to card check agreements and voluntary recognition. Premature recognition of a union before an employer has “employed a substantial and representative complement of its projected workforce,” and before it was engaged in its normal business operations reduces the “free choice” of workers hired subsequently to have a voice in the selection of their representative.

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<sup>110</sup> Elmhurst Care Center, 345 NLRB 1176, 1179 (2005).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 1181.

*Supervalu, Inc.*

351 NLRB 948 (2007)

**ISSUE:** Whether an “additional stores” clause, in which the Employer recognizes the Union as the sole and exclusive bargaining representative for all employees in the retail stores presently operated by the Employer or of employees in stores which may be operated by the Employer in the future, concerns a mandatory or merely a permissive subject of bargaining.

**HOLDING:** Overruling an ALJ's decision, the Board held that the “additional stores” clause concerned a permissive subject of bargaining, and thus, the Respondent Employer's actions did not violate the Act.

The Board panel first noted that mandatory subjects of bargaining under the Act are generally limited to “issues that settle an aspect of the relationship between the employer and employees” within the bargaining unit, and it recognized that, generally, matters involving individuals who are not part of the bargaining unit fall outside this category and thus constitute permissive rather than mandatory subjects of bargaining.<sup>113</sup>

The Board further recognized, however, that, in some circumstances, a third-party concern would constitute a mandatory subject of bargaining, provided that the third-party concern “vitaly affects” the terms and conditions of employment of the bargaining-unit employees.<sup>114</sup> In those cases, the Board applies an “after acquired” clause analysis, consistent with the Board’s holding in *Kroger Co.*,<sup>115</sup> and its progeny. The Board in *Kroger* did not discuss the mandatory-subject issue, but, by finding that the employer violated Section 8(a)(5) by refusing to recognize the union as the representative of employees in additional stores upon the union’s showing of majority support, it implicitly held that “additional stores” clauses, at least under the circumstances of that case, constitute mandatory subjects of bargaining.

The Board found that whether the after acquired store clause would vitaly affect the terms and conditions of the bargaining unit employees cannot be based on pure speculation but, rather, must be based on record evidence. General evidence that the unproven effect of the additional stores clause on the unit employees’ terms and conditions of employment is simply “too speculative a foundation on which to base an obligation to bargain.”<sup>116</sup> Thus, the Board held that the Employer had not violated by refusing to adhere to the after acquired store clause.

**DISSENT:** Member Walsh dissented, arguing that the parties bargained and agreed upon standard “additional stores” clauses, but the majority, ignoring precedent and taking a cramped view of what “vitaly affects” unit employees’ terms and conditions of employment, refused to hold the employer to its bargain.

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<sup>113</sup> Citing *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971).

<sup>114</sup> Citing *Pall Biomedical Products Corp.*, 331 NLRB 1674,1676 (2000), *enf. denied* 275 F.3d 116 (D.C. Cir. 2002).

<sup>115</sup> 219 NLRB 388 (1975).

<sup>116</sup> *Supervalu, Inc.*, 351 NLRB 948 (2007) (citing *Pittsburgh Plate Glass*, 404 U.S. at 182).



As to whether adherence to the after acquired store clause would vitally affect the terms and conditions of employment of bargaining unit employees, Member Walsh noted that the Board had long recognized that unionized employees' wages are affected by the degree of unionization among their employer's competitors. He stated that it is even clearer that the unionization of additional stores operated by the *same* employer vitally affects the existing unit employees.

Member Walsh would have held that application of the after acquired stores clause vitally affects the terms and conditions of existing unit employees was a mandatory subject of bargaining, and, therefore, the Employer should be held to its bargain to recognize the Union at all of its stores within a defined geographic area.

**SIGNIFICANCE**: If reversed, and unions were no longer required to show any evidentiary support of the "vitally affects" standard, making it mandatory subject of bargaining, this decision would expand to a nearly limitless scope the voluntary recognition and card check showings of majority support pursuant to after acquired stores clauses.

### **Scope of Protected Activity**

*Holling Press, Inc.*

*343 NLRB 301 (2004)*

**ISSUE**: Whether an employee was engaged in activity protected by the Act when she solicited a coworker to be a witness in support of her sexual harassment claim filed with a State agency.

**HOLDING**: The Majority applied the analysis set forth in the Board's decisions in *Myers I* and *II*<sup>117</sup> which requires that for an employee's actions to be protected Section 7 activity, the General Counsel must show that an employee's actions are (1) concerted and (2) for mutual aid or protection. The Board found that although the employee's attempts to solicit another coworker to accompany her to the State Agency in support of her sexual harassment claim was indeed concerted it was not engaged in for mutual aid or protection. The Board made that determination finding that the employee pursued the sexual harassment claim for purely personal benefit and not for the benefit of other employees.

**DISSENT**: Members Liebman and Walsh dissented, arguing that that an employee's request for assistance, even if purely for one's own benefit, is for mutual aid or protection. The Dissent reasoned that such activity is for mutual aid or protection because the next time another employee could be the victim.

**SIGNIFICANCE**: If the Dissent's viewpoint on what constitutes "mutual aid or protection" is applied in future PCA (protected concerted activity) cases, the scope of the Act's protection will be

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<sup>117</sup> *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), *remanded sub. nom. Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), *reaffd. in Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), *enfd. sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

greatly broadened offering protection to employees who act out of purely selfish motivations, so long as they solicit or induce assistance in their personal issue from at least one other employee. Such broad protection will lead to many more “meritorious” unfair labor practice charges against employers.

*Waters of Orchard Park*

*341 NLRB 642 (2004)*

**ISSUE:** Whether two nursing home employees were engaged in protected, concerted activity when they called the New York State Department of Health Patient Care Hotline to report excessive heat in the Respondent’s nursing home.

**HOLDING:** The Majority found that although the employees’ action in making the call was concerted (as there were two employees involved in the call), it was not protected as it did not relate to a term or condition of their employment. The Majority found that because the employees made the call to the hotline to express their concern about the effect the heat was having on patients, as opposed to employees, the activity was not for mutual aid or protection of employees and therefore not protected. As stated another way in a concurring opinion by Member Meisburg, the NLRA “is not a general whistleblower’s statute. Absent an intent to improve wages, hours, or working conditions, concerted activity of the type in this case cannot be deemed ‘mutual aid and protection.’”<sup>118</sup>

**DISSENT:** Members Liebman and Walsh dissented on the basis that the nursing home had posted a mandatory NY State Dept of Health notice requiring that employees report any instance of physical abuse, mistreatment or neglect. The Dissent found that the employees’ stated motives for calling the hotline, concern for residents, are irrelevant as the activity still relates to a working condition.

**SIGNIFICANCE:** The Minority’s position would embolden disgruntled employees to report any potential workplace issues to State or Federal agencies, regardless of the motivation, safe in the knowledge that their activities are protected by the NLRA.

*Five Star Transportation, Inc.*

*349 NLRB 42 (2007)*

**ISSUE:** Whether a successor contractor providing school bus transportation lawfully refused to hire certain drivers of the predecessor contractor who sent letters in an effort to persuade the School District to award the contract to the predecessor.

**HOLDING:** The Majority held that the successor contractor did not violate the Act by refusing to hire certain drivers. Although the Majority acknowledged that all of the drivers engaged in concerted activity by preparing and submitting individual letters to the school committee, the Majority

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<sup>118</sup> Waters of Orchard Park, 341 NLRB 642, 645 (2004).

concluded the letters were not sufficiently related to terms and conditions of employment to constitute protected activity. One group of drivers' letters simply discussed generalized assertions about the quality of the successor contractor's buses, failing to raise common employment-related concerns related to wages and working conditions of the drivers.

Another group of driver's letters disparaged the successor contractor's business. The Majority found that the letters used inflammatory language to criticize the successor contractor's operations and that the letters were not related in any way to the drivers' wages and working conditions.

**DISSENT:** Member Liebman dissented, finding that all of the letters were part of a concerted campaign arising out of a labor dispute. Liebman argued that the Majority should not have examined the content of the letters, but instead determined that the letters were part of and related to the ongoing labor dispute.

**SIGNIFICANCE:** Once again, in analyzing the protected nature of employees' activities, the Dissent articulated an approach where the focus is solely on the concerted nature of the activity. It appears that if the activity is concerted, the Dissent is apt to find the activity to be protected as well.

*Amcast Automotive of Indiana, Inc.*

*348 NLRB 836 (2006)*

**ISSUE:** Whether the employer violated 8(a)(3) of the Act when it terminated an employee for using a Company computer to search the internet to investigate the truth of rumors that the Company was selling a portion of its business.

