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NLRB FOIA Officer
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UNITED STATES GOVERNMENT

NATIONAL LABOR RELATIONS BOARD

FREEDOM OF INFORMATION ACT BRANCH

Washington, D.C. 20570

Via email

January 3, 2017

Re: FOIA ID: LR-2017-0093

This is in response to your request, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, dated October 10, 2016 and received on October 11, 2016, in which you requested an electronic copy of the significant ULP Cases in 2013, 2014 and 2015 found on the Agency's intranet page. You agreed to assume financial responsibility for the processing of your request.

We acknowledged your request on October 10, 2016. An interim response was sent on November 9, 2016. We regret the delay in this response

I have attached a copy of the requested documents.

For the purpose of assessing fees, we have placed you in Category D, the "all other requesters" category, because you do not fall within any other of the fee categories. Consistent with this fee category, you will be assessed charges to recover the full reasonable direct costs for searching for the requested documents and the duplication of those documents. As a requester in this category, you will not be charged for the first two hours of search time or the first 100 pages of duplication. NLRB Rules and Regulations, 29 C.F.R. § 102.117(d)(2)(ii)(D). Charges for all categories of requesters are $3.10 per quarter-hour or portion thereof of clerical time and $9.25 per quarter-hour or portion thereof of professional time. 29 C.F.R. § 102.117(d)(2)(i).

Less than two hours of professional time was expended in searching for the requested material. Accordingly, there is no charge for this request.

You may contact Teresita Sanabria at (202) 568-3531 or by email at teresita.sanabria@nlrb.gov, who processed your request, as well as our FOIA Public Liaison at (202) 273-0902 or by email at FOIAPublicLiaison@nlrb.gov, for any further assistance and to discuss any aspect of your request. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, email at ogis@nara.gov, telephone at (202) 741-5770, toll free at (877) 684-6448, or facsimile at (202) 741-5769.

You may obtain a review of this determination under the NLRB Rules and Regulations, 29 C.F.R. § 102.117(c)(2)(v), by filing an appeal by mail to the Division of Legal Counsel, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C., 20570, or by email to DLCFOIAAppeal@nlrb.gov, within 90 days of the date of this letter, such period beginning to run on the calendar day after the date of this letter. Any appeal should contain a complete statement of the reasons upon which it is based. Should you have questions concerning this letter, you may contact Denise Meiners, Acting FOIA Supervisor, at (202) 273-2935 or by email at Denise.Meiners@nlrb.gov.

Sincerely

Synta E. Keeling /s/

Synta E. Keeling
Freedom of Information Act Officer

Attachment: (113 pages)

Significant ULP Cases in 2013

By

Barry J. Kearney*

I have set forth below the significant ULP cases decided by the Board in 2013.

1. Agency

A. W. Farrell & Son, Inc., 359 NLRB No. 154

The Board (Pearce, Griffin, and Block), reversing the ALJ, found that the Employer violated Section 8(a)(5) and (1) by refusing to execute the 2010-2012 successor collective-bargaining agreement reached with the Union in group bargaining and ordered it to execute and retroactively apply the agreement because the Employer failed to give clear and timely notice to the Union limiting the authority of its chosen representative to bind the Employer to the agreement.

The Employer and four other roofing contractors did not constitute a multiemployer bargaining group but bargained jointly with the Union. The group bargaining sessions took place in May and July of 2010, and a representative from one of the other contractors served as the general spokesperson and chief negotiator for the contractors. The Employer's Las Vegas branch manager attended all bargaining sessions, indicated on the sign-in sheet that he was present on behalf of the Employer, and received copies of all correspondence exchanged between the parties regarding the negotiations. He never mentioned before or during bargaining that he lacked authority to bind the Employer to an agreement. In late July, the chief negotiator presented the contractors' last best offer, which was ratified by the Union's membership the following day. Subsequently, the Employer representative notified the chief negotiator that the proposed contract would need to be accepted by the Employer's corporate office because he lacked the authority to bind the Employer to the negotiated agreement. The Union did not receive notice of the Employer representative's lack of authority to bind the Employer to the agreement until the end of August. The Employer never executed the agreement and, on April 28, 2011, withdrew recognition from the Union.

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The Board explained that an agent assigned to negotiate a collective-bargaining agreement is deemed to have apparent authority to bind his principal in the absence of clear notice to the contrary. *Teamsters Local 771 (Ready-Mixed Concrete)*, 357 NLRB no. 173, slip op. at 4 (2011); *University of Bridgeport*, 229 NLRB 1074, 1074-75 (1977). To limit his authority, the principal must give clear and timely notice to the other parties that any tentative agreement is contingent upon subsequent approval or ratification. *Id.* To be timely, notice of limitations must be given to the other parties before an agreement is reached. *See Cablevision Industries*, 283 NLRB 22, 29 (1987); *Maury's Fluorescent*, 226 NLRB 1290, 1292 (1976). Here the Employer clothed its representative with apparent authority to bind the Employer to an agreement and did not give notice that his authority was limited until after an agreement was reached. Thus, the Board found that the Employer violated Section 8(a)(5) and (1) by refusing to execute the agreement.

2. Section 8(a)(1)

a. Rules

***Target Corp.*, 359 NLRB No. 103**

The Board (Pearce, Griffin, and Block), affirming the ALJ, found that the Employer violated Section 8(a)(1) by maintaining, and, in some instances, enforcing unlawful confidential information, no-solicitation/no-distribution, off-duty access, and dress code policies. The Board, however, reversed the ALJ's ruling that the Employer's parking lot policy was unlawful.

An employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). In *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004), the Board held that if the rule does not explicitly restrict Section 7 activity, a violation will be dependent on a showing that (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to Section 7 activity; or (3) the rule has been applied to restrict the exercise of Section 7 activity. Here, the Board held in agreement with the ALJ that the Employer rule prohibiting employees from discussing confidential information, which was defined to include personnel records, was overbroad and could reasonably be construed by employees to prohibit Section 7 activity, i.e., speaking with their coworkers about wages and terms and conditions of employment. The Board further agreed that the Employer's no-solicitation/no-distribution rule was unlawful to the extent it banned solicitation and distribution "at all times on Target premises" for "commercial purposes." Since the rule separately banned solicitation for "personal profit" and during the Employer's anti-Union campaign it had characterized the Union as a business attempting to make money, employees would reasonably conclude that the ban on solicitation for "commercial purposes" included lawful solicitation on behalf of the Union.

The Board also affirmed the ALJ's finding that the Employer's off-duty access rule, which barred employees from the premises during their off-duty hours, violated the Act because the bar on access was not limited to the interior of the store as required by *TeleTech Holdings, Inc.*, 333 NLRB 402 (2001), and the Employer failed to provide a sufficient justification for its prohibition on access to areas outside of the store, such as parking lots, as required by *Tri-County Medical Center*, 222 NLRB 1089 (1976).

Further, the Board affirmed the ALJ's finding of a violation regarding the Employer's dress code policy, which prohibited employees from wearing "any buttons or logos on [their] clothing (unless approved by [their] team leader)." The employees' right to wear union buttons is protected by *Republic Aviation v. NLRB*, 324 U.S. 793 (1945) unless special circumstances exist, and neither customer contact nor the requirement that employees wear a uniform (in this case, red shirts and khaki pants) alone have been deemed a special circumstance. *See UPS*, 312 NLRB 596, 597 (1993). Moreover, the evidence demonstrated that other pins and buttons were tolerated by the Employer without concern that they interfered with the Employer's public image.

The Board, however, disagreed with the ALJ's finding that the Employer's policy of requiring employees to notify management if they saw unfamiliar people loitering in the parking lot was unlawful. The disputed provision did not explicitly restrict Section 7 activity, and there was no evidence that it had been promulgated in response to Union activity or that it had been applied to restrict the exercise of Section 7 rights. The Board concluded that employees would reasonably interpret the rule in this context as addressing safety issues and not as a prohibition on protected Section 7 activity. In so concluding, the Board stated that it would not read the rule to apply to Section 7 activity merely because it could be interpreted that way.

***Supply Technologies, LLC*, 359 NLRB No. 38**

The Board majority (Griffin and Block) adopted the ALJ's decision that the Employer violated the Act by instituting and maintaining a mandatory grievance-arbitration program that restricted employees' Section 7 right to file unfair labor practice charges or otherwise access the Board's processes. Applying the Board's test for determining if an employer's work rule unlawfully interfered with employees' Section 7 rights set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004), the Board majority agreed with the ALJ that employees would reasonably construe the documents establishing the program to prohibit them from filing Board charges or otherwise accessing the Board's processes. The

Board ordered the Employer to rescind the grievance-arbitration program and to reinstate and make whole 20 employees who had been discharged for failing to sign the unlawful agreement.

The Employer's grievance-arbitration program, instituted three days after Teamsters Local 120 narrowly lost a representation election, required employees to use the Employer's program for any claims against the Employer under federal, state, or local statutes, including claims under a nonexclusive list of federal employment statutes enumerated in the program language. The program, comprised of multiple documents, was broad in scope and contained only three limited exceptions—criminal matters, claims for workers' compensation, and claims for unemployment compensation benefits. The Board reasoned that although subsequent language provided that employees could file a charge with a government agency, or cooperate in an agency's investigation of such a charge, that language was ambiguous at best and failed to make clear what types of administrative charges it intended to except from the initial broad description of claims that "must" be brought through the Employer's program. Resolving the apparent ambiguity against the drafter, the Board agreed with the ALJ that the program was unlawful because it would reasonably be interpreted by employees to limit their Section 7 rights.

Member Hayes, dissenting, argued that employees would not be confused about whether the Employer's grievance-arbitration agreement interfered with their Section 7 right of access to the Board. He further argued that the Board majority's result both distorted the Board's test for determining whether a work rule that does not explicitly restrict Section 7 rights is nevertheless unlawful and signaled the Board's continued reluctance to endorse any form of mandatory alternative dispute resolution encompassing statutory claims for individual workers in a nonunion setting.

***Remington Lodging & Hospitality, LLC d/b/a The Sheraton Anchorage*, 359 NLRB No. 95**

The Board (Pearce, Griffin, and Block) adopted the ALJ's findings that the Employer violated the Act by maintaining and/or enforcing eight separate employee handbook rules and ordered the Employer to rescind or revise the overly broad rules.

Relying on the third prong of *Lutheran Heritage Village-Livonia*, which makes maintenance of a rule unlawful where the employer has applied the rule to restrict the exercise of Section 7 rights, the Board found unlawful the Employer's rules (1) confining employees to the area of their job assignment and work duties and barring them from "other parts of the hotel, parking lots, or outside facilities without the permission of the immediate Department Head"; (2) prohibiting distribution of literature in guest areas or work areas, solicitation during working time, or solicitation of guests at any time for any purpose; (3) prohibiting a conflict of interest with the hotel; (4) prohibiting behavior that "violates common decency or morality or publicly embarrasses the hotel"; and (5) prohibiting insubordination or failure to carry out a job assignment. Because the Employer cited these rules when it unlawfully disciplined nine employees engaged in protected concerted activity, the Board found that continued maintenance of the rules would reasonably tend to chill further protected activity but concluded that it was unnecessarily duplicative to decide whether any of the rules was invalid on its face.

The Board further found three other Employer rules to be facially unlawful. First, the Employer's rule prohibiting off-duty employee access was unlawful because it failed to limit the restriction to the interior of the hotel. Further, it was not a ban for all purposes but, rather, gave management unfettered discretion to grant or deny access in violation of the standard set forth in *Tri-County Medical Center*, 222 NLRB 1089, 1089 (1976). Second, the Employer's confidentiality rule prohibiting the disclosure of information contained in personnel files and labor relations information was facially overbroad because employees would reasonably believe they were prohibited from discussing wages and other terms and conditions of employment with nonemployees, such as union representatives, which is activity protected by Section 7 of the Act. *See, e.g., Flex Frac Logistics, LLC*, 358 NLRB No. 127, slip op. at 1 (2012). Finally, the Employer's rule prohibiting employees from communicating "any information" to the media without authorization from the General Manager was facially overbroad because it interfered with the Section 7 right of employees to publicize their labor dispute. *See Double Eagle Hotel & Casino*, 341 NLRB 112, 114 (2004).

***DirectTV U.S. DirectTV Holdings, LLC*, 359 NLRB No. 54**

The Board (Pearce, Griffin, and Block), in agreement with the ALJ, found that the Employer maintained unlawful work rules restricting employee communications with the media and NLRB agents, and overbroad rules regarding confidentiality and the release of company information. A fifth rule regarding use of company systems, equipment, and resources was found to be lawful.

The Employer unlawfully maintained two rules restricting contact with the news media. The first completely prohibited contacts with the media and was unlawful because it would be reasonably construed by employees to limit Section 7 activity, i.e. publicizing a labor dispute. The Board found it significant that the rule did not attempt to distinguish between protected communications and unprotected communications, such as statements that are maliciously false. The second, prohibiting employee contact with or comment to the media without pre-authorization by the Employer's public relations department, violated the Act because a rule requiring employees to secure permission from the employer to engage in Section 7 activity on their own time and in nonwork areas is unlawful. *See Brunswick Corp.*, 282 NLRB 794, 795 (1987).

The Employer's rule prohibiting employees from cooperating with "law enforcement" investigations before contacting the Employer's security department was unlawful because reasonable employees would conclude that they were required to contact the Employer's security department before cooperating with a Board investigation. While the Employer may have a legitimate interest in learning about law enforcement investigations, the rule did not make clear that it was not applicable to activity protected by the Act, and, construing that ambiguity against the drafter, the rule was invalid.

Likewise, the Employer's confidentiality rule, which prohibited employees from discussing "details about your job, company business or work projects with anyone outside the company" and cautioned employees never to give out information about customers or other DirectTV employees, was unlawfully overbroad because "company information" that was required to be kept confidential was defined to include "employee records." A reasonable employee would construe the rule to prevent discussions of wages and terms and conditions of employment. *See Flex Frac Logistics, LLC*, 358 NLRB No. 127, slip op. at 1 (2012). The confidentiality rule was also unlawful because it did not exempt protected communications with third parties such as union representatives, Board agents, or other governmental agencies concerned with workplace matters, leaving employees to reasonably interpret the rule as prohibiting such communications. *See Trinity Protection Services*, 357 NLRB No. 117, slip op. at 2 (2011). Further, the portion of the Employer's intranet policy prohibiting the disclosure through social media and other outlets of "company information" was equally unlawful because, as noted, "company information" was defined in its handbook to include "employee records." *See Hyundai America Shipping Agency*, 357 NLRB No. 80, slip op. at 12 (2011).

Finally, the Board found, in agreement with the ALJ, that the Employer's rule prohibiting use of company systems, equipment, and resources for "outside organization activity" was lawful under *The Register-Guard*, 351 NLRB 1110 (2007), enfd. in part sub nom. *Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009). The charging party and the General Counsel had urged the Board to revisit its decision in *Register-Guard*. Chairman Pearce and Member Griffin stated that they questioned whether *Register-Guard* was correctly decided, but declined to address the issue in this case.

b. Solicitation of Grievances/Interrogation

***Albertson's, LLC*, 359 NLRB No. 147**

The Board (Pearce, Griffin, and Block) found, in unanimous agreement with the ALJ, that the Employer violated Section 8(a)(1) of the Act during the Union's organizing campaign among grocery store employees by, among other things, soliciting grievances from an employee and impliedly promising to remedy her grievances. The Board further found, reversing the ALJ, that the Employer's attorney, in preparing for the hearing, violated Section 8(a)(1) by interviewing an employee without following the *Johnnie's Poultry* safeguards. *See* 146 NLRB 770, 775 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965).

The Board held that the Employer's one-on-one meeting with an employee during the Union's organizing campaign, conducted by a high-level official, was unlawful because it was a departure from the Employer's existing practice of addressing employee grievances through its telephone hotline. *See Center Service System Division*, 345 NLRB 729, 730 (2005), enfd. in relevant part 482 F.3d 425 (6th Cir. 2007). Citing *Wm. T. Burnett & Co.*, 273 NLRB 1084, 1086, (1984), the Employer contended that no Section 8(a)(1) violation could be found because the employee did not voice any complaints in response to the grievance solicitation. The Board disagreed because Section 8(a)(1) violations turn on whether the employer's conduct had a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of rights guaranteed under the Act, not on the employee's subjective reaction. Furthermore, the Board noted that cases decided both before and after *Burnett* supported neither the relevant theory in *Burnett* nor the Employer's proposition. Thus, the Board explicitly overruled *Burnett* to the extent it held that grievance solicitation cannot be found unlawful if the solicited employee fails to raise a grievance in response.

The Board also found that the Employer violated the Act when it failed to provide *Johnnie's Poultry* assurances at interviews in preparation for the unfair labor practice hearing, even though the employee interviewed had received such assurances at two prior interviews. These safeguards, in relevant part, require that the employer (1) communicate to the employee, before the interview begins, the purpose of the questioning; (2) assure the employee that no reprisals will take place for refusing to answer any question or for the substance of any answer given; (3) obtain the employee's participation in the interview on a voluntary basis; and (4) ask questions that are not themselves coercive. In this case, the employee was interviewed twice at the store where he worked and received *Johnnie's Poultry* assurances at each of these interviews. Several months later, he was interviewed two more times, at the offices of the Employer's law firm, by a different attorney, who did not provided the required assurances. The ALJ had found that the failure to repeat the assurances at these later interviews did not violate Section 8(a)(1) because the employee interviewed was perceived as favorably disposed to the Employer's point of view and the subjects of the questioning at the subsequent interviews were the same as at the earlier interviews. Reversing the ALJ, the Board found that given the long interval between the earlier and later interviews, as well as the change in the identity of the questioner and the location of the interview, the earlier assurances did not reasonably diminish the risk that the subsequent interviews were coercive. Furthermore, the Board declined to make an exception to its bright-line approach to enforcing *Johnnie's Poultry* regardless of whether the employee was favorably disposed to the Employer's position. The third interview was coercive for the additional reason that the employer's participation at that meeting was against his will, after he was denied a request to continue working to correct some problems in his department. Additionally, the Board found the fourth meeting violated the Act because the questioning itself interfered with the employee's Section 7 rights by coercing him to reveal that he had been an active opponent of the organizing effort. *See Gene's Bus Co.*, 357 NLRB No. 85, slip op. at 2 (2011).

3. *Wright Line*

Grand Canyon Education, Inc. d/b/a Grand Canyon University, **359 NLRB No. 164**

The Board (Pearce, Griffin, and Block), adopting the ALJ's decision, found that the respondent violated Section 8(a)(1) by discharging an employee for her protected concerted activity but the discharges of two other employees were lawful, because the respondent showed that it would have discharged them even in the absence of their protected activity.

Under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel establishes unlawful motivation by showing that (1) the employee engaged in protected activity, (2) the employer knew of the activity, and (3) the employer had animus toward the activity. Once the General Counsel satisfies his burden, the employer may overcome it by proving that it would have taken the action even in the absence of the employee's protected activity. In discussing the *Wright Line* standard, the Board noted that the General Counsel's initial burden does not include a requirement to show a nexus between the employee's protected activity and the adverse employment action taken. *See Mesker Door*, 357 NLRB No. 59, slip op. at 2 fn. 5 (2011).

Here, all three employees had engaged in protected concerted activity by discussing their terms and condition of employment—including the difficulty of meeting increasing enrollment quotas and the addition of a night shift—with other enrollment counselors. The employees also discussed their concerns openly with management. The Employer's demonstrated animus towards the employees' conduct included threats to discharge employees engaged in protected conduct, maintenance of a rule prohibiting employees from communicating with others about terms and conditions of employment, and unlawful interrogation. Although the General Counsel made out a prima facie case under *Wright Line,* the Employer met its burden to show it would have taken the same action absent protected activity regarding two employees; one had a history of misuse of the Employer's email system and the other fraudulently misrepresented his authority to a prospective student in order to get the student to matriculate. The Board found that the third employee was discriminatorily discharged because the Employer's reasons for her discharge were not supported by credited evidence.

***St. Bernard Hospital & Health Care Center*, 360 NLRB No. 12**

The Board (Pearce, Johnson, and Schiffer) adopted the ALJ's finding that the Employer violated Section 8(a)(1) by terminating a technician because he engaged in protected concerted activity. Applying *Wright Line*, the ALJ found that the employee had engaged in protected concerted activity by repeatedly raising employee concerns over a recent renovation at the facility that they believed negatively impacted the technicians' safety. The Employer was aware of his activities since the employee had brought the technicians' shared concerns directly to management, who had responded with animus towards the employee's efforts. Animus was also inferred from the close timing between the protected concerted activity and the employee's discharge. The ALJ determined that the Employer's reason for discharging the employee—that he was sleeping on the job—was fabricated and mere pretext. Member Johnson noted that he did not dispute that the precedent cited in the ALJ decision established the three specific elements of the initial burden of proof set forth in *Wright Line*, and he would not include a separate and distinct fourth element that the General Counsel establish a link or nexus between the employee's protected activity and the adverse employment action. He emphasized, however, that *Wright Line* is a causation test, and, therefore, not just any animus borne against protected activity generally, even if involving the same employees subject to the disputed employer action, will necessarily satisfy the initial *Wright Line* burden of proving unlawful motivation for that particular action.

4. Section 8(a)(5)

a. Subjects of bargaining

***Aggregate Industries*, 359 NLRB No. 156**

The Board (Pearce, Griffin, and Block), reversing the ALJ, found that the Employer violated the Act by, among other things, unilaterally moving a classification of drivers and the work they performed from coverage under the

Construction Agreement to coverage under the less favorable Ready-Mix Agreement. The Construction unit included "off-site material haul" drivers, who hauled aggregate from the Employer's facility to construction sites. The Ready-Mix unit included "Transport Drivers (Bulk)," who transported cement powder from cement plants to batch plants, and "Transport Drivers (S&G)," who transported "plant haul" from quarries to batch plants as well as between batch plants. The Board found the Employer's unilateral transfer of drivers who hauled aggregate from the Employer's facility to be a change in the scope of the bargaining units—a permissive subject of bargaining—and therefore a change that the Employer could not implement without first reaching agreement with the Union. *See Wackenhut Corp.*, 345 NLRB 850, 852 (2005). The Board noted that it is a violation for an employer to alter the scope of the bargaining unit under the guise of transferring work, which is particularly clear when, as here, the same employees continue to do the same work, in the same location, using the same equipment. *See, e.g., Beverly Enterprises, Inc.*, 341 NLRB 296, 296 (2004). The Board further found, however, that even if the Employer's action was properly characterized as a transfer of unit work, and therefore constituted a mandatory subject of bargaining, the Employer violated the Act by acting without giving the Union sufficient notice and opportunity to bargain concerning the change.

b. Refusal to supply information

***U.S. Postal Service*, 359 NLRB No. 115**

The Board (Pearce, Griffin, and Block), upon remand from the First Circuit and applying the law of the case as directed, reaffirmed its finding that the Employer violated Section 8(a)(5) and (1) by refusing to furnish the Union with unit employees' aptitude test scores. The Employer required all applicants for its mail handler position to take an aptitude test, which measured cognitive skills and certain personal skills. The score from that test, among other things, was included in the applicant's final rating, which determined their placement on a local hiring registry. The Employer considered the three top applicants for each job opening. In order to resolve concerns among certain of its members about their seniority standing, which was directly related to their placement on the registry and date of hire, the Union requested the registry, including the aptitude test scores. The Employer redacted the test scores for confidentiality reasons. The Board found that the Union's need for that information to police the collective-bargaining agreement's seniority clause outweighed the employees' privacy interests. Noting that the parties had been unable to reach a reasonable accommodation during six years of litigation on the issue, the Board, rather than order the parties to engage in bargaining, devised a remedy that would fully satisfy the employees' confidentiality concerns while providing the Union with the necessary information. Specifically, it ordered the Employer to furnish the test scores in a manner that would not link an individual employee with his or her test score. In the case of three employees whose scores would be readily identifiable based on their date of hire, the Board ordered the Employer to seek their consent to disclose their test scores. If one or more refused consent, the Employer was directed to allow the Regional Director or her agent to review the information and inform the parties whether the questioned seniority status was correct.

5. Section 8(d)

Walt Disney World Co., 359 NLRB No. 73

The Board (Pearce, Griffin, and Block) adopted the ALJ's conclusion—albeit for different reasons—that the Employer violated the Act by eliminating three job classifications in its catering department during the term of the collective-bargaining agreement. The Board concluded that the Employer's elimination of certain job classifications from the unit and reassignment of the work previously performed by those classifications to non-unit managerial employees changed the scope of the unit. The Board additionally concluded that the elimination of all three classifications constituted an unlawful mid-term contract modification in violation of Section 8(d). Addendum A to the collective-bargaining agreement set forth the job classifications covered by the master agreement, indicating that those classifications "shall prevail during the term of the contract." The Board rejected the Employer's contention that the management rights clause and other contractual language granting the Employer discretion over staffing levels at catered functions provided a sound arguable basis for interpreting the contract as ceding to it the authority to eliminate the classifications. The Board reasoned that while the collective-bargaining agreement granted the Employer the right to determine the number of employees in particular classifications that would staff a given catering function, it did not vest the Employer with the right to eliminate employee classifications. The Board ordered the Employer to restore the status quo ante, to continue in effect all terms and conditions of employment contained in the collective-bargaining agreement covering its employees, and to make the impacted unit employees whole for any loss of earnings or benefits suffered as a result of the Employer's unlawful actions.

6. Section 8(b)(1)(A) (*Beck*)

Communications Workers of America Local 4309 (AT&T Midwest), 359 NLRB No. 131

The Board (Griffin and Block) found that the Union violated its duty of fair representation by requiring employees they represent who are not union members and who seek *Beck* objector status to assert their objection on an annual basis. *See Communications Workers of America v. Beck*, 487 U.S. 735 (1988). In *Machinists Local 2777 (L-3 Communications)*, the Board determined that a union's maintenance of an annual renewal requirement for *Beck* objectors is unlawful unless the burden it imposes on employees is de minimis or the union demonstrates a legitimate justification for the requirement. 355 NLRB 1062, 1064-65 (2010), petition for review dismissed 2010 WL 4340436 (D.C. Cir. 2010). The Board noted that the Union here did not except to the ALJ's finding that the burden imposed on *Beck* objectors by the annual renewal requirement was more than de minimis. The Union asserted, however, that it had a legitimate justification for the requirement because it used the annual *Beck* objector information to assess its performance. While recognizing that the Union has a legitimate interest in addressing dissent among the employees it represents, the Board found that the Union had not shown that it had ever used the data as a basis for taking any action. And the mere collection of data is not a sufficient justification for burdening objecting employees with an annual renewal requirement.

The Board, however, rejected the Charging Party's exception to the ALJ's failure to provide a make whole remedy to her and other similarly situated employees. The Board reasoned that it would be unfair to award such relief because this case was pending when *L-3 Communications* issued, and, prior to that decision, courts had consistently approved of an annual renewal requirement. The Union excepted to the ALJ's requirement that it announce the rescission of the unlawful policy because it had already done so in a CWA newsletter after the ALJ's decision. The Board deferred the question of the effect of the Union's policy revision on their remedial obligation to the compliance stage of the proceedings, which is the Board's standard practice.

Chairman Pearce, who was a member of the panel, recused himself and took no part in the consideration of this case.

7. **Section 8(b)(3)**

***California Nurses Assn., National Nurses Organizing Committee*, 359 NLRB No. 150**

The Board (Pearce, Griffin, and Block) reversed the ALJ's determination that the Union violated Section 8(b)(1)(A) by printing a statement of employee *Weingarten* rights on the back of its collective-bargaining agreement but held that the printing of the statement violated Section 8(b)(3). The ALJ had found that the statement violated Section 8(b)(1)(A) because it contained the following sentence: "You must request a CNA rep be called into the meeting." The Board found, however, that read in context, the statement was not ambiguous and would not cause employees to reasonably believe that they were required to request a Union representative at a disciplinary meeting. Rather the statement was susceptible of only one reasonable interpretation—that if an employee wished to invoke his *Weingarten* right to have a representative present, he must ask for one.

The Board did, however, find a violation of Section 8(b)(3) on the ground that the Union had a contractual obligation to print the contract without the *Weingarten* statement. The parties had reached a clear understanding that the printed contract would not contain the *Weingarten* statement in a previously negotiated non-Board settlement entered into by the parties after the Union printed a virtually identical statement on the back cover of the prior collective-bargaining agreement. As a result of that settlement, the Union reprinted that contract with a blank back cover. Thus, by again printing the statement on the collective-bargaining agreement despite the parties' clear understanding not to do so, the Union violated its statutory duty to bargain in good faith.

8. Facebook Activity

***Design Technology Group, LLC d/b/a Bettie Page Clothing*, 359 NLRB No. 96**

The Board (Pearce, Griffin, and Block) found, in agreement with the ALJ, that the Employer violated the Act by discharging three employees for their Facebook activity. The Board agreed that they had engaged in protected concerted activity when they presented their concerns about working late in an unsafe neighborhood to their supervisor and the owner, and that their subsequent Facebook postings were a continuation of that effort. In addition, the Board held that the Facebook postings alone would have constituted protected concerted activity. The Facebook postings were complaints among employees about the conduct of their supervisor as it related to their terms and conditions of employment and about management's refusal to address the employees' concerns. The employees also discussed looking at a book about the rights of workers in California so that they could determine whether the Employer was violating labor laws. The Board found these conversations to exemplify classic protected concerted activity for mutual aid and protection, even absent prior action. *See Rhee Bros., Inc.*, 343 NLRB 695, 695 fn. 3 (2004). The Board agreed with the ALJ that the Employer's theory that the employees had devised a scheme to entrap the Employer into firing them was "nonsensical."

***New York Party Shuttle, LLC*, 359 NLRB No. 112**

The Board (Pearce, Griffin, and Block) adopted the ALJ's finding that the Employer violated Section 8(a)(3) and (1) when it discharged an employee because of his union activity. The employee, a tour guide, sent a number of communications, via email and Facebook, to the Employer's other employees and to other area tour guides detailing problems with the Employer's existing terms and conditions of employment and listing the benefits of unionization. In response to the unfair labor practice charge, the Employer essentially admitted that it would not have terminated the employee were it not from his recent union activity. The Board rejected the Employer's defense that the communications were impermissibly disparaging and libelous; the ALJ had found that the communications, while perhaps unflattering, were, in fact, true. In reaching their conclusion, the Board did not rely on the ALJ's finding that the employee's statements did not lose protection under *Atlantic Steel Co.,* 245 NLRB 814 (1979). The Board noted that such an analysis was unnecessary because *Atlantic Steel* typically applies when determining whether initially protected activity has been rendered unprotected by subsequent misconduct. Here, the Employer had asserted that the email and Facebook postings were unprotected from the outset. Inasmuch as the Board affirmed the ALJ's finding that the Employer's discharge of the employee for his union activity violated Section 8(a)(3), and Section 8(a)(1) derivatively, the Board found it unnecessary to pass on the Acting General Counsel's cross-exception to the ALJ's failure to find that the discharge independently violated Section 8(a)(1).

