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UNITED STATES GOVERNMENT
**NATIONAL LABOR RELATIONS BOARD**
FREEDOM OF INFORMATION ACT BRANCH
Washington, D.C. 20570

*Via email*

April 17, 2020

Re: FOIA Case No. NLRB-2019-000065

This is in response to your request, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, received in this Office on October 22, 2018, in which you request an electronic copy of thirty-eight (38) NLRB Significant Advice Memoranda (SAMs) listed in the chart that was provided in response to your previous FOIA Request LR-2017-0092. You assumed fees in the amount of $25.00 for the processing of your request.

We acknowledged your request on October 22, 2018. In an email communication dated November 7, 2018, a member of my staff informed you that ten of the requested SAMs were already available on the Agency's public website at https://www.nlrb.gov/guidance/memos-research/advice-memos and provided you with the links to those records. Based on that email, you agreed to exclude those records from your request, i.e. the SAMs in Case Nos. 03-CA-176218, 13-CA-163079, 05-CA-138613, 12-CA-165643, 28-CA-167277, 21-CA-150875, 01-CA-144463, 13-CA-134294, 20-CA-130613, and 19-CA-125339. We regret the delay in our final response.

Your request is granted in part and denied in part, as explained below.

A search of the Agency's electronic casehandling system, NxGen, was conducted to locate the remaining requested SAMs. This search revealed that Case No. 10-RD-149908 is not a real case file. It was created by employees in the Office of the Chief Information Officer to test the deployment of new features in the Agency's electronic casehandling system. Accordingly, there was no responsive record contained in that case file. However, the remaining requested SAMs were located by our search. After review of these records, I have determined that 21 of the remaining 27 SAMs are releasable with redactions, and they are attached here. Redactions were made to these responsive memoranda pursuant to FOIA Exemptions 6 and 7(C) to protect the privacy interests of individuals referenced therein. 5 U.S.C. § 552(b)(6) and (b)(7)(C). Certain portions of the attached memoranda have also been redacted to protect confidential,

"commercial or financial information" that is arguably covered by Exemption 4, 5 U.S.C. § 552(b)(4). *See Food Mktg. Inst. v. Argus Leader Media*, 139 S.Ct. 2356, 2366 (2019) (SNAP data from individual grocery retailers found to be "confidential" within meaning of Exemption 4 as requested information was treated as private by its owners and provided to the government under an assurance of privacy). Here, the redacted material includes sensitive financial information about some of the parties that was received by the Agency during the course of its investigation into the underlying unfair labor practice allegations. Finally, other redactions have been made pursuant to FOIA Exemption 5, 5 U.S.C. § 552(b)(5), to protect casehandling guidance from attorneys in the NLRB's Office of General Counsel to regional personnel. Exemption 5 protects advice, recommendations and opinions that are part of the Agency's deliberative and decision-making process, *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (citing *NLRB v. Sears, Roebuck & Co.,* 421 U.S. 132, 150 (1975)), as well as the opinions and legal theories that are contained in records prepared in anticipation of litigation. *Judicial Watch v. United States Dep't of Justice,* 432 F.3d 366, 371 (D.C. Cir. 2005).

Six of the responsive SAMs identified in the search are being withheld in their entirety pursuant to FOIA Exemptions 5 and 7(A), 5 U.S.C. § 552(b)(5) and (b)(7)(A), as explained below.

The responsive memorandum in *Providence Tarzana Medical Center*, Case No. 31-CA-173364 is being withheld in its entirety pursuant to Exemption 5 as it contains casehandling guidance that directs neither the issuance of a complaint nor the dismissal of a charge. Accordingly, it does not fall under the Agency policy that releases advice memorandum in certain closed cases in the General Counsel's discretion, and is being withheld in its entirety as casehandling guidance pursuant to FOIA Exemption 5. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 154, 159-160 (1975) (establishing that NLRB Advice and Appeals Memorandum are privileged from disclosure as attorney work-product since they are "prepared by an attorney in contemplation of litigation" and set forth the "attorney's theory of the case and his litigation strategy").

The remaining five, responsive memoranda in *Michael Cetta, Inc. d/b/a Sparks Restaurant,* Case No. 02-CA-142626, *Hospital Español Auxilio Mutuo de Puerto Rico*, Case No. 12-CA-175136, *United Site Services of California, Inc.,* Case No. 20-CA-139280, *Preferred Building Services, Inc. and Rafael Ortiz d/b/a Ortiz Janitorial Services, Joint Employers,* Case No. 20-CA-149353, and *Hospital of Barstow Inc., d/b/a Barstow Community Hospital and Community Health Systems, Inc.,* Case No. 31-CA-124540 are parts of the investigative files in open cases. Thus, they are exempt from disclosure at this time pursuant to FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A). Exemption 7(A) allows an agency to withhold records included in an open investigatory file where disclosure could reasonably be expected to interfere with a pending enforcement proceeding. *See NLRB v. Robbins Tire & Rubber Co.,* 437 U.S. 214, 236 (1978). Because the release of any investigatory records at this point in the proceedings could interfere with the pending cases, your request for these particular

SAMs is denied at this time. Please be note, however, that these memoranda may become disclosable, subject to applicable exemptions, after the cases close, that is, once there has been full compliance with a settlement, or the cases have otherwise been closed under Agency procedures. Accordingly, you may wish to file a new request at that time.

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 of the other fee categories. Consistent with this fee category, you will be assessed charges to recover the reasonable direct costs for searching for the requested records, except that you will not be charged for the first two hours of search. NLRB Rules and Regulations, 29 C.F.R. § 102.117(d)(2)(ii)(D). Charges for all categories of requesters are $9.25 per quarter hour 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 assessed for this request.

You may contact Marissa Wagner or Michael Maddox, the FOIA Attorneys who processed your request, at (202) 273-2957 or (202) 273-0013, or by email at marissa.wagner@nlrb.gov or michael.maddox@nlrb.gov, as well as the Agency's FOIA Public Liaison, Patricia A. Weth, for any further assistance and/or to discuss any aspect of your request. The FOIA Public Liaison, in addition to the FOIA Specialist or Attorney-Advisor, can further explain responsive and releasable agency records, suggest agency offices that may have responsive records, and/or discuss how to narrow the scope of a request in order to minimize fees and processing times. The contact information for the Agency's FOIA Public Liaison is:

Patricia A. Weth
FOIA Public Liaison
National Labor Relations Board
1015 Half Street, S.E., 4th Floor
Washington, D.C. 20570
Email: FOIAPublicLiaison@nlrb.gov
Telephone: (202) 273-0902
Fax: (202) 273-FOIA (3642)

After first contacting the Agency, you may additionally contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA dispute resolution services it offers. The contact information for OGIS is:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, Maryland 20740-6001

Email: ogis@nara.gov
Telephone: (202) 741-5770
Toll free: (877) 684-6448
Fax: (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 administrative appeal with the Division of Legal Counsel (DLC) through FOIAonline at: https://foiaonline.gov/foiaonline/action/public/home or by mail or email at:

Nancy E. Kessler Platt
Chief FOIA Officer
National Labor Relations Board
1015 Half Street, S.E., 4th Floor
Washington, D.C. 20570
Email: DLCFOIAAppeal@nlrb.gov

Any appeal must be postmarked or electronically submitted 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.

Please be advised that contacting any Agency official (including the FOIA Specialist, Attorney-Advisor, FOIA Officer, or the FOIA Public Liaison) and/or OGIS does not stop the 90-day appeal clock and is not an alternative or substitute for filing an administrative appeal.

Sincerely,

/s/ *Synta E. Keeling*

Synta E. Keeling
Freedom of Information Act Officer

Attachment: (285 pages)

*United States Government*
*National Labor Relations Board*
**OFFICE OF THE GENERAL COUNSEL**

# Advice Memorandum

S.A.M.

DATE: December 12, 2016

TO: John J. Walsh, Jr., Regional Director
Region 1

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Zane's, Inc.
Cases 01-CA-167721, 01-CA-178261,
01-CA-181191

512-5006-5036-0000
512-5081-7000-0000
524-3325-1400-0000
524-3350-5800-0000

The Region submitted this case for advice as to whether the Employer violated Sections 8(a)(1), (3), and (4) of the Act when, after the Union filed an unfair labor practice charge alleging that three employees had been unlawfully laid off, it hired a firm to scrutinize the immigration documents of the laid off employees and then communicated this to Union representatives in bargaining. We conclude that the Employer's course of conduct violated Section 8(a)(1), (3), and (4) because it was motivated by employees' protected activity and unlawfully interfered with Board processes.

## FACTS

Zane's, Inc. ("the Employer") operates two retail stores and a warehouse in Connecticut selling bicycles and bicycle accessories. In the summer of 2015,[1] the Employer employed approximately eight warehouse employees to assemble and package bicycles. Some of these employees began organizing with the United Food and Commercial Workers Local 919 ("the Union") and the Union filed a petition to represent the unit. Soon after, the Employer brought in a former supervisor who urged employees to vote against the Union and told them that if they voted for the Union they would be paid at the minimum wage or drop to the bottom of the pay scale. On September 9, the employees voted six to two in favor of Union representation in a Board election.

The Employer and Union met to bargain twice in November but made little progress. The Union organizer/business agent also visited the shop in late November.

[1] All dates are in 2015 until otherwise noted.

At that time, (b) (6), (b) (7)(C) told him that business was down and that it would need to lay off the employee who had served as (b) (6), (b) (7)(C) during the election because [redacted] was the "weakest" in terms of production. The Union immediately sent a letter to the Employer informing it that it was obligated to negotiate over the manner of the layoff and asking for a variety of information. The Employer did not respond to the Union's communications, but did not take any immediate action regarding the employee.

The Employer refused to bargain in December claiming it was too busy and said it could only bargain in January 2016. The Union contacted the Employer various times in December to confirm the January 2016[2] date and to request additional January dates. The Employer finally confirmed that it would bargain on January 8 but said it would not bargain on any other date in January.

At the [redacted] session, the Union began by expressing concern regarding the Employer's failure to respond to its communications. The parties then reviewed the Union's proposed contract but the Employer did not offer feedback on most of the articles and said it would have to get back to the Union. At the end of the meeting, the Employer told the Union that because sales were down [redacted] would need to lay off three workers as of that day (including [redacted]) and in two weeks would possibly need to lay off two additional workers. In response to a question from one of the Union representatives, the Employer said it would bring back the workers once business picked up. Of the three employees laid off, two had been employed by the Employer for approximately [redacted], and the third had been employed by the Employer for approximately [redacted].

On January 14, the Union filed unfair labor practice charges alleging that the Employer violated the Act by, among other things, laying off employees because of their union activity in violation of Sections 8(a)(1) and (3), and failing to bargain in good faith in violation of Section 8(a)(1) and (5). On February 2, the laid off employees, along with a news reporter and a number of community organizations, delivered a petition to the Employer requesting reinstatement and that the Employer negotiate in good faith. The employees also delivered a letter from a U.S. Congresswoman.

The Employer explains in its position statement that around February, in connection with the unfair labor practice charge filed by the Union, it requested advice from counsel as to its potential financial exposure and possible defenses to any claim for back pay and reinstatement. It therefore "undertook a review of the I-9

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[2] All further dates are in 2016 unless otherwise noted.

documentation previously produced by the three laid off employees." As a result of that review, the Employer concluded that the documentation submitted by each laid off employee (in [redacted] and [redacted] respectively) was fraudulent, rendering the employees ineligible for continued employment.

At a bargaining session on March 4, the Union asked the Employer if it was prepared to rehire the three laid off employees. The Employer requested to discuss that issue at the end of the meeting. The Union agreed and, after the parties discussed contract proposals for a short time, (b) (6), (b) (7)(C) pulled out a folder and told the Union that there was a problem. [redacted] showed the Union representatives the I-9 documents of the three laid off employees, which had circles in various locations. [redacted] explained that there were misspellings and incorrect alignment. [redacted] said that after consulting with [redacted] attorney, they had determined that the documents were fraudulent and that [redacted] could not rehire the laid off employees because they had "bad papers." The Union organizer/business agent asked when (b) (6), (b) (7)(C) had found this out because the Employer had employed the employees for [redacted] years. (b) (6), (b) (7)(C) got angry and asked if the Union was telling [redacted] to break the law. [redacted] then said that it was the Union's fault and that the Union had forced [redacted] into this with the charges it had filed.

(b) (6), (b) (7)(C), the two employees that the Employer had threatened to lay off in (b) (6), (b) (7)(C) quit their jobs because they were scared they would be fired. One of these employees told the Union organizer/business agent that [redacted] and the other employee were nervous about being deported and did not believe the Employer would negotiate a contract.

The Union filed amended charges alleging that the Employer's conduct with respect to scrutinizing the employees' immigration status violated Sections 8(a)(1), (3), and (4) and that is the sole issue submitted to advice.[3]

In October, the Employer told the Union during a tense moment in negotiations that the first thing it was going to ask during the upcoming trial was whether the employees were citizens. The Employer said that the employees will have to tell the truth and then they will be arrested.

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[3] The Region has already determined that the Employer violated the Act by unlawfully laying off the three employees and failing and refusing to bargain in good faith, among other things.

## ACTION

We conclude that the Employer violated Sections 8(a)(1), (3), and (4) of the Act when, after the Union filed an unfair labor practice charge alleging that three employees had been unlawfully laid off, it hired a firm to scrutinize the immigration documents of the laid off employees and communicated this to Union representatives during bargaining. Thus, the Region should issue complaint, absent settlement.

It is well established that conducting an investigation because of an employees' protected activity is unlawful.[4] The Board has also held that terminations based on information gleaned during investigations motivated by protected activity are unlawful.[5] Where such investigations involve employee immigration status, the interference with employee rights under the Act is heightened. The Board has long noted the severely coercive effect on the exercise of Section 7 rights that results from an employer raising the immigration status of its employees in response to their protected concerted activities.[6] The Board has specifically held that employer

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[4] *See, e.g., Murtis Taylor*, 360 NLRB No. 66, slip op. at 14 (Mar. 25, 2014) (an employer violates Section 8(a)(1) when it subjects an employee to an investigation, and possible discipline, based on the employee's conduct in the course of protected activity); *Consolidated Diesel Co.*, 332 NLRB 1019, 1020 (2000) (employer violated Section 8(a)(1) for investigating employees for harassment based on their protected activities), *enforced*, 263 F.3d 345 (4th Cir. 2001).

[5] *See, e.g., Concrete Form Walls, Inc.*, 346 NLRB 831, 835 (2006) (rejecting employer's 11th hour concern with complying with IRCA as the reason it terminated the only four Hispanic group employees who voted in the election), *enforced*, 225 F. App'x 837 (11th Cir. 2007); *Kidde, Inc.*, 294 NLRB 840, 840 n.3 (1989) ("an employee's misconduct discovered during an investigation undertaken because of an employee's protected activity does not render a discharge lawful"); *Kut Rate Kid & Shop Kwik*, 246 NLRB 106, 121-122 (1979) (post-discharge investigation that uncovered misconduct insufficient to bar reinstatement because investigation was undertaken pretextually).

[6] *See, e.g., Labriola Baking Co.*, 361 NLRB No. 41, slip op. at 2 (Sept. 8, 2014) ("[e]mployer threats touching on employees' immigration status warrant careful scrutiny, as they are among the most likely to instill fear among employees."); *Viracon, Inc.* 256 NLRB 245, 246-47 (1981) (employer threats that a union election could result in employees being reported to immigration officials would remain "indelibly etched in the minds" of any who would be affected by such actions). *See*

scrutiny of employees' immigration status in response to protected concerted activity is extremely coercive and unlawful.[7] It has therefore, in many cases, found that an employer violates the Act by requiring employees to produce immigration documents in response to their protected concerted activity.[8] The Board has analyzed such employer requests for immigration documents as implied threats of unspecified reprisal that could have adverse immigration consequences.[9]

Likewise, the Board has concluded that raising questions about employees' immigration status in an intimidating or threatening manner during litigation is a

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*also* (b) (7)(A) (b) (7)(A)

[7] *See, e.g., Nortech Waste*, 336 NLRB 554, 554-55 (2001) (employer review of employees' immigration status was a "smokescreen to retaliate for and to undermine a [u]nion's election victory").

[8] *See Murtis Taylor Human Services Systems*, 360 NLRB No. 66, slip op. at 1 n.3, 16 (employer violated the Act when, because of an employee's protected concerted activities, it required him to provide documentation to confirm his immigration and/or citizenship status); *North Hills Office Services*, 344 NLRB 1083, 1084, 1099-1100 (2006) (employer's demand to employee to provide it with documentation establishing that he was legally entitled to work in the United States was motivated by union animus and violated the Act); *Michael's Painting, Inc.*, 337 NLRB 860, 868 (2002) (employer violated the Act where, prior to employee picketing, it freely allowed false documentation, but after employee picketing, it demanded documentation of authorization to work in this country); *Victor's Café 52*, 321 NLRB 504, 514 (1996) (employer violated the Act by demanding to see employees' work documents when it only did so after learning that the union had obtained authorization cards from a number of its employees); *Del Rey Tortilleria, Inc.*, 272 NLRB 1106, 1113 (1984) (employer violated the Act by posting a notice requiring employees to present two forms of identification in order to obtain their paychecks in reprisal for their union activities).

[9] *See, e.g., Belle Knitting Mills,* 331 NLRB 80, 80 n.2, 100-01 (2000) (employer's request to employees for immigration papers for union election was an implicit threat that without them, employees could face possible arrest and deportation); *Impressive Textiles*, 317 NLRB 8, 13 (1995) (in the absence of exceptions on the substantive violations, Board affirmed ALJ's rulings, findings, and conclusions, including that an employer's requirement that an employee produce immigration documents upon recall constituted an implied threat to report her to the INS in retaliation for her support of the union).

violation of the Act. In *John Dory Boat Works*, the Board held that an employer violated Section 8(a)(1) when it served subpoenas on five of its six Spanish-speaking employees, commanding them to produce travel and immigration documents that they could only possess if they were legal immigrants into the United States.[10] The ALJ described the effect upon the General Counsel's witnesses of the "wholly irrelevant probe" as "rang[ing] from unsettling to devastating and certainly affected their ability to testify."[11] In *Commercial Body & Tank Corp,* the Board concluded that an employer's comment to an employee witness outside of the hearing room that "[Y]ou are in the wrong place . . . What happens if the immigration man should come inside here now," was in fact calculated to induce or influence the employee either not to testify in the case or to give false testimony and thus violated Section 8(a)(1).[12] And in *AM Property Holding Corp.,* the Board held that the employer attorney's objection to a line of questioning regarding the witness's good acts, in which the attorney stated he would "have to get an investigator and [find] out whether [the witness was] here in this country illegally," was an unlawful threat in violation of Section 8(a)(1) and (4).[13] Federal courts have also recognized the extreme chilling effect that employer inquiries into immigration status can have during litigation, as well as the deterrent

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[10] *John Dory Boat Works*, 229 NLRB 844, 852 (1977).

[11] *Id.* at 852.

[12] *Commercial Body & Tank Corp.*, 229 NLRB 876, 879 (1977).

[13] *AM Property Holding Corp.*, 350 NLRB 998, 998 n.4, 1042-43 (2007), *enforced in part on other grounds*, 647 F.3d 435 (2d Cir. 2011). *See also Iowa Beef Processors, Inc.*, 226 NLRB 1372, 1474 (1976) (employer counsel's statement at Board hearing that witnesses had no immunity and that the employer would take "appropriate action" against any newly discovered wrongdoing was a maneuver to intimidate witnesses to prevent them from testifying for fear that their fellow employees might lose their jobs and/or be prosecuted and thus was unlawful), *enforced in rel. part*, 567 F.2d 791, 796 (8th Cir. 1977) (concluding that employer's statements at hearing intimidated prospective employee-witnesses even though they were technically correct); *OM Memorandum 11-62*, "Updated Procedures in Addressing Immigration Status Issues that Arise During NLRB Proceedings," dated June 7, 2011, at 7 (instructing Regions to contact the Board's Division of Operations-Management in cases where an employer is taking advantage of immigration status issues in an attempt to abuse the NLRB process and thwart the effective enforcement of the law, including "alluding to immigration status in a menacing or suggestive way during representation or ULP proceedings").

effect such inquiries might have on employees' willingness to cooperate with federal agencies or otherwise attempt to enforce their statutory rights.[14]

For these reasons, the Board has also carefully limited how and when immigration status can be raised during an unfair labor practice proceeding.[15] In *Flaum Appetizing*, the Board characterized questions about immigration status during litigation as an "intrusive inquiry" and discussed the intimidating and chilling effect it could have on statutory rights.[16] The Board therefore concluded that, even in a compliance proceeding, employers could not plead an affirmative defense regarding employees' immigration status without a factual basis.[17] In doing so, the Board reasoned that if employers could raise immigration status as an affirmative defense in any and every case, that it could subject every employee whose rights have been violated to "what is often an embarrassing and frightening inquiry into their immigration status."[18] The Board noted that it would be the filing of the unfair labor practice charge and the discriminatees' participation in the case that would have

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[14] *See Cazorla v. Koch Foods of Mississippi, L.L.C.*, 838 F.3d 540, 563 (5th Cir. 2016) (vacating discovery order relating to immigration issues and noting that "[c]onsiderable evidence suggests that immigrants are disproportionately vulnerable to workplace abuse, and not coincidentally, highly reluctant to report it for fear of discovery and retaliation"); *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1065 (9th Cir. 2004), *cert. denied*, 544 U.S. 905 (2005) (explaining that individuals may choose to forego civil rights litigation if discovery around immigration status is permitted and that even documented workers may be chilled by such inquiries as they may fear that their immigration status would be changed, would reveal immigration problems of family or friends, or feel intimidated by the prospect of having their immigration history examined in a public proceeding).

[15] *See, e.g., Farm Fresh Company, Target One, LLC*, 361 NLRB No. 83, slip op. at 1, 5 (Oct. 30, 2014) (affirming ALJ's decision to preclude respondent from questioning witnesses about their immigration status during ULP trial); *Rogan Bros. Sanitation*, 357 NLRB 1655, 1658 n.4 (2011) (leaving to compliance "questions concerning the effect, if any, of the discriminatees' immigration status on the reinstatement and make whole remedies").

[16] *Flaum Appetizing Corp.*, 357 NLRB 2006, 2012 (2011).

[17] *Id.* at 2012-13.

[18] *Id.* at 2011-12.

motivated the pleading at issue and the inquiry that would follow.[19] The Board thus stated that "mere service of a subpoena…combined with knowledge that such an inquiry may be made in every case and will have to be contested, would have a chilling effect on the exercise of the fundamental right to file a charge with the Board."[20]

In the instant case, because the Employer's conduct was motivated by the employees' protected activities, including their activity in support of the Union and as alleged discriminatees in a charge, and because the Employer's conduct substantially interferes with Board processes, it violated Sections 8(a)(1), (3), and (4) of the Act. Specifically, the Employer conducted its investigation soon after the employees, the Union, and their allies engaged in a high-profile protest in support of their Section 7 rights, as well as explicitly in response to the Union filing a charge on behalf of the employees.[21] And, the Employer communicated the investigation and its results to the Union in a threatening manner by stating that the employees' papers were fraudulent, and that the Union had forced the Employer to investigate their immigration status by filing charges. It referred back to these threats months later, telling the Union that it would ask the employees about their immigration status on the stand and that they would have to tell the truth and would be arrested. The Employer's course of conduct with respect to the investigation of employees' status is intimidating and chilling and, in fact, caused two of its then current employees to resign out of fear that the Employer would retaliate against them.

While the Employer admits to having investigated the employees in response to their protected activities, it asserts that it had a legitimate interest in preparing a defense to litigation, which includes a defense that the employees were not lawfully authorized to work. While we acknowledge the Employer's interest in preparing its defense, its conduct here threatens core employee Section 7 rights and the integrity of Board processes. If permitted, it would mean that any employee that engages in protected activity and files an unfair labor practice could be subject to an investigation of its status and potential threats based on such an investigation. Under these circumstances, employees who are unauthorized, have uncertain status, or who have family members or friends with uncertain status could be chilled from

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[19] *Id.* at 2011.

[20] *Id.* at 2012 n.11.

[21] The Board has held that being the subject of a charge is protected activity under the Act. *See Fairprene Industrial Products*, 292 NLRB 797, 804 (1989), *enforced*, 880 F.2d 1318 (2nd Cir. 1989), *cert. denied,* 493 U.S. 1019 (1990).

engaging in the "fundamental right to file a charge with the Board."[22] Such a result is inimical to the Act's purposes and threatens the Board's ability to conduct investigations and enforce the Act. It is thus unlawful. We also note that in other contexts, the Board has likewise placed reasonable limits on an employer's conduct in preparing defenses to litigation, where allowing such conduct threatens Section 7 rights and the Board's processes.[23] Here, where the Employer conducted its investigation in a threatening and intimidating manner, chilling its current employees in addition to the discriminatees involved in Board litigation, such a limitation is not only reasonable, but is also necessary to maintain the integrity of Board processes.[24]

For these reasons, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1), (3), and (4) through its course of conduct.

/s/
B.J.K.

ADV.01-CA-167721.Response.Zanes.[redacted]

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[22] *See, supra,* note 18. *See also*, *Manno Electric*, 321 NLRB 278, 297 (1996) (*citing Nash v. Florida Industrial Commission*, 389 U.S. 235, 238 (1967)), *enforced mem.*, 127 F.3d 34 (5th Cir. 1997) ("Congress has made it clear that it wishes all persons with information about such [unfair labor] practices to be completely free from coercion against reporting them to the Board.")

[23] *Guess?, Inc.,* 339 NLRB 432, 434 (2003) (employer's deposition questions regarding employee Section 7 activity is unlawful unless employer's interest in obtaining information outweighs employees' confidentiality interests under Section 7); *Johnnie's Poultry Co.*, 146 NLRB 770, 774-775 (1964), *enf. denied on other grounds* 344 F.2d 617 (8th Cir. 1965) (recognizing that an employer has a right to ask employees questions in anticipation of litigation but finding such questions unlawful unless accompanied by multiple safeguards).

[24] *See, e.g., Farm Fresh Company, Target One, LLC*, 361 NLRB No. 83, slip op. at 1, 5 (affirming judge's decision to preclude respondent from questioning witnesses about their immigration status in part to protect the integrity of Board proceedings).

*United States Government*
*National Labor Relations Board*
**OFFICE OF THE GENERAL COUNSEL**

# Advice Memorandum

S.A.M.

DATE: May 24, 2016

TO: Harold A. Maier, Acting Regional Director
Region 4

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Trump Entertainment Resorts, Inc., et al. and Icahn Enterprises, et al., Joint Employers
Cases 04-CA-143464, et al.

**Employer Status**
133-8200
177-1650
530-6067-4000
530-6067-4033
530-6067-4055
596-0175-8100
867-2520-7567-5000
867-2540-8367

These cases were resubmitted for advice as to how to proceed after the United States Court of Appeals for the Third Circuit affirmed a bankruptcy court order that authorized at least some of the unilateral changes at issue here. We conclude that the Region should issue complaint as to those meritorious allegations that were not affected by the affirmed bankruptcy court order, including the allegations of unlawful unilateral changes that were not clearly authorized by the bankruptcy court order, and should name both of the joint employers as respondents. The Region should continue to hold in abeyance the allegations affected by the bankruptcy court order, pending the completion of the ongoing litigation over that order.

## FACTS

The facts and background of these cases are more fully set forth in our prior memorandum, dated July 1, 2015. In brief, these cases involve several unilateral changes expressly authorized by a bankruptcy court order, as well as other allegedly unlawful conduct, including Section 8(a)(1) statements, Section 8(a)(3) discrimination, Section 8(a)(5) denials of access and information to the Union, and other Section 8(a)(5) unilateral changes—allegations separate from the unilateral changes authorized by the bankruptcy court order. In our prior memorandum, which issued while the bankruptcy court order was on appeal to the Third Circuit, we concluded that: (1) Trump Entertainment Resorts, Inc. and its subsidiaries ("Trump") and Icahn Enterprises and its subsidiaries ("Icahn") are joint employers with respect to the employees at issue here, due to Icahn's influence over collective bargaining between

Trump and UNITE HERE Local 54 (the Union); and (2) the Region should hold the case in abeyance until the Third Circuit issued a decision as to the bankruptcy court order.

On January 15, 2016, the Third Circuit affirmed the bankruptcy court order in its entirety. Most significantly, the Third Circuit affirmed the order's provisions authorizing Trump to reject the terms of its expired collective-bargaining agreement with the Union and implement the terms and conditions of its proposal, specifically including authorization to withdraw from the Health and Welfare, Pension, and Severance Funds; implement an unpaid 30-minute meal break; change the full-shift guarantee for banquet bartenders from 8 to 4 hours; reduce holiday pay; and "to expand its right to direct and control employees, such as by consolidating jobs, by determining and re-determining job content and determining the assignment of work, in order to allow for a more flexible use of staff and generate cost-savings." In addition, the court affirmed the order's provisions containing general release and injunction language limiting the judicial and administrative claims of private parties subject to the bankruptcy court order, particularly those entities that agreed to be bound by the bankruptcy plan of reorganization.

On April 14, 2016, the Union filed a petition for a writ of certiorari to the Supreme Court, seeking to overturn the bankruptcy court order. The Union's petition is still pending.

In light of the Third Circuit's affirmance of the bankruptcy court order, the Region has resubmitted these cases for advice as to: (1) which meritorious charges are affected by the bankruptcy court order, and on which the Region should issue complaint; (2) whether the Region should proceed against both Trump and Icahn as joint employers, and (3) how the Region should proceed on the charges affected by the bankruptcy court order, particularly as the Third Circuit's affirmance of that order is still subject to a pending writ of certiorari to the Supreme Court.

## ACTION

We conclude that the Region should issue complaint as to those meritorious allegations that were not affected by the bankruptcy court order, including the allegations of unlawful unilateral changes that were not clearly authorized by the bankruptcy court order, and should name both of the joint employers as respondents. The Region should continue to hold in abeyance the allegations affected by the bankruptcy court order, pending the completion of the ongoing litigation over that order.

**The Region should issue complaint as to those meritorious allegations that were not affected by the affirmed bankruptcy court order.**

Initially, we conclude that the Region should issue complaint as to those meritorious allegations of unlawful unilateral changes that were not clearly authorized by the bankruptcy court order.[1] The bankruptcy court order authorized Trump to reject the terms of its expired collective-bargaining agreement with Local 54 and implement the terms and conditions of its proposal, specifically including withdrawing from the Health and Welfare, Pension, and Severance Funds; implementing an unpaid 30-minute meal break; changing the full-shift guarantee for banquet bartenders from 8 to 4 hours; reducing holiday pay; and "to expand its right to direct and control employees, such as by consolidating jobs, by determining and re-determining job content and determining the assignment of work, in order to allow for a more flexible use of staff and generate cost-savings." Thereafter, based on the bankruptcy court's order, Trump implemented several changes, including retroactively ceasing its contributions to the healthcare, pension, and severance funds; an unpaid 30-minute meal break; reducing the full-shift guarantee for banquet bartenders from 8 to 4 hours; reducing holiday pay; increasing work assignments for housekeepers; and consolidating some bellman/doorman positions.

The bankruptcy court order issued under Section 1113 of the Bankruptcy Code, which permits a bankruptcy court to authorize a debtor's rejection of a collective-bargaining agreement but places important restrictions on that power.[2] As relevant here, Section 1113 requires that a court only approve a debtor's application for such relief if: (i) the debtor made a proposal to the employees' representative that, among other things, provides for modifications that are necessary for reorganization and treats all creditors and affected parties fairly; (ii) the employees' representative refuses the proposal without good cause; and (iii) the balance of equities clearly favors rejection.[3] When a court orders relief under that section, as the bankruptcy court did

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[1] All of our conclusions regarding the scope and effect of the bankruptcy court order were arrived at in consultation with, and with the agreement of, the Contempt, Compliance, and Special Litigation Branch (CCSLB). To the extent that any particular questions arise in the litigation of these cases concerning the effect of the bankruptcy court order, the Region may wish to contact CCSLB for their assistance and litigation advice.

[2] *See* 11 U.S.C. § 1113; *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of Am.*, 791 F.2d 1074, 1081-84, 1086-89 (3d Cir. 1986) (detailing the history of the provision).

[3] 11 U.S.C. § 1113(c).

here, the debtor is no longer obligated to comply with the contract, and any resulting breach-of-contract damages are converted to an unsecured prepetition claim.[4]

Given this legal framework, to the extent Trump's changes were clearly authorized by the bankruptcy court order, the Region should not issue complaint over them, but should instead hold these allegations in abeyance, pending the conclusion of the litigation over the Union's pending petition for a writ of certiorari seeking to overturn the bankruptcy court order.[5] Should the Union's petition be denied, or the bankruptcy court order otherwise finally determined to be valid, the Region should dismiss these allegations, as the unilateral changes at issue were specifically authorized by the bankruptcy court order.[6] Should the bankruptcy court order be found invalid, the Region should contact the Division of Advice for instructions as to how to proceed on the allegations being held in abeyance.

In addition to the above unilateral changes clearly authorized by the bankruptcy court order, however, Trump also engaged in other allegedly unlawful conduct, including Section 8(a)(1) statements, Section 8(a)(3) discrimination, Section 8(a)(5) denials of access and information to the Union, and other Section 8(a)(5) unilateral changes—allegations separate from the unilateral changes authorized by the bankruptcy court order. Nothing in the bankruptcy court order authorized any of this allegedly unlawful conduct, and nothing in the bankruptcy court order precludes complaint on these allegations. Indeed, at no time were these issues ever considered in the bankruptcy proceedings. This is most evident as to the individual instances of

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[4] 11 U.S.C. § 365(g)(1) (deeming breach to occur immediately before date of petition). In this regard, the Union itself may have a right to bring an independent action seeking liquidated unsecured damages resulting from the changes, but the Board would appear to have no role in any such litigation.

[5] While we recognize that the changes here were authorized by the bankruptcy court *after* the expiration of the parties' collective-bargaining agreement, the Third Circuit expressly affirmed the validity of the order notwithstanding that distinction. Therefore, absent a Supreme Court decision invalidating the bankruptcy court order, we will consider Trump's changes made pursuant to that order to have been duly authorized, and not unlawful under the Act. (b) (5) [redacted].

[6] If the bankruptcy court order is ultimately found to be valid as a matter of law, the Region need not use any special language in dismissing charge allegations because Trump acted pursuant to the order. In these circumstances, insofar as Trump acted based on a valid bankruptcy court order, its actions were not unlawful under Section 8(a)(5) of the Act.

Section 8(a)(1) statements, Section 8(a)(3) discrimination, and Section 8(a)(5) denials of access and information to the Union that occurred after the bankruptcy court order issued, but is equally the case as to the unilateral changes Trump made that were not part of its bankruptcy proposal or covered by the bankruptcy court order. For example, after the bankruptcy court order issued, Trump unilaterally made numerous changes to employees' schedules, scheduling and terms of employees' breaks, and bidding procedures for schedules. While the bankruptcy court order authorized Trump to "determin[e] the assignment of work," it does not appear to have included any provisions authorizing these unilateral changes in the scheduling of work, including employees' breaks, or the unilateral changes in bidding procedures. Therefore, to the extent these and other of Trump's unilateral changes were made independently from any clear authorization of the bankruptcy court order, they should be treated the same as any other employer's unlawful unilateral changes, and complaint should issue on these allegations.

We note that nothing else in the bankruptcy court order would preclude such a complaint. In particular, while the bankruptcy court order included provisions containing general release and injunction language limiting the judicial and administrative claims of private parties subject to the bankruptcy court order, particularly those entities that agreed to be bound by the bankruptcy plan of reorganization, none of these provisions were intended to interfere with the Board's authority to proceed against unfair labor practices. Indeed, assuming *arguendo* that the bankruptcy court order had intended to preclude the Board from enforcing the Act generally, such an order would have been of dubious legality.[7]

**Trump and Icahn are joint employers, both liable for the unfair labor practices at issue here.**

We further conclude that Trump and Icahn are joint employers with respect to the employees at issue here. In our prior memorandum, we made this conclusion under the then-extant standard,[8] based primarily on Icahn's influence over collective

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[7] *See, e.g., NLRB v. Baldwin Locomotive Works*, 128 F.2d 39, 44 (3d Cir. 1942) ("The jurisdiction of a United States District Court in bankruptcy does not embrace the power to treat with a debtor's unfair labor practices which affect commerce. [N]or is such a court's leave to the Board to proceed in [an] appropriate manner required."); *W. T. Grant Regional Credit Center*, 225 NLRB 881, 881 n.1 (1976) (stating that the proposition that "Board proceedings are subject to a general restraining order issued by a court of bankruptcy has been uniformly rejected in both court and Board decisions").

[8] *See, e.g., CNN America, Inc.*, 361 NLRB No. 47, slip op. at 3 (Sept. 15, 2014).

bargaining between Trump and the Union. In particular, we emphasized that Icahn's involvement in the collective-bargaining process meaningfully affected various matters relating to the employment relationship between Trump and the employees, including employees' wages, employees' work hours, and the assignment of work, and that Icahn inserted itself into the negotiations, making public statements designed to influence the bargaining process and playing a direct role in the unilateral changes at issue here. Consequently, we concluded that Icahn "shared or codetermined these key matters with Trump, and therefore is a joint employer."

Since we issued our prior memorandum, the Board clarified its joint employer standard.[9] In *BFI Newby Island Recyclery*, the Board reaffirmed the long-standing rule that two or more employers are joint employers of the same employees if (1) they are "both employers [of a single workforce] within the meaning of the common law" and (2) they "share or codetermine those matters governing the [employees'] essential terms and conditions of employment."[10] In discussing the common-law agency test, the Board emphasized that "the Board properly considers the existence, extent, and object of the putative joint employer's control,"[11] as well as that, "[u]nder common-law principles, the right to control is probative of an employment relationship—whether or not that right is exercised."[12] In this regard, the Board expressly held that it would no longer require that a joint employer both *possess* the authority to control employees' terms and conditions of employment and *exercise* that authority directly, immediately, and "not in a 'limited and routine' manner."[13] Rather, the Board concluded, it would also find joint employer status where the putative employer has the *right* to control, in the common-law sense, "the means or manner of employees' work and terms of employment," or actually exercises such control, "either directly or [indirectly] through an intermediary."[14] However, the Board also noted, if a putative

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[9] *BFI Newby Island Recyclery*, 362 NLRB No. 186, slip op. at 2 (Aug. 27, 2015).

[10] *Id.*, slip op. at 15.

[11] *Id.*, slip op. at 12.

[12] *Id.*, slip op. at 13.

[13] *Id.*, slip op. at 15-16 (overruling Board decisions, including *TLI, Inc.*, 271 NLRB 798 (1984), *enforced mem. sub nom. Teamsters Local 326 v. NLRB*, 772 F.2d 894 (3d Cir. 1985) and *Laerco Transportation*, 269 NLRB 324 (1984)).

[14] *Id.*, slip op. at 2, 3-6, 15-16, 18-20 (finding that two statutory employers were joint employers of a single workforce where, per their agreement, the supplier employer recruited, selected, and hired employees for the user employer which could, in turn, reject and discharge employees and exert control over their wages, work shifts, and

employer's control over terms and conditions of employment is too limited in scope or significance to permit meaningful collective bargaining, the Board may decline to find a joint employer relationship.[15] In any case, the Board made it clear in *BFI Newby Island Recyclery* that its intent was to broaden, rather than limit, the scope of its joint employer standard.

In the instant cases, there is nothing in *BFI Newby Island Recyclery* that would provide any basis for altering our previous conclusion that Trump and Icahn are joint employers of the employees at issue here. Thus, as we previously concluded, both employers shared or codetermined key matters of employees' terms and conditions of employment, and both employers meaningfully affected various matters relating to the employment relationship.[16] Therefore, we reiterate our adherence to our previous conclusion that Trump and Icahn are joint employers, and that Icahn is liable as well as Trump for any unfair labor practices found here.

We recognize that it might be argued that, while Trump and Icahn are certainly joint employers responsible for remedying each other's unlawful bargaining conduct, only Trump should be liable for any other unfair labor practices, such as violations of Section 8(a)(1) or (3) of the Act. In this regard, while the Board's general rule is that joint employers are liable for each other's unfair labor practices,[17] the Board did

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productivity and safety standards, even though the agreement specified that the supplier was the sole employer).

[15] *Id.*, slip op. at 16.

[16] We note that, while our prior memorandum contained arguments in support of finding joint-employer status based on "economic realities," this approach was expressly rejected by the Board in *BFI Newby Island Recyclery*. *Id.*, slip op. at 12-13 n.68. Therefore, the Region should not rely on such an analysis.

[17] *See, e.g., Ref-Chem Co.*, 169 NLRB 376 (1968), *enforcement denied on other grounds*, 418 F.2d 127 (5th Cir. 1969). In *Ref-Chem Co.*, the Board rejected a joint employer's Section 10(b) defense, explaining that a charge against one of the employers effectively constituted a charge against both of the employers, as "each is responsible for the conduct of the other and whatever unlawful practices are engaged in by the one must be deemed to have been committed by both." *Id.* at 380. The Board has repeatedly reaffirmed this principle of joint liability. *See, e.g., Whitewood Maintenance Co.*, 292 NLRB 1159, 1164 (1989) (joint employer liable for its co-employer's unlawful Section 8(a)(1) statements), *enforced*, 928 F.2d 1426 (5th Cir. 1991); *Mar del Plata Condominium*, 282 NLRB 1012, 1012 n.3 (1987) (joint employer liable for co-employer's unlawful Section 8(a)(3) discipline and 8(a)(1) statements); *Windemuller Electric*, 306 NLRB 664, 666 (1992) (joint employer liable for its co-

create a narrow exception to this general rule in *Capitol EMI Music.*[18] In *Capitol EMI Music*, the Board found that a staffing agency that referred a temporary employee to a recording products company was not liable for the latter company's unlawful termination of the temporary employee, despite the fact that the companies were joint employers, where the reasons given to the staffing agency for his removal made no mention of his union activity.[19]

In reaching this holding, the Board expressly noted that, where joint employers "perceive a mutual interest in warding off union representation from the jointly managed employees[,]" then "one joint employer, by its unlawful conduct, might reasonably be regarded as acting in the 'interest' of its co-employer by chilling the union activity of its employees."[20] In such a situation, the Board might prevent a "seemingly 'innocent' joint employer" from reaping the benefits of its co-employer's unlawful conduct "by holding that seemingly innocent joint employer vicariously liable."[21] Such is not the case, however, where one employer merely provides employees to its co-employer and takes no part in the daily direction or oversight of the employees and has no representatives present at the worksite, as was the case in *Capitol EMI Music.*[22] In those circumstances, the Board held, it would be unreasonable to automatically hold the labor supplier liable for the unlawful acts of its co-employer.[23] The Board emphasized in *Capitol EMI Music* that this new rule applies only to the type of joint employer relationships in which one employer supplies employees to work in another employer's business and to unfair labor practices dependent on findings of unlawful motive.[24]

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employer's 8(a)(1) violations and discriminatory 8(a)(3) layoffs), *enforced in relevant part*, 34 F.3d 384 (6th Cir. 1994); *Branch International Services*, 313 NLRB 1293, 1300 (1994) (co-employers jointly liable for staffing agency's refusal to remit check-off dues to union after staffing agency became party to collective-bargaining agreement).

[18] 311 NLRB 997 (1993), *enforced per curiam*, 23 F.3d 399 (4th Cir. 1994).

[19] *Id.* at 997-98.

[20] *Id.* at 999.

[21] *Id.*

[22] *Id.* at 1000.

[23] *Id.*

[24] *Id.* at 1001.

In the years since *Capitol EMI Music* issued, the Board has generally applied the rule announced in that case primarily in the context of labor supplier-user relationships[25] and only to unfair labor practices that turn on an unlawful motive. For example, in *D&F Industries*, the Board took care to distinguish the analysis regarding the labor supplier's alleged 8(a)(3) violations from that applied to its alleged 8(a)(1) violations.[26] Thus, the Board explained that the labor supplier was liable for the user's discriminatory actions under the *Capitol EMI Music* test, while it found the labor supplier liable for the user's coercive statements simply based on its joint employer status, citing to an earlier decision that relied on *Ref-Chem*.[27]

Moreover, the Board has clearly distinguished *Capitol EMI* and found joint liability in cases where the "nonacting" employer was not "innocent" and had an interest in preventing union representation of its co-employer's employees. For example, in *Mingo Logan Coal Co.*, involving a mining company and one of the mining company's on-site contractors, the Board upheld the ALJ's finding that *Capitol EMI Music* was "clearly distinguishable."[28] The ALJ had observed that the two employers perceived "a mutual interest in warding off union representation," and as such the contractor was not an "innocent" employer within the meaning of *Capitol EMI Music*.[29]

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[25] In the exceptional cases in which the Board has applied *Capitol EMI Music* outside of the context of a "user-supplier" joint employer relationship, it has nonetheless found joint liability for all of the unfair labor practices at issue. Thus, in *Le Rendezvous Restaurant*, 332 NLRB 336, 336-37 (2000), while the Board acknowledged that *Capitol EMI Music* had involved a "user-supplier" joint employer relationship, it used the analysis contained therein to find joint liability for a hotel and a separate company to which the hotel had subcontracted the operation of its restaurant. And, in *Adams & Associates, Inc.*, 363 NLRB No. 193, slip op at 1 n.7 (May 17, 2016), the Board cited *Capitol EMI Music* in finding joint liability to be appropriate, also in the context of a subcontracting relationship.

[26] 339 NLRB 618, 618 n.2 (2003).

[27] *Id.* (citing *Windemuller Electric,* 306 NLRB at 666).

[28] 336 NLRB 83, 108 (2001), *enforced in relevant part*, 67 F. App'x 178 (4th Cir. 2003).

[29] *Id. See also Hobbs & Oberg Mining Co.*, 316 NLRB 542, 542 (1995) (in compliance proceeding, Board found order against two contractor joint employers for unlawful conduct of a third co-employer, a mining company, to be "consistent" with *Capitol EMI Music*, as all three were "engaged in an unlawful scheme to oust the [u]nion").