**HOLDING:** The Majority held that the employer did not violate the Act when it discharged the employee. In reaching that decision, the Majority found that although the activity may have been concerted, as the alleged discriminatee was with another employee at the time he was on the internet, the activity was not protected. In that regard, the Majority found that the internet activity was too attenuated from employees' working conditions to be protected, noting that the "mere possibility of a future sale was too speculative and remote..."<sup>119</sup>

**DISSENT:** Member Walsh dissented, arguing that the employees' internet search was not too attenuated from employees' working conditions as the search was done out of concern for the employees' futures. The Dissent further points out that the employer was in fact engaged in negotiations with the potential buyer that the employees were researching on the internet.

**SIGNIFICANCE:** If overturned, the Board will likely find activity that has a potential at some time in the future to impact terms and conditions of work to be protected.

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<sup>119</sup> *Amcast Automotive of Indiana, Inc.*, 348 NLRB 836, 839 (2006).

## ***Gissel / Special Remedies***

*Abramson*

*345 NLRB 171 (2005)*

**ISSUE:** Whether the employer's conduct before and after the election warranted a *Gissel* bargaining order (ordering bargaining even though the Union has not won in a NLRB-conducted election because the employer's conduct has prevented the possibility of ensuring a fair election).

**HOLDING:** The Majority upheld ALJ findings with regard to several unfair labor practice violations that the employer committed during the course of the Union organizing campaign, including threats of plant closure, as well as loss of jobs and benefits should employees choose union representation.

In this case, the Majority found that because the threats were disseminated to a minority of the employees (at most 35 out of 80 employees) a *Gissel* bargaining order was unwarranted and the Board's traditional remedies, including a rerun election, would suffice.

**DISSENT:** Member Liebman dissented, discounting the fact that the threats were made to a minority of the employees. Liebman stated that the effectiveness of the threats was evident in the outcome of the election with 68 out of 73 employees voting against the Union.

**SIGNIFICANCE:** It is likely that the new Board will be more liberal in imposing a *Gissel* bargaining order where there are threats made during Union organizing campaigns. Such a harsh remedy will require employers to be more circumspect about how they communicate with employees during the critical period.

*Hialeah Hospital*

*343 NLRB 391 (2004)*

**ISSUE:** Whether the union's objections to election regarding various unfair labor practices that the employer committed after learning that the union filed a petition for election with the NLRB warrant a *Gissel* bargaining order.

**HOLDING:** The Majority upheld the ALJ finding of a violation with regard to several of the Union's objections, including the following: (a) threats made at a mandatory meeting of employees of unspecified reprisals for engaging in union activity; (b) promises of job promotions to employees who stop supporting the union; (c) stricter enforcement of workplace rules; (d) removing employee benefits (i.e. removal of shower head and ping pong table from employee lounge); (e) various threats; (f) surveillance; and, (g) a retaliatory discharge. The Majority reversed the ALJ, however, with respect to his recommended remedy of a *Gissel* bargaining order. The Majority determined that the Board's traditional remedies, including a rerun election and reinstatement of the unlawfully discharged employee were sufficient and that the employer's violations were not as serious or as

pervasive as they would need to impose a bargaining order, which should be reserved for those cases where the possibility of erasing the effects of unfair labor practices is slight.

**DISSENT:** Member Liebman dissented, and would issue a *Gissel* bargaining order where violations of the type at issue here are committed.

**SIGNIFICANCE:** The new Board will likely not shy away from imposing a *Gissel* bargaining order in cases such as this, where violations occur during the critical period between the filing of the petition and the election. Employer conduct will be more scrutinized than ever during the critical period and extreme remedies, such as a *Gissel* bargaining order, will be imposed more often.

*The Register Guard*

344 NLRB 1142 (2005)

**ISSUE:** Whether a *Gissel* bargaining order is warranted where an employer engages in violative activity including (a) granting wage increases, (b) soliciting employees' grievances and promising to remedy them, (c) and soliciting employees to withdraw the Union authorizations.

**HOLDING:** The Majority held that the three 8(a)(1) violations did not fall into either category of violation that the Board has found to warrant a *Gissel* bargaining order (i.e. either (1) exceptional cases, which are marked by ULPs that are so outrageous and pervasive that a fair election could not be run; or, (2) less extraordinary cases, which are marked by less pervasive violations but which still have a tendency to impede the election process).

**DISSENT:** Member Liebman dissented, finding that a *Gissel* bargaining order was warranted. In reaching that decision, Liebman pointed to overall dissemination of the 8(a)(1) violations: the employer granted wage increase to all employees; the employer sent letters to all employees soliciting employees to withdraw their union authorizations; and, the employer solicited employee grievances at a mandatory meeting for all employees.

**SIGNIFICANCE:** The Dissent has made it clear in this and other *Gissel* bargaining order cases that it will be much more inclined to issue a bargaining order where the employer commits violations such as those at issue here in the context of a union organizing campaign.

*Intermet Stevensville*

350 NLRB 1349 (2007)

**ISSUE:** Whether the employer's violations so tainted the workplace atmosphere that the possibility of a fair rerun election was slight and a bargaining order was warranted.

**HOLDING:** The Majority held that imposition of bargaining order was not warranted where the "hallmark" violations—threatening plant closure and loss of employment if the union won the election—did not impact a significant portion of the bargaining unit and therefore did not warrant a

bargaining order. The Majority further found that there was no evidence that the two employees who were affected by the hallmark violations disseminated news of these unfair labor practices to other employees.

**DISSENT:** Member Walsh would find that a *Gissel* bargaining was warranted where the employer engaged in the hallmark violations described above as well as many other violations, including, for example, the following employer actions taken after it learned of the union organizing efforts: removal of bulletin boards; confiscation of union literature; prohibition of union materials in the plant; and, statements regarding the futility of supporting the Union.

**SIGNIFICANCE:** This case is just one of several demonstrating that the Board will be prone to approving the imposition of *Gissel* bargaining orders where an employer's unfair labor practice violations are committed after it obtains knowledge of a union organizing effort.

*Washington Fruit & Produce Co.*

*343 NLRB 1215 (2004)*

**ISSUE:** Whether the election results should be set aside on the basis of the union's objection to the election regarding inaccurate address information on the *Excelsior* list.

**HOLDING:** The Majority held that the election should not be set aside, finding that there was no evidence that the inaccuracies were the result of bad faith or gross negligence and that the union possessed accurate addresses for more than 90 percent of the employees.

**DISSENT:** The Dissent would find the inaccuracies in addresses to constitute grounds for setting aside the election.

**SIGNIFICANCE:** If the Dissent's view becomes the law, it will lead to many more election reruns where an employer, through no fault of its own provides even a low percentage of address inaccuracies. Such inaccuracies on the *Excelsior* list often occur for example when employees do not inform the employer that they have moved residences during their employment.

*Woods Quality Cabinetry Co.*

*340 NLRB 1355 (2003)*

**ISSUE:** Whether an election should be set aside and new election directed where the sample ballot and notice of election erroneously indicated that the union was affiliated with the AFL-CIO.

**HOLDING:** The Majority found that the erroneous designations on the notices and ballots would reasonably tend to interfere with the election process because unit employees would incorrectly assume that they were joining the AFL-CIO. The Board found that this mistaken belief was material in several respects, including (1) calling into question the employer's credibility where it had indicated to employees that the union was not affiliated with the AFL-CIO; and, (2) giving employees a false

impression that the union would receive the assistance of a much larger union. Consequently, the Majority directed a new election with corrected notices and ballots.

**DISSENT:** Member Liebman dissented, finding that the incorrect designation on the ballot was a harmless mistake. Liebman argued that there was no good evidence that the voters cared about the affiliation issue. Liebman also argued that the affiliation issue was insignificant as evidenced by the fact that the both parties signed the election stipulation which also contained the incorrect designation.

**SIGNIFICANCE:** The new Board will likely treat insignificant employer mistakes on the *Excelsior* list as grounds for setting aside an election while, on the other hand, it will find Board inaccuracies in election notices and ballots as immaterial and not warranting the setting aside of an election.

*First Legal Support Services, LLC*

*342 NLRB 350 (2004)*

**ISSUE:** Whether the employer's numerous 8(a)(1) and (3) violations committed during a union organizing campaign warranted a bargaining order and other special remedies.

**HOLDING:** The Majority affirmed the ALJ's rulings that the employer did in fact commit numerous unfair labor practices during the union organizing campaign. The unfair labor practices included, but were not limited to, the following: forcing employees to sign independent-contractor agreements; threatening employees with discharge if they did not sign the agreement; discharging two employees because they supported the union; threatening to close the facility if the organizing effort continued; promising benefits if employees abandoned the union; refusing to hire an applicant because his wife was associated with the union; threatening to discharge employees if they engaged in a strike; and, conveying to employees that their organizing efforts were futile.

Despite the ALJ's findings that the employer committed numerous violations (which the employer did not appeal) the Majority upheld the ALJ's recommendation for standard remedies and rejected the General Counsel's and Union's exceptions which asserted that the appropriate remedy should include, among other things, a *Gissel* bargaining order.