9. Procedure (Deferral)

Sheet Metal Workers Local 18—Wisconsin, 359 NLRB No. 121

The Board (Pearce, Griffin, and Block), reversing the ALJ, deferred to arbitration a contractual dispute over whether the Employer provided timely and sufficient written notice of its intention to modify or terminate the parties' collective-bargaining agreement. The agreement contained a rollover provision extending the agreement for one year unless one of the parties gave written notice of its intent to reopen or terminate the agreement at least 60 days prior to its expiration on February 29, 2012. On January 7, 2012, the Union notified the Employer that the contract had rolled over for the following year because neither party had provided timely notice of an intent to modify or terminate. The Employer disagreed, stating that it had provided adequate notice, but the Union refused to enter into negotiations. Although the Board shared the ALJ's concern regarding the additional delay that would result from deferral, the Board found that the conditions for deferral were met in this case because the parties had a long and productive collective-bargaining relationship, there was no claim of animosity to employees' exercise of Section 7 rights, the parties' agreement provided for arbitration of the dispute, the party seeking deferral was willing to utilize arbitration, and the dispute was well suited to resolution by arbitration. *See United Technologies*, 268 NLRB 557, 558 (1984); *Collyer Insulated Wire*, 192 NLRB 837, 842 (1971). The Board disagreed with the ALJ's finding that the Union's conduct amounted to a rejection of collective-bargaining principles. The Board also disagreed that the Union's request for deferral five days before hearing was untimely, nothing that deferral is an affirmative defense that can be raised even at the hearing. Finally, the Board admonished the ALJ for deciding the merits of the case before determining whether deferral was appropriate and "a fortiori" basing his refusal to defer in part on his decision on the merits. While a deferral defense and the merits may be addressed in the same hearing, whether deferral is appropriate must be decided in the negative before the merits are considered.

***BCI Coca-Cola Bottling Co. of Los Angeles*, 359 NLRB No. 110**

The Board (Pearce, Griffin, and Block) remanded the case to the ALJ with instructions to hold an evidentiary hearing to determine whether the settlement agreement between the parties, purporting to resolve an unlawful discharge allegation, was repugnant to the Act under *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955) and *Olin Corp*, 268 NLRB 573 (1984). The Regional Director deferred to the parties' grievance procedure under *Dubo Mfg. Corp*., 142 NLRB 431 (1963) when the charge was filed in 2009, alleging that eight employees were discharged because of their Union and other concerted activities and without giving the Union notice and an opportunity to bargain. The Regional Director revoked the deferral after reviewing a settlement agreement reached in 2012, and subsequently issued complaint alleging the Employer made threats of futility, layoffs, and other unspecified reprisals in violation of Section 8(a)(1) and discharged the eight employees in violation of Section 8(a)(1) and (3). Although the grievance had already been settled, the ALJ decided that the matter should have been deferred under *Collyer Insulated Wire*, rather than *Dubo*, and dismissed the complaint, in order to allow the parties another opportunity to handle the matter under the *Collyer* doctrine. The Board determined that the basis for deferral does not affect the standard for review of an ensuing settlement, and an evidentiary hearing was necessary, not to determine the merits of the unfair labor practices, but to allow the ALJ to determine if the settlement was repugnant to the Act. The Board further instructed the ALJ to decide the Section 8(a)(1) complaint allegations, which had not been dismissed or otherwise addressed at the hearing.

***Shands Jacksonville Medical Center, Inc.*, 359 NLRB No. 104**

The Board (Pearce, Griffin, and Block) agreed with the ALJ's finding that deferral to an arbitration award was appropriate under *Spielberg Mfg. Co.* and *Olin Corp*., and adopted the ALJ's dismissal of the complaint alleging that an employee's discharge violated Section 8(a)(3) and (1). The arbitrator found the employee's discharge for distributing Union literature was not for good cause and ordered reinstatement. His decision did not, however, provide for backpay or credit for time lost for seniority, vacation, or sick leave purposes because the employee had lied to the Employer during its investigation and under oath at the arbitration hearing. The Board found that the arbitrator had adequately considered the unfair labor practice issue and that the award was not clearly repugnant to the Act. Specifically, the denial of backpay and credit for time lost could be interpreted in a way that was consistent with the Act because the discriminatee had lied under oath. The Board declined to pass on the Acting General Counsel's request that it adopt a new framework for considering post-arbitration deferral cases, which would reallocate the burden of proof to the party urging deferral and modify aspects of the deferral standards themselves. *See Guideline Memorandum Concerning Deferral to Arbitral Awards and Grievance Settlements in Section8(a)(1) and (3) Cases,* GC Memorandum 11-05. In declining to make the requested modifications, the Board noted that the Acting General Counsel did not propose revisiting precedent concerning when an award is "clearly repugnant" to the Act, which was the crux of the present case.

10. Remedies

a. Notice Reading

***Sprain Brook Manor Nursing Home, LLC*, 359 NLRB No. 105**

The Board (Pearce, Griffin, and Block), finding numerous violations of the Act and a demonstrated proclivity by the Employer to violate the Act, ordered the Employer's owner or another management official to read aloud to employees the remedial notice or to have a Board agent read the notice in the presence of that management official. The Board found that the Employer violated Section 8(a)(1) by threatening an employee with unspecified reprisals for seeking assistance from the Union, and by threatening that if the employee sought Union representation she would not receive payments owed to her in connection with the compliance settlement in a prior case. The Board further found that the Employer violated Section 8(a)(3) and (1) by discharging that employee and by suspending and subsequently discharging another employee. The Board also found that the Employer violated Section 8(a)(5) and (1) by changing employees' terms and conditions of employment without giving the Union notice and an opportunity to bargain about the changes, which included discontinuing its practice of providing a free hot lunch to employees; discontinuing its practice of providing on-site check-cashing privileges to employees; discontinuing its practice of providing free on-site physicals and tuberculosis examinations to employees; and discontinuing "medical expenses" payouts to employee who were not enrolled in the health plan offered by the Employer. Although the Acting General Counsel did not request a notice reading remedy, one was granted because of the serious and persistent nature of the Employer's unfair labor practices, especially in light of the Employer's repetition of the same type of misconduct previously found by the Board to be unlawful in its prior decision. The Board found the reading requirement necessary to serve as a "minimal acknowledgement of the obligations that have been imposed by law" and to provide employees with some "assurance that their organizational rights will be respected in the future." *Homer D. Bronson Co.*, 349 NLRB 512, 515 (2007), enfd. mem. 273 Fed. Appx. 32 (2d Cir. 2008).

***Ozburn-Hessey Logistics, LLC*, 359 NLRB No. 109**

The Board (Pearce, Griffin, and Block), in order to appropriately remedy the Employer's pervasive unfair labor practices, required the Employer to permit a Board agent to read the remedial notice aloud to unit employees at the facility during working time in the presence of the senior vice president of operations and the director of operations, both of whom figured prominently in the violations found, or, alternatively, to allow the senior vice president or director of operations to read the order in the presence of the Board agent. This was the third in a series of cases involving the Employer's unlawful attempts to thwart its employees' union organizing campaign. In the prior decisions the Board found that the Employer committed numerous violations of Section 8(a)(1) and (3), and the Acting General Counsel obtained a Section 10(j) injunction ordering the Employer to reinstate or make whole several unlawfully disciplined employees. The Board found, in agreement with the ALJ, that in this case the Employer violated Section 8(a)(3) by discharging an employee and disciplining another employee; and violated Section 8(a)(1) by unlawfully confiscating union materials, urging union supporters to quit, conducting surveillance of protected activity, creating an impression of surveillance, interrogating employees about their protected activity, and threatening employees. Due to the multiple violations committed by the Employer in the prior two decisions and this case, the Board agreed with the ALJ that a notice reading remedy was warranted because it would help assure employees that they could freely exercise their Section 7 rights in the future.

***Bud Antle*, 359 NLRB No. 140**

The Board (Pearce, Griffin, and Block) adopted the ALJ's finding that the Employer violated Section 8(a)(5) and (1) by failing and refusing to furnish information requested by the Union regarding subcontracting. The Board affirmed the ALJ's order requiring the posted notice to be mailed to employees. Because the work force moved from place to place harvesting various crops throughout the year, and the Employer did not maintain any facilities to which all unit employees reported, notice posting alone was insufficient to ensure that all employees would see the notice. The Board therefore required that the notice be mailed to all current and former employees employed by the Employer at any time from the onset of the unfair labor practices until the date the notices were mailed. In addition, since many unit employees might not reside at their last known addresses once the notice was mailed, the Board granted the Union's request that the notice be read to employees at the start of the harvest at each location, when employees gather for the reading of the seniority list and to bid on crew assignments. The Board reasoned that sending the notice to the last known address of unit employees would result in many employees remaining unaware of the Board's order and ultimate remedy for the Employer's unfair labor practices. And a reading of the notice at the employee gatherings at the start of harvesting was consistent with the Employer's established method of communicating with employees.

b. Physical Assault

***Norquay Construction, Inc.*, 359 NLRB No. 93**

The Board (Pearce, Griffin, and Block) found, in the absence of exceptions, that the Employer violated Section 8(a)(1) by interfering with the Union's contractual right to enter the construction project site to perform representative functions. The Board reversed the ALJ's conclusion that the Employer did not violate Section 8(a)(1) by physically ejecting a Union representative from an office trailer. Two Union representatives had entered the office trailer to ask the Employer for subcontractor information on some of the carpentry-related work to determine whether to provide the Employer with the Union's area-standards contractor list. The Employer declined to provide any information, suggesting the Union look up the requested information through publicly available sources, and then loudly and profanely asked the representatives to leave. After the first representative left the trailer, the Employer, having pushed the second representative once before only moments earlier, shoved him from behind onto the trailer landing and down the trailer's metal stairs, causing the representative to strike his hand and neck on the railing during his descent. The Union representative complained of severe musculoskeletal pain and sought treatment at a clinic later that same day. The Board found that the physical assault violated Section 8(a)(1) because it occurred while the Union representative was engaged in protected area-standards activity. The Board ordered, among other remedies, that the Union representative be made whole for any losses that he may have suffered from the unlawful assault, including lost wages and benefits and out-of-pocket medical expenses, as determined during compliance proceedings.

c. Litigation Expenses

***Wellington Industries*, 360 NLRB No. 14**

The Board (Pearce, Miscimarra, and Johnson) adopted the ALJ's finding that the Employer violated Section 8(a)(5) and (1) by refusing to accept a UAW Local 174 officer as the representative of the Union (Independent Union Local One) in a grievance-arbitration proceeding. The Union sought help during the grievance procedure from UAW Local 174, a union with greater resources with which the Union was seeking to affiliate. Although agreeing that the Union had a statutory right to designate an officer of another union as its representative, the Board reversed the ALJ's award of attorneys' fees and other litigation expenses to the General Counsel and the Union. The ALJ had awarded this extraordinary remedy based on the frivolity of the Employer again challenging the Union's right to designate an officer of Local 174 after two previous Board decisions finding the Employer's conduct unlawful. Members Miscimarra and Johnson expressly noted that they were not reaching the question of whether the Board has authority to grant such fees and expenses.

Significant ULP Cases in 2014

By

Barry J. Kearney[*]

I have set forth below the significant ULP cases decided by the Board in 2014.

1. LEAD CASES

***Fresh & Easy Neighborhood Market,* 361 NLRB No. 12**

The Board majority (Pearce, Hirozawa, and Schiffer), reversing the ALJ, found that the Charging Party had engaged in concerted activity for the purpose of mutual aid and protection when she sought assistance from her co-workers in raising an individual sexual harassment complaint to the Employer.

The Charging Party's co-worker had posted a sexually harassing message directed at the Charging Party on a whiteboard located in a break room. In order to prepare a sexual harassment complaint regarding the whiteboard message, the Charging Party copied it to a piece of paper and asked a supervisor and two co-workers to sign the paper. Subsequently, during the Employer's investigation of the incident, the Employee Relations manager asked the Charging Party why she had requested that her co-workers sign the paper and instructed her not to solicit additional written statements from the co-workers so that the manager could conduct her own investigation into the incident. But the manager advised the Charging Party that she could talk to other employees about the incident and ask them to be witnesses.

The ALJ had dismissed the complaint, relying on *Holling Press*, *Inc.,* 343 NLRB 301 (2004), where the Board previously held that an employee, although acting concertedly, did not act for the purpose of mutual aid or protection when she sought a colleague's assistance in connection with her individual sexual harassment complaint. In reversing the ALJ, the Board overruled *Holling Press* and held that an employee seeking the assistance or support of co-workers in raising a sexual harassment complaint is acting for the purpose of mutual aid or protection, whether that employee is raising a complaint directly to her employer or to an outside entity. The Board noted that Congress, in enacting Section 7, created a framework for

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employees to band together in solidarity to address their terms and conditions of employment with their employer. What mattered was that the Charging Party approached her co-workers with a concern implicating the terms and conditions of their employment and sought their help in pursuing it. The solicited employees had an interest in helping the Charging Party, even if she alone had an immediate stake in the outcome, because next time it could be one of them. Therefore, the Charging Party's request for her co-workers to sign the paper documenting the sexually harassing message was protected activity under Section 7. Nonetheless, the Board found that the Employer's question and instruction to the Charging Party did not violate Section 8(a)(1) because both were narrowly tailored and reasonably necessary to ensure the integrity of the Employer's investigation into the Charging Party's sexual harassment complaint.

Member Miscimarra dissented from the majority's conclusions that the Charging Party's activity was concerted and was for the purpose of mutual aid and protection, as well as from the majority's decision to overrule *Holling Press*. Member Johnson dissented from the majority's holding that an employee seeking the assistance or support of co-workers in raising a sexual harassment complaint is always acting for the purpose of mutual aid or protection, but he concurred that, on the facts of this case, there was such a purpose, primarily because the offensive message was posted on a whiteboard in an employee break room visible to other employees.

***Triple Play Sports Bar & Grille,* 361 NLRB No. 31**

The Board panel (Miscimarra, Hirozawa, and Schiffer), affirming the ALJ, held that the Employer unlawfully discharged the Charging Parties for participating in a Facebook comment thread about the Employer's perceived failure to properly withhold income taxes. Applying the Supreme Court's decisions in *NLRB v. Electrical Workers Local 1229 (Jefferson Standard),* 346 U.S. 464 (1953) and *Linn v. Plant Guards Local 114,* 383 U.S. 53 (1966), rather than the test set forth in *Atlantic Steel Company,* 245 NLRB 814 (1979), the Board found that the Charging Parties had not lost the protection of the Act.

The Charging Parties' co-worker posted on Facebook "Maybe someone should do the owners of Triple Play [Employer] a favor and buy it from them. They can't even do the tax paperwork correctly!!! Now I OWE money … Wtf!!!!" Both Charging Parties clicked the Like button on the post. One of the Charging Parties also commented on the post: "I owe too. Such an asshole." After learning of the Facebook exchange, the Employer discharged the Charging Parties, citing their Facebook activity as the reason.

The Employer did not dispute that the Charging Parties' Facebook activity was concerted or that they had a protected right to engage in a Facebook discussion about the Employer's tax withholding calculations, but argued that the Charging Parties had lost the protection of the Act. The Board concluded that the *Atlantic Steel* test was not appropriate for analyzing employees' off-duty, offsite use of social media. That test typically is applied to analyze face-to-face communications between an employee and manager or supervisor to determine whether the employer's interest in maintaining order at its workplace outweighs an employee's exercise of Section 7 rights. While noting that it was not suggesting that off-duty, offsite use of social media can never implicate an employer's interest in maintaining workplace discipline in the same manner as a face-to-face workplace confrontation, in the circumstances of this case, where no manager or supervisor participated in the discussion, the Board determined that the standards applied to communications by employees with third parties or the general public were more appropriate. Applying those standards, the Board held that the Charging Party's Facebook comments did not lose protection under *Jefferson Standard* because they disclosed the existence of an ongoing labor dispute, were not directed at the general public, and did not disparage or even mention the Employer's product or services. The Board held that the comments did not lose protection under *Linn* because they were not maliciously untrue, i.e. made with knowledge of their falsity or with reckless disregard for their truth or falsity.

The Board, with Member Miscimarra dissenting, also held that the Employer's Internet/Blogging Policy's prohibition on "inappropriate discussions about the company, management, and/or co-workers" violated Section 8(a)(1). Applying *Lutheran Heritage Village*, 343 NLRB 646 (2004), the Board majority held that the rule was unlawfully overbroad because employees would reasonably construe the policy to prohibit protected activity, particularly in light of the unlawful discharges. The Board majority further held that the unlawful discharges in this case also negated any power the policy's savings clause might have had to reassure employees that the rule against "inappropriate discussions" would not be invoked unlawfully.

Member Miscimarra dissented from the Board's holding that the Internet/Blogging policy violated Section 8(a)(1). He found that the policy was not actually applied to discharge the Charging Parties here, but rather they were discharged for purported defamation and disloyalty. He also criticized the majority for "cobbling together" two different prongs of *Lutheran Heritage*, and found that the policy would not be reasonably construed as prohibiting protected conduct because it stated only that, by engaging in "inappropriate discussions," an employee "*may* be violating the law and is subject to disciplinary action." Finally, Miscimarra noted that the savings clause reinforced that the policy was meant not to be interpreted as prohibiting protected activity.

***Food & Commercial Workers, Local 700 (Kroger Limited Partnership*), 361 NLRB No. 39**

The Board majority (Pearce, Hirozawa, and Schiffer), reaffirmed the three-stage process that unions must follow to fulfill their *Beck* obligations set forth in *California Saw & Knife Works,* 320 NLRB 224 (1995), *enforced sub nom. Machinists v. NLRB,* 133 F.3d 1012 (7th Cir. 1998). Affirming the ALJ, the majority found that the Union did not violate Section 8(b)(1)(A) by failing to provide the Charging Party with a computation of the reduced fees and dues applicable to nonmember objectors when it provided its initial notice of her obligations and rights under the union-security clause.

The Union did not advise the Charging Party of the specific amount of the reduced dues and fees applicable to nonmember objectors upon her hire but did provide her with that information once she resigned her membership and requested objector status. The General Counsel and the Charging Party conceded that the Union had complied with extant Board law, but urged the Board to overrule that precedent and hold that the duty of fair representation requires provision of reduced payment information when the union first informs an employee of his or her obligations under a union-security clause.

Declining to overrule precedent, the Board reaffirmed that a union's performance of its obligations under *Communication Workers of America v. Beck*, 487 U.S. 735 (1988), is to be judged under the duty of fair representation standard, and that *California Saw & Knife Works* properly outlined the set of procedures unions must follow to fulfill their *Beck* obligations. Under *California Saw*, unions must follow a three-stage process. At stage 1, the union must inform employees of their right not to join the union and that nonmembers (1) have the right to object to paying for union activities not germane to the union's duties as bargaining agent and to obtain a reduction in fees for such activities; (2) to be given sufficient information to decide intelligently whether to object; and (3) to be apprised of internal union procedures for filing objections. If an employee decides not to become a member and exercises the *Beck* right to object to paying non-representational fees, then at stage 2 the union must inform the objector of the percentage reduction in fees he or she will receive, the union's basis for that determination, and the right of the objector to challenge those figures. Stage 3, which pertains to handling such challenges, was not implicated in this case.

In rejecting the contention of the Charging Party and General Counsel that unions should provide a computation of fees going towards non-representational activities at stage 1, the Board majority found that the extant stage 1 notice requirements strike the most reasonable balance between the competing interests. Thus, the present notice requirements meet employees' fundamental need for information about their right to object, without imposing administrative and financial burdens on unions simply because some employees may object in the future.

Members Miscimarra and Johnson dissented, noting that the Board's established rule is inconsistent with cases decided by the federal courts and asserting that the balance of interests favors notice of the percentage of non-representational expenses at stage 1.

***CNN America, Inc.,* 361 NLRB No. 47**

The Board majority (Pearce and Hirozawa), affirming the ALJ, held that CNN was a joint employer with Team Video Services (TVS), the subcontractor that provided its audio and video technicians for its Washington, D.C. and New York City bureaus. The majority held that, *inter alia*, CNN violated Section 8(a)(3) and (1) by terminating the subcontracts out of antiunion animus and causing the discharge of the unit employees; and violated Section 8(a)(5) and (1) by failing to bargain about the decision to terminate the subcontracts and the effects of that decision, and by failing to apply the terms of TVS' collective-bargaining agreements with the Union after replacing the unit employees with an in-house nonunion workforce.

CNN, a news television channel, awarded exclusive technical service contracts to a series of subcontractors between 1980 and 2002, ending with TVS. Starting in 1982 and 1985 respectively, the technicians in the D.C. bureau were represented by NABET, CWA Local 13, and the technicians in the New York City bureau were represented by NABET, CWA Local 11 (collectively the Union). Each successive subcontractor hired nearly all of its predecessor's employees and continued to recognize and bargain with the Union. CNN terminated its contracts with TVS effective December 6, 2003 and January 17, 2004 and directly hired employees to perform the unit work. CNN refused to recognize the Union or to apply the terms and conditions embodied in TVS's collective-bargaining agreement with the Union.

Noting first that the Board will find two employers to be joint employers if they share or codetermine matters governing the essential terms and conditions of employment, the Board majority looked specifically to the factors set forth in *Laerco Transportation,* 269 NLRB 324, 325 (1984) – hiring, firing, discipline, supervision, and direction. The majority also pointed out though that those five aspects of the employment relationship are not the only relevant areas of consideration. Rather, the relevant facts in such a determination "extend to nearly every aspect of employees' terms and conditions of employment and must be given weight commensurate with their significance to employees' work life." 361 NLRB No. 47, slip op. at 3, *quoting Aldworth Co.,* 338 NLRB 137, 139 (2002), *enforced sub nom. Dunkin' Donuts Mid-Atlantic Distribution Center, Inc. v. NLRB,* 363 F.3d 437 (D.C.

Cir. 2004). Significantly, the majority did not rely upon the Board's statement in *Airborne Express,* 338 NLRB 597, 597 n.1 (2002), that the test requires "direct and immediate" control by the putative joint employer over employment matters. Instead, in footnote 7, the majority expressly noted that *Airborne Express* cited *TLI, Inc.,* 271 NLRB 798, 798-99 (1984) but that *TLI* makes no mention that control must be direct and immediate.

Applying its interpretation of the extant joint employer test to the facts of the case, the majority determined that CNN was involved in practically every important aspect of the employment relationship between TVS and its employees. Thus, the Board found that CNN was able to exert significant influence over hiring and work hours by barring from employment technicians who had worked for its competitors, determining overall staffing levels, directing TVS to hire freelancers for temporary assignments, and controlling the number of regular, part-time, and overtime hours of unit employees. CNN also substantially controlled work assignments and carried out a significant amount of supervision and direction, with some employees receiving their sole supervision and direction from CNN. Among other factors, CNN provided TVS employees with office space, email accounts, and equipment. Further, TVS employees performed work that was at the core of CNN's business, worked exclusively for CNN, and were held out as CNN employees.

In dissent, Member Miscimarra relied on *Airborne Express* and stated that the essential element in the joint employer analysis was whether CNN had "direct and immediate" control over employment matters. Applying this test, he concluded that CNN had no such control and therefore was not a joint employer of the TVS technical employees.

***Pressroom Cleaners,* 361 NLRB No. 57**

The full Board, affirming the ALJ, held that the Employer violated Section 8(a)(3) and (1) by discriminatorily refusing to hire six of its predecessor's employees because of their union affiliation and, as a successor employer, violated Section 8(a)(5) and (1) by unilaterally imposing new terms and conditions of employment on the employees it hired. A Board majority (Pearce, Hirozawa, and Schiffer), however, overruled *Planned Building Services,* 347 NLRB 670 (2006), and set aside the portion of the ALJ's order directing that the Respondent be given the opportunity in compliance to limit its liability by showing that, even absent its unfair labor practices, it would not have agreed to the monetary provisions of the Union's contract with the predecessor and on some identifiable date would have bargained to impasse or reached agreement on other terms.

The Employer successfully bid for a janitorial service contract previously held by a company whose employees were represented by the Union, and proceeded to conduct the same business as its predecessor at the same location. Further, the predecessor's employees would have comprised a majority of the Employer's workforce had it not engaged in discriminatory refusals to hire. Accordingly, under *Love's Barbeque Restaurant No. 62,* 245 NLRB 78, 82 (1979), *enforced in relevant part sub nom. Kallmann v. NLRB*, 640 F.2d 1094 (9th Cir. 1981), the Employer was a statutory successor, obligated to recognize and bargain with the Union. Although a statutory successor typically is not bound by the terms of its predecessor's contract and is free to set its own initial terms and conditions, in *Love's Barbeque,* the Board held that the right to set initial terms is forfeited where the successor unlawfully refuses to hire its predecessor's employees. Instead, in such cases the successor must maintain the status quo and continue the predecessor's terms and conditions of employment until the parties have bargained to agreement or impasse.

In *Planned Building Services*, the Board modified the traditional remedy in *Love's Barbeque* cases and fashioned a new approach that gave the respondent an opportunity to show in compliance that, even absent its unfair labor practices, at some identifiable time it would have reached impasse or agreement on terms less favorable than the monetary provisions of the Union's contract with the predecessor. The Board majority found the rationale in *Planned Building Services* fundamentally flawed and inconsistent with the Board's standard remedial scheme in Section 8(a)(5) unilateral change cases – i.e. rescission of the unlawful changes, restoration of the status quo terms and conditions, and bargaining to agreement or impasse. Instead, the approach in *Planned Building Services* presents the wrongdoing successor employer with an option that is not available to employers in any other refusal-to-bargain cases and creates a one-sided opportunity that can only benefit the wrongdoer. Accordingly, the Board majority overruled *Planned Building Services* and returned to the remedy outlined in *Love's Barbeque Restaurant No. 62* and *State Distributing*, 282 NLRB 1048 (1987). Then, determining that it was appropriate to apply its decision retroactively, the majority applied the older precedent to the instant case and modified the remedy imposed by the ALJ accordingly.

Members Miscimarra and Johnson dissented from this aspect of the majority's decision, and would adhere to the holding and remedial structure of *Planned Building Services*.

***FedEx Home Delivery,* 361 NLRB No. 55**

The Board majority (Pearce, Hirozawa, and Schiffer), revisiting its earlier denial of review, held that a petitioned-for unit of delivery drivers were Section 2(3) employees rather than independent contractors, and concluded therefore that the Employer had violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union that represents the drivers.

The Regional Director had previously determined that the delivery drivers were employees under the Act and certified the Union as their representative after a successful election. The Board denied review of that determination. The Employer then refused to bargain in violation of Section 8(a)(5), in order to challenge the drivers' employee status. Ordinarily, the Board would have granted the General Counsel's motion for summary judgment, but instead the Board revisited the question of employee status because, in the interim, the D.C. Circuit had held that drivers performing the same job at other FedEx Home Delivery facilities were independent contractors. *See FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009). In its decision, the D.C. Circuit observed that the Board had recently shifted its focus in these cases away from the employer's right to control the means and manner of the work and towards the existence of an entrepreneurial opportunity for gain or loss. The Court then treated the existence of entrepreneurial opportunity as an overriding consideration.

The Board has now restated and refined its approach for assessing independent contractor status. First, the Board reaffirmed that it follows the common-law agency principles in determining whether an individual is an employee or an independent contractor and that all the incidents of the relationship and no one factor, including entrepreneurial opportunity, is decisive. Second, the Board clarified that in assessing entrepreneurial opportunity for gain or loss, it will look to actual, not theoretical, entrepreneurial opportunity and evaluate the constraints imposed by a company on the individual's ability to pursue this opportunity. Third, the Board stated that entrepreneurial opportunity is only one aspect of the broader factor of whether the putative contractor is rendering services as part of an independent business. Relevant to that inquiry is whether the alleged contractor (a) has a realistic ability to work for other companies; (b) has a proprietary or ownership interest in his or her work; and (c) has control over important business decisions, such as the scheduling of performance, the hiring and assignment of employees, the purchase and use of equipment, and the commitment of capital.

The Board then applied to the instant case the factors set out in the Restatement (Second) of Agency, as well as the "newly-articulated independent-business factor," and found the drivers to be employees under the Act.

In dissent, Member Johnson asserted that the majority's revised approach goes beyond the limits of the Agency's discretion and fails to give adequate weight to entrepreneurial opportunity as part of the test. Member Johnson also criticized the majority for incorrectly measuring and artificially restricting the relevant evidence for assessing what opportunity actually exists for the drivers. He would have remanded the case to the Regional Director to reopen the record and accept relevant systemwide evidence to allow a proper determination of the fair market value of the entrepreneurial opportunities available to drivers.[1] Member Miscimarra recused himself and took no part in the consideration of this case.

***Purple Communications, Inc.*, 361 NLRB No. 126**

The Board majority (Pearce, Hirozawa, and Schiffer), overruled the holding in *Register Guard*, 351 NLRB 1110 (2007), *enforced in relevant part and remanded sub nom. Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009), that employees have no statutory right to use employers' email systems for Section 7 purposes.[2] The Board will now apply the test set forth in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), and presume that employees who have rightful access to their employer's email system in the course of their work have a right to use the email system to engage in Section 7-protected communications on nonworking time. However, an employer can rebut the presumption by demonstrating that "special circumstances" make its restrictions necessary to maintain production and discipline.

The full Board reviewed the ALJ's finding under *Register Guard* that the Employer's business-use-only electronic communications policy did not violate Section 8(a)(1). The majority concluded that *Register Guard* had focused too much on employers' property rights and too little on the importance of email as a means of workplace communication. Overruling *Register Guard*, the majority reiterated that the workplace is uniquely appropriate for employee communication and recognized the centrality of such workplace communications to employees' exercise of their Section 7 rights. The majority characterized email as a forum for communication that rarely interferes with employers' business practices and costs, thereby rejecting *Register Guard's* reliance on Board's "equipment" cases involving telephones, copiers, bulletin boards, and other office supplies. Instead, the majority adopted the analysis set forth in *Republic Aviation* that accommodates employers' management rights and employees' ability to communicate effectively at the workplace. Notably, the majority rejected arguments that *Republic Aviation*'s presumption should apply only if employees would otherwise be entirely deprived of their statutory right to communicate, and that employees' alternative means of communication (such as through personal email or social media) made the presumption inappropriate. Rather, the availability of "alternative means" of communication is relevant only with regard to access by nonemployees, who were not at issue in *Purple*. The majority also rejected arguments that overruling *Register Guard* would infringe on employers' free speech rights, noting that email users understand that an email

[1]The majority had noted, however, that they would have reached the same result even considering the systemwide evidence that the Employer proffered and the Regional Director excluded.

[2] The Board did not reach or disturb *Register Guard*'s definition of discrimination. *See* slip op. at 5 n.13.

message conveys the views of the message sender and not those of the email account provider. The majority further explained that its decision was limited because it applies only to email, only to employees who use their employer's email system for work, and only to employees' use of their employer's email system during nonworking time. Employers may still monitor email use for legitimate management reasons and tell employees that they have no expectation of privacy when they use the email system. Finally, the majority held that it would apply its holding retroactively, thus remanding the case to the ALJ for the parties to introduce evidence concerning the effect of any "special circumstances" on the lawfulness of the Employer's business-use-only email policy.