Here, of course, Icahn is not merely an uninterested supplier of employees to Trump, or the type of "innocent" employer to which the *Capitol EMI Music* analysis was intended to apply.[30] Unlike the staffing agency in *Capitol EMI Music*, which itself had no connection with the recording products company apart from leasing employees to it, Icahn is a substantial creditor and investor in Trump, publicly and privately involved in Trump's dealings with the Union, and highly likely to benefit from its joint employer's unlawful conduct. Thus, the exception set forth in *Capitol EMI Music* is inapplicable here, and Icahn should be held jointly liable for all of the unfair labor practices at issue.

This conclusion is consistent with long-standing Board law recognizing that a creditor can be a joint employer of a debtor's employees.[31] Thus, for example, in *Sussex*, the Board concluded that a principal creditor and source of working capital "in fact control[ed] the business and labor policies" of the debtor company, and therefore was a joint employer with the debtor company.[32] For all these reasons, we conclude that Icahn is a joint employer with Trump, also liable for all of the unfair labor practices at issue here.

(b) (5)

(b) (5)

[30] *See Capitol EMI Music*, 311 NLRB at 999-1000.

[31] *See, e.g., Sussex Dye & Print Works, Inc.*, 34 NLRB 625, 629-33 (1941).

[32] *Id.* at 632-33.

[33] (b) (5)

(b) (5) [redacted].

Accordingly, the Region should issue complaint, absent settlement, as to those meritorious allegations that were not affected by the bankruptcy court order, naming both of the joint employers as respondents. The Region should continue to hold in abeyance the allegations clearly affected by the bankruptcy court order, pending the completion of the ongoing litigation over that order.

/s/
B.J.K.

ADV.04-CA-143464.Response.TrumpEntertainment.[redacted]

cc: Contempt, Compliance, and Special Litigation Branch

*United States Government*
*National Labor Relations Board*
**OFFICE OF THE GENERAL COUNSEL**

# Advice Memorandum

S.A.M. DATE: October 26, 2015

TO: Charles L. Posner, Regional Director
Region 5

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Sentara Healthcare, Inc. d/b/a Medical Transport, LLC
Case 05-CA-145731

512-5030-8000
512-5030-8050
512-5030-8075

This case was submitted for advice on whether an employer violated Section 8(a)(1) by issuing a litigation hold and document preservation notice to employees who had filed an employment-related collective action lawsuit against it. We conclude that the employer violated the Act because the notice is overbroad and would reasonably tend to chill the employees' exercise of their Section 7 right to engage in collective action litigation related to their employment. We emphasize that our conclusion here does not extend generally to litigation hold notices; properly drafted, such notices fulfill an employer's legal obligation to avoid spoliation of evidence without infringing on employee rights protected by the Act.

## FACTS

Sentara Healthcare, Inc. d/b/a Medical Transport, LLC ("the Employer") provides ambulance transportation services throughout Virginia. The Charging Party worked as (b) (6), (b) (7)(C) ((b) (6), (b) (7)(C)) for the Employer from (b) (6), (b) (7)(C) until (b) (6), (b) (7)(C) in (b) (6), (b) (7)(C). On (b) (6), (b) (7)(C) the Charging Party and several other current and former ambulance crew employees filed a collective action suit against the Employer in the U.S. District Court for the Eastern District of Virginia, alleging that the Employer violated the Fair Labor Standards Act ("FLSA") by failing to pay them (and other similarly situated employees) appropriate overtime compensation. In particular, the complaint alleged that the Employer: deducted lunch-break time from employees, even when no lunch break had been provided to them; required employees to take calls and respond to emails and text messages during off-duty hours, without compensation; required employees to maintain certain certifications and licenses, but failed to compensate them for the associated training time; and required employees to perform various types of work while off duty, without compensation.

On December 3, 2014, the Employer emailed a document entitled "Litigation Hold and Document Preservation Notice" ("the notice") to 17 employees, all but one of whom were named plaintiffs in the FLSA suit, as well as to several human resources and management personnel. The subject line of the notice read "Litigation Hold Notice– Effective Immediately" and listed the case name of the FLSA suit, i.e., "[*Charging Party*] *et al. v. Medical Transport LLC*." The notice specifically outlined the allegations made in the FLSA complaint and stated that the Employer "has a legal duty to preserve all records . . . and documents . . . that are, or may be, relevant to the potential dispute." The notice continued:

> You have been identified as someone who may be in possession of documents or records that could be relevant to this dispute. Thus, you are required to continue to preserve and retain all potentially relevant records and documents. Strict compliance with this notice is required as a condition of employment, as non-compliance could result in the loss of evidence and potential sanction against the company.
>
> At this time, you are only required to preserve potentially relevant records and documents and therefore should not alter or destroy them. You do not need to make copies or otherwise distribute any potentially relevant document. Accordingly, you should take steps to preserve all potentially relevant documents and records, no matter their form, and even if they appear on your personal cell phone, personal computer, personal social media page, or personal journal/diary/calendar, among other things.
>
> * * *
>
> **What to Preserve:** Potentially relevant documents or records may include, but are not necessarily limited to:
>
> - Any documents or records about or concerning EMTs and/or Paramedics regarding any of the allegations;
>
> - Any documents or records which reflect, demonstrate or discuss Medical Transport EMTs' or Paramedics' attendance, participation, and/or travel at trainings, seminars, or other continuing professional educational courses;
>
> - Any documents or records evidencing or refuting that employees in these positions' [*sic*] performed work while off-the-clock;
>
> - Any documents or records evidencing or refuting that employees in these positions missed or performed work during a meal break.

- Any documents or records evidencing or reflecting non-work related activities engaged in by employees in these positions while on the clock or while allegedly performing work off the clock.

Potentially relevant documents and records must be preserved whether in electronic or paper format, and whether contained on personal or Company-owned computers, phones or devices. If you have any doubts as to whether any documents, records, communications, or information in your possession or control are relevant, err on the side of preservation.

* * *

Sentara takes its preservation obligation very seriously and, therefore, failure to comply with this notice could result in discipline up to and including termination of employment.

Attached to the notice was an acknowledgment page that employees were expected to sign and return to the Director of Human Resources. Employees subsequently contacted the attorneys representing them in the FLSA lawsuit, who advised them not to sign the notice. None of the employees named in the lawsuit has done so, and the Employer has not disciplined any of them for that failure. According to the Charging Party, since the notice was issued, employees have stopped discussing the FLSA suit and their employment via text messaging and social media so as to avoid having to retain and disclose to the Employer records of those discussions.

In general, employees use Employer-provided radios and pagers when communicating with the Employer. However, employees use their personal cell phones to: (1) communicate with dispatch and their team leader when they are in remote areas with weak radio signals; (2) discuss work-related matters with their team leader; and (3) communicate with other employees. One employee witness stated that [redacted] used [redacted] personal cell phone about 1% of the time to communicate with [redacted] team leader and about once a week to communicate with dispatch. Another employee stated that using [redacted] personal cell phone was convenient but not mandatory. With respect to the FLSA lawsuit, the parties reached agreement on the terms of a settlement on [redacted] That settlement is currently pending court approval.

## ACTION

We conclude that the Employer violated Section 8(a)(1) by issuing the notice to employees because it was overbroad and would reasonably tend to chill employees' exercise of their Section 7 rights. Specifically, we find unlawful those portions of the notice that reference, or would reasonably be read to encompass, documents and records contained on the employees' personal devices (as opposed to Employer-owned

devices), as well as those portions of the notice that suggest to employees that compliance with the notice is a condition of their employment. Although there is insufficient evidence to find that the Employer had an unlawful motive in issuing the notice, we conclude that its need for promulgating the notice, as written, is outweighed by the employees' rights under the Act.

**A. The Act**

Section 7 protects an employee's right to pursue employment-related grievances, either with or on behalf of other employees, through collective or class action lawsuits.[1] It also protects an employee's right to engage in activities connected to pursuing such a lawsuit.[2] In addition, the Act protects the right of employees to keep their Section 7 activities confidential from their employer.[3] The Board has deemed

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[1] *Beyoglu*, 362 NLRB No. 152, slip op. at 1-2 (July 29, 2015) (Section 7 protects individual employee's filing of employment-related class or collective action lawsuit); *D.R. Horton, Inc.*, 357 NLRB No. 184, slip op. at 2 & nn.3-4 (Jan. 3, 2012) ("The Board has long held, with uniform judicial approval, that the NLRA protects employees' ability to join together to pursue workplace grievances, including through litigation."), *enforcement denied in part*, 737 F.3d 344 (5th Cir. 2013); *Le Madri Restaurant*, 331 NLRB 269, 275 (2000) (citing cases) ("It is well settled that the filing of a civil action by employees is protected activity unless done with malice or in bad faith.").

[2] *Salt River Valley Water Users Association*, 99 NLRB 849, 853–854 (1952) (Section 7 protected employee's circulation among coworkers of petition designating him as their agent to seek back wages under the FLSA), *enforced*, 206 F.2d 325 (9th Cir. 1953); *see also Saigon Grill Restaurant*, 353 NLRB 1063, 1064-65 (2009) (employer violated Act when it ordered mass discharge in retaliation for group of employees having signed document authorizing an attorney to file a wage and hour lawsuit on their behalf against employer).

[3] *Guess?, Inc.*, 339 NLRB 432, 434-35 & n.8 (2003) ("[E]mployees are guaranteed a certain degree of assurance that their Sec. 7 activities will be kept confidential, if they so desire."); *Chino Valley Medical Center*, 362 NLRB No. 32, slip op. at 1 n.1 (Mar. 19, 2015) (finding employer's subpoena unlawful because it "would subject employees' Sec. 7 activities to unwarranted investigation and interrogation"; subpoena encompassed communications between employees and union, union authorization and membership cards, and all documents relating to those cards); *see also Laguna College of Art and Design*, 362 NLRB No. 112, slip op. at 1 n.1 (June 15, 2015) (upholding ALJ's decision to quash employer's subpoena that sought prounion supervisor's personal email and text messages relating to organizing campaign and representation election; employer's interests outweighed by interests of supervisor

this confidentiality interest "substantial" because the willingness of employees to engage in protected concerted activities "would be severely compromised" if an employer could easily obtain information about those activities.[4]

An employer violates Section 8(a)(1) when it takes action that "reasonably tend[s] to chill employees in the exercise of their Section 7 rights."[5] Indeed, the Board has found that an employer violates the Act when it conveys to employees its concern about their protected activity, even when it does not seek to ascertain the content of that activity.[6] For example, in *Waggoner Corp.*, an employer violated Section 8(a)(1) when it told employees that they could obtain, and then assisted them in obtaining, copies of statements they had given to a Board agent investigating unfair labor practice charges.[7] Although the employer did not itself request the statements or ask about their contents, the Board explained that its actions interfered with the employees' Section 7 rights because those actions "would necessarily impress employees with the [employer's] concern for the matters related by them to the Board," and "an employee's knowledge that his employer has manifested an interest in what the employee has to say about him can only exert an inhibitory effect upon the employee's willingness to give a statement at all, much less a statement which might contain matters damaging to the employer."[8] Similarly unlawful is employer

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and coworkers "in keeping their Sec. 7 activity confidential"); *Santa Barbara News-Press*, 358 NLRB No. 155, slip op. at 2 (Sept. 27, 2012) (finding employer's subpoenas "inherently coercive and unlawful" because they sought copies of affidavits the employees had provided to the Board during the course of an unfair labor practice investigation; such requests were inconsistent with keeping "employee attitudes, activities, and sympathies in connection with the union" confidential), *adopted by* 361 NLRB No. 88 (Nov. 3, 2014); *National Telephone Directory Corp.*, 319 NLRB 420, 421 (1995) (emphasizing that "[t]he confidentiality interests of employees have long been an overriding concern to the Board" and denying employer's motion seeking production of union authorization cards and names of employees who signed authorization cards or attended union meetings).

[4] *Guess*, 339 NLRB at 435.

[5] *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999).

[6] *Waggoner Corp.*, 162 NLRB 1161, 1162-63 (1967).

[7] *Id.* at 1162.

[8] *Id.* at 1162-63.

conduct, such as surveillance activity, that "reasonably tend[s] to coerce and restrain [employees] by creating a fear among them that the record of their concerted activities might be used for some future reprisals."[9]

In *Guess*, the Board announced a framework for assessing the lawfulness of an employer's questioning about employees' protected concerted activities during a legal proceeding. Specifically, it held that, in order to be lawful, an employer's questioning must be relevant and must not have an "illegal objective." In addition, even if the questioning is relevant and without an illegal objective, it is unlawful unless the employer's need for the information outweighs the employees' Section 7 confidentiality interests.[10] Thus, where an employer's questioning is overbroad and impinges on employees' Section 7 confidentiality interests, the Board will strike the balance in favor of employee rights.[11] For instance, in *Guess*, the Board found that the employer violated the Act when, during a deposition concerning an employee's workers' compensation claim, it asked the employee for the names of coworkers who had attended meetings at a union hall.[12] The employer argued that the question was necessary for it to identify potential witnesses to whether the employee had sustained her injuries while performing activities on behalf of the union or had engaged in physical activities at the union hall that were inconsistent with her injuries.[13] The Board, in rejecting that defense, assumed that the question was relevant and had a lawful objective; nonetheless, it found that the need for the inquiry "was only marginal," and was outweighed by the employee's Section 7 interests, because the question was overbroad: it was not limited to the particular time period during which the employee claimed to have been injured and did not ask whether any of the

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[9] *Waco, Inc.*, 273 NLRB 746, 747 (1984) (internal quotation marks omitted) (noting that without proper justification, photographing pickets violates the Act because it tends to intimidate employees and "to implant fear of future reprisals"); *see also National Telephone*, 319 NLRB at 421 (rejecting employer's efforts to subpoena information about employees' union activities and noting that "an employer may not surveil its employees to obtain such information, and may not give its employees the impression that it has surveilled—or will surveil—them to obtain such information").

[10] *Guess*, 339 NLRB at 433-35.

[11] *Id.* at 435.

[12] *Id.* at 432.

[13] *Id.*

coworkers, whose names were being sought, had witnessed the employee's activities at the union hall during the period in which she claimed to have been injured.[14]

**B. The Duty to Preserve Evidence**

Generally, parties have a common law duty to preserve evidence within their "possession, custody, or control" that is potentially relevant to "specific, predictable, and identifiable litigation."[15] For a defendant, that duty is triggered, "at the latest, when the defendant is served with the complaint."[16] Failure to comply with that duty results in spoliation,[17] which prevents other parties to the litigation from obtaining relevant evidence in discovery and undermines the integrity of the judicial process.[18] Consequently, courts have the inherent power to impose sanctions for spoliation.[19]

Various aspects of spoliation law are not well established, especially where electronically stored information is concerned.[20] In particular, what constitutes "control" sufficient to trigger a party's duty to preserve relevant evidence remains unsettled and subject to different standards in different federal judicial circuits.[21] Courts in the Fourth Circuit, which encompasses the district court where the

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[14] *Id.* at 434-35.

[15] *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 521-38 (D. Md. 2010) (internal quotation marks omitted).

[16] *Id.* at 522.

[17] THE SEDONA CONFERENCE, THE SEDONA CONFERENCE GLOSSARY: E-DISCOVERY & DIGITAL INFORMATION MANAGEMENT 43 (4th ed. 2014), *available at* https://thesedonaconference.org/download-pub/3757 ("Spoliation is the destruction of records or properties, such as metadata, that may be relevant to ongoing or anticipated litigation, government investigation or audit.").

[18] *See Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590-91 (4th Cir. 2001).

[19] *Id.* at 590.

[20] *See* THE SEDONA CONFERENCE, COMMENTARY ON RULE 34 AND RULE 45 "POSSESSION, CUSTODY, OR CONTROL" 3-4 (2015), *available at* https://thesedonaconference.org/download-pub/4115 [hereinafter SEDONA COMMENTARY].

[21] *See id.* at 4-12.

employees' FLSA suit is pending, apply two different standards: the "legal right plus notification standard" and the "practical ability standard."[22]

Under the "legal right plus notification standard," a party must preserve, collect, search, and produce evidence that it has a "legal right" to obtain and must also notify its adversary in litigation about potentially relevant evidence held by third parties.[23] Applying the "legal right" criterion, one court outside of the Fourth Circuit denied a plaintiff's motion to compel production of text messages sent or received by a corporate-defendant's employees' personal cell phones that mentioned the plaintiff and/or his allegations of discrimination, harassment, and/or retaliation.[24] The court reasoned that the corporate defendant did not have "possession, custody, or control" of the text messages because it did not issue the cell phones to the employees, the employees did not use the cell phones for any work-related purpose, and the corporate-defendant otherwise did not have any legal right to obtain employee text messages on demand.[25]

Under the "practical ability standard," a party must preserve, collect, search, and produce evidence "irrespective of that party's legal entitlement or actual physical possession of the documents," so long as it has the "practical ability" to obtain the evidence.[26] While some courts have stated that "practical ability" means "the possibility that a party could potentially obtain the documents on demand," there is no "precise, commonly-accepted definition of 'practical ability.'"[27] That is particularly true in the employer-employee context,[28] where "no court has squarely held that the [p]ractical [a]bility [s]tandard can compel corporate parties to produce documents and [electronically stored information] in the possession of current employees."[29] Nor has any court ever specifically held that corporations have the "practical ability" to obtain information from employees' social media accounts merely by asking employees to

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[22] *Id.* at 7 n.14 (citing cases).

[23] *Id.* at 4-7.

[24] *Id.* at 17-18 (citing *Cotton v. Costco Wholesale Corp.*, No. 12-2731, 2013 WL 3819974 (D. Kan. July 24, 2013)).

[25] *Cotton*, 2013 WL 3819974, at *6.

[26] SEDONA COMMENTARY at 6-7 (italics omitted).

[27] *Id.* at 13 & n.37.

[28] *See generally id.* at 4, 17-19, 23-25.

[29] *Id.* at 18.

produce or preserve that evidence.[30] On the contrary, employers generally "do[] not have 'control' over or the right to access personal information and data stored on home or personal computers, personal email accounts, personal PDAs, etc., of its employees."[31] Moreover, as the above-cited commentary distributed by the Sedona Conference[32] states, a broad interpretation of the practical ability standard could result in employer demands for evidence held by employees that are improper, "coercive,"[33] and that conflict with state and federal laws protecting various aspects of social media use by employees.[34]

**C. Application**

Applying the above-cited principles, we find that the Employer's issuance of the litigation hold and document preservation notice reasonably tends to chill the employees' protected concerted activity in pursuing their collective action suit. Strictly speaking, the notice only requires the employees to preserve certain documents and does not demand that the employees turn them over to the Employer. Still, that requirement, and the attendant threat of discipline and potential termination for failure to comply, makes clear to employees that the Employer has an interest in, and is concerned about, their protected activity. As in *Waggoner*, the Employer's action tends to inhibit the employees' willingness to engage in the suit and related Section 7 activities. Moreover, as when an employer surveils its employees' activities, the Employer's issuance of the notice here reasonably tends to create a fear among the employees that the information subject to the litigation hold might, in the future, be demanded and used against them.[35] That the Employer has

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[30] *Id.* at 24.

[31] *Id.* at 25 (but noting potential complications if any employer has a "Bring Your Own Device to Work" policy).

[32] The Sedona Conference is a non-partisan law and policy think tank focused on antitrust law, complex litigation, and intellectual property legal issues. It issues influential e-discovery guidelines that are frequently cited in judicial decisions and consulted by businesses and other organizations.

[33] SEDONA COMMENTARY at 18.

[34] *Id.* at 24-25 & nn.77-79, 81 (citing state privacy statutes, the NLRA, and a case involving the attorney-client privilege).

[35] *See Waco*, 273 NLRB at 747; *see also National Telephone*, 319 NLRB at 421 ("That the [employer] has sought this information through cross-examination, rather than through surveillance or interrogation of employees, does not reduce the potential chilling effect . . . that could result from employer knowledge of the information.").

not taken steps to enforce the notice against the employees thus far is irrelevant.[36] Indeed, although such evidence is not required to establish a violation,[37] the fact that employees have stopped using certain platforms to communicate regarding their suit supports our conclusion.

Next, applying the *Guess* framework, we find that the employees' Section 7 confidentiality interests outweigh the Employer's need to preserve documents and other information contained on the employees' personal devices, as required by certain portions of the notice. As the Board did in *Guess*, we assume arguendo that the information subject to the notice is sufficiently relevant to the issues in the lawsuit, such that, absent countervailing employee rights, the notice would be appropriate, and that the Employer did not have an illegal objective in issuing the notice.[38] Moreover, we emphasize that our conclusion here does not extend to litigation hold notices in general, many of which, when properly drafted, serve important employer needs without infringing upon employees' Section 7 interests. However, in the circumstances of this case, we conclude that portions of the Employer's notice are unduly broad. In particular, we find the following portions of the notice (all designated in bold italics below) unlawful.

First, the two portions of the notice that explicitly refer to employees' personal devices are unlawful:

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[36] *See Cintas Corp. v. NLRB*, 482 F.3d 463, 467-68 (D.C. Cir. 2007) (affirming that "the Board is under no obligation to consider" evidence of employer enforcement of overbroad work rule against Section 7 activity).

[37] *See id.* at 467 (evidence that employees actually interpreted overbroad rule as prohibiting Section 7 activity not required); *Waco, Inc.*, 273 NLRB 746, 747-48 (1984) (finding rule unlawful even though "[n]o employee testified that [it] inhibited him from engaging in protected activity").

[38] There are some questions about what the *Guess* Board meant by "illegal objective" in the discovery request context. *See Stock Roofing Co.*, Case 18-CA-19622, et al., Advice Memorandum dated May 26, 2011, at 5 n.4. Assuming arguendo that the Board meant "illegal motivation," we observe that the Employer did not issue the notice exclusively to employees who had filed the FLSA suit, but also issued it to another employee and management and HR personnel. In addition, because a litigation hold only becomes necessary in connection with a particular legal matter and does not necessarily involve an employer's entire workforce, we do not view the Employer's selective issuance of the notice here, without more, as evidence of discriminatory motivation.

> At this time, you are only required to preserve potentially relevant records and documents and therefore should not alter or destroy them. You do not need to make copies or otherwise distribute any potentially relevant document. Accordingly, you should take steps to preserve all potentially relevant documents and records, no matter their form, ***and even if they appear on your personal cell phone, personal computer, personal social media page, or personal journal/diary/calendar, among other things.***
>
> * * *
>
> Potentially relevant documents and records must be preserved whether in electronic or paper format, and ***whether contained on personal*** or Company-owned computers, phones or devices. If you have any doubts as to whether any documents, records, communications, or information in your possession or control are relevant, err on the side of preservation.

These provisions sweep into the notice's scope records of purely personal communications among employees, on their own personal devices, regarding the workplace grievances underlying their suit, as well as records relating to their pursuit of the specific FLSA claims—all information related to clearly protected Section 7 activity that the employees have an interest in keeping confidential. Not only is that interest not diminished by the fact that (b) (6), (b) (7)(C) in the FLSA suit,[39] but the inf er's notice reasonably includes, among other things, non-public employee communications regarding the issues in the lawsuit or the lawsuit itself, as well as evidence of Section 7 activities undertaken by employees not named as plaintiffs in the FLSA suit.[40] Moreover, as noted further below, because there are serious doubts as to whether such records on employees' personal devices would be considered to be within the Employer's "possession, custody, or control," its need for these provisions is less than compelling.

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[39] *See Manorcare Health Services—Easton*, 356 NLRB No. 39, slip op. at 34 (Dec. 1, 2010) (rejecting argument that employees who engage in Section 7 activity in a public setting thereby waive their right to confidentiality), *enforced*, 661 F.3d 1139 (D.C. Cir. 2011).

[40] *See id.* ("[I]f the employer does not learn of [employees' public] involvement [in Section 7 activity]. . . by no sound logic is the employee obligated thereafter to disclose [it] and by no logic is the employer free to demand an accounting of who participated in the public event.").

Second, two of the bullet points in the notice describing what the Employer considers to be "potentially relevant documents or records" are unlawful:

- ***Any documents or records about or concerning EMTs and/or Paramedics regarding any of the allegations;***

- ***Any documents or records which reflect, demonstrate or discuss Medical Transport EMTs' or Paramedics' attendance, participation, and/or travel at trainings, seminars, or other continuing professional educational courses.***

These portions of the notice reasonably encompass the same sort of information stored on employees' personal devices as do the previously identified provisions and are unlawful for the same reasons.[41] In fact, even absent the other unlawful provisions, these portions of the notice would reasonably be read to include information on employees' personal devices, unless the Employer added an explicit savings clause to the contrary. The broad wording of these bullet points illustrates this. The references to documents "regarding any of the [FLSA] allegations" and those that "reflect, demonstrate or discuss" certain employee activities lack any indication as to either the time of creation of those documents or the time of the events to which the documents relate, and so reasonably bring within their scope communications *about* the suit among employees and/or among employees and their attorneys, which were made on the employees' personal devices.

Third, the following language, which requires the employees to comply with the notice as a condition of their employment, clearly includes the unlawful provisions and thus unlawfully infringes upon the employees' Section 7 interests:

> You have been identified as someone who may be in possession of documents or records that could be relevant to this dispute. Thus, you are required to continue to preserve and retain all potentially relevant records

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[41] Although these portions of the notice do not explicitly mention personal devices, to the extent that that there is any ambiguity in the notice, it should be construed against the Employer, which drafted and issued the document. *See Lafayette Park Hotel*, 326 NLRB at 828; *Flex Frac Logistics, LLC*, 358 NLRB No. 127, slip op. at 2 (Sept. 11, 2012) ("Board law is settled that ambiguous employer rules—rules that reasonably could be read to have a coercive meaning—are construed against the employer. This principle follows from the Act's goal of preventing employees from being chilled in the exercise of their Section 7 rights—whether or not that is the intent of the employer—instead of waiting until that chill is manifest, when the Board must undertake the difficult task of dispelling it."), *enforced*, 746 F.3d 205 (5th Cir. 2014).

> and documents. ***Strict compliance with this notice is required as a condition of employment***, as non-compliance could result in the loss of evidence and potential sanction against the company.
>
> * * *
>
> Sentara takes its preservation obligation very seriously and, therefore, ***failure to comply with this notice could result in discipline up to and including termination of employment.***

Against the employees' interest, the only need that the Employer has asserted for issuing the notice is its duty to avoid spoliation of material evidence related to the ongoing FLSA litigation. We find that to be an insufficient justification in the circumstances of this case. Specifically, while the Employer would have had a legitimate need to issue a properly tailored notice encompassing certain material evidence related to the FLSA suit, it had no need to issue the overly broad notice that it did, which encompasses records bearing minimal relation to its duty to avoid spoliation. On the contrary, since a more narrowly tailored litigation hold notice (e.g., one excluding records stored on employees' personal devices regarding activities related to their decision to concertedly pursue the FLSA suit) would have satisfied any legal duty the Employer had to avoid spoliation, there is no legitimate purpose for the notice here.[42] In addition, the more than three-month delay between the employees' filing of the FLSA suit and the Employer's issuance of the notice indicates that its interest in avoiding spoliation is less than compelling.[43] Since the employees' confidentiality interest in their Section 7 activities outweighs the employer's need for

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[42] *See Cintas*, 482 F.3d at 470 (finding overbroad workplace rule unlawful because "[a] more narrowly tailored rule that does not interfere with protected employee activity would be sufficient to accomplish the Company's presumed interest in protecting" certain workplace information); *Guardsmark, LLC v. NLRB,* 475 F.3d 369, 380 (D.C. Cir. 2007) (finding that even where employer had legitimate interest in restricting certain conduct, "it had an obligation to demonstrate its inability to achieve that goal with a more narrowly tailored rule that would not interfere with protected activity"); *NLRB v. Ne. Land Servs.*, 645 F.3d 475, 483 (1st Cir. 2011) (rejecting employer's "legitimate business reasons" defense for overbroad workplace rule and observing that "a more narrowly drafted provision" would accomplish employer's goal).

[43] *See Victor Stanley*, 269 F.R.D. at 522 (duty triggered, at the latest, when the complaint is filed).

the notice under the third step of the *Guess* framework, the issuance of the notice is unlawful.[44]

We acknowledge that the Employer's notice here is generally similar to those commonly issued by businesses and other organizations involved in litigation and that the Employer's issuance of the notice may have been genuinely motivated by a desire to avoid spoliation sanctions. However, under current law, it is far from clear that the Employer would even be deemed to have a duty to avoid spoliation of the evidence encompassed by the objectionable portions of the notice. As explained in Section B above, it is not certain that evidence contained on employees' "personal . . . computers, phones or devices" would fall within the Employer's "possession, custody, or control," regardless of whether the "legal right" or "practical ability" standard were applied. In any event, there is no caselaw holding that an employer has a duty to require its employees to preserve evidence when (i) such preservation would have an

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[44] In other contexts, Advice has expressed concerns about the continued validity of *Guess* in light of *BE & K Constr. Co. v. NLRB*, 536 U.S. 516 (2002), and the Board's subsequent decision on remand, 351 NLRB 451 (2007). *See Stock Roofing,* Case 18-CA-19622, et al., Advice Memorandum dated May 26, 2011, at 5 n.4; *Chinese Daily News*, Case 21-CA-36919, et al., Advice Memorandum dated December 29, 2006, at 2 n.6; *Cintas Corp.*, Case 29-CA-27153, Advice Memorandum dated May 24, 2006, at 5 n.14. Those concerns are largely inapplicable here because any First Amendment interests held by the Employer and implicated by Board action in this case are highly attenuated. The Employer did not file suit here and has not even asserted that its issuance of the notice was needed to preserve documents necessary to its own defense in the FLSA suit. Rather, the Employer has only invoked its duty to avoid spoliation, which functions largely to prevent destruction of evidence needed by a party's *adversary* in litigation. *See Victor Stanley*, 269 F.R.D. at 526. At best, the Employer might argue that a Board order mandating rescission of portions of the notice would result in the concerned employees' destruction of evidence relevant to their FLSA claims and that the employees might then seek court-imposed sanctions based on the Employer's failure to take necessary action to preserve the destroyed evidence. "To verbalize the claim is to recognize how distant the burden is from the asserted right." *Univ. of Pa. v. EEOC*, 493 U.S. 182, 200 (1990) (rejecting First Amendment claim where the purported constitutional harm was too attenuated from the government agency's action). That attenuation is particularly apparent in light of the broad discretion that courts have in imposing sanctions for spoliation. *See, e.g.*, *Victor Stanley*, 269 F.R.D. at 522 (internal quotation marks omitted) (noting that "whether preservation or discovery conduct is acceptable in a case depends on what is *reasonable,* and that in turn depends on whether what was done—or not done—was *proportional* to that case and consistent with clearly established applicable standards" (internal quotation marks and brackets omitted)).

unlawful chilling effect on the employees' federal statutory rights and (ii) that evidence is stored on the employees' personal devices and was, for the most part, not created within the scope of the employees' employment.[45] In this connection, we emphasize that we do not find unlawful other aspects of the notice, such as its requirement that employees preserve evidence stored on non-personal devices that reasonably relates to the issues in the FLSA suit. For example, the bullet point referring to "[a]ny documents or records evidencing or refuting that employees in these positions' [*sic*] performed work while off-the-clock," as well as the two subsequent, similarly worded bullet points, are tailored to the allegations in the FLSA suit and would not reasonably be read to encompass employees' Section 7 communications on personal devices. Such specifically-worded provisions, moreover, contrast with the overbroad portions of the notice and show the Employer's ability to tailor the notice to avoid unlawful overbreadth.

In addition, sanctions are discretionary and highly dependent upon both the facts of the individual case and the purposes that they would serve. Here, the duty to preserve is unclear as to employees' personal devices, clearly defined federal statutory rights under the Act militate against preservation that extends to those personal devices, and there is no specific discovery order in effect. In this context, the potential for sanctions, especially severe ones,[46] is attenuated, if not speculative. While it might be contended that the Employer should not be required to undertake even that risk, the Employer should not be permitted to rely upon purely speculative and tenuous concerns about spoliation sanctions to privilege conduct that clearly impinges on employees' rights under the Act. And finally, because the employees, as plaintiffs in the FLSA suit, have their own duty to preserve relevant evidence, Board-ordered rescission of the unlawful portions of the notice will not impair the judicial process.[47] Instead, it will simply remedy the unwarranted chilling effect resulting from the Employer's issuance of the notice, not as a mere private litigant, but *as the employees' employer* (a point underscored by its threat of discipline up to termination for failure to comply with the notice).

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[45] Although there is evidence that some employees used personal devices for work on a very limited basis, the wording of the notice also encompasses other devices, such as personal home computers, which there is no indication were ever used for work-related purposes.

[46] *See United States v. Shaffer Equip. Co.,* 11 F.3d 450, 462 (4th Cir. 1993) ("[W]hen a party *deceives a court or abuses the process at a level that is utterly inconsistent with the orderly administration of justice or undermines the integrity of the process*, the court has the inherent power to dismiss the action" (emphasis supplied)).

[47] In fact, the Employer has never asserted that the notice is needed to preserve evidence necessary to its own defense.

Accordingly, the Region should issue complaint, absent settlement.

/s/
B.J.K.

ADV.05-CA-145731.Response.MedicalTransportLLC (b) (6), (b) (7)

*United States Government*
*National Labor Relations Board*
**OFFICE OF THE GENERAL COUNSEL**

# Advice Memorandum

S.A.M.

DATE: December 15, 2015

TO: Charles L. Posner, Regional Director
Region 5

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Bayhealth Medical Center
Case 05-CA-157145

**Weingarten Chron**
506-4033-3000
512-5072-2400

This case was submitted for advice as to whether it is an appropriate vehicle in which to urge the Board to overrule *IBM Corp.*[1] and to recognize employees' *Weingarten*[2] rights in non-unionized settings, and if so, what the remedy should be.[3] We conclude that the Region should use this case as a vehicle to urge the Board to extend *Weingarten* rights to unrepresented employees and find that the Employer violated Section 8(a)(1) by forcing the Charging Party to participate in an investigatory interview without the assistance of a coworker. In addition, we conclude that the appropriate remedy in this case is make-whole relief because the Employer contends that the Charging Party was discharged, in part, for misconduct that occurred during the interview.

## FACTS

The Charging Party was employed as a registered nurse in the emergency department at Bayhealth Kent General, one of Bayhealth Medical Center's

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[1] 341 NLRB 1288 (2004).

[2] *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

[3] The Region has already decided to issue complaint, absent settlement, alleging the Charging Party was unlawfully discharged based on [redacted] protected concerted activities and the Employer's mistaken belief that [redacted] was engaged in union activities. The Region also concluded that the Employer unlawfully interrogated the Charging Party and made coercive statements during its investigative interview.

("Employer") affiliated hospitals, until [redacted] termination on [redacted] 2015.[4] The nursing staff is not represented by a union.

The Employer follows a "shared governance" practice model, wherein staff and management are supposed to collaborate and share decision-making and accountability for patient care, safety, and work life. Notwithstanding this collaborative model, the Employer repeatedly rejected the Charging Party's individual attempts to raise operational complaints and ideas about improving the emergency department in recent years. In raising these issues, the Charging Party was motivated not only by patient care concerns, but also staff safety and concern that these safety issues might pose a risk to [redacted] nursing license.

During a shared governance meeting in February, the Employer permitted staff to meet without the presence of managers. At this meeting, the Charging Party discovered that other staff shared many of [redacted] concerns about the emergency department, in addition to other concerns. Specifically, employees raised issues related to staffing, nursing recruiters, assignment sheets, equipment, vacations, educational accommodations, and uniforms.

Realizing that shared governance might provide a mechanism to pursue desired changes, the Charging Party volunteered to assist the nurse chair of the committee and over the next few weeks set about uniting the staff around common complaints. On [redacted] the Charging Party emailed the nursing and hourly staff to encourage them to coalesce around a few issues to present to management, noting that nurses bear responsibility for assessing department needs and providing solutions since managers are not practitioners. [redacted] created an email distribution list so that employees could communicate amongst themselves. [redacted] developed and distributed to employees an informal grievance form to be used to document employees' individual and group complaints and management's responses. In an email to staff on [redacted] in which the Charging Party referred to [redacted] as a [redacted] outlined a new framework for shared governance. Specifically, [redacted] presented a structure for running the meetings (allocating time for a management speaker, a guest speaker, and discussion of agreed-upon topics of concern) and proposed a schedule and system for soliciting employee concerns and voting on which issues to submit to management. The Charging Party believes that another employee shared this [redacted] email with the Employer.[5] The following day, the Employer sent an

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[4] All dates hereafter are in 2015, unless otherwise noted.

[5] In any event, the Employer's managers admit that they knew about some of the Charging Party's emails. In fact, the Employer submitted [redacted] email as evidence to the Region. They mistakenly characterize the content of [redacted] messages as discussing getting nurses together to vote and bargain and excluding management from shared governance.

email informing staff that it would give an educational presentation on what the shared governance model is at the next meeting.

Frustrated by management's attempt to regain control of the shared governance process, the Charging Party emailed the staff to announce [redacted] resignation from shared governance and to inform them that [redacted] would submit grievances as an individual rather than as a group. On [redacted] emailed [redacted] supervisor and the director of the emergency department announcing that [redacted] would start documenting requests for changes using the grievance form [redacted] created due to management's failures to address earlier concerns. [redacted] also referred to a refusal-of-assignment form that [redacted] had created about two years ago to document instances where the assignment load created an unsafe situation for patients, and suggested that [redacted] might use it again as a complement to the grievance form. That same day, [redacted] submitted two grievances to [redacted] supervisor concerning staffing issues. [redacted] indicated that all in the department shared the grievances, but that [redacted] was submitting them solely on behalf of [redacted] [redacted] noted that it was up to others whether they concurred with [redacted] concerns.

Later that day, the emergency department director informed the Charging Party that [redacted] presence would be required at a meeting with human resources on [redacted][6] When the Charging Party inquired about the purpose of the meeting, [redacted] was informed that it was about patient complaints and other unspecified issues in the department. Typically, if a supervisor is uncertain about how to handle a patient complaint, a human resources representative conducts an investigation and solicits the employee's side of the story before deciding whether discipline is warranted. The Employer refused to supply the Charging Party with the names of the patients who lodged complaints in advance of the meeting. In denying [redacted] request for this information, the Vice President of Human Resources allegedly told the Charging Party that the hospital does not provide information to employees when it is "building a case" against them.[7] The Employer's human resources representatives uniformly contend that no corrective action had been decided upon prior to the meeting. The Corrective Action Record likewise notes that the meeting was scheduled as a "conversation only" and that there was no intention to issue corrective action prior to the meeting.

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[6] It is unclear when the Employer made the decision to hold this meeting. One email suggests it was on or before [redacted], but the Vice President of Human Resources indicated that the meeting was called when [redacted] learned of patient complaints just a few days before the meeting.

[7] The Vice President of Human Resources contends that [redacted] merely told the Charging Party that the hospital was conducting an investigation into patient complaints.

The Charging Party asked another nurse to accompany [redacted] to the meeting in case the meeting resulted in corrective action. When the pair arrived at the meeting, the Employer refused to allow the Charging Party's coworker to attend, citing hospital policy. The Employer did not give the Charging Party the option of abstaining from the meeting.

The [redacted] meeting was attended by four Employer representatives: the Charging Party's supervisor, the director of the emergency department, the HR Vice President, and another HR manager. The meeting began with a brief discussion of patient complaints. One concerned an accusation that the Charging Party yelled at a patient during her emergency room visit; the other involved a mother's concern that more wasn't done for her son at the emergency room. The Charging Party requested time to review the patient charts before responding to the allegations, which the Employer representatives agreed to.

The meeting then turned to the Charging Party's recent emails to the staff. Employer representatives questioned the appropriateness of [redacted] communications about shared governance and asserted that it was a violation of policy to report safety issues using an unapproved grievance form rather than the Employer's variance report. The Charging Party defended [redacted] emails as being within [redacted] federal rights and asserted that [redacted] actions were intended to promote patient care and staff safety and to protect [redacted] license. In the course of this discussion, the Charging Party stated to the emergency department director that [redacted] couldn't do [redacted] job and [redacted] couldn't do [redacted] The director told [redacted] was out of line, and [redacted] apologized for the comment. At one point in the meeting, the Charging Party asserted [redacted] right to a "steward" and the HR Vice President asked whether [redacted] had worked in a union shop. [redacted] chastised [redacted] for using union terminology and accused [redacted] of acting as if the hospital were unionized in [redacted] efforts to address patient safety issues. When the Charging Party stated that [redacted] was anti-union and denied trying to start a union, [redacted] expressed disbelief. Toward the end of the meeting, the Charging Party challenged management's assertion that human resources was an advocate for employees, noting the HR Vice President's statement prior to the meeting that the hospital was building a case against [redacted] denied making that statement, and the Charging Party responded in a raised voice, "either I am a liar or you are a liar." [redacted] then reminded [redacted] that [redacted] prior suspension for letting [redacted] license lapse[8] was still active in [redacted] personnel file and informed [redacted] was terminated.

The Corrective Action Record documenting the Charging Party's discharge states three reasons for [redacted] termination. Primarily, it relies upon the "inappropriate outburst" at the [redacted] meeting, i.e. [redacted] raised voice, [redacted] "verbally combative,"

[8] According to the Charging Party, [redacted] was suspended in 2013 for letting [redacted] license lapse for one day.

"condescending and demeaning" remarks to management, and [redacted] exclamation that either the HR Vice President was lying or [redacted] was. Additionally, the disciplinary notice cites [redacted] "consistent failure to hold [redacted] accountable for insubordinate behavior," i.e. [redacted] emails about changing the shared governance meeting and implementing the grievance form and refusal-of-assignment form without management approval. And finally, the notice mentions the Charging Party's "clear violation of [Employer] policies," i.e. implementing the grievance form to document safety issues in lieu of the variance reporting system. The Corrective Action Record notes that termination was the next step pursuant to the Employer's progressive discipline policy, since [redacted] had an active suspension on file. It also notes that the Charging Party had previously been disciplined for sending emails rebutting [redacted] manager's direction, specifically for replying all to an email announcing a new patient assessment policy and criticizing it as infeasible.

The Charging Party appealed [redacted] termination using an internal appeal process, but the Employer upheld [redacted] termination. [redacted] also sent a letter to the CEO informing [redacted] of department issues and protesting [redacted] termination. During the course of the Charging Party's unemployment compensation proceeding, the Employer learned that [redacted] recorded the [redacted] meeting in violation of hospital policy.[9] The Employer asserts that this constitutes misconduct warranting termination, notwithstanding that state law apparently permits recordings in such circumstances.[10]

## ACTION

We conclude that the Region should use this case as a vehicle to urge the Board to overrule *IBM Corp.*[11] and find that the Employer violated Section 8(a)(1) by requiring the Charging Party to attend the human resources meeting without the assistance of a coworker. In addition, we conclude that the appropriate remedy for this violation is make-whole relief, since the Employer based its discharge decision, in part, on the Charging Party's behavior at the investigatory interview.

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[9] The use of recording devices is prohibited under Section 5 of the Employer's corrective action policy, entitled "General Guidelines Regarding the Application of Corrective Actions."

[10] *See* DEL. CODE ANN. tit. 11, § 2402(c)(4) (stating that it is lawful for a person to intercept an oral communication where the person is a party to that communication, and the interception is not for the purpose of committing a criminal or tortious act).

[11] 341 NLRB 1288 (2004).

**Legal Background**

In *Weingarten*, the Supreme Court upheld the Board's rule that employees have the right to refuse to submit to an interview without a union representative if the employee reasonably believes it may result in discipline.[12] In upholding the Board's policy, the Court found that the "right inheres in § 7's guarantee of the right of employees to act in concert for mutual aid and protection[,]"[13] and further, that an employee request for a union representative at an investigatory interview "clearly falls within the literal wording of § 7."[14] It explained that although the employee may be the only one with an "immediate stake" in the matter, such a request is encompassed within the "mutual aid or protection" clause because: (1) the union representative safeguards the whole bargaining unit's interest in preventing unjust punishment; and (2) [redacted] presence assures other employees that they too can avail themselves of such a representative should they find themselves in similar circumstances.[15] With respect to this latter point, the Court cited with approval Judge Learned Hand's observation in *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*[16] that:

> [w]hen all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in "concerted activity" for "mutual aid or protection," although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is "mutual aid" in the most literal sense, as nobody doubts.[17]

The *Weingarten* Court found that the Board's construction was not only faithful to the statutory text, but that it effectuated the purposes of the Act by attempting to eliminate the "'inequality of bargaining power between employees . . .

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[12] 420 U.S. at 256, 260.

[13] *Id.* at 256.

[14] *Id.* at 260.

[15] *Id.* at 260-61.

[16] 130 F.2d 503 (2d Cir. 1942).

[17] 420 U.S. at 261 (quoting *Peter Cailler Kohler Swiss Chocolates*, 130 F.2d at 505-06).

and employers.'"[18] The Court also noted that the Board's rule benefitted employers as well as employees.[19] In this regard, a lone employee may be "too fearful or inarticulate" to accurately describe the underlying incident or "too ignorant" to point out extenuating circumstances, whereas a "knowledgeable" union representative could benefit the employer by drawing out favorable facts and helping to get to the bottom of the incident, thereby saving production time.[20] Finally, the Court observed that the statutory right was consistent with actual industrial practice, as demonstrated by its incorporation in many collective-bargaining agreements and its recognition by arbitral authority.[21]

The Board first directly addressed the applicability of the *Weingarten* right to a non-union setting in *Materials Research Corp.*,[22] finding that unrepresented employees enjoyed a similar right to have a fellow employee present at an investigatory interview. The Board principally relied upon the fact that this right emanates from Section 7, as recognized by the Supreme Court in *Weingarten*, and that Section 7's protections do not vary based on whether the employee involved is represented by a union, with very limited exceptions.[23] The Board further explained that a request for a coworker's assistance in a non-union setting satisfies the elements under Section 7. It is "concerted activity—in its most basic and obvious form—since employees are seeking to act together."[24] And it is conduct undertaken for "mutual aid or protection," notwithstanding that a coworker does not safeguard the interests of the broader workforce, since by such a request "all employees can be assured that they too can avail themselves of the assistance of a coworker in like circumstances."[25] Thus, in the Board's view, the Supreme Court's framing of the *Weingarten* right as the right to the assistance of a "union representative" simply reflected the fact pattern presented to the Court in that case

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[18] *Id.* at 261-62 (quoting 29 U.S.C. § 151).