In reaching its decision that traditional remedies sufficed, the Board determined that a bargaining order was not warranted because the GC failed to establish that the union enjoyed majority support. The Board also rejected the GC request for other special remedies because the GC failed to carry its burden that traditional remedies would not sufficiently remedy the unfair labor practices.

**DISSENT:** Even though Member Liebman argued that the GC had established that the Union enjoyed majority status, she nevertheless made it clear that she would overrule Board precedent and order a *Gissel* bargaining order even if the GC had failed to establish majority status.

Member Liebman would also grant most of the GC's requests for special remedies, including: (1) having the owner read notice to employees; (2) allowing the union reasonable access to employer bulletin boards; (3) giving the union equal time and access to employees to respond to an employer

address regarding union representation; (4) allowing union access to employees during working time to deliver a 30 minute address; (5) mailing copies of notices to all employees; and, (6) supplying the union with names and addresses of unit employees.

**SIGNIFICANCE:** What is most concerning here is that a new Board will likely overrule Board precedent and issue *Gissel* bargaining orders even where the GC fails to establish that the union ever enjoyed majority support.

### **Partial Lockout**

*Bunting Bearings Corp.*

343 NLRB 479 (2004)

**ISSUE:** Whether the Employer violated Section 8(a)(3) of the Act by implementing a partial lockout that was limited to nonprobationary employees following an impasse in negotiations.

**HOLDING:** The Majority held that the lockout was lawful following a legal impasse in negotiations. The Majority concluded that the Employer lawfully exerted economic pressure on the union following the lawful impasse by limiting the lockout to nonprobationary employees whom the Employer believed to be its only employees covered by the terms of the CBA.

**DISSENT:** The Dissent would find that the partial lockout unlawfully discriminated against union employees. In reaching that decision, the Dissent determined that the employer's distinction was not between probationary vs. non-probationary employees, but rather was between union vs. non-union employees.

**SIGNIFICANCE:** Should the Dissent's position become law, it would potentially limit an employer's ability to lock out employees who are covered by a CBA to exert pressure on the Union to accede to its bargaining position following a lawful impasse.

*Midwest Generation, EME, LLC*

343 NLRB 69 (2004)

**ISSUE:** Whether the Employer violated 8(a)(1) and (3) of the Act by locking out and / or refusing to reinstate those employees who were on strike at the time of the Union's unconditional offer to return to work, while not locking out or refusing to reinstate workers, who, prior to the Union's unconditional offer to return to work, had already ceased participating in the strike and had already made their own unconditional offers to return to work.

**HOLDING:** The Majority held that the employer did not violate the Act by locking out and refusing to reinstate only those workers who stuck with the strike until the end when the Union made an unconditional offer on their behalf to return to work.



The Majority explained that the employer was justified in distinguishing between (a) employees who ceased participation in the strike and made unconditional offers to return to work prior to the Union formally announcing an end to the strike and (b) employees who “stuck with it until the end of the strike.” The Majority found that with regard to the former group, these employees had “already eschewed the strike weapon during the strike” and it was “no longer necessary for the Respondent to place additional pressure upon them in order for the Respondent to achieve its bargaining goals.”

**DISSENT:** The Dissent would find that the lockout was not protected because the Employer discriminatorily limited the lockout to employees who exercised their Section 7 right to continue striking. The Dissent argued that the Employer’s asserted business justification for limiting the lockout to those employees (i.e. it was unnecessary to pressure employees who either did not participate at all or who eschewed the strike on their own prior to the Union’s official announcement ending the strike) failed to satisfy its burden. The Dissent argues that the mere fact that employees ceased striking earlier than the Union announcement does not mean that those employees had abandoned the Union’s bargaining position.

**SIGNIFICANCE:** The Dissent’s position would effectively call into question an employer’s ability to justify a partial lockout on the previously, long-recognized business justification that the impetus behind the lockout is to pressure the Union into acceptance of its legitimate bargaining proposals.

### **Mitigation of Damages**

*Grosvenor Resort*

*350 NLRB 1197 (2007)*

**ISSUE:** Whether the ALJ properly awarded full back pay to certain alleged discriminatees who (a) delayed their initial job search until several weeks after discharge; (b) voluntarily quit interim work; or (c) performed a limited search for work.

**HOLDING:** The Majority held that the unlawfully terminated discriminatees failed to make sufficiently reasonable efforts to secure interim work to be entitled to full backpay. The Board denied full back pay to employees whose efforts fell in to the following categories:

- Searches commenced more than two weeks after unlawful discharge—absent circumstances justifying a longer delay, employees whose search commenced more than two weeks after discharge will have backpay tolled until the reasonable search began (the mere fact that employees engaged in picketing subsequent to discharge does not relieve them of this responsibility);
- Quitting interim employment—employee who quit after incident where coworker embarrassed her in front of customers, was denied backpay for time after she quit the job and remained unemployed. The Board noted that when a discriminatee

voluntarily quits interim employment the burden shifts to the General Counsel to show that the quit was reasonable.

- Inadequate searches for interim work—
  - one application in a two month span inadequate;
  - three applications in a three month span inadequate;
  - 7 weeks in between applications is insufficient;
  - Working for family member which amounts to nothing more than a hobby found inadequate; and
  - Securing work soon after discharge but not starting that work for several weeks inadequate.

**DISSENT:** The Dissent would have granted full back pay to all of the alleged discriminatees. The Dissent argued that the sufficiency of a discriminatee's search for work is determined with respect to the back pay period as a whole and is not based on isolated portions of the back pay period.

With regard to employees who engaged in picketing, the Dissent determined that they did not unreasonably delay search for work by engaging in protected, concerted activity and therefore, according to the Dissent, the back pay period for those employees should not have been tolled.

The Minority also disputed the Majority finding that certain employees did not make an adequate search for work. The Minority argued that the adequacy of the search should take into account the discriminatees' skills, qualifications, age, and other personal limitations, such as whether or not the discriminatee speaks English.

**SIGNIFICANCE:** The Minority's position regarding the adequacy of an employee's search for work in determining whether that employee has made proper attempts to mitigate damages makes the determination completely subjective. That subjective standard in the hands of the new Board will likely lead to consistent findings that employees routinely make adequate searches for work even where, for example, the search is delayed by weeks, the employee voluntarily quits interim work, and where employees make scant efforts to apply for work. The Minority's position would also embolden alleged discriminatees to picket their employers and abandon any responsibility to mitigate damages safe in the knowledge that they will continue to accrue back pay.

*St. George Warehouse*

*351 NLRB 961 (2007)*

**ISSUE:** Which party bears the burden of production when an employer contends that the discriminatee has failed to mitigate damages by making reasonable efforts to find work.

**HOLDING:** The Majority held that the discriminatee failed to take reasonable steps to find work. In reaching that decision the Majority articulated the proper burden shifting analysis as follows: (a) the employer bears the initial burden to show that there were substantially equivalent jobs within the relevant geographic area; and, (b) assuming the employer meets that initial burden, the burden shifts to

the discriminatee and General Counsel to show that the discriminatee took reasonable steps to seek those jobs.

**DISSENT:** Members Liebman and Walsh dissented, finding that the respondent should bear the entire burden to produce all facts to substantiate the affirmative defense that a discriminatee unreasonably failed to mitigate damages.

**SIGNIFICANCE:** Assuming the Minority view becomes the law, an employer will once again be saddled with the entire burden to prove a discriminatee's failure to take reasonable steps to find work and mitigate damages. The problem with this is that the discriminatee and General Counsel are the entities most likely in possession of information and documents to show that the discriminatee took reasonable steps to mitigate damages, not the employer.

### **Information Requests**

*American Polystrene Corp.*

*341 NLRB 508 (2004)*

**ISSUE:** Whether the employer claimed a present inability to pay the union's bargaining demands during collective-bargaining negotiations and whether the employer subsequently violated Section 8(a)(5) of the Act by refusing to furnish the union with requested financial information.

**HOLDING:** The Majority held that the employer had no duty to provide the requested financial information because, even assuming it did claim an inability to pay, the employer effectively retracted any such claim simultaneously with its denial of the union's information request the very next day.

**DISSENT:** Member Walsh dissented, finding that the employer failed to effectively retract its claim of inability to meet the union's bargaining proposals when it "lied" about the fact that its general manager stated that the employer could not afford the union's proposals and that it would go broke if those proposals were implemented. The Dissent concluded that such statements were lies because the ALJ credited the union's chief negotiator that the statements were made.

**SIGNIFICANCE:** Although the focus of this case should be on whether the employer effectively retracted any claim of present inability to afford union bargaining proposals, a new Board may be expected to effectively ignore such retraction attempts should an ALJ credit union witnesses over employer witnesses regarding inability to pay statements.