Member Miscimarra dissented for four main reasons. Specifically, he asserted, the majority decision: (1) improperly presumed that employees need their employers' email systems to engage in protected activity; (2) fails to accommodate an employer's substantial property interests in its computer resources, including the employer's right to manage its business; (3) will create many new problems for employers, unions, employees, and the Board, including by blurring the line between work and nonwork time, creating privacy and surveillance issues, and resulting in employers providing unlawful assistance under Section 8(a)(2) and/or financial assistance under Section 302(a) of the Labor Management Relations Act; and (4) created a new legal presumption that is ill-suited for practical application.

In a separate lengthy dissent, Member Johnson argued that the majority's legal presumption that employees have a Section 7 right to use their employer's email system is a radical and ill-advised departure from Board and court precedent. First, Member Johnson asserted that the majority misapprehended the difference between physical and virtual space, thereby undermining employers' rights to own and operate their email networks for business purposes. In this regard, Member Johnson asserted that email is not an employee gathering place or "forum," as so described by the majority, because email has no definite bound in physical space, time, or audience, and poses an acute danger of infringing on employers' productivity. Second, Member Johnson asserted that the Board's "equipment" cases appropriately hold that employees have no Section 7 right to use company equipment, which he would apply to employers' email systems, and that employee "convenience" in using employer equipment does not establish such a right. Third, Member Johnson concluded that, even if *Republic Aviation* applies to employees' use of employer email, it still requires the Board to consider (i) the primary function and use of the employer's communication network at issue; (ii) whether alternative means of communication exist (including alternative communication networks such as personal email, social media, and texting); and (iii) the risk of interference with the employer's operation, including the principle that "working time is for work." Fourth, Member Johnson argued that the majority's presumption violates employers' free speech rights because it requires employers to sponsor and subsidize "hostile speech" by (i) compensating employees who compose hostile speech on work time; (ii) paying for the licensing, electricity, and maintenance that allows the transmission of hostile speech; and (iii) storing or archiving hostile speech. Finally, Member Johnson criticized the majority for creating an unworkable rule and for failing to provide adequate guidance concerning what constitutes, and how the Board will evaluate, "special circumstances" justifying employer restrictions, including monitoring, of email systems.

***Murphy's Oil USA, Inc.,* 361 NLRB No. 72**

The Board majority (Pearce, Hirozawa, and Schiffer) reaffirmed *D.R. Horton, Inc.*, 357 NLRB No. 184 (January 3, 2012), *enforcement denied,* 737 F.3d 344 (5th Cir. 2013), and found that the Employer violated Section 8(a)(1) of the Act by maintaining and enforcing a mandatory arbitration agreement that waived employees' right to maintain class or collective actions, and which employees reasonably would believe barred them from filing charges with the Board. The Board reiterated that mandatory agreements that require individual arbitration are unlawful because they restrict employees' substantive Section 7 right to pursue their work-related legal claims *together*. The Board further emphasized that its finding does not conflict with the Federal Arbitration Act (FAA). For these reasons, the Board majority held that the Fifth Circuit and other circuit courts have erred by rejecting *D.R. Horton*.

Significantly, the Board majority held that the Employer violated Section 8(a)(1) of the Act when it enforced its unlawful arbitration agreement through a motion in federal court to compel individual arbitration of employees' collective Fair Labor Standards Act claims. In so holding, the Board majority found that the Employer's motion was not protected by the First Amendment because it had the illegal objective of seeking to enforce an unlawful contract provision. *See Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 737 n.5 (1983).

The Board majority included in its remedial order provisions requiring the Employer to: (1) reimburse the employees for expenses and legal fees incurred in opposing the unlawful motion; (2) rescind or revise the unlawful arbitration agreement; (3) notify employees and the court that it has done so; and (4) inform the court that it no longer opposes the plaintiffs' claims on the basis of the unlawful arbitration agreement.

Member Miscimarra dissented, arguing that: (1) the Board does not have the authority to require any particular adjudication procedures for non-NLRA claims; (2) Section 9(a) of the Act -- which protects the rights of employees and employers "at any time" to adjust grievances on an "individual" basis -- protects the right of individual employees and employers to enter into arbitration agreements; (3) the FAA precludes the Board from invalidating class waivers contained in individual employment agreements; and (4) the Act and its legislative history render inappropriate the majority's remedies, including the requirement that the Employer pay attorneys' fees.

Member Johnson also dissented, arguing that: (1) the majority interpreted Section 7 too broadly; (2) the Board cannot transform procedural class and collective action rules -- established under other statutes -- into substantive rights under the Act; (3) employers have a legitimate interest in avoiding aggregated, meritless suits; and (4) Supreme Court FAA jurisprudence makes clear that the Board cannot override the FAA.

***Babcock & Wilcox Construction Co.*, 361 NLRB No. 132**

The Board majority (Pearce, Hirozawa, and Schiffer) adopted new standards for determining whether to defer to arbitral decisions, the arbitral process, and grievance settlements in cases alleging violations of Section 8(a)(1) and (3) of the Act.

In *Spielberg Manufacturing Co.*, 112 NLRB 1080 (1955), the Board held that it would defer to an arbitrator's decision when the arbitral proceedings appeared to be fair and regular, all parties agreed to be bound, and the arbitrator's decision was "not clearly repugnant to the purposes and policies of the Act." After some years of experience applying *Spielberg*, the Board expanded on that test by requiring an arbitrator to have considered the unfair labor practice issue. *Raytheon Co.*, 140 NLRB 883 (1963), *enforcement denied*, 326 F.2d 471 (1st Cir. 1964). In *Olin Corp.*, 268 NLRB 573 (1984), the Board relaxed the consideration requirement, holding that it was satisfied if the contractual and statutory issues were factually parallel and the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. *Olin* placed the burden on the party opposing deferral to show that the standards for deferral were not met.

In *Babcock & Wilcox*, the Board majority found that the existing postarbitral deferral standard did not adequately balance the protection of employee rights under the Act and the national policy of encouraging arbitration of disputes over the application or interpretation of collective-bargaining agreements. The majority reasoned that the existing standard created excessive risk that the Board would defer when an arbitrator had not adequately considered the unfair labor practice issue, or when it was impossible to tell whether that issue had been considered.

Based on these concerns, the majority adopted a new postarbitral deferral standard. The new standard retains the *Spielberg* requirements that the arbitral proceedings appear to be fair and regular and that all parties have agreed to be bound. In addition, the new standard places the burden on the party urging deferral to show that: (1) the arbitrator was explicitly authorized to decide the unfair labor practice issue (i.e. the specific statutory right at issue was incorporated in the collective-bargaining agreement or the parties agreed to authorize arbitration of the statutory issue in the particular case); (2) the arbitrator was presented with and considered the statutory issue (or the party opposing deferral acted affirmatively to prevent the party advocating deferral from placing the statutory issue before the arbitrator); and (3) Board law reasonably permits the arbitral award.

The Board determined that it would apply the new postarbitral deferral standard prospectively rather than retroactively because parties had relied on the preexisting framework in negotiating contracts and processing grievances. Thus, where current contracts do not authorize arbitrators to decide unfair labor practice issues and the parties have not agreed to authorize such arbitration, the Board will not apply the new standard until those contracts have expired. If, however, the parties' contracts already provide for arbitration of unfair labor practice issues, or the parties authorized arbitration in particular cases, the Board will apply the new standard to future arbitrations, since its application will not contravene the parties' settled expectations. Applying the existing standard to the facts in *Babcock*, the Board determined that it was appropriate to defer to the arbitral award upholding the discharge of a union steward.

The Board also determined that the above modifications to the postarbitral deferral standard necessitated certain changes to the standards for deferring to the arbitral process and grievance settlements. Thus, the Board will no longer defer an unfair labor practice charge to the grievance-arbitration process unless the arbitrator is explicitly authorized to decide the unfair labor practice issue, since there is no reason to delay processing a Board charge if it is plain from the outset that deferral to the ultimate arbitral decision would be improper. In addition, in order to maintain consistency between the deferral principles applicable to grievance settlements and arbitral decisions, the Board will defer to such settlements only if it is shown that: (1) the parties intended to settle the unfair labor practice issue; (2) they addressed it in the settlement agreement; and (3) Board law reasonably permits the settlement agreement (in light of the factors set forth in *Independent Stave Co.*, 287 NLRB 740 (1987)).

In separate dissents, Members Miscimarra and Johnson questioned the need and the legal rationale for changing the Board's long-standing reliance on the *Spielberg/Olin* standard. The dissenters emphasized, among other things, the history of Congressional and legislative support for the private resolution of disputes through arbitration, and the absence of any perceived or manifest shortcomings in the current standard.

***HTH Corporation, Pacific Beach Corp., and KOA Management, LLC, d/b/a Pacific Beach Hotel,* 361 NLRB No. 65**

The full Board, affirming the ALJ, found multiple violations by the recidivist Respondents. In addition to the standard Board remedies, the Board majority (Pearce, Hirozawa, and Schiffer) imposed on the Employer a number of enhanced remedies and also indicated that the Board likely has the authority to impose the previously unused remedy of front pay, though it opted not to do so here.

The Board found in prior decisions, over a ten year period, that the Employer maintained an overbroad solicitation policy, threatened and coerced employees, unlawfully granted promotions and wage increases just prior to an election, unlawfully discharged members of the Union's bargaining committee, promulgated numerous overbroad rules, threatened employees with job loss, bargained in bad faith, unlawfully withdrew recognition from the employees' chosen representative, unilaterally changed various terms and conditions of employment, unlawfully imposed discipline, laid off employees and reassigned employees to other jobs without providing the Union notice and opportunity to bargain, and refused the Union's information requests. Despite Board orders finding the Employer violated multiple provisions of the Act and engaged in objectionable conduct that interfered with elections on two occasions, two Section 10(j) injunctions, and a contempt of court order for violating one of those injunctions, the Employer has continued to engage in unlawful activities and failed to comply with the remedial obligations previously imposed by the Board.

In the instant case, the Employer unlawfully disciplined and discharged an employee, disparaged the Union by telling employees that Union agents were barred from the premises, threatened Union agents with removal from a public sidewalk, denied Union agents access in violation of the parties' agreement, implemented unilateral changes to terms and conditions, and refused to respond to Union information requests. The ALJ recommended the standard Board remedies for this unlawful conduct, as well as a broad cease and desist order and a notice reading.

Given the Employer's track record, the Board determined that the ALJ's recommended remedies were inadequate. Such remedies would be insufficient to dissipate the likely chilling effects of the Employer's unlawful conduct, to promote the free exercise of Section 7 rights, and to fully restore the Union to its former position. Accordingly, the Board also imposed certain enhanced remedies to reimburse the Union for certain costs incurred as a direct result of the Employer's unfair labor practices and to insure that the employees were fully informed of the Board's actions and the protections of the Act. Those enhanced remedies included: (1) reimbursement of the litigation expenses of the General Counsel and the Union; (2) reimbursement of the Union's bargaining expenses, as well as other expenses incurred because of the Employer's unlawful activity; (3) the posting of a notice and Explanation of Rights for three years and the distribution and mailing of those documents to all current and new employees and supervisors over a three-year period; (4) the publication of the notice and Explanation of Rights in two local publications twice a week for eight weeks; (5) a reading of the notice and

Explanation of Rights in front of the employees, supervisors, and managers; and (6) periodic visitation by Board agents over a three-year period to ensure compliance.

The Board awarded the discriminatee the traditional remedy of reinstatement and back pay, but the majority (Pearce, Hirozawa, and Schiffer) noted that he had been unlawfully terminated twice for his protected activity, in the context of numerous other violations of the Act and instances of retaliation for union activity, and that front pay might be a more appropriate remedy in such circumstances. The majority cited to *Pollard v. E. I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001), a Title VII Civil Rights Act case, as providing "strong support" for concluding that the Board has the authority to award front pay, even though it has not previously done so. In *Pollard*, the Supreme Court made clear that front pay awards in lieu of reinstatement are a make-whole remedy under Title VII, and noted further that the remedial provisions of Title VII closely track those of Section 10(c) of the Act. The majority also cited to other employment discrimination cases where reinstatement was found not feasible and front pay was awarded because there was extreme hostility between the parties, the employee had suffered psychological harm from the discrimination, or the employer had demonstrated aggressive behavior toward the former employee. Further, the majority referenced empirical evidence that the effectiveness of reinstatement as a remedy is limited; discriminatees are often deterred from accepting reinstatement because of the risk of retaliation from their employers, and many that accept reinstatement remain at work for only a short time. Nonetheless, the majority decided to defer consideration of front pay to a future case, since determinations of what circumstances warrant such an award and the methodology for calculating it would be better made where the necessary factual record has been fully developed and the issue has been thoroughly briefed.

Writing separately, Member Miscimarra concurred with the majority's findings of violations and on some of the remedies ordered, but dissented on other remedies, particularly the award of attorneys' fees to the General Counsel and the Union, and the majority's discussion of the Board's authority to award front pay as a remedy in an appropriate case. In his separate opinion, Member Johnson also concurred with the majority's findings of violations and some of the remedies ordered, but dissented on the award of attorneys' fees to the General Counsel and the Union, the award of certain nonlitigation expenses to the Union for costs resulting from the Respondents' violations, and the requirement that the Respondents publish the notices in local newspapers. Member Johnson would also apply a different time frame to satisfy the mailing requirements, require a more limited notice posting period, and refrain from consideration of front pay.

2. SECTION 8(a)(1)

a. *Weingarten*

***YRC Freight*, 360 NLRB No. 90**

The Board panel (Miscimarra, Johnson, and Schiffer) adopted the ALJ' s finding that the Employer did not violate Section 8(a)(1) by denying an employee's request for *Weingarten* representation, inasmuch as the Employer then discontinued the interview. The Board majority (Miscimarra and Johnson) further agreed with the ALJ that the Employer did not violate Section 8(a)(1) by subsequently issuing the employee a warning for his alleged misconduct.

The Employer operates a trucking company in Illinois. One morning a supervisor observed an employee pulling out of the Employer's yard in his truck an hour behind schedule. The supervisor approached the employee and asked why he was tardy. The employee questioned whether the supervisor was conducting an investigation, and if so, stated that he wanted a *Weingarten* representative. The supervisor replied that no stewards were available, but that the employee could choose another co-worker. (The collective-bargaining agreement allowed a co-worker to serve as a representative when a steward was unavailable.) The employee asked for a list of people scheduled to work that day, at which point the supervisor terminated the interview and informed the employee that he would be disciplined for misuse of company time. The employee then received a warning letter six days later, stating that he was being disciplined because he could offer no valid reason for his delay in pulling out of the yard.

The Board majority explained that the Supreme Court's decision in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), allows an employer confronted with an employee request for union representation during an investigatory interview to *not* move forward with the interview. In such a situation, the employee is considered to have relinquished any benefit associated with explanations he may have conveyed during the interview, and the employer can make a disciplinary decision based on other information available to it. In the instant case, as the supervisor had already observed the employee leaving the trucking yard an hour late, the Employer was privileged to issue discipline based on that information. Thus, the Board majority concluded, the discipline was based on the Employer's observation of the employee's tardiness, not on the employee's invocation of his *Weingarten* right, and therefore did not violate Section 8(a)(1).

Member Schiffer, dissenting in part, used a *Wright Line* analysis to find that the Employer's issuance of discipline violated the Act because it was motivated by the employee's request for a representative, rather than the supervisor's observation of the employee's tardiness. *See Wright Line,* 251 NLRB 1083 (1980), *enforced on other grounds,* 662 F.2d 899 (1st Cir. 1981). She first concluded that the Charging Party's assertion of his *Weingarten* right was a motivating factor in the Employer's decision to discipline him, since the warning letter relied at least in part on the Charging Party's failure to offer a valid reason for his delay and the Employer knew that the lack of an explanation was the result of his request for a *Weingarten* representative. She then concluded the Employer had not presented sufficient evidence to show that it would have disciplined the Charging Party absent his request for a *Weingarten* representative.

***Ralph's Grocery Co.,* 361 NLRB No. 9**

The Board majority (Pearce and Schiffer), affirming the ALJ, found that the Employer violated Section 8(a)(1) by suspending and terminating an employee for refusing to submit to a drug and alcohol test without union representation. Because the employee's termination was inextricably linked to his assertion of *Weingarten* rights, the Board majority also concluded that a make-whole remedy was appropriate.

After various other employees observed the discharged employee engaging in odd behavior, the Employer informed the employee that he would be required to submit to a drug and alcohol test, and that his refusal to take the test would be considered both insubordination and an automatic positive test result. The employee then asked to contact a Union representative. Although the Employer stated that he did not have that right, it nevertheless allowed the employee to attempt to call a Union representative. After the employee was unable to reach anyone, the Employer again informed him that he was required to take a drug and alcohol test. The employee continued to refuse, however, as he had been unable to obtain Union representation. The Employer then suspended him on that day, and terminated him the following day. The termination report stated that the employee was terminated for insubordination and for refusing to take the drug and alcohol test.

All three Board members agreed that the Employer violated Section 8(a)(1) by insisting the employee submit to the drug and alcohol test notwithstanding his request for union representation. The Board majority further held that, based on the wording of the termination report, the suspension and discharge were based solely on the employee's protected refusal to submit to the intoxication test without *Weingarten* representation, rather than on the Employer's observation of the employee's erratic behavior. Thus, the Board majority distinguished this case from *YRC Freight*, 360 NLRB No. 90 (Apr. 30, 2014), where the employer disciplined an employee based on information the employer had obtained prior to the employee's invocation of his *Weingarten* rights. The Board majority further concluded that a make-whole remedy was appropriate, as the discipline was inextricably tied to the employee's request for union assistance.

Member Johnson dissented in part, concluding that the employee was suspended and discharged lawfully based on the Employer's belief that he was intoxicated, and not due to any hostility toward his request for union representation.

***Postal Service,* 360 NLRB No. 79**

The Board panel (Pearce, Miscimarra, and Hirozawa), reversing the ALJ, held that an Employer did not violate Section 8(a)(1) by asking an employee an additional question after he had asserted his *Weingarten* right at an investigatory interview.

On February 23, 2012, the employee completed a request for leave from March 1 through March 4, and his request was approved without incident. On March 1, the employee informed a supervisor of his upcoming scheduled leave. The supervisor questioned whether the employee had an approved leave slip, the employee replied that he did, and the supervisor requested the slip. The employee then requested a *Weingarten* representative, and the supervisor assured him their conversation would not lead to discipline. The employee asked the supervisor to put that assurance in writing, which the supervisor did. The employee showed the supervisor the leave slip, and the supervisor then asked the employee to give him the leave slip. The employee refused, and the supervisor left the room. A short time later, a higher-ranking supervisor entered and asked if the employee had scheduled leave. The employee replied that he had and again requested a *Weingarten* representative. The higher-ranking supervisor asked if he was kidding, the employee replied that he was not, and the higher-ranking supervisor then left the room as well.

The Board disagreed with the ALJ's conclusion that, after the employee's initial request for a *Weingarten* representative, the Employer violated Section 8(a)(1) by continuing the questioning without giving the employee the option of continuing without a union representative or discontinuing the interview. Thus, the Board explained that the *Weingarten* right is only triggered when the employee requests it. As there was no evidence that the second, higher-ranking supervisor was aware of the employee's prior *Weingarten* request during the employee's conversation with the first supervisor, the Employer did not violate the Act through the second supervisor's questioning of the employee. The Board noted that as soon as the employee reiterated his request for a union representative to the second supervisor, that supervisor discontinued the interview, thus satisfying the requirements of *Weingarten*.

b. Access

***Piedmont Gardens*, 360 NLRB No. 100**

The Board majority (Johnson and Schiffer), affirming the ALJ, held that an Employer's rule concerning off-duty employee access to the Employer's facility was facially unlawful. The Employer rule prohibited employees from remaining on the Employer's premises after their shift ended unless expressly authorized by a supervisor to do so.

The Board majority explained that, under *Tri-County Medical Center*, 222 NLRB 1089 (1976), a rule restricting off-duty employee access is valid only if it: (1) limits access solely with respect to the interior of the facility and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. The Board majority held that the Employer rule failed under the third prong of this standard, as the exception to the general prohibition on off-duty access (i.e., that an employee may access the facility if given permission by a supervisor) was indefinite in scope and effectively permitted the Employer to decide when and why employees may access the facility.

Member Johnson, though agreeing with Member Schiffer in the holding, did not rely on the ALJ's citation of precedent that arguably suggests that a rule permitting any limited exception to a uniform prohibition of off-duty employee access is unlawful.

Member Miscimarra, disagreeing with the majority's holding, would find that a rule broadly prohibiting off-duty employee access can lawfully contain an exception permitting access if the employee obtains prior approval from a supervisor. He would find that such an exception reasonably contemplates legitimate business needs, which cannot all be enumerated in advance, that would warrant allowing off-duty employees on the premises.

c. Threats

***Dover Energy, Inc.*, 361 NLRB No. 48**

The Board majority (Pearce and Hirozawa), reversing the ALJ, found that an Employer violated Section 8(a)(1) by threatening an employee with discipline if he made future "similar" information requests, because the employee would reasonably understand that warning to proscribe union or concerted protected activity.

The Employer and the Union had maintained a collective-bargaining relationship for many years, and in the summer of 2012 were negotiating for a new contract. The Charging Party was a shop steward, and in that capacity was responsible for investigating and handling contractual grievances on behalf of the Union. On June 12, the Charging Party presented a written request to the Employer, "for the purpose of future bargaining," for information about financial relationships between the Employer and members of the Union. The Employer asked the Union president (who was also a member of the bargaining committee) whether the Union had authorized this information request, and the president replied that the Union had not. The Employer then replied to the steward, denying the request, observing that the steward was not on the bargaining committee, and stating that the information request was outside his scope. On August 10, the steward made an additional information request, regarding employees' hours and pay, as well as photocopies of employee paychecks, stating that he sought this information for a "labor board investigation." Upon discovering that the Union had also not authorized this information request, the Employer sent the steward a letter that constituted a verbal warning "for continued frivolous requests for information," and stating that "[s]imilar requests" would result in further discipline up to and including discharge.

Citing *ITT Federal Services Corp.*, 335 NLRB 998, 1002-1003 (2001), the Board majority explained that an employer violates Section 8(a)(1) when it engages in conduct which reasonably tends to interfere with protected employee rights, including conduct which would reasonably be understood to proscribe *future* protected activity. The Board majority then observed that Section 7 protects a union steward's activity when seeking information for purposes of investigating potential grievances, and moreover that Section 7 protects employee activity that seeks "to initiate or to induce or to prepare for group action." *Meyers Industries*, 281 NLRB 882, 887 (1986), *affirmed sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987). Thus, as the Employer warned the steward that similar future information requests would result in further discipline, and future information requests could well be protected activity, the Employer had violated Section 8(a)(1). In so concluding, however, the Board majority did not pass on whether the steward's first two information requests constituted protected activity.

Member Miscimarra, dissenting, concluded that the Employer did not violate Section 8(a)(1), as the steward would not reasonably have understood the Employer's warning as prohibiting future legitimate information requests. Instead, Member Miscimarra found, the steward would have reasonably understood that the warning that he would face discipline for "similar requests" referred to the type of "continued frivolous requests" referenced earlier in the letter.

d. Insignia

***Healthbridge Mgmt.*, 360 NLRB No. 118**

The Board panel (Hirozawa, Miscimarra, and Schiffer), affirming the ALJ, concluded that the Employer violated Section 8(a)(1) by removing flyers from Union bulletin boards at various facilities and by broadly prohibiting employees from wearing Union stickers at two of its facilities. The Board majority (Hirozawa and Schiffer), affirming the ALJ, also found that the Employer violated Section 8(a)(1) by prohibiting employees from wearing those stickers in patient care areas in four of its facilities.

The Employer manages six separate healthcare facilities in Connecticut where the events at issue transpired. In March 2011, the Union prepared flyers and stickers stating that the Employer had been "busted" by the NLRB for violating federal labor law, referencing an earlier complaint against the Employer and these six facilities. The flyer was posted on Union bulletin boards at each of the six facilities, and employees wore the stickers while at work. The Employer removed the flyers from all bulletin boards, four of the facilities specifically prohibited the stickers in patient care areas, and the remaining two facilities categorically banned employees from wearing the stickers in any part of the facilities.

The Board panel initially found that the Employer violated the Act by removing the flyers from union bulletin boards. Thus, the parties' collective-bargaining agreement requires the Employer to provide the Union with bulletin boards at each of its facilities for posting notices, and the Employer was unable to present any evidence that it retained contractual authority to unilaterally approve the content of the bulletin boards.

In regard to the stickers, the Board explained that in the healthcare sphere, restrictions on wearing union insignia in nonpatient care areas are presumptively invalid, while such restrictions in patient care areas are presumptively valid. *See NLRB v. Baptist Hospital*, *Inc.,* 442 U.S. 773, 779-81 (1979). In the latter case, however, the presumption of validity does not apply to a selective ban on only certain union insignia. In that case, as in the case of restrictions of union insignia in nonpatient care areas, the employer must demonstrate special circumstances justifying the restriction. *See Saint John's Health Center*, 357 NLRB No. 170, slip op. at 2 (Dec. 30, 2011). Here, as the Employer broadly prohibited the "busted" stickers in all areas at two facilities and banned only the "busted" stickers—but not other union insignia—at the remaining four facilities, the Employer was required to demonstrate special circumstances justifying its ban. The Board majority determined that the Employer did not meet this burden, as it provided only speculative testimony supporting its view that the stickers would upset patients.

Member Miscimarra, dissenting from the Board majority's holding that the Employer violated Section 8(a)(1) by banning employees from wearing the "busted" sticker in patient care areas, would have found that the ban was presumptively valid and that categorically banning all unofficial insignia in patient care areas was not necessary in order to lawfully ban the "busted" sticker. Moreover, Member Miscimarra would have found that the ALJ did not give enough weight to the Employer's testimony regarding the potentially detrimental effects the stickers would have on patients, and thus that special circumstances justified the Employer's restriction on the "busted" stickers in patient care areas.

e. Rules

***First Transit, Inc.,* 360 NLRB No. 72**

The Board panel (Pearce, Johnson, and Schiffer), applying *Lutheran Heritage Village-Livonia,* 343 NLRB 646 (2004), examined numerous provisions in the Employer's employee handbook to determine whether employees would reasonably construe the challenged rules in context to prohibit protected Section 7 activity. For example, the panel found that the stealing/theft rule and the employee-performance rule were lawful because when the contested language−"using Company property for activities not related to work anytime" and "loitering, or excessive visiting"−was read in light of the bullet points and examples listed, employees would reasonably construe such language to refer respectively to the theft of Employer property and to a failure to perform job duties, rather than Section 7 activity. Similarly, the use of the words "uncivil" and "insulting" in the portion of the personal conduct rule prohibiting "[p]rofane or abusive language where the language used is uncivil, insulting, contemptuous, vicious, or malicious" was not so ambiguous as to render that bullet point overbroad; the introductory language made the purpose of the bullet point clear. On the other hand, Members Pearce and Schiffer, with Member Johnson dissenting, found that other portions of the personal conduct rule and certain portions of the employer's disloyalty rule were unlawfully overbroad.

Further, the Board panel found that the inclusion of a "savings clause" in the handbook's freedom of association policy was insufficient to ensure that employees would not read otherwise overbroad rules as restricting their Section 7 rights. An employer's express notice to employees advising them of their rights under the Act may, in certain circumstances, clarify the scope of an otherwise ambiguous and unlawful rule. But an effective "savings clause" or "safe harbor" provision should address the "broad panoply of rights protected by Section 7." 360 NLRB No. 72, slip op. at 4 (Apr. 2, 2014). This savings clause did not and focused solely on union organizational rights. In addition, the clause's placement was neither prominent nor proximate to the rules it purported to inform. Finally, the clause did not reference those rules, nor did the rules expressly reference the policy.

***Copper River of Boiling Springs, LLC,* 360 NLRB No. 60**

The Board majority (Miscimarra and Johnson), affirming the ALJ, found that the Employer did not violate Section 8(a)(1) by maintaining a rule prohibiting "[i]nsubordination to a manager or lack of respect and cooperation with fellow employees or guests." The rule went on to state, "[t]his includes displaying a negative attitude that is disruptive to other staff or has a negative impact on guests." The majority found that the language of the rule limited it to unprotected conduct that would interfere with the Employer's legitimate business concerns.

Chairman Pearce dissented, finding that an employee would reasonably interpret a "negative attitude" as one that is critical of the Employer, and that the rule would thereby reasonably inhibit employees from discussing controversial topics, including terms and conditions of employment.

***Hill & Dales General Hospital,* 360 NLRB No. 70**

The Board panel (Pearce, Johnson, and Schiffer) held that three paragraphs of the Employer's Values and Standards of Behavior Policy, which respectively prohibited "negative comments" about co-workers and managers, required employees to represent the Employer in "a positive and professional manner," and precluded employees from engaging in or listening to "negativity" were facially overbroad in violation of Section 8(a)(1).

Affirming the ALJ, the panel agreed that prohibitions upon "negative comments" and "negativity" were overbroad and ambiguous by their own terms, and, under *Lutheran Heritage,* employees would reasonably construe them to prohibit protected Section 7 activity. (A prohibition of gossip was not alleged to violate the Act.) Reversing the ALJ, a majority of the panel (Pearce and Schiffer) also found language stating that employees will "represent [the Employer] in the community in a positive and professional manner in every opportunity" just as overbroad and ambiguous. Particularly when considered in context with these other unlawful paragraphs, employees would reasonably view such language as proscribing them from engaging in any public activity or making any public statements on work-related matters that were not perceived as "positive" toward the Employer. This would, for example, discourage employees from engaging in protected public protests of unfair labor practices or making statements to third parties protesting their terms and conditions of employment. Member Johnson would have upheld the ALJ's finding that this particular provision was lawful.

***Philips Electronics North America Corp.,* 361 NLRB No. 16**

The Board majority (Johnson and Schiffer), reversing the ALJ, held that the Employer violated Section 8(a)(1) by maintaining a rule prohibiting employees from discussing their discipline with their co-workers. The majority noted that an employer violates Section 8(a)(1) when it prohibits employees from speaking with their co-workers about discipline and other terms and conditions of employment, absent a legitimate and substantial business justification for the prohibition. More specifically, employees must be permitted to communicate the circumstances of their discipline so that their co-workers can be made aware of the nature of discipline being imposed, how they might avoid such discipline, and matters that can be raised in their own defense. Member Miscimarra dissented, on the ground that there was insufficient evidence that the Employer maintained such a rule.

***Fresh & Easy Neighborhood Market,* 361 NLRB No. 8**

The Board majority (Pearce and Schiffer), reversing the ALJ, held that the Employer violated Section 8(a)(1) by maintaining a confidentiality rule in its "Code of Business Conduct" requiring employees to keep employee information "secure" and use it "fairly, lawfully and only for the purpose for which it was obtained." The majority applied *Lutheran Heritage* and concluded that employees would reasonably construe the admonition to keep employee information "secure" to prohibit discussion and disclosure of information about other employees, such as wages and terms and conditions of employment. Further, the instruction to use information "only for the purpose for which it was obtained" reinforces that impression because the Employer's business purpose clearly does not include protected discussion of wages or working conditions with fellow employees, union representatives, or Board agents.