[19] *Id.* at 262.

[20] *Id.* at 262-63.

[21] *Id.* at 267.

[22] 262 NLRB 1010 (1982).

[23] *Id.* at 1011-12.

[24] *Id.* at 1015.

[25] *Id.*

rather than an indication that the Court intended to limit employees' rights to the union setting.[26]

In addition, the *Materials Research* decision observed that unrepresented employees would benefit from a coworker representative in ways similar to those the Court recognized for organized employees. Thus, the imbalance of power between employers and employees is present in both union and non-union settings, and the mere presence of a coworker as a witness can help prevent the employer from overpowering a lone employee.[27] Indeed, unrepresented employees may be even more dependent upon coworker solidarity to combat unjust or arbitrary employer action in the Board's view, since they do not have the benefit of a collective-bargaining agreement or a grievance-arbitration process.[28] The Board recognized that an unrepresented employee may be too "fearful" or "inarticulate" to describe the incident being investigated, or too "ignorant" to raise extenuating factors and thus adequately defend [redacted] perhaps even more so than a represented employee given [redacted] more vulnerable employment circumstances—and that a coworker would be capable of performing the limited tasks required of a *Weingarten* representative, i.e. eliciting helpful facts and getting to the bottom of the incident.[29] In addition, the Board recognized that a coworker can lend valuable moral support and that his mere presence as a witness militates against unjust or arbitrary action since [redacted] can relay any signs of employer wrongdoing to other employees.[30] Significantly, regardless of the efficacy of such a representative, the Board expressed its unwillingness to substitute its judgment for that of employees facing discipline who believe that the presence of a coworker lends a measure of meaningful protection.[31]

Finally, the Board in *Materials Research* noted that granting unrepresented employees access to a coworker is unlikely to interfere any more with operations than permitting access to a union representative in an organized workplace. The *Weingarten* right is only triggered by investigatory interviews and the employer

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[26] *Id.* at 1012.

[27] *Id.* at 1014-15.

[28] *Id.* at 1014.

[29] *Id.* at 1015.

[30] *Id.*

[31] *Id.* ("It is for the employee himself to determine whether the presence of a coworker at an investigatory interview provides some measure of protection.").

may schedule the interview so as not to disrupt production.[32] Moreover, an employer may actually benefit from the presence of a coworker, who may be able to assist in resolving the investigation expeditiously.[33] And, the Board underscored, an employer's hands are not tied when an employee invokes the right to coworker assistance, since the employer need not undertake the interview if it so chooses and it is free to discipline based on other information gleaned during the investigation.[34]

After following *Materials Research* in several subsequent cases,[35] just a few years later the Board reversed course, concluding that the Act compelled the opposite conclusion. In *Sears, Roebuck and Co.*,[36] the Board reasoned that extending the *Weingarten* right to unrepresented employees was an impermissible construction of the Act because it would require an employer to "deal with" the equivalent of a union representative in derogation of the statute's exclusivity principle.[37] After the Third Circuit rejected this premise in a subsequent case,[38] the Board in *DuPont IV*[39] conceded that *Materials Research* reflected a permissible construction of the Act, but again refused to apply *Weingarten* to the non-union setting.[40] This time, the Board justified its denial of such rights based on a balancing of labor's and management's interests.[41] The Board reasoned that unrepresented employees' Section 7 interests were "less numerous and less

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[32] *Id.*

[33] *Id.*

[34] *Id.* at 1015-16.

[35] *See, e.g.*, *E. I. DuPont de Nemours (DuPont I)*, 262 NLRB 1028 (1982); *E. I. DuPont de Nemours & Co. (DuPont II)*, 262 NLRB 1040 (1982); *Valley West Welding Co.*, 265 NLRB 1597, 1599 (1982).

[36] 274 NLRB 230 (1985).

[37] *Id.* at 231-32.

[38] *Slaughter v. NLRB*, 794 F.2d 120, 122 (3d Cir. 1986), *denying enforcement to E. I. DuPont de Nemours (DuPont III)*, 274 NLRB 1104 (1985).

[39] *E. I. DuPont & Co. (DuPont IV)*, 289 NLRB 627 (1988), *enforced*, 876 F.2d 11 (3d Cir. 1989).

[40] *Id.* at 628.

[41] *Id.* at 628, 630.

weighty" than the interests of represented employees when measured against certain factors referenced in *Weingarten* itself.[42] And it found that the interests of both labor and management would be better served by withholding *Weingarten* rights from unrepresented employees, noting that such a right could work to the disadvantage of employees since they might lose their only opportunity to tell their side of the story.[43]

In *Epilepsy Foundation of Northeast Ohio*,[44] the Board once again reversed course and overruled *Dupont IV*, citing "compelling considerations"—namely that the existing rule infringed on employees' Section 7 rights and was inconsistent with the rationale underlying *Weingarten* and the purposes of the Act.[45] The Board reasoned that unrepresented employees should be entitled to representation at investigatory interviews since the Supreme Court grounded the right to assistance in Section 7's protection of concerted activities for mutual aid or protection, that clause generally protects employees acting together to address unjust punishment, and Section 7's guarantees are applicable to all employees and are not dependent on union representation.[46] It found that bestowing a right to assistance on unrepresented employees "greatly enhances the employees' opportunities to act in concert to address their concern 'that the employer does not initiate or continue a practice of imposing punishment unjustly.'"[47] In re-adopting this right, the Board observed that Section 7 rights do not turn on employee skills or motives.[48] It also found speculative *Dupont IV*'s observation that extending *Weingarten* rights might work to the detriment of unrepresented employees, and stated that it preferred to let employees decide for themselves whether calling upon a coworker for aid would be strategically advantageous.[49]

*Epilepsy Foundation* expressly rejected the contention raised in *Sears* that conferring a *Weingarten* right on unrepresented employees clashes with provisions

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[42] *Id.* at 629-30.

[43] *Id.* at 630.

[44] 331 NLRB 676 (2000), *enforced in relevant part*, 268 F.3d 1095 (D.C. Cir. 2001).

[45] *Id.* at 677, 678 n.8.

[46] *Id.* at 677-78.

[47] *Id.* at 678 (quoting *Weingarten*, 420 U.S. at 260-61).

[48] *Id.* at 679.

[49] *Id.*

of the Act that enable a non-union employer to "deal with employees on an individual basis."[50] The Board concluded that while employers are generally free to deal with employees individually where there is no union present, employers may not assert this right as a means of obstructing employees' Section 7 right to act together to prevent unjust punishment.[51] Likewise, the Board rejected the related argument that coworker representation conflicts with the exclusivity principle under Section 9(a) by forcing an employer to "deal with" the equivalent of a labor organization. As the Board explained, the exclusivity principle is inapplicable in a non-union setting, and in any event, an employer is free to forego the interview, and thus there is no obligation to deal with an employee representative of nonunionized employees.[52]

**The *IBM Corp.* Decision**

Less than four years later, the Board reversed course yet again in *IBM Corp.* Although a majority of the Board believed that *Epilepsy Foundation* was a permissible construction of the Act, a different majority determined that unrepresented workers should not enjoy *Weingarten* rights because policy considerations necessitated that employers be allowed to conduct investigations in a "thorough, sensitive, and confidential manner."[53] To justify this change in law, the Board majority cited a heightened need for employers to conduct investigations in the decades since *Weingarten* as a result of new employment laws (particularly those banning discrimination and harassment), a rise in workplace violence and corporate abuse, and new security concerns raised by the terrorist attacks of September 11, 2001, a sign of the "troubled times in which we live."[54]

The *IBM* majority articulated four broad policy concerns weighing against conferring *Weingarten* rights on unrepresented employees, largely echoing points raised in *DuPont IV* and other prior opinions. First, it observed that coworkers do not have a legal duty or personal incentive to represent the interests of the entire

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[50] *Id.* at 678.

[51] *Id.*

[52] *Id.* at 678-79.

[53] 341 NLRB at 1289-90. Member Schaumber concurred fully with the policy considerations advanced in the plurality opinion of Chairman Battista and Member Meisburg. *Id.* at 1295. For this reason, we refer to the plurality opinion as the *IBM* majority.

[54] *Id.* at 1290-91, 1294.

workforce, whereas a union representative is legally bound to safeguard the interests of the whole bargaining unit.[55] Second, coworkers who are selected as representatives on an ad hoc basis cannot redress the imbalance of power between employers and employees, whereas union representatives are backed by the collective force of the bargaining unit and have knowledge of the workplace and its politics, and can thereby aid in developing consistent practices and improve the speed and efficiency of investigations.[56] Third, coworkers lack the skills, knowledge, and experience that union representatives have to facilitate the interview and propose solutions to workplace issues, and are therefore less useful to both the employee being interviewed and the employer.[57] The majority viewed coworker representatives as primarily being able to lend moral and emotional support rather than as capable of advancing the fact-finding mission.[58] It also raised the concern that coworkers might be more disruptive because of their personal connection to the employee being investigated and the potential that the representative might be a coconspirator in the incident under investigation.[59]

Fourth, the *IBM* majority raised concerns surrounding confidentiality, injecting a new policy consideration into the long-running debate over *Weingarten* rights for unrepresented employees.[60] In this regard, the Board noted that investigations in the workplace are a "relatively new fact of industrial life" and often touch upon sensitive and personal subjects.[61] Accordingly, a promise of confidentiality may be necessary to elicit candid answers from witnesses, protect the reputation of the employee under investigation, encourage those with information to come forward, and maintain the integrity of the investigation in cases where there is a need to conceal the fact of the inquiry or the substance of the questions.[62] In the majority's view, the risk of a confidentiality breach is lower when the interview assistant is a union representative as compared to an ordinary

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[55] *Id.* at 1291-92. *See also DuPont IV*, 289 NLRB at 629.

[56] 341 NLRB at 1292. *See also DuPont IV*, 289 NLRB at 629; *Sears*, 274 NLRB at 234 (Member Hunter, concurring).

[57] 341 NLRB at 1292. *See also DuPont IV*, 289 NLRB at 629-30.

[58] 341 NLRB at 1292.

[59] *Id. See also Materials Research*, 262 NLRB at 1021 (Member Hunter, dissenting).

[60] 341 NLRB at 1292-93.

[61] *Id.* at 1293.

[62] *Id.*

employee because the union representative is bound by the duty of fair representation and has an interest in maintaining an "amicable relationship" with the employer.[63]

In addition to these four enumerated policy considerations, the Board majority in *IBM* also argued that *Epilepsy Foundation* should be overruled because it failed to take into account the fact that non-union employers are free to deal with employees on an individual basis.[64] The Board considered this to be the "critical difference" between union and non-union settings under "national labor policy."[65] In its view, allowing employees to avail themselves of the assistance of a coworker, in effect, forbids employers from dealing with employees individually and conflicts with this "historic distinction."[66] For this additional policy reason, the Board majority declined to follow *Epilepsy Foundation*.

The majority opinion in *IBM* drew a sharp dissent from Members Liebman and Walsh.[67] The dissenting opinion faulted the majority's conclusion that unrepresented employees' Section 7 rights must always yield to employers' interest in conducting effective investigations.[68] In the dissenters' view, the majority failed to adequately explain why the presence of a union representative (who is more skilled and backed by the power of union solidarity) posed *less* of a threat to employer interests than a mere coworker representative.[69] To the extent there are legitimate employer concerns in non-union settings, the dissent advocated taking them into account by adopting a presumptive right to representation, which an employer could rebut in appropriate circumstances[70]—an approach the majority

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[63] *Id.*

[64] *Id.* at 1292, 1294-95. *See also Epilepsy Foundation*, 331 NLRB at 683 (Member Hurtgen, dissenting); *Sears*, 274 NLRB at 231; *Materials Research*, 262 NLRB at 1019 (Chairman Van de Water, dissenting).

[65] 341 NLRB at 1292.

[66] *Id.* at 1292, 1295.

[67] In addition to countering the arguments made by the majority, the dissent also refuted Member Schaumber's concurrence, which strongly implied that recognition of *Weingarten* rights for unrepresented employees is an impermissible construction of the Act. *Id.* at 1307-08 (Members Liebman and Walsh, dissenting).

[68] *Id.* at 1309 (Members Liebman and Walsh, dissenting).

[69] *Id.*

[70] *Id.* at 1309-10 (Members Liebman and Walsh, dissenting).

dismissed because it would spawn extensive litigation and leave parties uncertain about the scope of the right.[71]

The dissent also dismissed each of the majority's policy justifications, and raised a new policy consideration in favor of *Weingarten* rights for unrepresented employees. As to the first three policy concerns—safeguarding the interest of all employees, redressing the imbalance of power, and effectiveness of representatives in facilitating the investigation—the dissent echoed *Epilepsy Foundation*'s observation that Section 7 rights do not depend on the skills or motives of the *Weingarten* representative.[72] As to the majority's concern for confidentiality, the dissent observed that this consideration is not unique to the non-union workplace, and that the majority was wrong to suggest that the duty of fair representation, which runs to employees, would serve the employer's interest in confidentiality.[73] With respect to the freedom to deal with employees on an individual basis, the dissent asserted that *Epilepsy Foundation* properly dismissed the argument—likewise rejected by the Third Circuit and D.C. Circuit—that recognizing a right to coworker representation forces an employer to deal with the equivalent of a labor organization in derogation of the exclusivity principle.[74] Finally, the dissent noted that the increasing prevalence of alternative dispute resolution (ADR) mechanisms in non-union workplaces reflected an "evolving norm of fairness and due process" and weighed in favor of granting *Weingarten* rights to unrepresented employees[75]—a consideration the majority considered unavailing because ADR is a voluntary system and should not be imposed by "governmental fiat."[76]

**Analysis**

We conclude that the Board should be given an opportunity to revisit this issue because *Materials Research* and *Epilepsy Foundation* better comported with

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[71] *Id.* at 1295.

[72] *Id.* at 1308 (Members Liebman and Walsh, dissenting).

[73] *Id.* at 1309 (Members Liebman and Walsh, dissenting).

[74] *Id.* at 1308-09 (Members Liebman and Walsh, dissenting) (citing *Slaughter v. NLRB*, 794 F.2d at 127, and *Epilepsy Foundation of Northeast Ohio v. NLRB*, 268 F.3d at 1101-02).

[75] *Id.* at 1310 (Members Liebman and Walsh, dissenting).

[76] *Id.* at 1295.

the Act and the *Weingarten* decision than *IBM*, which rests on faulty assumptions and is out of step with current Board precedent.

### 1. *IBM* infringes on employees' Section 7 rights and is inconsistent with the policies of the Act and the *Weingarten* rationale

Granting coworker representation to unrepresented employees in investigative interviews is not only a permissible construction of the Act,[77] it better effectuates the purposes of the Act and the rationale underlying the Supreme Court's decision in *Weingarten*. As the Board explained in *Materials Research* and *Epilepsy Foundation*, the Supreme Court expressly grounded the right to representation in employees' Section 7 right to engage in concerted activities for mutual aid or protection. An unrepresented employee's utilization of a fellow employee for assistance satisfies the required elements for protected concerted activity.[78] And such a right "greatly enhances the employees' opportunities to act in concert to address their concern 'that the employer does not initiate or continue a practice of imposing punishment unjustly.'"[79] Thus, the rationale underpinning *Weingarten* is equally applicable to unrepresented employees. In addition, extending protection to unrepresented employees better comports with the long recognized principle that Section 7 rights apply to unrepresented employees.[80]

Not only does an employee's request for assistance satisfy the required elements of "concert" and "mutual aid or protection," but granting coverage in these circumstances better comports with Board precedent granting Section 7 protection to a broad scope of activities. In this regard, mere discussions among employees about job security, a "vital term and condition of employment," are protected under Section 7 as "inherently concerted" conduct.[81] This is so even if group action is

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[77] *See id.* at 1289; *DuPont IV*, 289 NLRB at 628.

[78] *See Materials Research*, 262 NLRB at 1015 ("[A] request for the assistance of a fellow employee is also concerted activity—in its most basic and obvious form—since employees are seeking to act together. It is likewise activity for mutual aid or protection: by such, all employees can be assured that they too can avail themselves of the assistance of a coworker in like circumstances 'as nobody doubts.'")

[79] *Epilepsy Foundation*, 331 NLRB at 678 (quoting *Weingarten*, 420 U.S. at 260-61).

[80] *See id. See also Materials Research*, 262 NLRB at 1012 & nn.15-16 (citing Board and court cases for this principle).

[81] *See Hoodview Vending Co.*, 359 NLRB No. 36, slip op. at 3-5 (Dec. 14, 2012) (holding employee conversations about job security to be inherently concerted and finding therefore that employer violated Section 8(a)(1) by discharging an employee

"nascent or not yet contemplated."[82] Thus, it would be anomalous to find that an employee has no Section 7 right to obtain help from a fellow employee when facing the possibility of discharge, but the same employee has a Section 7 right to merely discuss job security with a coworker.

In addition, the first policy consideration that the *IBM* majority cited as weighing against granting a *Weingarten* right to unrepresented employees—the fact that coworkers do not represent the interests of the whole workforce—is in tension with judicial and Board precedent based on the solidarity principle. As the *IBM* dissent noted, "[t]his notion of solidarity, of course, is basic to the Act."[83] Indeed, in *Weingarten,* the Supreme Court explicitly endorsed the solidarity principle as an additional basis for Section 7 coverage of *Weingarten* requests.[84] The Board has recently reaffirmed that the mutual aid or protection element is satisfied by demonstrations of employee solidarity, i.e. when one employee supports another with respect to an issue that appears to only concern the latter employee, because in such circumstances there is an "implicit promise of future reciprocation."[85] When employees engage in concerted activities that are protected under this solidarity principle, it does not matter whether those acting in solidarity represent any other employee's interests. Likewise, they need not be under a legal duty or personally incentivized to safeguard others' interests for their actions to warrant protection. What matters is that an employee approached a coworker with "a concern *implicating the terms and conditions of their* employment and sought . . . help in pursuing it."[86] And, it is enough that one employee has made common

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who engaged in such a conversation with a coworker), *reaffirmed by* 362 NLRB No. 81 (Apr. 30, 2015).

[82] *Id.* at 3-4.

[83] 341 NLRB at 1306, n.12 (Members Liebman and Walsh, dissenting) (citing *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.,* 130 F.2d at 505).

[84] 420 U.S. at 261 ("Concerted activity for mutual aid or protection is therefore as present here as it was held to be in *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.* . . . .").

[85] *See Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 5-7 (Aug. 11, 2014) (holding that lone victim of sexual harassment who approached coworkers to solicit their support as witnesses to report an incident to management was engaged in protected concerted activity).

[86] *Id.,* slip op. at 7 (emphasis in original).

cause with another; the employee's subjective motive is irrelevant.[87] Thus, *IBM*'s policy concerns in this regard are misplaced.

**2. *IBM* conflates the efficacy of the right with the right itself**

The second and third policy considerations relied on by the *IBM* majority—that coworkers are less capable of redressing the imbalance of power and of offering constructive assistance than union representatives—are likewise uncompelling. As the Board explained in *Materials Research*, the role of a *Weingarten* representative is limited and can be performed by co-workers.[88] Indeed, an employer can benefit from coworker representatives even if they lack special skills or knowledge. Their mere presence and moral support may calm the employee's nerves so as to enable the employee to describe the incident more accurately, thereby aiding the employer's discovery of the truth.[89] This is especially true in the case of unrepresented employees, since their employment is more vulnerable and they are likely to be more apprehensive.

But even assuming a coworker would be less effective than a union representative, this should not weigh against Section 7 coverage. As the Board explained in *Epilepsy Foundation*, Section 7 rights do not turn on the skills or abilities of the participants.[90] Nor does protection depend on the efficacy of the concerted action.[91] To withhold representation at investigatory interviews from unrepresented employees on the basis that they might not benefit as much as unionized employees is therefore unwarranted. In any event, the Board should not deny employees the exercise of a Section 7 right based on a generalized, somewhat paternalistic assumption that the right will be of limited value.[92]

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[87] *Id.* at 3, 5-7.

[88] 262 NLRB at 1015.

[89] *See id.*

[90] 331 NLRB at 679. *See also IBM*, 341 NLRB at 1308 (Members Liebman and Walsh, dissenting).

[91] 331 NLRB at 679 n.12.

[92] *See Materials Research,* 262 NLRB at 1015 ("We would not substitute our judgment for that of employees who have shown that they believe that the presence of a coworker lends a measure of meaningful protection.").

### 3. *IBM*'s concern over employer confidentiality interests is unpersuasive and out of step with current Board law

The *IBM* majority's fourth policy consideration for treating unrepresented employees differently from unionized employees—that a coworker representative may compromise the confidentiality of information—is likewise unavailing. As the dissent amply explained, there is no rational basis for believing that a union representative's duty of fair representation would safeguard the *employer's* interest in confidentiality, since that duty runs to *employees*.[93] In addition, we note that a union representative's interest in maintaining an amicable relationship with the employer is not meaningfully distinguishable from that of a coworker, contrary to *IBM*'s suggestion otherwise.[94] A coworker has at least as strong an interest in maintaining an agreeable relationship with the employer, if not stronger, since [redacted] employment is dependent on the employer and [redacted] is likely an at-will employee without the benefit of a grievance-arbitration procedure. If an employer lawfully imposes a non-disclosure requirement on participants in the investigation, it seems unlikely that a coworker would jeopardize [redacted] employment by violating such a rule. Thus, coworkers are not more likely to divulge sensitive information where discretion is required.

More importantly, recently the Board has recognized that an employer's general confidentiality interests must not be allowed to presumptively trump employees' Section 7 rights regarding disciplinary investigations. Thus, in *Banner Estrella Medical Center*,[95] the Board held that an employer may restrict employee discussions about ongoing disciplinary investigations only where it shows a legitimate and substantial business justification that outweighs employees' Section 7 rights.[96] Under this standard, an employer must assess its confidentiality needs on a case-by-case basis and demonstrate objectively reasonable grounds for believing that confidentiality is necessary to protect the integrity of an investigation.[97] Generalized concern about safeguarding the integrity of investigations is insufficient to outweigh employees' Section 7 rights.[98] Given the

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[93] *IBM*, 341 NLRB at 1309 (Members Liebman and Walsh, dissenting).

[94] See *id.* at 1293.

[95] 362 NLRB No. 137 (June 26, 2015).

[96] *Id.*, slip op. at 2.

[97] *Id.*, slip op. at 3.

[98] *Id.*, slip op. at 4.

Board's recognition of the rights of employees to discuss ongoing investigations, it is incongruous to maintain a policy that denies representation to unrepresented employees in such investigations in each and every case out of deference to generalized confidentiality interests.[99]

Moreover, such a policy makes little practical sense. In cases where an employer is not justified in banning discussions of investigations, the accused would be entitled to discuss the substance of the interview with [redacted] coworkers immediately after it ended. Thus, the employer gains very little by excluding a coworker witness from the interview itself. And in cases where a ban would be justified, the employer can lawfully prohibit both the accused and [redacted] representative from speaking about the investigation with others, upon pain of discipline. Thus, *IBM* should be abandoned in favor of a more balanced approach that gives due regard to employees' Section 7 interests.

### 4. Extending *Weingarten* rights is consistent with the prerogative of non-union employers to deal with employees on an individual basis

The *IBM* majority's concern that extending the *Weingarten* right to unrepresented employees interferes with a non-union employer's right to deal with such employees on an individual basis is also misdirected. It is, of course, unlawful for a unionized employer to bypass employees' chosen representative and engage in so-called "direct dealing" by making offers regarding terms and conditions directly to the employees.[100] The corollary is also true—non-union employers do not violate the Act by dealing with employees individually regarding their terms and conditions of employment. And as the Board held in *Charleston Nursing Center,* non-union employers do not infringe on employees' Section 7 rights by refusing to deal with their employees except on an individual basis.[101]

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[99] Assigning greater weight to employees' Section 7 interests compared to generalized concerns about confidentiality would also be congruous with the Board's recent decision to demand a more particularized showing of confidentiality concerns in the context of union requests for witness statements. *See Piedmont Gardens*, 362 NLRB No. 139, slip op. at 1-6 (June 26, 2015) (overruling the blanket exemption for witness statements in favor of case-by-case balancing of an employer's confidentiality interests and the union's need for the information).

[100] *See, e.g.*, *Central Management Co.*, 314 NLRB 763, 767 (1994) (citing *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 683-85 (1944)).

[101] 257 NLRB 554, 555 (1981) (employer lawfully refused to meet with unrepresented group of employees about pay raise because "generally an employer is under no obligation to meet with employees or entertain their grievances upon request where

Recognizing *Weingarten* rights for unrepresented employees is consistent with these principles of law. Investigatory interviews do not entail exchanges of proposals. Indeed, it is well-established that employers have no duty to bargain in such interviews.[102] Thus, the *IBM* majority's concern that enabling coworker representation would "forbid" an employer from dealing with employees individually about their terms and conditions of employment misses the mark, since such discussions are outside the scope of the investigatory interview.[103] In addition, coworker representation at such interviews does not force the employer to deal with employees on a group basis in the sense envisioned by the Board in *Charleston Nursing Center*.[104] Unlike the situation where employees present grievances to their employer, it is the employer who demands the meeting in the case of an investigatory interview. Moreover, the employer can elect to forego the interview if the employee insists on representation, thereby invoking its prerogative to refuse to deal with employees on a "group" basis. Thus, extending *Weingarten* rights to unrepresented employees is consistent with the unique prerogatives of non-union employers recognized by the Board, contrary to concerns raised in *IBM*.

### 5. The industrial and societal changes relied on in *IBM* do not provide a compelling rationale for withholding *Weingarten* rights from unrepresented employees, and *IBM* imprudently discounted other changes that support the extension of such rights

The *IBM* majority 's reliance on certain industrial and societal changes—namely, employers' increased need to conduct investigations because of the rise in workplace violence, increased incidents of corporate abuse, legal obligations regarding workplace harassment, and post-September 11 terrorism threats—as reasons for a reversal of *Epilepsy Foundation* is neither well founded nor supported by any empirical evidence. For one, the *IBM* majority failed to consider that the greater need for workplace investigations not only strengthens employers' interests, but also those of employees in having some measure of protection. Moreover, none of these societal changes warrants a blanket denial of *Weingarten* rights for unrepresented employees. These trends are not usually even relevant to run-of-the

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there is no collective-bargaining agreement with an exclusive bargaining representative requiring it to do so").

[102] *See Weingarten*, 420 U.S. at 259-60.

[103] 341 NLRB at 1292.

[104] This related argument was raised by Member Schaumber in his concurrence. *Id.* at 1298.

mill investigations into employee misconduct. In addition, as the dissent explained, to the extent these changes demand greater confidentiality in particular investigations, such concerns can be accommodated on a case-by-case basis. Indeed, as explained above, this is how the Board has approached confidentiality concerns in the context of employee discussions of ongoing investigations. We are unaware of any evidence that this case-by-case approach has compromised the integrity of employer investigations in any respect, let alone so as to warrant a blanket rule against coworker representation.

As commentators have noted, the *IBM* majority's reliance on these changed societal conditions is fraught with difficulties.[105] First, the commentators point out that these purported "changes" do not really represent new phenomena. In this regard, employers have had a legal obligation to address discrimination and harassment complaints for decades.[106] The nation has experienced equally "'troubled times'" in the past, yet this was not taken into account in earlier Board decisions.[107] And workplace homicides actually declined in the years leading up to *IBM*.[108] Second, practically speaking, withholding representation from employees under investigation is an ill-suited response to the problems of terrorism, workplace violence, and corporate malfeasance. In this regard, responsibility for investigating and punishing perpetrators of terrorism and violent crimes rests with law enforcement agencies, not employers.[109] Moreover, isolating employees and withholding moral support during investigatory interviews may be

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[105] *See* Sarah Helene Duggin, *The Ongoing Battle over* Weingarten *Rights for Non-Union Employees in Investigative Interviews: What do Terrorism, Corporate Fraud, and Workplace Violence Have to Do With It?*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 655, 661, 691-717 (2006) ("The Board's *IBM Corporation* ruling reflects an ill-considered and dangerous decision to restrict important safeguards in the name of enhanced security—both physical and economic—without any critical analysis of the legitimacy or efficacy of doing so."); William R. Corbett, *The Narrowing of the National Labor Relations Act: Maintaining Workplace Decorum and Avoiding Liability*, 27 BERKELEY J. EMP. & LAB. L. 23, 32-34 (2006) ("the rationale of changed conditions and increased need for workplace investigations rings hollow"); Christine Neylon O'Brien, *The NLRB Waffling on* Weingarten *Rights*, 37 LOY. U. CHI. L.J. 111, 142 (2005) ("[*IBM*] was not supported by persuasive rational reasons").

[106] *See* Corbett, *supra* note 105, at 32-33.

[107] Duggin, *supra* note 105, at 699-703 (quoting *IBM*, 341 NLRB at 1294).

[108] *See id.* at 704-05 & n.284.

[109] *See id.* at 703-07.

counterproductive and tend to incite violent outbursts.[110] In addition, as the *IBM* dissent also pointed out, corporate wrongdoing is an executive-level problem that is not connected to the due process rights of line employees.[111]

As one commentator has noted, there is a much more relevant change in the workplace in recent years—the vast majority of American workers, particularly in the private sector, do not belong to a union. Thus, "most of the country's workers are susceptible to the very problems that *Weingarten* rights help to mitigate," i.e. "the unfair imposition of disciplinary sanctions."[112] This change presents a much more compelling argument for extending the *Weingarten* right to the non-unionized workplace than any of the *IBM* majority's arguments for restricting it to unionized workplaces.

Finally, the *IBM* majority disregarded the relevance of the increasing prevalence of alternative dispute resolution mechanisms in the workplace on the grounds that such systems are voluntary. In *Weingarten* itself, the Supreme Court pointed to the fact that many collective-bargaining agreements incorporate a right to union representation at investigatory interviews in finding that such a right comported with industrial practice. These contract provisions are equally voluntary, since there is no duty to agree to any particular proposal in bargaining.[113] Thus, the Board should take into account the rise in ADR and the concomitant "evolving norm of fairness and due process" as supporting a *Weingarten* right in non-union settings.[114]

### 6. The Employer violated Section 8(a)(1) by insisting that the Charging Party attend the HR meeting alone

Recognizing that unrepresented employees enjoy an equal right to representation at investigatory interviews, it follows that the Employer infringed on that right by forcing the Charging Party to attend the HR meeting without the assistance of [redacted] coworker. The Charging Party was entitled to invoke [redacted] right to representation because [redacted] reasonably perceived that the meeting might lead to

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[110] *See id.* at 708-09.

[111] *See IBM*, 341 NLRB at 1305 (Members Liebman and Walsh, dissenting); Duggin, *supra* note 105, at 709-10.

[112] Duggin, *supra* note 105, at 714.

[113] *See NLRB v. Am. Nat'l Ins. Co.*, 343 U.S. 395, 401-04 (1952) (citing Section 8(d)).

[114] *IBM*, 341 NLRB at 1310 (Members Liebman and Walsh, dissenting).

discipline. In this regard, [redacted] was aware that the Employer was planning to question [redacted] about patient complaints, which is part of the Employer's admitted procedure in investigating such incidents in contemplation of discipline. Also, the Charging Party reasonably feared discipline based on the HR Vice President's statement that the Employer was building a case against [redacted] Once an employee makes a valid request for representation, the employer has three options: (1) grant the request; (2) discontinue the interview; or (3) offer the employee a choice between continuing the interview without a representative or having no interview.[115] Thus, it was unlawful for the Employer to bar the coworker from the HR meeting and to proceed with questioning without giving the Charging Party the option of foregoing the interview.

## 7. Make-whole relief is the appropriate remedy in the circumstances of this case

The Board recently determined that a make-whole remedy is appropriate for *Weingarten* violations where: (1) the discharge decision was based, at least in part, on the employee's misconduct during an unlawful interview; and (2) the employer cannot demonstrate that it would have discharged the employee absent that purported misconduct.[116] Here, the Employer purportedly relied on both the Charging Party's behavior during the HR meeting as well as [redacted] prior protected concerted activities of organizing fellow nurses around group complaints and presenting complaints to management as an outgrowth of those discussions. Since the Employer relied on misconduct occurring in the investigatory interview, and the second basis for the discharge is unlawful, we conclude that the Charging Party is entitled to make-whole relief.

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) by refusing the Charging Party's request for a coworker to accompany [redacted] at the HR meeting, and it should seek make-whole relief to remedy this violation.

/s/
B.J.K.

ADV.05-CA-157145.Response.Bayhealth[redacted]

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[115] *See, e.g., Menorah Medical Center,* 362 NLRB No. 193, slip op at 2 (Aug. 27, 2015).

[116] *E.I. DuPont de Nemours & Co.*, 362 NLRB No. 98, slip op. at 4 (May 29, 2015).

*United States Government*
*National Labor Relations Board*
**OFFICE OF THE GENERAL COUNSEL**

# Advice Memorandum

S.A.M.

DATE: April 22, 2016

TO: Charles L. Posner, Regional Director
Region 5

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Seven Hills, Inc.
Cases 05-CA-159426, 05-CA-157153,
05-CA-149015, 05-CA-135126

506-6050-2500
506-6080-0800
512-5036-6720-5600
524-8351-4300

These cases were submitted for advice as to whether a series of eight full-day strikes over the course of almost two years, during which employees joined in political protests with other federal contractor employees over wages, constituted protected concerted activity rather than unprotected "intermittent" strikes. Resolution of this legal issue is determinative of whether the Employer violated Section 8(a)(1) by engaging in various retaliatory acts against strikers. We conclude that the strikes were protected, and consequently, the Employer's actions unlawfully coerced employees in the exercise of their Section 7 rights.

## FACTS

Seven Hills, Inc. ("Employer") operates ten food concession outlets at the Pentagon under contract with the Navy Exchange Service Command ("Navy Exchange"), a government entity. It employs about 70 non-supervisory employees at these outlets. In addition to the Pentagon outlets, the Employer operates more than a dozen fast-food restaurants in Virginia, Maryland, and Pennsylvania.

Good Jobs Nation is a campaign by the Change to Win Labor Federation to improve the wages and benefits of federal contractor employees by, among other things, securing an executive order requiring contractors to pay their employees at least $15.00 per hour. The campaign is currently targeting about twenty federal contractors, including the Employer. Change to Win is not seeking to represent employees as a labor organization, but (b) (4), (b) (6), (b) (7)(C) employed by the Employer have signed cards in support of the campaign. The campaign coordinates political protests, which are attended by hundreds of striking employees of federal contractors, including the Employer's employees. The protests are planned weeks in advance and are scheduled so as to attract media attention, such as by arranging for the appearance of high-profile politicians. Strike notices are circulated to employees

about a week or two in advance of the scheduled protests to solicit employee participation.

The Employer's employees at the Pentagon engaged in eight one-day strikes in 2014 and 2015, during which most strikers attended protests organized by Good Jobs Nation. The strikes occurred about every two to three months, with the longest break being six months and the shortest about three weeks. Specifically, employees struck on January 22, 2014 (first strike), July 29, 2014 (second strike), November 13, 2014 (third strike), December 4, 2014 (fourth strike), April 22, 2015 (fifth strike), July 22, 2015 (sixth strike), September 22, 2015 (seventh strike), and November 10, 2015 (eighth strike). Participation in the strikes gradually increased over time, with a peak of between 26 to 36 employees during the fifth and sixth strikes.[1]

Typically, Good Jobs Nation provided notice of a strike to the Employer the evening prior to the strike.[2] The notices contained the strikers' names and signatures and made an unconditional offer to return to work the following day. Each notice for the first through fourth strikes stated that employees were going on strike "to demand better wages and benefits, and to insist that our legal right to join together to improve our employment conditions is respected." Thereafter, the notices cited varying unfair labor practices (which were allegedly committed weeks or months before the strikes) as the basis for each strike, namely: to demand respect for the right to wear insignia at work (fifth strike notice), to demand employees' old schedules back and the reinstatement of two employees who were discharged after the fifth strike (sixth strike notice), to demand the reinstatement of two employees who were terminated after the sixth strike (seventh strike notice), and to demand an end to threats against employees for taking concerted action to improve pay and working conditions (eighth strike notice). All of the notices (including those for the fifth through eighth strikes) stated that employees "are sick and tired of working hard for poverty-level wages that

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[1] The number of employees who actually struck, that is, did not show up for a scheduled shift, was much lower than the number of employees who signed the strike notices. The number of employees who actually struck was: 0 to 2 for the first strike, 3 to 9 for the second strike, 10 to 13 for the third strike, 14 to 22 for the fourth strike, 26 to 36 for the fifth strike, 27 for the sixth strike, 15 to 20 for the seventh strike, and 16 for the eighth strike. Uncertainty as to the number of employees who actually struck is primarily due to the Employer's failure to produce comprehensive scheduling and timekeeping records, but also the fact that some purported strikers did not sign in at the Good Jobs Nation protest.

[2] For the first strike, Good Jobs Nation did not send the strike notice to the Employer until the morning of the strike. While there is some evidence that some supervisors or managers were aware of the strikes before the Employer received the strike notices, it was typically no more than one day in advance.

do not allow us to afford decent housing, provide for our families and take care of our health and other basic needs."

**The Employer's Assertions**

The Employer asserts that the strikes negatively impacted its business in three respects: by causing outlets to close for the day, by reducing sales at other outlets, and by harming its business relationships with the government and franchisors. While none of the Employer's ten Pentagon outlets closed as a result of the first strike, each subsequent strike caused some closures. Specifically, one outlet closed during the second and eighth strikes, two outlets closed during the third, fourth, sixth, and seventh strikes, and three outlets closed during the fifth strike.[3] One particular outlet, the Taco Bell/KFC restaurant, closed on at least four occasions. The other outlets that closed did so only once or twice.

The Employer asserts that it was forced to close outlets because it was infeasible to obtain replacement labor, but its claims in this regard are overstated or unsubstantiated. The Employer claims that it is virtually impossible to temporarily assign non-Pentagon employees to the Pentagon or hire new employees to maintain operations because it takes at least three to five business days to obtain a security badge, and the badges are inactivated if they are not used at least once every 30- to 45-day period. The Employer admittedly borrowed a few employees from non-Pentagon locations to fill in during the eighth strike, when it received warning about the strike from the Navy Exchange a week before it occurred. The Employer claims that borrowing outside employees is not a viable solution to fully maintain operations because such replacements need to be escorted by someone with a security badge all day.[4] However, according to the Navy Exchange, there is a process for on-call employees to obtain a security badge that is active for a full year. The Employer also asserts that it cannot use off-duty Pentagon employees to cover for strikers because most of its staff is full-time, and its part-time employees often hold other jobs and are not readily available. To the contrary, the evidence suggests that at least half of its

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[3] The Employer's claim that an additional outlet closed during the second, third, and fourth strikes was unsubstantiated. It is unclear whether an additional outlet closed during the eighth strike. Only one employee was scheduled to work at the Freshens outlet and that employee struck, but the Employer did not provide relevant timekeeping records or sales data to demonstrate that no one worked.

[4] According to the Navy Exchange, managers are permitted to escort up to three individuals per day onsite, but those escorted individuals are prohibited from working until they receive their own security badge. It appears that the Employer did not abide by this rule when it permitted non-Pentagon employees to work during the eighth strike.

workforce works less than 30 hours per week (based on the limited work schedules produced during the investigation). The Employer has not substantiated its claim that part-time employees are unavailable for work outside their scheduled hours. Although the Employer claims that few employees are crossed-trained to work at other Pentagon outlets, it admits that it can and has juggled employees around on strike days. Finally, the Employer asserts that Pentagon security would not allow the use of temp workers from an agency, but it has not substantiated this claim or explained why temps would be ineligible to receive a yearly badge for on-call employees.[5]

With respect to the Employer's claim that open outlets did less business on strike days, the evidence is equivocal. Some outlets experienced a drop in customers on strike days, while others did not. In some instances, outlets served even more customers on strike days compared to the days before and after the strike.

With respect to the claim that the strikes have interfered with the Employer's business relationships, the Employer asserts that the strikes have caused it to breach its government contract and its franchise agreements. The Employer claims that the Navy Exchange opens compliance investigations and levies fines when outlets close, and that these contract breaches adversely affect its prospects for securing future government contracts. By letter dated October 2, 2015, the Navy Exchange chastised the employer for breaching the contract by closing some outlets during the sixth and seventh strikes, levied a $191.91 fine for the latter closures, and demanded that the Employer submit a plan of action to prevent future closures. Furthermore, the Employer claims that the closures have caused it to breach its franchise agreements by failing to fulfill brand standards due to inadequate staffing, but it has not substantiated this claim. The Employer produced a notice of noncompliance from Starbucks for closing one of the Pentagon outlets the day of the third strike, but it does not appear that the strike caused the outlet closure since only 2 out of 20 employees assigned to Starbucks signed the strike notice.[6]

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[5] According to one of the Employer's Pentagon contracts, any subcontractors or outside associates must be agreed to by the Navy Exchange. It is unclear whether this provision would, in fact, prohibit the Employer from utilizing labor from a temp agency.

[6] Assuming the strikes are protected, the Region plans to issue complaint alleging that the Employer unlawfully disciplined one employee for missing work to attend the second strike, disciplined and discharged four other employees for pretextual reasons shortly after the fifth and sixth strikes, reduced employees' hours of work because of the fifth strike, and interrogated and threatened employees in connection with the second, fifth, and sixth strikes. The Region has also concluded that the Employer unlawfully coerced employees with respect to their wearing of Good Jobs Nation

## ACTION

We conclude that the employees were engaged in protected concerted activity and not unprotected, intermittent strikes. Accordingly, the Employer violated Section 8(a)(1) by threatening, interrogating, disciplining, discharging, and reducing the hours of work of employees as a result of their strike activity.

The right to strike is statutorily protected under Sections 7 and 13 of the Act.[7] "Without question employees have a protected right to withhold services from an employer," whether to protest unfair labor practices or for other reasons, such as to enhance their bargaining position or to act together to better their working conditions.[8] The Board has been particularly likely to find work stoppages protected when the employees were not represented by a union.[9] That is essentially because in those instances, the employees lacked a lawfully implemented grievance procedure or a recognized bargaining representative to assist them in negotiating

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campaign stickers and their discussing grievances with customers, and promulgated new uniform rules to discourage protected concerted activity.

[7] *NLRB v. Preterm, Inc.*, 784 F.2d 426, 429 (1st Cir. 1986) (pursuant to Section 7, "employees are granted the right to peacefully strike, picket and engage in other concerted activities"); *NLRB v. Drivers, Chauffeurs, Helpers, Local 639 (Curtis Bros.)*, 362 U.S. 274, 281 (1960) (Section 13 "provides, in substance, that the Taft-Hartley Act shall not be taken as restricting or expanding either the right to strike or the limitations or qualifications on that right . . . unless 'specifically provided for' in the Act itself").

[8] *Embossing Printers*, 268 NLRB 710, 722 (1984), *enforced mem.*, 742 F.2d 1546 (6th Cir. 1984) (table decision); *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14-15 (1962).

[9] *See Washington Aluminum*, 370 U.S. at 14-15 (employees' work stoppage protected despite failure to make specific demand upon employer to remedy objectionable condition where they were part of a small group of unorganized employees; having no bargaining representative and no established procedure for negotiating with the company, they took the most direct course to let the company know that they wanted a warmer place in which to work); *Serendippity-Un-Ltd.*, 263 NLRB 768, 775 (1982) (employees' joint cessation of work to protest perceived safety violations and inadequate health insurance coverage protected, especially where there was no bargaining representative, notwithstanding the reasonableness of their perception, any lack of notification to the employer of their intent to cease work, or the existence of alternative methods of solving the problems).

improved working conditions and resolving grievances.[10] Whether a concerted work stoppage has lost the Act's protection is an affirmative defense; thus, the employer bears the burden of showing that the stoppage is unprotected.[11]

A work stoppage that seeks a statutorily protected goal will be deemed unprotected because of its partial or intermittent character only in certain limited circumstances. There are essentially three bases for finding that a partial or intermittent strike is unprotected. First, the Board has held such work stoppages unprotected where they are part of a planned strategy to "harass the company into a state of confusion," such as through intermittent "'hit and run' strikes."[12] Second,

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[10] *See, e.g.*, *Advance Industries Division*, 220 NLRB 431, 431-32 (1975) (employees engaged in protected conduct by staying on the premises past unilaterally established shift where they did not have the benefit of a bargained-for grievance procedure), *enforcement denied in relevant part*, 540 F.2d 878 (7th Cir. 1976); *Polytech, Inc.*, 195 NLRB 695, 696 (1972) (noting that employees were unrepresented and lacked "structured procedures to protest . . . working conditions" in finding single concerted refusal to work overtime protected). *Cf. Swope Ridge Geriatric Center*, 350 NLRB 64, 64 n.3, 68 (2007) (employees were represented by a union, whose intent was to engage in a series of recurring intermittent work stoppages as part of its underlying bargaining strategy until a contract was reached).

[11] *See, e.g.*, *Silver State Disposal Service*, 326 NLRB 84, 85 (1998) (respondent bears burden of showing that work stoppage is unprotected) (citing *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 277 (1956) (whether a work stoppage is unprotected because it violates a no-strike clause is an affirmative defense), and *Heavy Lift Services, Inc.*, 234 NLRB 1078, 1079 (1978) ("the initial burden of proceeding with proof of an affirmative defense rests with Respondent"), *enforced*, 607 F.2d 1121 (5th Cir. 1979)).