The Dissent's position will embolden unions to file more 8(a)(5) charges in the context of collective bargaining negotiations alleging a failure to provide financial information pursuant to a claimed inability to pay safe in the knowledge that assuming the employer tries to defend against the charge, a subsequent credibility determination by an ALJ could lead to the new Board finding that the employer is "lying" and therefore required to turn over its books, regardless of its attempts to retract such statements.

## **Surveillance**

*Anheuser-Busch, Inc.*

*351 NLRB 644 (2007)*

**ISSUE:** Whether the Board should grant a make-whole remedy to employees who were disciplined for misconduct (loitering in an unauthorized area of the employer's facility where they used illegal drugs and urinating off of the employer's roof) that the employer observed by means of cameras installed without prior notification or bargaining with the Union.

**HOLDING:** The Majority held that despite the fact that the employer violated 8(a)(1) and (5) by failing to give the union notice and opportunity to bargain regarding the installation of the cameras, the remedy was limited to the 8(a)(5) failure to bargain and did not include a make-whole remedy for the employees engaged in the misconduct.

In reaching that decision the Majority determined that where adverse action is taken against an employee for cause, a make-whole remedy to such employees is precluded by Section 10(c) of the Act which states that the Board shall not issue an order requiring reinstatement or backpay to any individual who has been disciplined or terminated for cause.

The Majority also recognized that in *Weingarten* cases, the Board has denied make-whole remedies to employees where the adverse action taken was for cause even where employers denied union assistance at an investigatory interview.

**DISSENT:** Members Liebman and Walsh would find that the discriminatees were entitled to a make-whole remedy. The Minority argues that because Section 10(c) authorizes the Board to fashion a remedy that will "effectuate the purposes of the Act" such authority should be used to make employees whole where the employer discovers their misconduct by means that violate the Act.

**SIGNIFICANCE:** The Minority made clear that it will interpret its remedial authority broadly.

## **Discharge**

*Sacramento Recycling and Transfer Station*

*345 NLRB 564 (2005)*

**ISSUE:** Whether the General Counsel established as part of his prima facie case with respect to five discharged employees that the employer had knowledge of the employees' union activity or sentiments based solely on its knowledge of employees' attempts to unionize a predecessor employer.

**HOLDING:** The Majority determined that the General Counsel failed to establish as part of its prima facie case that the employer possessed knowledge of the discharged employees' union activities or sentiments. In so holding, the Majority noted that although the employer was aware of efforts to

unionize the predecessor employer, the General Counsel failed to establish that the employer had knowledge of continuing efforts to organize after it took over operations as the successor employer.

**DISSENT:** Member Liebman would find that the General Counsel had established the employer's knowledge, as well as the other elements of his initial burden of proof under *Wright Line*.<sup>120</sup> Liebman would find that the employer's knowledge that certain employees desired union representation when they were employed by the predecessor employer should be sufficient to establish knowledge of the employees' pro-union sentiment after it took over operations.

**SIGNIFICANCE:** Member Liebman would ease the General Counsel's burden with respect to the knowledge element in successorship cases.

*Music Express East*

340 NLRB 1063 (2003)

**ISSUE:** Whether the General Counsel established as part of his prima facie case with respect to a single discharge that the employer had knowledge of the employee's union activities or support based on conversations the employee had with a low level, part-time supervisor who himself was union supporter.

**HOLDING:** The Majority held that the employer did not violate 8(a)(3) of the Act regarding the discharge as the General Counsel failed to establish employer knowledge of the individual's union activity or support and, therefore failed to establish an element of a prima facie case pursuant to the Board's decision in *Wright Line*.

The Majority determined that because the lower level supervisor had expressed interest in the Union and had even attempted to attend a union meeting, he was a pro-union supervisor and that as such he would not inform upper management about individual employee union activity.

**DISSENT:** Member Walsh acknowledges the line of cases which stand for the proposition that a supervisor who is a "union promoter" would not divulge to upper management the union activity of employees. However, he would not extend that line of cases to include lower level supervisors who express support for the union but do not go so far as to promote the union. As such, Member Walsh would impute the lower level supervisor's direct knowledge of the employee's union activity to upper management, despite the fact that the lower level supervisor is an admitted union supporter.

**SIGNIFICANCE:** The new Board can be expected to impute knowledge to the employer even where the source of that knowledge is a low-level supervisor who has professed union support.

*Caribe Ford*

348 NLRB 1108 (2006)

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<sup>120</sup> 251 NLRB 1083 (1980).

**ISSUE:** Whether the General Counsel established as part of his prima facie case with respect to a single discharge that the employer had knowledge of the employee's union activities or support based on the timing of the discharge soon after the employee engaged in open union activity.

**HOLDING:** The Majority held that the General Counsel failed to establish a prima facie case that the employer violated 8(a)(3) of the Act when it discharged an employee. Specifically, the Majority found that the GC failed to demonstrate the employer had knowledge of the employee's union activity.

**DISSENT:** Member Liebman would find that the GC did establish a prima facie case of an unlawful discharge and that the knowledge element was established through the timing of the discharge soon after the employee engaged in open union activity. Member Liebman also stated that evidence of animus is relevant to the issue of employer knowledge. In that regard, Member Liebman points to evidence of animus that occurred after the employee was discharged.

Member Liebman used that same evidence of post-facto anti union animus to satisfy its prima facie of case of an unlawful discharge.

**SIGNIFICANCE:** Should the Minority approach prevail, even evidence of animus that occurs subsequent to the alleged adverse action will satisfy the GC's *Wright Line* burden with regard to both the animus and knowledge elements.

*Quietflex Manufacturing Company*

*344 NLRB 1055 (2005)*

**ISSUE:** Whether the employer lawfully discharged 83 employees, who were peacefully engaged in a 12 hour work stoppage, for refusing to vacate the employer's parking lot where: 1) the employer requested that employees either return to work or vacate the parking lot area; 2) the employer offered to meet with employees to discuss their issues; and, 3) the employer warned employees that a refusal to move could lead to termination.

**HOLDING:** The Majority held that the employer lawfully terminated the employees. The Board recognized that where employees engage in lawful on-site work stoppages, it is required to weigh certain factors to determine if the work stoppage has lost protection of the Act. The factors the Board weighs include the following: (1) the reason for the work stoppage; (2) whether the stoppage was peaceful; (3) whether the work stoppage interfered with production or deprived the employer access to its facility; (4) whether employees had adequate opportunity to present their grievances to management; (5) whether employees were given any warning that they must leave the premises or face discharge; (6) the duration of the work stoppage; (7) whether employees were represented or had an established grievance procedure; (8) whether employees remained on the premises beyond their shift; (9) whether employees attempted to seize the employer's property; and (10) the reason for which the employees were ultimately discharged.

Although the Majority found that the employees had engaged in a peaceful work stoppage, it concluded that after the employer (1) made repeated requests that the employees return to work or move off of the employer's facility, (2) offered to meet with the group to discuss their issues, and (3) warned the employees that their refusal to return to work or move off the property could lead to termination the employees' work stoppage became unprotected after they remained in the parking for 12 hours.

**DISSENT:** Member Liebman would find the termination to be unlawful. Liebman believed that the work stoppage did not become unprotected despite the twelve-hour duration because it occurred outside the facility and did not interfere with operations, ingress and egress, or with other employees.

**SIGNIFICANCE:** Should Member Liebman's opinion, which draws a distinction between work stoppages inside and outside the employer's facility, become the law, it would appear that work stoppages that take place in an outside area of the employer's facility would not be held to any standard of reasonable duration.

### **Union Paraphernalia**

*W San Diego*

*348 NLRB 372 (2006)*

**ISSUE:** Whether the Employer violated 8(a)(1) of the Act when it prohibited its employee from wearing a union button while at work.

**HOLDING:** The Majority held that the employer did not violate the Act by prohibiting its employee from wearing the union button in public areas. In so holding, the Board recognized the precedent set forth in *Republic Aviation Corp., v. NLRB*,<sup>121</sup> that employees have a right to wear union insignia. However, the Majority also recognized that an employer may lawfully restrict the wearing of union insignia where special circumstances exist which warrant a restriction. In this case, the Hotel articulated its interest in providing its guests with a unique atmosphere and ambience. In that regard, the Hotel maintained a policy on attire that prohibited all non-business uniform adornments, and required its in-room delivery personnel to wear black t-shirts, black slacks, and a black apron.

The Majority also held that the employer violated the Act by refusing to allow its employee from wearing a union button in non-public areas of the Hotel.

**DISSENT:** Member Liebman would find that the employer's prohibition on in-room delivery personnel wearing union buttons in public as well as in non-public areas was unlawful. In so finding, Liebman disagrees with the Majority that the employer established special circumstances warranting the ban in public areas.