Member Johnson dissented, finding that the Employer's Code was dedicated only to consideration of ethical matters and did not resemble an employee handbook dealing with working conditions, the challenged rule was adequately limited by context, and therefore the rule would not reasonably tend to chill employees' exercise of their Section 7 rights.

***Casino San Pablo*, 361 NLRB No. 148**

The full panel (Pearce, Johnson, and Schiffer) found unlawful the maintenance of handbook rules prohibiting solicitation and distribution of literature in the workplace, and precluding the making of "false, fraudulent or malicious statements" to or about a fellow employee. Board Members Pearce and Schiffer also found that that the Employer violated Section 8(a)(1) by maintaining a handbook rule that prohibited "disrespectful conduct," and a rule that limited off-duty employee access to the back of the house areas. A different Board majority (Schiffer and Johnson) upheld the rule prohibiting "gossip" as lawful.

With regard to the rule prohibiting "false, fraudulent, or malicious statements," the full panel held that prohibiting employees from making merely false statements, as opposed to maliciously false statements, had the tendency to chill protected activity, citing *Lafayette Park Hotel,* 326 NLRB 824, 828 (1998), *enforced mem.,* 203 F.3d 52 (D.C. Cir. 1999), where a virtually identical rule was found unlawfully overbroad. Applying *Lutheran Heritage,* Members Pearce and Schiffer held that employees would reasonably construe the rule stating that employees would be subject to discipline for "[i]nsubordination or other disrespectful conduct (including failure to cooperate fully with Security, supervisors and managers)" as encompassing any form of Section 7 activity that might be deemed insufficiently deferential to a person in authority, in other words, as referring to something less than actual insubordination. The rule would reasonably be construed to preclude, for example, concerted objections to working conditions imposed by a supervisor, collectively complaining about a supervisor's arbitrary conduct, or joint challenges to an unlawful pay scheme. Members Schiffer and Johnson found, however, that employees would not reasonably construe the rule prohibiting gossip as precluding Section 7 activity, as gossip is reasonably understood as chatty talk, rumors, or reports of an intimate nature. Chairman Pearce would find this rule too ambiguous and subject to a reasonable belief that it would include Section 7 activity.

Members Pearce and Schiffer analyzed the rule limiting off-duty employees' access to "back of the house areas" under *Tri-County Medical Center,* 222 NLRB 1089 (1976). The rule limited such access more than 30 minutes prior to the beginning of or after the end of employees' shifts except to conduct business with Human Resources, for pre-arranged training sessions or orientations, or with the approval of a director, manager, or supervisor. They found the rule unlawful under the third prong of the *Tri-County* test because the last exception effectively vested management with unlimited discretion to expand or deny off-duty employees' access for any reason it chose.

Member Johnson dissented, and would have upheld as lawful both the rule limiting off-duty employees' access and the rule prohibiting "[i]nsubordination or other disrespectful conduct." More significantly, he called attention to what he considers justifiable criticism of the Board's application of the *Lutheran Heritage* "reasonable employee" standard, noting that Member Miscimarra has already "given up on the test entirely." *See MCPc, Inc.,* 360 NLRB No. 39, slip op. at 1, n.4 (Feb. 6, 2014) (Member Miscimarra, concurring). He urged the Board to decide on a defined set of rules for applying the *Lutheran Heritage* test that will provide more guidance to employers. He proposed starting with *ejusdem generis,* the concept that "where general words follow words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying to persons or things of the same kind or class as those specifically mentioned." 360 NLRB No. 148, slip op. at 12 (Dec. 16, 2014) (Member Johnson, dissenting). Applying that concept here, he would find that "a normal person" would interpret the phrase "disrespectful conduct" to be "a species of, or akin to, insubordination." *Id.*

***Care One at Madison Ave.,* 361 NLRB No. 159**

The Board majority (Pearce and Schiffer), affirming the ALJ, found that the Employer violated the Act by posting a postelection memorandum directed at union activity on its employee bulletin board. The memorandum was posted three days after the election, with the Employer's preexisting Workplace Violence Prevention Policy attached. The Employer's administrator stated in the memorandum that, "I thought that after the election we would treat each other with dignity and respect[,]" but that it had been reported to him "that a few employees are not treating their fellow team members with respect and dignity. I have even heard disturbing reports that some of our team members have been threatened." The memorandum went on to state that anyone engaging in such conduct would be disciplined. *The* ALJ found no evidence that any such threats had actually occurred. Applying *Lutheran Heritage,* the Board held that the Employer violated Section 8(a)(1) because the memorandum was promulgated in response to union activity, and employees would reasonably construe the memorandum to prohibit such activity. The Board reasoned that employees would understand the memorandum to suggest that employees had not treated each other with dignity and respect when they had engaged in protected union activity during the Union campaign, and would reasonably construe the memorandum to target such protected activity in the wake of the election.

Member Johnson dissented, finding that the postelection memorandum merely reiterated the Employer's lawful, preexisting Workplace Violence Prevention Policy and would not reasonably be construed by employees to restrain their Section 7 rights.

f. Lawsuits

***Atelier Condominium & Cooper Square Realty,* 361 NLRB No. 111**

The Board panel (Hirozawa, Schiffer, and Miscimarra writing in a separate concurrence) found, among other violations, that the Employer violated Section 8(a)(1) by filing and maintaining a baseless and retaliatory lawsuit against one of the Charging Parties.

The Employer operates a luxury residential condominium building. A group of condominium owners filed a lawsuit against members of the Employer's Board of Directors, the Employer's Property Manager, and the Board President's real estate company, accusing the defendants of corruption, bribery, payoffs, and extortion. The day the lawsuit was filed, the Employer's Resident Manager committed suicide. Shortly thereafter, anonymous internet postings addressed to the condominium residents discussed the suicide and the alleged corrupt activities of those named in the lawsuit. In response to the internet postings, the Board President, Property Manager, and estate of the Resident Manager filed and maintained a state-court lawsuit for libel and tortuous business interference against anonymous "John and Jane Doe" defendants and three former employees, including one of the Charging Parties, whom the Employer had previously unlawfully discharged.

The Board found that the Employer's lawsuit against that Charging Party was baseless because the Employer had no evidence and could not reasonably believe it would acquire evidence in discovery that showed he had published the anonymous internet postings, a requisite element of a libel claim and a necessary factual foundation for the tortuous business interference claim. The Board found the lawsuit retaliatory based on the following circumstantial evidence: (1) the Employer knew of the Charging Party's protected union activity; (2) the Employer had demonstrated anti-union animus by conducting unlawful interrogations, threatening reprisals during the Union's organizing drive, unlawfully discharging the Charging Parties, and assisting a different minority union; (3) the Employer's lawsuit was baseless; and (4) the Employer's lawsuit sought $190 million in compensatory and punitive damages, without attempting to justify the amount of damages sought.

Member Miscimarra concurred with the majority's conclusion, but he would not rely on the baselessness of the lawsuit as evidence of retaliation because baselessness is a separate requirement of the *Bill Johnson's* test. *See Bill Johnson's Restaurants, Inc. v. NLRB,* 461 U.S. 731 (1983). He also would not infer a retaliatory motive from the amount of damages sought in an employer's state-court lawsuit because the amount of damages sought might be based on many factors, and the Board does not have the expertise to determine what constitutes reasonable damages under a state-law claim. He concluded that the Employer's unfair labor practices alone were sufficient to support a finding that the lawsuit had a retaliatory motive.

3. SECTION 8(a)(3)

Conagra Foods, Inc., 361 NLRB No. 113

The Board majority (Pearce and Schiffer), affirming the ALJ, held that the Employer violated Section 8(a)(3) and (1) by issuing an employee a verbal warning for violating its lawful no-solicitation policy, based on her having informed employees during work time that she had placed authorization cards in their locker.

The Union was organizing the Employer's Troy, Ohio food processing plant when the discriminatee, a third-shift employee who was also an open Union supporter, encountered two second-shift employees in the restroom. The discriminatee asked the two second-shift employees if they would like to sign authorization cards, and they answered affirmatively. A few days later, again in the restroom, one of the second-shift employees provided the discriminatee with the locker number shared by the two second-shift employees, so that the discriminatee could place the authorization cards therein. Later, the discriminatee told the two second-shift employees on the production floor, while one was waiting to start work and the other was cleaning, that she had placed the authorization cards in their locker. The discriminatee did not ask the employees then to sign the cards, and the encounter lasted only a few seconds. Thereafter, the Employer issued the discriminatee a verbal warning for violating the Employer's lawful no-solicitation policy.

The Board majority agreed with the ALJ that the discriminatee's conduct on the production floor had not amounted to solicitation and, therefore, the Employer had unlawfully applied its no-solicitation policy to her. The Board majority applied longstanding Board precedent—holding that "solicitation" occurs when someone is asked to join a union by signing an authorization card at that time—and concluded that the discriminatee's statement that the authorization cards were in the employees' locker did not amount to "solicitation." There was no request to take action, and merely providing information to co-workers does not constitute solicitation. The Employer therefore violated Section 8(a)(3) by issuing the discriminatee a verbal warning for protected activity.

Member Miscimarra dissented in part and concluded that the discriminatee's conduct constituted "solicitation" under a commonsense definition of the word because it interrupted the employees' work time and was intended to obtain their signatures, despite the absence of Union authorization cards at that conversation. He would therefore have found that she was lawfully disciplined for engaging in solicitation during working time.

4. SECTION 8(a)(5)

a. Decision Bargaining

***Mi Pueblo Foods*, 360 NLRB No. 116**

The Board majority (Pearce and Hirozawa), reversing the ALJ, held that the Employer's unilateral elimination of its "cross-docking" delivery system and assignment of that work to a subcontractor were unlawful under *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964) and *Torrington Industries*, 307 NLRB 809 (1992). Additionally, the full Board panel affirmed the ALJ's conclusion that the Employer made other unlawful unilateral changes, including eliminating backhauls and pickups of its products and subcontracting that work. Members Pearce and Hirozawa analyzed those unilateral changes under *Fibreboard*, whereas Member Johnson analyzed them under *First National Maintenance Corp. v. NLRB,* 452 U.S. 666 (1981).

The Employer had engaged in "cross-docking" of products since 2008, i.e., using its distribution center employees to receive vendors' goods and prepare them for delivery to the Employer's retail grocery stores. In April 2011, the Employer unilaterally decided, without bargaining with the Union, to cease "cross-docking" some products and contract out the delivery of those products directly from the vendors to the retail stores to cut costs and improve operational efficiency.

The Board majority found that the Employer's decision to change from a hub-and-spoke delivery system to a point-to-point system for distributing the products of one supplier to most but not all of its stores was not a change in the scope or direction of its enterprise but, rather, entailed substituting one group of employees for another. As such, the Employer's decision was not akin to a core entrepreneurial decision, like a closure or partial closure, under *First National Maintenance* and thus fell squarely under the *Fibreboard* and *Torrington* framework. The majority also concluded though that, even under the balancing test set forth in *First National Maintenance*, since the Employer's concerns raised issues amenable to the collective-bargaining process, the potential benefits of seeking a solution to those concerns through bargaining outweighed any temporary burden on the Employer that bargaining would entail. The Board therefore rejected the ALJ's reasoning that the Employer's decision did not materially, substantially, or significantly affect employees' terms and conditions of employment because no employees were immediately laid off or adversely affected.

Member Johnson dissented and, analyzing the Employer's "cross-docking" decision solely under *First National Maintenance*, concluded that the Employer made a core entrepreneurial decision to discontinue that portion of its business model. He further concluded that the Employer's need for unencumbered decision-making over its distribution model outweighed any potential benefits to the collective-bargaining process.

b. Unilateral Changes

***Barstow Community Hospital*, 361 NLRB No. 34**

The Board (Pearce, Hirozawa, and Johnson), affirming the ALJ, held that the Employer violated Section 8(a)(5) by declaring impasse and refusing to bargain unless the Union directed the unit registered nurses to stop using the Union's "assignment despite objection" form to document circumstances they believed to be unsafe or could jeopardize their nursing licenses. A majority of the panel (Pearce and Hirozawa) also agreed with the ALJ that the Employer violated Section 8(a)(5) by refusing to submit any bargaining proposals or counterproposals until it received the Union's entire contract proposal. Unlike the ALJ, however, the full Board panel held that the Employer also violated Section 8(a)(5) by unilaterally changing its certification training policy.

Nurses at the Employer's hospital are required to be certified in basic, advanced cardiac, and pediatric life support. Previously, the Employer offered instructor-led certification training at its facility, which nurses were paid to attend, and other pre-approved in-person training at other facilities, for which nurses were not reimbursed. Shortly after the Union was certified as the nurses' representative, the Employer unilaterally replaced its on-site training with the online service and capped the number of training hours for which nurses would be paid.

Chairman Pearce and Member Hirozawa rejected the Employer's claim that its change was not "material, substantial, or significant," noting the difference in format and potential effectiveness of online versus in-person training, as well as the limited number of paid hours for the new training. Member Johnson did not find that the training change alone was material, substantial, or significant but concluded that the Employer's unilateral change was unlawful because it included the reimbursement limitation. Finally, the Board majority ordered the Employer to reimburse the Union for its negotiating expenses; Member Johnson would not have concluded that such an award was necessary.

5. SECTION 8(b)(1)(A)

a. Duty of Fair Representation

***Amalgamated Transit Union Local 1498 (Jefferson Partners L.P.)*, 360 NLRB No. 96**

The Board majority (Pearce and Hirozawa), reversing the ALJ, held that the Union did not violate its duty of fair representation under Section 8(b)(1)(A) by negligently failing to timely request arbitration of the Charging Party's grievance and thereafter mistakenly conveying to the Charging Party that his grievance was pending.

The applicable contract required that a party seeking arbitration must, within 30 days of the Employer's grievance denial, notify the Federal Mediation and Conciliation Service and request a list of arbitrators or forfeit the claim. The Charging Party filed a grievance concerning his unsuccessful bid for a mechanic position, and thereafter an appeal thereof, with the Union's support and assistance. However, Union counsel negligently failed to comply with the contractual 30-day requirement, thereby resulting in the forfeiture of the Charging Party's grievance. Two years elapsed between the Union's initial noncompliance and ultimate discovery of the mistake, during which the Union had informed the Charging Party several times that his arbitration was pending.

The majority held that the Union's negligent failure to timely obtain an arbitration was an inadvertent error and not arbitrary, discriminatory, or bad faith conduct violative of Section 8(b)(1)(A). Under longstanding precedent, "something more" than mere negligence, ineptitude, or mismanagement is required to establish a union's breach of its duty of fair representation. Because the Union had not ignored the Charging Party's grievance, or processed it perfunctorily, its negligent failure to timely file for arbitration was not arbitrary conduct, and the Union's subsequent actions, including the Union's failure to discover its error for two years, did not render the Union's initial negligent mistake arbitrary. Moreover, the Union president and attorney never deliberately misrepresented the status of the grievance to the Charging Party, and instead operated under the good faith but mistaken belief that the attorney had properly scheduled the arbitration.

Member Miscimarra dissented, concluding that the Union's conduct as a whole amounted to gross negligence. Miscimarra agreed with the ALJ that the Union's mishandling of the Charging Party's grievance was "unconscionable and far outside the pale of reasonable" because it was comprised of multiple cumulative lapses, including the Union's subsequent failure to realize and correct its initial filing mistake, rather than a single inadvertent error as characterized by the majority.

b. Facebook

***Amalgamated Transit Local 1433 (Veolia Transportation Services)*, 360 NLRB No. 44**

The Board panel (Pearce, Hirozawa, and Miscimarra), affirming the ALJ, held that the Union did not violate Section 8(b)(1)(A) by failing to disavow or remove certain comments posted on its Facebook page by individuals who were not Union agents.

The Union represents drivers of a private contractor that provides public bus service and maintains a Facebook page intended to function as a forum for discussions among its members. During a six-day strike, individuals, who were neither alleged nor found to be Union agents, posted on the Union's Facebook page comments that threatened employees with physical harm and less favorable Union representation if they refused to participate in the strike. The Acting General Counsel argued that the Union had a duty to disavow such comments because the Union's Facebook page was an electronic extension of its picket line. The ALJ rejected that argument.

Affirming the ALJ, Chairman Pearce and Member Hirozawa held that the Union did not violate Section 8(b)(1)(A) by failing to remove the comments from its Facebook page because the comments did not constitute threats and the individuals who posted them were not Union agents. Because the Facebook comments referenced physical violence, Member Miscimarra relied solely on the lack of agency status to dismiss the allegations, and disagreed with the majority that the comments would have been permissible under Section 8(b)(1)(A) if they been made by Union agents.

6. SECTION 10(b)

***Laborers Local No. 16,* 360 NLRB No. 77**

The Board majority (Pearce and Johnson), affirming the ALJ, dismissed allegations that the Employer violated Section 8(a)(3) and (1) by requiring the Charging Party to become a member of the Union as a condition of employment, on the ground that those allegations were time-barred.

The Employer, Laborers Local 16, employed the Charging Party as a secretary. When she was hired, the Employer required her to become a member of Local 16 as a condition of her employment, even though she was not in a bargaining unit represented by Local 16 or covered by a lawful union security agreement. Although that occurred more than six months prior to the filing of the charge, the General Counsel argued that there was a continuing violation, based on her continuing to pay dues within the relevant 10(b) period. The Board majority rejected that argument, noting that there was no evidence that the Employer imposed or maintained a membership requirement within the 10(b) period. Rather, the conduct that occurred within the six-month limitation period could be found unlawful only by relying on an unfair labor practice that occurred outside the 10(b) period. And her continued union membership did not establish a violation, as employees are free to join and maintain membership in a labor organization that does not represent them.

Member Hirozawa dissented and would find that the Employer had maintained an unlawful policy within the 10(b) period, based on its continued acceptance of the Charging Party's dues within the 10(b) period and its continued failure to tell her that union membership was voluntary.

7. PROTECTED CONCERTED ACTIVITY

Plaza Auto Center, Inc., 360 NLRB No. 117

The Board majority (Pearce and Hirozawa), on remand from the Ninth Circuit Court of Appeals, affirmed the Board's prior holding that an employee had not lost the protection of the Act by his outburst, and therefore the Employer violated Section (8)(a)(1) by discharging him for engaging in protected concerted activity.

The Employer sells used cars, and hired the Charging Party as a salesman in August 2008. During his short tenure with the Employer, the Charging Party spoke with his fellow employees about joint working concerns, including breaks, restroom facilities, and compensation. The Charging Party frequently raised these issues with the Employer, and on several occasions the Employer informed him that he could quit if he didn't like the Employer's working conditions. In October 2008, the Charging Party was called into a meeting with the Employer's owner and two other managers and was informed that he complained too much. During the course of this meeting, the Charging Party lost his temper, stood up and pushed his chair aside, proceeded to call the owner a "fucking mother fuck[er]," a "fucking crook," an "asshole," and stated that if he were fired, the owner would regret it. The Charging Party was then terminated.

Applying *Atlantic Steel Company*, 245 NLRB 814 (1979), the ALJ determined that the Charging Party had lost the protection of the Act through his "belligerent" behavior, as well as by haranguing the owner in "obscene and personally denigrating terms accompanied by menacing conduct and language." The Board majority reversed the ALJ and determined that all four of the *Atlantic Steel* factors weighed in favor of protection, and therefore the Employer had unlawfully terminated the Charging Party. Upon a petition for review filed by the Employer, the Ninth Circuit agreed that three of the four factors (place of the discussion, subject matter of the discussion, and employer provocation by unfair labor practices) weighed in favor of protection, but that the nature-of-the-outburst factor did not. On remand, the Ninth Circuit instructed the Board to: re-evaluate the nature-of-the-outburst factor; adopt or reject the ALJ's finding that the Charging Party engaged in menacing, physically aggressive, or belligerent conduct; and then rebalance the *Atlantic Steel* factors. In particular, the Ninth Circuit noted that, even if the other three *Atlantic Steel* factors weighed in favor of protection, it could not be certain that the Charging Party would retain the protection of the Act if the Board were to adopt the ALJ's belligerence finding.

Citing *Kiewit Power Constructors Co. v. NLRB*, 652 F.3d 22, 29 fn. 2 (D.C. Cir. 2011), *enforcing* 355 NLRB 708 (2010), the Board majority explained that allegedly threatening conduct should be assessed under an objective, rather than a subjective, standard to determine whether it was threatening. The Board majority then concluded that, objectively, the Charging Party's statement that the owner would regret it if he terminated the Charging Party was ambiguous and most likely referred to legal consequences stemming from the Charging Party reporting the Employer to a state agency for failing to pay its employees a minimum wage. Further, the majority did not find anything objectively threatening or menacing in the Charging Party pushing aside his chair to stand up, as the room this conversation took place in was very small and pushing aside the chair was likely a practical necessity in order to stand. Therefore, the Board majority rejected the ALJ's conclusion that the Charging Party had engaged in belligerent conduct.

Accepting as the law of the case the Ninth Circuit's determination that the Charging Party's obscene language caused the nature-of-the-outburst factor to weigh against protection, the Board nevertheless concluded that the other *Atlantic Steel* factors heavily favored protection. Thus, (1) the subject matter of the discussion concerned the Charging Party's concerted complaints about working conditions; (2) the place of the discussion (a small office with only managers present) meant that no other employees witnessed the outburst, and thus the outburst did not interfere with the Employer's ability to maintain order and discipline; and (3) the Charging Party's outburst was strongly motivated by the Employer's unfair labor practices, which included two veiled threats of discharge during the meeting and continued hostility towards the substance of the Charging Party's concerted complaints over working conditions. Having found that the other three *Atlantic Steel* factors weighed heavily in favor of protection, the Board majority concluded that the Charging Party did not lose the protection of the Act by his outburst, and therefore that the Employer had unlawfully discharged him.

Member Johnson, dissenting, agreed that while three of the *Atlantic Steel* factors weighed in favor of protection, the nature of the Charging Party's outburst was so egregious that he lost the protection of the Act. In this regard, Member Johnson argued that by concluding that the Charging Party had not engaged in belligerent, threatening behavior the majority had essentially failed to adopt the ALJ's credibility findings and the law of the case established by the Ninth Circuit. Moreover, even under the majority's characterization of the Charging Party's actions, he still would have found that the Charging Party lost the protection of the Act, inasmuch as the outburst amounted to an obscene, denigrating, *ad hominem* attack that should not be protected simply because it took place in a private office and was connected to workplace complaints.

***Flex Frac Logistics, LLC* 360 NLRB No. 120**

The Board panel (Miscimarra, Hirozawa, and Schiffer), affirming the ALJ, concluded that the Employer did not violate Section 8(a)(1) by discharging an employee pursuant to an unlawfully overbroad confidentiality rule.

The Employer was engaged in the business of delivering frac sand for use in oil and gas drilling. To make these deliveries, it directly employed drivers and also contracted with other trucking companies to obtain additional drivers. The Employer maintained a confidentiality rule concerning financial information and client rates that the Board, in an earlier proceeding, found to be unlawfully overbroad inasmuch as it could be read by employees to forbid them from discussing wages, hours, and other terms and conditions of employment with one another. The Charging Party, an accounting employee, was aware of this rule and nevertheless informed a dispatch employee, who was a former driver, that the Employer was charging much more for client deliveries than it paid its drivers. The dispatch employee reported this conversation to management. Shortly afterwards the Employer received calls from several trucking companies that it contracted with, who demanded more money in light of having learned how much the Employer charged for its deliveries. Believing that the companies obtained this information from the Charging Party, the Employer discharged her for violating its confidentiality policy.

Members Hirozawa and Schiffer explained that, under *Continental Group, Inc.,* 357 NLRB No. 39 (Aug. 11, 2011), discipline pursuant to an unlawfully overbroad rule is unlawful only if the discharged employee violated the rule by: (1) engaging in protected conduct, or (2) engaging in conduct that otherwise implicates concerns underlying Section 7. Here, the Board determined that even though the Charging Party's actions might have implicated Section 7 concerns, she was terminated for her gross misconduct in betraying the Employer's confidentiality interests, and not because of application of the rule. Importantly, other employees would have understood her termination to be for her gross misconduct, and thus the discharge would not tend to chill the exercise of Section 7 rights.

Member Miscimarra, though agreeing in the outcome, would have found the Charging Party's actions to be unprotected conduct whether or not the Employer applied an overbroad rule, and thus would not apply or rely on *Continental Group*. For that reason, he expressed no opinion as to the merits of the Board's earlier determination finding the Employer's confidentiality rule unlawful.

***Food Services of America, Inc.*, 360 NLRB No. 123**

The Board majority (Hirozawa and Schiffer), reversing the ALJ, held that the Employer violated Section 8(a)(1) by terminating an employee in retaliation for her protected concerted activity of warning a fellow employee that she was in danger of being discharged for poor work performance. The Board panel (Hirozawa, Schiffer, and Miscimarra), affirming the ALJ, also concluded that the Employer did not violate Section 8(a)(1) by terminating the Charging Party pursuant to an unlawfully overbroad rule, inasmuch as his transfer of hundreds of confidential business emails to his and the other employee's personal email accounts had only a tangential connection to Section 7 activity.

In November 2010, a supervisor on several occasions sent the discriminatee e-mails promoting the supervisor's religious beliefs and intimating that the discriminatee would be more likely to be promoted if she adopted them. At about the same time, the Employer hired her friend, based in part on her recommendation. Due to the friend's work performance issues, however, the discriminatee was criticized by the same supervisor for recommending the friend for hire, and the discriminatee believed that the friend's job was in jeopardy. The discriminatee began telling the friend every other day that she was going to be fired, and sending her website links for other job opportunities. On February 25, 2011, the discriminatee—suspicious that the supervisor's proselytizing was motivated by a national origin bias—suggested to her friend via instant message that the two speak Spanish in front of the supervisor in order to upset her and see if the supervisor would "say something stupid." The discriminatee also stated that, in the future if the friend did not understand the supervisor's instructions, she should "play dumb" and just ask the discriminatee or the Charging Party, (another co-worker), for help. The friend declined to participate in this scheme designed to provoke the supervisor and later provided a copy of the February 25 conversation (and their earlier discussions regarding the friend's job security) to the Employer, who then terminated the discriminatee. After her termination, the discriminatee asked the Charging Party to forward her work emails in an effort to document her allegations concerning harassment and discrimination. The Charging Party transferred hundreds of emails to both his and the discriminatee's personal email accounts, many of which contained confidential business information. The Employer, learning of the Charging Party's actions, terminated him for violating its confidentiality policy.

Citing *Jhirmack Enterprises*, 283 NLRB 609 (1987), the Board majority explained that one employee's warning to another that the latter's job is at risk is protected concerted activity. Then, applying *Wright Line*, the Board majority concluded that, because the discriminatee's warnings to the friend regarding her job security played a significant role in the discriminatee's discharge, and the Employer did not demonstrate that it would have terminated her in the absence of these warnings, her termination violated Section 8(a)(1).

Member Miscimarra, dissenting, would have found the discriminatee's actions in instructing the friend to "play dumb" and disregard the supervisor when being given instructions to be unprotected misconduct. Because the Employer lawfully focused on this aspect of the discriminatee's conduct, Member Miscimarra would have concluded that her termination did not violate Section 8(a)(1).

Members Hirozawa and Schiffer agreed with the ALJ that the Charging Party's termination was not unlawful under *Continental Group, Inc.*, 357 NLRB No. 39, slip op. at 4, inasmuch as the transfer of hundreds of confidential business emails was an egregious act that had a minimal relationship to his Section 7 interest in documenting the discriminatee's allegations of discrimination and the Charging Party's own satisfactory job performance. Member Miscimarra agreed that the Charging Party was not unlawfully discharged, but would not apply or rely on *Continental Group*.

***Los Angeles Airport Hilton Hotel & Towers*, 360 NLRB No. 128**

The Board panel (Pearce, Johnson, and Schiffer), on remand from the D.C. Circuit Court of Appeals, reaffirmed the Board's earlier finding that the Employer violated Section 8(a)(1) of the Act by suspending 77 employees for participating in an on-site work stoppage.

During the course of an organizational campaign, the Employer suspended an employee for alleged theft. Believing that the employee was targeted because of his union activity, a group of 70 to 100 of the hotel's employees gathered in the employee cafeteria and requested to speak with senior members of management about their fellow employee's suspension. Though many of the participants were on clocked-out breaks of 15 to 30 minutes when the work stoppage began, the stoppage eventually lasted for approximately 2 ½ hours. The employees refused several initial orders to return to work or clock out and go home. About an hour after the work stoppage began, the housekeeping director again ordered the employee to return to work or clock out and go home, this time adding that their failure to do so would result in suspensions. A few minutes later, she began suspending the employees one by one. After waiting for over two hours and failing to receive a response to their request to meet with management, the employees offered to return to work. Instead, the Employer suspended 77 employees for five days for insubordination and ordered them to go home.

In the first proceeding the Board, affirming the ALJ, applied the ten-factor test set forth in *Quietflex Mfg. Co.*, 344 NLRB 1055 (2005), to balance the employees' Section 7 right to remain on the property in order to meet with management over workplace grievances with the Employer's private property rights and legitimate business interests. Thus, in determining when an on-site work stoppage is protected, the Board looks to the following factors: (1) the reason the employees have stopped working; (2) whether the work stoppage was peaceful; (3) whether the work stoppage interfered with production, or deprived the employer access to its property; (4) whether the employees had adequate opportunity to present 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 the employees were represented or had an established grievance procedure; (8) whether the employees remained on the premises beyond their shift; (9) whether the employees attempted to seize the employer's property; and (10) the reason for which the employees were ultimately disciplined. Weighing these factors, the Board concluded that only the fifth factor weighed in favor of the stoppage being unprotected, inasmuch as the employees were given warning that if they did not clock out and return home they would face discipline. Because the other nine factors weighed in favor of protection, however, the Board concluded that the work stoppage was protected and therefore the suspensions were unlawful.

The D.C. Circuit agreed with the Board's application of many of the factors, but questioned the premise of factor 3 (whether the stoppage interfered with production), inasmuch as many protected activities (such as a strike) are designed to interfere with production. Further, with regard to factor 7, the court concluded that the Board erred in determining that employees lacked access to an established procedure for addressing group grievances, as the Employer maintained in its handbook an "open door policy" that would have allowed employees as a group to discuss work-related issues with the Employer. The Court therefore remanded the case to the Board to rebalance the relevant interests in light of its holdings.

On remand, the Board majority (Pearce and Schiffer) concluded that the work stoppage was protected for the entire duration. The Board reached this conclusion relying primarily on the following factors: the purpose of the work stoppage was clearly protected (factor 1); it was peaceful and did not disrupt the work of nonstriking employees (factors 2 and 3); it was of a limited duration (factor 6); and no employees remained on the Employer's premises beyond their shift or attempted to seize the Employer's property (factors 8 and 9). The Board found that the fact that the Employer warned the employees they would be suspended (factor 5) was of minimal importance, as that warning came less than an hour into the stoppage, and the Employer immediately began suspending employees after issuing the warning. The Board also noted that the reason for the discipline, insubordination, (factor 10) did not weigh against protection, as employees generally are entitled to engage in peaceful work stoppages for a reasonable period of time, so long as they do not interfere with the work of nonstrikers. *See Cambro Mfg. Co.*, 312 NLRB 634, 636 (1993).