[12] *See Pacific Telephone & Telegraph Co.*, 107 NLRB 1547, 1548-50 (1954) (union-orchestrated waves of work stoppages at different locations over nine days unprotected where they were admittedly calculated to "harass the company into a state of confusion" by repeatedly striking only as long as it took for the employer to find replacements; the "inherent character of the [hit and run] method used [set] this strike apart from the concept of protected union activity envisaged by the Act") (citing *Auto Workers v. Wis. Employment Relations Bd. (Briggs-Stratton)*, 336 U.S. 245, 249-50, 264 (1949) ("recurrent or intermittent" work stoppages—26 mid-day stoppages over four and a half months—pursuant to a union plan to hold surprise meetings during work hours to exert pressure on the employer while avoiding the hardships of a strike were unprotected under federal law; union did not provide notice as to when or whether the employees would return to work and did not inform the employer of any concessions it could make to avoid the stoppages), *overruled on other grounds by Lodge 76, Machinists v. Wis. Employment Relations Comm'n*, 427 U.S. 132, 151-52 (1976)). *Cf. United States Service Industries*, 315 NLRB 285, 285-86 (1994) (three

the Board has held striking employees unprotected when they engage in quasi-strikes that are "intentionally planned and coordinated so as to effectively reap the benefit of a continuous strike action without assuming the economic risks associated with a continuous forthright strike, i.e., loss of wages and possible replacement."[13] This type of no-risk, partial strike is unprotected because employees are unfairly exerting economic pressure on their employer without assuming the status of strikers.[14] This principle has been applied where employees pick and choose which tasks to perform[15] or which portion of the work day they will work, including circumstances in which employees selectively work on an intermittent basis.[16] Finally, employees are not entitled to dictate their own terms

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strikes involving one set of worksites and then a different set protected where striking employees were not "engaged in a campaign to harass the [c]ompany into a state of confusion"), *enforced mem. per curiam*, 72 F.3d 920 (D.C. Cir. 1995) (table decision); *WestPac Electric*, 321 NLRB 1322, 1360 (1996) (three strikes within a two-week period protected where they were not part of "hit and run" scheme, and were for separate employer acts).

[13] *WestPac Electric*, 321 NLRB at 1360 (finding no such quasi-strike condition). *See also New Fairview Hall Convalescent Home*, 206 NLRB 688, 747 (1973) ("the Board and the courts have deemed it an 'indefensible' tactic for employees to refuse to work on the terms prescribed by their employer, and yet to remain on their jobs and thus deny the employer the opportunity to replace them with workers who will accept these terms"), *enforced sub nom. Donovan v. NLRB*, 520 F.2d 1316 (2d Cir. 1975).

[14] *First National Bank of Omaha*, 171 NLRB 1145, 1151 (1968) ("[W]hat makes any work stoppage unprotected . . . [is] the refusal or failure of the employees to assume the status of strikers, with its consequent loss of pay and risk of being replaced. Employees who choose to withhold their services because of a dispute over [terms and conditions] may properly be required to do so by striking unequivocally. They may not simultaneously walk off their jobs but retain the benefits of working."), *enforced*, 413 F.2d 921 (8th Cir. 1969).

[15] *See, e.g.*, *Audubon Health Care Center*, 268 NLRB 135, 136-37 (1983) (unprotected partial strike where nurses refused to work in the open section "while accepting pay" for the work they remained willing to perform; "employees must withhold all their services from their employer" during a strike, and may not "pick and choose the work they will do or when they will do it"). *See also Yale University*, 330 NLRB 246, 247-48 (1999) (teaching fellows engaged in unprotected partial strike by refusing to turn in students' grades while continuing to perform other duties).

[16] *Compare Polytech*, 195 NLRB at 696 (noting that "when employees engage in repeated work stoppages *limited to a portion of the working day*, they are plainly

and conditions of employment.[17] Accordingly, employees may not engage in part- or full-day work stoppages in such a way as to effectively set their own work schedules.[18]

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unwilling to assume the status of strikers") (emphasis added), *and Valley City Furniture Co.*, 110 NLRB 1589, 1594-95 (1954) (refusal to perform overtime unprotected because union "sought to bring about a condition that would be neither strike nor work"), *with WestPac Electric*, 321 NLRB at 1360 (three strikes over two-week period consisting of one part-day strike and two multi-day strikes were not designed to reap the benefit of a continuous strike without the economic risks). *See also Embossing Printers*, 268 NLRB at 711, 723 (finding employees' clocking out of work on three different days to attend union meetings regarding contract negotiations constituted a pattern of intermittent partial strikes inconsistent with a genuine strike); *New Fairview Hall Convalescent Home*, 206 NLRB at 701-02, 708, 746-747 (applying this standard in finding three mid-day walkouts about three weeks apart, lasting thirty minutes to three and a half hours each, unprotected "recurrent, intermittent and partial work stoppages").

[17] *See, e.g.*, *Honolulu Rapid Transit Co.*, 110 NLRB 1806, 1807-11 & n.3 (1954) (union campaign of weekend strikes over four consecutive weeks amounted to employees "impos[ing] upon the employer their own chosen conditions of employment" by converting 7-day workweek to 5-day workweek; "[w]e are aware of no law or logic that gives the employee the right to work upon terms prescribed solely by him"); *Valley City Furniture*, 110 NLRB at 1594-95 (union tactic of regularly refusing to work overtime amounted to attempt to "dictate the terms and conditions of employment"; "[w]ere we to countenance such a strike, we would be allowing a union to do what we would not allow an employer to do, that is to unilaterally determine conditions of employment"); *John S. Swift Co.*, 124 NLRB 394, 396-97 (1959) (refusal to work overtime constituted "attempt to work on terms prescribed solely by [employees]"), *enforced in part*, 277 F.2d 641 (7th Cir. 1960); *Audubon Health Care Center*, 268 NLRB at 136-37 (refusal to perform certain work "constitutes an attempt by the employees to set their own terms and conditions of employment"); *Embossing Printers*, 268 NLRB at 723 (noting that employees "did not have a right under the Act to come and go as they pleased" in finding three walkouts to attend union meetings during working hours unprotected intermittent partial strikes).

[18] *See Honolulu Rapid Transit*, 110 NLRB at 1807-11 & n.3 (all-day weekend strikes); *Swope Ridge Geriatric Center*, 350 NLRB at 68 (applying *Honolulu Rapid Transit* in finding two 24-hour weekend strikes unprotected).

The Board has made clear that the mere fact that employees engage in multiple work stoppages does not render their activities unprotected.[19] There is no "magic number" before they are considered to be of a "recurring nature."[20] Moreover, employees "are not required to institute the strike at any particular time of the day or to maintain it for any particular period of time to be entitled to the protection of the Act."[21] Further, the fact that work stoppages are designed to disrupt an employer's operation does not render them unprotected because disruption is an inherent aspect of a strike.[22]

**The strikes here were not designed to harass the Employer into a state of confusion**

The Board has found multiple work stoppages to be "beyond the pale of proper strike activities" where they involve "hit and run" tactics deliberately designed to "harass the company into a state of confusion" through "calculated unpredictability."[23] In *Pacific Telephone,* the Board found the union to be engaged in unlawful intermittent work stoppages where it coordinated waves of strikes by employees at different offices over a nine-day period, during which the employer was compelled to "'get its defenses up'—or gather substitute workers wherever a stoppage

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[19] *United States Service Industries*, 315 NLRB at 285 (citing *Chelsea Homes*, 298 NLRB 813, 831 (1990), *enforced mem.*, 962 F.2d 2 (2d Cir. 1992) (table decision)); *Robertson Industries*, 216 NLRB 361, 361-62 (1975) (two work stoppages three months apart totaling two days' absence from work as part of employees' continuing effort to resolve work-related problems is not the type of pattern of recurring stoppages warranting the deprivation of Section 7 protection; to hold otherwise would "disallow employees to engage in more than one instance of concerted protected activity during an indefinite period of time regardless of the variety and number of conditions or occurrences protested and the identity of the individuals involved"), *enforced*, 560 F.2d 396 (9th Cir. 1976); *WestPac Electric*, 321 NLRB at 1359-60 (three strikes within a two-week period protected).

[20] *Robertson Industries*, 216 NLRB at 362.

[21] *First Nat'l Bank of Omaha*, 413 F.2d at 925.

[22] *See Allied Mechanical Services*, 341 NLRB 1084, 1102 (2004) ("a requirement that a strike not be disruptive of an employer's operations, or harassing to it, is a requirement that the strike not be conducted"), *enforced*, 668 F.3d 758 (D.C. Cir. 2012); *Swope Ridge Geriatric Center*, 350 NLRB at 67 ("It is axiomatic that the very purpose of a strike is to cause disruption, both operationally and economically, to an employer's business operations . . . .").

[23] *Pacific Telephone*, 107 NLRB at 1548-49.

was unexpectedly pulled—'only to have the picket line gone' when the emergency crews reached the picketed place."[24] As the Board noted in that case, the union acknowledged that its surprise "hit and run" tactics were deliberately calculated to "harass the company into a state of confusion," tax management's ability to organize its offices, and shut down the employer's nationwide operations.[25] The union also acknowledged that this tactic was advantageous because most workers would remain on the job and collect pay while a subset of key employees would effectively harass the company into a state of confusion.[26] In these circumstances, the Board found the strikes unprotected because the union's tactics were inconsistent with the concept of protected activity envisioned by the Act.[27] The Board also explained that the employer had a right to know whether the operation was going to continue for the day or not, and the strikers were unwilling to give that assurance.[28]

Applying the above principles here, the strikes, while planned, were not unlawfully designed to "harass the employer into a state of confusion" or to cripple its operations using a small subset of employees.[29] Here, there was no scheme to use "calculated unpredictability" to wreak havoc on the Employer's operations. For all but the first strike, employees gave notice of the strike the night before, informing the Employer of which employees would be out on strike and when they planned to return to work. With this information, the Employer could organize its operations for the day and arrange for replacement labor as best as possible within the constraints of the Pentagon's security protocols. Although the Employer's efforts to secure replacements may have been marginally more successful with earlier notice,[30]

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[24] *Id.*

[25] *Id.* at 1548 n.3, 1549.

[26] *Id.* at 1548 n.3.

[27] *Id.* at 1549-50.

[28] *Id.* at 1551. The only other case finding a strike to be unprotected because it was calculated to create a state of confusion is *National Steel & Shipbuilding Co.*, 324 NLRB 499 (1997), *enforced*, 156 F.3d 1268 (D.C. Cir. 1998), however that case is not precedential since exceptions were not filed to the dismissal of allegations related to striker discipline. *See id.* at 499 n.1.

[29] *United States Service Industries*, 315 NLRB at 285 (mere fact that several employees struck more than once does not render their conduct intermittent striking where there was no evidence of strategy to "harass the company into a state of confusion" through use of hit and run strikes).

[30] Notably, the Employer still complained of difficulty replacing strikers even when given one week's notice in advance of the eighth strike.

advance notice is not generally a prerequisite to a lawful strike where no collective-bargaining agreement is in effect.[31] And the Employer was not prevented from organizing its operations, in contrast to the company in *Pacific Telephone*, since employees gave assurances that they would return the following day.

Furthermore, the significant hiatus between most of the strikes undermines any argument that they were designed to harass the Employer into a state of confusion. These breaks between strikes, typically two to three months, gave the Employer ample time to put together a plan of action to minimize service disruptions during the strikes, such as by obtaining annual security badges for on-call personnel or implementing a system for calling in unscheduled workers. Indeed, the Navy Exchange has demanded such a plan with the apparent expectation that one is feasible. The fact that the Employer has failed to develop an effective staffing plan in the face of recurring strikes reflects a lack of planning on its part rather than a scheme on the part of employees to harass it into a state of confusion. In short, this is not a situation where the union left the employer in disarray by striking multiple times in a very short amount of time.[32]

Moreover, the strikes were not intended to, nor did they have the effect of, shutting down the Employer's entire operation. Only a small portion of the Employer's ten concession outlets closed during the strikes—roughly proportionate to the percentage of the workforce on strike—and there is no evidence that the strikers' absences were designed to, or did, prevent other employees from performing their jobs. Thus, while outlets closed and the Employer apparently lost some revenue as a result of the strikes, this alone is insufficient to render the strikes unprotected.[33] Unlike in *Pacific Telephone*, employees were not represented by a union that could coordinate a high-impact strike utilizing only a small number of key employees, thereby shielding most employees from the risks associated with assuming the status

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[31] *See Bethany Medical Center*, 328 NLRB 1094, 1094 (1999).

[32] *Compare, e.g.*, *NLRB v. Blades Mfg. Corp.*, 344 F.2d 998, 1005 (8th Cir. 1965) (in finding three walkouts over three-week period to be intermittent strikes, court emphasized the "repetitiousness of the intermittent walkouts within a short span of time" combined with the union's "threat to continue the activity in the future"), *reversing* 144 NLRB 561 (1963); *Honolulu Rapid Transit Co.*, 110 NLRB at 1808 ("bus service became seriously disorganized" because of strikes over four consecutive weekends); *Pacific Telephone*, 107 NLRB at 1548-50 (waves of strikes at different locations over nine days).

[33] *See Allied Mechanical Services, Inc.*, 341 NLRB at 1102; *Swope Ridge Geriatric Center*, 350 NLRB at 67.

of strikers.[34] Additionally, the fact that the employees are not unionized, and thus have no exclusive representative to speak on their behalf or any negotiated mechanisms for resolving their grievances, increases the importance of finding these activities in support of improved working conditions protected.[35]

**The strikes are protected because employees assumed the status of strikers and did not dictate their own terms and conditions of employment**

The rationale for finding strikes unprotected where employees reaped the benefits of a continuous strike action without the attendant economics risks (i.e. loss of wages and possible replacement) is inapplicable where employees completely withhold their labor for a full day or longer.[36] In such circumstances, employees necessarily lose pay, and the employer has the legal option of hiring permanent replacements. Thus here, employees did not remain on the job collecting pay while simultaneously denying the Employer the opportunity to replace them. Although the Employer's ability to hire replacements once a strike was called was constrained due to the short nature of the strike, combined with the Pentagon's security protocols, the economic risk to employees remained. Most significantly, they did lose their wages when then went on strike. Further, the risk that they would be replaced was not eliminated entirely.[37] The Employer could have arranged for new hires or employees at other facilities to be badged and on-call in case of a strike. Thus, this rationale cannot serve as the basis for denying protection to employees who engaged in a complete work stoppage for a full work day.

In addition, there can be no claim here that the strikers effectively set their own terms and conditions of employment. In *Honolulu Rapid Transit*, the Board found unprotected a union's campaign of weekend strikes that effectively truncated the

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[34] *See Pacific Telephone*, 107 NLRB at 1548, n.3 (union published article indicating that "hit and run" strikes "will beat the telephone industry" because when only a small group of employees strike, the employer "can't function efficiently in its nation-wide operations if any part of its circulation is cut off").

[35] *See Washington Aluminum*, 370 U.S. at 14-15; *Advance Industries Division*, 220 NLRB at 432.

[36] *See supra* note 16.

[37] *See Swope Ridge Geriatric Center*, 350 NLRB at 67 (although finding 24-hour weekend strikes unprotected under *Honolulu Rapid Transit*, the judge rejected the argument that the employer had been deprived of the right to permanently replace employees where it was difficult to find weekend replacements because there was "no legal impediment" to permanent replacement).

work week from seven days to five and seriously disrupted bus service.[38] In so doing, the Board found that the employees imposed their own chosen conditions of work and arrogated the "right to determine their schedules and hours of work."[39] In this regard, the Board considered a "regular weekend strike" to be indistinguishable from a "regular daily strike of 1-hour duration," which the Board had already deemed unprotected.[40]

Here, employees struck eight times over the course of almost two years, and the strikes followed no particular pattern in terms of timing. Thus, the strikes did not occur so frequently or regularly that employees were effectively setting their own work schedules, as in *Honolulu Rapid Transit*.[41] Nor did employees dictate their terms and conditions of work in any other respect. When employees reported to work, they performed all of their work duties without exception. Accordingly, these strikes did not implicate the concern that employees not be entitled to dictate their own working conditions.

**The strikes are protected since employees were motivated in part by distinct grievances during the last four strikes**

The argument for protecting this series of strikes is further bolstered by the fact that the latter four strikes were motivated, in part, by distinct unfair labor practices committed by the Employer. The Board has cautioned against applying the intermittent strike doctrine to cabin employees' right to engage in protected concerted activities by limiting their ability to protest different working conditions during an indefinite period.[42] Thus, in *Robertson Industries*, the Board found two strikes about three months apart protected where the grievances motivating the

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[38] 110 NLRB at 1807-09.

[39] *Id.* at 1809-10 & n.3.

[40] *Id.* at 1811. *See also Swope Ridge Geriatric Center*, 350 NLRB at 68 (applying *Honolulu Rapid Transit* in finding 24-hour weekend strikes unprotected).

[41] *See also Embossing Printers*, 268 NLRB at 723 (noting that employees "did not have a right under the Act to come and go as they pleased" in finding three walkouts over seven days to attend union meetings during working hours unprotected).

[42] *See Robertson Industries*, 216 NLRB at 362 ("To hold . . . that the two occasions establish a pattern of recurrent and intermittent work stoppages would, in our view, disallow employees to engage in more than one instance of concerted protected activity during an indefinite period of time regardless of the variety and number of conditions or occurrences protested and the identity of the individuals involved.").

actions were different, albeit overlapping.[43] During the first strike, employees protested their heavy workload, and during the second strike, employees were motivated by that and "other issues."[44] Likewise, in *Westpac Electric*, the Board upheld a finding that three strikes over a two-week period were protected where "each strike had its distinct origins and motivating antecedent features."[45] While the employees were motivated by economic reasons in striking the first time, the employer's unlawful discrimination against participants in the first strike was an "important factor" in the second strike, and its subsequent discrimination against employees involved in the second strike was an "important cause" of the third strike.[46]

Here also, the fact that employees' motivations for engaging in the strikes changed over time supports the argument that the strikes should be protected. Although the first four strikes were motivated purely by dissatisfaction over wages, the strike notices for the subsequent strikes, which were signed by employees, cited distinct unfair labor practices as the motivating reason.[47] As in *Robertson Industries*, the fact that employees had other reasons for striking, in addition to wages, during the fifth through eighth strikes weighs in favor of protection, so as not to chill employees from repeatedly engaging in protected, concerted activities for different reasons over an indefinite period. Consequently, the Employer's retaliatory acts against strikers, which were concentrated during this later period, unlawfully coerced employees in the exercise of their Section 7 rights.[48]

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[43] *Id.* at 361-62.

[44] *Id.*

[45] 321 NLRB at 1360.

[46] *Id.*

[47] Although the strike notice itself, which employees presumably read before signing, is sufficient evidence that strikers were motivated, in part, by these distinct unfair labor practices, we recommend that the Region bolster the evidence of striker motivation through employee testimony at trial.

[48] Although we conclude that all eight strikes are protected, the Region should additionally argue that the discipline of an employee for attending the second strike is unlawful because there was no evidence of an employee scheme or pattern of intermittent strikes over wages at that time. At most, only two employees actually struck during the first strike, and the second strike occurred more than six months after the first.

**The strikes are protected notwithstanding that employees attended political rallies while on strike**

The fact that employees attended political rallies in support of an executive order on federal contractor wages while on strike does not detract from the protected nature of the strikes. Although economic pressure in support of a political dispute may not be protected when it is exerted on an employer with no control over the subject matter of the dispute,[49] here the employees were striking over an issue—wages—that was clearly within the employer's control, and formed a central basis of the labor dispute. In each strike notice, employees raised their dissatisfaction with "poverty-level wages." And the political rallies they attended were aimed at addressing that same grievance, by pushing for a higher minimum wage for federal contractors. Since this is not a case of misdirected economic coercion, employees' strike efforts should retain their protection as concerted action for "mutual aid or protection."[50]

Moreover, we have found strikes protected where employees concertedly withheld their labor in order to seek to remedy a work-related complaint or grievance, regardless of strikers' participation in activities unrelated to the strike while they were absent from work.[51] Since the express purpose of the work stoppages, as explained in the strike notices, was to protest low wages as well as

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[49] *See* Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Political Advocacy, Memorandum GC 08-10, dated July 22, 2008, at 10 (citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 568 n.18 (1978)).

[50] Moreover, even if it were determined that the strike was a misdirected economic weapon because the Employer had no control over the issuance of an executive order, as opposed to the subject of wages, this would not mean that the Employer was free to retaliate against employees who attended the rallies. Rather, the Employer would merely be entitled to impose lawful, neutrally-applied work rules, such as an absenteeism policy, against the strikers for missing work. *See* Memorandum GC 08-10, at 13. Here, the vast majority of the Employer's allegedly unlawful retaliatory acts were not taken pursuant to such facially lawful rules.

[51] (b) (7)(A) [redacted] (b) (7)(A) [redacted] *See also Wal-Mart Stores, Inc.*, Cases 16-CA-096240 et al., JD–03–16, Jan. 21, 2016, slip op. at 65-66 (concluding that strikers who attended community rallies, among other activities, were bona fide strikers and that employees need not join a picket line for their strike activity to be protected).

unfair labor practices, employees' activities were protected notwithstanding that many strikers attended Good Jobs Nation rallies during the strikes.

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) by retaliating against strikers, including by discharging, disciplining, interrogating, and threatening employees, and by reducing their hours of work.

/s/
B.J.K.

ADV.05-CA-159426.Response.SevenHills.IntermittentStrikes[redacted]

*United States Government*
*National Labor Relations Board*
**OFFICE OF THE GENERAL COUNSEL**

# Advice Memorandum

REVISED

DATE: April 19, 2016

S.A.M.

TO: Allen Binstock, Regional Director
Region 8

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: BFG Federal Credit Union
Case 08-CA-151936

*Dubuque Chron*
530-6050-4500
530-6067-6000
530-6067-6067-8150

The Region submitted this case for advice as to: (1) whether the Employer's decision to close one of its three branches, with corresponding layoffs and a reassignment of unit work, was a mandatory subject of bargaining under either *Dubuque Packing Co.*[1] or *Holmes & Narver*[2]; (2) whether the Employer unlawfully failed to provide the Union with a National Credit Union Administration ("NCUA") report that the Employer claimed it was prohibited from disclosing by NCUA regulations; and (3) whether this case presents an appropriate vehicle to urge the Board to adopt Member Liebman's concurring opinion in *Embarq Corp.*,[3] which proposed modifying the duty to provide information in the *Dubuque* context. We conclude that the Employer's decision to close one of its branches is properly analyzed under *Dubuque* and that the decision is a mandatory subject of bargaining, that the Employer unlawfully failed to bargain toward an accommodation to disclose information from the NCUA report, and that this case presents an appropriate vehicle to urge the Board to adopt Member Liebman's concurring opinion in *Embarq*.

## FACTS

BFG Federal Credit Union (the "Employer") is a non-profit financial institution that offers a wide range of financial and banking services. It is headquartered in Akron, Ohio and has branches in Hudson and Twinsburg, Ohio. The Office and

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[1] 303 NLRB 386 (1991), *enforced sub nom. Food & Commercial Workers Local 150-A v. NLRB*, 1 F.3d 24 (D.C. Cir. 1993).

[2] 309 NLRB 146 (1992).

[3] 356 NLRB 982, 983-84 (2011).

Professional Employees Union, Local 1794 (the "Union") began organizing the Employer in October 2014. In response, the Employer mounted a vigorous anti-Union campaign.[4] In the midst of the Union's organizing campaign, the NCUA—a federal agency that monitors the Employer—completed an examination of the Employer's operations and issued a report requiring the Employer to reduce its expenses and generate a profit by the end of 2015. The Employer had generated a net income of $100,216 in 2012, but sustained net losses of $765,133 in 2013 and $746,674 in 2014. In particular, the report instructed the Employer to perform a "branch analysis" to assess the volume of transactions, loan activity, etc., at its three locations, which might help "identify opportunities for reducing hours or number of employees." According to an NCUA official, failure to abide by the report's recommendations would lead to a warning letter; in turn, failure to heed the warning letter would lead to a cease and desist letter. The NCUA official noted that enforcement actions are comparatively rare, and that the NCUA typically only fines a credit union if it violates a statute or fails to turn in a quarterly operating report.

A majority of the employees voted in favor of the Union during a Board election held on January 20, 2015,[5] and the Union was certified on January 29. On January 27 the Employer held a board meeting regarding the NCUA report's findings. According to the redacted minutes of the meeting, the board discussed the possibility of closing branches and reducing healthcare and pension benefits. At the Employer's next board meeting on February 17, the board voted to close the Twinsburg branch.

The parties met for their first bargaining session on April 2, at which the Employer informed the Union of its decision to close the Twinsburg branch and consolidate those operations at its Hudson branch. In addition, the Employer identified eight unit employees it intended to lay off as a result of the consolidation. None of those employees were employed at Twinsburg. The Employer explained that it had lost nearly (b) (4) in 2014 and that the branch closure and layoffs were due to the NCUA report. By letter dated April 10, the Union requested, *inter alia*, a copy

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[4] The Region has determined that the Employer has committed numerous other violations during the course of the Union's organizing campaign and subsequent bargaining. Specifically, the Region determined that the Employer violated Sections 8(a)(1), (3), and (5) by: interrogating employees, threatening employees with the loss of their benefits, disparaging the Union, making coercive statements, maintaining overly broad rules, disciplining and selecting employees for layoff in retaliation for union activities, freezing employees' pensions, unilaterally discontinuing awards, refusing to meet and confer at reasonable times, and engaging in other tactics aimed at frustrating negotiations.

[5] All remaining dates are in 2015, unless otherwise noted.

of the NCUA report. The Employer responded that the decision to close the Twinsburg branch was not a mandatory subject of bargaining and therefore that the Union was not entitled to documents pertaining to it.

At the parties' April 16 bargaining session, the Union proposed a confidentiality agreement for disclosure of the NCUA report. The Employer replied that it would consider it, but reiterated that it was not required to bargain over the decision to close the Twinsburg branch inasmuch as the Employer was facing an "exigency." The Employer explained that Twinsburg was the best branch to close because the Hudson branch was newer, had safety deposit boxes, and had a three-lane drive up, and because the Employer could write more off for tax purposes on the Hudson branch. According to a branch analysis that the Employer showed the Union, the Employer could write off approximately (b) (4) for the Hudson branch versus only (b) (4) for the Twinsburg branch. The branch analysis also indicated that the Hudson branch annually cost (b) (4) to run, of which (b) (4) was salary and benefits, while the Twinsburg branch cost (b) (4) to run, of which (b) (4) was salary and benefits.

The Employer went ahead with the proposed layoffs on April 17. On April 18, the Employer sent an email to an NCUA examiner stating that the Employer was now unionized, that the Union was requesting a copy of the most recent NCUA report, and requesting that the NCUA provide the Employer with proof that the Employer was not permitted to release the report. The NCUA examiner responded with generic information about Freedom of Information Act ("FOIA") requests and exemptions. On May 11, the Employer informed the Union that the NCUA had instructed the Employer to not provide the NCUA report, and that any Union request should be made pursuant to FOIA; however, the Employer stated that any such FOIA request was likely to be denied. On May 30, the Employer ultimately closed the Twinsburg branch and transferred all work performed at Twinsburg to the Hudson branch. On January 27, 2016, in response to an inquiry from the Region, an NCUA official stated that she had no record of an Employer request for the NCUA report.

## ACTION

We conclude that the Employer's decision to close its Twinsburg facility is properly analyzed under *Dubuque* rather than under *Holmes & Narver*, that the decision is a mandatory subject of bargaining, that the Employer unlawfully failed to bargain over an accommodation to disclose the contents of the NCUA report, and that this case presents an appropriate vehicle to urge the Board to adopt Member Liebman's concurring opinion in *Embarq*, which proposed modifying the duty to provide information in the *Dubuque* context.

The Employer's decision to close its Twinsburg facility was a mandatory subject of bargaining under *Dubuque Packing Co.*

In *Fibreboard Paper Products v. NLRB*, the Supreme Court held than an employer's subcontracting of bargaining unit work, in such a way that it merely replaced existing employees with those of an independent contractor who did the same work under similar conditions of employment, was a mandatory subject of bargaining.[6] The Court stated that, since the decision to subcontract and replace existing employees with those of an independent contractor involved no capital investment and had not altered the company's basic operation, requiring the company to bargain about the decision "would not significantly abridge the company's freedom to manage the business."[7] Moreover, because the decision turned on labor costs, it was "peculiarly suitable for resolution within the collective-bargaining framework . . . ."[8]

Nearly two decades later, the Supreme Court issued its decision in *First National Maintenance v. NLRB*, which not only reaffirmed the Court's earlier holding in *Fibreboard*, but also determined that an employer lawfully refused to bargain over a decision to close part of its business for purely economic reasons unrelated to labor costs.[9] In reaching this conclusion, the Court also noted that "[m]anagement must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business . . . ." and that "bargaining over management decisions that have a substantial impact on the *continued availability of employment* should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business."[10] The Court also noted that it had implicitly engaged in such an analysis in *Fibreboard*.[11]

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[6] 379 U.S. 203, 213 (1964).

[7] *Id.*

[8] *Id.* at 214.

[9] 452 U.S. 666 (1981).

[10] 452 U.S. at 678-79 (emphasis added).

[11] *Id.* at 679-80.

In *Dubuque*, the Board established a test for applying the Supreme Court's *First National Maintenance* analysis to plant relocation decisions.[12] Under this test, the General Counsel establishes a prima facie case that the employer's relocation decision was a mandatory subject of bargaining by showing that the decision was "unaccompanied by a basic change in the nature of the employer's operation."[13] The employer can rebut the General Counsel's prima facie case by establishing that the work performed at the new location "varies significantly from the work performed at the former plant," that the work performed at the former plant will be "discontinued entirely," or that the employer's decision involves a "change in the scope and direction" of its enterprise.[14] Alternatively, the employer may rebut the General Counsel's prima facie case by demonstrating that labor costs were not a factor in the decision or, even if labor costs were a factor, that the union could not have offered labor cost concessions sufficient to change the employer's decision to relocate.[15]

In *Holmes & Narver*, the Board found that an Army subcontractor unlawfully failed to bargain over its decision to consolidate three of its divisions into two divisions and lay off nine employees, but did not apply the *Dubuque* test.[16] The Board explained that the *Dubuque* analysis was meant to apply to plant relocations, which potentially involve complex capital decisions, rather than to a simple consolidation of jobs and resultant layoffs, which is a traditional mandatory subject of bargaining.[17] The Board expanded the holding of *Holmes & Narver* in *Westinghouse Electric Corp.* to find that an employer had unlawfully failed to bargain over its decision to close one building at its facility, lay off four employees, and transfer the work to a different building on the same premises.[18] The Board explained that, similar to the employer in *Holmes & Narver*, the employer in *Westinghouse* was simply seeking to continue

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[12] 303 NLRB at 391-93.

[13] *Id.* at 391.

[14] *Id.*

[15] *Id.*

[16] 309 NLRB at 146.

[17] *Id.* at 147 (citing *Cincinnati Enquirer*, 279 NLRB 1023, 1031-32 (1986) (transfer of job duties to nonunit employee, which resulted in elimination of unit position, is a mandatory subject of bargaining)).

[18] 313 NLRB 452 (1993), *enforced*, 46 F.3d 1126 (4th Cir. 1995), *cert. denied*, 514 U.S. 1037 (1995).

the same work with fewer employees.[19] The Board rejected the *Dubuque* multi-step approach because the case involved "essentially one plant, albeit [with] operations . . . located in several different buildings . . . ."[20] Simply shifting work from one group of employees to another in a different building on the same premises was not the "type of relocation" properly encompassed by the *Dubuque* analysis.[21]

Here, the Employer's decision to close the Twinsburg branch is properly analyzed under *Dubuque*. Although the Employer is not planning on investing capital in a new facility to house the relocated work, its decision nonetheless involved the type of capital decision that is properly analyzed under *Dubuque* rather than *Holmes & Narver*.[22] Indeed, the Employer was influenced by the fact that it could write off nearly (b) (4) on the Hudson facility versus only (b) (4) on the Twinsburg facility, and by the fact that the Hudson facility was newer and had safety deposit boxes and a three-lane drive up. And, unlike *Westinghouse* and *Solutia*, in which the Board declined to apply the *Dubuque* test because the employers shifted unit work between existing buildings on the same premises, the Employer here closed a facility and relocated work to an existing facility in a different geographical location.[23] The Employer's action was not akin to shifting work within what was essentially a single plant; rather, it was a laborious process that involved transferring customers' accounts and notifying the affected customers (with the concomitant risk of customer alienation), alongside the aforementioned capital considerations.

Applying the *Dubuque* analysis, we conclude that the Employer unlawfully failed to bargain with the Union over its decision to close the Twinsburg facility. First, there has been no basic change in the nature of the Employer's operation. Following the closure, the Employer has continued to provide the same services to the same account

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[19] *Id.* at 453.

[20] *Id.*

[21] *Id. See also Solutia, Inc.*, 357 NLRB 58, 63-64 (2011) (employer's decision to close one chemical-testing facility at its premises and consolidate that work into another facility at the same premises is a mandatory subject of bargaining without regard to *Dubuque* multi-step analysis), *enforced*, 699 F.3d 50 (1st Cir. 2012).

[22] *See Embarq Corp.*, 356 NLRB at 982 (applying *Dubuque* test to evaluate whether employer unlawfully refused to bargain over decision to close Las Vegas call center and streamline operations by consolidating all work into existing Florida call center; employer's decision did not involve facility construction).

[23] *Embarq Corp.*, 356 NLRB at 982.

holders, but with fewer employees and from one less location.[24] In addition, labor costs were plainly a factor in the Employer's decision; thus, the branch analysis provided by the Employer to the Union indicated that approximately three-quarters of the operating expenses at both the Hudson and Twinsburg branches were chargeable to salary and benefits. Further, the Employer has not argued that the Union could not have made labor-cost concessions sufficient to offset the Employer's savings.[25] Accordingly, we conclude that the Employer's failure to bargain over the relocation decision violated Section 8(a)(5).[26]

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[24] *See id.* (employer continued to provide same customer service and employees performed work in the same manner, but from one less location).

[25] We note that it would be difficult to make such an assessment at this juncture because it is unclear how much the Employer saved by this closure. Though the Employer's branch analysis indicates that the Twinsburg branch annually costs (b) (4) in benefits and salary, none of the Twinsburg employees were actually laid off. Instead, eight employees from the other two branches were laid off. (b) (5) [redacted]

[26] We additionally note that, inasmuch as the Employer argues that a financial "exigency" relieved it from bargaining over the decision to close the Twinsburg branch, neither the "greater" exigency outlined in *Bottom Line Enterprises*, 302 NLRB 373 (1991), *enforced*, 15 F.3d 1087 (9th Cir. 1994), nor the "lesser" exigency discussed in *RBE Electronics of S.D.*, 320 NLRB 80 (1995), would have excused the Employer's failure to bargain. Thus, in order to qualify for the "greater" exigency that excuses an employer's complete failure to bargain over a unilateral change, the economic event giving rise to the exigency must be an extraordinary, unforeseen event having a major economic impact and which requires immediate action. *See Port Printing AD & Specialties*, 351 NLRB 1269, 1270 (2007), *enforced*, 589 F.3d 812 (5th Cir. 2009). An example of such an exigency is a hurricane which forced an employer to evacuate its facility and temporarily lay off employees. *See id.* Here, NCUA did not require closure of a branch, but rather that the Employer come up with some way of lowering costs, and the prospect of gradually escalating NCUA warnings accompanied by fines should the Employer not quickly secure cost savings does not rise to the high exigency level. Moreover, the "lesser" exigency discussed in *RBE Electronics* permits an employer to make a unilateral change during contract bargaining *only if* the employer provides notice and an opportunity to bargain to the union and the union either waives its right to bargain or the parties reach impasse over the specific matter proposed for

The Employer unlawfully failed to bargain over an accommodation to disclose the information contained in the NCUA report

A union is generally entitled to information pertaining to the performance of its collective-bargaining responsibilities.[27] However, an employer may assert a legitimate confidentiality interest that outweighs the union's need for the information.[28] Even when an employer asserts a legitimate confidentiality interest in relevant information, however, the employer must bargain toward an accommodation between the union's information needs and the employer's justified confidentiality interests.[29] The Board has found that such an accommodation can take the form of a confidentiality agreement or a protective order that will "permit the disclosure of the needed information subject to safeguards negotiated by the parties to ensure its proper use."[30] Moreover, the Board has held that a law prohibiting the disclosure of relevant information does not relieve an employer of its duty under Section 8(a)(5) to bargain towards an accommodation with the union.[31] Thus, in *Borgess Medical Center*, an employee was discharged for giving the wrong medication to a patient, which caused temporary paralysis, and then attempting to cover up his mistake.[32] The employee grieved his discharge and, in preparation for arbitration, the union requested incident reports concerning other medication errors.[33] State law, however,

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change. *RBE Electronics*, 320 NLRB at 82. Here, the Employer steadfastly refused to bargain over its decision, and so the "lesser" exigency would likewise not excuse the Employer's unilateral decision.

[27] *See NLRB v. ACME Indus. Co.*, 385 U.S. 432, 435-36 (1967).

[28] *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 318 (1979).

[29] *Pennsylvania Power Co.*, 301 NLRB 1104, 1105-06 (1991); *see id.* at 1107-08 (where nuclear power company had strong interest in preserving anonymity of employee informants whose statements led to some employees being drug-tested and disciplined, union nevertheless was entitled to summary of informants' statements that avoided identifying information).

[30] *Exxon Co. USA*, 321 NLRB 896, 899 (1996), *aff'd mem.*, 116 F.3d 1476 (5th Cir. 1997).

[31] *Borgess Medical Center*, 342 NLRB 1105 (2004).

[32] *Id.* at 1105.

[33] *Id.*

prohibited hospitals from disclosing "self-review" documentation.[34] Although the Board recognized the important public policies behind the state law and the hospital's resulting legitimate confidentiality interest in the information, the Board held that the hospital nevertheless unlawfully failed to bargain towards an accommodation for a conditional disclosure.[35]

Here, the NCUA report is clearly relevant to the Union's collective-bargaining duties, given that the Employer is relying on the report to justify closing the Twinsburg facility and implement layoffs. However, the Employer has asserted a legitimate confidentiality interest in the NCUA report, inasmuch as NCUA regulations prohibit the report's disclosure. Nevertheless, similar to the hospital in *Borgess Medical Center*, the Employer has unlawfully failed to bargain towards an accommodation that would seek to satisfy the Union's need for information while protecting the confidentiality of the NCUA report. Thus, although the Employer told the Union that it would "consider" the Union's proposed confidentiality agreement, the Employer did not follow through.[36] The Employer neither asked NCUA to release the report nor inquired about conveying the report's contents to the Union under a confidentiality agreement or other procedure; rather, the Employer assumed it was prohibited from disclosing the report to the Union and simply asked for proof that it was forbidden to do so. Tellingly, the NCUA official contacted by the Region had no record of an Employer request to provide the report to the Union.

Moreover, it is far from certain that the NCUA would have precluded the Employer from conditionally disclosing the report to the Union. The NCUA's own regulations allow NCUA examination reports to be disclosed—through a confidentiality agreement or a protective order—in legal proceedings, and offers a mechanism to do so.[37] Although not a "legal proceeding,"[38] collective bargaining

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[34] *Id.*

[35] *Id.* at 1106.

[36] We note that "[t]he burden of formulating a reasonable accommodation is on the employer; the union need not propose a precise alternative to providing the requested information unedited." *Borgess Medical Center*, 342 NLRB at 1106.

[37] 12 C.F.R. §§ 792.41-42 (providing that NCUA nonpublic records may be requested for purposes of legal proceedings if the requesting party submits a written request to the NCUA General Counsel); 12 C.F.R. §792.48(a) (providing that the NCUA General Counsel may impose restrictions on the disclosure of nonpublic documents, such as a protective order or confidentiality agreement that limits access to and any further disclosure of the nonpublic records).

imposes a legal requirement on employers through Section 8(a)(5) to disclose relevant information or, when legitimately confidential information is concerned, bargain toward an accommodation between the union's information needs and the employer's justified confidentiality interests. Had the Employer actually submitted a written request for the report to the NCUA General Counsel, it is entirely possible that the NCUA General Counsel would have permitted the Employer to disclose the report to the Union pursuant to a mutually acceptable confidentiality agreement. Because the Employer did not make that request, and did not offer any other reasonable accommodation that would provide the Union with the substance of the information in the report, it failed in its obligation under Section 8(a)(5) to bargain over an accommodation.

The instant case presents an appropriate vehicle to urge the Board to adopt Member Liebman's concurring opinion in *Embarq Corp.*

In *Embarq Corp.*, Member Liebman, concurring, recommended that in future *Dubuque* cases employers be required to provide unions with information about relocation decisions whenever there is a reasonable likelihood that labor-cost concessions might affect the decision.[39] She noted that the *Dubuque Packing* Board observed that an employer would enhance its chances of establishing that labor-cost concessions could not have altered its relocation decision "by describing the reasons for relocating to the union, fully explaining the underlying cost or benefit considerations, and asking whether the union could offer labor cost reductions that would enable the employer to meet its profit objectives."[40] She observed that such information "will often be necessary for the union to bargain intelligently[,]"[41] yet, anomalously, under existing law a union is not entitled to such information if the Board determines in hindsight that the union could not have made sufficient concessions to change the decision and therefore that the decision was not a

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[38] A legal proceeding is defined in 12 C.F.R. § 792.49 as "any matter before any federal, state or foreign administrative or judicial authority, including courts, agencies, commissions, boards or other tribunals, involving such proceedings as lawsuits, licensing matters, hearings, trials, discovery, investigations, mediation or arbitration."

[39] *Embarq Corp.*, 356 NLRB at 983.

[40] *Id.* (quoting *Dubuque Packing*, 303 NLRB at 392).

[41] *Id.*

mandatory subject of bargaining.[42] And if the employer initially refuses to provide the information on the ground that labor costs were not a factor in the relocation decision or the union could not have offered concessions sufficient to offset the employer's savings, the Board's later effort to deduce whether the union *would* have offered concessions is complicated and not "constructive for any of the parties involved."[43]

Under Member Liebman's proposed framework, an employer would be required to classify its contemplated relocation as either turning on labor costs or not.[44] If the relocation does not turn on labor costs, the employer would be required to explain the basis for its decision to the union.[45] If the contemplated relocation does turn on labor costs, the employer would be required to provide the union, upon request, with information about labor cost savings and, if the union fails to offer concessions, it would then be precluded from arguing to the Board that it could have made concessions.[46] But if the employer fails to honor the union's information requests, the employer would be precluded from arguing before the Board that the union could not have made sufficient concessions.[47] In addition to relieving the Board of an after-the-fact effort to ascertain whether a union could have offered sufficient labor concessions, Member Liebman argued that her proposed framework would encourage parties to share information and might lead to more constructive good-faith bargaining.[48]

The instant case is an appropriate vehicle for urging the Board to adopt Member Liebman's framework. Labor costs were clearly a factor in the Employer's decision, inasmuch as three-fourths of the Twinsburg branch's operating costs were composed of salary and benefits. Although the Employer has not yet argued that the Union could not have made sufficient labor-cost concessions to alter its decision to close the Twinsburg branch, the Employer will presumably make this argument before an Administrative Law Judge. At that point, the ALJ (and subsequently the Board) will be forced to play a guessing game as to whether or not the Union could have actually

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[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.* at 984.

[47] *Id.*

[48] *Id.*

made such concessions. Had the Employer instead shared the information about its anticipated cost savings up front, the Union could have attempted to make concessions to offset those savings. The dispute could have been resolved through the collective-bargaining process rather than an after-the-fact inquiry by the Board.

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer unlawfully failed to bargain over its decision to close its Twinsburg branch and unlawfully failed to bargain towards an accommodation to disclose the contents of the NCUA report. Moreover, the Region should use this case as a vehicle to urge the Board to adopt Member Liebman's concurring opinion in *Embarq Corp*.

/s/
B.J.K.

ADV.08-CA-151936.Response.BFGFederalCreditUnion[redacted]

cc: Injunction Litigation Branch

*United States Government*
*National Labor Relations Board*
**OFFICE OF THE GENERAL COUNSEL**

# Advice Memorandum

S.A.M.

DATE: June 7, 2016

TO: Peter Sung Ohr, Regional Director
Region 13

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Lifeway Foods, Inc.
Case 13-CA-169510

512-5081-3300-0000
512-5081-7500-0000
524-3325-4200-0000
524-3350-5800-0000

The Region submitted this case for advice as to whether the Employer violated Section 8(a)(1) of the Act when it questioned two discriminatees about their immigration documents during an unfair labor practice ("ULP") proceeding in which the discriminatees' immigration status was not relevant. We conclude that the Employer's questioning violated Section 8(a)(1) and (4) because it constituted an implied threat of reprisal and interfered with witness testimony.

## FACTS

Lifeway Foods, Inc. ("the Employer") is a public company based in Illinois that supplies, manufactures, and distributes cultured dairy products known as kefir, organic kefir, probiotic cheeses, and related products. In June 2014, the Employer's employees at a number of its facilities in Illinois voted in favor of representation by the Bakery, Confectionery, Tobacco Workers and Grain Millers Union ("the Union"). The Employer filed objections to the election and has refused to bargain. In June 2015,[1] the Board overruled the Employer's objections and certified the Union.[2]

In July, the Region issued complaint against the Employer in Cases 13-CA-146689, et al., alleging a number of Section 8(a)(1) and (5) violations, including among other things, unlawful threats, unilateral changes, refusals to provide information,

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[1] All subsequent dates are in 2015 unless otherwise noted.

[2] The Employer is continuing to challenge the validity of the Union's certification by refusing to bargain. The Board recently issued a decision ordering the Employer to recognize and bargain on request with the Union. *Lifeway Foods, Inc.*, 364 NLRB No. 11, slip op. at 3 (May 24, 2016).

and the unlawful discharges of Employees 1, 2, and 3. The Region did not issue a concurrent compliance specification. The Employer filed an answer asserting that Employees 1 and 2 did not possess valid authorizations for employment in the United States and therefore, pursuant to *Hoffman Plastic Compounds, Inc. v. NLRB*,[3] even if the Employer had committed the alleged violations, those two employees would not be entitled to backpay, search-for-work expenses, or interim work-related expenses.

On August 12-13, 2015, the trial in Cases 13-CA-146689, et al., took place in Chicago, IL. Present during the trial were: Employer Counsel, Counsel for the General Counsel, and Charging Party/Union Counsel. Employee 3, one of the employees that the Region alleged the Employer had unlawfully terminated, served as the Union's representative during the trial. Other than Employee 3, no other current or former employees were permitted to sit in the courtroom or discuss their testimony based on a sequestration order issued by the administrative law judge ("ALJ").

On the first day of the trial, Counsel for the General Counsel called Employee 1 as its first witness. Employer Counsel then cross-examined Employee 1. During the cross-examination, Employer Counsel introduced Respondent Exhibit 3, which was a one-page document containing a copy of Employee 1's permanent resident card and social security card. Employer Counsel asked Employee 1 whether she recognized the two documents depicted in the exhibit. Employee 1 said that she did. Employer Counsel asked whether those were copies of documents that she had presented to the Employer when she was hired. Employee 1 said that they were. Employer Counsel then moved to admit Respondent Exhibit 3.