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<sup>121</sup> 324 U.S. 793 (1945).

**SIGNIFICANCE:** The new Board will not likely accept a business image rationale as sufficient to prohibit employees from wearing union insignia in public areas.

*Leiser Construction, LLC*

*349 NLRB 413 (2007)*

**ISSUE:** Whether the Employer violated the Act by prohibiting its employee from wearing a union sticker depicting someone or something urinating on a rat that was designated as “non union.”

**HOLDING:** The Majority held that the employer did not violate the Act by prohibiting its employee from wearing the union sticker. In so holding, the Majority first relied on Board precedent (e.g. *Southwestern Bell Telephone Co.*<sup>122</sup>) which recognizes an employer’s right to restrict the display of insignia that is vulgar and obscene.

The Majority next noted that the employer’s prohibition was narrowly tailored to prohibit only the rat sticker, and not the numerous other union-related stickers on his hard hat that were not obscene or vulgar.

**DISSENT:** Member Walsh dissented with respect to the Majority decision that the employer did not violate the Act when it prohibited its employee from displaying the rat sticker on his hard hat. First, Member Walsh argued that although the sticker was vulgar, the employee should not have been prohibited from displaying it on his hard hat because vulgar language by both management and employees was common in the workplace. Second, Member Walsh considered determinative the fact that the employer did not maintain any rules governing employee apparel or that the employee had any contact with the public such that displaying the sticker would harm the employer’s public image.

**SIGNIFICANCE:** The Minority position would restrict the employer’s ability to prohibit employees from adorning themselves or their equipment with obscene paraphernalia so long as that paraphernalia has some relation to unions.

### **Interrogation**

*Winkle Bus Co.*

*347 NLRB No. 108*

**ISSUE:** Whether in the context of an organizing campaign it is unlawful for a supervisor to ask an employee whether he wanted to wait for years for a raise like employees of another employer that was the subject of a ULP hearing involving refusal to bargain allegations.

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<sup>122</sup> 200 NLRB 667 (1972).



**HOLDING:** The Majority held that the supervisor’s question did not constitute an unlawful statement of futility as it simply identified one of the possible consequences of unionization (i.e. that bargaining could take time before employees would receive any raises).

The Majority found that the supervisor’s statement in this case did not rise to the level of an unlawful threat of futility (e.g. where an employer states or implies that it will ensure nonunion status by unlawful means.) In so finding, the Majority distinguished the statement at issue in this case from unlawful threats that negotiations “would start from zero” and that employees would not receive scheduled wage increases.

**DISSENT:** Member Walsh would find the statement an unlawful implication of excessive delay and not merely a reference to the reality of collective bargaining.

**SIGNIFICANCE:** Under the new Board, employers can expect that statements to employees regarding possible consequences of unionization once protected by section 8(c) of the Act will likely be much more critically scrutinized and will often be found to be unprotected threats.

*Medieval Knights, LLC*

*350 NLRB 194 (2007)*

**ISSUE:** Whether or not statements made by a labor consultant, hired by the employer during a union organizing campaign, are lawful where the consultant informs employees that all negotiations are different and that employers could hypothetically give in to lesser items to show good faith bargaining while not agreeing to a full agreement thereby lawfully stalling negotiations.

**HOLDING:** The Majority held that the statements are lawful as the labor consultant’s remarks involved hypothetical bargaining parties and there was no evidence that the consultant threatened or suggested that the employer would engage in the bargaining he described. In reaching its holding the Majority also considered the fact that the consultant stated that all negotiations are different and that negotiations could take weeks, months, or more than a year. The Majority concluded that the consultant’s statements lawfully pointed out to employees the possible pitfalls the bargaining process.

**DISSENT:** Member Walsh dissented finding that the consultant’s statements conveyed the message to employees that if they selected union representation, the employer would engage in sham bargaining. Member Walsh argued that the consultant was an experienced antiunion consultant and that because his audience consisted of laypersons they would be unable to understand his statements as referring to hypothetical bargaining parties or possible pitfalls and would rather interpret his statements as threats that should they choose the union the employer would engage in the bargaining strategy that would stall indefinitely.

**SIGNIFICANCE:** This is yet another case which shows that under the new Board, an employer’s free speech rights to educate employees about the potential pitfalls of unionization previously protected under Section 8(c) of the Act will likely be significantly curtailed.

*George L. Mee Memorial Hospital*

348 NLRB 327 (2006)

**ISSUE:** Whether the employer unlawfully interrogated employees about pro union statements attributed to them in fliers that were openly circulated to employees at the employer's facility.

**HOLDING:** The Majority held, among other things, that the questioning did not constitute unlawful interrogation as the employees were open and active union supporters who articulated their sentiments in fliers that were circulated throughout the facility.

The Majority further found that the supervisor's questions were protected because they were designed merely to engage the employees in a discussion of the merits of the pro union statements in the fliers. The employees responded to the questions "openly and honestly." The Majority determined that under the circumstances described, the exchange was protected by Section 8(c).

**DISSENT:** Member Walsh would find that the questioning constituted unlawful interrogation based on, among other things, the supervisor's angry tone; the fact that the questioning took place at a time when the employer committed other unfair labor practices; the supervisor's failure to provide any legitimate reason for the questions; and the failure to provide the employees with assurances that they would not be subjected to discipline if they answered the questions.

**SIGNIFICANCE:** The Minority position demonstrates that the new Board will likely not tolerate any employer questioning of employees about union-related issues, even where the questioning is pursuant to open employee activity.

*Longs Drug Stores California, Inc.*

347 NLRB No. 45 (2006)

**ISSUE:** Whether the employer engaged in objectionable conduct when its leadmen engaged in conversation with one another near the election polls regarding, for example, the likelihood that the union would lose the election.

**HOLDING:** The Majority held, among other things, that the comments of the leadmen did not constitute objectionable conduct as they were engaged in conversation with one another and not with the voters as was the case in *Milchem, Inc.*<sup>123</sup> the seminal case on the issue of employer misconduct in the polling area. In so holding, the Majority did not pass on the agency status of the leadmen.

**DISSENT:** Member Liebman would find objectionable the conversation the leadmen engaged in near the polling. Member Liebman determined that when the employer asked the leads to maintain order near the polling place, pursuant to a request from the NLRB agent conducting the election, it vested the leads with apparent authority to speak and act on behalf of the employer.

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<sup>123</sup> 170 NLRB 362 (1968).

Having found the leads to be statutory agents of the employer, Member Liebman next argued that the Majority too narrowly construed the holding in *Milchem*. Member Liebman would find that although the leadmen did not direct their conversation to the voters, their conversation was analogous to cases where the Board has found objectionable employer conduct that is something other than direct conversation with employees waiting to vote but nonetheless constitutes an unlawful distraction or pressure on those employees.

**SIGNIFICANCE:** Member Liebman's position is in line with other recent dissents which effectively limit an employer's free speech rights in any workplace context.

*Frito Lay, Inc.*

*341 NLRB 515 (2004)*

**ISSUE:** Whether the Employer's use of "ride-alongs" (nonunion truck drivers from Frito Lay facilities and company managers and supervisors) to communicate with the unit employees prior to a union representation election is objectionable conduct.

**HOLDING:** The Board held that Frito Lay's use of ride-alongs was not coercive.

Under prior Board precedent, *Noah's New York Bagels, Inc.*,<sup>124</sup> the use of ride-alongs to communicate with over-the-road truck drivers is not, in itself, coercive. An employer's use of ride-alongs to communicate with its employees during an election campaign is only objectionable if, under all of the circumstances, the use of ride-alongs interferes with the employees' right to freely choose a bargaining representative.

In deciding whether an employer's use of ride-alongs amounts to objectionable conduct, relevant factors include: (1) whether the use and conduct of ride-alongs is reasonably tailored to meet the employer's need to communicate with its employees in light of the availability and effectiveness of alternate means of communication; (2) the atmosphere prevalent during the ride-alongs and the tenor of the conversation between the drivers and the employer's representatives; (3) whether the employer effectively permitted the employees to decline ride-alongs; (4) the frequency of the ride-alongs, both during and prior to the election campaign; (5) the positions held by the ride-along guests; (6) whether the ride-alongs were scheduled in a discriminatory manner; and (7) whether the ride-alongs took place in a context otherwise free of objectionable conduct.

Applying these factors in the instant case, the Board found that Frito Lay's use of ride-alongs was not coercive. The Employer had a limited opportunity to meet with the drivers on company time, and the ride-alongs permitted relaxed meetings on company time, without interfering with the drivers' work schedules.

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<sup>124</sup> 324 NLRB 266 (1997).