In response to the D.C. Circuit's concerns regarding factor 3—whether the work stoppage interfered with production—the Board clarified that a work stoppage does not forfeit protection by virtue of the economic pressure it exerts on an employer; rather, factor 3's focus is whether striking employees interfere with nonstriking employees' attempt to work or perform their duties. Because there was no evidence of such interference here, the Board concluded that factor 3 weighed in favor of protection. In regard to factor 7, the Board accepted the D.C. Circuit's conclusion that employees did have access to a grievance procedure for addressing group concerns. However, the Board noted that there is no general requirement in labor law that employees exhaust grievance procedures prior to engaging in economic action. Further, the Board emphasized that here the employees were never offered an opportunity to discuss their grievance with senior managers prior to being suspended.

Member Johnson, concurring, agreed with the outcome but would have analyzed several of the *Quietflex* factors differently. In particular, Member Johnson disagreed with the weight the majority assigned the existence of the "open door" policy available to employees for addressing group grievances. Member Johnson viewed the existence of such a procedure as a limitation on the right to engage in a work stoppage that shifts the locus of accommodation between employees' rights and employers' rights. Nonetheless, Member Johnson still found the suspensions to be unlawful, inasmuch as the Employer began suspending employees less than an hour into the stoppage without making clear that a meeting with senior managers would not be possible.

***Starbucks Coffee Company*, 360 NLRB No. 134**

The Board panel (Miscimarra, Hirozawa, and Schiffer), on remand from the Second Circuit, reaffirmed its prior finding that the Employer violated Section 8(a)(1) and (3) by terminating an employee for engaging in protected activity.

As part of an ongoing campaign to unionize four Manhattan Employer locations, the discriminatee and other Union supporters wore Union pins at one of these locations, while off-duty, to protest that location's prohibition of the pins. A manager from another location, also off-duty, was present and confronted the discriminatee about the Union. The discriminatee raised the fact that the off-duty manager had previously insulted the discriminatee's father, and a heated confrontation ensued, which included both men speaking loudly and using obscenities. The discriminatee was terminated several weeks later; the discharging document noted that the discriminatee was insubordinate, had threatened the store manager, and was a strong supporter of the Union.

In the first proceeding, the Board affirmed the ALJ's finding that the employee did not lose the protection of the Act under *Atlantic Steel* during the course of this confrontation. The ALJ had alternatively found the discharge to be unlawful under a *Wright Line* analysis, but the Board relied only on the *Atlantic Steel* analysis in finding the discharge unlawful. In its opinion, the Second Circuit found that an *Atlantic Steel* analysis was inappropriate in determining whether an employee lost the protection of the Act while engaged in an outburst in front of customers. The Court therefore remanded the case so that the Board could decide what standard should apply to employee outbursts in front of customers.

Members Hirozawa and Schiffer accepted, as the law of the case, the Second Circuit's opinion that *Atlantic Steel* was inapplicable to the discriminatee's outburst, and assumed his conduct therefore lost the protection of the Act. However, applying a *Wright Line* analysis, they concluded that the discriminatee's Union activity was a motivating factor in his discharge, and that the Employer had not met its burden of demonstrating it would have terminated the discriminatee even in the absence of his Union activity.

Member Miscimarra, concurring, agreed that the Employer had failed to meet its burden under *Wright Line*. However, he would have responded to the Second Circuit's request to decide what standard should apply to employee outbursts in front of customers. In his view, the proper analysis would be whether an employee's conduct causes disruption of or interference with the business. *See Restaurant Horikawa*, 260 NLRB 197 (1982).

***Alternative Energy Applications, Inc.*, 361 NLRB No. 139**

The Board majority (Hirozawa and Schiffer), reversing the ALJ, concluded in relevant part that the Employer violated Section 8(a)(1) by discharging an employee because it believed he had discussed wages with other employees.

The Employer weatherizes homes and offices in Tampa, Florida. The Charging Party was hired as a driver/installer and, shortly after hire, asked the Employer for a wage increase. The Employer gave him a raise in advance of the traditional six-week waiting period but instructed him not to discuss his wage increase with other employees because "we have fired employees in the past for talking about their wages." A month later, the mother of another employee, who was a friend of the company president, called the president to complain about her son's pay. During that conversation, she told the president that her son had discussed issues relating to overtime pay with the Charging Party. A few weeks later, the Charging Party was working an installation job when his foot went through an attic ceiling because he failed to follow the Employer's installation directions. The Charging Party thereafter contacted OSHA. The Employer then terminated him on the grounds that he did not fit the Employer's "philosophy" and other employees complained about working with him. As part of the OSHA investigation, the Employer's attorney wrote that it had not terminated the

Charging Party because of the OSHA complaint but, rather, in part because he "had disclosed his rate of pay to other employees, prompting the mother of another employee to contact [the Employer] and complain."

Applying *Wright Line*, Members Hirozawa and Schiffer concluded that the Employer violated Section 8(a)(1) by terminating the employee because it believed he had discussed wages with his co-workers. The majority concluded that the evidence, including the Employer's response to the OSHA investigation, established a prima facie case that the Employer discharged the employee based on its belief that he had discussed wages with other employees. The majority rejected the Employer's argument that the Charging Party's wage-related complaints were not concerted activities, noting that wage discussions are "inherently concerted" because wages are a vital term and condition, and wage discussions are often preliminary to organizing or other action for mutual aid and protection. Further, the majority would have found his discharge unlawful even if his wage discussions were not concerted because he was discharged to prevent him from talking to others about wages. *See Parexel International, LLC,* 356 NLRB No. 82, slip op. at 3 (Jan. 28, 2011). Finally, the majority held that the Employer had failed to establish that it would have discharged the employee for his poor attitude and work ethic, absent its belief that he discussed wages with others.

Member Miscimarra dissented, concluding that the evidence failed to establish that the employee's wage discussions were meant to induce group action. He found that the majority's view that any discussion about wages is inherently concerted, as well as the "preemptive strike" theory of *Parexel,* are directly contrary to the holdings in *Meyers Industries*, 281 NLRB 882 (1986), *affirmed sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987) and *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964). Even assuming *Parexel* was correctly decided, Member Miscimarra concluded that there was no evidence that the Employer discharged the Charging Party to prevent him from engaging in future concerted activity.

***Jimmy John's*, 361 NLRB No. 27**

The Board majority (Pearce and Schiffer), affirming the ALJ, found that the Employer violated Section 8(a)(3) and (1) by disciplining and terminating employees for publishing a "Sick Days" poster at various Employer facilities during the course of an organizational campaign. In so doing, the Board majority concluded that the poster did not lose the protection of the Act under *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953).

The Employer operates ten sandwich shops in the Minneapolis area as a franchisee of Jimmy John's, a nationwide fast food chain. One of the employee concerns underlying the organizing drive was the lack of paid sick leave. If an employee was sick, he was required to find a replacement for his shift or risk receiving discipline. In late January or early February 2011, the Union placed identical posters about the sick leave policy on community bulletin boards in the Employer's stores. The posters displayed side-by-side pictures of a sandwich, one described as made by a healthy employee and the other as made by a sick employee. The caption read, "Can't tell the difference? That's too bad because Jimmy John's workers don't get paid sick days. Shoot, we can't even call in sick. We hope your immune system is ready because you are about to take the sandwich test…. Help Jimmy John's workers win sick days." The poster then listed contact information for the Union. The Employer removed all of the posters. In March, four employees approached one of the Employer's owners and gave him a letter from the Union requesting that he change the sick leave policy and that he discuss the matter with the Union; on the same day, the Union issued a press release which included a copy of the poster. The co-owner refused to meet with the Union. Later that month employees posted additional posters in stores and also in public places near the stores. These posters were identical to the earlier copies except that in lieu of the Union's contact information, it contained the co-owner's telephone number. Shortly thereafter the Employer discharged six employees and issued written warnings to three others for their participation in the poster campaign.

Initially, the Board majority noted that it is well settled that employees are protected when they seek to improve their working conditions through channels outside the immediate employee-employer relationship, such as communications to third parties. *Eastex, Inc. v. NLRB,* 437 U.S. 556, 565 (1978). Here, the Employer argued that the posters were disloyal and therefore lost protection under the Act. Under *Jefferson Standard*, the Board focuses on whether communications to third parties indicate they are related to an ongoing labor dispute and if so, whether they nevertheless lose protection because they are "so disloyal, reckless or maliciously untrue as to lose the Act's protection." *MasTec Advanced Technologies*, 357 NLRB No. 17, slip op. at 5 (July 21, 2011). Further, in regard to disloyalty, the Board considers whether the communications were made at a critical time during the start of a company's business, and whether the communications were so disparaging that they could be seen as reasonably calculated to harm the company or reduce its income. *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007). Applying this framework, the Board majority first observed that the communications expressly indicated they were related to an ongoing labor dispute. Next, the majority concluded that none of the statements contained in the poster were maliciously untrue or reckless, inasmuch as the statements that employees don't receive sick days and cannot call in sick were fairly accurate characterizations of the impact of the Employer's policy. Finally, the Board determined that the posters were not "so disloyal" as to lose protection of the Act because they were not published at a critical time in the initiation of the Employer's business, and were not designed to inflict economic harm on the Employer. Moreover, although the posters touched on a potential public safety issue, the employees were motivated by a sincere desire to improve their working conditions, and raising the potential safety hazard of sick employees making sandwiches was in direct furtherance of that aim. Therefore, by disciplining and terminating employees engaged in the poster campaign, the Employer violated Section 8(a)(3) and (1).

Member Johnson, dissenting, found that the posters contained maliciously untrue statements, since employees could in fact call in sick if they found a replacement, and also disparaged the Employer's product with the primary aim of injuring the Employer's business and income, rather than redressing the employees' work-related grievances. In this respect, Member Johnson would find that implying the Employer's sandwiches were a public health risk was akin to a nuclear bomb wholly out of proportion to the employees' single issue of unpaid sick leave. For those reasons, he would find that the employees lost protection and were therefore lawfully disciplined and terminated.

***Richmond District Neighborhood Center*, 361 NLRB No. 74**

The Board panel (Miscimarra, Johnson, and Schiffer), affirming the ALJ, found that an Employer did not violate Section 8(a)(1) when it rescinded the rehire letters of two employees based on a Facebook conversation.

The Employer is a teen center attached to a San Francisco high school that provides afterschool activities to students. Prior to the beginning of each school year, the Employer sends rehire letters to those employees it wishes to return. Both of the discharged employees in this case received rehire letters in advance of the 2012-2013 school year. In early August, the two employees engaged in a profanity-laden Facebook exchange that expressed displeasure with the way the Employer operated, and contemplated various acts of insubordination, including refusing to obtain permission before organizing youth activities as required by the Employer's policies, disregarding school rules (such as encouraging the kids to paint graffiti on the walls), undermining leadership, and neglecting their duties. The Employer obtained a screenshot of the exchange, and rescinded both employees' rehire letters.

Citing *Neff-Perkins Co.*, 315 NLRB 1229, 1229 n.2, 1233-34 (1994), the Board found that the Employer had reasonably concluded that the discharged employees' conduct was so egregious as to take it outside the protection of the Act and render them unfit for further service. Members Johnson and Schiffer did not pass on whether this standard was the appropriate standard for analyzing private Facebook conversations, given that no exceptions were filed to the ALJ's use of this test. Member Miscimarra would find that the ALJ used the appropriate standard.

8. **REMEDY**

***Mimbres Memorial Hospital & Nursing Home*, 361 NLRB No. 25**

The Board panel (Pearce, Johnson, and Schiffer), on remand from the D.C. Circuit, affirmed its finding in an earlier proceeding that the backpay due employees whose hours had been unlawfully reduced, but who did not lose their jobs, should not be reduced by any interim earnings.

In 2004 the Board issued a Decision and Order finding that the Employer had violated Section 8(a)(5) and (1) by unilaterally reducing unit employees' hours from 40 hours per week to between 32 and 36 hours per week. To remedy the violation, the Board ordered the Employer to make the affected employees whole for any loss of earnings in accordance with *Ogle Protection Service, Inc.,* 183 NLRB 682 (1970), *enforced,* 444 F.2d 502 (6th Cir. 1971). In a subsequent compliance proceeding, the Board held that the backpay due each employee should not be reduced by any interim earnings the employees may have obtained during the backpay period. On appeal from the compliance proceeding, the D.C. Circuit Court of Appeals, in relevant part, vacated the Board's backpay computation and remanded the case for a more thorough review of the question of whether the Board should deduct an employee's interim earnings from other employment when calculating backpay where the employee suffers no cessation of employment with the respondent.

The Board first explained that the duty of an employee to mitigate lost earnings was rooted in an ancient principle of law that discouraged an unjustifiable refusal to take new employment, and, as explained by the Supreme Court in *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 200 (1941), furthers "the healthy policy of promoting production and employment." However, declining to impose a duty to mitigate damages where there is no cessation of employment is well within the Board's broad discretionary authority as defined by Section 10(c) of the Act. The Board noted that although some of its decisions may have mistakenly deducted interim earnings where there had been no cessation of employment, overwhelming Board policy and precedent has been to preclude the deduction of such interim earnings. The Board accepted the D.C. Circuit's view that the Board could deduct interim earnings without imposing a duty to mitigate damages, but concluded that doing so would contravene the policy of promoting production and employment. And, permitting the deduction of interim earnings would result in two deleterious consequences: (1) wrongdoing employers would have an incentive to delay compliance with a Board order to reduce the backpay owed a wronged employee, and (2) wronged employees confronted with the necessity of working two jobs may simply seek full-time employment elsewhere, thus abandoning their entitlement to a full vindication of their statutory rights. For these reasons, the Board affirmed its earlier order providing for full backpay.

9. IT'S ALL IN THE FOOTNOTES

a. Rules

***MCPc, Inc.,* 360 NLRB No. 39, fn. 4:**

"Member Miscimarra agrees that the Respondent's confidentiality rule violated Sec. 8(a)(1) because it would prohibit protected employee discussions regarding compensation without other important justifications, and this aspect of the rule was a basis for the employer's actions in this case; but Member Miscimarra does not agree with the current Board standard regarding allegedly overly broad rules and policies, which is set forth as the first prong of *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 647 (2004) (finding rules and policies unlawful, even if they do not explicitly restrict protected activity and are not applied against or promulgated in response to such activity, where 'employees would reasonably construe the language to prohibit Section 7 activity'). He advocates a reexamination of this standard in an appropriate future case."

***California Institute of Technology Jet Propulsion Laboratory,* 360 NLRB No. 63, fn. 1:**

"… In addition, although Chairman Pearce agrees with the judge and his colleagues that, in context, a reasonable employee would not understand sec. 2.3 of the Respondent's Ethics and Business Conduct policy to interfere with Sec. 7 activity, in doing so he finds it unnecessary to pass on whether *Ark Las Vegas,* 335 NLRB 1284 (2001), and *Lafayette Park Hotel,* 326 NLRB 824 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999), were correctly decided.

Member Miscimarra agrees that Sec. 2.3 of the Respondents Ethics and Business Conduct policy is not overly broad in violation of the Act, but he disagrees with the standard set forth in the first prong of the test in *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 647 (2004), which was relied upon by the judge; Member Miscimarra advocates for a reexamination of this standard in an appropriate future case."

***Durham School Services,* 360 NLRB No. 85, fn. 5:**

"For the reasons stated by the judge, we find objectionable the provision of the Respondent's social networking policy requiring that employees' contacts with parents, school representatives and school officials be 'appropriate,' and the provision subjecting employees to investigation and possible discipline for publicly sharing 'unfavorable … information related to the company or any of its employees.' …

Members Miscimarra and Johnson join their colleagues in setting aside the election, but do so based solely on Cheesman's unlawful discharge. They do not reach or join in the findings of the majority or the judge regarding the Respondent's off-duty access and social networking policies."

***Good Samaritan Medical Ctr.,* 361 NLRB No. 145, fn. 14:**

"Under the third prong of *Lutheran Heritage Village,* supra, application of a rule or policy to restrict the exercise of Sec. 7 rights makes the maintenance of that rule unlawful, and the Board has ordered rescission of rules found unlawful under *Lutheran's* third prong. See *Albertson's, Inc.,* 351 NLRB 254, 259, 262 (2007). Member Miscimarra and Member Johnson disagree that the unlawful application of an otherwise lawful rule should make it unlawful to *maintain* that rule. Similarly, they disagree that rescission is an appropriate remedy when an otherwise lawful rule or policy is unlawfully applied. In their view, the proper remedy would be an order that the employer cease and desist from applying such a rule in a manner that restricts the exercise of protected employee rights. See *Ivy Steel & Wire, Inc.,* 346 NLRB 404, 404 fn. 4, 405 (2006). …"

b. Deferral of Information Requests

***Chapin Hill at Red Bank,* 360 NLRB No. 27, fn. 2:**

"… Finally, we affirm the judge's finding that deferral to arbitration is inappropriate. The Board has long held that deferral is inappropriate in 8(a)(5) information request cases. See, e.g., *United Technologies Corp.,* 274 NLRB 504, 505 (1985); *DaimlerChrylser Corp.,* 331 NLRB 1324, 1324 fn. 3 (2000), enfd. 288 F.3d 434 (D.C. Cir. 2002). …

Because the Union requested the information at issue here to police the parties' collective-bargaining agreement as well as in connection with a grievance arbitration, Member Miscimarra finds it unnecessary to pass on the foregoing cases or decide whether--and, if so, under what circumstances--it would be appropriate to defer to arbitration a dispute about information requested solely in connection with a pending grievance."

***Endo Painting Service,* 360 NLRB No. 61, fn. 6:**

"… Regarding the Respondent's contention that the parties' dispute over the Union's information request must be submitted to arbitration, Member Miscimarra notes that the Board's policy is not to defer information-request disputes to arbitration, but he believes deferral to arbitration could be appropriate where either (1) the scope of an information request would be significantly affected by the merits of a particular grievance pending arbitration, and/or (2) nondeferral would result in duplicative litigation that undermines the role played by arbitration as the method agreed upon by the parties for the final adjustment of disputes involving interpretation of collective-bargaining agreements. Labor Management Relations Act § 203(d), 29 U.S.C. § 173(d). Such circumstances are not resent here. …"

c. Information Request (out of unit)

***Conditioned Air Systems,* 360 NLRB No. 97, fn. 3:**

"… Member Miscimarra also notes that, because the requested information was not presumptively relevant, he would follow *Hertz Corp. v. NLRB,* 105 F.3d 868 (3d Cir. 1997), where the Third Circuit held that the employer's duty to respond was conditioned on the union's disclosure of facts sufficient to demonstrate relevance unless the factual basis was readily apparent from the surrounding circumstances. In the instant case, Member Miscimarra would find that the factual basis for the Union's request was readily apparent and he agrees with the judge's finding that Respondent's failure to adequately respond violated Sec. 8(a)(5)."

d. Successor Bar

***FJC Security Services,* 360 NLRB No. 115, slip op. at 2 (Miscimarra, concurring):**

"… I would adhere to the standard established in *MV Transportation,* supra, where the Board held that 'an incumbent union in a successorship situation is entitled to—and only to—a *rebuttable* presumption of continuing majority status, which will not serve as a bar' whenever a rival union petition is filed 337 NLRB at 770. Based on *MV Transportation,* and for reasons stated by former Member Hayes in his *UGL-UNICCO* dissent, I would find that the newly filed petition warrants an election, without any evaluation of whether a 'reasonable period for bargaining' had elapsed."

e. *St. George Warehouse* (Mitigation)

***Pessoa Construction Co.,* 361 NLRB No. 138, fn. 2:**

"… No party asks us to revisit or overrule *St. George Warehouse,* 351 NLRB 961 (2007), but the General Counsel excepts to the judge's determination that the Respondent showed that substantially equivalent jobs were available during the backpay period as required by *St. George.* We find it unnecessary to pass on this exception. A finding that the Respondent failed to carry its burden would not affect the outcome because the judge found, and we agree, that the General Counsel demonstrated that the discriminatee engaged in a reasonable effort to find work. …"

Significant ULP Cases in 2015
By Barry J. Kearney[*]

I have set forth below the significant ULP cases decided by the Board in 2015.

1. LEAD CASES

***Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery*, 362 NLRB No. 186**

The Board majority (Pearce, Hirozawa, McFerran) restated the Board's joint-employer standard to reaffirm the standard articulated by the Third Circuit in *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.,* 691 F.2d 1117 (3d Cir. 1982)**.** Under that standard, the Board may find that two or more statutory employers are joint employers of the same statutory employees if they "share or codetermine those matters governing the essential terms and conditions of employment." More specifically, the Board will inquire first as to whether there is a common-law employment relationship between the putative joint employer and the employees in question. If so, the Board will then determine whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining. In determining the extent of the putative joint employer's control, the Board will no longer require that a joint employer both possess the authority to control terms and conditions of employment and also exercise that control. Nor will the Board require that such control be exercised directly or immediately. Reserved authority to control, even if not exercised, is relevant to the inquiry; and, if otherwise sufficient, control exercised indirectly, such as through an intermediary, may establish joint-employer status.

In this case, the Union petitioned for review of a Decision and Direction of Election finding that Leadpoint Business Services was the sole employer of the petitioned-for employees. Leadpoint provided those employees to BFI, a Browning Ferris recyclery, to work inside BFI's facility sorting through waste and recyclables materials. Applying the Board's then-existing joint employer standard, the Regional Director determined that BFI was not a joint employer of the Leadpoint employees. In granting the Union's petition for review, the Board invited the parties and interested amici to brief the question, among others, of whether the Board should adhere to its existing joint-employer standard or adopt a new standard.

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[*] Mr. Kearney is Associate General Counsel in the Division of Advice, National Labor Relations Board. He would like to acknowledge the contributions of Debra Willen, Kayce Compton, Kyle Mohr, Laura Vazquez, Miriam Szapiro, Elinor Merberg, and Amy Cocuzza of the Division of Advice in the preparation of this paper.

The majority began its analysis by reviewing the evolution of the Board's joint-employer standard. It found that historically, from 1965 through the time of the Third Circuit's decision in *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.* in 1982, the Board typically used the "share or co-determine" formulation and treated the right to control the work of employees and their terms of employment as probative of joint-employer status. However, the Board did not require that this right be exercised, or that it be exercised in any particular manner. Thus, during this period, the Board found it probative if employers retained the contractual power to control terms and conditions and gave weight to a putative joint employer's "indirect" exercise of control over terms and condition. Reviewing courts, including the Third Circuit in *Browning-Ferris Industries,* endorsed this approach. Subsequently, however, the Board moved in a "new and different direction." Beginning in 1984 with *Laerco Transportation*, 269 NLRB 324 (1984) and *TLI, Inc.*, 271 NLRB 798 (1984), *enforced mem.*, 772 F.2d 894 (3d Cir. 1985), the Board, without any explanation or even acknowledgment, and without overruling a single prior decision, imposed additional requirements that effectively narrowed the joint-employer standard. For the next thirty years, the Board's decisions implicitly repudiated its earlier reliance on reserved control and indirect control as indicia of joint-employer status. And even where a putative joint employer exercised direct control over employees, the Board gave no weight to various forms of supervision deemed "limited and routine."

The majority found that these additional requirements left the Board's joint-employment jurisprudence increasingly out of step with changing economic circumstances, particularly the recent dramatic growth in contingent employment relationships. The majority reasoned that the Board's joint-employer standard should, to the extent permitted by the common law, encompass the full range of employment relationships wherein meaningful collective bargaining is possible, in order to best advance the statutory purpose of promoting the peaceful settlement of industrial disputes. The majority then concluded that the Board's post-*Browning-Ferris* narrowing of the joint-employer standard was not in fact compelled by the common law and was actually inconsistent with common-law principles.

Accordingly, the majority decided to return to the traditional test used by the Board and endorsed by the Third Circuit in *Browning-Ferris*. Under that test, the Board will find two or more entities are joint employers if they are both employers within the meaning of the common law and if they share or codetermine matters governing the essential terms and conditions of employment. These include matters such as hiring, firing, discipline, supervision, and direction, but also wages and hours, the number of workers to be supplied, scheduling, seniority, overtime, work assignment, and the manner and method of work performance, among others. The Board will no longer require that the putative joint employer not only possess the authority to control but also exercise that authority. The right to control, in the common-law sense, is probative of joint-employer status, whether direct or indirect.

The majority expressly overruled *Laerco, TLI, AM Property Holding Corp.*, 350 NLRB 998 (2007), *enforced in relevant part sub nom. Service Employees Local 32BJ v. NLRB*, 647 F.3d 435 (2d Cir. 2011), *Airborne Express*, 338 NLRB 597 (2002), and other Board decisions to the extent that they are inconsistent with this approach. Finally, the majority noted that a joint employer will be required to bargain only with respect to such terms and conditions over which it possesses the authority to control.

The majority announced that it would apply this restated standard retroactively and found in the instant case that BFI was a joint employer of the petitioned-for employees. The facts demonstrated that BFI was an employer under common-law principles, and that BFI shared and codetermined matters governing the essential terms and conditions of the Leadpoint employees, relying, among other things, on BFI's possession of control over who Leadpoint could hire to work at the BFI facility, BFI's direct and indirect control over work processes and task assignment, and BFI's significant role in determining employees' wages.

Members Miscimarra and Johnson dissented, arguing that the majority improperly resurrected the "economic realities" theory endorsed by the Supreme Court in *NLRB v. Hearst Publications*, 323 U.S. 111 (1944) and rejected in the Taft-Hartley amendments, by reading the Act's classifications broadly and considering economic realities rather than using previously established common-law agency principles. They also contended that the majority's test does not comport with common-law agency principles, which require some evidence of direct and immediate control even when indirect factors are deemed probative. They asserted that the majority abandoned a longstanding test that provided certainty and predictability, replacing it with an ambiguous standard that will impose unprecedented bargaining obligations on multiple entities in a wide variety of business relationship. Finally, they argued that the majority's test will undermine existing principles of sales and successorship, franchising arrangements, parent-subsidiary relationships, and secondary economic protest.

***Fresenius USA Mfg., Inc.*, 362 NLRB No. 130**

In view of the Supreme Court's decision in *NLRB v. Noel Canning,* 134 S. Ct. 2550 (2014), the Board panel (Pearce, Johnson, and McFerran) considered *de novo* the ALJ's decision and the Board's now-vacated Decision and Order, reported at 358 NLRB No. 138 (Sept. 19, 2012). In the prior decision, the Board had held that the Employer violated Section 8(a)(1) and (3) by suspending and discharging an employee for writing vulgar, offensive, and arguably threatening comments on union newsletters left in an employee breakroom. Upon review *de novo*, the Board concluded that even assuming that the employee's comments retained the Act's protection, the Employer lawfully discharged the employee for his unprotected dishonesty during its investigation into his conduct.

Kevin "Dale" Grosso, an open and active Union supporter, anonymously scribbled vulgar, offensive, and arguably threatening statements on several union newsletters left in an employee breakroom, in an attempt to encourage his fellow employees to support the Union in an upcoming decertification election. In a good-faith response to complaints from a number of female employees, the Employer investigated those statements. During that investigation, Grosso committed two acts of dishonesty: he denied authorship; and then, after unwittingly confessing to management during a telephone call that he initiated the following day, he attempted to conceal his identify. After confirming that Grosso was the author of the comments, the Employer suspended and discharged him for writing the comments and for his dishonesty during the investigation.

The Board concluded that the Employer had a legitimate business interest for investigating the handwritten comments, based on the complaints received, its anti-harassment policy, and federal and state anti-discrimination statutes. The investigation was conducted in a manner consistent with its purpose; questioning was focused solely on the handwritten comments and did not delve into Grosso's union views generally or any other union activity. For these reasons, and absent any evidence that the investigation occurred in the context of Employer hostility to protected union activity, the Board concluded that the investigation could not be viewed as a pretext to inquire into Grosso's union activity. Moreover, Grosso had no reasonable basis to believe that the Employer was attempting to pry into protected union activity generally or that he would suffer reprisals for the activity because of its prounion content. On these facts, the Board concluded that Grosso's false statements were not protected. Although the Employer relied on both Grosso's unprotected dishonesty and his handwritten comments, which the Board assumed without deciding were protected, the Board found that the Employer met its *Wright Line* burden of showing that it would have taken the same action based solely on his dishonesty. Accordingly, the Board dismissed the allegations that the Employer suspended and discharged Grosso in violation of Section 8(a)(3) and (1). The Board also concluded, however, that the Employer violated Section 8(a)(1) by discouraging Grosso from speaking to other employees about its investigation.

***GVS Properties, LLC*, 362 NLRB No. 194**

The panel majority (Pearce and Hirozawa), affirming the ALJ, held that the appropriate time to determine successorship where the Employer was required by local statute to retain its predecessor's employees for 90 days was when it took over operations from its predecessor. Accordingly, the Employer was a *Burns* successor when the Union requested recognition and bargaining, and its refusal to bargain violated Section 8(a)(5) and (1).

The Employer purchased properties that had been serviced and maintained on a daily basis by a unionized building-services contractor. The Employer intended to self-manage the properties and was required by the New York City's Displaced Building Service Workers Protection Act to hire the unit employees for at least 90 days. On the day of the purchase, the Employer notified the unit employees that they would no longer have jobs with the contractor, but if they wished to continue working at the properties under specified new terms and conditions of employment, they would be employed on a "temporary and trial basis" for 90 days. The Employer then hired seven of the eight unit employees. When the Union requested recognition and bargaining, the Employer refused, asserting that the request was premature because it would not employ a substantial and representative complement until after the expiration of the 90-day period mandated by the statute.

The panel majority held that the appropriate time to determine successorship in cases where a new employer is required by a state or local worker-retention statute to retain its predecessor's employees for a specific period of time is when the new employer assumes control over the business and hires the predecessor's employees, and not after the mandatory retention period has ended. The Employer and dissenting Member Johnson argued that such a conclusion was inconsistent with language in *Fall River Dyeing & Finishing Corp. v. NLRB,* 482 U.S. 27, 40-41 (1987), to the effect that the bargaining obligation is only activated when the successor makes a "conscious decision" to maintain the same business and hire a majority of its employees from the predecessor. The panel majority, however, found that the Employer here made the required "conscious decision" when it purchased the predecessor's buildings and took over its business with actual or constructive knowledge of the requirements of the applicable worker-retention statute. Further, the majority found that the Act's aim of preserving industrial peace and stability in labor relations during a transition between employers, recognized in *Fall River,* is best served by ensuring continued representation as early as possible during that transition. The majority further noted that the Board has consistently found it inappropriate to defer successorship determinations until after the completion of employer-imposed probationary periods or temporary employee-retention periods compelled by a sales contract. The majority saw no reason to depart from this precedent simply because the probationary period and retention were compelled by a statute. Finally, the majority specifically disputed the notion advanced by their dissenting colleague that its holding would deprive successor employers of the opportunity to exercise the *Burns* right to set new terms. The majority emphasized that it was not implying -- "much less hold[ing]" -- that new employers subject to worker-retention statues are "perfectly clear" successors, and that such a result would be inconsistent with *Spruce Up Corp.,* 209 NLRB 194 (1974), *enforced,* 529 F.2d 516 (4th Cir. 1975).