Charging Party/Union Counsel and Counsel for the General Counsel objected to the relevance of Respondent Exhibit 3. Employer Counsel then stated that it was relevant to the Employer's affirmative defense regarding the availability of backpay and that he was not going to ask any other questions about the exhibit. The ALJ told Employer Counsel that as he understood Board law, those issues were to be litigated in the compliance phase. Employer Counsel agreed with the ALJ, but added that if the ALJ did find violations and Employer Counsel had not introduced the exhibit into the record for the ULP proceeding, he would not be permitted to raise Employee 1's immigration status as a defense in the compliance proceeding. Employer Counsel said that there was an ALJ decision, which the Board had not yet considered, that stood for the proposition that if Employer Counsel did not raise the issue and make his record during the ULP proceeding, he could not then do any investigation, take any testimony, or ask Employee 1 any questions about that issue during the

[3] 535 U.S. 137 (2002).

compliance proceeding. Employer Counsel said he was merely attempting to make a record and had no intention of asking any further questions regarding the exhibit.

The ALJ then stated that, rather than engage in "an extended legal research project," he was going to overrule the objections and admit the evidence into the record based on Employer Counsel's representations that he would not ask any further questions about the exhibit. Counsel for the General Counsel then stated that she continued to object to admission of the document, and that an ALJ's decision was not binding on the Board. She also stated that her understanding of Board law was that issues regarding immigration status are not, and could not, be considered unless and until the parties were in the compliance phase and therefore the documents were completely irrelevant. The ALJ said that he was overruling the objections for the reasons that he had stated and would admit the exhibit at that time.

Later that day, Counsel for the General Counsel called Employee 2 as its second witness. Employer Counsel then cross-examined Employee 2. During the cross-examination, Employer Counsel introduced Respondent Exhibit 4, which was a one-page document containing a copy of Employee 2's permanent resident card and social security card. Counsel for the General Counsel again objected and stated that the exhibit was utterly irrelevant to the ULP proceeding. The ALJ said that he understood her position and informed Employer Counsel that he could continue.

Employer Counsel asked Employee 2 if the documents in the exhibit were the ones that she had presented to the Employer when she was hired. Employee 2 stated that they were. Employer Counsel also asked her if the handwriting on the exhibit was hers. Employee 2 stated that the handwriting on the exhibit itself was not hers but the handwriting on the social security card was. Employer Counsel then moved to admit Respondent Exhibit 4. The ALJ said that he understood that Counsel for the General Counsel had an objection and asked whether the Charging Party also objected. Charging Party/Union Counsel said that she did. The ALJ then said on the record:

> For the reasons I indicated previously, I'm going to admit the document based on the representation that there's at least one case that may be on appeal to the Board that made some statements about documents like this coming in in a ULP case. I take it that, Respondent, you have no further questions about this after the introduction of the document.

Employer Counsel confirmed that he had no further questions and then said that he could state for the record the case that he had referred to earlier. Employer Counsel stated that the case was *Farm Fresh Company, Target One, LLC*, and that it was issued by an ALJ in 2013. Employer Counsel then gave the Westlaw citation for the case. The ALJ then went off the record. When the ALJ went back on the record, he explained that Employer Counsel had located the decision previously mentioned

and that the Board had in fact passed on the ALJ's decision in that case. Employer Counsel then stated the citation for the Board decision in *Farm Fresh Company, Target One, LLC.*[4]

After Employees 1 and 2 testified, Employee 3 and three additional employees of the Employer testified. The Employer did not raise the immigration status of these witnesses.

On December 21, 2015, the ALJ issued his decision in Cases 13-CA-146689, et al.[5] He found merit to a number of the alleged violations. The ALJ also noted that he did not consider Respondent Exhibits 3 and 4 in his decision. Specifically he stated:

> At the trial, [Employer Counsel] on cross-examination, introduced, over the objections of the General Counsel and the Charging Party, the permanent resident and Social Security cards of [Employee 1] and [Employee 2] (R. Exhs. 3 and 4). [Employer Counsel] claimed that the administrative law judge's decision in *Farm Fresh, Target 1, LLC*, 361 NLRB No. 83 (2014) indicated that the [Employer] could not raise immigration status issues during compliance proceedings unless it was preserved as an issue at the unfair labor practice hearing. (Tr. 114-117; 163-164) So as not to delay the hearing while legal research was conducted, I admitted the exhibits based on counsel's representation. [Employer Counsel] asked no questions regarding these documents at the hearing. The General Counsel's brief points out that in *Farm Fresh*, supra, the Board affirmed the administrative law judge's ruling excluding direct questions about the alleged discriminatees' immigration status and reiterating its policy that determining the immigration status of discriminatees is left to compliance. Id. at fns. 1 and 3. In light of the Board's decision in [*Farm Fresh*], I have given no consideration to R. Exhs 3 and 4 in reaching my findings and conclusions in this case.[6]

On February 11, 2016, the Union filed the charge in the instant case alleging that the Employer had restrained, coerced, and intimidated its employees in violation

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[4] 361 NLRB No. 83 (Oct. 30, 2014).

[5] *Lifeway Foods, Inc.*, Cases 13-CA-146689, et al., JD-67-15 (NLRB Div. of Judges Dec. 21, 2015).

[6] *Id.*, JD-67-15 at 22 n.13.

of Section 8(a)(1) by questioning employees regarding the authenticity of residency documentation in the ALJ hearing.

## ACTION

We conclude that the Employer's questioning of Employees 1 and 2 about their immigration documents during a ULP proceeding in which their immigration status was not relevant violated Section 8(a)(1) and (4) of the Act because it constituted an implied threat of reprisal and interfered with witness testimony.[7] Thus, the Region should issue complaint, absent settlement.

The Board has long noted the severely coercive effect on the exercise of Section 7 rights that results from an employer raising the immigration status of its employees in response to their protected concerted activities. For example, in *Viracon, Inc.*, the Board stated that employer threats that a union election could result in employees being reported to immigration officials would remain "indelibly etched in the minds" of any who would be affected by such actions.[8] More recently, in *Labriola Baking Co.*, the Board said that "[e]mployer threats touching on employees' immigration status warrant careful scrutiny, as they are among the most likely to instill fear among employees."[9] Indeed, the Board has noted that in analyzing the legality of such employer statements, it must be mindful of the tendency of employees, particularly in light of their dependent relationship with an employer, "to pick up on intended implications" that might be dismissed "by a more disinterested ear."[10]

The Board has specifically held that employer inquiries into their employees' immigration status in response to protected concerted activity are extremely coercive

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[7] The Region should seek an amended charge alleging that the Employer's conduct violated Section 8(a)(4) in addition to Section 8(a)(1). The Board has held that threats and other conduct covered by Section 8(a)(1) can also violate Section 8(a)(4). *See, e.g., Fuqua Homes (Ohio), Inc.*, 211 NLRB 399, 400-01 & n.7 (1974).

[8] *Viracon, Inc.*, 256 NLRB 245, 246-47 (1981).

[9] *Labriola Baking Co.*, 361 NLRB No. 41, slip op. at 2 (Sept. 8, 2014). *See also* (b) (7)(A)

[10] *Labriola Baking Co.*, 361 NLRB No. 41, slip op. at 2 n.4 (*citing NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969)).

and unlawful.[11] Similarly, an employer violates the Act by requiring employees to produce immigration documents in response to their protected concerted activity.[12] The Board has also analyzed such employer requests for immigration documents as implied threats of unspecified reprisal that could have adverse immigration consequences.[13]

The Board has further held that employer questions and comments to employee witnesses in preparation for or during ULP proceedings about their immigration status violate the Act where those questions and comments interfere with the employees providing free and uncoerced testimony. For example, in *John Dory Boat Works*, the Board held that an employer violated Section 8(a)(1) when it served subpoenas on five of its six Spanish-speaking employees, commanding them to produce travel and immigration documents that they could only possess if they were

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[11] *See, e.g., Nortech Waste*, 336 NLRB 554, 554-55 (2001) (employer review of employees' immigration status was a "smokescreen to retaliate for and to undermine a [u]nion's election victory").

[12] *See Murtis Taylor Human Services Systems*, 360 NLRB No. 66, slip op. at 1 n.3, 16 (Mar. 25, 2014) (concluding that employer violated the Act when, because of an employee's protected concerted activities, it required him to provide documentation to confirm his immigration and/or citizenship status); *North Hills Office Services*, 344 NLRB 1083, 1084, 1099-1100 (2006) (employer's demand to employee to provide it with documentation establishing that he was legally entitled to work in the United States was motivated by anti-union animus and violated the Act).

[13] *See, e.g., Belle Knitting Mills,* 331 NLRB 80, 80 n.2, 100-01 (2000) (employer's request to employees for immigration papers for union election was an implicit threat that without them, employees could face possible arrest and deportation); *Impressive Textiles*, 317 NLRB 8, 13 (1995) (in the absence of exceptions on the substantive violations, Board affirmed ALJ's rulings, findings, and conclusions, which included that an employer's requirement that an employee produce immigration documents upon recall constituted an implied threat to report her to the INS in retaliation for her support of the union).

legal immigrants into the United States.[14] The ALJ described the effect upon the General Counsel's witnesses of the "wholly irrelevant probe" as "rang[ing] from unsettling to devastating and certainly affected their ability to testify."[15] In *Commercial Body & Tank Corp,* the Board concluded that an employer's comment to an employee witness outside of the hearing room that "[Y]ou are in the wrong place . . . What happens if the immigration man should come inside here now," was in fact calculated to induce or influence the employee either not to testify in the case or to give false testimony and thus violated Section 8(a)(1).[16] And in *AM Property Holding Corp.,* the Board held that the employer attorney's objection to a line of questioning regarding the witness's good acts, in which the attorney stated he would "have to get an investigator and [find] out whether [the witness was] here in this country illegally" was an unlawful threat in violation of Section 8(a)(1) and (4).[17]

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[14] *John Dory Boat Works*, 229 NLRB 844, 852 (1977). The General Counsel did not allege a Section 8(a)(4) violation in that case. However, the Board has indicated in multiple Section 8(a)(4) cases that it is particularly suspicious of employer practices that affect the Board's processes because "Congress has made it clear that it wishes all persons with information about such [unfair labor] practices to be completely free from coercion against reporting them to the Board." *Manno Electric*, 321 NLRB 278, 297 (1996) (*citing Nash v. Florida Industrial Commission*, 389 U.S. 235, 238 (1967)), *enforced mem.,* 127 F.3d 34 (5th Cir. 1997).

[15] *John Dory Boat Works*, 229 NLRB at 852.

[16] *Commercial Body & Tank Corp.*, 229 NLRB 876, 879 (1977).

[17] *AM Property Holding Corp.*, 350 NLRB 998, 998 n.4, 1042-43 (2007), *enforced in part on other grounds*, 647 F.3d 435 (2d Cir. 2011). *See also Iowa Beef Processors, Inc.*, 226 NLRB 1372, 1374-75 (1976) (employer counsel's statement at Board hearing that witnesses had no immunity and that the employer would take "appropriate action" against any newly discovered wrongdoing was a maneuver to intimidate witnesses to prevent them from testifying for fear that their fellow employees might lose their jobs and/or be prosecuted and thus was unlawful), *enforced in rel. part*, 567 F.2d 791, 796 (8th Cir. 1977) (concluding that employer's statements at hearing intimidated prospective employee-witnesses even though they were technically correct); *OM Memorandum 11-62*, "Updated Procedures in Addressing Immigration Status Issues that Arise During NLRB Proceedings," dated June 7, 2011, at 7 (instructing Regions to contact the Board's Division of Operations-Management in cases where an employer is taking advantage of immigration status issues in an attempt to abuse the NLRB process and thwart the effective enforcement of the law,

In light of the Board's repeated acknowledgment that employees may feel intimidated by the prospect of having their immigration status probed and examined in a public proceeding, the Board has carefully prescribed the circumstances under which an employer may make such an intrusive inquiry. Initially, it is well established that where immigration status is not relevant to whether the respondent committed the alleged unfair labor practices, questioning regarding an employee's immigration status must be litigated at the compliance stage.[18] Further, even at the compliance stage, the Board has established strict parameters for how employers can inquire about these issues.

In *Flaum Appetizing Corp.*, the Board considered the appropriate standard for an employer pleading a discriminatee's immigration status as an affirmative defense to backpay liability in a compliance proceeding.[19] The Board discussed at length the harm of allowing an employer to use such an affirmative defense as a vehicle to inquire into the immigration status of employees.[20] The Board noted that "[n]umerous Federal courts have recognized that such formal inquiry into immigration status and facts arguably touching on it is intimidating and chills the exercise of statutory rights."[21] The Board quoted the Ninth Circuit's observation that:

> Even documented workers may be chilled by the type of discovery at issue here. Documented workers may fear that their immigration status would be changed, or that their status would reveal the immigration problems of their family or friends; similarly, new legal residents or citizens may feel intimidated by the prospect of having their immigration history examined in a public proceeding. Any of these individuals, failing to understand the

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including "alluding to immigration status in a menacing or suggestive way during representation or ULP proceedings").

[18] *Tuv Taam Corp.*, 340 NLRB 756, 760 (2003). *See also Rogan Bros. Sanitation*, 357 NLRB 1655, 1658 n.4 (2011) (leaving to compliance "questions concerning the effect, if any, of the discriminatees' immigration status on the reinstatement and make whole remedies").

[19] *Flaum Appetizing Corp.,* 357 NLRB 2006, 2009 (2011).

[20] *Id.* at 2011-12.

[21] *Id.* at 2012.

> relationship between their litigation and immigration status, might choose to forego civil rights litigation.[22]

The Board further reasoned that permitting such an "intrusive inquiry" into employee immigration status where the respondent "can articulate no justification for the inquiry, contravenes the purposes of the NLRA."[23] Thus, an employer may inquire into a discriminatee's immigration status only where it has pled that status as an affirmative defense to the compliance specification and offered either a factual basis for that defense or an articulable reason to believe a factual basis can be established.[24]

In the instant case, the Employer Counsel's questioning of Employees 1 and 2 about their immigration documents during a ULP proceeding where their immigration status was not relevant constituted an implied threat of reprisal and unlawful interference with Board proceedings. As set forth above, the Board has held that employer questions and comments touching on employee immigration status warrant careful scrutiny due to their severely coercive and lasting effect on the exercise of Section 7 rights, including providing testimony at Board proceedings. Indeed, the Board has acknowledged that requiring employees to answer questions about their immigration status during a legal proceeding can chill even authorized employees who may fear that their immigration status would be changed or that their status would reveal immigration problems of family or friends. Equally important is that the Employer flouted well-established Board procedural rules intended to maintain the validity of its processes by raising the issue during a ULP proceeding where the employees' immigration status was not relevant. The resulting effect was to intimidate Employees 1 and 2 and potentially others, such as those who testified after or who otherwise heard about the Employer's conduct at the trial, so that they would either not testify or provide false testimony in support of the Employer. In short, by presenting Employees 1 and 2 with their immigration documents during the ULP proceeding, the Employer violated Section 8(a)(1) and (4) of the Act.

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[22] *Id.* (*citing Rivera v. NIBCO, Inc.,* 364 F.3d 1057, 1065 (9th Cir. 2004), *cert. denied,* 544 U.S. 905 (2005)). In *Rivera,* the Ninth Circuit affirmed a protective order prohibiting an employer that was being sued for national origin employment discrimination from inquiring into where the plaintiffs were born, their immigration status, and their eligibility for employment. 364 F.3d at 1061-62.

[23] *Flaum Appetizing Corp.,* 357 NLRB at 2012.

[24] *Id.* at 2011-12.

Furthermore, Employer Counsel cannot justify his conduct at the ULP hearing by relying on the ALJ's decision in *Farm Fresh*. Indeed, his clear misrepresentation of that decision to the ALJ further supports finding a violation here. Employer Counsel represented to the ALJ that the judge's decision in *Farm Fresh* required him to introduce immigration documents at the merits stage of the case to preserve an affirmative defense regarding immigration status for the compliance stage. However, that representation could not have been further from the text of the *Farm Fresh* decision or the current state of Board law. In the first section of the ALJ's decision in *Farm Fresh*, the judge noted that he granted the Acting General Counsel's motion to preclude the respondent from questioning witnesses about their immigration status during the ULP trial.[25] The judge specified "that the public has an interest in maintaining the integrity of proceedings before the Board, and that the Board has recognized that 'formal inquiry into immigration status and facts arguably touching on it is intimidating and chills the exercise of statutory rights.'"[26] The Board then adopted the ALJ's decision to grant the Acting General Counsel's motion, with Member Schiffer concurring that "even authorized employees may be chilled from exercising their Section 7 rights if it means they might be questioned about their actual or perceived immigration status."[27] The ALJ in the underlying proceeding here noted Employer Counsel's statements at trial and then relied on the Board and ALJ decisions in *Farm Fresh*, including their reiteration that immigration status could be raised only in compliance proceedings, to not consider Respondent Exhibits 3 and 4 in reaching his conclusions.[28]

Thus, in stark contrast to Employer Counsel's claims during the hearing, the case law, including *Farm Fresh*, establishes that inquiring into employees' immigration status during the merits stage of an unfair labor practice case chills the exercise of statutory rights where such questioning is irrelevant. Despite this state of the law, which was articulated by both Counsel for the General Counsel and the ALJ at the hearing, Employer Counsel insisted on making Employees 1 and 2 answer questions about their social security cards and legal permanent resident cards during the merits phase of the trial. Under the circumstances, this misrepresentation of the law and subsequent questioning would reasonably tend to chill employees from exercising

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[25] *Farm Fresh Company, Target One, LLC*, 361 NLRB No. 83, slip op. at 5.

[26] *Id.* (*quoting Flaum Appetizing Corp.*, 357 NLRB at 2012).

[27] *Id.*, slip op. at 1 n.1.

[28] *Lifeway Foods, Inc.*, Cases 13-CA-146689 et. al., JD-67-15 (NLRB Div. of Judges Dec. 21, 2015), at 22 n.13.

their statutory rights, including providing unfettered testimony in a Board proceeding.

Finally, while the Employer has not raised a defense based on the First Amendment, we conclude that no such defense would be available here. The Board and Supreme Court have held that an employer's use of legal proceedings violates the Act where those proceedings have an illegal objective, and that such conduct is not shielded by the First Amendment right to petition the government for the redress of grievances.[29] Here, the Employer's presentation of immigration documents to Employees 1 and 2 during the ULP proceeding had the illegal objective of impliedly threatening employees with reprisal and unlawfully interfering with the Board's processes.[30] Thus, we conclude that the First Amendment does not shield the Employer from liability.

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) and (4) by questioning employees about their immigration documents during the ULP proceeding in Cases 13-CA-146689, et al.

/s/
B.J.K.

ADV.13-CA-169510.Response.LifewayFoods.(b) (6), (b)

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[29] *See, e.g., Santa Barbara News-Press*, 358 NLRB 1539, 1542 (2012) (finding employer violated Section 8(a)(1) by serving subpoenas for employee Board affidavits; employer was not shielded either by the First Amendment or the *Noerr-Pennington* doctrine because it had an illegal objective), *adopted by* 361 NLRB No. 88 (Nov. 3, 2014); *Dilling Mechanical Contractors*, 357 NLRB 544, 546 (2011) (finding employer's discovery requests seeking the names of its employees who were members of the union had an illegal objective and thus the Board had authority under Supreme Court case law to find them to be unlawful); *Wright Electric, Inc.*, 327 NLRB 1194, 1195 (1999) (discovery request for signed authorization cards had an illegal objective and enjoyed no special protection under Supreme Court case law), *enforced*, 200 F.3d 1162 (8th Cir. 2000).

[30] *Cf. Chino Valley Medical Center,* 359 NLRB No. 111, slip op. at 1 n.2, 10 (Apr. 30, 2013) (employer violated the act by seeking, under the guise of subpoenas, information that was not related to the legal proceeding and which otherwise violated the Act), *adopted by* 362 NLRB No. 32 (Mar. 19, 2015).

*United States Government*
*National Labor Relations Board*
**OFFICE OF THE GENERAL COUNSEL**

# Advice Memorandum

S.A.M.

DATE: November 4, 2016

TO: Paul Hitterman, Acting Regional Director
Region 13

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Universal Security, Inc.
Case 13-CA-178494

133-4100-0000-0000
506-4067-9000-0000
506-4067-9500-0000
512-5012-0125-0000
512-5036-6720-7300
512-7550-0143-0000
524-0183-6700-0000
524-5073-1170-0000
524-8387-2350-0000

The Region submitted this case for advice as to whether the Employer unlawfully discharged two Employees because of their protected concerted activity or established that it lawfully discharged them because they lost the protection of the Act, either by disclosing sensitive security information ("SSI") or by making maliciously false statements about the Employer. We conclude that the Employer violated Section 8(a)(1) and (3) of the Act by terminating the two Employees for engaging in union or protected concerted activity, and that the Employees did not lose the Act's protection because, contrary to the Employer's assertion, they neither disclosed SSI nor maliciously defamed the Employer in the course of their Section 7 activity. In the alternative, we conclude that under *Wright Line*,[1] the Employer violated Section 8(a)(1) and (3) by discriminatorily terminating the two Employees because of their union and protected concerted activities. Finally, we conclude that the Employer unlawfully maintained an overbroad rule banning employee communications to the media and, under *Continental Group*,[2] violated Section 8(a)(1)

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[1] 251 NLRB 1083, 1089 (1980), *enfd. on other grounds*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

[2] 357 NLRB 409, 412 (2011).

and (3) by terminating the two Employees pursuant to that overbroad rule.[3] As a result, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) and (3) by terminating the two Employees and maintaining an overbroad rule.[4]

## FACTS

In 2007, Universal Security, Inc. ("the Employer" or "Universal") contracted with the City of Chicago ("City") to provide unarmed security guard services at O'Hare International Airport. Sometime thereafter, Service Employees Local 1 ("the Union") began its effort to organize the 170 unarmed security guards who work for the Employer at O'Hare.

In September 2015, Employee 1 began attending Union meetings. In early 2016, Employee 2 also began attending Union meetings.[5] By mid-March, Employee 2 had complained to the press about the Employer's sick-day and vacation-day policies, her lack of health care, and her low wages. She was identified in the press by name as an O'Hare security guard.

On March 22, there was a bomb attack at Brussels Airport, Belgium. On that day, Employee 2 was quoted in local and national news outlets as saying: "We need critical training to protect ourselves, other workers and the passengers if there were to be an emergency." It was also reported that Employee 2 said that "she and her teammates don't receive training related to how to respond to an emergency similar to the one at the Brussels airport."

On March 30, Employee 2 was again quoted in local and national news outlets, making similar comments to those she had made on March 22, and additionally complaining about the limitations of her equipment in addition to her training:

[3] (b) (5) [redacted]

[4] (b) (5) [redacted]

[5] All subsequent dates are in 2016.

> "We need critical training to protect ourselves, other workers and our passengers when emergencies happen," [Employee 2], a security officer at Chicago's O'Hare International Airport said. She said the Brussels attacks "should be a wake-up call for everybody."
>
> [Employee 2] is currently employed by Universal Security, which is contracted by the city Aviation Department to provide a so-called "third level" of security at O'Hare. The unarmed, uniformed guards handle lower-level security responsibilities such as monitoring doors and gates both in the terminals and on the airfield. One of the big complaints from the security workers — along with their $12.11-an-hour wage and no paid sick leave — is that they don't get enough training. In particular, they say they aren't instructed properly in how to deal with real security threats such as a terrorist attack. "All we have is the radio," [Employee 2] said Wednesday.

In a second article, Employee 2 also mentioned a video she was instructed to watch, referred to as "Run! Hide! Fight!,"[6] which provides instructions for unarmed persons on how to deal with an active-shooter situation. The article reported:

> After workers aired those complaints earlier this month to city Aviation Commissioner Ginger Evans, Universal Security followed up by showing its workers a Homeland Security video titled "Run! Hide! Fight!" The video was released four years ago as a way to advise members of the public about what to do if caught in an active-shooter situation, the main takeaway being you ought to try to get away quickly.[7]

On March 31, the Union organized a one-day strike at O'Hare. Both Employees participated in the strike and the Employer's operations manager is believed to have watched them on the picket line.[8] That same day, Employee 1 made the statement

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[6] *Run > Hide > Fight: Surviving An Active Shooter Event*, YOUTUBE (July 27, 2012), https://www.youtube.com/watch?v=p4IJA5Zpzz4.

[7] Prior to Employee 2's statements to the media, CNN also had reported that unarmed airport security guards are instructed to run and hide in the event of an active shooter situation at O'Hare Airport. That story was widely rebroadcast by other media sources.

[8] The two Employees were part of a group of 14 security guards who previously had informed the Employer in writing that they would participate in the March 31 strike.

below to the press, describing her job duties. At the beginning of her presentation, she both stated and spelled her name.

> Good morning supporters, co-workers, friends, my name again is [. . . ]. I am a security officer with Universal Security. I guard entryways at the airport and assure that no one gets through that is not supposed to be there. We are here to close and secure doors on the concourse, screen IDs for employees' access and log-in vendors. I keep the airport safe.

Employee 1 also spoke about standing up for workers' rights, fighting for living wages and benefits, and the Employer's retaliation against employees who complained about their working conditions.

That same day, Employee 2 made several other statements to the press. She complained about sick-leave policy, scheduling, and having to work in freezing weather. She also complained about wages. As reported by one news outlet, "[Employee 2] says that she and other workers haven't seen a single pay raise in the last 5 years, even though their contracts stipulate yearly pay raises. When their paychecks did get a bump, it was a mere 20 cents." Other news outlets only reported Employee 2's statement that she had not received a raise, but not her other statement that she had received a 20-cent "bump." Employee 2 also complained about her equipment and training: "'We don't have nothing much but a radio to communicate with command center . . . . I don't think that's enough.' She also feels unprepared in an emergency, particularly pertinent in light of the Brussels attack, and wants more training on how to respond."

On April 13, the Employer discharged both Employees and later asserted that "[i]t would be reckless (and perhaps illegal)" to not have terminated them. Both Employees were personally handed termination letters while at their posts. The letters were virtually the same, with each mentioning the disclosure of SSI and violation of the Employer's Post Orders as the reasons for the terminations:

> It has come to our attention that you have repeatedly spoken to a number of media outlets over the past several weeks regarding the details of your security work at O'Hare International Airport. Your comments have included sensitive security information. As you are aware, Universal's General Post Orders, which are mandated by the Chicago Department of Aviation, make clear that Universal personnel are not permitted to speak to the media regarding security operations at the airports.
>
> Accordingly, your employment with Universal is terminated effective immediately.

The Employer did not notify TSA about the release of alleged SSI.

The Employer's General Post Orders for O'Hare state, "All USC employees are not permitted to speak to the media at any time. If media arrives at your post, immediately contact your supervisor who will in turn contact the OOC."

On April 15, a local paper reported that "a union trying to organize airport workers says [Employees 1 and 2] have been fired for comments made to the media that their [E]mployer says revealed sensitive security information." On May 11, a Transportation Security Administration (TSA) federal security director notified the Employer by letter that it was being investigated for allegedly violating 49 CFR § 1520.9(a) and (c).[9] Subsection 1520.9(a) deals with covered persons/entities not taking reasonable steps to safeguard SSI from unauthorized disclosure. Subsection 1520.9(c) deals with not reporting unauthorized disclosures of SSI. The letter stated, "This investigation is in regards to media reports indicating that two Universal Security employees were fired for disclosure of SSI to the media."

In response to a ULP charge alleging the terminations were unlawful, the Employer stated in an email to the Region that "the local TSA Supervisory Transportation Security Inspector for Aviation advised Universal that both individuals did in fact disclose SSI in violation of federal law." The Region spoke with a TSA official, who stated that TSA was "investigating [the Employees] because they disclosed sensitive security information (SSI) to the media." The next day, the same TSA official emailed the Region stating, "We *will* [emphasis added] also open investigations against . . . [Employees 1 and 2]." On May 31, the TSA official confirmed in a telephone conversation with the Region that the employees did disclose SSI, but would not identify specifically what SSI had been disclosed in violation of the federal transportation regulations.

On August 29, in response to questions from the Region about the status of TSA's investigation, the TSA official replied, "All three [investigations] were resolved with counseling."[10] When the Region requested letters confirming TSA's investigation of the Employees, the official said she would send confirmation but never did.

TSA issued a Warning Notice to the Employer but not to the Employees. The notice stated that: (1) "TSA at [O'Hare] became aware via a . . . news article dated April 15, 2016, that two Universal Security employees employed as contractors at

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[9] 49 CFR § 1520.9(a) & (c) (2015). Hereinafter, all references to the CFR will be to the 2015 edition.

[10] The three investigations apparently were of the Employer and the two Employees.

[O'Hare] released Sensitive Security Information (SSI) to the media and possibly other individuals"; (2) "No notification informing TSA of this unauthorized release of SSI was made by the Chicago Department of Aviation or Universal Security"; (3) "This incident may have represented a failure on the part of Universal Security at [O'Hare] to comply with 49 CFR § 1520.9(c) . . . "; (4) "[W]e have elected to send you this Warning Notice rather than seek a Civil Penalty"; (5) "A Warning Notice is not a formal adjudication or a legal finding of the matter and, therefore, there are no rights to appeal this Notice."

## ACTION

We conclude that the Employer violated Section 8(a)(1) and (3) of the Act by terminating the two Employees for engaging in union or protected concerted activity, and that the Employees did not lose the Act's protection because, contrary to the Employer's assertion, they neither disclosed SSI nor maliciously defamed the Employer in the course of their Section 7 activity. In the alternative, we conclude that under *Wright Line*, the Employer violated Section 8(a)(1) and (3) by discriminatorily terminating the two Employees because of their union and protected concerted activities. Finally, we conclude that the Employer unlawfully maintained an overbroad rule banning employee communications with the media and, under *Continental Group*, violated Section 8(a)(1) and (3) by terminating the two Employees pursuant to that overbroad rule. As a result, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) and (3) by terminating the two Employees and maintaining an overbroad rule.

### I. The Employer Terminated the Two Employees for Protected Concerted Activity That Did Not Lose the Protection of the Act.

Where an employee is discharged for alleged misconduct while engaged in protected concerted activity, to find an unfair labor practice the Board must only resolve "the question [of] whether the conduct is sufficiently egregious to remove it from the protection of the Act."[11] Concerted activities may be found unprotected when they involve conduct that is unlawful, violent, or otherwise "indefensible."[12] Concerted activities may also lose protection where employee statements were either

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[11] *Stanford Hotel*, 344 NLRB 558, 558 (2005), *citing Aluminum Co. of America*, 338 NLRB 20, 21 (2002). Thus, the Board need not apply the normal *Wright Line* analysis in such cases. *See, e.g., Chromalloy Gas Turbine Corp.*, 331 NLRB 858, 864 (2000), *enfd. sub nom., NLRB v. Caval Tool Div.*, 262 F.3d 184 (2d Cir. 2001).

[12] *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962).

so disloyal or maliciously false such that they would fit into one of those traditional categories of unprotected speech.[13]

Here, the manner and content of the two Employees' statements establish that they were engaged in union and protected concerted activity when they spoke with the various media outlets in March. Employee 2 repeatedly voiced work-related complaints, and both Employees spoke with the media in furtherance of the one-day strike the Union had called at O'Hare to support the ongoing organizing campaign. The Employees' statements brought attention to the fact that they were underpaid, received poor benefits, had to work under harsh conditions, and needed additional training and equipment to do their jobs properly. In short, the Employees were engaged in union and protected concerted activity to improve their terms and conditions of employment.

It is also clear that the Employer discharged the two Employees for engaging in that Union and protected concerted activity. The termination letters the Employees received specified that the Employer was discharging them for their statements to the media. Nevertheless, the Employer seeks to legitimize the discharges by asserting that the Employees, who are airport security guards, lost the Act's protection either because their disclosure of SSI violated federal transportation regulations and created a threat to public safety (which was "indefensible" conduct) or because their statements maliciously defamed it. The Employees did not disclose SSI or make maliciously false statements, and therefore their conduct did not lose the Act's protection.

### A. The two Employees did not disclose SSI, and thus could not have lost the protection of the Act for that reason.

An examination of the federal transportation regulations that the Employer asserts the Employees violated reveals that they did not disclose SSI. Initially, it is significant that TSA has not made a formal adjudication or legal finding that the two Employees here disclosed SSI. It is even unclear whether TSA concluded or conducted an investigation into the conduct of *the Employees*. Rather, TSA conducted investigations of the Employer for failing to report a potential unauthorized disclosure of SSI (in violation of 49 CFR § 1520.9(c)) and for failing in its duty to "safeguard SSI . . . from unauthorized disclosure"(in violation of 49 CFR § 1520.9(a)). TSA does not appear to have determined that the Employees disclosed SSI. Again, it appears that

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[13] *See NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464, 475–76 (1953) (finding disloyal statements about employer's product unprotected); *Linn v. Plant Guard Workers Local 114*, 383 U.S. 53, 62–63 (1966) (finding statements constituting malicious libel unprotected).

the focus of TSA's investigation was on whether the Employer failed to report a disclosure had it believed SSI was disclosed. While the Employer could have violated subsection 1520.9(a) (failure to *prevent* disclosure) only if the Employees actually had disclosed SSI, there is no evidence that TSA ever substantiated a violation of subsection 1520.9(a) or warned the Employer for an alleged violation of that subsection.

Indeed, the form and content of TSA's warning notice to the Employer creates so much ambiguity that it is impossible to rely on the statements in that notice for any guidance. TSA only informally warned the Employer that in its non-legal opinion, the content of the April 15, 2016 Chicago Tribune article indicated that the Employer may have failed to comply with its reporting requirements under 49 CFR § 1520.9(c). Regarding the Employees, TSA never formally stated that they had disclosed SSI. Around May 20, the Employer told the Region that TSA had advised it that the Employees had disclosed SSI. However, this is contradicted by a May 24 email from the TSA official to the Region, stating, "We *will* [emphasis added] also open investigations against . . . [Employees 1 and 2]." By May 31, the Region noted that "the TSA agent confirmed in a telephone conversation . . . that the employees did disclose [SSI], but would not identify specifically what [SSI] was disclosed in violation of federal law." However, TSA never issued a warning notice to either Employee. Because TSA has not provided the Board with any definitive guidance on whether the two Employees disclosed SSI, the Board must resolve for itself whether the two Employees did so.[14] As set forth below, they did not.

**1. Employee 1 did not disclose SSI.**

In her press interview during the March 31 strike, Employee 1 stated and spelled her name, said she is a security officer with the Employer, and described her job duties as follows: "guard entryways at the airport and assure that no one gets through that is not supposed to be there," "close and secure doors on the concourse," "screen IDs for employees' access," "log in vendors," and "keep the airport safe." The Employer claims that these disclosures violated 49 CFR § 15.5(a)(3), 15.5(b)(1)(i), 15.5(b)(1)(iii), 15.5(b)(8), 15.5(b)(9)(i), 15.5(b)(10), and 15.5(b)(11).[15] We disagree,

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[14] The Employer alleges violations of 49 CFR § 15 and § 1520. Because these two sections are virtually identical, we will address only the text of 49 CFR § 15.

[15] While the Employer asserts that Employee 1 violated 49 CFR § 15.5(b)(1)(iii), that subsection deals with "Maritime transportation security plans" and does not apply here. It is also impossible to see how Employee 1 could be said to have disclosed "security training materials," which 49 CFR § 15.5(b)(10) defines as: "Records created or obtained for the purpose of training persons employed by, contracted with, or acting for the Federal government or another person to carry out any aviation or

finding that Employee 1's statements merely recited widely known duties of security guards,[16] one of which is checking "credentials."[17]

49 CFR § 15.5(a)(3) defines SSI as "information obtained or developed in the conduct of security activities, including research and development, the disclosure of which the Secretary of DOT has determined would . . . be detrimental to transportation safety." Employee 1 never disclosed any information based on research and development, and TSA has not determined, on behalf of the Secretary of DOT, that she disclosed information that would be detrimental to transportation safety. Nor could Employee 1's comments be construed to have violated 49 CFR § 15.5(b)(1)(i), which states that SSI includes, "Any security program or security contingency plans issued, established, required, received, or approved by DOT or DHS, including—(i) Any aircraft operator or airport operator security program or security contingency plan under this chapter."[18] Reciting general security guard duties says little or nothing about the Employer's "program or plan" to secure O'Hare Airport and has no bearing on security contingency plans.

Nor did Employee 1 disclose "security measures," which 49 CFR § 15.5(b)(8) defines as "Specific details of aviation or maritime transportation security measures,

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maritime transportation security measures required or recommended by DHS or DOT." Nothing in the facts suggests that she disclosed such records.

[16] *See Security Guard*, WIKIPEDIA.ORG, https://en.wikipedia.org/wiki/Security_guard (last visited Sept. 28, 2016), ("Security personnel may also perform access control at building entrances and vehicle gates; meaning, they ensure that employees and visitors display proper passes or identification before entering the facility.").

[17] *See Access Control*, WIKIPEDIA.ORG, https://en.wikipedia.org/wiki/Access_control (last visited Sept. 28, 2016).

[18] 49 CFR § 15.3 states that a "security program means a program or plan and any amendments developed for the security of the following, including any comments, instructions, or implementing guidance: (1) An airport, aircraft, or aviation cargo operation; (2) A maritime facility, vessel, or port area; or (3) A transportation-related automated system or network for information processing, control, and communications." The same section states that a "security contingency plan means a plan detailing response procedures to address a transportation security incident, threat assessment, or specific threat against transportation, including details of preparation, response, mitigation, recovery, and reconstitution procedures, continuity of government, continuity of transportation operations, and crisis management."

both operational and technical . . . ."[19] Employee 1's general comments could not be construed as "specific details" of security measures under this provision, either as a matter of common sense or under settled canons of statutory interpretation. According to the principle of *noscitur a sociis*,[20] which the Board has long accepted and still employs,[21] when trying to understand the meaning of a term in a statute, the Board should not stretch for the outermost possible meaning of a statutory term, but rather, should understand the meaning of a term in relation to the terms around it. Here, a reasonable reading of the subsection's references[22] to deployments, numbers, and operations of Federal Air Marshals and Flight Deck Officers compels finding that the regulation prohibits the disclosure only of specific security details, not general job descriptions.

Employee 1 also did not disclose "security screening information," which 49 CFR § 15.5(b)(9)(i) defines as "Any procedures, including selection criteria and any comments, instructions, and implementing guidance pertaining thereto, for screening of persons, accessible property, checked baggage, U.S. mail, stores, and cargo . . . ." Employee 1 did not reveal procedures for *how* she performs screening but only *that* she performs screening.[23] Furthermore, subsequent subsections of § 15.5(b)(9)

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[19] 49 CFR § 15.5(b)(8) further defines security measures as: "(i) Security measures or protocols recommended by the Federal government; (ii) Information concerning the deployments, numbers, and operations of Coast Guard personnel engaged in maritime security duties and Federal Air Marshals, to the extent it is not classified national security information; and (iii) Information concerning the deployments and operations of Federal Flight Deck Officers, and numbers of Federal Flight Deck Officers aggregated by aircraft operator."

[20] *See Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) ("The maxim *noscitur a sociis*, that a word is known by the company it keeps, while not inescapable, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to Acts of Congress.").

[21] *See Schwan's Home Service*, 364 NLRB No. 20, slip op. at 5 n.15, 19 n.41 (June 10, 2016); *Auto Workers Local 833 (Paper Makers Importing Co.)*, 116 NLRB 267, 272 (1956).

[22] *See* note 18, *supra.*

[23] 49 CFR § 15.3, clarifies that "[s]ecurity screening means evaluating a person or property to determine whether either poses a threat to security," and "SSI means sensitive security information, as described in § 15.5." Based on those definitions, it does not appear that stating one performs "security screening" would qualify as SSI,

suggest that screening information refers to information at a greater degree of specificity than general job descriptions, *e.g.*,

> (ii) Information and sources of information used by a passenger or property screening program or system, including an automated screening system. (iii) Detailed information about the locations at which particular screening methods or equipment are used, only if determined by TSA to be SSI. (iv) Any security screener test and scores of such tests. (v) Performance or testing data from security equipment or screening systems. (vi) Any electronic image shown on any screening equipment monitor, including threat images and descriptions of threat images for threat image projection systems.

Employee 1's statements about her general job duties are not on par with the specific prohibitions (*e.g.*, on revealing detailed information about screening at specific locations) enumerated in these subsections.

Finally, under the Employer's interpretation of 49 CFR § 15.5(b)(11), an employee could not even state her name in connection with her job without disclosing SSI. The regulation states that "Identifying information of certain transportation security personnel" is SSI, specifically,

> (i) Lists of the names or other identifying information that identify persons as—(A) Having unescorted access to a secure area of an airport or a secure or restricted area of a maritime facility, port area, or vessel or; (B) Holding a position as a security screener employed by or under contract with the Federal government pursuant to aviation or maritime transportation security requirements of Federal law, where such lists are aggregated by airport; (C) Holding a position with the Coast Guard responsible for conducting vulnerability assessments, security boardings, or engaged in operations to enforce maritime security requirements or conduct force protection; (D) Holding a position as a Federal Air Marshal; or (ii) The name or other identifying information that identifies a person as a current, former, or applicant for Federal Flight Deck Officer.

It is well-settled law that the Board and courts should avoid interpreting statutes in a way that leads to an absurd result.[24] Here, the absurd result—not being able to state

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for the fact that persons are employed to perform security screening is a matter of common knowledge.

one's name—does not stem from the language of the regulation. Rather, it stems from the fact that the Employer has overlooked that the applicable parts of the regulation—15.5(b)(11)(i)(A) and (B)—only prohibit the disclosure of "lists of names" or other information that identifies "persons" in the plural, in contrast to subsection 15.5(b)(11)(ii), which is inapplicable. Employee 1 never provided a list of names or any name other than her own. She never claimed to have unescorted access to secure areas, never provided a list of security screeners "where such lists are aggregated by airport," never provided a list of Coast Guard or Federal Air Marshal employees, and never identified a current/former/applicant Federal Flight Deck Officer. Thus, she did not violate this regulation.

**2. Employee 2 did not disclose SSI.**

Employee 2 stated to reporters that she felt unprepared for an emergency, that "we don't have nothing much but a radio to communicate with command center," and "we need critical training to protect ourselves, other workers and passengers if there were to be an emergency." She also told a reporter about a training video she watched. In doing so, the Employer argues that Employee 2 violated 49 CFR § 15.5(b)(4)(ii), 15.5(b)(5), 15.5(b)(10), and 15.5(b)(11). As with Employee 1, none of these statements disclosed SSI.

49 CFR § 15.5(b)(4)(ii) states that SSI includes any "performance specification" for "(ii) Any communications equipment used by the Federal government or any other person in carrying out or complying with any aviation or maritime transportation security requirements of Federal law." Employee 2 did not reveal the performance specifications of her radio. Rather, she provided the fact that she has a radio. This information—that contractors are only expected to provide radios to unarmed security guards—is not redacted in the Employer's contract with the City and is also made available to the public through the City's website.[25]

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[24] *See, e.g.*, *United States v. Granderson*, 511 U.S. 39, 47 n.5 (1994) (dismissing an interpretation leading to an absurd result); *Retail Stores Employees Union, Local 400, Etc.*, 136 NLRB 414, 425 (1962) ("If the literal import of the words … leads to absurd results the words of the statute will be modified by the intention of the legislature."); *United Packinghouse Workers of America*, 89 NLRB 310, 318 (1950) (rejecting a statutory interpretation leading to "unreasonable and absurd results, plainly at variance with the policy of the statute as a whole"); *see also Greenville Cotton Oil Co.*, 92 NLRB 1033, 1072 n.27 (1950).

[25] Unarmed Security Guard Services for Chicago Airport System 62, *City of Chicago Vendor, Contract and Payment Webpage*, CITYOFCHICAGO.ORG, https://webapps1.cityofchicago.org/VCSearchWeb/org/cityofchicago/vcsearch/controller/contracts/display.do?contractNumber=14731 (last visited Sept. 28, 2016).

49 CFR § 15.5(b)(5) states that SSI includes any "vulnerability assessment" that is "directed, created, held, funded, or approved by the DOT, DHS, or that will be provided to DOT or DHS in support of a Federal security program." Employee 2 did not publicize any vulnerability assessment, let alone one directed, created, held, funded, or approved by DOT or DHS, as provided above. While she did state that she felt undertrained and underequipped, that statement of her personal opinion on the shortcomings of airport security did not violate this subsection, which mentions only officially prepared evaluations.

49 CFR § 15.5(b)(10) states that SSI includes certain "Security training materials."[26] The only security training material that Employee 2 referenced was a video the Employer required her to watch that DHS had released to the public over four years ago. Because this information had been disseminated to the public by DHS, it cannot be SSI. Indeed, CNN had reported in advance of Employee 2's comments that unarmed airport security guards are instructed to run and hide in the event of an active shooter situation at O'Hare Airport,[27] and this CNN story was widely rebroadcast prior to Employee 2's comments.[28]

Finally, 49 CFR § 15.5(b)(11) states that "Identifying information of certain transportation security personnel" is SSI. As explained above in the discussion of Employee 1, the Employer's interpretation of subsections 15.5(b)(11)(i)(A) and (B) to prohibit Employee 2's self-identification leads to an absurd result and overlooks the fact that this part of the regulation only prohibits the disclosure of "lists of names" or other information that identifies "persons." Employee 2 never provided a list of names or any name other than her own.

### B. Employee 2's statements were not malicious defamation that lost the protection of the Act.

The Employer also asserts that Employee 2 lost the Act's protection by making maliciously false statements against it. Specifically, it notes that Employee 2 publicly

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[26] See note 14, *supra*, where the full text of Section 15.5(b)(10) is reproduced.

[27] *Guidance to unarmed aviation police: Run and hide*, CNN (Dec. 31, 2015), (https://amp.cnn.com/cnn/2015/12/30/us/unarmed-aviation-officers/index.html.