**CONCURRENCE**: Member Liebman wrote: “Because the result here seems compelled by the Board’s decision in *Noah’s New York Bagels*, . . . I reluctantly concur. There is no basis for setting aside the election in this case unless “ride-alongs”—in which employer officials accompany employee-drivers in order to campaign against the union—are deemed inherently objectionable. But the Board instead looks to the specific circumstances, applying several factors to gauge the tendency of particular ride-alongs to interfere with employee free choice. We should reconsider that approach. As this case illustrates, there are good reasons to adopt a bright-line rule prohibiting campaign-related ride-alongs altogether.”<sup>125</sup>

In her view, ride-alongs tend to put inappropriate pressure on individual employees. She argues that the “Board’s approach misses the subtle ways that ride-alongs can improperly inhibit employees, not merely persuade them. The Board accordingly should take a closer look.”<sup>126</sup>

**SIGNIFICANCE**: Employer-employee communications with drivers will become more difficult if the Board prohibits ride-alongs as inherently coercive.

## **Work Rules**

### *Tradesmen International*

338 NLRB 460 (2002)

**ISSUE**: Whether the following employer rules would reasonably tend to chill employees in the exercise of Section 7 activity: (1) prohibition of disloyal, disruptive, competitive or damaging conduct; (2) prohibition of slanderous or detrimental statements; and, (3) requirement that employees represent the employer in a positive manner.

**HOLDING**: The Majority held that the rules did not violate the Act. In so holding, the Majority acknowledged that the Board’s analysis in *Lafayette Park*,<sup>127</sup> is controlling. In that case, the Board held that rules similar to the ones at issue here were lawful because they served a legitimate business interest and reasonable employees would not construe such rules as intended to proscribe Section 7 Activity.

**DISSENT**: Member Liebman would find that the employer’s rules do have a reasonable tendency to chill employee Section 7 rights such that they violate Section 8(a)(1) of the Act. In so holding, Member Liebman noted that she dissented in the Board precedent to which the Majority cites (e.g. *Lafayette Park*) in support of its position that the rules are legal and that for the reasons articulated in those earlier dissents she dissented in this case as well.

**SIGNIFICANCE**: Under the new Board, employer rules such as those at issue here, which have been found to be legal on the basis that they address legitimate business concerns, will likely be

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<sup>125</sup> *Frito Lay, Inc.*, 341 NLRB 515, 518 (2004).

<sup>126</sup> *Id.*

<sup>127</sup> 326 NLRB 824 (1998).

construed as intended to restrain employees with respect to Section 7 activity unless the rules specifically define the terms of what is prohibited and adequately inform employees that the terms do not encompass Section 7 activity.

*Martin Luther Memorial Home, Inc.*

*343 NLRB 646 (2004)*

**ISSUE:** Whether the employer's rules prohibiting "abusive and profane" language would reasonably tend to chill employees in the exercise of their Section 7 activity.

**HOLDING:** The Majority held that the rule prohibiting abusive and profane language is lawful. In so holding, the Majority recognized that where, as here, a rule does not on its face restrict Section 7 activity, it will be found violative only if (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 activity.

After applying the above test, the Majority concluded that the rule was lawful because (1) there was no evidence the rule had been promulgated in response to union activity; (2) there was no evidence the rule had been applied to restrict Section 7 activity, and (3) a reasonable employee would not read a rule prohibiting profane or abusive language as interfering with Section 7 rights. The Majority also determined that the rule was lawful because an employer has a right to maintain a civil and decent workplace and to maintain rules that promote an atmosphere free of all types of harassment.

**DISSENT:** Members Liebman and Walsh would find the rule violative on the grounds that it would reasonably tend to chill employee Section 7 activity. Specifically, the Minority argued that because the rule prohibited profane and abusive language employees would believe that they were not free to communicate about terms and conditions of work. In support of their argument, the Minority asserted that the rule failed to adequately define what types of conduct constituted abusive language.

Member Liebman suggested that an employer could cure such ambiguities with regard to its rules by simply inserting language that the prohibition does not apply to conduct that is protected by the NLRA.

**SIGNIFICANCE:** It is likely that the new Board will find even the most patently legitimate work rule as unlawful restraints on Section 7 activity unless, as Member Liebman suggests, the employer includes language acknowledging employees' rights to engage in Section 7 activity. In effect, Member Liebman would advise that every employer, regardless of whether or not ULP charges have ever been brought against it, post or promulgate the type of "Notice to Employees" that employers have only posted after a determination that they violated the Act or pursuant to a stipulated settlement agreement.

*Guardsmark, LLC*

*344 NLRB 809 (2005)*

**ISSUE:** Whether the employer's rule prohibiting its employees who provide security services from fraternizing with coworkers or employees of clients would reasonably tend to chill employees in the exercise of their Section 7 activity.

**HOLDING:** The Majority held that the rule did not violate the Act. The Majority considered the rule in the context of other rules the employer maintained prohibiting dating and becoming overly friendly with the client's employees and coworkers. In the context of those other rules, the Majority determined that employees would reasonably understand the rule to prohibit "personal entanglements" and not to prohibit activity protected by the Act.

The Majority also acknowledged that the non fraternization rule is particularly reasonable with regard to security guards and is "designed to provide safeguards so that security will not be compromised by interpersonal relationships ..."<sup>128</sup>

**DISSENT:** Member Liebman would find the rule prohibiting fraternization is violative of the Act because the rule is ambiguous and would reasonably tend to chill employees in the exercise of Section 7 activity.

**SIGNIFICANCE:** Again, it is likely that the new Board will take a closer look at employer work rules and consider many more employer policies as violative of the Act.

**Strike Notice for Health Care Institutions (Section 8(g))**

*Alexandria Clinic, P.A.*

*339 NLRB 1262 (2003)*

**ISSUE:** Whether the employer violated the Act by discharging its nursing employees because of a failure to comply with the requirements of Section 8(g) when there was a four hour delay in the start of an economic strike at a healthcare center.

**HOLDING:** The Majority held that the employer did not violate the Act by discharging the nursing employees on the grounds that the strike at the clinic started four hours after the time set forth in the union's 10-day notice to the employer. The Board discussed Congress's policy reasons for strictly enforcing the date and time notification requirements in Section 8(g) where unplanned for "disruption in patient care of even a few hours may cost lives."<sup>129</sup>

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<sup>128</sup> *Guardsmark, LLC, 344 NLRB 809, 810 (2005).*

<sup>129</sup> *Alexandria Clinic, P.A., 339 NLRB 1262, 1266 (2003).*

**DISSENT:** Members Liebman and Walsh would find that the Employer violated the Act when it discharged the nursing employees. The Dissent argued that the four hour delay in the strike was not a sufficient departure from the requirements of 8(g) for the nurses to lose the protection of the Act.

In reaching that conclusion the Dissent stressed that because the strike began four hours after the time set forth in the notice, as opposed to four hours before, the hospital should have already been prepared for the strike. The Dissent reasoned that a strike that occurs before the employer expects it directly implicates the harm Congress sought to forestall whereas a strike that occurs after the employer expects it is somehow less egregious as the preparations are already in place.

**SIGNIFICANCE:** Assuming the Dissent's position becomes the law, unions will not be required to strictly comply with the requirements of section 8(g) pertaining to strikes, picketing, walkouts, etc. in the healthcare industry. According to the Dissent, as long as the 8(g) notice is provided to the healthcare facility at least 10 days prior to the strike, the actual time of the strike is irrelevant. This position is clearly at odds with Congress's intent in singling out the healthcare industry, where such activities could potentially have a detrimental effect on patients' health.

#### **Other Withdrawal of Recognition**

*Nott Company*

*345 NLRB 396 (2005)*

**ISSUE:** Whether, as a matter of law, the Union was entitled to a conclusive presumption of majority status through the term of its contract where the employer merged its unionized 14-employee business with a non-union 14-employee business.

**HOLDING:** Applying accretion principles, the majority concluded that the Respondent lawfully withdrew recognition from the Union because the Union lost majority status once the two companies were merged. Given that the previously represented employees are no longer a majority of the new overall unit, the majority decided there is no bargaining obligation in the unit and accordingly, as the General Counsel and the Charging Party acknowledge, the unilateral changes that occurred were not unlawful because the Union no longer had Section 9(a) status.

Because the Respondent consolidated or integrated an equal number of union and unrepresented employees in one group, the unrepresented employees could not be accreted into the bargaining unit, the Union automatically lost its majority status, and the Respondent's withdrawal of recognition did not violate the Act.

Contract-bar principles are inapplicable essentially because this is an unfair labor practice proceeding and the contract-bar doctrine is limited to representation proceedings.

**DISSENT:** Member Liebman, dissenting, found that as a matter of law, the Union was entitled to a conclusive presumption of majority status through the term of its contract. She observed that under the applicable contract-bar principles, the increase in the size of the bargaining unit was not substantial

enough to create an exception to the conclusive presumption. Also, there was no change in the nature of the Respondents operations or in the functions of the employees in the overall unit.