Member Johnson dissented and would have dismissed the complaint, finding that the Employer was not a *Burns* successor at the time the Union requested recognition and bargaining because the New York City worker-retention statute prevented the Employer from making a voluntary decision to hire its predecessor's employees. He would apply the successorship doctrine after the end of the statutorily-required retention period.

2. SECTION 8(a)(1)

a. *Weingarten*

***Fry's Food Stores*, 361 NLRB No. 140**

The full panel (Hirozawa, Schiffer, and Miscimarra), affirming the ALJ, held that the Employer violated Section 8(a)(1) by denying the Charging Party the union representative of her choice at an investigatory interview. A majority of the panel (Hirozawa and Schiffer) also affirmed the ALJ's findings that the Employer violated Section 8(a)(1) by not allowing the Charging Party to confer before the interview with the steward that the employer chose for her, and by implicitly telling that steward not to speak during the interview.

The Charging Party, a barista at one of the Employer's stores, learned that the Employer was investigating employee misconduct at the store, including theft. Believing that the Employer might discipline her when she next reported for work, she contacted her union representative and arranged for her to be in the vicinity and wait for the Charging Party's call that day, in case she was needed. The Charging Party reported for work and was summoned to the store manager's office to be interviewed by the Employer's loss prevention specialist. When she arrived, she requested to call her union representative but was not allowed to. Instead, the assistant store manager was dispatched to bring in a floor shop steward. The shop steward was not informed why she had been summoned and asked the assistant store manager if she was in trouble. Further, when the steward entered the office, the loss prevention specialist instructed her to sit off to the side and told her that she was only there to "observe and listen." The steward understood those instructions to mean that she was not permitted to ask any questions and was to remain quiet during the interview and did so.

The full panel found that the Employer unlawfully denied the Charging Party her choice of union representative under *NLRB v. J. Weingarten,* 420 U.S. 251 (1975). The majority found that the Employer also unlawfully denied the Charging Party her right to effective *Weingarten* representation by instructing the steward that she was at the interview only to "observe and listen." The majority noted that *Weingarten* recognized that a union representative is entitled to give advice and active assistance to the employee and need not sit silently like a mere observer. In the circumstances here, where the steward was concerned about being disciplined when she was unexpectedly summoned and escorted to the store manager's office, she reasonably construed the instruction "to observe and listen" to mean that she must remain silent and not interrupt the interview. The majority further found that the Employer unlawfully precluded the Charging Party from conferring with the steward prior to the interview, even though neither of them requested a pre-interview conference. The Employer's representatives effectively foreclosed the possibility of a pre-interview conference by summoning the steward without explanation and after the Charging Party was already sitting in the store manager's office, and conveyed by their words and actions that any request to confer would have been futile.

Member Miscimarra dissented in part. He would have found that the Charging Party was not unlawfully denied a pre-interview conference because she did not request one. And while the Charging Party's representative believed that she could not ask questions, he would not find that the Employer unlawfully silenced her since she was not explicitly told not to speak.

***Howard Industries*, 362 NLRB No. 35**

The panel majority (Pearce and Hirozawa), reversing the ALJ, found that the Employer violated Section 8(a)(1) by threatening a union steward with suspension for using notes during an investigatory interview.

The steward was asked by an employee to serve as his representative at an investigatory interview. Prior to the interview the two conferred, and the steward took notes recording the employee's explanation that he made a mistake performing his job because of a lack of training. During the interview, the steward raised his notebook while the employee was being questioned, and the employee read aloud what was written. The supervisor conducting the interview told the steward to close the notebook and when he refused to do so, threatened him with a suspension. The supervisor later explained that the steward's use of the notebook was not a problem, it was the employee using the notebook as a script.

The majority found that the threat to suspend the steward violated Section 8(a)(1) under *Weingarten*. Although an employer is entitled to investigate an employee's alleged misconduct without interference from union officials, the union representative's role under *Weingarten* includes providing assistance and counsel to employees who might be too fearful or inarticulate to express themselves and raise extenuating circumstances. 420 U.S. at 260-63. The majority concluded that the steward's conduct here was protected and did not exceed his permissible *Weingarten* role because his use of the notebook provided clarification and counsel to the employee and did not interfere with the integrity of the investigation.

Member Miscimarra dissented, finding that the Employer lawfully insisted on hearing the employee's own account of the matter under investigation, and the steward exceeded the scope of his protected role by interfering with employer prerogatives under *Weingarten.*

***E.I. Dupont de Nemours & Co.*, 362 NLRB No. 98**

The full panel (Pearce, Hirozawa, and Johnson), affirming the ALJ, held that the Employer violated Section 8(a)(1) by denying an employee a *Weingarten* representative during some of its investigatory interviews into a workplace accident. A majority (Pearce and Hirozawa) additionally found that because the employee's ultimate discharge may have been based in part on statements that he made after the denial of his *Weingarten* rights and during the unlawful interviews, he might be entitled to make-whole relief. Therefore, the case was remanded to the judge to determine whether the employee's discharge was based in part on his conduct during the unlawful interviews. If so, then the Employer has the burden of showing that it would have terminated him for reasons independent of his conduct during the unlawful interviews. If the Employer fails to make this showing, then the appropriate remedy for the *Weingarten* violation will include reinstatement and back pay.

Joel Smith, an employee at one of the Employer's manufacturing plants, experienced a slip-and-fall accident during a hot and difficult night shift. After he was released from the hospital and returned to work, he was called into an investigatory interview with three management officials. He immediately requested a *Weingarten* representative but was denied one. A week later he was again interviewed and again denied a union representative. He was permitted a union representative at a third and final interview. The Employer subsequently discharged him for giving false and incomplete information, based on inconsistencies in his description of the accident.

The full panel agree with the ALJ that the Employer violated Section 8(a)(1) by denying Smith a union representative at his initial investigatory interview and at the second interview a week later, and that the appropriate remedies included a cease-and-desist order and notice posting. The General Counsel had urged that a make-whole remedy was appropriate, but the Judge found that a make-whole remedy was only appropriate in *Weingarten* cases where the employee was discharged for asserting his *Weingarten* right. In this regard, he relied on *Taracorp, Inc.*, 273 NLRB 221 (1984), where the Board determined that a make-whole remedy for a "typical" *Weingarten* violation was contrary to Section 10(c)'s prohibition against reinstatement and backpay to any individual discharged "for cause." The majority however disagreed, distinguishing *Taracorp, Inc.*, and other "typical" *Weingarten* cases, where the employee whose *Weingarten* right was violated was discharged for reasons wholly independent of the unlawful interview. Here, unlike those cases, the misconduct giving rise to Smith's discharge occurred *after* the denial of the *Weingarten* right and *during*, as opposed to before, the unlawful interview. Noting that the instant case presented a gap in the Board's jurisprudence, the majority found that a make-whole remedy will be appropriate when: (1) an employer, in discharging an employee, relies at least in part on the employee's misconduct during an unlawful interview; and (2) the employer is unable to show that it would have discharged the employee absent that purported misconduct. Since it was not clear from the record whether Smith's discharge was based, at least in part, on his conduct during one or both of the unlawful interviews, the case was remanded for further findings. If the ALJ so finds, and if the Employer is unable to meet its burden of showing that it would have discharged Smith regardless of any conduct during the unlawful interviews, then the ALJ should order the Employer to make Smith whole, with reinstatement and backpay.

Member Johnson, dissenting in part, would have found that *Taracorp* controlled. He found that the fact that Smith's misconduct occurred during the unlawful interviews and not before was a distinction without legal significance, and that there simply was not a sufficient nexus between the unfair labor practice and the reason for the discharge to justify a make-whole remedy. He criticized the majority's holding on the grounds that it lacked a limiting principle and would entitle an employee to make-whole relief no matter how abhorrent or criminal the conduct engaged in during an unlawful interview.

***Manhattan Beer Distributors, LLC*, 362 NLRB No. 192**

The panel majority (Hirozawa and McFerran), affirming the ALJ, held that the Employer violated Section 8(a)(1) by denying an employee his right to union representation before consenting to a drug test. The majority further held, reversing the ALJ, that the Employer violated Section 8(a)(1) by discharging that employee for refusing to take a drug test without having a union representative present.

The Charging Party, a delivery driver, reported to work allegedly "reek[ing] of the smell of marijuana" and with glassy and bloodshot eyes. His manager informed him that he would have to take a drug test before being assigned a route. The Charging Party said that he was willing to take the test but wanted his shop steward present. He contacted his shop steward, but the steward was unavailable to come in; he also tried unsuccessfully to reach an assistant shop steward. The facility manager then instructed the Charging Party to either let the manager drive him to the drug test or drive himself there. The Charging Party refused to do so without a union representative. The delivery manager subsequently offered him another opportunity to take the test, reminding him that his failure to do so would be treated the same as a positive result, potentially resulting in termination. The Charging Party again refused to take the test without his shop steward. He was discharged later that day for refusing to submit to substance-abuse testing based on reasonable suspicion.

The majority found that an employee has a right to union representation before consenting to take a drug and/or alcohol test as part of an investigation into his alleged misconduct. In such circumstances, as in the usual case where an employee requests a *Weingarten* representative, the employer has three options: (1) grant the request; (2) give the employee the option of proceeding without representation; or (3) discontinue the "interview" and make a disciplinary decision based on the information available. Here, the Employer did not abide by any of these options. Instead, when the Charging Party invoked his *Weingarten* rights and learned that a union representative was unavailable, the Employer essentially insisted on continuing the interview by giving him an ultimatum: take the test immediately without representation or be treated as is if he had tested positive and face termination. Acknowledging that employers have a legitimate need to conduct drug and alcohol testing in a timely manner, the majority noted that while an employer is not required to delay testing indefinitely, it nonetheless must afford the employee a reasonable period of time to obtain union representation. The majority found that the Employer did not do so here.

The majority further held that the Employer violated Section 8(a)(1) by discharging the Charging Party. Because the Employer treated the Charging Party's refusal to take the drug test without the benefit of union representation as an automatic positive result, the reason for his discharge was inextricably linked to his assertion of his *Weingarten* rights. And since his discharge was a direct result of his invocation of his *Weingarten* rights, reinstatement and backpay were warranted.

Member Johnson dissented, finding that the Charging Party's brief phone conversation with his union representative satisfied his right to union representation. In Member Johnson's view, the role of a union representative is more limited in a drug- or alcohol-testing situation. He also found that the Charging Party's discharge was lawfully based on the Employer's reasonable suspicion that he had reported to work under the influence of drugs, as well as on his failure to overcome that suspicion by submitting to and passing a drug test.

b. Rules

***UPMC*, 362 NLRB No. 191**

Reversing the ALJ, and applying *Purple Communications, Inc.*, 361 NLRB No. 126 (Dec. 11, 2014) retroactively, the panel majority (Pearce and Hirozawa) held that the Employers violated Section 8(a)(1) by maintaining a solicitation policy that prohibited employees' use of the Employers' email system to engage in solicitation, including protected communications, during non-work time, and that required employees to report violations of that policy. The majority also adopted the ALJ's findings that other provisions of the Employers' solicitation policy and certain provisions in the Employers' email policy and acceptable use of information technology resources policy were facially unlawful. These included provisions that: precluded the use of its email system "in a way that may be disruptive, offensive to others, or harmful to morale" or for the purpose of soliciting employees to support any organization unless sanctioned by UPMC; and precluded participation in websites or social networks that described any affiliation with UPMC, "[d]isparage[d] or [m]isrepresented" UPMC, or used UPMC's logos.

UPMC and its subsidiary hospitals were alleged to have violated Section 8(a)(1) based on the maintenance of various overly broad employment policies. Applying *Register Guard*, 351 NLRB 1110 (2007), *enforced in relevant part and remanded sub nom. Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009), the ALJ found that a provision in the Employer's solicitation policy that prohibited employees from using the Employers' electronic messaging systems to engage in solicitation was lawful. There was no dispute that the policy applied to employees' use of the Employers' email system and that employees had rightful access to the Employers' email system during the course of their work.

While the case was pending before the Board, the Board issued its decision in *Purple Communications*, and held that it would apply the standard enunciated therein to all pending cases in whatever stage. *See* 361 NLRB No. 126, slip op. at 16-17. Declining to revisit the substance and retroactive application of that decision, the majority applied *Purple Communications* and held that employees had a presumptive right to use the Employer's email system to engage in Section 7-protected communications during nonworking time. The Employers therefore had the burden of demonstrating that special circumstances necessary to maintain production or discipline justified restricting the employees' Section 7 right. The majority determined that the parties had already litigated the issue of whether special circumstances existed, and it was therefore unnecessary to remand this issue to the Judge for further proceedings. Turning to the merits of the Employers' special circumstances argument, the majority found that the Employers had not established a connection between the asserted patient-safety interests and the prohibition on use of its email system for only one type of communication, namely solicitation, nor did the Employers explain why their patient-safety concerns would justify applying this prohibition to nonworking time. Accordingly, the majority held that the policy was unlawful and that the Employers further violated Section 8(a)(1) by requiring employees to immediately report all instances of unauthorized solicitation.

Member Johnson dissented from the majority's decision on the Employers' solicitation policy, on the alternative grounds that *Purple Communications* was wrongly decided, and that the presumptions adopted therein should not be applied to the healthcare industry and the Employers established special circumstances relating to the healthcare environment. At a minimum, he would have remanded the case for further litigation on the "special circumstances" defense. Member

Johnson also dissented from the majority's view that certain provisions of the Employers' email policy were unlawful. However, he concurred with the finding of a violation in regard to the acceptable use of information technology resources policy, with the exception of the ban on use of logos.

***Boch Honda,* 362 NLRB No. 83**

The panel majority (Pearce and Hirozawa), affirming the ALJ, found that the Employer violated Section 8(a)(1) by maintaining numerous provisions in its 2010 employee handbook that interfered with the exercise of employee rights, and that the Employer did not effectively repudiate its unlawful maintenance of those rules merely by issuing a new handbook in May 2013 containing revised rules.

The majority further found that the Employer's social media policy in its 2010 handbook violated Section 8(a)(1) by: (1) requiring employees to identify themselves when posting comments about the Employer, the Employer's business, or a policy issue; and (2) prohibiting employees from using the Employer's logos in any manner. The ALJ had neglected to make findings on these particular rules.

The majority also found that the Employer's dress-code policy, in both the 2010 and 2013 handbooks, unlawfully prohibited the wearing of pins. The Employer asserted that the prohibition on pins was necessary to prevent injury to employees and damage to vehicles. Contrary to the ALJ, the majority rejected this "special circumstances" defense because the rule was not narrowly tailored to address those concerns, but instead applied to all employees who had contact with the public, regardless of whether they came into contact with vehicles. And the record included no evidence supporting actual safety concerns related to pins. Finally, the full panel (Pearce, Hirozawa, and Johnson) affirmed the ALJ's finding that the Employer's dress-code policy violated the Act by prohibiting the display of insignias and other message clothing.

Member Johnson, dissenting in part, would have found that the Employer effectively repudiated its maintenance of overbroad rules in its 2010 handbook and that the Employer demonstrated special circumstances justifying its ban on the wearing of pins by employees interacting with the public.

***Rio All-Suites Hotel & Casino*, 362 NLRB No. 190**

A panel majority (Pearce and McFerran), reversing the ALJ, found that the Employer maintained unlawfully overbroad rules prohibiting: (1) employee disclosure of "any information about the Company which has not been shared by the Company with the general public[,]" including "salary structures" and "policy and procedures manuals"; and (2) employee use of cameras, camera phones, and other recording equipment on the Employer's property without its permission. The provisions banning cameras and recording equipment were unlawfully overbroad because they could be read to prohibit protected Section 7 activity, such as employees recording images of employee picketing, documenting unsafe workplace equipment or hazardous working conditions, documenting and publicizing discussions about terms and conditions of employment, or documenting inconsistent application of employer rules. Further the Employer did not tie these prohibitions to any legitimate interest, such as the privacy of its patrons. The same majority remanded to the ALJ allegations related to the Employer's ban on certain types of computer usage for further consideration in light of *Purple Communications, Inc.*, 361 NLRB No. 126 (Dec. 11, 2014). Member Johnson dissented from these findings.

A different panel majority (Johnson and McFerran), affirming the ALJ, dismissed allegations relating to: (1) a different confidentiality rule prohibiting employee disclosure of confidential company information to unauthorized persons; (2) a rule requiring off-duty employees to secure approval before visiting the facilities; and (3) a rule specifying the proper attire that employees should wear when visiting the property during off-duty hours. They found that in context, the latter rule would not reasonably be construed to prohibit the wearing of messages or images about terms and conditions of employment, given that the record showed that employees frequently wore clothing at the facility that bore a union message. Chairman Pearce dissenting, would have found all but the final rule unlawful.

***Boeing Co.*, 362 NLRB No. 195**

The Board panel (Pearce, Hirozawa, and Johnson), affirming the ALJ, held that the Employer violated Section 8(a)(1) by maintaining and routinely distributing prior to November 2012 a confidentiality notice to all employees involved in human resources investigations. That notice stated in relevant part: "you are directed not to discuss this case with any Boeing employee other than company employees who are investigating this issue or your union representative, if applicable." The notice went on to state that if any coworker or manager asked the employee to discuss the case, the employee should inform him or her that "you have been instructed not to discuss it" and refer the individual to the investigating HR representative. The panel noted that an employer may legitimately require confidentiality in appropriate circumstances when its need for confidentiality with respect to a specific investigation outweighs employees' statutory right to discuss among themselves their terms and conditions of employment. However, the Employer's generalized concern about protecting the integrity of all of its investigations was insufficient to justify its sweeping policy.

A panel majority (Pearce and Hirozawa) also found unlawful the Employer's revised confidentiality notice routinely distributed to employee witnesses after November 2012. The revised notice substituted the language "we recommend that you refrain from discussing this case" for "you are directed not to discuss[,]" and advised employees that if any coworker or manager asked to discuss the case "we recommend that you inform him or her that Human Resources has requested that you not discuss the case[.]" The majority found that the revised confidentiality notice would reasonably tend to inhibit Section 7 activity, given the notice's clear communication of the Employer's desire for confidentiality, the Employer's routine requests that employees sign the notice, and the lack of any assurance in the notice that employees were free to disregard the Employer's recommendation. Member Johnson dissented and would have found the revised notice lawful, because it contained no mandate to refrain from discussing the investigation, either express or implicit, nor was there any suggestion that discipline could result from failing to follow the recommended course of action.

***Whole Foods Market, Inc.*, 363 NLRB No. 87**

The panel majority (Pearce and Hirozawa), reversing the ALJ, held that the Employer's rules prohibiting recording of conversations, phone calls, images, or company meetings without prior management approval violated Section 8(a)(1). The majority found that photography and audio or video recording in the workplace, as well as the posting of photographs and recordings on social media, are protected by Section 7 if employees are acting in concert for their mutual aid and protection and no overriding employer interest is present, citing *Rio All-Suites & Casino*, 362 NLRB No. 190, slip op. at 4 (Aug. 27, 2015). The majority referred to the same examples of protected concerted activity referenced in *Rio All-Suites & Casino*, and also cited case law where photography or recording, often covert, was an essential element in vindicating an underlying Section 7 right. Since the rules at issue unqualifiedly prohibited all workplace recording, the majority found the rules would reasonably chill employees in the exercise of Section 7 rights. Further, the majority found that the Employer's asserted interest in preserving privacy interests in certain circumstances and encouraging open communication failed to justify the rules' unqualified restrictions on Section 7 activity.

Member Miscimarra dissented and would have found the rules lawful because their stated purpose was to encourage open communications, which would include communications protected by Section 7. He concluded that employees would reasonably read the rules to safeguard their right to engage in union-related and other protected conversations rather than to preclude Section 7 activity.

c. Mandatory Arbitration Agreements

***On Assignment Staffing Services*, 362 NLRB No. 189**

On a motion for summary judgment, the panel majority (Pearce and McFerran) held that the Employer violated Section 8(a)(1) by promulgating and maintaining a mandatory arbitration agreement that compelled employees, as a condition of employment, to waive their right to maintain class or collective actions in all forums, unless employees followed a procedure to individually opt out of the agreement.

The Employer in this case required each of its employees to sign an acknowledgement form certifying that he or she had received a copy of a dispute-resolution agreement. The agreement itself required that all employment-related disputes were to be resolved only by arbitration and included a class-action waiver that precluded the bringing of any class or collective action. An employee could opt-out of the agreement by signing an attached opt-out form within ten days of receiving the agreement.

The majority held first that the agreement's prohibition against the pursuit of class or collective claims rendered it unlawful under *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (Oct. 28, 2014), *enforcement denied in relevant part*, 2015 WL 6457613, __ F.3d ___ (5th Cir. Oct. 26, 2015) and *D.R. Horton, Inc.*, 357 NLRB No. 184 (Jan. 3, 2012), *enforcement denied in relevant part,* 737 F.3d 344 (5th Cir. 2013). The majority found that the existence of the opt-out procedure did not change this fact and itself was a condition of employment that significantly interfered with the exercise of Section 7 rights. The opt-out procedure reasonably tended to interfere with or burden the exercise of Section 7 rights in two ways: (1) by requiring that employees take affirmative steps to retain their Section 7 rights; and (2) by requiring employees to make an "observable choice" that forces them to reveal their sentiments concerning Section 7 activity.

Second, deciding an issue left open by *Murphy Oil* and *D.R. Horton*, the majority held that even assuming, as the Employer argued, that the opt-out provision rendered the arbitration agreement not a condition of employment, the agreement was still unlawful because it required employees to prospectively waive their Section 7 right to engage in concerted activity. Citing Supreme Court and Board precedent prohibiting individual agreements in which employees prospectively waive their right to engage in concerted activity for mutual aid or protection, the majority concluded that this prohibition applies even if such agreements are entirely voluntary. The majority further concluded that whether such agreements are imposed by employers or whether employees are free to reject them also makes no difference to any required accommodation between the NLRA and FAA. For the reasons stated in *Murphy Oil*, 361 NLRB No. 72, slip op. at 6 and *D.R. Horton*, 357 NLRB No. 184, slip op. at 7-12, even if there were a direct conflict between the NLRB and the FAA, the FAA would have to yield where necessary to accommodate Section 7 rights.

Member Johnson dissented. First, he would have dismissed the complaint for the reasons set forth in his dissent in *Murphy Oil*, 361 NLRB No. 72, slip op. at 35-58. Second, he concluded that the opt-out provision made the agreement voluntary and not a mandatory condition of employment. Finally, he concluded that such voluntary agreements do not require employees to prospectively waive any substantive statutory rights or otherwise violate the Act.

***Bristol Farms*, 363 NLRB No. 45**

The majority (Pearce and McFerran) denied the Employer's motion seeking approval of a proposed unilateral settlement agreement and found that the revised arbitration agreement did not remedy the Section 8(a)(1) violation found by the ALJ under *Murphy Oil* and *D.R. Horton*, even though the revised agreement stated that signing it was optional.

The ALJ found that the Employer violated Section 8(a)(1) by maintaining and enforcing a mandatory arbitration agreement that precluded class action litigation and would have been reasonably construed by employees to restrict their right to file charges with the Board. Thereafter, the Employer proposed a settlement agreement in which it offered a revised arbitration agreement that contained an explicit class and collective action waiver but also contained language stating that "SIGNING THIS AGREEMENT IS OPTIONAL," and clarified that employees could access the Board and its processes. The Region rejected the proposed settlement, and the Employer then filed a Motion to Approve Unilateral Settlement Agreement.

The majority denied the motion, based the Board's recent decision in *On Assignment*, 362 NLRB No. 189 (Aug. 27, 2015), holding that an arbitration agreement that precludes collective action in all forums is unlawful even if entered into voluntarily. The majority reiterated that it is a "bedrock principle" of federal labor law and policy that agreements in which individual employees purport to give up the statutory right to act concertedly for their mutual aid or protection are void. In response to Member Miscimarra's dissent, the majority also reiterated that the right to pursue joint, class, or collective claims arising in the workplace is a substantive right under Section 7. The Section 9(a) proviso has no bearing in cases like this, but merely permits an employer to entertain individual grievances without violating its duty to bargain collectively under Section 8(a)(5). Moreover, the Section 7 right to refrain from engaging in protected concerted activity is not implicated here; the Board is not requiring employees to act collectively by preventing *employers* from enforcing agreements by individual employees not to exercise their statutory rights to engage in concerted activity.

Member Miscimarra, dissenting, would have granted the Employer's motion. Adhering to his partial dissent in *Murphy Oil*, Member Miscimarra reiterated his view that Section 8(a)(1) does not vest the Board with authority to dictate any particular procedures pertaining to the litigation of non-NLRA claims, and the Act does not entitle employees to class-type treatment of such claims. Moreover, even if employees were deemed to have an NLRA-protected right to insist on class treatment of non-NLRA claims, he would find the revised arbitration agreement lawful because: (1) Section 7 gives every employee the right to refrain from NLRA-protected activity; (2) Section 9(a) gives every employee the right to adjust his or her non-NLRA disputes on an individual basis; and (3) the revised agreement has no effect unless an employee voluntarily chooses to sign it.

***SolarCity Corp.*, 363 NLRB No. 83**

The Board majority (Pearce, Hirozawa, and McFerran) held that the Employer violated Section 8(a)(1) by maintaining and enforcing mandatory arbitration agreements that required employees to individually arbitrate employment-related claims but contained an exception permitting employees to file claims with certain administrative agencies, which could potentially choose to pursue a remedy on behalf of employees as a group. The majority also held that the agreements independently violated Section 8(a)(1) by interfering with employees' Section 7 right to file charges with the Board.

The Employer required its employees as a condition of employment to sign arbitration agreements, which mandated that any dispute arising out of or related to employment be resolved through arbitration. Included in the agreements was a "class action waiver" provision, which prohibited disputes from being arbitrated as a class or collective action. The agreements also contained an exception that permitted employees to file claims with certain administrative agencies, including the EEOC, the DOL, and the NLRB. The Employer contended that the agreements were lawful because the exception provided an adequate substitute for class or collective litigation brought by the employees.

The Board majority rejected this contention. The Board held in *D.R. Horton*, 357 NLRB No. 184, slip op. at 12, and *Murphy Oil,* 361 NLRB No. 72, slip op. at 18, that agreements that prohibit class or collective litigation "in *all* forums, arbitral and judicial" restrains employees from engaging in Section 7 activity. The Board majority here determined that the exception in the Employer's agreements permitting the filing of claims or charges with administrative agencies did not satisfy the requirement of an alternative judicial forum for the pursuit of joint, class, or collective claims for three reasons. First, there is a wide range of employment-related claims that are not within the purview of any administrative agency, such as common-law claims. Second, even if an administrative agency has the authority to pursue employees' claims, it also has the discretion to decline to do so, or to do so only on the agency's terms. Third, even where the agency does choose to pursue employees' claims, a typical administrative agency is not the equivalent of a "judicial forum." Indeed, the EEOC and DOL cannot adjudicate employment-related claims. Thus, DOL's Wage and Hour Division's sole recourse for obtaining a remedy is to commence court litigation, which it does in just a small fraction of cases, and when it does so, the agency, not the employees, controls the litigation.

Similarly, the EEOC decides whether it will litigate an employment discrimination claim, and whether it will do so on an individual or collective basis. And in over 99 percent of filed charges, the EEOC decides not to litigate the claim.

The majority further held that employees would reasonably interpret the agreements as prohibiting the filing of charges with the Board and for that reason also, the agreements violated Section 8(a)(1). Despite the exception for the filing of administrative claims, including NLRB charges, the scope of the agreements was broad, requiring that "all" or "any disputes" be resolved by an arbitrator. Moreover, the Board found that the relevant language in the agreements pertaining to the filing of agency and Board charges created confusion, and it would take "specialized legal knowledge" to determine whether employees' right to file Board charges was permitted or precluded. In any event, the agreements suggested that any ULP-charge filing had to be done individually and not in concert with other employees.

Member Miscimarra dissented and would have held that the class action waiver in the agreements was not unlawful, for the reasons set forth in his partial dissenting opinion in *Murphy Oil*. *See* 361 NLRB No. 72, slip op. at 22-35. He also would have found that any reasonable construction of the agreements reveals that they exclude the filing of NLRB charges from their scope. He therefore would find that the agreements do not interfere with employees' Section 7 right to file such charges.

3. SECTION 8(a)(3)

***Southcoast Hospitals Group, Inc.*, 363 NLRB No. 9**

The Board majority (Pearce and Hirozawa), affirming the ALJ in part, found that the Employer violated Section 8(a)(3) and (1) by maintaining and enforcing a discriminatory hiring and transfer policy. The same majority found that the Employer also violated Section 8(a)(3) and (1) by refusing, based on the policy, to consider and/or hire employee-applicants and by delaying the hiring of an employee-applicant, also based on the unlawful policy.

Since at least 1996, the parties' collective-bargaining agreement has provided that represented employees receive a preference over unrepresented employees in hiring and transferring to other bargaining unit positions. The policy implemented by the Employer, HR 4.06, gave a similar preference to unrepresented employees in hiring and transferring to non-bargaining unit positions, which vastly outnumber the bargaining unit positions. The Board majority concluded that, under the framework of *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967), the Employer's policy had at least a "comparatively slight" impact on represented employees based on their representational status and their having obtained a contractual benefit through collective bargaining. The burden therefore shifted to the Employer to establish that it had a legitimate and substantial business justification for the policy. The Board majority rejected the Employer's proffered business justifications: namely, that it needed the policy to avoid potential complaints from its unrepresented employees about being shut out of bargaining unit jobs and that the policy would "level the playing field" for unrepresented employees. In so doing, the majority concluded that there was no evidence that a single unrepresented employee had complained about the preference. Further, the policy did not level the playing field but rather conferred a significant advantage on unrepresented employees because only 215 of the roughly 5,000 positions at the Employer's facilities were in the bargaining unit.

Member Miscimarra dissented in part, concluding that HR 4.06 did not violate the Act because, in his view, the Employer established a legitimate and substantial business justification for the policy. Accordingly, he also found that the Employer lawfully relied on HR 4.06 in refusing to hire and/or consider employee-applicants.

A different Board majority (Pearce and Miscimarra) reversed the ALJ and found that the Employer did not violate Section 8(a)(3) and (1) by refusing to hire an employee-applicant. They found that the Employer met its burden to show that it would not have selected the employee-applicant for the position, even in the absence of HR 4.06, because she lacked certain requisite skills. Member Hirozawa dissented in part, finding that the Employer failed to prove that it would not have hired the employee-applicant in the absence of HR 4.06.

***Paragon Systems, Inc.*, 362 NLRB No. 182**

The Board panel (Pearce, Hirozawa, and Johnson), affirming the ALJ, held that the Employer violated Section 8(a)(3) and (1) by suspending and then discharging three protective security officers for their union activity.