[28] *See, e.g.*, AWR Hawkins, *Chicago Airport Police Officers Directed to 'Run And Hide' In Event of Active Shooter*, BRIETBART.COM (Jan. 4, 2016), http://www.breitbart.com/big-government/2016/01/03/airport-police-officers-directed-run-hide-event-active-shooter/amp/.

stated she had not received a raise in five years when, in fact, she had received an annual raise of 20 cents per hour for each of five years, as guaranteed by her employment contract. The Employer's defense is without merit.

Employee statements in the context of a labor dispute are unprotected only if they are maliciously untrue, that is, if they are made with knowledge of their falsity or with reckless disregard for their truth or falsity.[29] The mere fact that statements are false, misleading, or inaccurate is insufficient to demonstrate that they are maliciously untrue.[30] The Board and courts also recognize that during a labor dispute, employees often use hyperbole,[31] figurative speech,[32] and altogether inaccurate language[33] to describe their experiences, and although these claims often prove to be untrue, they are not unprotected so long as they are truthful from the employee's perspective.[34] Indeed, as the Board recently stated, "[a]ny arguable departures from the truth . . . [that are] no more than good-faith misstatements or

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[29] *See, e.g., Valley Hosp. Med. Ctr., Inc.*, 351 NLRB 1250, 1252 (2007), *enfd. sub nom., Nevada Service Employees Local 1107 v. NLRB*, 358 F. App'x 783 (9th Cir. 2009); *see also Linn v. Plant Guard Workers Local 114*, 383 U.S. at 61–63.

[30] *See MasTec Advanced Technologies*, 357 NLRB 103, 107 (2011), *enfd. sub nom., DIRECTV, Inc. v. NLRB*, __ F.3d __, 2016 WL 4933174 (D.C. Cir. Sept. 16, 2016).

[31] *See Steam Press Holdings, Inc. v. Hawaii Teamsters Local 996*, 302 F.3d 998, 1006-07 (9th Cir. 2002) (holding that during labor campaigns, rhetorical hyperbole blurs figurative expression and expressions of objective fact; local union president's statements at union meeting that employer's owner was "making money" and "hiding money" in a related holding company were not defamatory), *cert. denied*, 537 U.S. 1232 (2003).

[32] *See id.*

[33] *See Valley Hospital Medical Center*, 351 NLRB at 1252–53 (finding that biased, inaccurate statements are not maliciously false if an employee made the assertions in good faith, based on his personal experiences).

[34] *See id.* at 1253 (finding that inaccurate employee statements "based . . . on her own experiences and the experiences of other [employees] as related to" the employee were not maliciously false and remained protected).

incomplete statements [are not] malicious falsehoods justifying removal of the Act's protection."[35]

Here, Employee 2's statement that she and her coworkers had not received a pay raise in five years was nothing more than a good-faith misstatement or incomplete statement that was not maliciously false.[36] At least one news outlet reported that she also said, "[w]hen their paychecks did get a bump, it was a mere 20 cents." Thus, her complete statement, which was not reported in its entirety by every news outlet, makes clear that the claim that she had never received a raise was not meant to be taken literally. Rather, Employee 2 spoke figuratively in implying that she and her coworkers had only received a de minimis, meaningless raise, and spoke truthfully in stating that they had received a "mere 20 cent" raise. Thus, Employee 2 retained the protection of the Act.

## II. In the Alternative, the Employer Violated Section 8(a)(1) and (3) Under *Wright Line* Because It Discriminatorily Terminated the Two Employees for Their Union Activities.

Because the evidence here establishes that the Employer knew of the two Employees' organizing activities and creates the strong inference that it discharged them in retaliation for those activities, it also violated Section 8(a)(1) and (3) under a *Wright Line* analysis.[37] The Board applies the two-part *Wright Line* analysis to determine whether an employer who asserted a legitimate reason for an adverse personnel action actually retaliated against its employee's union or protected concerted activities.[38] Under *Wright Line*, to show that an employer violated Section 8(a)(1) and (3) by terminating an employee, the General Counsel must establish that

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[35] *MasTec Advanced Technologies*, 357 NLRB at 108. *See also Jacobs Transfer, Inc.*, 201 NLRB 210, 218 (1973) ("[I]n determining whether [statements] are protected by the Act, a good-faith belief supported by colorable facts is in my opinion all that is necessary to establish such protection. A union member seeking to exercise his right to criticize the union administration and to supplant it does not speak at his peril. He is permitted reasonable latitude, even for error, though that error may be hurtful to others, if his utterances are in good faith, on colorable ground, and not deliberately or maliciously false.").

[36] *See MasTec Advanced Technologies*, 357 NLRB at 108.

[37] 251 NLRB at 1089.

[38] *Id.*; *see also Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 4, 6 (Feb. 20, 2014).

protected conduct was "a motivating factor" for the termination.[39] In order to do so, the General Counsel must demonstrate that: (1) the discriminatee engaged in union or protected concerted activities; (2) the employer knew of those activities; and (3) the employer's action was motivated by union animus.[40] After this showing, the burden shifts to the Employer to demonstrate that it would have terminated the Employees even in the absence of their protected conduct.[41]

The General Counsel can establish each of the *Wright Line* elements here. There is no dispute that the two Employees engaged in Union and protected concerted activities by supporting the one-day strike and speaking to media outlets about their working conditions and organizing campaign, and that the Employer knew about those activities. Extensive circumstantial evidence also strongly supports the inference that the Employer discharged the Employees because of its animus against those activities. The General Counsel can use circumstantial evidence to establish animus, including the timing of the discharges, the presence of contemporaneous unfair labor practices, and evidence showing that the reasons given for the discharge were a pretext.[42] Regarding this last factor, where an employer's proffered non-discriminatory motivational explanation is false, even in the absence of direct evidence of motivation, the trier of fact may infer an unlawful motivation.[43] Several factors can show that an employer is advancing a false reason for a discharge, including proffering a non-discriminatory reason that is not true, subjecting the employee to disparate treatment, or providing shifting explanations for the discharge.[44]

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[39] *Wright Line*, 251 NLRB at 1089; *Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 4.

[40] *See, e.g.*, *Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 4.

[41] *See id.*, slip op. at 6.

[42] *See id.*, slip op. at 4.

[43] *See, e.g.*, *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *see also Aliante Casino & Hotel*, 364 NLRB No. 78, slip op. at 1 & n.4, 13–14 (Aug. 25, 2016).

[44] *See, e.g., Cincinnati Truck Center,* 315 NLRB 554, 556–57 (1994) (finding employer's reason for termination "totally baseless" because employee could not have engaged in alleged insubordination where he had followed supervisor's instructions), *enfd. sub nom.*, *NLRB v. Transmart, Inc.*, 117 F.3d 1421 (6th Cir. 1997) (unpublished table decision); *Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 4–5.

Here, the timing of the terminations, i.e., only two weeks after a highly publicized one-day strike during which these two Employees spoke with the media about their work-related complaints, strongly supports a finding of Union animus.[45] Moreover, the Employer's discriminatory motive is revealed by evidence showing that the reason it provided for the discharges is a mere pretext. Here, the Employer claims to have terminated the Employees because of their unauthorized disclosure of SSI. As noted in Section I.A. above, the Employees did not disclose SSI. Even more telling is that if the Employer in fact had believed that there was an unauthorized disclosure of SSI, it was required under the federal transportation regulations to report the disclosure to the TSA.[46] The Employer did not report the disclosure to the TSA, but rather terminated the Employees, which was *not* required under federal or state law. That conduct undermines both any asserted good-faith belief that the Employees disclosed SSI in the first place, and the Employer's claim that it adhered fastidiously to the law in terminating the Employees.[47] The legitimacy of the Employer's proffered reason for the discharges is further called into question by the fact that the Employer has not provided comparative data demonstrating that it has summarily terminated other security guards for similar assumed disclosures of SSI. Given that the Employer claims to define SSI so broadly that an employee stating her name or identifying herself as a security officer is deemed to have made an unauthorized disclosure, it is implausible that the Employer would not have disciplined other employees for these disclosures. In short, the Employer's animus here may reasonably be inferred from both the timing of and pretextual reason offered for the discharges.

For these reasons, and as described in Section I.A. above, the Employer cannot meet its burden in proving that it would have terminated the Employees for a legitimate reason (i.e., the improper release of SSI or malicious defamation) even in the absence of their Union or protected concerted activities.

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[45] *See, e.g., Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 4 (citing *Davey Roofing, Inc.*, 341 NLRB 222, 223 (2004) ("[T]he timing of an employer's action in relation to known union activity can supply reliable and competent evidence of unlawful motivation.")).

[46] 49 CFR § 1520.9(c).

[47] Indeed, the Employer asserted that "[i]t would be reckless (and perhaps illegal)" to not terminate the Employees.

## III. The Employer Violated Section 8(a)(1) by Maintaining an Overbroad Rule and Violated Section 8(a)(1) and (3) Under *Continental Group* by Terminating the Employees Pursuant to that Rule.

The Employer's policy on employee communications with the media is stated as follows in its post orders: "*All USC employees are not permitted to speak to the media at any time. If media arrives at your post, immediately contact your supervisor who will in turn contact the OOC.*" The post order elaborates that "[f]ailure to follow post orders can and will result in disciplinary action and or termination" and that "[p]ost orders are to be strictly adhered to." We conclude that the italicized portion of the Employer's policy is facially unlawful because employees would reasonably construe its prohibition against them speaking to the media "at any time" as prohibiting Section 7 activity. Employees have a statutory right to speak publically about their complaints or concerns with their terms and conditions of employment, including to the press, without employer authorization.[48] This rule prohibits such activity by directing employees to immediately contact their supervisors if media arrives at their posts. Taken as a whole, the Employer's policy would have a severe chilling effect on the right of its employees to solicit third party support for their labor dispute, and hence violates Section 8(a)(1).

Under *Continental Group*, an employer violates Section 8(a)(1) or (3) by discharging or otherwise disciplining an employee for violating an unlawfully overbroad rule when the employee was engaged in protected conduct, unless the employer can establish that the employee's conduct interfered with production or operations and that this was the actual reason for the discipline.[49] Here, the

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[48] *See, e.g.*, *Quicken Loans,* 359 NLRB 1201, 1201 n.3, 1205 (2013) (rule requiring employees to not "publicly criticize, ridicule, disparage or defame" employer found unlawfully overbroad), *affd. and adopted,* 361 NLRB No. 94, slip op. at 1 n.1 (Nov. 3, 2014), *enfd.*, __ F.3d __, 2016 WL 4056091 (D.C. Cir. July 29, 2016); *DirecTV U.S. DirecTV Holdings*, 359 NLRB 545, 545–46 (2013) (finding unlawful rule stating "[e]mployees should not contact or comment to any media about the company unless pre-authorized by [p]ublic [r]elations"), *affd. and adopted,* 362 NLRB No. 48 (March 31, 2015), *enf. denied on other grounds,* 2016 WL 3074408 (5th Cir. May 31, 2016); *Trump Marina Casino Resort*, 354 NLRB 1027, 1027 n.2 (2009) (finding unlawful "broad rules prohibiting employees from releasing statements to the news media without prior approval, and authorizing only certain representatives to speak with the media"), *affd. and adopted* 355 NLRB 585 (2010), *enfd.* 435 Fed. Appx. 1 (D.C. Cir. 2011).

termination letters that the Employer gave to each Employee noted that they had violated the overbroad rule in the post orders prohibiting them from communicating with the media. As discussed above, the two Employees were engaged in union and protected concerted activities when they supported the organizing campaign by participating in the one-day strike and speaking to the media in an effort to improve their working conditions. Thus, their terminations for violating the overbroad rule were unlawful unless the Employer makes out an affirmative defense that their conduct interfered with security operations at the airport and that this interference was the reason for the discipline.[50] The Employer has not come forward with any evidence to show that the two Employees' statements to the media interfered with its ability to provide security at O'Hare. As previously set forth in Section I.A., the Employees did not disclose SSI. Moreover, the Employees' termination letters merely listed their violation of the overbroad media policy, and there is no evidence that the Employer ever informed the Employees of how that violation interfered with its ability to provide security services at O'Hare.[51]

Based on the preceding analysis, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) and (3) by unlawfully terminating Employees 1 and 2, and by maintaining an overbroad ban on employees speaking with media.

/s/
B.J.K.

ADV.13-CA-178494.Response.UniversalSecurity.[redacted]

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[49] *Continental Group, Inc.*, 357 NLRB 409, 412 (2011). The Board has applied its rule from *Continental Group* to also find violations of Section 8(a)(3). *See, e.g., Grill Concepts Services d/b/a Daily Grill*, 364 NLRB No. 36, slip op. at 3 (June 30, 2016).

[50] *See Continental Group, Inc.*, 357 NLRB at 412.

[51] *See id.* ("[A]ssuming that the employer provides the employee with a reason (either written or oral) for its imposition of discipline, the employer must demonstrate that it cited the employee's interference with production and not simply the violation of the overbroad rule.").

*United States Government*
*National Labor Relations Board*
**OFFICE OF THE GENERAL COUNSEL**

# Advice Memorandum

**S.A.M.**

DATE: October 23, 2015

TO: Kathleen M. McKinney, Regional Director
Region 15

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Nissan North America, Inc.
Nissan Canton Assembly Plant
Case 15-CA-145053

506-6090-3200
512-5012-6787
512-5012-6787-3300
512-5072-7775
625-8817-0400

The Region submitted this case for advice as to the appropriate remedy where the Employer's uniform policy interfered with its employees' right to wear union insignia. We conclude that the Employer failed to demonstrate special circumstances justifying its interference with the right to wear union insignia, that accordingly complaint should issue, absent settlement, alleging that the Employer's uniform policy violated Section 8(a)(1), and that the Region should seek an order requiring the Employer to rescind its unlawful uniform policy.

## FACTS

Nissan Motor Company Limited has its headquarters in Yokohama, Japan, and is one of the largest automobile manufacturers in the world. Its related company, Nissan North America, Inc. ("Nissan"), is responsible for the manufacture and distribution of Nissan and Infinity vehicles in North America. One of Nissan's factories is located in Canton, Mississippi, where it employs 6,300 workers.

The Charging Party, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("Union"), began an organizing campaign in about 2011 or 2012. In 2013, the Union began distributing t-shirts to employees to wear at work, and made a "big push" for t-shirts to be worn in the plant starting in early 2014. Employees wore the t-shirts frequently, sometimes on a daily basis. The t-shirts had messages such as, "Organize, Build Power, Win Justice," "Pro-Union, Pro-Nissan," "United we Stand, Divided we Beg," and "Labor Rights are Civil Rights," with some t-shirts showing images of people at civil rights rallies. The t-shirts had a positive impact on employee relations and helped defuse racial tension, especially a t-

shirt that showed Walter Reuther and Martin Luther King, Jr. shaking hands with a message that advocated for civil rights. None of the t-shirts were inflammatory, pitted employees against one another, or had negative messages about Nissan.

At this time, Nissan did not have a mandatory uniform policy. Employees were permitted to wear jeans or pants without metal buttons or studs that may damage the cars, and any shirt they wanted, including t-shirts, button down shirts, and polo shirts, as long as it did not contain vulgar or offensive language. Employees also had the option of wearing a uniform consisting of grey pants and a Nissan t-shirt, button down shirt, or polo shirt in navy blue, red, green, or black. The optional uniforms were provided by Nissan. Employees could not wear buttons or pins because they might damage the cars. The dress code stated:

> Nissan expects all employees to use good judgment in matters of dress, grooming and personal hygiene. You should not wear clothes that are offensive to your coworkers or others. Nissan supplies company wearing apparel free of charge, but wearing this apparel is voluntary in most areas. In certain areas, specific clothing or footwear is required due to safety issues and quality concerns. Nissan prohibits the wearing of canvas or open-toe shoes in production areas.

Starting in June 2014, Nissan informed employees that it was instituting a uniform requirement that would go into effect on January 1, 2015. The uniform consists of a red polo shirt, gray pants or shorts, a black belt, and a gray jacket. The polo shirt has the Nissan wordmark on the front and the American flag on the sleeve. Employees were told they cannot alter the new uniforms. Employees can wear personal long-sleeved shirts underneath the Nissan polo shirt, but the sleeves cannot have writing, patches, or badges on them. Nissan says employees will be permitted to wear Union insignia on baseball caps.

Despite the initial plan of rolling out the uniform policy in January 2015, the policy has not yet fully been implemented. Moreover, Nissan has not yet enforced the policy or disciplined employees for wearing union t-shirts, even if the employees have been issued Nissan uniforms.

## ACTION

We agree with the Region that the Employer's uniform policy, which clearly has impinged on the exercise of Section 7 rights, violates Section 8(a)(1) because the Employer has failed to demonstrate special circumstances that justify the uniform

policy's restrictions on wearing union insignia and that the appropriate remedy is to require the Employer to rescind the unlawful uniform policy.[1]

Section 7 of the Act protects the right of employees to wear attire and insignia that address union and other employment-related issues while at work.[2] An employer may restrict such activity only by presenting substantial evidence of special circumstances sufficiently important to outweigh Section 7's guarantees.[3] The Board has found special circumstances when the display of union insignia would likely jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image the employer has established as part of its business plan.[4]

The Board has made clear that neither a uniform policy nor a dress code in itself establishes special circumstances.[5] Further, the Board has indicated that where an

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[1] Nissan argues as a preliminary matter that this case is not ripe for adjudication because the new uniform policy has not been fully implemented (not all employees have received the new uniforms) or enforced. As to the absence of full implementation, the fact that not all employees have been subjected to the policy is irrelevant; some employees have been issued uniforms and told they must wear them, which has restricted those employees in the exercise of their Section 7 rights. As to the absence of any enforcement of the policy against those who have failed to follow it, it is well established that mere maintenance of an overly broad policy that would reasonably tend to chill employees in the exercise of their Section 7 rights violates Section 8(a)(1). *See, e.g., Lafayette Park Hotel,* 326 NLRB 824, 825 (1998), *enforced mem.,* 203 F.3d 52 (D.C. Cir. 1998).

[2] *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801-803 (1945) (upholding right of employees to wear union buttons while on the job); *see also P.S.K. Supermarkets*, 349 NLRB 34, 34 (2007).

[3] *Eckerd's Market, Inc.*, 183 NLRB 337, 338 (1970) (finding the "vague, general evidence" of customer complaints presented by the employer did not constitute substantial evidence of "special circumstances" warranting removal of the union buttons worn by its employees).

[4] *P.S.K. Supermarkets*, 349 NLRB at 35 (citing *Bell-Atlantic-Pennsylvania*, 339 NLRB 1084, 1086 (2003), *enforced* 99 F. App'x 233 (D.C. Cir. 2004); and *Nordstrom, Inc.*, 264 NLRB 698, 700 (1982)).

[5] *World Color (USA) Corp.*, 360 NLRB No. 37, slip op. at 1 n.3 (2014), *reviewed and remanded*, 776 F.3d 17 (D.C. Cir. 2014); *see also P.S.K. Supermarkets*, 349 NLRB at 35 ("Nor is the requirement that employees wear a uniform a special circumstance

employer requires a uniform that interferes with employees' Section 7 right to wear union insignia, the employer will have the burden of demonstrating special circumstances for that requirement. Thus, in *Stabilus, Inc.,* in dicta, the Board stated that:

> An employer cannot avoid the 'special circumstances' test simply by requiring its employees to wear uniforms or other designated clothing, thereby precluding the wearing of clothing bearing union insignia. The Board has consistently applied that test where employers have required employees to wear particular articles of clothing and have correspondingly prohibited them from wearing clothing displaying union insignia.[6]

The *Stabilus* Board subsequently referred to the employer's "burden of proving that special circumstances justified its uniform policy," holding that even if that burden had been met, the employer violated Section 8(a)(1) by disparately enforcing its policy to prohibit union t-shirts.[7]

Recently, in *World Color (USA) Corp.*, the Board affirmed the ALJ's finding that the employer unlawfully prohibited employees from wearing any baseball caps other than company caps, because the company cap was not a required part of the employees' uniform.[8] But the Board specifically stated that it would have ordered the rescission of the policy banning union caps even if baseball caps were, in fact, part of the employer's uniform policy, reiterating that "[a]n employer cannot avoid the 'special circumstances' test simply by requiring its employees to wear uniforms or other designated clothing, thereby precluding the wearing of clothing bearing union

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justifying a button prohibition."); *Woonsocket Health Center*, 245 NLRB 652, 659 (1979) (affirming ALJ finding that "[t]he mere fact that an employer has a dress code, as here, is not a special circumstance" which warrants depriving employees of their right to wear union insignia at work).

[6] 355 NLRB 836, 838 (2010) (citing *Great Plains Coca-Cola Bottling Co.*, 311 NLRB 509, 515 (1993) (no special circumstances justified employer banning the wearing of union jackets before an election even though the employer's policy only permitted employees to wear company jackets); and *Meijer, Inc.*, 318 NLRB 50, 56-57 (1995) (employer cannot ban employee from wearing union jacket instead of uniform jacket in a noncustomer area), *enforced*, 130 F.3d 1209, 1217 (6th Cir. 1997)).

[7] *Id.*

[8] 360 NLRB No. 37, slip op. at 1 n.3.

insignia."[9] Thus, an employer's uniform policy that precludes the wearing of union insignia overcomes the presumption that employees may wear union insignia in the workplace only where the employer demonstrates special circumstances for the policy.

Nissan's uniform policy interferes with employees' ongoing exercise of their Section 7 right to wear union insignia in the workplace. Although the policy does not explicitly restrict Section 7 activity, the policy necessarily has that effect, since employees cannot wear the union t-shirts they had been wearing if they must wear the uniform shirt.[10] Moreover, Nissan forbids employees from wearing buttons or pins on their uniforms because they may cause a hazard to Nissan's work product, which prevents employees from wearing union buttons. Thus, the only way employees can wear Section 7 messages is through the wearing of insignia shirts instead of the uniform shirt.[11] By requiring employees to wear a uniform, Nissan thus defeats their right to wear union insignia. Nissan should not be permitted to interfere with employees' statutory rights in this manner unless it demonstrates special circumstances that justify requiring employees to wear a uniform that precludes the wearing of union insignia.

Nissan contends that the following special circumstances justify its uniform policy. First, it claims that the policy is necessary to prevent damage to automobiles. Second, it argues that it wishes to project a distinct public image when the public tours the facility and to promote teamwork and pride on the part of employees. Finally, Nissan claims that it wishes to increase efficiency by streamlining supervisors' daily duties to eliminate the need for them to inspect employees' clothing for mutilation risks. None of these arguments has merit.

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[9] *Id.* (quoting *Stabilus, Inc.*, 355 NLRB at 838).

[10] Accordingly, this is not the kind of ambiguous rule that requires analysis under the first prong of the *Lutheran Heritage* test. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-47 (2004).

[11] Nissan permits long-sleeved shirts to be worn under the uniform shirt, but requires that they be free of logos or any other writing, which prevents employees from having union insignia on their long-sleeved shirts. Nissan permits hats that contain union insignia, but given the size of the plant and the distances between employees, and the fact that some employees cannot work comfortably in a hat, this is a far less effective means of communicating the Union's message.

**A. Damage to Product**

An employer can demonstrate it has a special circumstance for banning union insignia where the insignia would cause damage to its product. For example, in *Hanes Hosiery*, the employer lawfully required employees to either remove union buttons or cover them where the employer demonstrated the buttons could cause "picks" in its hosiery because the buttons had a pin that protruded a quarter inch beyond the circular button.[12] The ALJ's decision, adopted by the Board, noted that the restriction on wearing the union buttons was reasonable in light of the fact that the buttons were not absolutely banned because employees could cover them with a transparent material to prevent damage to the company product.[13] But in *Honda of America Manufacturing, Inc.*, the Board adopted the ALJ's finding that the employer's policy requiring employees to wear a white uniform, intended in part to avoid damage to the employer's product in an auto manufacturing plant, violated Section 8(a)(1) because its terms in effect deprived employees of their right to wear union buttons and insignia and the employer failed to demonstrate the policy was necessary to prevent damage to vehicles: not all employees came into contact with the product and could cause scratches or damage, employees were permitted to wear watches and rings that could cause the same type of damage as union insignia, maintenance employees wore company-issued utility belts with metal buckles and tool pouches that had exposed metal rivets while working near the vehicles, and the employer had not conducted any scientific studies regarding the effect of the rule on production.[14] Thus, the employer's maintenance of the rule violated Section 8(a)(1).[15]

Here, the Union is not contesting the Employer's ban on buttons and pins. Instead, the issue is whether Nissan has a legitimate concern about damage to vehicles that may occur if employees are wearing t-shirts that it does not provide. But Nissan has not provided any evidence of employees' personal t-shirts damaging

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[12] 219 NLRB 338, 346-47 (1975).

[13] *Id.* at 347.

[14] 260 NLRB 725, 728-29 (1982).

[15] *Id.* at 729 (the employer also failed to demonstrate other asserted special circumstances); *see also Boch Honda*, 362 NLRB No. 83, slip op. at 3 (Apr. 30, 2015) (employer failed to demonstrate special circumstances justifying rule prohibiting employees from wearing union buttons where the rule was written to apply to employees who came into contact with the public regardless of whether they had contact with vehicles and the employer did not provide evidence that vehicles had been damaged by employee pins or the pins posed a safety hazard).

cars, nor has Nissan demonstrated that the uniform policy would reduce the likelihood that damage would occur. Thus, Nissan has failed to demonstrate that its uniform policy is required to prevent damage to its product.

### B. Public Image

Employees' exposure to customers standing alone is not a special circumstance.[16] However, an employer may establish special circumstances where union insignia "unreasonably interfere[s] with a public image which the employer has established, as a part of its business plan" through strict dress code requirements for its employees.[17] For example, in *W San Diego*, the employer – a high-end hotel chain – demonstrated its business plan was to create a "wonderland" experience where guests could fulfill their "fantasies and desires," and that the employer's uniforms for its servers were part of this plan.[18] On the other hand, in *P.S.K. Supermarkets*, the Board held that the employer's requirement that its employees wear company-issued uniforms, along with those employees' "significant" customer contact, did not constitute special circumstances justifying the employer's ban on all buttons.[19]

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[16] *World Color (USA) Corp.*, 360 NLRB No. 37, slip op. at 8 ("Customer exposure to union insignia, standing alone, is not a special circumstance which permits an employer to prohibit display of such insignia by employees"; but finding that employer did not show employees had contact with customers); *see also United Parcel Service*, 312 NLRB 596, 597 (1993) (no special circumstances justifying prohibition on lapel pins with union logo on company-provided uniform; pins did not interfere with employer's desired public image of its employees being "neatly attired" where the pin was small, inconspicuous, and free of provocative messages or language), *enforcement denied*, 41 F.3d 1068 (6th Cir. 1994).

[17] *Meijer, Inc.*, 318 NLRB at 50 (quoting *United Parcel Service*, 312 NLRB at 597) (employer's ban on union pins unlawful where employer offered no evidence that pins interfered with company's public image and did not enforce its policy in a consistent and nondiscriminatory manner); *United Parcel Service*, 195 NLRB 441, 441 n.2, 449-50 (1972) (finding special circumstances where UPS developed a public image that was "an integral part of its business and a substantial business asset" that would be adversely affected by drivers wearing a button 2.5 inches in diameter that said "Vote Jack Ryan Local 294").

[18] 348 NLRB 372, 372-373 (2006).

[19] 349 NLRB at 35; *see also Howard Johnson Motor Lodge*, 261 NLRB 866, 868 n.6 (1982) (employer not justified in prohibiting union buttons in order to avoid potentially adverse reaction by customers because employees' rights do not depend on

Here, there is no evidence that the public image presented by Nissan's production employees to potential customers touring its factories is vital to its business plan, and these employees have far less public contact than in other cases where the Board found no special circumstances. Moreover, the Employer has not even articulated how the employees' Union t-shirts would interfere with its public image.[20] Since employee exposure to the public alone is not a special circumstance,[21] Nissan has not shown that its public image concern is a special circumstance that justifies its ban on union t-shirts.

**C. Teamwork and Pride**

Although the Employer asserts that the uniform policy is meant to foster "teamwork" and "pride in the product" produced, the Board has never recognized that rationale as a special circumstance privileging the restriction of union insignia. The most analogous employer concern recognized by the Board is where an employer is seeking to reduce animosity or tension between opposing employee groups and to maintain decorum and discipline in the workplace. In *United Aircraft Corp., Pratt & Whitney Division*, the Board found an employer lawfully asked employees to remove union buttons identifying themselves as "loyal strikers" who did not cross the picket line during a nine-week strike, where the strike had been accompanied by mass picketing and violence and there was great animosity between the striking employees and those who crossed the picket line.[22] Based on evidence of "poststrike instances of discord and bitterness between the two employee groups," the Board found that the employer's legitimate concern that the pins would create disorder in the plant

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"the pleasure or displeasure of an employer's customers"), *enforced*, 702 F.2d 1 (1st Cir. 1983); *Nordstrom, Inc.*, 264 NLRB 698, 701–702 (1982) (employer's desire to avoid creating controversy among customers insufficient justification for ban on union insignia); *Eckerd's Market, Inc.*, 183 NLRB at 337–38 (general evidence of customer displeasure with union buttons insufficient to establish special circumstances); *Floridan Hotel of Tampa, Inc.*, 137 NLRB 1484, 1486 (1962) (fact that employees "come in contact with . . . customers does not constitute such 'special circumstances' as to deprive them of their right, under the Act, to wear union buttons at work"), *enforced*, 318 F.2d 545 (5th Cir. 1963).

[20] *Cf. W San Diego,* 348 NLRB at 372-73 (union button would have interfered with the all-black shirt, slacks, and apron used to create a special atmosphere for customers).

[21] *See, e.g.*, *P.S.K. Supermarkets*, 349 NLRB at 35.

[22] 134 NLRB 1632, 1633-35 (1961).

justified the ban.[23] In *Eckerd's Market, Inc.*, on the other hand, the Board found that an employer had not demonstrated any animosity among employees that would justify banning union buttons that said "Retail Clerks Union, AFL-CIO. July 1969."[24]

Nissan cannot demonstrate that its uniform policy is necessary to establish decorum and discipline in the workplace. In fact, the Union t-shirts have contributed to a positive workplace. In the past, the plant struggled with racial tension. Once the Union started distributing t-shirts with a photo of Walter Reuther and Martin Luther King, Jr. shaking hands, racial tension died down and employees worked more harmoniously together. There is also no evidence that the Union t-shirts have caused employees to react negatively toward Nissan management or supervisors. Nor is there any evidence that the Union distributed t-shirts that are inflammatory toward non-Union supporters or toward management. Thus, Nissan cannot demonstrate that its uniform policy is necessary to reduce tension or maintain decorum in the plant, and its assertion that the uniform requirement meets the special circumstances test because uniforms will more generally foster "teamwork" and "pride in the product" has no support in current Board jurisprudence.

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[23] 134 NLRB 1635; *accord*, *Reynolds Electrical Co.*, 292 NLRB 947, 947 n.1 (1989) (employer lawfully banned buttons with a red diagonal line drawn through the word "scab" to maintain employee discipline based on evidence that there were numerous hostile acts by strikers against nonstrikers during and after the strike); *see also Komatsu America Corp.*, 342 NLRB 649, 650 (2004) (finding employer demonstrated special circumstances where it banned employees from wearing t-shirts that compared the Japanese employer's outsourcing to the Pearl Harbor attacks because the comparison was "inflammatory and offensive" and the employer was legitimately concerned about disruption of the harmonious relationships between employees and management); *Southwestern Bell Telephone Co.*, 200 NLRB 667, 671 (1972) (employer lawfully banned t-shirts that said "Ma Bell is a Cheap Mother" to maintain discipline and harmonious employee-employer relations).

[24] 183 NLRB at 338; *see also Floridan Hotel of Tampa, Inc.*, 137 NLRB at 1486 (finding no special circumstances justified banning union buttons the size of a dime that contained the union's name or initials where there was no strike, no animosity among employees, and no evidence that banning the buttons was necessary to maintain employee discipline); *Boise Cascade Corp.*, 300 NLRB 80, 82 (1990) ("[G]eneral, speculative, isolated or conclusory evidence of potential disruption does not amount to 'special circumstances.'").

**D. Employee Efficiency**

Nissan also argues that its uniform policy is necessary to promote efficiency in the plant by streamlining its supervisors' daily tasks so as to eliminate the need to examine every employee's attire for mutilation risk. However, in the line of cases cited by Nissan that reference "efficient production" as a special circumstance, the asserted efficiency concern typically related to an employer's interest in maintaining discipline, decorum, or workplace safety, and in none of these cases did the Board find special circumstances had been demonstrated.[25] Moreover, even if the type of "employee efficiency" concern expressed by Nissan could constitute special circumstances, Nissan has not demonstrated that requiring employees to wear a uniform is more efficient than enforcing its prior dress code policy. Supervisors will still need to check employees daily to ensure that they are wearing the uniform and wearing it properly (e.g., with nothing attached to the uniform). Nor has Nissan shown that supervisors spent an inordinate amount of time inspecting employees' clothing for mutilation hazards prior to implementing its uniform policy.

In sum, based on the foregoing analysis, we conclude that Nissan has not met its burden to establish the requisite special circumstances to justify the restrictions it has placed on its employees' statutory right to wear union attire at work. Thus, the

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[25] *See United Parcel Service*, 325 NLRB 1, 4 (1997) (referring to "efficient production" but concluding employer violated Section 8(a)(1) by removing a flyer from a union bulletin board because it was critical of UPS and not because its removal was necessary to maintain decorum and discipline); *Autumn Court*, Case No. 8-CA-34334, JD-120-04, Dec. 30, 2004, at 27 (finding employer unlawfully banned union buttons without proving the buttons had a negative effect on efficient or safe production of its facility). *Cf. Pay 'N Save Corp.*, 247 NLRB 1346, 1349 (1980) (defining an "employee efficiency" claim as a claim that union insignia would interfere with work or production as recognized in *Hanes Hosiery*, 219 NLRB 338 (union pins could cause damage to employer's product)); *Standard Fittings Co.*, 133 NLRB 928, 942-45 (1961) (finding employees were not engaged in horseplay or "milling around" as a result of wearing union badges and were in fact talking to one another about their right to wear union badges after the employer demanded their removal; minor interruptions in production largely resulted from the employer's interference with the employees' right to wear union badges and not from employees wearing badges, and union badges were not a safety hazard that could interfere with work performance); *Midstate Telephone Corp.*, 262 NLRB 1291, 1292 (1982) (concluding employer failed to prove banning union t-shirts would promote "efficient production in the workplace" where the t-shirts were not obscene or profane, did not cause discord or bitterness among employees, did not adversely affect decorum and discipline, and were not likely to impair safety or production).

Region should issue complaint, absent settlement, alleging that Nissan's uniform policy violates Section 8(a)(1) and seek rescission of the Employer's unlawful uniform policy as a remedy.[26]

/s/
B.J.K.

ADV.15-CA-145053.Response.Nissan North America (b)(6), (b)(7)(C)

[26] *See World Color (USA)*, 360 NLRB No. 37, slip op. at 3 (ordering employer to rescind its overbroad policy prohibiting employees from wearing baseball caps with union insignia).

*United States Government*
*National Labor Relations Board*
**OFFICE OF THE GENERAL COUNSEL**

# Advice Memorandum

S.A.M.

DATE: January 13, 2016

TO: M. Kathleen McKinney, Regional Director
Region 15

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Durham School Services, L.P.
Case 15-CA-163098

512-5024-7300
512-5024-9900
512-5030-8000
512-5030-8050
512-5030-8075
512-5030-4020
512-5030-4080
512-5030-4090
530-6067-2040-8075

This case was submitted for advice as to whether the Employer violated the Act by seeking through discovery in a state court lawsuit the identities of employees who completed union safety surveys. We conclude that the Employer's actions violated Section 8(a)(1) because employees' Section 7 confidentiality interests outweigh the Employer's need for the information.

## FACTS

Durham School Services, L.P. ("Employer") provides school bus transportation services for the Santa Rosa County school district in Florida. In February 2013, Local 991 ("Union" or "Local") of the International Brotherhood of Teamsters ("International") won an election to represent school bus drivers and monitors in that county, and the Board certified the results the following year. The Employer has since refused to bargain with the Union in order to challenge the union's certification, and appellate court review of the ensuing Board decision finding a Section 8(a)(5) violation is currently pending. In a related Section 8(a)(1) case, an ALJ has concluded that the Employer unlawfully interrogated an employee leading up to the election, and engaged in a host of unlawful conduct post-election, including creating the impression of surveillance, telling employees that union representation would be

futile, promulgating a new rule in response to union activity, and repeatedly interrogating employees.[1]

In early 2013, a panel of domestic and international labor and human rights activists began investigating the Employer's working conditions in North America. After learning that drivers in Santa Rosa County experienced safety and health hazards, the panel requested that the International arrange a site visit to observe these hazards.[2] On April 18, 2013, representatives from the Local and International, together with members of the panel, visited a bus yard in Navarre, Florida. Without seeking permission from the Employer, the group entered the Navarre bus yard through an open gate, spoke to employees about their hazardous working conditions, and at least one member of the group boarded a school bus to inspect it for health and safety problems and to take photographs and videos. When an Employer representative confronted the group and asked them to leave, the group complied. Just after they exited the bus yard, police arrived and informed them that entering the bus yard without permission constitutes trespassing on school property. Later that day, representatives from the International together with members of the panel went to the school district's transportation office in order to obtain permission to enter the Employer's bus yards to continue their investigation of working conditions. The transportation office is directly adjacent to another school bus yard used by the Employer in Milton, Florida. An Employer representative again asked the group to leave the premises, although the Union claims that the visitors were on public property and did not, in fact, enter the Milton bus yard.

That evening, the International and Local held a public forum for the purpose of educating the community about the Employer's work and safety conditions. The forum was moderated by the panel of domestic and international activists described above. A packet distributed at the forum included fourteen affidavits from Santa Rosa County drivers complaining about their working conditions. Almost all of these affidavits contain at least one complaint about the safety of the Employer's buses, including problems with tires, brakes, delayed repairs, and mold, and the affidavits were signed in the weeks leading up to the site visits.

Also included in the forum packet were data summarizing the results of safety surveys distributed by the Union and completed by Santa Rosa County employees during the organizing campaign. The survey instrument itself states that it is confidential. The instrument asks that the survey responder list his or her name and

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[1] *See Durham School Services, L.P.*, Case No. 15-CA-106217 et al., JD–62–15, Oct. 30, 2015.

[2] *See* Brief in Support of IBT, Local 991's Appeal of the Dismissal of Unfair Labor Practice Charge 15-CA-105976.

contact information if interested in becoming involved in the International's campaign to improve safety standards on school buses.

About a month after the site visits and community forum, the Employer filed a civil lawsuit against the Local, International, and individual representatives from those organizations alleging trespass and seeking an injunction against repeated and willful trespass, among other claims. In their answers, the Local and International argued that the state court's jurisdiction was preempted under *Garmon*[3] because the defendants' actions were arguably protected by Section 7 as protected concerted activity to investigate health, safety and workplace concerns, and to otherwise seek to improve working conditions. Their answers additionally stated that the claims and relief sought were preempted by the Act and that the defendants' activities were protected activities under the Act. Notwithstanding the defendants' *Garmon* preemption defense, no charge was filed with the Board alleging that the group's expulsion from the Navarre bus yard was unlawful. The Local did file a charge alleging that the Employer's trespass lawsuit was unlawful, but the Region dismissed that charge and the Office of Appeals affirmed the dismissal. In pursuing that charge, the Local did not advance the theory that the lawsuit was preempted by the Act; it merely argued that it was coercive of employees' Section 7 rights.

During the course of discovery in the state court trespass action, the Employer requested the records from which the safety data contained in the community forum packet were compiled. The International produced copies of the surveys with employee names and contact information redacted. On July 30, 2015, the Employer filed a motion to compel, alleging that the International unnecessarily redacted information in its various document productions. During a phone conference concerning the motion on August 7, 2015, the Employer's counsel requested unredacted versions of the safety surveys for the first time. Out of concern for the confidentiality interests of the employees, counsel for the International and Local proposed limiting disclosure to Employer's counsel of record in the trespass action, who was outside counsel. The Employer rejected this proposal and asserted that it was entitled to the information because it was material to the defense that the trespassers were investigating health and safety concerns and it needed the identities to ascertain the bona fides of the surveys, the manner of their creation (i.e. whether solicited or unsolicited), and the particulars of the safety issues raised.

During a November 30, 2015 hearing on the motion to compel, counsel for the International and Local argued that the discovery request violated the Act because employees have an interest in keeping their union activities confidential. The judge ruled that the unredacted surveys should be produced pursuant to a protective order that would limit disclosure to the Employer's trespass counsel, who would be

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[3] *See San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959).

permitted to consult with and share the information with a corporate representative and another outside counsel (i.e. labor counsel) as needed to prepare to interview or depose employees. The parties have recently submitted a proposed protective order to the judge, and it is awaiting his signature. The unredacted surveys have not yet been produced.

## ACTION

We conclude that the Employer's pursuit of the unredacted employee safety surveys violates Section 8(a)(1) because the employees' Section 7 confidentiality interests outweigh the Employer's need for the discovery.

The Act protects the right of employees to keep their union activities confidential from their employer in order to prevent the chilling of such activities and to protect employees from the possibility of intimidation by their employers.[4] Employees' confidentiality interests extend not only to union membership, union authorization cards, and attendance at union meetings,[5] but also employees' communications with a union, including their complaints concerning terms and conditions of employment.[6] Accordingly, employer efforts to learn the identities of

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[4] *See Guess?, Inc.*, 339 NLRB 432, 434, 435 n.8 (2003) ("This right to confidentiality is a substantial one, because the willingness of employees to attend union meetings would be severely compromised if an employer could, with relative ease, obtain the identities of those employees."); *National Telephone Directory Corp.*, 319 NLRB 420, 421 (1995) ("[I]t is entirely plausible that employees would be 'chilled' when asked to sign a union card if they knew the employer could see who signed. . . . [The Board] take[s] very seriously the possibility of intimidation of employees by employers seeking to learn the identity of employees engaged in organizing.") (internal quotations and citations omitted).

[5] *See Dilling Mechanical Contractors*, 357 NLRB No. 56, slip op. at 3 (Aug. 19, 2011) (union membership); *Guess*, 339 NLRB at 434 (attendance at union meetings); *Wright Electric, Inc.*, 327 NLRB 1194, 1195 (1999) (authorization cards), *enforced*, 200 F.3d 1162 (8th Cir. 2000); *National Telephone*, 319 NLRB at 421 (authorization cards and attendance at union meetings).

[6] *See Allied Mechanical*, 349 NLRB 1077, 1077 n.1 (2007) (deposition questioning concerning union meeting discussions of complaints about working conditions and reasons for unionization unlawful); *Chino Valley Medical Center*, 362 NLRB No. 32, slip op. at 1 n.1 (Mar. 19, 2015) (employer violated Section 8(a)(1) by issuing subpoenas to employees encompassing employee-union communications, union authorization and membership cards, and documents related to the distribution of those cards).

employees engaged in such activities and the nature of their activities violates Section 8(a)(1).[7]

In *Guess*, the Board announced a framework for assessing the lawfulness of an employer's demand for information concerning employees' confidential Section 7 activities in the course of a legal proceeding.[8] Specifically, it held that, in order to be lawful: (1) an employer's request must be relevant, (2) an employer's request must not have an "illegal objective," and (3) the employer's need for the information must outweigh the employees' Section 7 confidentiality interests.[9]

As an initial matter, we conclude that the *Guess* balancing test is a legally valid analytical framework, and we disavow earlier concerns raised as to whether such balancing has a role to play in reasonably-based lawsuits.[10] In *Guess*, the Board explained that discovery is preempted by the Act where the "importance of the [Section] 7 rights that would be compromised by a discovery request outweighs the interests that would be served by the discovery request."[11] As such, the Board has the authority to condemn discovery requests that do not satisfy the *Guess* balancing test, even in the context of a reasonably-based lawsuit, because such preempted requests do not implicate First Amendment concerns.[12]

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[7] *See National Telephone*, 319 NLRB at 421.

[8] 339 NLRB at 433-34. Although *Guess* involved the lawfulness of questioning in a deposition, we construe its test as encompassing document requests in discovery as well, since the Board in *Guess* relied on *National Telephone*, 319 NLRB at 420-22, and *Wright Electric*, 327 NLRB at 1195, in devising its standard, both of which involved employer requests for documents.

[9] 339 NLRB at 434.

[10] *See Stock Roofing Co.,* Case No. 18-CA-19622 et al., Advice Memorandum dated May 26, 2011, at 5 n.4; *Chinese Daily News, Inc.*, Case No. 21-CA-36919 et al., Advice Memorandum dated December 29, 2006, at 2 n.6; *Cintas Corp.*, Case No. 29-CA-27153, Advice Memorandum dated May 24, 2006, at 5 n.14; *American Broadcasting Companies*, Case No. 31-CA-27698, Advice Memorandum dated May 24, 2006, at 5 n.10.

[11] 339 NLRB at 435 n.10 (citing *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 737 n.5 (1983)).

[12] We additionally note that *Guess* issued after the Supreme Court's decision in *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002), and that the Board has continued to apply *Guess*'s balancing test following its 2007 reconsideration of *BE & K* on remand. *See Best Century Buffet, Inc.*, 358 NLRB No. 23, slip op. at 1 n.1 (Mar. 27,

Applying these principles, we conclude that the Employer acted unlawfully by insisting that the Union produce employees' unredacted safety surveys during the course of discovery, thereby revealing the identities of employees who complained to the Union and wished to become involved in the International's bus safety campaign. We find that the Employer's request did not have an illegal objective and that it is relevant to the state court action because the Union thrust the issue of employee safety complaints into the case by raising its preemption defenses.[13] Nonetheless, the Employer's request violated Section 8(a)(1) because the *Guess* balancing favors the employees' Section 7 confidentiality interests.

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2012) (*Noel Canning* Board); *Chinese Daily News*, 353 NLRB 613, 614-15 (2008) (two-member Board).