Member Liebman's dissent made it clear that she believes well-established Board principles give unions a conclusive presumption of majority support during the term of a collective-bargaining agreement. She describes the Majority's decision as perpetuating "an aberration in Board precedent: that an employer may—under the guise of a 'consolidation' of employees, which affects neither the bargaining unit's work nor the employer's business operation—abrogate its collective-bargaining agreement and strip its employees of the union representation they have freely chosen by statutory right."<sup>130</sup>

**SIGNIFICANCE:** The different interpretations offered by the majority opinion and the dissent are largely based on the different interpretations of the Board Members over the Act's policy favoring stabilization of labor relations and the Act's policy favoring employee choice over whether to be represented. It is likely that the new Board will place much more emphasis on encouraging collective bargaining than encouraging employee choice.

## **V. Important Cases Presently Pending Before the Board**

### **Dana Corporation and UAW<sup>131</sup>**

7-CA-46965, 7-CA-47078, 7-CA-47079,  
7-CB-14083, 7-CB-14119, 7-CB-14120 (April 11, 2005)

**ISSUE:** Whether pre-recognition bargaining between employers and unions that do not represent a majority of employees as part of a voluntary recognition agreement provides unlawful support to the union in violation of section 8(a)(2) of the NLRA. Whether the Letter of Agreement entered into between Dana and the UAW constitutes an unlawful pre-recognition contract in violation of the Act under Board precedent in *Majestic Weaving*.<sup>132</sup>

**HOLDING:** The Administrative Law Judge dismissed the Complaint distinguishing *Majestic Weaving* on the basis that the Letter of Intent was not a collective bargaining agreement.

The General Counsel and Charging Party had argued that the parties negotiated substantive terms and conditions of employment, most of which were concessionary in nature, in exchange for card check and neutrality provisions that would expedite the recognition process at the plant. Thus, according to the General Counsel:

Dana's *granting of exclusive bargaining status* to the UAW when it did not represent a majority of employees at the St. Johns plant constituted interference with its employees'

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<sup>130</sup> Nott Co., 345 NLRB 396, 402 (2005).

<sup>131</sup> While this case is properly styled as *Dana Corp.* we refer to it as *Dana / UAW* to more clearly distinguish it from another case we refer to as *Dana / Metaldyne* that involves application of the recognition bar in cases of voluntary recognition.

<sup>132</sup> 147 NLRB 859 (1964).



Section 7 rights and unlawful support of the union in violation of Section 8(a)(1) and (2) of the Act. The UAW's conduct *in accepting recognition* violated Section 8(b)(1)(A). (emphasis added)<sup>133</sup>

The Charging Party and the General Counsel relied heavily on the Board's decision in *Majestic Weaving*. In *Majestic Weaving Co.*,<sup>134</sup> the Board held that "the Respondent's contract negotiation with a non-majority union constituted unlawful support within the meaning of Section 8(a)(2) of the Act."<sup>135</sup>

The ALJ concluded, however, that *Majestic Weaving* was not controlling for two reasons: "First, the Board there [in *Majestic Weaving*] concluded that the employer had recognized the union apart from negotiating a contract; that is the very element missing in this case. Second, the collective-bargaining contract there [in *Majestic Weaving*] was complete and whole; the letter of agreement in this case is a far cry from a collective bargaining agreement."<sup>136</sup>

The ALJ held that "there is no evidence in this case that Dana verbally or in writing recognized the UAW as the bargaining representative for the St. John's employees; to the contrary the letter of agreement explicitly states that recognition has not been granted and the Respondents have confirmed that throughout these proceedings."<sup>137</sup>

Thus, the question was whether Dana granted recognition to the UAW by entering into the letter of agreement notwithstanding the disclaimers to the contrary. The ALJ found that the letter of agreement does indeed touch upon some terms and conditions of employment, while other typical and essential elements of recognition are entirely absent from the letter of agreement.

It was critical to his decision that the ALJ distinguished *Majestic Weaving*.

Also, prior to this decision, the only recognized exception to pre-recognition bargaining under the Act had been limited to Section 8(f), which uniquely permits employers in the construction industry to recognize unions as employee bargaining agents without any indication of actual majority status. In accordance with this narrow statutory exception, the Board has refused to allow employers outside the construction industry to enter into pre-majority bargaining agreements with unions under the guise of 8(f) or otherwise.<sup>138</sup>

The Administrative Law Judge in this case adopted Respondents' arguments that their neutrality agreement was lawful under the Board's decision in *Majestic Weaving* because Dana did not explicitly recognize the Union as the representative of its employees prior to negotiating with it.

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<sup>133</sup> *Dana / UAW*, 2005 NLRB LEXIS 174, \*12 (2005).

<sup>134</sup> 147 NLRB 859 (1964), *enf. den. on other grounds*, 355 F. 2d 854, at 860 (2d Cir. 1966),

<sup>135</sup> *Id.* at 860.

<sup>136</sup> *Dana / UAW*, 2005 NLRB LEXIS 174, \*16 (2005).

<sup>137</sup> *Dana / UAW*, 2005 NLRB LEXIS 174, \*13 (2005).

<sup>138</sup> *Columbus Bldg. & Const. Trades Council (Kroger Co.)*, 149 NLRB 1224, 1225-26 (1964).

Yet, the General Counsel and Charging Party countered with the argument that either the act of negotiating the neutrality agreement with a union constitutes implicit and unlawful recognition of it, or the act of pre-recognition bargaining itself is an independent violation of Section 8(a)(2).

**STATUS:** The ALJ decision dismissing the Complaint is pending before the Board for decision when the Board achieves a majority of confirmed Members.

**SIGNIFICANCE:** If the Board affirms the ALJ's decision dismissing the Complaint against Dana and the UAW for pre-recognition bargaining, it will open the door for other forms of pre-recognition negotiations the results of which will be to show unrepresented employees in advance what the terms and conditions of their collective bargaining agreement will be. It will likely encourage more voluntary recognition agreements based on employer neutrality and card check.

### **New York New York Hotel & Casino**

28-CA-14519 (July 25, 2001)

**ISSUE:** Whether New York Hotel & Casino (“Casino” or “Owner”) may prohibit off-duty employees of Ark Las Vegas Restaurant Corporation (“Ark”) from engaging in consumer handbilling activities in the porte-cochere on the Owner’s property and in the areas in front of the Ark restaurant that are located on the Casino’s premises.

**HOLDING:** The NLRB issued its initial decision in this matter in 2001.<sup>139</sup> In that initial decision, the Board held that since the off duty employees of Ark were engaged in lawful handbilling of customers in non-work areas of the Casino’s property, the Casino violated section 8(a)(1) of the Act by prohibiting Ark’s off duty employees from engaging in that activity.<sup>140</sup>

In reaching that decision, the Board distinguished this case, involving the handbilling activity of off duty Ark employees from cases involving “individuals who do not work regularly and exclusively on the employer’s property, such nonemployee union organizers” who “may be treated as trespassers, and are entitled to access to the premises only if they have no reasonable non-trespassory means to communicate their message.”<sup>141</sup>

**STATUS:** On appeal the D.C. Circuit Court of Appeals denied enforcement of the Board’s orders stating that the underlying decisions upon which the orders were based “leave a number of questions... unanswered.”<sup>142</sup> The Court remanded the matter to the Board with instructions to answer the following specific questions:

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<sup>139</sup> New York New York Hotel and Casino, 334 NLRB 762 (2001).

<sup>140</sup> Citing Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945), et al.

<sup>141</sup> Citing NLRB v. Babcock & Wilcox, 351 U.S. 105 (1956).

<sup>142</sup> New York New York, LLC v. NLRB, 313 F. 3d 585 (D.C. Cir. 2002).

1. Without more, does the fact that [Ark's] employees work on the [Casino's] premises give [Ark] employees Republic Aviation rights throughout all of the non-work areas of the hotel and casino?
2. Or, are the [Ark] employees invitees of some sort but with rights inferior to those of the [Casino's] employees?
3. Or should [Ark's] employees be considered the same as nonemployees when they distribute literature on the [Casino's] premises outside [Ark's] leasehold?
4. Does it matter that [Ark's] employees here had returned to the Casino after their shifts had ended and thus might be considered guests of the Casino?
5. Is it of any consequence that [Ark's] employees were communicating, not to other [Ark] employees, but to guests and customers of the [Casino]?

The Board accepted Briefs and heard oral argument on these issues in November 2007. These matters are still pending before the Board.

**SIGNIFICANCE:** The controlling authority in access cases requires that individuals be deemed either employees or non-employees of the property owner. Under either of those scenarios, Board precedent is clear: (1) off duty employees are permitted to come onto the property of their employers and to engage in handbilling activities in non-work areas unless the employer can show that it was necessary to restrict such activity to maintain production or discipline or otherwise prevent disruption of operations; and (2) employers may prohibit non-employee union organizers from engaging in such activity at all on the employer's property if the union has reasonable alternative means of communicating its message and the employer does not discriminatorily exclude the non-employee union organizers from engaging in such activity on its property.