As a preliminary matter, a panel majority (Pearce and Hirozawa) agreed with the ALJ that the Employer had failed to establish that the alleged unfair labor practices were nonjusticiable because the disciplinary actions were purportedly grounded in national security concerns. The Employer, a private sector employer, provided security services at a Federal facility, under contract to the Federal Protective Service (FPS). The Employer discharged three security officers who had engaged in protected union activity, after receiving an FPS report recommending their removal from the contract. The Employer contended that the Board's jurisdiction to review the alleged unlawful discharges was precluded under *Department of the Navy v. Egan*, 484 U.S. 518 (1988) (holding that the Merit Systems Protection Board lacked the authority to review the Navy's denial of a security clearance to a Federal civilian employee). The majority found that *Egan* did not apply and there was no bar to review because there was no evidence that the adverse employment decisions were based on national security considerations.

Applying *Wright Line*, the majority found that the General Counsel met his initial burden, and the Employer failed to show it would have taken the same actions in the absence of the employees' union activities. The majority then rejected the Employer's contention that the discharges were justified because the discriminatees had lied. Finding that they had a reasonable basis for believing that the Employer was attempting to pry into protected union activity and they would suffer reprisal for that activity, the majority concluded that they were under no obligation to respond to questions seeking to uncover protected activities.

Member Johnson, concurring, stated that substantial weight should be given to national security concerns when raised by a contractor in defense of disciplinary action recommended by a government agency, but he agreed with his colleagues that the Employer's reliance here on the government report was pretextual.

***Arc Bridges, Inc.*, 362 NLRB No. 56**

On remand from the Court of Appeals, the panel majority (Pearce and Hirozawa) held that the Employer's decision during bargaining to withhold a wage increase from represented employees that was granted to unrepresented employees was unlawfully motivated and therefore violated Section 8(a)(3) and (1).

In its prior decision, *Arc Bridges, Inc.*, 355 NLRB 1222 (2010), the Board found that the Employer had an established condition of employment of granting across-the-board wage increases to employees each July if sufficient funds existed. The Board therefore concluded that the Employer's failure to extend the general wage increase to newly-represented employees was "inherently destructive" of their Section 7 rights, and violated Section 8(a)(3) and (1) even without proof of antiunion motivation. On review of the Board's Order, the Court of Appeals for the D.C. Circuit rejected the Board's finding that the Employer's practice of annually giving an across-the-board wage increase if sufficient funds existed was an established condition of employment. The D.C. Circuit therefore set aside the Board's Order and remanded the case for further proceedings to determine whether the failure to grant a wage increase to the represented employees was unlawfully motivated.

Accepting the Court's decision as the law of the case, the panel majority re-examined the record. It determined that the evidence of animus, along with the Employer's admission that it would have given the same wage increase to all of its employees if the Union had not been representing some of them, established that the Employer's decision to withhold the wage increase from represented employees was unlawfully motivated. The majority therefore concluded that the Employer's conduct violated Section 8(a)(3) and (1).

Member Miscimarra, dissenting, found that the Employer did not violate the Act by refraining from unilaterally giving represented employees a wage increase during bargaining that remained incomplete. His view was that, given the Circuit Court's finding that the annual wage increases were not an established condition of employment, the Employer would have violated the Act if it had unilaterally implemented the wage increase for represented employees. Since the Act cannot be reasonably interpreted to find a party in violation regardless of what it does, he would not find a violation. He also concluded that the General Counsel had failed to sustain his initial burden under *Wright Line* because he failed to show a "motivational link" between any animus and the challenged adverse action.

***Hawaiian Dredging Construction Co.*, 362 NLRB No. 10**

The panel majority (Pearce and Hirozawa), reversing the ALJ, held that the Employer violated Section 8(a)(3) and (1) by discharging all employees who were members of the Boilermakers when it repudiated its 8(f) bargaining relationship with that Union.

The Employer was a member of the Association of Boilermakers Employers of Hawaii. After the Association's Section 8(f) collective-bargaining agreement with the Boilermakers expired, and the parties were unable to reach a successor agreement, the Association lawfully terminated its 8(f) relationship with the Boilermakers. On the same date that its relationship with the Boilermakers was terminated, the Employer temporarily shut down its welding operations and terminated all thirteen of its Boilermakers-represented employees. The Employer then entered into a collective-bargaining agreement with the United Plumbers and Pipefitters Union and resumed its welding operations within two weeks of shutting them down, using employees dispatched by the Pipefitters Union. The Employer contacted ten of the thirteen alleged discriminatees and informed them that they would need to speak to the Pipefitters' leadership if they were interested in returning to work.

The panel majority found that although an employer is free to terminate a Section 8(f) relationship with a union after contract expiration, it cannot discriminatorily discharge its employees because of their affiliation with that union. Here, the Employer did just that, and those facts compelled a finding under *Wright Line* that the Employer discharged the alleged discriminatees because of their Boilermakers affiliation. The majority further found that the Employer had not met its burden of demonstrating that it would have discharged the alleged discriminatees even in the absence of their affiliation with the Boilermakers, rejecting the Employer's contention that its practice of relying on hiring halls required it to discharge these employees because of the absence of an agreement. In this regard, the Board noted that the Employer had continued to operate with

Boilermakers-represented employees in the absence of a contract in the past. The majority expressly disagreed with Dissenting Member Miscimarra's reliance upon *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263 (1965) to justify the Employer's actions here, finding that *Darlington* was inapplicable because this case involved a temporary shutdown and not a permanent closure.

The panel majority further found, in the alternative, that the Employer's discharge of all of its Boilermakers-represented employees was unlawful under *NLRB v. Great Dane Trailers*, 388 U.S. 26, because the Employer's conduct was "inherently destructive" of those employees' right to membership in the union of their choosing. Under the "inherently destructive" theory of violation, no proof of discriminatory motive is required, and a violation will be found unless the Employer's asserted business justification is sufficient to outweigh the destructive impact of the discharges. The majority found that the Employer's justification here was not.

Member Miscimarra, dissenting, found that the discharges were a lawful exercise of the Employer's right under *Textile Workers v. Darlington Mfg. Co.* to discontinue welding operations, regardless of motive. Alternatively, he found that the Employer's conduct was neither unlawfully motivated nor inherently destructive of employee rights.

4. SECTION 8(a)(5)

a. Alter Ego

***Deer Creek Electric,* 362 NLRB No. 171**

The Board majority (Miscimarra and Johnson) adopted the ALJ's finding that Respondents Black Hills Electric and Deer Creek Electric were not alter egos. The majority based its conclusion in large part on Deer Creek's lack of financial control over Black Hills or its owner, who was also a family member of Deer Creek's owners. The majority noted that substantially identical ownership between alter egos is not determined by family relationship alone but rather by the exercise of considerable financial control by members of one company over the other. The majority also found that the Respondents lacked substantially identical equipment and that Respondent Black Hills was not formed to evade Deer Creek's obligations under the Act. The majority thus concluded that the Respondents were not alter egos despite finding, contrary to the ALJ, that they shared substantially identical supervision and management.

Member Hirozawa dissented and would find the Respondents to be alter egos. Unlike the majority, Member Hirozawa would find that the entities' substantial identical ownership was established by the family relationship between the companies' owners, the companies shared equipment, and that Black Hills was formed to evade Deer Creek's contractual responsibilities to the Union.

b. Impasse

***Atlantic Queens Bus Corp.*, 362 NLRB No. 65**

The Board (Miscimarra, Hirozawa, and Johnson) affirmed the ALJ's conclusion that the Employers violated Section 8(a)(5) by unilaterally implementing their final offer after declaring an overall impasse based on an asserted deadlock over the single issue of whether to include a most-favored-nations clause.

The Employers provide school bus services for the New York City Department of Education. The parties' most-recent contract contained a most-favored-nations clause. When the Union and 28 Employers began bargaining for a successor contract, they remained at odds over the inclusion of a most-favored-nations clause but made significant movement on wages. Despite that movement, the Employers declared overall impasse based on the parties' deadlock over the most-favored-nations clause, and implemented their final proposal.

Board precedent recognizes that a single bargaining issue may be of such overriding importance to the parties that impasse on that one issue justifies a finding of overall impasse on all issues. In such circumstances, *CalMat Company*, 331 NLRB 1084, 1097 (2000) holds that an employer may unilaterally implement its final offer if: (1) a good-faith impasse existed as to a particular issue; (2) that issue was of "overriding importance" in the bargaining; and (3) impasse on the single issue led to the breakdown in overall negotiations. The ALJ found that the most-favored-nations clause was not of overriding importance to bargaining. The Board concluded that, even if the parties were at impasse over the most-favored-nations clause and it was critical to bargaining, the parties were still progressing on other issues, notably wages, when the Employers declared impasse.

***Kellogg Company*, 362 NLRB No. 86**

The Board (Pearce, Hirozawa, and Johnson), reversing the ALJ, held that Kellogg unlawfully insisted to impasse on, threatened to lock out, and locked out over 200 bargaining unit employees over, bargaining proposals that would have modified the parties' existing master agreement and were therefore nonmandatory subjects of bargaining.

The parties' employment relationship is governed by two collective-bargaining agreements: a master agreement that covers Kellogg's four ready-to-eat cereal plants, including in Memphis, Tennessee, and supplemental local agreements at each respective location. During negotiations for the Memphis supplemental agreement, Kellogg proposed that "any employee hired … to perform … bargaining unit work" be classified as a "casual employee." Under the terms of the existing master agreement, casual employees received $6 per hour less than regular employees and were excluded from contractual benefits. The Board found that Kellogg's proposals would have effectively altered the master agreement's wage and benefit provisions pertaining to new regular employees, including in Memphis, by relabeling them "casual" employees. The Board concluded that Kellogg's insistence to impasse on proposals that would have modified the separate master agreement covering the Memphis plant violated Section 8(a)(5) and that Kellogg's threat to lock out, and lockout of the Memphis employees over those nonmandatory subjects of bargaining, violated Section 8(a)(3) and (5).

Member Johnson concurred in finding a violation, since Kellogg's proposals would have removed any distinction between regular and causal employees contrary to the ordinary meaning of the term "casual." However, he surmised that the parties could have intended to bargain all terms and conditions for casual employees locally, consistent with the intent of the parties to the master agreement.

c. Subjects of Bargaining

***WCCO-TV,* 362 NLRB No. 101**

The Board (Pearce, Miscimarra, and Hirozawa) reversed the ALJ and found that the Employer's bargaining proposal, which would allow daily cross-utilization of nonunit employees to perform unit work, was a mandatory subject of bargaining over which the Employer could bargain to impasse. The Board applied and re-affirmed the holding in *Storer Communications*, 295 NLRB 72 (1989), *enforced sub nom. Stage Emps. IATSE Local 666 v. NLRB*, 904 F.2d 47 (D.C. Cir. 1990).

The Employer's employees are represented by several unions, including National Association of Broadcast Employees and Technicians (NABET), representing the photojournalists, and American Federation of Television and Radio Artists (AFTRA), representing reporters and producers. The Employer and NABET have long agreed to allow nonunit employees represented by other unions to perform a limited amount of unit work. The parties later amended that agreement to allow the Employer to cross-utilize two AFTRA-represented reporters or producers to perform NABET unit work on a daily basis. AFTRA rejected the Employer's proposal for a similar agreement allowing the cross-utilization of NABET employees. The Employer began assigning AFTRA-represented employees to perform daily camera work pursuant to its agreement with NABET. However, during negotiations for a successor contract, NABET argued that the unit work provision was a permissive subject that did not survive the contract's expiration; the parties reached impasse over its inclusion in their successor agreement.

The Board, reversing the ALJ, found that the unit work proposal was a mandatory subject of bargaining because it affected only the assignment of unit work and not the unit's scope, i.e., who NABET represented. Thus, NABET continued to represent the photojournalists and remained free to challenge the unit placement of AFTRA or other nonunit employees assigned to perform unit work.

d. Unilateral Changes

***Olean General Hospital*, 363 NLRB No. 62**

The Board majority (Hirozawa and McFerran) affirmed the ALJ's findings that the Employer violated Section 8(a)(5) by failing and refusing to bargain in good faith with the Union both over the decision and effects of a training program that employed unit nurses as trainers of nursing students, and refusing to supply the Union with relevant information, including a patient care survey ostensibly containing confidential information.

The Employer informed the Union that it intended to create a new program in which unit nurses would train student nurses at a local university campus. The Union requested bargaining over the new program but the Employer refused, arguing that implementation of the new program was covered by the parties' contract and past practice.

The Board majority first found that the Employer's decision to implement the new training program was a mandatory subject of bargaining that was not covered by the parties' contract or consistent with the parties' past practice. The Union had therefore not "clearly and unmistakably" waived its right to bargain over the new program under *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007). The majority also found that the Employer failed to provide the Union with relevant information concerning the new program, including patient-care surveys. Although the Board found, contrary to the ALJ, that the Employer had asserted a legitimate and substantial confidentiality interest in the survey, it applied the balancing test set forth in *Detroit Edison Company. v. NLRB*, 440 U.S. 301 (1979) and concluded that the Employer's interest was outweighed by the Union's need for the information.

Member Miscimarra dissented in part, and would hold that the parties' contract and past practice permitted the Employer to unilaterally implement its new training program under either a "waiver" or "contract coverage" analysis.

***Sutter Tracy Community Hospital*, 362 NLRB No. 199**

The Board (Hirozawa, Johnson, and McFerran) reversed the ALJ and concluded that the Employer did not violate Section 8(a)(5) by implementing its proposed changes to unit employees' healthcare and wellness programs. The Board approved the ALJ's application of *Stone Container Corporation,* 313 NLRB 336 (1993) and *Brannan Sand and Gravel Company,* 314 NLRB 282 (1994) because the parties were engaged in first contract negotiations and had stipulated to the

Employer's past practice of annually reviewing and modifying its healthcare and wellness programs. The Board rejected, however, the ALJ's finding that the Employer presented its proposed changes to the Union as a *fait accompli*. Instead, the Board found that the Employer provided the Union with timely notice and a meaningful opportunity to bargain, i.e., six weeks before the planned commencement of enrollment and over three months before the planned implementation of the proposed changes.

Member Hirozawa concurred but wrote separately his view that the Board should reexamine the effect of an employer's right to implement unilateral changes, pursuant to *Stone Container* and *Brannan Sand and Gravel*, on the collective-bargaining process.

Chemical Solvents, Inc. and Turn-To Transport, LLC, a single employer and/or alter egos, **362 NLRB No. 164**

The Board (Hirozawa, Johnson, McFerran), affirming the ALJ, dismissed the allegation that Chemical Solvents, Inc. (CSI) unilaterally subcontracted the bargaining unit's driving work. The Board found that the parties' collective-bargaining agreement, which expressly entitled the Employer to transfer work to any other entity, privileged the Employer to unilaterally subcontract the work.

The Employer directly employed several drivers, a job classification that was part of the bargaining unit covered by a collective-bargaining agreement with Teamsters Local 507. The Employer had a history of subcontracting part of the driving work, depending on the type of transport, route, customer request, or need for additional manpower. The parties' collective-bargaining agreement stated that the Employer retained the right "[t]o transfer any or all of its work to any other entity." In 2010, during the life of this contract, the Employer started increasing the use of subcontractors. The Employer eventually subcontracted all of its trucking operations and laid off its drivers.

The Board agreed with the judge that the contract's language allowing the Employer to "transfer" work constituted a "clear and unmistakable waiver" of the Union's right to bargain over subcontracting. The Board acknowledged that the cases establish a "strict standard" when evaluating whether a contract provision privileges one party to act unilaterally. The Board rejected the General Counsel's argument that under that strict standard, the words "transfer" and "subcontract" have different meanings. The Board held that, to the contrary, the word "transfer" is a general formulation that includes subcontracting; subcontracting is a "specific sort of transfer." Thus, despite the fact that the contract does not refer to subcontracting by name, the transfer language constituted a clear and unmistakably waiver of the right to bargain about subcontracting.

The Board declined the Employer's invitation to apply the "contract coverage" standard instead of the "clear and unmistakable waiver" standard, but noted that the result would be the same under either standard. Member Johnson found it unnecessary to express his view on whether the Board should apply the "contract coverage" standard instead of the "clear and unmistakable waiver" standard, noting that there is at present no three-member majority in favor of reconsidering the established waiver standard.

The Board also affirmed the judge's conclusion that the decision to lay off all the bargaining unit drivers and subcontract the driving work did not violate Section 8(a)(3) and (1) because the Employer demonstrated that it would have laid off all of the drivers for financial reasons, even in the absence of their union activities.

The Board, however, reversed the judge's conclusion that the Employer unilaterally changed employees' health insurance. Disagreeing with the judge, the Board concluded that the Employer had given sufficient notice of the changes in health insurance to enable meaningful bargaining when it obtained an extension of health insurance coverage that gave the Union seven weeks' notice before implementation. The Board also reversed the judge's conclusion that the changes to the cell phone policy and pre-trip inspection reporting requirements were not significant and were therefore not a violation of Section 8(a)(5). Disagreeing with the judge, the Board concluded that the changes to policies on cell phone usage and pre-trip inspections were material, significant, and substantial because the Employer attached discipline to the new policies.

Finally, the Board reversed the judge to find that CSI and Turn-To Transport constituted a single employer and, accordingly, held both companies jointly liable for the unfair labor practices found. The Board found it unnecessary to decide whether they were also alter egos, because doing so would not affect the remedy.

***MSR Industrial Services, LLC*, 363 NLRB No. 1**

The Board (Pearce, Miscimarra, McFerran), reversing the ALJ, found that that the Employer did not violate Section 8(a)(5) of the Act by making unilateral changes to terms and conditions of employment after the expiration of the Employer's collective-bargaining agreement with the Union, despite the Employer's failure under Section 8(d) to notify the Federal Mediation and Conciliation Service in advance of contract expiration. The Board found that the parties' relationship was governed by Section 8(f) of the Act and concluded that the notice requirements of Section 8(d) do not apply to 8(f) relationships. Because the Employer had no continuing bargaining obligation after expiration of the 8(f) contract, the Board dismissed additional 8(a)(5) allegations of a post-contract unlawful lockout and reassignment of bargaining unit work to a supervisor. The Board affirmed the judge's conclusion that the Employer violated Section 8(a)(5) by dealing directly with employees and failing to provide information to the Union prior to contract expiration.

The Employer is a construction industry employer. It entered into a “me too” agreement to be bound by the contract between a construction employer association and the Union. On the day the contract expired, the Employer sent a Section 8(d) notice to the Federal Mediation and Conciliation Service. No notice was sent before expiration, as required by Section 8(d). After expiration of the contract, the Employer told its employees that they could continue to work at non-contractual wages without contractual fringe benefits and paid the employees under those terms upon their acceptance. The Employer also reassigned unit work to a supervisor.

The judge found that the Employer’s changes were unlawful, not because the Employer was bound to the successor agreement or because the Employer made the changes without bargaining with the Union, but only because the Employer failed to fully comply with the notice requirements of Section 8(d).

The Board disagreed. First, the Board found that the parties’ relationship was governed by Section 8(f). The Board noted that the complaint alleged a Section 8(f) relationship and there was no record evidence of Section 9(a) recognition that would rebut the 8(f) presumption that applies to the construction industry. Second, the Board concluded that the policy reasons behind the notice requirement of Section 8(d) are not applicable to Section 8(f) relationships. The Board noted that Section 8(d) requirements are designed to minimize the disruption to commerce in 9(a) relationships where the duty to bargain continues past contract expiration and where the parties may use economic weapons to enforce that continuing bargaining obligation. Because the bargaining obligation does not continue past contract expiration in Section 8(f) relationships, there is no concomitant need for the Section 8(d) notice requirements.

Accordingly, the Board dismissed the Section 8(a)(5) allegations based on conduct occurring after the expiration of the 8(f) contract, but affirmed the findings of violations for conduct occurring before expiration of the contract.

***American Electric Power*, 362 NLRB No. 92**

A unanimous Board panel (Miscimarra, Hirozawa, and McFerran) overturned the ALJ’s recommendation and found that the Employer did not unlawfully modify a contract with the Union within the meaning of Section 8(d) because it had a sound arguable basis for believing that the parties’ agreement allowed it to unilaterally eliminate certain retiree medical benefits during the term the agreement.

The Employer and Union were party to a collective-bargaining agreement that contained a “participation clause” stating that employees “shall be permitted to participate in the American Electric Power System . . . Comprehensive Medical Plan

. . . Retirement Plan . . . .” All of the Employer’s employees, both union and nonunion, received the same systemwide benefit programs offered by the Employer. The Employer had made several changes to its medical and benefit plans over the years and the Union did not object to or demand bargaining over any of the prior changes. In November 2012, the Employer announced that it was going to make changes to the medical benefits for retirees, including that new hires would not be eligible for retiree medical coverage at all. The Union requested bargaining over the change but the Employer refused, pointing to the participation clause in the contract and the history of making unilateral changes to benefits programs.

The Board first held that the change in benefits should be analyzed as a contract modification within the meaning of Section 8(d) and, as such, should be analyzed under the “sound arguable basis” standard. *Citing Bath Iron Works,* 345 NLRB 499, 502 (2005), *affd sub nom. Bath Marine Draftsmen’s Assn. v. NLRB*, 475 F.3d 14 (1st Cir. 2007). Applying that standard, the Board concluded that the Employer had a sound arguable basis for its interpretation of the contract. The Board found that the participation clause in the contract, providing that employees “shall be permitted” in the Employer’s benefit plans, arguably suggests that unit employees participate only for so long as the plans are offered and on whatever terms they are offered. Or, the Board suggested, “*if* the plans exist, then unit employees cannot be excluded from the plans, such as they are.” (Emphasis in original.) The Board also found that the Employer’s interpretation of the contract is “strongly bolstered by its history of providing the same benefits to represented and unrepresented employees and—most notably—of making unilateral changes” to its benefit plans. Whether or not the Employer’s interpretation of the contract is correct, the Board concluded, its assertion that the participation clause allowed it to eliminate retiree medical benefits for new hires is plausible and satisfies the sound arguable basis standard. The Board stated that the General Counsel’s interpretation might also have merit, but it need not pass on which interpretation is the better view because the Employer presented a reasonable interpretation.

5. DEFERRAL TO ARBITRATION

St. Francis Regional Medical Center, 363 NLRB No. 69

A majority of the Board panel (Pearce and McFerran) affirmed the ALJ’s conclusion that deferral of a Section 8(a)(1) and (3) discharge allegation to the parties’ arbitration procedure under *Collyer Insulated Wire*, 192 NLRB 837 (1971) was not appropriate.

The Employer is an acute care and clinical services facility. Its health information management services are supported by Allina. The Employer’s health information management (HIM) employees, among others, are represented by SEIU Healthcare Minnesota (the Union) and covered by a collective-bargaining agreement that includes a just cause clause and a four-step grievance-arbitration procedure. During the course of her ordinary workflow, an HIM employee came across some medical records that contained the initials of a supervisor as the transcriptionist. She became concerned that a supervisor was performing bargaining unit work, a potential violation of the collective-bargaining agreement. She also knew that bargaining unit members were being required to take unpaid days off and had heard rumors of layoffs due to a low volume of available work. Because of these concerns, the HIM employee made a copy of the medical records, redacted personally-identifying patient information, and brought them to the attention of a steward. In an effort to investigate the HIM employee's suspicions, and pursuant to the pre-grievance step of the parties' collective-bargaining agreement, the steward sent an email to a human resource manager seeking information regarding whether a supervisor was performing bargaining unit work. The steward attached a copy of one of the redacted medical records in support of her information request. The steward's email triggered an intensive management investigation that included threats and interrogation of the steward, and ultimately led to the discharge of the two employees for, ostensibly, breaching patient-confidentiality policies.

The ALJ rejected the Employer's patient privacy concerns as pretext and found instead that the employees were discharged in retaliation for engaging in the protected and Union activity of filing an information request in pursuit of a grievance regarding a possible violation of the parties' collective-bargaining agreement. The ALJ found that deferral was not appropriate because there was tension in the parties' collective-bargaining relationship, the Employer demonstrated animosity to the employees' exercise of their Section 7 rights, the dispute involves discipline of employees in reprisal for their grievance activities, and, since the information allegation is not suitable for arbitration, the Board should resolve the entire dispute in a single proceeding.

The Board agreed with the judge's unfair labor practice findings. It also agreed that deferral to arbitration would be inappropriate. However, the Board did not rely on the judge's finding that the strain in the parties' bargaining relationship and the potential for piecemeal litigation arising from the information allegation weighed against deferral. Instead, the Board held that the Employer's animosity to the employees' exercise of Section 7 rights established that the matter is not eminently well suited to arbitration. The Board acknowledged that Section 8(a)(1) and (3) cases frequently involve claims of animus. But in this case, the Board found that the Employer's "substantial animosity" toward the exercise of Section 7 rights was "particularly severe," as demonstrated by its alleged discipline and discharge of a Union steward and her unit member for activity related to the processing of the member's grievance. In those circumstances, even though the parties had processed numerous grievances over the course of their bargaining relationship, the dispute here involved allegations concerning the use of the grievance process itself and conduct that challenges the ability of the parties to fairly resolve the case among themselves.

Member Miscimarra dissented in part and would defer the Section 8(a)(3) and (1) allegations regarding the two terminated employees to arbitration and dismiss those allegations, retaining jurisdiction for limited purposes.

***Doctors' Hospital of Michigan*, 362 NLRB No. 149**

The panel majority (Pearce and McFerran), affirming the ALJ, concluded that deferring to arbitration the parties' dispute concerning the Employer's unilateral changes to employees' health insurance benefits was not appropriate, and clarified that the Employer violated the Act by making mid-term contract modifications within the meaning of Section 8(d) without the Union's consent, thereby violating Section 8(a)(5) and (1).

The parties' collective-bargaining agreement states that—with notice to the Union—the Employer reserves the right to amend the health plan design, except for the listed premium co-share schedule. A separate provision allows the Employer to switch health care providers, so long as "similar coverage" is provided. In November 2013, the original health insurance provider informed the Employer that it would terminate its contract with the Employer. The Employer selected a new plan on December 24, 2013 that substantially increased unit employees' premium co-shares. On several occasions throughout 2013 the Union had asked the Employer whether it anticipated changes to health care coverage, and each time, the Employer stated that no changes had been proposed. However, on December 16, 2013, the Employer informed the Union of prospective changes to the health plan, including significant increases in employees' premium contributions. When informed of the details of the new plan, the Union objected that the Employer was in violation of the collective-bargaining agreement and refused to agree to the new terms. The Employer began deducting the increased premium amounts in January 2014.

The panel majority agreed with the ALJ that the relevant contractual provisions were unambiguous and therefore not susceptible to contractual interpretation by an arbitrator. Specifically, the majority agreed that the agreement: 1) explicitly prohibits the Employer from unilaterally adjusting employees' co-shares, which it did anyway; and 2) requires that notice be given to the Union of any health plan changes, which the Employer did not provide. Additionally, the majority noted that these changes were mid-term contract modifications within the meaning of Section 8(d), and thus also statutory violations of Section 8(a)(5) and (1). The majority concluded that deferral was inappropriate pursuant to the Board's policy to not bifurcate cases involving both statutory and contractual questions; Member McFerran noted specifically that the Employer's defense that the Union consented to the contract modification was a statutory defense not susceptible to contract interpretation.

Member Johnson, dissenting, would find deferral to arbitration appropriate because resolution of the parties' dispute turns solely on an interpretation of the operable contractual provision allowing the Employer to unilaterally switch health care providers as it did here. In his view, the key to interpreting that provision is whether the definition of "similar coverage" refers to types of treatment, costs, or both, and that question is appropriate for arbitration. Nor would Member Johnson conclude that the contractual provision's prohibition on changing co-share rates cited by the majority is unambiguous. In any event, given what Member Johnson views as the substantial contractual ambiguity surrounding the dispute, he would defer the case to arbitration pursuant to *Collyer*.

***Verizon New England, Inc.*, 362 NLRB No. 24**

The panel majority (Pearce and Hirozawa), overruling the ALJ, concluded that an arbitral award, which found employees' placement of informational picket signs in their car windows to constitute "picketing" in violation of the parties' collective-bargaining agreement, was clearly repugnant to the Act and that deferral was therefore inappropriate. In addition, the majority concluded that the Employer's order to remove the signs was a violation of 8(a)(1).

The Union and Employer were parties to successive collective-bargaining agreements since at least 1977. Since that time, the parties' agreements have always incorporated a "no-strike" clause that included a ban on picketing. Despite that ban, the Union had a long practice of informational picketing at the Employer's premises in advance of renewing contract negotiations. In advance of such a period of informational picketing, employees began displaying their picket signs in their car windows in the Employer's parking lot while at work. The Employer ordered employees to remove the signs and the Union filed a grievance over the incident. After the grievance was deferred pursuant to *Collyer*, an arbitral panel concluded that the display of signs constituted picketing in violation of the parties' contract. The ALJ deferred to the arbitration award under *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955) and *Olin Corp.*, 268 NLRB 573 (1984).

The panel majority concluded, contrary to the ALJ, that the arbitration award was "clearly repugnant" to the Act. The majority first explained that, absent special circumstances, employees' display of prounion signs in their car windows on an employer's property is protected Section 7 activity absent a union's "clear and unmistakable" waiver of that Section 7 right. The majority concluded that a Union waiver of employees' right to display the signs was not established by the parties' collective-bargaining agreement or bargaining history and noted that the parties' long-established history of allowing informational picketing prior to contract renegotiation established that the parties did not intend their contract to prohibit the conduct at issue here. The majority observed that the arbitrators relied solely on a nineteenth century book about picketing and a mid-twentieth century labor dictionary in determining that displaying the signs qualified as picketing, and failed to cite any decisions from the overwhelming body of Board law that requires as a necessary element of picketing the kind of "personal confrontation," which the employees' display of signs in their unoccupied vehicles lacked.

Member Johnson, dissenting, would find deferral to the arbitral award appropriate, noting that the Board recently held in *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.)*, 355 NLRB 797, 804 (2010) that the display of placards in employees' cars parked on the employer's premises could be interpreted as picketing if, e.g., the placards were simultaneously being used for the same informational protest in ambulatory picketing activities elsewhere. Thus, as deferral to an arbitral award only requires that it be within the "broad parameters of the Act," and does not mean that that the Board would necessarily reach the same result, Member Johnson would find that the arbitral award is not clearly repugnant.

***Babcock & Wilcox Nuclear Operations Group, Inc.*, 363 NLRB No. 50**

The Board (Pearce, Miscimarra, and Hirozawa) granted the Employer's motion to dismiss the complaint alleging that the Employer violated Section 8(a)(3) by disciplining an employee for engaging in protected concerted activity, and deferred the dispute to the parties' contractual grievance-arbitration procedure.