[13] The Union's *Garmon* preemption defense is without merit. It never filed a charge challenging the Employer's exclusion of the group from the Navarre bus yard. Nor did the Union argue that the trespass action was preempted under *Garmon* when it presented its charge challenging the lawsuit itself. Since the Union failed to invoke the jurisdiction of the Board to decide whether it was engaged in protected activity when it entered the bus yard purportedly to investigate safety complaints, and the Employer had no means of presenting that issue to the Board, the state court can adjudicate the matter. *See Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 201-03, 206-07 (1978) (holding that the Act does not deprive a state court of jurisdiction over action involving arguably protected trespassory picketing where the union failed to invoke the jurisdiction of the Board and the employer had no means to do so). Similarly, the Union's argument that the trespass was actually protected by the Act is of dubious merit since it does not appear that the employees' Section 9(a) representative, i.e. the Local, sought access in order to fulfill its duty of responsible representation. The site visit was organized at the prompting of the panel of domestic and international activists in order to further the panel's nationwide investigation of the company. Thus, it appears that the Local representative was present to facilitate the tour and was not, in fact, there for the purpose of verifying particular employee complaints. Furthermore, the Local did not make any effort to seek the Employer's permission or schedule the visit so as to minimize any interruption of operations. *See Holyoke Water Power Co.*, 273 NLRB 1369, 1369-70 (1985) (employer must afford the union hygienist access to its facility, upon request, to conduct noise level studies because employees' right to responsible representation outweighed employer's property interest; access must be limited to reasonable periods to avoid unwarranted interruption of operations), *enforced*, 778 F.2d 49 (1st Cir. 1985); *Hercules, Inc.*, 281 NLRB 961, 966, 971 (1986) (employer unlawfully denied union's trained expert access to its facility to investigate an industrial accident and conduct health and safety testing; local requested access in good faith for the benefit of the bargaining unit and it was not acting as a surrogate

Here, the employees' interest in maintaining the confidentiality of their safety surveys is strong. The surveys not only constitute employee communications to the Union about their working conditions, to which employees have an obvious confidentiality interest,[14] they also reveal which employees wanted to become active in the International's campaign to improve bus safety. Recognizing that employees might be hesitant to register their safety concerns if the Employer would be privy to their complaints, the survey instrument itself promised employees that their responses would remain confidential. Moreover, employees completed the surveys during the organizing campaign, when employees have a heightened interest in keeping their union activities secret from their Employer.[15] And employees would reasonably fear intimidation if their identities were shared with the Employer at this point, since the Employer committed a number of unfair labor practices in the wake of the election and continues to challenge the election results. Finally, there can be no argument that the survey responders opened themselves up to questioning about their union activities since they are not parties to the lawsuit,[16] and the Union cannot waive their confidentiality interests.[17]

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for the international union for some other purpose), *enforced*, 833 F.2d 426 (2d Cir. 1987).

[14] *See Allied Mechanical*, 349 NLRB at 1077 n.1; *Chino Valley Medical Center*, 362 NLRB No. 32, slip op. at 1 n.1.

[15] *See Guess*, 339 NLRB at 434-35.

[16] *Compare Guess*, 339 NLRB at 434-35 (deposition questions in workers' compensation case about attendance of non-party employees at union meetings violated Section 8(a)(1)), *with Maritz Communications Co.*, 274 NLRB 200, 201 (1985) (employer lawfully deposed plaintiff about his relationship with the union and the Board charge he filed where issues in civil suit and Board proceeding arose from similar operative facts and plaintiff's claims before the different tribunals may be inconsistent). *See also Stock Roofing Co.*, Case No. 18-CA-19622 et al., Advice Memorandum dated May 26, 2011, at 6-7 (deposition questions about plaintiff-employee's union and other protected activities lawful where he made his interest in union representation an issue by filing a Board charge and made his other complaints against the employer public by filing the discrimination and wage claim lawsuit in state court; in contrast, questions about other employees' union activities arguably violated the Act); *American Broadcasting Companies*, Case No. 31-CA-27698, Advice Memorandum dated May 24, 2006, at 7 (discovery requests for communications between named class-action plaintiffs and the union lawful where employer requests were narrowly tailored and employer did not attempt to ascertain the identity of non-named party employees).

In contrast, the Employer's need for the identities of the survey responders is marginal. The Union has already produced redacted versions of the surveys, with only the names concealed, so the Employer already has information concerning the particulars of the safety complaints. Moreover, the Employer's argument that it needs the employees' identities in order to verify the authenticity of the surveys, thereby testing the Union's defense that it was on the property to investigate employee reports of safety issues, is not compelling. In *National Telephone*, the Board determined that employee confidentiality interests trump an employer's need to obtain employee identities for cross-examination and credibility impeachment purposes, at least where the employer is not prejudiced by this limitation.[18] The Employer's objective here, to test the reliability of the surveys, is virtually indistinguishable from the employer's objective in *National Telephone*. Accordingly, employee confidentiality interests are paramount unless the Employer can demonstrate that it will be prejudiced. There can be no such claim here, since the Employer already possesses evidence demonstrating that the Union was aware of employee reports of safety issues prior to the trespass. About a dozen employees signed affidavits attesting to such concerns, and the Employer has copies of those affidavits and can scrutinize their authenticity. Unless and until the Employer demonstrates that the affidavits were fabricated, coerced, or otherwise unreliable, it need not probe the authenticity of the surveys. Accordingly, the Employer's insistence that the Union produce the safety surveys in unredacted form violates Section 8(a)(1) under the *Guess* balancing test.

Furthermore, we conclude that the protective order envisioned by the state court judge is insufficient to safeguard employees' confidentiality interests. The order will still permit an Employer representative, such as a human resources representative, to have access to the information, thereby creating an opportunity for intimidation. Such coercion is more than a speculative possibility in this case, given the Employer's history of unfair labor practices. Furthermore, even if the protective order limited access to the Employer's outside counsel handling the trespass dispute and outside labor counsel, this would not mitigate our concerns. The Board has held that questioning about confidential protected activities by outside counsel during the course of a legal proceeding likewise violates the Act.[19]

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[17] *National Telephone*, 319 NLRB at 422 ("The right to confidentiality exists for the protection of the employees, and thus cannot be waived by the [u]nion, but only by the employees themselves.").

[18] *Id.* at 421.

[19] *See Guess*, 339 NLRB at 435 n.8 (employees' confidentiality interests are not diminished by the fact that the employer's workers' compensation attorney posed the questions).

Furthermore, the Employer's counsel is planning to contact the surveyed employees to confirm that they completed surveys and to ascertain the circumstances under which they did so. This will exacerbate the situation by alerting employees to the fact that their confidentiality has been breached and by coercing them through interrogation.[20]

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) by seeking and insisting that the Union produce unredacted employee safety surveys in discovery.

/s/
B.J.K.

ADV.15-CA-163098.Response.DurhamSchoolServices [redacted]

[20] We likewise conclude that the Region's proposed solution—that the Union produce a list of survey responders such that the specific safety complaints raised in the surveys will remain anonymous—is insufficiently protective of employees' confidentiality interests. This approach gives the Employer an opportunity to intimidate employees, and will likely chill employees from completing such surveys in the future should they learn that their names were shared with the Employer. In addition, it still exposes information that employees have a substantial interest in keeping confidential, namely, that they communicated with the Union about safety concerns and were interested in becoming involved in the International's bus safety campaign.

*United States Government*
*National Labor Relations Board*
**OFFICE OF THE GENERAL COUNSEL**

# Advice Memorandum

**S.A.M.**

DATE: April 22, 2015

TO: Marlin O. Osthus, Regional Director
Region 18

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Seagate, 18-CA-138463
Boston Scientific, 18-CA-138485, and
Medtronic, 18-CA-138607

*Lechmere* Chron
512-5012-2500
512-5012-5000
512-5012-8300
512-5012-8320-5000
512-5018-3300
530-6067-4060

The Region submitted these cases for advice on whether three businesses that contract with janitorial companies to provide daily cleaning services at their facilities violated the Act by denying access to the janitorial employees' union representative where the contract between the union and the janitorial companies contained access clauses. We conclude that the Region should issue complaint, absent settlement, alleging that each of the businesses violated Section 8(a)(1) because their respective denials of access were discriminatory. We also conclude that additional investigation is needed in order to determine whether, even in the absence of discrimination, the businesses violated the Act by denying the union access to their non-secure interior areas and parking lots, as well as secure interior areas, under a balancing of the businesses' property interests against the Section 7 rights of the union and the employees it represents and consideration of reasonable, effective alternative means of communication.

## FACTS

Seagate, Medtronic, and Boston Scientific (collectively, the "businesses") are unrelated companies with operations in the Minneapolis/St. Paul, Minnesota area. Seagate is a data storage company that offers products and services related to the storage and recovery of electronic data. Boston Scientific manufactures products and creates technologies that are used to diagnose or treat a wide range of medical conditions. Medtronic is the world's largest medical technology company.

Each of these employers has a contract with a janitorial/cleaning company that provides daily cleaning services at their respective facilities. Seagate and Boston

Scientific have contracts with ABM Janitorial Services (ABM), and Medtronic has a contract with SBM Site Services (SBM). ABM and SBM are members of the Minneapolis-St. Paul Contract Cleaners Association (Association), which is a multi-employer bargaining association that has a collective-bargaining agreement with SEIU Local 26 (Union). Article 18.6 of that agreement contains a Union access provision, entitled "Conference with Union Representatives," which states:

> Union representatives shall, at all times, be permitted to confer with employees in the service of the Company, provided it does not interrupt or interfere with the Company's operation. The union recognizes that work under this agreement is sometimes performed in buildings under control of customers of the Company and in buildings requiring security clearances. In such cases the Union agrees to make arrangements for conferences with employees so as not to interfere with the operation of the building in question and the Company agrees to cooperate with the Union in making these conferences in a reasonable manner and consistent with the demands of security and other establishment rules prescribed by the owner.

SBM, ABM, and the Union agree that Article 18.6 was intended to permit the Union to meet with employees on their respective jobsites and does not merely incorporate employees' statutory right to speak with their Union representative. The Union has utilized this contractual access clause to enter the property of several ABM clients and meet with ABM's janitorial employees at their worksites. When visiting an ABM client's property, the Union representatives typically meet with a group of employees in the employees' lunch or break area.[1]

In 2013, the Union and the Association negotiated a new collective-bargaining agreement. In response to employees' concerns about their workloads being too demanding, the Union pressed for and secured a new contractual provision (Article 19.1) relating to employees' workloads, which provides for "work assignment reviews" and "walkthroughs" at jobsites. This contractual language provides, *inter alia*:

> The Company shall not impose an unreasonable workload upon any employee, and should there be a substantial change in workload, the employees' work hours shall be reviewed and adjusted as appropriate. . . . The employer shall not unreasonably deny an employee's written request

[1] There is currently no evidence regarding the Union's visits to other properties of SBM clients.

> for a written description, review and/or walkthrough of their work assignment. . . . The employee may request that the building steward be present during the review. If no building steward has been designated for the building in question, the employer shall mutually agree that an individual from a pool of union designated, trained stewards or representatives from the same employer may accompany the individual on the review and/or walkthrough. Work assignment reviews and walkthroughs shall not interfere with the operation of the building in question and be subject to security and other establishment rules prescribed by building management.

## I. The Union's Requests for Facility Access are Rejected.

### A. Medtronic (SBM)

The Union represents approximately seventy SBM janitorial employees, each of whom works regularly at one of Medtronic's five locations in the Minneapolis/St. Paul metropolitan area. Although the Union was previously able to meet with Union-represented employees at Medtronic's properties without incident over seven years ago when ABM was Medtronic's cleaning contractor, the Union has not been permitted such access while SBM has held the contract.[2]

In February 2013, Medtronic contacted SBM officials regarding a newspaper article stating that the Union was preparing to engage in an economic strike related to the Association's refusal to agree to certain Union-requested contractual provisions. Medtronic sought assurances from SBM that it would be able to provide at least a minimum level of cleaning services if the Union-represented employees who worked at Medtronic's facilities participated in the anticipated strike. During these communications, Medtronic informed SBM that Union officials were not permitted on its property, but did not indicate that any written Medtronic access rule or policy precluded the Union from accessing its facilities.

In early 2014, the Union requested that SBM assist it in gaining access to the employees it represents at Medtronic's facilities. According to the Union, it explained to SBM that the SBM employees who worked at Medtronic were complaining about their workloads. These complaints were exacerbated in the spring when Medtronic requested less vacuuming at its facilities, which resulted in SBM determining that it

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[2] The copy of the Medtronic/SBM service contract provided to the Region, and an addendum to that contract, have been mostly redacted.

needed to lay off employees and increase the remaining employees' workloads. The Union was ultimately able to reach an agreement with SBM to rescind some of those layoffs, and the Union wanted to access the Medtronic facilities in order to ensure that SBM was abiding by its agreement with regard to layoffs and workload. That summer, the Union contacted SBM and requested access to the Union-represented employees at Medtronic's facilities. SBM was unsuccessful in obtaining access for the Union, however, so the Union engaged in direct communications with Medtronic. Specifically, the Union indicated it was willing to meet with employees during their break time or before their shifts in the conference room outside of Medtronic's secured areas. It is unclear whether SBM or the Union communicated to Medtronic that the Union was seeking access in order to ensure that SBM was abiding by its agreement with regard to layoffs and workload. On July 23, Medtronic sent SBM a letter, which stated that Medtronic was denying the Union's request for access because "[f]or security reasons, and pursuant to its well-established, uniformly applied policy, Medtronic only allows access to those with a clear business reason to be on Medtronic property."

Around the time of the Union's access requests, Medtronic's (b) (6), (b) (7)(C) revised the company's Access Control Standard policy in response to the Union's request for access. On July 16, (b) (6), (b) emailed Medtronic's (b) (6), (b) (7)(C) and requested that (b) (6), (b) revise the policy, because Medtronic needed "to get this approved soon as [the Union] is doing a hard press" to gain access to the Medtronic facilities. The primary revision to the policy was a provision entitled "Visitors and Events," which provides:

> All persons and groups must obtain permission before entering Medtronic property. This includes guests of an active Medtronic employee who can grant such permissions. There must be either a) a clear Medtronic business reason to be on Medtronic property, and/or b) have a direct invitation from Medtronic or Medtronic employee(s).

B. Boston Scientific and Seagate (ABM)

Approximately thirty ABM employees work at the three Boston Scientific locations in the Minneapolis/St. Paul metropolitan area. Boston Scientific's service contract with ABM states, *inter alia*, that ABM "will use its best efforts to avoid any work stoppages, slowdowns, disputes and strikes" with its workers, and that if they occur, ABM will ensure that Boston Scientific receives at least a "minimum level" of cleaning services.

ABM also provides cleaning services at Seagate's facilities in Bloomington and Shakopee, Minnesota. Approximately fifteen ABM employees work at each facility

during the day, and fewer employees work at the facilities in the evenings. ABM managers, who are on-site and have an office in the facilities, supervise the janitorial employees. Most of the Union's requests for access were for the Bloomington facility, but the Union also sought access to the Shakopee facility. The ABM employees use the same break rooms as Seagate employees.

In June 2014,[3] the Union asked ABM to assist it in gaining access to ABM customers' facilities where Union-represented ABM employees worked. According to the Union, it sought access because it was concerned about employees' workloads. ABM agreed to assist the Union and asked the Union to send it a list of the facilities it wanted to access. On August 1, the Union provided this list, which included the Seagate and Boston Scientific facilities, to ABM. ABM asked Seagate and Boston Scientific to provide access to the Union, but it is unclear whether ABM or the Union explained to Seagate and Boston Scientific that the Union was requesting access in order to police the contract's employee workload provisions.

In early August, a Boston Scientific representative called a Union representative to discuss the Union's request for access. They discussed the Union's need to access employees at work during their breaks in order to provide them with information and to receive employees' feedback about their jobs. Although the Union desired access to the interior of Boston Scientific's facility, it sought to compromise with Boston Scientific by asking to meet with employees in the parking lot. On September 8, a Union representative emailed an ABM representative and stated that [redacted] would like access to the Seagate facilities on certain specified dates. The ABM official replied that Seagate had not approved the access request. Boston Scientific and Seagate ultimately denied all of the Union's access requests.

## II. Instances where the Businesses have Permitted Outside Groups to Access and Use their Facilities.

### A. Medtronic

At all times material to this case, Medtronic has maintained a Facility Common Space Usage policy in addition to the Access Control Standard policy. The Facility Common Space Usage policy sets forth the process for external groups to request the use of common space at Medtronic's facilities. That policy provides, *inter alia*, that the common space is "not available for non-business use during regular business hours," that use of the space is "limited and granted to charitable non-profit organizations only," that a Medtronic employee must be on site at all events, and that the event must support Medtronic's "mission and have a direct connection to Medtronic."

[3] All dates hereinafter are in 2014 unless otherwise indicated.

Medtronic has permitted several outside, nonemployee groups to utilize its facilities. It permits the Red Cross to utilize either the interior of its facilities (e.g., areas near the main facility entrance) or its parking lot for blood drives twice a year. It has also permitted an outside group to hold a book fair near a small retail shop that is located in its interior space, and permits a farmer's market to be held in its parking lot every Wednesday from June through September.[4] A Caribou Coffee store is also located onsite for employees to patronize. The small retail shop sells a myriad of items, and vendors often set up tables and sell items, such as jewelry and fine soaps, inside or around the area of the small shop. Only those who work at the Medtronic facility are permitted to shop at Caribou Coffee and the small shop. It is unclear whether the vendors who periodically come to the small shop area to sell their products rent or otherwise pay to utilize space within Medtronic's facility.

B. Boston Scientific

Boston Scientific permits the Red Cross to hold blood drives at its facilities around May and October of each year. It also permits Costco to set up tables inside its facilities in order to sell Costco memberships to Boston Scientific employees. In the winter months, Boston Scientific also permits a charitable organization to solicit donations such as winter jackets from Boston Scientific employees.

C. Seagate

Seagate permits charitable groups to place collection boxes in its facilities in order to collect donations, but it is unclear whether a representative from the charity picks up the donations from Seagate or whether a Seagate employee delivers the collected donations to the charity. Seagate also permits organizations to hold blood drives on its premises, although it is unclear whether these blood drives occur inside its facilities or in its parking lots. On December 11, Seagate permitted various commercial vendors affiliated with the Minnesota Employee Recreation & Services Council (MERSC)[5] to hold a vendor fair in its Main Café 1, 2, & 3 in order to solicit

[4] Additionally, Medtronic has allowed various cultural events to be held at its facilities, including the "Day of the Hispanics" and a folklore event. It is unclear whether these were events that Medtronic sponsored for its employees or whether, pursuant to its Facility Common Space Usage policy, it permitted outside groups to use its space to host these events.

[5] MERSC is an organization that companies can join in order to provide their employees with discounts from various commercial vendors. *See* http://www.mersc.org/ (last accessed April 9, 2015). Medtronic and Boston Scientific are also listed as MERSC member companies, but it is unclear whether they also permit MERSC vendor fairs at any or all of their facilities. *See* http://www.mersc.org/member_companies.php (last accessed April 9, 2015) (listing Medtronic, Seagate, and Boston Scientific among MERSC member companies).

business from Seagate employees. The vendors included hotels and resorts, the U.S. Federal Credit Union, a daycare center, a local dentistry practice, Costco, Sam's Club, a dinner theatre, and a mortgage company.

Seagate also provides tours to various groups and has permitted groups to use its property for science fairs, demonstrations, and trade association meetings. For example, between 2013 and 2014, Seagate provided tours and/or demonstrations to a group from the Edina, Minnesota police department; a group from the Bakken Museum; and various middle school, high school, and college student groups. In early May, Seagate hosted the quarterly meeting for the Fab Owners Association, a trade industry group it belongs to, at its facilities. Seagate asserts that the tours it provides to outside groups are fundamentally different from the access the Union sought for meetings, because the tours create good will with the communities in which Seagate operates and are therefore consistent with its requirement that groups have a "business purpose" for accessing its property.

## ACTION

We conclude that the Region should issue complaint, absent settlement, alleging that Seagate, Medtronic, and Boston Scientific each violated Section 8(a)(1) by discriminatorily denying the Union access to their facilities while granting access to other groups. Medtronic also violated Section 8(a)(1) by maintaining a facially unlawful access rule and by discriminatorily promulgating a new access rule in response to the Union's request for access. We further conclude that, even if the access denials were not discriminatory, the businesses may have violated the Act if, under the Board's balancing test, their property rights did not outweigh the Union's Section 7 rights to enter parking lots, non-secure interior areas of their facilities, and other interior areas, including secure areas where the employees it represents may work. The Region should conduct further investigation, as set forth below, to determine if the denials violated the Act under the balancing test and resubmit the case to Advice.

### I. Seagate, Boston Scientific, and Medtronic Violated Section 8(a)(1) by Denying Access to the Union While Granting Access to Other Outside Groups.

An employer may lawfully ban nonemployee union solicitation or distribution of literature for organizational purposes on its property if it does not discriminate against the union by allowing similar solicitation or distribution by other nonemployee entities.[6] A finding of unlawful discrimination generally requires

[6] *See, e.g., NLRB v. Babcock & Wilcox Co.*, 351 U.S. 104, 112 (1956). *See also Lechmere, Inc. v. NLRB*, 502 U.S. 527, 535 (1992) ("To gain access, the union has the burden of showing. . . that the employer's access rules discriminate against union solicitation.").

sufficient proof that an employer has allowed other nonemployee individuals, groups or organizations to use its premises for various activities while denying access to the union.[7] There are two exceptions to this rule. First, an employer may lawfully permit a small number of isolated "beneficent acts" as narrow exceptions to a no-access rule.[8] Second, an employer does not violate the Act when it permits nonemployee solicitations that relate to the employer's business function and purposes—the "business-related" exception—while prohibiting union access.[9] The Board has held that solicitations involving the employees' "regular benefit package," and fundraising sales where the proceeds go to the employer to fund part of its core business function, are an integral part of the employer's business functions and purposes and therefore satisfy the "business-related" exception.[10]

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[7] *See, e.g., Dow Jones & Co.*, 318 NLRB 574, 574-75 (1995) (employer unlawfully denied union access to its premises for union meetings while permitting other organizations to hold meetings, including weight-reduction and stop-smoking programs for employees conducted by independent organizations), *enforced mem.*, 100 F.3d 950 (4th Cir. 1996) (Table); *Union Child Day Care Center*, 304 NLRB 517, 525 (1991) (employer violated Section 8(a)(1) by granting access to its meeting room to parents and businesses while prohibiting the union from using it for union meetings). *See also Sandusky Mall Co.*, 329 NLRB 618, 620-21 (1999), *enforcement denied*, 242 F.3d 682 (6th Cir. 2001).

[8] *See, e.g., Lucile Salter Packard Childrens' Hospital*, 318 NLRB 433, 434 (1995) (citing *Hammary Mfg. Corp.*, 265 NLRB 57, 57 n.4 (1982)), *enforced*, 97 F.3d 583 (D.C. Cir. 1996). *See also Serv-Air, Inc.*, 175 NLRB 801, 801 (1969) (condoning two or three collections for beneficent purposes insufficient to establish disparate enforcement). *See generally Sentry Markets, Inc.*, 296 NLRB 40, 42 (1989) (determining, under *Jean Country* balancing test, that the limited presence of the Salvation Army over Christmas season did not significantly diminish employer's property right), *enforced*, 914 F.2d 113 (7th Cir. 1990).

[9] *See, e.g., Lucile Salter Packard Childrens' Hospital*, 318 NLRB at 433-34, 436, *enforced*, 97 F.3d at 589-90.

[10] *See, e.g., id.* at 433-34, 436 (finding that providing access to retirement and health plan representatives did not evidence discrimination against the union because they were part of the employees' regular benefits package); *Rochester General Hospital*, 234 NLRB 253, 258, 259 (1978) (employer did not engage in discrimination by providing access to a volunteer organization's fundraising sale, which was part of the women's board and which donated all of its profits to the employer); *George Washington University Hospital*, 227 NLRB 1362, 1369 & n.22, 1373-74 & n.39 (1977) (employer did not engage in unlawful discrimination by permitting sales events related to the employer's gift shop, which was operated by the hospital's women's board and which gave all of its profits to the employer to use for its necessary functions, while prohibiting union solicitations), *enforced in relevant part per curiam,* 1978 WL 4100 (D.C. Cir 1978).

A. Medtronic

We conclude that Medtronic engaged in unlawful discriminatory treatment when it denied the Union's request for access while granting other nonemployee groups access to its property for a variety of purposes. Specifically, Medtronic has permitted an outside group to hold a book fair near the small retail shop inside its facility and permits a farmer's market to operate in its parking lot every Wednesday from June through September.[11] Clearly, the book fair and farmer's market do not constitute a small number of "isolated beneficent acts."[12] There is no evidence that either of these activities were for a charitable purpose, and even if the "isolated beneficent acts" exception applied to non-charitable entities, the farmer's market also occurred too frequently to be considered an "isolated" event.[13] Nor do these events fall under the "business-related" exception. They clearly were not part of Medtronic's regular employee benefits package, and there is no evidence that any of the proceeds funded its core business.[14]

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[11] *See, e.g., Knogo Corp.*, 262 NLRB 1346, 1360-62 (1982) (employer unlawfully excluded union representatives while regularly admitting a nonemployee food vendor to its parking lot), *enforced in pertinent part*, 727 F.2d 55 (2d Cir. 1984); *Chrysler Corp.*, 232 NLRB 466, 466 n.2, 476-77 (1977) (employer discriminatorily enforced no-access rule against, and caused the arrest of, a former employee for distributing union literature in its parking lot where the employer permitted farmers to use the parking lot during the summer months to sell produce to employees, and permitted various food vendors to deliver food to employees in the parking lot during lunchtime), *enforced sub nom.*, *Smith v. NLRB*, 125 LRRM 3063, 1979 WL 6182 (D.C. Cir. 1979) (per curiam).

[12] Permitting the Red Cross to hold blood drives twice per year, however, falls under the "isolated beneficent act" exception. Therefore, evidence regarding these blood drives should not be used to support the disparate treatment argument.

[13] As noted in *supra* note 5, Medtronic is also a MERSC member. The Region should investigate whether Medtronic, like Seagate, has also held MERSC vendor fairs on its premises because such evidence would establish an even stronger case of unlawful discriminatory treatment.

[14] The Region should also investigate whether the various cultural events discussed in *supra* note 4 are events that Medtronic provided for its employees or whether the events were staged by outside groups that were permitted to utilize Medtronic's interior space pursuant to the Facility Common Space Usage policy. If Medtronic permitted outside groups to utilize its space pursuant to that policy, then these cultural events are evidence of discriminatory treatment. The Region should also investigate whether the outside vendors who sell items such as jewelry and fine soaps utilize space within the small retail shop or whether they set up their tables in other Medtronic interior space that is near the small shop. If the latter is the case, then providing access to the vendors would be evidence of discrimination if the vendors do not provide Medtronic with a portion of their sales to put toward Medtronic's core business function. *See* cases cited in *supra* note 10 and *Lucile Salter Packard Childrens' Hosp. v. NLRB*, 97 F.3d at 591 (discriminatory denial of access to union

Additional evidence bolsters the conclusion that Medtronic's denial of access to the Union was discriminatory. First, the provision in Medtronic's Facility Common Space Usage policy, which provides that use of its space is "granted to charitable non-profit organizations only," is facially unlawful.[15] Second, a July 16 email establishes that Medtronic promulgated a revised Access Control Standard policy in response to the Union's request for access.[16]

B. Boston Scientific

We conclude that Boston Scientific also violated Section 8(a)(1) when it denied the Union's request for access to perform a representational function with respect to ABM employees who work regularly at its facilities while permitting Costco—a commercial entity—to set up tables within those facilities in order to sell memberships to its employees.[17] Because Boston Scientific's granting of access to Costco is essential to finding a discriminatory access violation in this case, the Region

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where employer permitted access to nonemployee vendors who contributed a share of profits to an employee committee that used the funds for social and recreational events for employees; such activities were not directly related to the employer's function of providing health care and, thus, did not come within the "integral part of the employer's business function" exception).

[15] *See, e.g., Riesbeck Food Markets*, 315 NLRB 940, 940 (1994) (employer's policy, which permitted only organizations that were charitable in nature to solicit and distribute to customers, was discriminatory on its face), *enforcement denied per curiam* 91 F.3d 132 (4th Cir. 1996) (Table).

[16] *See, e.g., Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004) (holding that an employer violates Section 8(a)(1) when it promulgates a rule in response to union activity).

[17] *See, e.g., Schear's Food Center*, 318 NLRB 261, 265-66 (1995) (finding unlawful disparate treatment where employer allowed voter registration, Girl Scout cookie sales, and blood pressure checks at one store, and Seventh Day Adventist literature distribution, Girl Scout cookie sales, and Jaycee voter registration drives at another store, while prohibiting union distribution); *Great Scot*, 309 NLRB 548, 549 (1992) (finding unlawful disparate treatment when employer prohibited the union from engaging in area standards picketing on its property but permitted approximately six charitable and civic organizations to use the area near store entrances for fundraising purposes and also regularly permitted two nonemployee food vendors to set up portable wagons and sell prepared food near the front of the store), *enforcement denied* 39 F.3d 678 (6th Cir. 1994); *Davis Supermarkets, Inc.*, 306 NLRB 426, 426 (1992) (finding unlawful discrimination where, on the same day that the store refused to allow the union pickets to remain in the front of its store, it permitted a charitable organization to set up a table on the sidewalk and sell raffle tickets for a car; store had previously permitted various church and school groups to use the front of the store to sell items to its customers), *enforced in pertinent part*, 2 F.3d 1162 (D.C. Cir. 1993), *cert denied* 511 U.S. 1003 (1994).

should investigate how often this occurs.[18] In addition, as noted in *supra* note 5, Boston Scientific is also a MERSC member. The Region should investigate whether Boston Scientific, like Seagate, has also held MERSC vendor fairs on its premises because such evidence would establish a stronger case of unlawful discriminatory treatment.

C. Seagate

We also conclude that Seagate engaged in unlawful discriminatory treatment when it denied the Union's request for access while granting other nonemployee groups access to its property for a variety of purposes. Specifically, Seagate has permitted various business, including hotels and resorts, the U.S. Federal Credit Union, a daycare center, a local dentistry practice, Costco, Sam's Club, a dinner theatre, and a mortgage company to solicit business from Seagate employees during a MERSC vendor fair.[19] Although it appears that Seagate likely pays a membership fee to belong to MERSC, and it is likely that most, if not all, MERSC vendors provided employees with a discount on their memberships or services, these discounts do not constitute employee benefits under the "business-related" exception.[20] In order for that exception to apply, an employer must at least partially subsidize the benefit and the benefit must be one that is ordinarily included in an employee benefits package, such as employee health and retirement plans.[21] Thus, even if Seagate did pay for

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[18] We recognize that if Boston Scientific only permitted the Red Cross to hold blood drives at its facilities a few times per year, the "isolated beneficent acts" exception would apply to those events.

[19] *See* cases cited in *supra* note 17.

[20] *See e.g., Lucile Salter Packard Childrens' Hosp. v. NLRB*, 97 F.3d at 591 (nonemployee vendors who contributed a share of profits to an employee committee that used the funds for social and recreational events for employees did not come within the "integral part of the employer's business function" exception because such activities were not directly related to the employer's function of providing health care); *Dow Jones & Co.*, 318 NLRB at 574-75 & n.3 (nonemployee organizations that allegedly "benefited" employees, e.g., Weight Watchers and a stop-smoking program that the employer partially subsidized, did not fall under "business related" exception); *Deborah Heart & Lung Center*, Case 4-CA-30363, Advice Memorandum dated Jan. 17, 2002, at pp. 6-7 (employee discount for cellular phone service that employer did not pay for was not part of employees' regular benefit package); *Lakeland Regional Medical Center*, Case 12-CA-18460, Advice Memorandum dated April 29, 1997, at pp. 9-10 (cheaper activation fees for cellular phone service was not part of employees' regular benefit package even though employer contracted for that benefit).

[21] *See, e.g., Lucile Salter Packard Childrens' Hospital*, 318 NLRB at 433-34, 436 (finding that providing access to retirement and health plan representatives did not evidence discrimination against the union because they were part of the employees'

the entirety of the membership or services that the MERSC vendors were selling, the membership or services would not constitute an "employee benefit" under the "business-related" exception because they are not benefits included as part of the employees' regular benefit package.[22]

Furthermore, Seagate also regularly provides tours of its facilities and/or demonstrations and science fairs for various groups, including museum employees; various middle school, high school, and college groups; and police officers.[23] Although Seagate contends that these tours to outside groups are fundamentally different because they fall "within its mission by fundamentally creating goodwill" in the community and are therefore "consistent" with the requirement of having a business purpose for accessing its property, the Board has previously concluded that an employer engages in unlawful discrimination by allowing certain groups access in order to "enhance business goodwill."[24]

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regular benefits package, but that providing access to the credit union and property insurance company, which were employer-subsidized employee benefits, was evidence of discrimination), *enforced*, 97 F.3d at 589-90.

[22] Although Seagate permits the Red Cross to hold blood drives in its facilities twice each year and permits another charity to collect donations, such as winter coats, from employees once or twice per year, such access would likely fall within the isolated beneficent acts exception. *See, e.g., Jewish Hospital of St. Louis*, Case 14-CA-20413, Advice Memorandum dated Jan. 19, 1990, p. 2 (exceptions in employer's written rule for solicitations by three charities fell within the "beneficent acts" exception where the United Way and/or Jewish Federation drive only occurs once a year and the blood drive occurs only twice a year).

[23] *See, e.g.,* cases cited in *supra* note 17.

[24] *See Riesbeck Food Markets*, 315 NLRB at 943 (employer engaged in unlawful discrimination by "opening up its property to a wide range of solicitation that it deems 'enhanc[ing to its] business goodwill' and forbidding—as here—the dissemination of messages protected by the Act which it deems bad for business") (alteration in original).

II. Additional Investigation is Needed to Determine Whether the Property Rights of Seagate, Boston Scientific, and Medtronic Must Yield to the Union's Section 7 Interest in Accessing the Property for a Representational Purpose.

A. General principles: a case-specific balancing test applies here.

The Board's task in access cases is to resolve conflicts between Section 7 rights and private property rights and seek a proper accommodation between the two.[25] The Board's basic objective is to fashion an accommodation of Section 7 rights and private property rights with as little destruction of one as is consistent with maintenance of the other.[26] The "locus of that accommodation," however, may fall at differing points along the spectrum depending on the "nature and the strength of the respective [Section] 7 rights and the private property rights asserted in any given context."[27] On the one hand, Section 7 of the Act affords protection to employees in their invocation of a right rooted in a collective-bargaining agreement—such as a union access provision—because invoking a contractual right is "unquestionably an integral part of the process that gave rise to the agreement."[28] Moreover, Section 8(a)(1) affords employees of a particular employer protection from another employer's interference with their Section 7 rights.[29] Employees of a subcontractor therefore have a legitimate interest in being protected from the owner's or general contractor's imposition of extra-contractual restraints that might operate to nullify important provisions of their collective-bargaining agreement.[30] On the other hand, the owner or general contractor has a legitimate interest in controlling its property and may not wish to admit the union agent onto the property.[31] Also, the owner or general

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[25] *See, e.g., Hudgens v. NLRB*, 424 U.S. 507, 521 (1976) (quoting *Central Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972)).

[26] *See Hudgens*, 424 U.S. at 522 (quoting *NLRB v. Babcock & Wilcox Co.*, 351 U.S. at 112).

[27] *See id.*

[28] *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 831 (1984).

[29] *See, e.g., Hudgens*, 424 U.S. at 510 n.3. *See also New York New York Hotel & Casino*, 356 NLRB No. 119, slip op. at 5 (Mar. 25, 2011) (citing cases and concluding that hotel/casino, as a statutory employer, could violate the Act by coercing or restraining onsite contractor's employees in the exercise of their Section 7 rights, notwithstanding that hotel/casino did not directly employ those employees), *enforced*, 676 F.3d 193 (D.C. Cir. 2012), *cert denied* 133 S.Ct. 1580 (2013).

[30] *See, e.g., CDK Contracting*, 308 NLRB 1117, 1122 (1992) (quoting *Villa Avila*, 253 NLRB 76, 81 (1980), *enforced as modified*, 673 F.2d 281 (9th Cir. 1982)).

[31] *See CDK Contracting*, 308 NLRB at 1121.

contractor is not a party to the subcontractor's labor contract containing the access provision and does not have a bargaining relationship with the union.[32]

In cases involving union attempts to gain entry to worksites pursuant to access clauses in contracts with construction subcontractors, the Board has reasonably accommodated these competing interests by applying a balancing test derived from *NLRB v. Babcock & Wilcox*.[33] In those cases, the Board held that the Section 7 interests outweighed the general contractors' property interests such that the subcontractor must be permitted to observe its contractual obligations and the union must be permitted its contractual access rights.[34]

Although the cases decided by the Board, including *CDK Contracting*, involved contractual access provisions that did not contain a limitation that subjected the union's access rights to any and all restrictions in the property owners' own access rules, and the Board has not yet struck the balance regarding property interests and Section 7 rights where such limitations apply, the Board's jurisprudence suggests that

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[32] *Id. See also C. E. Wylie Construction Co.*, 295 NLRB 1050, 1050 n.3 (1989) (concluding that, "standing alone, the contracts [containing the union access provisions] are not dispositive," because those contracts are with the subcontractor rather than the general contractor), *enforced in pertinent part*, 934 F.2d 234 (9th Cir. 1991). *Cf. Holyoke Water Power Co.*, 273 NLRB 1369, 1370 (1985) (concluding that, on balance, a union had the right to access the property of an employer with which it had a bargaining relationship in order to observe and survey noise level hazards), *enforced*, 778 F.2d 49 (1st Cir. 1985), *cert. denied* 447 U.S. 905 (1986).

[33] *See, e.g., C. E. Wylie Construction Co.*, 295 NLRB at 1050 n.3 ("The analysis…in the instant case[] begins with the balancing test enunciated in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956)."). The Board has expressly held that this accommodation is consistent with the Supreme Court's decision in *Lechmere Inc. v. NLRB*, 502 U.S. at 537. *See, e.g., CDK Contracting*, 308 NLRB at 1117. *See also Wolgast Corp. v. NLRB*, 349 F.3d 250, 255-56 (6th Cir. 2003) (stating that *Lechmere* is not a "trump card" that authorizes exclusion of every nonemployee union representative from third party property, regardless of the purpose or relationship with employees at the jobsite). Indeed, while there is a "critical distinction" between the organizing activities of employees, to whom Section 7 guarantees the right to self-organization, and to non-employees, to whom Section 7 "applies only derivatively," *Lechmere*, 502 U.S. at 533, a union seeking entry to property pursuant to a contractual access provision is attempting to carry out its non-derivative statutory duties as the exclusive bargaining representative of the subcontractor's employees. More fundamentally, giving effect to the contractual access provision furthers the employees' non-derivative Section 7 right to enjoy the benefits negotiated in their collective-bargaining agreement. *See City Disposal Sys.*, 465 U.S. at 831.

[34] *See, e.g., CDK Contracting*, 308 NLRB at 1117; *Mayer Group, Inc.*, 296 NLRB 25, 27 (1989); *Subbiondo & Associates*, 295 NLRB 1108, 1116 (1989); *C. E. Wylie Construction Co.*, 295 NLRB at 1051, 1055-56; *Villa Avila*, 253 NLRB at 79-83.

a balancing test is appropriate in that context as well.[35] Thus, the Board has not held that property owners can lawfully deny access whenever their contractors' contractual access provisions have restrictions, e.g., where the contract makes access subject to rules established by the property owner. Rather, the Board has concluded that there must be a case-specific balancing of Section 7 interests and property interests, including consideration of the availability of reasonable, effective alternative means of communication.[36] Thus, in *CDK Contracting*, the ALJ, upheld by the Board, applied a balancing test in concluding that the general contractor violated the Act by denying access to the union representative of employees of a subcontractor's subcontractor,[37] and neither the ALJ nor the Board stated that the breadth of the access clause language determined the legality of the denial of access; it was merely one of several important factors the Board examined in balancing the competing interests at stake.[38] Notably, the Board, in adopting the ALJ's application of the balancing test, distinguished *Lechmere* on the ground that the general contractor, by "invit[ing]" subcontractors onto the jobsite, had subjected its property rights to the union's contractual access rights with those subcontractors.[39] Accordingly, although the breadth of the access clause is relevant to the balancing test, it is not the *sine qua non*.[40]

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[35] To the extent that *Bobo Construction*, Cases 32-CA-25014 & -25085, Advice Memorandum dated Nov. 5, 2010; *Stonegate Construction, Inc.*, Case 20-CA-3072402, Advice Memorandum dated Jan. 23, 2003; and *S.D. Deacon Corp. of California*, Cases 32-CA-19543-1 and -19617-1, Advice Memorandum dated Dec. 6, 2002, suggest otherwise, they should no longer be regarded as correct since we now conclude that a balancing test is the correct analytical framework.

[36] *See, e.g., C. E. Wylie Construction Co.*, 295 NLRB at 1050 n.3 ("The analysis in *Villa Avila*, as the analysis in *Jean Country*, and the analysis combining those two cases in the instant case, begins with the balancing test enunciated in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956).").

[37] 308 NLRB at 1121-22.

[38] We further note that, although the access clause at issue in *CDK Contracting* had broad language, it was not "unlimited." It required union representatives to "make their presence known to the management" at the jobsite and to "not unnecessarily interfere with the employees or cause them to neglect their work." *Id.* at 1117 n.3. That clause had greater restrictions than the access clause in *Villa Avila*, 253 NLRB at 81, which the Board described as "unrestricted" due to language stating that the union "shall have access to the project during working hours and shall make every reasonable effort to advise the Contractor or his representative of his presence on the project."

[39] *See CDK Contracting*, 308 NLRB at 1117.

[40] *See, e.g., C. E. Wylie Construction Co.*, 295 NLRB at 1050 n.3 ("The contracts giving the [u]nions access are not with the [general contractor] but[] with its subcontractors. Thus, standing alone, the contracts are not dispositive of the issues to be decided."),

In addition to the factors considered as part of the balancing conducted by the Board in *CDK Contracting*,[41] factors that are relevant in considering the strength of an employer's property right include: "the use to which the property in question is put; the restrictions, if any, that are imposed on public access to the property or the facility located on the property; and the size and location of the private property."[42] Utilizing those factors, the Board has noted that "'a single store surrounded by its own parking lot provided exclusively for the convenience of customers will have a significantly more compelling property right claim' than 'the owner of a large shopping mall who allows the general public to utilize his property without substantial limitation.'"[43] The Board has also noted that a property owner or surrogate weakens its property right when it allows outside persons or groups to utilize its property[44] and when it permits a contractor's employees or independent

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*enforced*, 934 F.2d at 239 (noting that the Board's decision "did not accord 'decisive weight' to the CBA provisions requiring jobsite access," and finding it "probable that in rejecting [the general contractor's] proposed limitation [on jobsite access], the NLRB implicitly decided that in future cases involving the absence of access provisions the balance would still tip in favor of the unions").

[41] In *CDK Contracting*, the Board has explained that a general contractor, by soliciting other employers to provide services at its jobsite, "'invited' subcontractors, and their respective subcontractors, onto the jobsite, and thus subjected its 'property rights' to the [u]nion's contractual 'access' rights with those subcontractors." 308 NLRB at 1117. *See also Villa Avila*, 253 NLRB at 81 (discussing *Scott Hudgens*, 230 NLRB 414 (1977)). Moreover, the Board found that a general contractor's property rights are further "diminished" when its contract with the subcontractor requires the subcontractor to comply with its labor agreements or to ensure timely job completion or labor peace. *CDK Contracting*, 308 NLRB at 1117 n.2, 1122-23.

[42] *C. E. Wylie Construction Co.*, 295 NLRB at 1055, citing *Homart Development*, 286 NLRB 714 (1987). *See also Caterpillar, Inc.*, 361 NLRB No. 77, slip op. at 1 n.2 (Oct. 30, 2014), *incorporating by reference* 359 NLRB No. 97, slip op. at 1 (Apr. 30, 2013) ("The Board has long considered access granted to third parties as a relevant factor under *Holyoke*, as allowing others to enter the property weakens the relative strength of the employer's interest in denying the union access to its property."); *C.C.E., Inc.*, 318 NLRB 977, 977 (1995) (rejecting employer's argument that providing access to the union, which represented its employees, would risk disclosure of confidential, proprietary, and trade secret information; employer had granted access to many individuals and groups, including school children, a video production crew, cub scouts, vocational students, potential customers, dealers and their drivers, and suppliers).

[43] *L & L Shop Rite*, 285 NLRB 1036, 1038 (1987) (finding, pre-*Lechmere*, that union's Section 7 interest in conducting area standards picketing on employer's property did not outweigh property interest), quoting *Fairmont Hotel*, 282 NLRB 139, 141 (1986).

[44] *See Thriftway Supermarket*, 294 NLRB 173, 173-74 (1989) (finding in pre-*Lechmere* case that, under *Jean Country* balancing test that applied to nonemployee union organizers, the employer "weakened" its property interests where it allowed other "noncustomer persons or groups" to access the property in order to hold events such as bake sales). *See also C. E. Wylie Construction Co.*, 295 NLRB at 1056 (under

contractor's employees to utilize its property.[45] Additionally, the employer's property interest is greater when permitting access could hinder production,[46] but weaker when the union's purpose for accessing the facility would not interfere with or disrupt work.[47] The nature of the workplace and the industry also impacts the strength of the employer's property interest. For example, the Board has stated that access provisions contained in a subcontractor's collective-bargaining agreement diminish the property interest of a construction-industry general contractor more than that of property-owners in other industries.[48] This is because "the general contractor receives substantial and immediate economic benefit from a harmonious relationship between the union and signatory subcontractors," which "is enhanced by readily available avenues of communication [to aid] the speedy resolution of the myriad of problems which are intrinsic to the construction industry."[49]

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balancing test, the fact that "[t]he jobsite was a construction site, not generally available to anyone other than contractors and their employees," was a factor that gave more weight to the general contractor's property interest).

[45] *See Trident Seafood Corp.*, 293 NLRB 1016, 1019, 1021 (1989) (finding, in pre-*Lechmere* case where union sought access to organize employees, that employer's property interest was weakened where it had permitted crewmembers from the approximately 300 fishing vessels under independent contract with the employer to moor at the employer's facility and use its showers, recreation room, laundry, company store, and cafeteria).