If the Board concludes on remand that Ark's employees constitute some form of hybrid worker who must be given access rights that exceed those of non-employee union organizers under *Babcock & Wilcox* and *Lechmere*<sup>143</sup> and are instead treated as something akin to an off-duty employee under *Republic Aviation*,<sup>144</sup> the result could significantly strip such employers of their right to police the activities of individuals who, although they do not work for the property owner, are to be afforded heightened rights to come onto the property and engage in handbilling and other such activities.

**RELATED DECISIONS:** There are several cases pending before the Board that present subtle factual differences in the context of access rights:

- ***Roundy's Inc.*** 30-CA-17185 (2006) (ALJ determined that the Employer violated 8(a)(1) of the Act by prohibiting non-employee union agents from handbilling on its property while allowing charitable or civic organizations to distribute information);

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<sup>143</sup> *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

<sup>144</sup> *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

- ***Wal-Mart Stores, Inc. and UFCW, AFL-CIO***, 12-CA-20986 (2001) (ALJ found that the employer violated 8(a)(1) of the Act by enforcing its no-solicitation/ distribution policy in such a way as to allow Girl Scouts, the Salvation Army, and other local non-profit charitable organizations access to its property to raise funds for example, while at the same time prohibiting nonemployee union agents from distributing handbills); and
- ***Simon DeBartelo Group***, 29-CA-23218 (2006) (this case was decided by ALJ Carson on remand from Board with instructions to “review the record and issue a reasoned decision” in light of prior ALJ Edelman’s obvious improprieties where “both his factual statement and his legal discussion [were] copied verbatim from the General Counsel’s posthearing brief.” ALJ Carson determined that off duty employees employed by a service contractor to perform janitorial and maintenance work at malls owned by Simon DeBartelo Group (“Owner”) were “rightfully on the [mall owner’s] property” and that they had the right to solicit and distribute union leaflets at the mall in non-work areas. In so finding, the ALJ rejected the mall owner’s position that the employees in question are not its employees and that this case is controlled by the decision in *Lechmere*. Instead, the ALJ agreed with the General Counsel that the case is controlled by Board decisions which deal with employees who although not employed by the property owner where the work is performed “regularly and exclusively work on the premises” and thus “are not strangers to the property.”<sup>145</sup> With *Debartelo* pending before the Board, the issue is obviously not whether the Board will reverse the ALJ’s decision (which it clearly would not) but rather, whether the Board will take the opportunity to grant greater rights to off-duty employees to engage in Section 7 activity.

**Southwest Regional Council of Carpenters (Carignan Construction Co.)  
NLRB ALJ, 31-CC-2113 (Feb. 18, 2004)**

**ISSUE:** The legality under Section 8(b)(4)(ii)(B) of the Act of displaying large stationary banners announcing a “labor dispute” at a neutral employer’s worksite.

**HOLDING:** In *Carignan Construction Co.*, the United Brotherhood of Carpenters displayed large signs at the property of neutral employers who subcontracted work to non-union contractors with whom the unions admittedly had primary labor disputes. The banners in *Carignan* measured as large as 20 x 4 feet, and displayed the words “labor dispute” and stated “shame on” the neutral employers. The General Counsel took the position that the bannering constituted unlawful signal picketing or fraudulent speech. The Carpenters took the position that the conduct was protected free speech, and did not constitute unlawful picketing.

The ALJ agreed with the Carpenters in *Carignan* that the bannering was neither picketing nor its functional equivalent. ALJ Kennedy concluded that the bannering was more akin to lawful

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<sup>145</sup> Citing to Gayfers Department Store, 324 NLRB 1246 (1997); Southern Services, 300 NLRB 1154 (1990) where the Board determined that such employees’ rights to engage in Section 7 activity during nonworking time in nonwork areas of the owner’s premises are established by the standard set forth in *Republic Aviation*, not the standard set forth in *Babcock & Wilcox* and *Lechmere*.

billboard advertising, and fell within the publicity proviso to Section 8(b)(4) of the Act. The ALJ dismissed the underlying unfair labor practice charges.

**SIGNIFICANCE:** Several cases currently before the Board, including *Carignan*, raise the issue of whether the use of such banners at a neutral employer's job site violates the secondary boycott provisions contained in Section 8(b)(4)(B) of the Act. ALJs have split on whether the conduct is protected speech or unlawful picketing, and the Board has yet to address the issue.

**Local Union No. 1827, United Brotherhood of Carpenters and Joiners of America (Eliason & Knuth of Arizona, Inc.)**

2003 WL 21206515, 2003 NLRB LEXIS 256 (May 9, 2003)

**ISSUE:** Whether the activity of various local unions violated 8(b)(4)(ii)(B) of the Act when the Unions engaged in a campaign of secondary activity whereby they displayed large banners at the sites of secondary employers carrying the message "SHAME ON [NEUTRAL PERSON]" and "LABOR DISPUTE".

**HOLDING:** The ALJ held that the bannering was sufficiently akin to picketing to constitute unlawful secondary activity in violation of 8(b)(4)(ii)(B) of the Act.

In so holding, the ALJ noted, among other things, that (a) the banners were placed near enough to the neutrals' entrances, where the primary performed no work, as to be easily seen by the secondary employers' customers, suppliers or visitors, and (b) the banners identified a labor dispute with the secondary employers rather than the primary. In light of the above, the ALJ found the bannering activity constituted picketing.

In finding the bannering activity to be the equivalent of picketing, the ALJ determined that "the fact that the banners were essentially fixed and not utilized in patrolling does not materially affect the function of the banner as a visually dramatic notice that the Respondent Unions had labor disputes with named business entities." In that regard, the ALJ also rejected the Unions' argument that no violation should be found because no confrontational activity occurred at any of the bannering sites.

The ALJ acknowledged, however, that his determination that the bannering activity was picketing "is not... dispositive of the question of lawfulness" because the "language of 8(b)(4) does not define 'threaten, coerce or restrain' in terms of specific conduct and does not mention picketing. Rather, according to the ALJ, "the lawfulness of a union's conduct is based on the intent behind the picketing..."<sup>146</sup>

Based on the circumstances at issue in this case, including the clear message on the banners that the various "labor disputes" were between the Unions and the neutrals, and the fact that the banners were

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<sup>146</sup> See also, *United Food and Commercial Workers Union Local 1776 (Carpenters Health & Welfare Fund)* 334 NLRB 507 (2001) (where Board acknowledged that since "...picketing at the premises of a neutral, secondary employer... is not per se a violation of the Act... [t]he test for determining whether such picketing is lawful is the objective of the secondary activity, as gleaned from the surrounding circumstances.").

located in an area that was easily visible to the secondary's customers, suppliers and visitors, the ALJ concluded that the bannering activity constituted unlawful 8(b)(4)(ii) \ (B) picketing.

**SIGNIFICANCE:** It is likely that the Board will determine that bannering is a lawful exercise of 1<sup>st</sup> Amendment free speech rights akin to peaceful handbilling. If the Board so decides, unions will be emboldened to engage in bannering activity at the sites of neutrals as a regular course of action.

**RELATED DECISIONS:** There are several other cases pending before the Board that present bannering issues, including:

- *United Brotherhood of Carpenters and Joiners of America, Locals 184 and 1498 (Grayhawk Development.)* 2005 WL 195115, 2005 NLRB LEXIS 17 (Jan. 13, 2005) The ALJ held that unions' bannering activities at the sites of various neutral employers, where the banners indicated "SHAME ON [NEUTRAL]" and "LABOR DISPUTE" did not constitute picketing and thus did not violate 8(b)(4)(ii)(B) of the Act. In so holding, the ALJ rejected the General Counsel's argument that the banner at issue in this case was akin to unlawful "signal picketing." The ALJ rejected this argument stating that signal picketing "is typically a prearranged action and typically occurs at a common site," factors which he found were not present in this case.
- *Southwest Regional Council of Carpenters, and United Brotherhood of Carpenters and Joiners of America, Locals 184 and 1498 (New Star General Contractors, Inc.)* 2004 WL 2671638, 2004 NLRB LEXIS 660 (Nov. 12, 2004) The ALJ held that unions' bannering activities at the sites of various neutral employers, where the banners indicated "SHAME ON [NEUTRAL]" and "LABOR DISPUTE" did not constitute tradition or signal picketing and thus did not violate 8(b)(4)(ii)(B) of the Act. In so holding, the ALJ likened bannering to a message on a billboard which "constitutes pure speech, and not a mixture of speech and conduct, as in the case of picketing..."



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