The Region issued complaint alleging that the Employer had unlawfully disciplined a Union steward for his outburst on the production floor concerning an overtime dispute. The parties' collective-bargaining agreement contains a grievance-arbitration procedure that broadly states that "all differences, disputes, or grievances…pertaining to the terms of this Agreement" shall be submitted to arbitration. Another section of the parties' contract allows employees to challenge a discharge, but no specific provision addresses challenging an unjust disciplinary action falling short of a discharge. However, the Employer presented unrebutted evidence that the parties had used the grievance-arbitration to process over 160 grievances over the past 6 years, including for unjust discipline short of discharge. The General Counsel argued that deferral was inappropriate given that: 1) there was an issue of employer animosity towards employee exercise of protected statutory rights, inasmuch as the steward was engaged in protected union activity in connection with the overtime dispute; 2) the Board traditionally declines to defer where the employee in question was disciplined while acting in his capacity as a union steward; and 3) the parties' agreement contained no specific provision addressing unjust discipline short of discharge.

The Board, citing *Wonder Bread*, 343 NLRB 55, 55 (2004), first noted that all of the criteria for pre-arbitration deferral were met. Thus, the parties have had a long and productive collective-bargaining relationship; the grievance-arbitration procedure provides for a broad range of disputes; the Employer asserted its willingness to arbitrate the dispute (including waiving any timeliness or procedural objections); and there was no indication that the dispute was not eminently well-suited to arbitration. The Board explained that a single allegation that the Employer violated 8(a)(3) and (1) by issuing the employee a warning letter for engaging in protected union activity does not, by itself, establish the Employer's animosity to the exercise of Section 7 rights, especially where the parties' frequent use of the grievance machinery would indicate that its use in this case would not be futile. In this regard, the Board cited *United Aircraft Corp.*, 204 NLRB 879, 879 (1972), review denied sub nom. *Machinists Lodges 700, 743, 1746 v. NLRB*, 525 F.2d 237 (2d Cir. 1975) for its prior deferral of disputes involving alleged discrimination against union stewards where it was satisfied that the parties' grievance procedure would function properly and operate fairly. Finally, the Board explained that the mere fact that the parties' collective-bargaining agreement did not contain language specifically addressing employer discipline short of discharge was not dispositive. As the Board found in *E.I. DuPont & Co.*, 293 NLRB 896 (1988), the fact that the parties have made frequent use of the grievance machinery to arbitrate non-discharge discipline indicates that both parties consider such disputes to be subject to the grievance process.

6. INDEPENDENT CONTRACTORS

***Porter Drywall, Inc.*, 362 NLRB No. 6**

The panel majority (Pearce and Hirozawa) applied its independent contractor test announced in *FedEx Home Delivery*, 361 NLRB No. 55 (2014) and affirmed the Acting Regional Director's finding that drywall "crew leaders" are independent contractors rather than statutory employees and that the installers the crew leaders hired are employees of the crew leaders rather than of the Employer. The Board noted that in *FedEx*, it re-emphasized that its inquiry into independent contractor status assesses all of the incidents of the relationship and remains guided by the common-law factors enumerated in the *Restatement (Second) of Agency*, Second 220 (1958). Additionally, the Board stated that it clarified in *FedEx* that in assessing a putative independent contractor's entrepreneurial opportunity, the Board will give weight to actual—not merely theoretical—entrepreneurial opportunity. Finally, the Board explained that after assessing all of the relevant common-law factors, the applicable inquiry is whether the putative independent contractor is rendering services as part of an independent business.

Applying the test set forth in *FedEx*, the Board found that the following factors weighed in favor of the crew leaders as independent contractors: 1) the

Employer exercises little control over the leaders who complete general project goals in whatever manner they see fit; 2) crew leaders operate their own drywall installation businesses and do not work exclusively for the Employer and have even competed with the Employer for work; 3) the Employer performs almost no supervision over the work, and crew leaders alone are responsible for hiring, supervising, and paying their own crews; 4) crew leaders practice a skilled trade using their own equipment, tools, and supplies; 5) crew leaders work for the Employer on a project basis rather than for an indefinite time period; 6) the parties believe they have an independent contractor relationship; and 7) crew leaders have actual opportunities for entrepreneurial gain or loss, given that they do not work exclusively for the Employer, can turn down work, and make business decisions such as what type of equipment to purchase and how many installers to hire and what to pay them for particular jobs. The two factors weighing in favor of employee status—that the Employer and crew leaders are in the same business and the Employer's method of payment—did not outweigh the many factors favoring independent contractor status.

Member Johnson, concurring, noted that he continues to adhere to his dissent in *FedEx Home Delivery*. However, given that the result in the instant case would be the same as under the analysis that he advocated for in his *FedEx* dissent, he agreed with the result here.

***Sisters' Camelot*, 363 NLRB No. 13**

The Board (Pearce, Hirozawa, and McFerran), reversing the ALJ, found that canvassers are statutory employees rather than independent contractors. As a result, the Board determined that the Employer violated Section 8(a)(3) by discharging an employee canvasser and violated Section 8(a)(1) by making a statement of futility and by its grant of benefits. The Board noted that in its recent decision in *FedEx Home Delivery*, 361 NLRB No. 55 (2014), it re-emphasized that its inquiry into independent contractor status assesses all of the incidents of the relationship and remains guided by the common-law factors enumerated in the *Restatement (Second) of Agency*, Second 220 (1958). Additionally, the Board stated that it clarified in *FedEx* that in assessing a putative independent contractor's entrepreneurial opportunity the Board will give weight to actual—not merely theoretical—entrepreneurial opportunity. Finally, the Board explained that after assessing all of the relevant common-law factors, the applicable inquiry is whether the putative independent contractor is rendering services as part of an independent business. The party asserting the independent contractor status bears the burden of proving that status.

The Employer provides food to low-income individuals and uses "canvassers" to solicit door-to-door donations. The canvassers formed a union and a canvasser was discharged for engaging in protected concerted activity. Applying the *FedEx* test, the Board found the following factors weigh in favor of the canvassers as employees rather than independent contractors: 1) although canvassers are not required to work on any given day, the Employer exercises significant control over them when they do work, including by setting daily start and end times, directing canvassers' work, not allowing canvassers to solicit for other organizations while they work, and disciplining and terminating canvassers; 2) canvassers are not engaged in a distinct business—thus, although the canvassers are permitted to work for multiple employers, potential donors will clearly identify the canvassers as working for the Employer through their presentations and materials; 3) canvassers' work is significantly monitored through the Employer's required completion of detailed paperwork; 4) canvassing requires no significant skill or experience; 5) canvassers do not provide any of their own equipment or materials, and receive all transportation from the Employer; 6) canvassers are employed for indefinite time periods; 7) the Employer tightly controls canvassers' compensation through a nonnegotiable flat commission rate and by strictly defining where they may work; 8) canvassing is an integral and indispensable part of the Employer's business; and 9) canvassers have no actual entrepreneurial opportunity inasmuch as they make no monetary investment in their work, have no proprietary interest in their assigned territories, no discretion to implement a business strategy for developing a customer base, and are prohibited from subcontracting parts of their route to others. The one factor weighing in favor of independent contractor status, namely that the parties believed that they were creating an independent contractor relationship, was outweighed by the overwhelming evidence establishing employee status.

7. PROTECTED CONCERTED ACTIVITY

***Pier Sixty, LLC*, 362 NLRB No. 59**

The Board majority (Pearce and McFerran) determined that the Employer—a catering service company—violated Section 8(a)(3) by discharging an employee for his protected, concerted social media posting that included vulgar and obscene language. Member Johnson joined the panel in affirming the ALJ's conclusion that the Employer violated Section 8(a)(1) by threatening employees with a loss of benefits, job loss, and discharge; informing employees that it would "bargain from scratch;" and disparately enforcing a "no talk" rule.

Employees began an organizing campaign in response to what they viewed as managers' hostile and degrading treatment. Two days prior to the election, while at work, the discriminatee became upset by several rude comments from a supervisor, which he viewed as being consistent with managers' history of hostile behavior. The discriminatee complained to a coworker, who advised him to take a break to calm down. Following the co-worker's advice, the discriminatee took a break, walked outside, and vented his frustration on his personal Facebook page with the following message:

> [The supervisor] is such a NASTY MOTHER FUCKER don't know how to talk to people!!!!!! Fuck his mother and his entire fucking family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!

The discriminatee's post was visible to his Facebook "friends," which included some co-workers, and to others who visited his personal Facebook page. He deleted the post the day after the election but was terminated shortly thereafter for allegedly violating company policy. However, the Employer declined to provide any policy or explain its decision, and the evidence established that obscene language was routinely tolerated at the Employer's workplace, including managers regularly using racial slurs and epithets such as "motherfucker" and "asshole."

The Board first noted that the discriminatee's Facebook post constituted protected concerted activity and union activity, inasmuch as the comments were part of a sequence of employee actions designed to address what employees viewed as demeaning treatment from management. Next, the Board concluded that the comments were not so egregious as to lose the protection of the Act. In so doing, however, the Board disavowed the ALJ's reliance on *Atlantic Steel Co.*, 245 NLRB 814 (1979), and instead—in the absence of exceptions to its application—adopted the ALJ's alternative totality of the circumstances rationale, citing *Richmond District Neighborhood Ctr.*, 361 NLRB No. 74, slip op. at 2 n.6 (2014). The Board agreed with the ALJ that the following factors weighed in favor of protection: 1) the Employer's antiunion hostility; 2) the Employer provoked the discriminatee's conduct; 3) the discriminatee's conduct was impulsive; 4) the discriminatee posted the comments alone, on break, and outside the Employer's facility; 5) the subject matter of the post clearly echoed other employees' previous complaints about disrespectful management; 6) the Employer's widespread tolerance of profanity and familial slurs in the workplace; and 7) the absence of evidence that the Employer maintained a policy prohibiting obscenities or had discharged another employee solely for using obscenities in the past.

Member Johnson dissented from the panel majority's conclusion that the Employer unlawfully terminated the discriminatee for his Facebook comments. Citing *Honda of America Mfg.*, 334 NLRB 746, 747-749 (2001), Member Johnson would find that under the totality of the circumstances the discriminatee was not discharged for union or protected activity but rather for his vulgar and obscene Facebook rant. Moreover, citing his dissents in *Plaza Auto Center, Inc.*, 360 NLRB No. 117, slip op. at 15 (2014) and *Jimmy John's*, 361 NLRB No. 27, slip op. at 10 (2014), Member Johnson would find the discriminatee's Facebook post to be so uncivil and opprobrious as to remove it from the Act's protection. Member Johnson also voiced his concern that by considering all of the factors espoused by the ALJ, the Board was converting *Atlantic Steel's* traditional four-factor test into an *Atlantic*

Steel test "on steroids" that is susceptible to manipulation based on "agency whim." In any event, Member Johnson would not protect the discriminatee's offensive, "beyond the pale" behavior that happens to overlap with protected activity.

***Central States Southeast and Southwest Areas, Health & Welfare and Pension Funds*, 362 NLRB No. 155**

The Board (Hirozawa, Johnson, and McFerran), reversing the ALJ, found that the Employer violated Section 8(a)(1) by threatening an employee with discipline unless he removed a written disciplinary letter that he had posted in his work area. Further, the panel majority (Hirozawa and McFerran) concluded that the Employer committed an additional violation of 8(a)(1) inasmuch as this threat constituted an orally-promulgated rule of general application.

The Employer issued the employee a written warning at a disciplinary meeting for continuing to use an electronic tablet after being instructed not to the previous day. The employee discussed the incident with several co-workers and then laminated the warning and posted it to his cubicle. The employee grieved the disciplinary letter, and during the grievance hearing—at which several employee stewards were present—the employee was informed that posting the disciplinary letter was insubordinate and that he would be suspended if he did not remove it. The employee removed the letter.

Citing *Philips Electronics*, 361 NLRB No. 16, slip op. at 2 (2014), the Board first explained that an employer may not prohibit employees from discussing discipline unless the employer asserts a legitimate and substantial business justification that outweighs employees' exercise of Section 7 rights. The Board noted that it need not address whether the posting of a disciplinary warning, standing alone, would constitute protected activity, because the employee's posting of the warning clearly related to his communications with his co-workers about the warning and was therefore protected Section 7 activity. The Board rejected the Employer's asserted business justification—that posting the letter was disruptive and insubordinate—because it had no "factual basis" and would effectively permit the Employer to pick and choose how its employees could communicate with each other regarding disciplinary matters.

Members Hirozawa and McFerran also concluded that the Employer's instruction to the employee to remove the disciplinary letter constituted an oral promulgation of an unlawful work rule. The Board distinguished *Teachers AFT New Mexico*, 360 NLRB No. 59 (2014), relied on by the ALJ, wherein the Board concluded that no oral rule had been promulgated because the statements had not been communicated to other employees and thus would not be construed as establishing a general rule. Here, by contrast, the Employer's instruction to remove the posting was communicated in the presence of four employee stewards and implicitly carried a warning that the Employer would react similarly in the future were another employee to post a disciplinary letter, leading employees to reasonably interpret the instruction as establishing a new work rule of general applicability. Member Johnson, however, would have affirmed the ALJ's dismissal of the work-rule allegation. In his view, given that the stewards were only present at the disciplinary meeting to advocate for the disciplined employee's Section 7 rights, the stewards would not have understood the instruction to remove the posting directed at the individual employee to have established a general work rule.

***Beyoglu*, 362 NLRB No. 152**

The panel majority (Pearce and McFerran), affirming the ALJ, held that the Employer violated Section 8(a)(1) by discharging an employee for individually filing a collective action lawsuit on behalf of himself and other employees alleging violations of the Fair Labor Standards Act ("FLSA").

Citing *D.R. Horton*, 357 NLRB No. 184 (2012), enf. denied in part 737 F.3d 344 (5th Cir. 2013) and *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), the Board explained that it has long held that the filing of a lawsuit by a *group* of employees is protected Section 7 activity. The Board noted that this was the first instance where it has been squarely presented with the question of whether an individual employee filing an employment-related class or collective action lawsuit constitutes protected activity. The Board concluded that such individual action does qualify as protected Section 7 activity, inasmuch as the filing of a collective employment-based lawsuit is an effort to "initiate or to induce or to prepare for group action" under the principles of *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988), as set forth in *D.R. Horton* and *Murphy Oil*.

Member Miscimarra, dissenting, would not find that a single employee filing a class or collective-action lawsuit automatically engages in Section 7 activity. Citing his dissents in *Murphy Oil* and *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12 (2014), Member Miscimarra explained that while a broad range of concerted activities by two or more employees regarding a non-NLRA claim *may* be protected under the Act, such activity must still satisfy Section 7's two statutory requirements regardless of whether the non-NLRA claim is styled as a class or collective action, namely, that there is concerted activity by two or more employees engaged in for the purpose of collective bargaining or other mutual aid or protection. Member Miscimarra observed that the discharged employee here testified that he mentioned filing the lawsuit to a co-worker, which might satisfy Section 7's requirement that the activity induce group action. However, because the Employer had no *knowledge* of that conversation, Member Miscimarra would hold that the Employer cannot be charged with a violation of 8(a)(1). Finally, Member Miscimarra emphasized that the discharged employee had a remedy available under the FLSA, which prohibits employers from discriminating against employees for filing FLSA claims. By providing a remedy under the Act, Member Miscimarra believes that the Board is improperly assisting in the enforcement of other statutes not under its jurisdiction.

***Sun Cab, Inc. d/b/a Nellis Cab Company*, 362 NLRB No. 185**

The Board (Miscimarra, Johnson, McFerran), affirming the ALJ, unanimously concluded that the Employer violated Section 8(a)(1) by suspending 17 employees who engaged in a concerted work stoppage (the "extended break") to protest a proposed regulatory action that could affect their pay.

The Employer is a taxicab company that employs over 300 cab drivers. Drivers are required to take a 1-hour break during their shifts. Seventeen of the Employer's drivers took part in a mass protest in their taxicabs, the extended break, against a regulatory proposal supported by the Employer and other taxicab companies that would potentially reduce the drivers' earnings by increasing the number of taxicab medallions. The extended break lasted around 2-3 hours, but a majority of the drivers incorporated their hour-long break as part of the extended break. The Employer did not require the drivers to return the taxicabs during the extended break. When the Employer asked the drivers to return to the yard after the extended break, all of them complied. The Employer interrogated the drivers about the motive behind the break and disciplined the drivers for their participation.

The Board concluded that the extended break was protected and the discipline unlawful. The Board rejected the Employer's contention that the extended break, an undisputed concerted activity, was not protected because the Employer had no control over the regulatory action subject of the protest and could not remedy the employees' concerns. The Board found instead that the Employer and other taxicab companies sought to influence the regulatory authority to approve the increase in taxicab medallions and that the extended break was intended to "influence the influencers."

Next, applying *Quietflex Mfg. Co.*, 344 NLRB 1055 (2005), the Board agreed with the judge that the employees' conduct did not lose its Section 7 protection. The majority of the *Quietflex* factors support a finding of protected activity: (1) the reason for the extended break was to protest a measure that employees believed would impact their earnings; (2) the extended break was peaceful; (3) the employees did not refuse the Employer's instructions to return taxicabs to the yard, therefore there was minimal interference with the Employer's property (the taxicabs); (4) the employees' prompt compliance with the Employer's request to return the taxicabs shows there was no attempt to "seize" the Employer's property; (5) the Employer never warned the employees to return the taxicabs to avoid potential discipline; (6) the extended break was of short duration; and (7) the employees were not represented and had no established grievance procedure resolve. Only two factors weigh against protection: (1) there was some interference with the Employer's property rights in that 17 taxicabs were removed from service for a period of time and (2) although there was no grievance procedure, the Employer had an "open door" policy, but the employees did not avail themselves of that opportunity to bring their concern to the Employer. The Board therefore concluded that, under the great majority of the *Quietflex* factors, the extended break was protected activity.

The Board also unanimously found that the Employer violated Section 8(a)(1) by interrogating employees about the identity of the leader of the "extended break." Further, a Board Panel majority consisting of Member Johnson and Member McFerran found that the Employer violated Section 8(a)(1) by interrogating employees about why they engaged in the "extended break," and threatening an employee with loss of benefits and discharge. Member Miscimarra dissented with respect to those findings. Finally, affirming the judge, the Board unanimously dismissed an allegation that the Employer unlawfully discharged an employee, on the grounds that the General Counsel failed to meet his initial burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

8. SUPERVISORY STATUS

G4S Regulated Security Solutions, (USA) Inc., f/k/a The Wackenhut Corp., 362 NLRB No. 134

The panel majority (Pearce and Hirozawa) held that the Employer failed to meet its burden of proving that two lieutenants in its security force were statutory supervisors. Rather, they were statutory employees and thus were unlawfully suspended and discharged in violation of Section 8(a)(1).

The Board explained that to prove supervisory status, the statute requires evidence of actual supervisory authority visibly translated into tangible examples demonstrating the existence of such authority: mere inferences or conclusory statements, without detailed, specific evidence, are insufficient to establish supervisory authority; and job descriptions, job titles, and similar "paper authority," without more, do not demonstrate supervisory authority. Further, authority to discipline other employees is not determinative unless it is exercised using independent judgment.

The Employer argued that the lieutenants were supervisors based on their alleged disciplinary authority, relying on the testimony of a facility project manager and on disciplinary notices signed by the lieutenants. The Board found the evidence insufficient to meet the Employer's burden. The testimony, which was by a senior manager several levels removed from the lieutenants in the hierarchy, consisted chiefly of conclusory responses to leading questions; did not describe what procedures, protocols, criteria, or other factors, if any, governed lieutenants' disciplinary actions; and identified no specific instance in which a lieutenant had exercised discretion or independent judgment regarding discipline. The disciplinary notices, which were signed but not prepared by the two lieutenants, were also insufficient under this standard because they involved routine infractions of specific provisions of the attendance and progressive discipline policies, which mandated the level of discipline that the notices imposed. Thus, the lieutenants' involvement in the disciplinary process did not involve the exercise of discretion or require independent judgment in making the determination.

The Board rejected the dissent's argument that it was a applying a different "'undefined higher-level threshold of proof'" in finding that the lieutenants were not supervisors. Rather, the Board cited to an earlier case involving the same respondent, finding lieutenants were not supervisors, and citing the same reasons on which the Board relied here in finding an evidentiary absence of independent judgment in exercising disciplinary authority.

Member Miscimarra dissented, finding that the lieutenants were statutory supervisors based on their authority to discipline employees and to exercise independent judgment when imposing discipline.

9. REMEDY

Mezonos Maven Bakery, Inc., 362 NLRB No. 41

The Board addressed whether it should order the conditional reinstatement of employees who, at the time of their unlawful discharge, lacked proper documentation to work in the United States. The Board held in the affirmative.

In 2005, the Board issued a Decision and Order requiring the Employer to make the discriminatees whole with backpay and the offer of unconditional reinstatement, except that the Employer could attempt in compliance to establish that one or more of the discriminatees was not entitled to an unconditional offer of reinstatement. The Second Circuit enforced the Board's Order.

The General Counsel subsequently issued a compliance specification seeking backpay and unconditional offers of reinstatement. In the proceedings, the Employer contended that *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) precluded backpay and reinstatement because the discriminatees were not legally authorized to work in the U.S. The Employer sought to examine them as to their immigration status but the discriminatees objected. The GC ultimately agreed to proceed on the assumption that they were undocumented and modified the requested remedy to conditional reinstatement.

The judge recommended backpay, finding *Hoffman* distinguishable because here the Employer was the IRCA violator and knowingly employed undocumented workers. The judge also found that *Hoffman* did not preclude conditional reinstatement, but failed to include it in his Order. The Board's Supplemental Decision and Order reversed the judge's backpay grant but did not address conditional reinstatement. On petition for review, the Second Circuit remanded that issue, stating that the Board did not address it and that it was "skeptical" that it was not an appropriate remedy. The Board invited statements of position from the parties. The GC and discriminatees did so; the respondent did not.

The Board first held that the GC and the discriminatees were not estopped from seeking a conditional reinstatement order. The Board may address remedial matters in the absence of exceptions. Here, the GC explicitly requested conditional reinstatement at the hearing, and although neither the GC nor the discriminatees excepted to the judge's failure to order the remedy, and the Board did not discuss it, the issue was sufficiently raised and litigated before the Board. Moreover, no party was prejudiced by the Board's consideration of conditional reinstatement, as the parties had the opportunity to file position statements.

The Board next found nothing in IRCA or the cases interpreting it that cast doubt on the use of conditional reinstatement for undocumented workers. It noted that in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), the Supreme Court approved the use of conditional reinstatement remedies for unlawfully discharged undocumented workers. Although *Sure-Tan* was pre- IRCA, the Board in *A.P.R.A. Fuel Oil Buyers Group*, 320 NLRB 408 (1995), enfd. 134 F.3d 50 (2d Cir. 1997) later reaffirmed the appropriateness of conditional reinstatement orders under IRCA. The Board then concluded that *Hoffman* did not foreclose conditional reinstatement.

Finally, the Board held that conditional reinstatement is an appropriate remedy where, as here, an employer *knowingly* employs individuals who lack authorization to work in the United States and then discharges them in violation of the NLRA. The Board explained that conditional reinstatement accommodates the interests protected by the Federal immigration laws as it allows reinstatement only if the employee provides the necessary documentation under IRCA. Such a remedy in the immigration context is also consistent with the Board's practice in other circumstances where reinstatement would require the removal of a legal disability, such as where reinstatement of a driver whose license had been suspended is conditioned on presentation of a valid driver's license. Thus, ordering conditional reinstatement would effectuate the policies of the Act.

The Board's order required the Employer to provide the discriminatees a reasonable period of time to meet the condition for reinstatement but stated that those matters could be resolved in subsequent compliance proceedings.

J&J Snack Foods Handhelds Corp., 363 NLRB No. 21

The Board (Pearce, Hirozawa, McFerran) affirming the ALJ, found that the Employer committed multiple violations of Section 8(a)(1) and (5). The Board modified the judge's recommended order by requiring that the notice be read to employees in English and Spanish.

Agreeing with the judge, the Board found that the Employer violated Section 8(a)(1) by: (1) telling employees that the Union's representative was no longer permitted on the Employer's premises; (2) denigrating and disparaging the Union; and (3) encouraging employees to abandon support for the Union and its representative. The Board also affirmed the judge's findings that the Employer violated Section 8(a)(5) and (1) by: (1) ceasing its practice of providing employees with cooked food products in the cafeteria; (2) making a number of unilateral changes to the Union representatives' access to the facility; (3) failing and refusing to recognize the Union's representative; and (4) banning the Union's representative from the facility. The Employer did not except to additional findings that it violated: (1) Section 8(a)(1) by soliciting employee complaints and grievances, thereby promising increased benefits and improved terms and conditions of employment if they abandoned their support for the Union; and (2) Section 8(a)(5) by soliciting employees to indicate whether their contact information could be shared with the Union and to communicate shift preferences directly to the Employer in a manner that implied that granting the shift preference depended on whether they indicated their contact information could be shared with the Union.

Although the General Counsel did not request a notice reading, the Board, relying on "its broad discretionary authority under Section 10(c) to fashion appropriate remedies," ordered the reading of the Notice to Employees as a remedy. The Board concluded that the violations were "sufficiently serious and widespread" that a notice reading was necessary to dissipate as much as possible the lingering coercive effects of the Employer's violations. The Board noted that a letter to employees from a high-level manager that denigrated and disparaged the Union and encouraged employees to abandon their Union support was "particularly powerful" in undermining employees' free exercise of their Section 7 rights.

10. SIGNIFICANT *NOEL CANNING* CASES REAFFIRMED

Banner Estrella Medical Center, 362 NLRB No. 137

After the Supreme Court issued its decision in *NLRB v. Noel Canning,* 134 S. Ct. 2550 (2014), the D.C. Circuit vacated the Board's prior decision in this case, reported at 358 NLRB No. 93 (July 30, 2012), and remanded the case for consideration de novo. The panel majority (Hirozawa and McFerran), reversing the ALJ, held once again that the Employer violated Section 8(a)(1) by unlawfully requesting that employees involved in a workplace investigation not discuss the matter with their coworkers while the investigation was ongoing. The majority held that an employer has the burden to justify a prohibition on employees discussing a particular ongoing investigation. Thus, the employer cannot reflexively impose confidentiality requirements in all cases or in all cases of a particular type. Instead, the employer must proceed on a case-by-case basis and determine that confidentiality is necessary in a particular case based on objectively reasonable grounds for believing that the integrity of the investigation will be compromised without confidentiality. Member Miscimarra dissented, finding that a routine request that employees treat ongoing investigations as confidential is sufficiently narrowly tailored to be lawful.

***Finley Hospital*, 362 NLRB No. 102**

The panel majority (Pearce and McFerran) reconsidered the ALJD de novo, and agreed with the rationale in the Board's prior decision, reported at 359 NLRB No. 9 (Sept. 28, 2012), and vacated in light of *Noel Canning*. Thus, affirming the ALJ, the majority concluded that the Employer violated Section 8(a)(5) and (1) when, after the parties' collective-bargaining agreement expired, the Employer unilaterally discontinued the annual pay raises provided for in the agreement. The majority found that contract language requiring payment of annual raises "[f]or the duration of this Agreement" did not clearly and unmistakably waive the Union's statutory right to bargain over the discontinuation of the raises after the contract expired. Dissenting Member Johnson would have found that the Employer's duty to give raises was limited to the duration of the contract.

***King's Fire Protection, Inc.*, 362 NLRB No. 129**

In this post-*Noel Canning* case, the panel majority (Hirozawa and McFerran) once again affirmed the ALJ, for the reasons stated in its prior decision, reported at 358 NLRB No. 156 (Sept. 27, 2012). The majority found that the Employer had a Section 9(a) bargaining relationship with the Union, rather than a Section 8(f) relationship, based solely on the language of the parties' 2005 agreement, which satisfied the requirements of *Central Illinois Construction (Staunton Fuel)*, 335 NLRB 717 (2001). Specifically, the relevant language stated that the Employer "freely and unequivocally acknowledges that it has verified the Union's status as the exclusive bargaining representative of its employees pursuant to Section 9(a) of the Act … and the Union has offered to provide the Employer with confirmation of its support by a majority of such employees[.]" Member Miscimarra dissented on the grounds that record evidence undermined the agreement's representation that the Union had established majority support.

***Lincoln Lutheran of Racine*, 362 NLRB No. 188**

The full Board reexamined whether an employer's obligation to check off union dues from employees' wages terminates upon expiration of a collective-bargaining agreement, since *WKYC-TV, Inc.*, 359 NLRB No. 30 (Dec. 12, 2012), was rendered by a constitutionally infirm Board. A majority of the Board (Pearce, Hirozawa, and McFerran) held that such an obligation, like most other terms and conditions of employment, continues after contract expiration. However, the holding of the case will be applied only prospectively because it reverses longstanding substantive law, i.e. *Bethlehem Steel Co.*, 136 NLRB 1500 (1962), *remanded on other grounds sub nom. Marine and Shipbuilding Workers v. NLRB*, 320 F.2d 625 (3d Cir. 1963), and its progeny. Members Miscimarra and Johnson dissented, arguing that the Board should continue to adhere to the *Bethlehem Steel* exception.

***Piedmont Gardens*, 362 NLRB No. 139**

In light of *Noel Canning*, the Board set aside its prior decision, reported at 359 NLRB No. 46 (Dec. 15, 2012), and reconsidered the ALJD de novo. A majority (Pearce, Hirozawa, and McFerran) once again decided to overrule *Anheuser-Busch's* blanket exemption for witness statements from the general duty to furnish information. *See* A*nheuser-Busch, Inc.*, 237 NLRB 982, 984-85 (1984). The Board held that in future cases, when an employer argues that it has a confidentiality interest in protecting witness statements from disclosure, the Board will apply the balancing test set forth in *Detroit Edison Co. v. NLRB*, 440 U.S. (1979). Under that test, the Board balances the union's need for the requested information against any legitimate and substantial confidentiality interests established by the employer. Dissenting members Miscimarra and Johnson would continue to maintain a blanket exemption for witness statements.

***Coca Cola Puerto Rico Bottlers*, 362 NLRB No. 125**

Once again, after setting aside a prior decision, reported at 358 NLRB No. 129 (Sept. 18, 2012), in light of *Noel Canning*, the panel majority (Pearce and Hirozawa) held that a strike that was not authorized by the employees' collective-bargaining representative was nonetheless protected. Noting that not all unauthorized or "wildcat" strikes are unprotected, the majority found that here the employees were not attempting to bargain directly with the Employer and their position was not inconsistent with the Union's position. Therefore, affirming the ALJ, the majority concluded that the striking employees were engaged in protected concerted activity. Accordingly, the Employer violated Section 8(a)(3) and (1) by suspending and/or terminating them for that activity, and the Union violated Section 8(b)(1)(A) by sanctioning three of the stewards for that activity. Member Johnson, dissenting, would have found that the employees engaged in an unprotected wildcat strike.

***Alamo Rent-A-Car*, 362 NLRB No. 135**

Finally, in this post-*Noel Canning* decision, the panel majority (Pearce and McFerran) once again amended the remedy proposed by the ALJ for the Employer's failure to deduct and remit dues after it unlawfully withdrew recognition, and before the collective-bargaining agreement expired. As in its vacated decision, reported at 359 NLRB No. 149 (July 2, 2013), the majority amended the remedy to require the Employer to reimburse the Union for dues that the Employer unlawfully failed to deduct and remit, with interest, and without recouping the dues amounts from employees. Member Miscimarra dissented, maintaining that such a remedy is punitive.