[46] *See, e.g., SCNO Barge Lines*, 287 NLRB 169, 169-70 (1987) (finding, pre-*Lechmere*, that the employer's property interest was strong where union sought access to its towboats, where space was confined; union organizers would need to pass through work areas, "necessarily raising the risk of interference with production," in order to access employees on their personal time; and coordinating a time for the union representatives to meet with employees on the towboats would burden employer personnel because the towboats were constantly in motion—never docking and rarely tying up along the riverbanks), *petition for review denied sub nom. Maritime Union v. NLRB*, 867 F.2d 767 (1989).

[47] *See C. E. Wylie Construction Co.*, 295 NLRB at 1056 (discussing the general contractor's property interest and noting that the union's jobsite access did not involve "picketing, property damage, disruption of work, or interference").

[48] *See Villa Avila*, 253 NLRB at 81-82.

[49] *Id.* at 82. The Board has also indicated that the property interest of a property owner is stronger, for purposes of this analysis, than that of a surrogate (e.g., a general contractor on a construction site). *See C. E. Wylie Construction Co.*, 295 NLRB at 1056 (noting that the general contractor's property rights were not as strong as the union's Section 7 rights, where, *inter alia*, the general contractor did not own or lease the property and the owner had no objection to union access).

Factors that the Board has considered in assessing the strength of unions' and employees' Section 7 interests in access cases include the particular reason access is being requested[50] and the breadth of the language in the contractual access provision.[51] The Board has also noted that where a collective-bargaining agreement contains a general access clause, the right of union-represented employees to receive their business representatives' services—a right they obtained through collective bargaining— "should not be easily nullified by a nonsignatory employer's action."[52]

The final part of the Board's balancing test is to determine whether the party seeking access has reasonable, effective alternative means of communication.[53] The Board does not examine asserted alternative means of communication in a vacuum; rather, reasonable alternative means are contingent upon the location on the spectrum of the respective Section 7 and property rights.[54] In *CDK Contracting*, the

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[50] *See, e.g., Wolgast Corp.*, 334 NLRB 203, 203 (2001) (union representative had sought access to the jobsite in order to investigate a safety complaint that an employee had filed the previous day), *enforced*, 349 F.3d 250 (6th Cir. 2003); *Mayer Group, Inc.*, 296 NLRB at 24 (union sought access in order to prepare steward's reports and solicit safety complaints and other grievances); *C. E. Wylie Construction Co.*, 295 NLRB at 1055 (union sought access to service employees and perform a safety check; the Board has "recognized that union agents have greater expertise in safety than the average employee and are less likely to fear retaliation for reporting a safety violation"). *See also id.* at 1055-56 (noting that union agents conducted themselves in a peaceful manner and that there was no evidence or contention that they sought to engage in secondary activity).

[51] *See, e.g., Villa Avila*, 253 NLRB at 81 (two of three relevant contracts allowed for access on any job where union members worked, and the third contract allowed for access during working hours and stated that union representatives shall make every reasonable effort to advise the employer of their presence; ALJ, in decision affirmed by the Board, construed clauses as granting "unrestricted" access); *CDK Contracting Co.*, 308 NLRB at 1117 n.3 (union representatives permitted on property if they "make their presence known" to employer and do not unnecessarily interfere with or cause employees to neglect their work). *See also C. E. Wylie Construction Co.*, 295 NLRB at 1050 n.3 (noting that, in *Villa Avila*, the significance of the union's contracts with subcontractors was the "enhancement their access provisions imparted to the Sec[tion] 7 rights involved in weighing those rights against the [general contractors'] respective property rights").

[52] *C. E. Wylie Construction Co.*, 295 NLRB at 1055.

[53] This is not the same standard as in *Lechmere, Inc. v. NLRB*, 502 U.S. at 539, which requires the location and living quarters of employees to be "beyond the reach" of reasonable efforts by nonemployee union representatives to communicate, such as logging camps, mining camps, and mountain resort hotels.

[54] *See Sahara Tahoe Hotel*, 292 NLRB 812, 814-17 (1989) (union lacked reasonable alternative means to communicate with employees regarding contract negotiations because this was a "fundamental Section 7 right" and employer's property right was

Board found that the union had no reasonable, effective alternative means of communication, based solely on an inference from the jobsite visitation clause in the union's contract with the subcontractor that the parties believed that access was "necessary to ensure contract compliance."[55] Additional factors that are relevant to the assessment of alternative means include, but are not limited to, "the safety of attempting communications at alternative public sites, the burden and expense of nontrespassory communication alternatives and, most significantly, the extent to which exclusive use of the nontrespassory alternatives would dilute the effectiveness of the message."[56] The Board has found alternative means to be ineffective, even if they would provide the union with the same information, if they would be likely to hinder or delay the receipt of the information.[57]

In cases where the Board has found that the union's right to access the property owner's premises outweighs the property owner's right to exclude the union from the premises, the Board has ordered the property owner to cease and desist from imposing "unreasonable or discriminatory rules relating to access."[58] Although such property owners were precluded from banning the unions from their property entirely, the Board made clear that it would not preclude restrictions that were "reasonable and nondiscriminatory" under the circumstances.[59]

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"relatively modest" because union sought access to employee entrance, which was away from entrance used by customers). *See also C. E. Wylie Construction Co.*, 295 NLRB at 1056 (noting that although the Board's *Jean Country* case "identified the various factors within three categories labeled 'property rights,' 'Section 7 rights,' and 'alternative means,' those categories are not entirely distinct and self-contained. 'A given factor may be relevant to more than one inquiry.'"), quoting *Jean Country*, 291 NLRB 11, 13 (1988).

[55] *CDK Contracting Co.*, 308 NLRB at 1117. The Board's analysis in this regard is susceptible to an argument that it involves circular reasoning, *i.e.*, the Board has reasoned that the existence of an access provision itself establishes that any access that is permitted by the clause must be necessary. Although the existence of an access clause is undoubtedly relevant in considering whether there are reasonable alternative means, additional evidence regarding reasonable alternative means would be helpful in conducting a proper balancing test.

[56] *See C. E. Wylie Construction Co.*, 295 NLRB at 1056.

[57] *See, e.g., id.* at 1053, 1056 (where union representative sought access to construction jobsite to verify complaint that a union signatory was working on the jobsite but had not been properly using the hiring hall, alternative means were ineffective because the denial of jobsite "access was likely to hinder or delay resolution of such disputes").

[58] *See, e.g., CDK Contracting Co.*, 308 NLRB at 1117 n.1 & 1118.

[59] *See, e.g., id.* at 1117 n.1 (requiring access but permitting "reasonable and nondiscriminatory" escort requirement); *C. E. Wylie Construction Co.*, 295 NLRB at

B. The Union's right to access the businesses' facilities for representational purposes.

1. Additional investigation is needed to determine if the Section 7 interest in gaining access to non-secure areas and parking lots, as well as the potential unavailability of reasonable alternative means, outweighs the businesses' respective property interests.

In these cases, none of the businesses have a direct bargaining relationship with the Union. Additionally, they own their facilities, rather than merely being a property owner's surrogate.[60] And the businesses have legitimate and substantial security concerns, considering the industries in which they do business: data storage (Seagate) and medical technologies (Boston Scientific and Medtronic).[61] Yet, providing the Union access to the non-secure interior areas, such as conference rooms and the cafeteria, and the parking lot would not pose the same security issues that are inherent to other work areas and secure areas within the businesses' respective facilities.[62] And to the extent that security concerns are implicated, the businesses could satisfy those interests by requiring the Union to comply with the same measures that it has required of other nonemployee visitors to the property.[63]

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1050 n.2 & 1057 (requiring access but permitting "uniformly applied, reasonable rules regarding safety, working time, and security" if the union is given clear notice of such rules).

[60] *See supra* note 49.

[61] *See New Process Co.*, 290 NLRB 704, 705 (1988) (finding, pre-*Lechmere*, that employer had a strong property right at the warehouse facility that the union sought access to for organizational purposes, where the warehouse was used to store, inspect, pack, and ship merchandise; warehouse was located away from the highway on a large tract of land devoted exclusively to the employer's business; and customers were not invited to the property to conduct business), *enforced mem.*, 872 F.2d 413 (3d Cir. 1989) (Table). *See also Oakland Mall, Ltd.*, 304 NLRB 832, 840 (1991) (noting that, under *Jean Country*, the Board is more likely to find that a property owner's denial of access to the union is unlawful "'when the property is open to the general public than when a more private character has been maintained'"), *remanded in light of the Supreme Court's Lechmere decision*, 957 F.2d 912 (D.C. Cir. 1992) (Table).

[62] *See generally C. E. Wylie Construction Co.*, 295 NLRB at 1056 (discussing the general contractor's property interest and noting that the union's site visits did not involve "picketing, property damage, disruption of work, or interference" with the general contractor's jobsite); *Emery Realty*, 286 NLRB 372, 373 (1987) (where the property owner had permitted nonemployee organizations to solicit in the same area where the union sought to handbill, the union's desired use for the property was not inconsistent with the past use of the property and would not hinder its normal use), *enforced*, 863 F.2d 1259 (6th Cir. 1988). *See also supra* notes 46-47.

Indeed, all three businesses have, through their own business dealings and other conduct, diminished the strength of their respective property interests.[64]

First, because each business has contracted with another entity—ABM or SBM—to provide onsite daily cleaning services, and their facilities are the janitorial employees' only worksites, the businesses are presumed to have "constructive notice" of the access provisions in the cleaning contractors' collective-bargaining agreements.[65] In this regard, the Board has recognized the voluntary nature of these contractual relationships; property owners and general contractors have the right to require that contractors and subcontractors be non-unionized entities.[66] When such an owner or general contractor makes the affirmative business decision to contract with unionized entities, it is ill-positioned to thereafter claim an unfettered right to deny entry to union representatives whose collective-bargaining agreements contain access provisions. Therefore, the Board, balancing the conflicting interests, reasonably regards the owner or general contractor as having voluntarily elected to

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[63] *See, e.g., C.C.E., Inc.*, 318 NLRB at 977 (in case where employer had direct bargaining relationship with union, Board rejected employer's argument that granting access to union would risk disclosure of confidential, proprietary, and trade secret information, because employer had granted access to other nonemployees and alleviated those concerns by requiring them to provide advance notice and be accompanied by an employer representative, instituting certain safety measures, and concealing distinctive product features from view); *Hercules Incorporated*, 281 NLRB 961, 969-71 (1986) (in case where employer had direct bargaining relationship with union, Board rejected employer's argument that its proprietary and confidentiality interests outweighed the union's interest in conducting onsite safety studies because the employer had permitted contractors and their employees to enter the area subject to signing a confidentiality agreement to protect its trade secrets), *enforced*, 833 F.2d 426 (2d Cir. 1987).

[64] *See, e.g., Emery Realty*, 286 NLRB at 373 (finding, pre-*Lechmere*, that the employer "weakened" its property interest by permitting the Salvation Army, Shriners, and Girl Scouts to solicit around the same area where the union sought to distribute organizational handbills, because the union handbilling was not inconsistent with the past uses of the property and would not "hinder in any significant respect the normal use of its property.").

[65] *See, e.g., C. E. Wylie Construction Co.*, 295 NLRB at 1050; *Villa Avila*, 253 NLRB at 81.

[66] *See, e.g., Edward Carey, et al., Trustees of UMW*, 201 NLRB 368, 369 (1973) ("Section 8(a)(3)…does *not* 'protect employers as well as employees from employer discrimination[.]'") (emphasis in original); *Local No. 447, Plumbers (Malbaff Landscape Construction)*, 172 NLRB 128, 129 (1968) (an employer may lawfully cease doing business with another employer "because of the union or nonunion activity of the latter's employees").

subject its property rights to the access provision in the subcontractor's agreement with the union.[67]

Also, ABM's service contract with Boston Scientific has a provision that further diminishes Boston Scientific's property interest. The service contract contains the broad requirement that ABM use its "best efforts" to avoid "work stoppages, slowdowns, disputes, and strikes" with its employees, and that ABM ensure that Boston Scientific receives at least a "minimum level" of cleaning services.[68] Boston Scientific has therefore reduced the strength of its property interest in favor of provisions in ABM's contract with the Union—including the access provision—to the extent enforcement of those provisions promote labor peace.[69] Additionally, although it is unclear whether Medtronic's service contract with SBM contains a similar provision because the copy of that service contract provided to the Region has been mostly redacted, Medtronic's communications suggest that it holds SBM responsible for maintaining labor peace so as to ensure that Medtronic's business runs smoothly. Specifically, in February 2013, after Medtronic officials learned about a potential Union strike that could involve the SBM employees who cleaned its facilities, it requested assurances from SBM that it would at least receive a minimum level of cleaning services.[70]

Furthermore, all three companies have diminished the strength of their property interests by inviting a variety of nonemployees to utilize the same non-secure areas of its facilities and parking lots that the Union sought access to. For example, Boston Scientific has permitted Costco to set up tables inside its facilities to sell memberships to Boston Scientific employees, Seagate permits various commercial vendors to hold a vendor fair in its cafeteria, and Medtronic has permitted outside

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[67] *See, e.g., CDK Contracting*, 308 NLRB at 1117 (the general contractor, "by soliciting other employers to perform work at the jobsite, 'invited' subcontractors, and their respective subcontractors, onto the jobsite, and thus subjected its 'property rights' to the [u]nion's contractual 'access' rights with those subcontractors").

[68] *See, e.g., id.* at 1122 (finding that a general contractor had "compromised [its] property claim" by including provisions in its own subcontracting agreements requiring subcontractors to "fully abide by" their labor agreements).

[69] *See, e.g., Scott Hudgens*, 230 NLRB at 417-18 (noting that shopping center owner had weakened its property rights where, even though it was a "neutral" in the sense that it was not a party to its tenant's labor dispute, it had a financial interest in the success of its tenants because it received a percentage of the stores' gross sales as part of their rental arrangement).

[70] The Region should obtain unredacted versions of Medtronic's and Seagate's service contracts with their respective janitorial contractors to determine if their contracts also include a similar "labor peace" provision.

entities to hold a book fair and a farmer's market on its premises.[71] Medtronic has also contracted with Caribou Coffee and a retail store to provide services to Medtronic employees, and therefore has permitted additional non-Medtronic employees to regularly access its facilities to work at those stores.[72]

On the other side of the equation, the Union has a strong Section 7 interest, in general, in communicating with the employees it represents regarding enforcement of their contractual rights.[73] Furthermore, the inclusion of an access clause in the Union's collective-bargaining agreements "enhances" the Section 7 rights of the Union and the unit employees, even though the clause contains a restriction that the clauses at issue in prior Board cases did not contain.[74] Indeed, although the clause contains limitations on access to accommodate the property owner's "security" requirements

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[71] *See Thriftway Supermarket*, 294 NLRB at 173-74; *Emery Realty*, 286 NLRB at 373. *See also C.C.E., Inc.*, 318 NLRB at 977 (determining, under *Holyoke*, that the employer's confidentiality concerns were unfounded because it had provided facility access to many individuals and groups, including school children, a video production crew, cub scouts, vocational students, potential customers, dealers and their drivers, and suppliers).

[72] *See, e.g., McDermott, Inc.*, 305 NLRB 617, 618 (1991) (under *Jean Country* balancing test, the employer's property interest was "very strong" where, *inter alia*, it limited facility access "to individuals necessary for its operation."); *C. E. Wylie Construction Co.*, 295 NLRB at 1055-56 (the fact that the construction site was not generally available to anyone other than contractors and their employees was a factor that strengthened the general contractor's property interest in excluding the union representatives). *Cf. Caterpillar, Inc.*, 361 NLRB No. 77, slip op. at 1, n.2, *incorporating by reference* 359 NLRB No. 97, slip op. at 1.

[73] *See, e.g., CDK Contracting*, 308 NLRB at 1121 ("Personal contact with a union representative is typically essential to, and an integral part of, employees' exercise of Section 7 rights."); *Sahara Tahoe Hotel*, 292 NLRB at 815 ("[T]he right of a union to establish communications with the employees it represents and inform them about proposed contract terms that would cover those employees and seek employee input and questions regarding the contract negotiations is a fundamental Section 7 right."); *NLRB v. Villa Avila*, 673 F.2d at 283 (the subcontractor's "[c]ompliance with many contract provisions can be effectively policed only on the premises where the [union] agent may observe conditions during work hours"). *See also National Broadcasting Co.*, 276 NLRB 118, 118-19 (1985) (in case where the union and employer had a direct bargaining relationship, the union needed access for the general purpose of policing its collective-bargaining agreements, including work jurisdiction provisions), *enforced*, 798 F.2d 75, 77-78 (2d Cir. 1986).

[74] *Cf. Villa Avila*, 253 NLRB at 81 (where two of the three relevant contracts allowed for access on any job where the union members worked, and the third contract allowed for access during working hours and stated that union representatives shall make every reasonable effort to advise the employer of their presence on this project, the administrative law judge construed the clauses as granting "unrestricted" access).

and other "establishment rules," these limitations were likely included to ensure no disruption to the property owners' business. The Board has found those kinds of limitations to be applicable even to unions with access clauses that have less restrictive language than the clause involved in this case.[75]

But some additional investigation is needed to determine with greater precision the relative strength of the Section 7 interest. The current evidence indicates that the Union was concerned about employees' workloads and may have wanted to perform walkthroughs of the employees' work areas, pursuant to Article 19.1 of its collective-bargaining agreement. Indeed, a Union representative specifically communicated to a Boston Scientific representative that [redacted] needed to access employees at work during their breaks in order to provide them with information and to receive employees' feedback about their jobs. It is unclear, however, whether the Union actually requested a walkthrough at Boston Scientific or articulated what specific portion(s) of the facility it wanted to access. And it is unclear whether the Union (and/or the respective janitorial contractors) provided Seagate and Medtronic with any explanation as to why the Union wanted to access their facilities. The Region should conduct additional investigation in this regard.

With regard to whether the Union had reasonable, effective alternative means for obtaining the information it was seeking, we conclude that there is currently insufficient information to make an assessment. First, as noted *supra*, the Board examines asserted alternative means of communication in context with the property interests and Section 7 interests at issue, and the record here is incomplete as to those matters. Thus, it is unclear whether the Union was only seeking access to meet with employees or whether it was also interested in performing "walkthroughs" of the employees' work areas. To the extent the Union wanted to meet with employees, the Region should investigate the Union's experiences communicating with employees at

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[75] *Compare Peck/Jones Construction Corp.*, 338 NLRB 16, 16-17 (2002) (finding that employer could require union representatives to comply with "reasonable and non-discriminatory" security rule that was consistent with the access provision in the union's contract with the employer's subcontractor) and *C. E. Wylie Construction Co.*, 295 NLRB at 1056 (reasonable restrictions such as requiring a union representative to sign a log book and check in with a security guard are permissible), *with Subbiondo & Associates*, 295 NLRB at 1116 ("An escort is a reasonable precaution for the casual visitor, but it cannot be a requirement for a union representative in a lawful visit to employees on a worksite," as union representatives are familiar with construction projects and act at their own risk if they ignore safety warnings and precautions). *See also Ojai Valley Inn & Spa*, Case 31-CA-26677, Advice Memorandum dated July 9, 2004, pp. 8-9 (employer could not lawfully require union representatives seeking access pursuant to "unlimited" access clause to have an escort or provide at least one-day's notice of their visit).

meetings off the premises; by phone, email, or regular mail; or through coworkers.[76] If, for example, the investigation reveals that the Union needed to hold group meetings with employees who work multiple jobs and are therefore unavailable during non-work hours, there would be a strong argument that the Union lacked reasonable, effective alternative means of communication. If the Union also wanted to perform "walkthroughs" of employee work areas, the Region should investigate what information the Union looks for during a walkthrough and whether it can reasonably and effectively obtain the same information by simply communicating with the employees.[77]

Several cases involving an employer's obligation to grant access to a union for representational purposes provide guidance on the additional investigation needed with respect to reasonable, effective alternative means. For example, the Board has found that a union had no reasonable, effective alternative means to carry out its representational duties other than by accessing the employer's premises where the union needed to: investigate work-related accidents and deaths;[78] assess new machinery and production processes that the employer had implemented;[79] observe employees operating forklifts in order to evaluate complaints that they were overworked and to argue that the workload required a pay increase;[80] take temperature measurements in response to employee complaints and injuries related

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[76] *See, e.g., Sahara Tahoe Hotel*, 292 NLRB at 816 (discussing how the union's attempts to communicate with employees by phone and regular mail were inadequate because the employer provided it with an incomplete list of employees' names, addresses, and phone numbers, and much of the information provided was inaccurate).

[77] *See Washington Beef, Inc.*, 328 NLRB 612, 618-19 (1999), quoting *C.C.E., Inc.*, 318 NLRB at 978 (determining that the union's solicitation of employee complaints relating to safety and injury issues was an inadequate substitute for directly observing working conditions, because "'there can be no adequate substitute for [a] [u]nion representative's direct observation of . . . employee operations and working conditions, in order to evaluate . . . safety concerns. . .'").

[78] *See, e.g., Caterpillar, Inc.*, 361 NLRB No. 77, slip op. at 1, n. 2, *incorporating by reference* 359 NLRB No. 97, slip op. at 5-6; *Hercules Incorporated*, 281 NLRB at 970; and *ASARCO, Inc.*, 276 NLRB 1367, 1369-70 (1985), *enforced in part*, 815 F.2d 75 (6th Cir. 1987).

[79] *See, e.g., Brown Shoe Co.*, 312 NLRB 285, 285 & n.3 (1993) (union needed access to employer's premises to conduct time study in light of employees' decline in wages under the employer's piecemeal compensation system and their inability to keep up with production, which allegedly resulted from the employer installing new machinery), *enforcement denied*, 33 F.3d 1019 (8th Cir. 1994).

[80] *See, e.g., Nestle Purina Petcare Co.*, 347 NLRB 891, 891-93 (2006).

to heat;[81] observe the employees working at the employer's remote site in order to assess whether non-unit personnel were performing unit "cueing" work;[82] and formulate a negotiating strategy and/or bargaining proposals related to employees' jobs and other working conditions.[83]

This additional investigation will also help determine what "reasonable and nondiscriminatory" restrictions the businesses may lawfully impose if, on balance, they may not lawfully ban the Union from accessing their premises entirely.

2. Additional investigation is needed in order to determine whether the Union and employees' Section 7 rights outweighed the businesses' property interests with regard to facilities' *secure* areas.

There is also insufficient information to determine whether the businesses' property interests outweighed the Union's and the unit employees' Section 7 right to have the Union representatives access *secure* areas of the businesses' facilities. Initially, the Region should determine whether the Union sought access to secure areas, as this is unclear from the current record. If not, the Region need not conduct further investigation regarding access to secure areas. If, however, the Union did request access to secure areas in order to perform a walkthrough or otherwise ensure contractual compliance, then additional information is needed in order to assess the parties' respective interests.[84] For example, the evidence does not indicate what particular confidentiality and other interests could be compromised by granting the Union access to particular secured areas at the businesses' respective facilities.[85]

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[81] *See American National Can Co.*, 293 NLRB 901, 904-06 (1989), *enforced*, 924 F.2d 518 (4th Cir. 1991).

[82] *See National Broadcasting Co.*, 276 NLRB at 118-19

[83] *See, e.g., New Surfside Nursing Home*, 330 NLRB 1146, 1150 (2000) (finding that the union's need to obtain information about employee work processes for the purposes of bargaining outweighed the employer's property rights); *C.C.E., Inc.*, 318 NLRB at 978 (concluding that there is no adequate substitute for a union representative's "direct observation of the plant equipment and conditions, and employee operations and working conditions, in order to evaluate matters such as job classifications, safety concerns, work rules, relative skills, and other matters necessary to develop an informed and reasonable negotiating strategy").

[84] This additional investigation will also help determine what "reasonable and nondiscriminatory" restrictions the businesses may lawfully impose if, on balance, they are not permitted to ban the Union from accessing their secure areas entirely.

[85] Also, Seagate has given tours and demonstrations at its facilities to various outside groups, and it is possible that this included access to secure areas. In this regard, further investigation would be necessary to properly analyze whether Seagate weakened its property interest as to its secure areas.

Furthermore, with respect to reasonable, effective alternative means, the Union has not yet articulated why speaking with employees is not an adequate substitute to conducting a walkthrough of the employees' workspaces located in secure areas.[86] The Region should conduct further investigation into these matters and resubmit the case to Advice.

III. Conclusion.

In sum, we conclude that Seagate, Boston Scientific, and Medtronic each violated Section 8(a)(1) by discriminatorily denying access to the Union to their respective facilities for representational purposes while granting access to other nonemployee groups, and that Medtronic also violated Section 8(a)(1) because its Facility Common Space Usage policy is facially discriminatory and it promulgated a revised rule in response to Section 7 activity. The Region should perform additional investigation to determine whether the businesses' denials of access to the Union also violated the Act, even absent sufficient evidence of disparate treatment, based on a balancing of the Union's and employees' Section 7 interests and the businesses' respective property interests, as well as consideration of reasonable, effective alternative means.

/s/
B.J.K.

ADV.18-CA-138463.Response.SeagateBostonScientificandMedtronic.[redacted]

[86] *See C. E. Wylie Construction Co.*, 295 NLRB at 1056 (stating that the Board rarely finds that there are reasonable, effective alternative means to conducting an unannounced safety inspection). *See also supra* notes 50, 77-83, and accompanying text.

*United States Government*
*National Labor Relations Board*
**OFFICE OF THE GENERAL COUNSEL**

# Advice Memorandum

S.A.M.

DATE: December 2, 2016

TO: Marlin Osthus, Regional Director
Region 18

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Menard, Inc.
Case 18-CA-181821

177-2414-0100-0000
177-2414-2200-0000
177-2484-5067-3500
512-5006-5031-0000
512-5006-5050-0000
512-5006-5067-0000
512-5006-5053-0000
512-5006-5096-0000
512-5006-6767-0000

The Region submitted this case for advice as to whether the Employer's misclassification of its statutory employees as independent contractors, in itself, violates Section 8(a)(1). We conclude that the Region should issue a Section 8(a)(1) complaint alleging that the Employer's misclassification of its employees as independent contractors interfered with and restrained employees in the exercise of their Section 7 rights. Initially, we conclude that the Employer's haulers are statutory employees and not independent contractors. We further conclude that, in the circumstances here, where neither the Employer's contracts with its haulers nor its day-to-day practices establish an independent contractor relationship, the Employer's misclassification of its haulers as independent contractors interfered with and restrained the haulers in their exercise of Section 7 rights, in violation of Section 8(a)(1).[1]

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[1] The Region has already determined that, assuming the haulers are employees, the contracts' mandatory arbitration/class action waiver provisions violate Section 8(a)(1) under *U-Haul Co. of California*, 347 NLRB 375, 377-78 (2006) (mandatory arbitration policy that covered "all disputes relating to or arising out of an employee's employment," and set forth a long list of examples that concluded with "any other legal or equitable claims and causes of action recognized by local, state or federal law or regulations" violated Section 8(a)(1)), enforced, 255 F. App'x 527 (D.C. Cir. 2007); *2 Sisters Food Group*, 357 NLRB No. 168, slip op. at 2 (Dec. 29, 2011) (policy mandating

## FACTS

Menard, Inc. ("Employer") operates approximately 300 home improvement retail stores across fourteen states in the Midwestern United States, including Minnesota and Wisconsin. The Employer advertises the availability of home delivery for any products purchased from its retail store locations. Each of the Employer's stores typically contracts with one or two haulers who fulfill home delivery of the Employer's goods to its customers.[2] Each store has a hauler that operates at least one small box truck for smaller deliveries and one larger "Masterlift" truck for larger deliveries which require the use of a forklift at the delivery site.[3] The Employer is currently contracted with hundreds of haulers across its retail locations.

The Employer requires each of its haulers to execute a Delivery Service Agreement ("Agreement"). The Employer's store managers retrieve the latest version of the Agreement from the Employer's headquarters; the Agreement may not be changed without permission from headquarters personnel. The Agreement states that haulers are independent contractors and that "nothing in this Agreement[] shall be construed as creating an employer-employee relationship between [the Employer] and Hauler."

The Agreement contains several terms that govern the haulers' relationship with the Employer. Significantly, the Agreement requires haulers to "complete each delivery as soon as possible within [the Employer's stores'] normal business hours on the day that [the Employer] notified Hauler that a delivery job has been allocated to Hauler," and provide "all equipment necessary to protect the merchandise from being damaged." And "[m]erchandise damaged by Hauler will be paid for by the Hauler at the full retail price." The Agreement also requires haulers to "follow the unloading

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arbitration of "all [employment] disputes and claims" was unlawfully overbroad); and *D. R. Horton, Inc.*, 357 NLRB 2277, 2280 (2012) (applying *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-47 (2004), to determine whether employer violated Section 8(a)(1) by requiring employees to sign mandatory arbitration agreement as a condition of employment), *enforcement denied on other grounds*, 737 F.3d 344 (5th Cir. 2013).

[2] The number of haulers contracted to work at each store is dependent on how much business each store does.

[3] Stores will sometimes loan out their haulers to other nearby stores if their hauler has specialized equipment (such as a crane arm for delivering items onto roof tops) or if the other store is short-handed on haulers.

direction dictated by the [customer] and noted on the delivery agreement [between the Employer and the customer]."

Haulers' compensation is computed on a per-mile basis. Haulers receive additional compensation for handling specific types of goods, such as shingles, sheet rock, and lumber; handling pallets; and providing in-home delivery. The Agreement also specifies that haulers receive a "delivery bonus" of one-half of one percent of the net selling price (sales less returns) of all the Employer merchandise that the hauler delivers to customers. In addition, haulers receive a yearly "retention bonus" for each full year (January 1 to December 31) in which they make deliveries for the particular store they are contracted with. The retention bonus is calculated as one-half of one percent of the net selling price of all Employer goods that the hauler delivers to customers during the calendar year. Retention bonuses are non-transferrable without the Employer's express written consent. If the hauler sells or transfers its contract with the Employer to a third party on or before the end of the calendar year, neither the hauler nor its successor in interest is eligible for the retention bonus for that year.

Haulers may either provide their own vehicles or purchase vehicles from the Employer. In either event, the Agreement requires haulers' vehicles to identify the hauler's business name and display several of the Employer's decals. Haulers are responsible for maintaining their vehicles. Haulers also must maintain the necessary insurance to protect the hauler and the Employer from "any claims, which may arise as a result of this Agreement."

The Agreement requires haulers to purchase a GPS location manager device from the Employer and keep that device in their vehicles.

Haulers are permitted to subcontract their deliveries to other parties subject to written authorization from the Employer. Additionally, haulers are permitted to hire employees, but must provide all information about its employees to the Employer prior to the employees commencing work for the hauler.

The Employer is permitted to terminate the Agreement unilaterally in the event of "default by Hauler of any of the terms or conditions of th[e] Agreement." However, the hauler may only terminate "upon a sixty (60) day written notice being sent to [the Employer] by registered or certified mail."

Finally, the Agreement contains a non-compete clause that prohibits haulers from "agree[ing] . . . to do contract hauling for any competitor of [the Employer] that is located within within 25 miles of any [Employer] store" that the hauler is contracted with during the life of the contract and for a period of one year after the termination of the Agreement.

The Agreement also contains the following mandatory arbitration/class action waiver provisions:

**A. Resolution of Dispute by Binding Arbitration.**

> [The Employer] and Hauler agree that all claims and disputes between them shall be resolved by binding arbitration by the America Arbitration Association ("AAA") under its Commercial Arbitration Rules. [The Employer] and Hauler further agree that any arbitration held pursuant to this Agreement will be held in the city, or within (10) miles, of where the work took place, unless otherwise agreed to by both parties to this Agreement. . . . This provision constitutes an express waiver of the right to court, jury, or administrative review. . . .

**B. Class Action Waiver.**

> Any claim must be brought in the respective party's individual capacity, and not as a plaintiff or class member in any purported class, collective, representative, multiple plaintiff, or similar proceeding ("Class Action"). The parties expressly waive any ability to maintain any Class Action in any forum. The arbitrator shall not have authority to combine or aggregate similar claims or conduct any Class Action nor make an award to any person or entity not a party to the arbitration. Any claim that all or part of this Class Action Waiver is unenforceable, unconscionable, void, or voidable may be determined only by a court of competent jurisdiction and not by an arbitrator. **THE PARTIES UNDERSTAND THAT THEY WOULD HAVE HAD A RIGHT TO LITIGATE THROUGH A COURT, TO HAVE A JUDGE OR JURY DECIDE THEIR CASE AND TO BE PARTY TO A CLASS OR REPRESENTATIVE ACTION. HOWEVER, THEY UNDERSTAND AND CHOOSE TO HAVE ANY CLAIMS DECIDED INDIV[I]DUALLY, THROUGH ARBITRATION.**[4]

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[4] All emphasis in original. As mentioned *supra*, the Region has determined that these arbitration clauses violate Section 8(a)(1).

The Employer's day-to-day operations do not differ substantially from the purported terms set forth in the Agreement. The Employer maintains extensive control over the haulers' schedules. The Employer permits its customers who are selecting home delivery to select from two time slots: 12:00PM – 6:00PM or 6:00PM – 10:00PM. The haulers have some control over when to make deliveries during those time slots,[5] but they have no control over which deliveries are assigned to them. The Employer provides haulers with maps to each of their destinations generated by the Employer's proprietary GPS system. Although haulers are permitted to deviate from the Employer-produced maps, the rate of pay per delivery is determined by the maps the Employer produces for its haulers, not their actual mileage.

Haulers do not control which days they work. The Employer requires that the Haulers be available to work seven days a week during its stores' normal business hours (generally from 6:30AM – 10:00PM). The Employer does not guarantee work any particular day, and haulers are not informed of their scheduled deliveries until the night before. Haulers are not typically permitted to trade deliveries. However, if a hauler is unavailable on a particular day, it is incumbent on the hauler (with the Employer's permission) to find a replacement from the other haulers at their store or from one of the Employer's other stores.

The Employer does not have a formalized discipline policy for its haulers. But haulers are not permitted to reject deliveries, and the Employer has routinely threatened to punish haulers who do not follow its directives or resist completing all assigned deliveries in a given day. These punishments have included restricting haulers' scheduling times (such as requiring deliveries to be made in narrower time slots), requiring haulers to make deliveries well past the store's closing time, or threatening to withhold compensation for all deliveries from a given a day.

The Employer does not directly supervise the haulers during the work day. However, the Employer does monitor the position of each hauler using the GPS devices and displays the haulers' positions prominently in real-time within its stores. The Employer does not provide any training to its haulers; it merely requires drivers of larger trucks to have their commercial driver's licenses.

The haulers own their own trucks. Although the Employer does not require any particular makes or models of trucks, the Employer's stores will specify what type of truck (box, boom, or Masterlift) it is seeking for particular stores prior to signing an

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[5] The Employer offers its customers "first-out" and "second-out" options for deliveries and, in some instances, allows customers to pick a narrower time for delivery (e.g., 5:30PM – 6:00PM). These customer options limit the haulers' ability to control the order of their deliveries.

Agreement with a hauler. The Employer incentivizes the purchase of Masterlift trucks by offering to maintain and service both a Masterlift trailer and regular trailer while a hauler is using one or the other. The Employer also offers box trucks for sale to haulers. The box trucks have the Employer's logo and company information displayed prominently across the box section of the truck.

## ACTION

We conclude that the Region should issue a Section 8(a)(1) complaint alleging that the Employer's misclassification of its haulers as independent contractors interfered with and restrained haulers in the exercise of their Section 7 rights. Initially, we conclude that the haulers are statutory employees and not independent contractors. We further conclude that, in the circumstances here, where neither the Employer's contracts with its haulers nor its day-to-day practices establish an independent contractor relationship, the Employer's misclassification of its haulers as independent contractors interfered with and restrained the haulers in their exercise of Section 7 rights, in violation of Section 8(a)(1).

### A. The Employer's haulers are statutory employees

In *FedEx Home Delivery,* the Board recently reaffirmed that in determining whether a particular worker is an independent contractor or an employee under Section 2(3) of the Act, the Board will apply the traditional common-law factors enumerated in the Restatement (Second) of Agency § 220, with no single factor being determinative.[6] Thus, the following factors are relevant:

> [1] The extent of control which, by the agreement, the [employer] may exercise over the details of the work, [2] whether or not the one employed is engaged in a distinct occupation or business, [3] the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision, [4] the skill required in the particular occupation, [5] whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work, [6] the length of time for which the person is employed, [7] the method of payment, whether by the time or by the job, [8] whether or not the work is part of the regular business of the employer, [9] whether or not the parties

[6] 361 NLRB No. 55, slip op. at 2 (Sept. 30, 2014) (concluding that package delivery drivers were statutory employees rather than independent contractors).

> believe they are creating the relation of master and servant, and [10] whether the principal is or is not in the business.[7]

The Board also considers, along with the preceding factors, "whether the evidence tends to show that the putative contractor is, in fact, *rendering services as part of an independent business*."[8] The "independent-business factor" includes consideration of whether the putative contractor has a significant entrepreneurial opportunity; has a realistic ability to work for others; has a proprietary or ownership interest in his or her work; and has control over important business decisions, such as scheduling of performance, hiring and assignment of employees, equipment purchases, and investment of capital.[9] The Board gives weight to actual, and not merely theoretical, entrepreneurial opportunity, and also evaluates the constraints imposed by a company on the individual's ability to pursue this opportunity.[10] The Board also considers whether the terms and conditions under which the individual operates are "promulgated and changed unilaterally" by the putative employer.[11]

The Board has also long held that the party asserting independent-contractor status bears the burden of proof on that issue.[12] When applying these common-law agency factors and determining employee status under Section 2(3), the Board will "construe the independent-contractor exclusion narrowly" so as to not "deny protection to workers the Act was designed to reach."[13]

In the instant case, the evidence overwhelmingly demonstrates that the Employer's haulers are statutory employees and not independent contractors. Indeed, the facts involving the haulers are arguably even more compelling than those relating

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[7] *Id.* (quoting Restatement (Second) of Agency § 220 (1958)).

[8] *Id.*, slip op. at 11 (emphasis in original).

[9] *Id.*, slip op. at 12.

[10] *Id.*, slip op. at 10.

[11] *Id.*, slip op. at 12.

[12] *Id.*, slip op. at 2 (citing *BKN, Inc.*, 333 NLRB 143, 144 (2001) and *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 710–12 (2001) (upholding Board's rule that party asserting supervisory status in representation cases has burden of proof)). *See also Central Transport, Inc.*, 247 NLRB 1482, 1483 n.1 (1980).

[13] *FedEx*, 361 NLRB No. 55, slip op. at 9–10.

to the *FedEx Home Delivery* drivers. First, the Employer exerts extensive control over its haulers on a day-to-day basis as a matter of contract and practice. The Employer unilaterally dictates to the haulers not only the deliveries they will make, but also the route they will use to make the deliveries. As the Agreement sets forth haulers compensation as a matter of miles driven, the haulers have no opportunity to negotiate for greater pay or work "smarter," rather than "harder."[14] Haulers are also not permitted to reject deliveries, and the Employer unilaterally determines with its customers what time the deliveries will be made by the haulers.[15] Second, although the haulers are not necessarily "fully integrated into [the Employer's] organization," many of the Employer's products are either too large or too impractical for its customers to arrange delivery on their own.[16] Moreover, although haulers are required to display their company name on their vehicles in addition to the Employer's name, the Agreement prohibits haulers from performing services for the Employer's competitors, and there is no evidence that haulers perform delivery services for any other business but the Employer.[17] Third, the Employer effectively supervises the performance of the haulers' work by constantly monitoring their positioning through the on-board GPS device that it requires its haulers to purchase. This ability to monitor, in conjunction with the detailed maps provided for each

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[14] *See Corporate Express Delivery Sys. v. NLRB*, 292 F.3d 777, 780 (D.C. Cir. 2002) (enforcing Board's order finding drivers to be statutory employees, noting that absence of opportunity to work "smarter, not harder" was strong indicia of statutory employee status).

[15] *See id.,* slip op. at 12–13 (FedEx controls the number of packages delivered, the stops to be made, and the time in which the deliveries were to be). *See also Time Auto Transportation,* 338 NLRB 626, 637 (2002) (fact that drivers were assigned one load at a time and were penalized for refusing a load found to be indicia of employee status), *affirmed,* 377 F.3d 496 (6th Cir. 2004).

[16] *FedEx Home Delivery,* 361 NLRB No. 55, slip op. at 13 (quoting *United Ins. Co. of Am.*, 390 U.S. 254, 259 (1968)).

[17] *Compare FedEx Home Delivery*, 361 NLRB No. 55, slip op. at 13 (finding factor in favor of employee status where drivers' uniforms, logos, and colors on vehicles showed that drivers were in effect doing business in name of the employer where they were fully integrated into employer's business), *with Porter Drywall, Inc.*, 362 NLRB No. 6, slip op. at 3 (Jan. 29, 2015) (finding factor in favor of independent contractor status where crew leaders did not work exclusively for the employer and on occasion competed with employer for work). *See also Roadway Package Systems*, 326 NLRB 842, 851 (1998) (finding drivers to be employees in part where drivers doing business in name of employer).

delivery, operates as a functional equivalent to real-time tracking of the hauler's daily routes.[18]

Fourth, haulers are not required to have any special training or skills, other than a commercial driver's license.[19] Fifth, although haulers provide their own vehicles and the Employer does not strictly dictate vehicle specifications, the Employer incentivizes haulers to obtain vehicles optimized for its delivery, such as the Masterlift trucks, and offers its box trucks for sale to haulers.[20] Sixth, the haulers effectively "'have a permanent working arrangement with the company under which they may continue as long as their performance is satisfactory.'"[21] The Agreements that haulers sign are for no fixed duration, and other factors, including the yearly retention bonus and the large capital investments made by haulers in purchasing their vehicles, encourage long-standing relationships with the Employer. Indeed, many haulers stay with the Employer for years.

Seventh, the Employer establishes and controls the haulers' rates of compensation, which are nonnegotiable, and also fixes the rates charged to customers.[22] Eighth, as stated above, although the haulers' work is arguably not at the core of the Employer's business of selling home improvement products, many of the Employer's products are too large or impracticable for its customers to leave the store with. Furthermore, the Employer prominently advertises to its customers that it provides delivery services for its products in-store.[23] Ninth, although the

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[18] *Cf. FedEx*, 361 NLRB No. 55, slip op. at 13 (FedEx essentially directs the drivers' performance via the enforcement of rules and tracking mechanisms and can impose disciplinary measures).

[19] *See id.* (drivers receive all necessary skills via two weeks of training provided by FedEx).

[20] *Id.*, slip op. at 13–14 (FedEx drivers own their own vehicles but FedEx plays a primary role in dictating vehicle specifications and facilitating the transfer of vehicles between drivers).

[21] *Id.,* slip op. at 14 (quoting *NLRB v. United Ins. Co. of Am.*, 390 U.S. at 259).

[22] *See id.* (FedEx establishes, regulates, and controls the rate of compensation and rates charged to customers).

[23] *Cf. id.* (drivers "perform functions that are not merely a 'regular' or even an 'essential' part of the Employer's normal operations, but are the very core of its business." (quoting *Roadway Package System, Inc.,* 326 NLRB 842, 851 (1998)).

Agreement purports to create an independent-contractor relationship, and the haulers acknowledge that characterization by signing the Agreement, "the [haulers] do not have an opportunity to negotiate over that term . . . [and] the intent factor is therefore inconclusive."[24] As for the tenth common-law factor, however, the Employer is in a distinct and separate business (retail home improvement sales) from its haulers (delivery), so this factor arguably weighs against employee status.[25]

Finally, the evidence strongly demonstrates that the haulers are not rendering services as part of an independent business. Both the terms of the Agreement and the Employer's day-to-day practices demonstrate that the haulers have no entrepreneurial opportunity. The Agreement prohibits haulers from providing their services to any business similar to the Employer's, both during the life of the Agreement and for one year after the Agreement's termination.[26] Furthermore, because the Employer does not issue assignments until the night before the delivery, the haulers have no realistic opportunity to work for others and do not do so. Third, haulers have no proprietary or ownership interest in their Agreements. Haulers are not able to transfer their Agreements to others or even hire employees without extensive supervision and approval from the Employer. Lastly, the haulers have no control over important business decisions. Instead, the Employer "has total command over its business strategy, customer base and recruitment, and the prices charged to customers," and "unilaterally drafts, promulgates, and changes the terms of its Agreement with drivers[.]"[27]

In sum, under *FedEx Home Delivery,* the Employer's haulers are employees within the meaning of Section 2(3).

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[24] *See id.* (noting as well, however, that a majority of the FedEx drivers had voted to be represented as employees in a collective-bargaining unit).

[25] *Id.,* slip op. at 15.

[26] *See Corporate Express Delivery Systems*, 332 NLRB 1522, 1522 (1999) (concluding that owner-operator/drivers who were prohibited from handling goods for entities other than the employer lacked sufficient entrepreneurial opportunity to truly be independent contractors), *enforced*, 292 F.3d 777 (D.C. Cir. 2002).

[27] *Id.*

**B. The Employer violated Section 8(a)(1) by misclassifying its haulers as independent contractors**

Section 8(a)(1) makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of" employees' Section 7 rights.[28] Although the Board has never held that an employer's misclassification of statutory employees as independent contractors in itself violates Section 8(a)(1), there are several lines of Board decisions that support such a finding.

First, the Board has held that an employer violates Section 8(a)(1) when its actions operate to chill[29] or curtail future Section 7 activity of statutory employees.[30] In *Parexel International*, the Board made clear that an employer's "preemptive strike to prevent [an employee] from engaging in activity protected by the Act" violates Section 8(a)(1) because of its chilling effect on employees' future exercise of their Section 7 rights.[31] Even if an employee has no history of Section 7 activity, if the employer acts to prevent that employee from engaging in protected activity in the future, "that action interferes with and restrains the exercise of Section 7 rights and is unlawful without more."[32] In *Parexel,* the Board noted that it is the suppression or chilling of future protected activity that lies at the heart of unlawful employer retaliation against past protected activity.[33] Similarly, Board precedent holding

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[28] 29 U.S.C. § 158(a)(1). In contrast, an employer does not violate the Act if it interferes with, restrains, or coerces the exercise of what would otherwise constitute Section 7 rights by individuals who are not statutory employees. *See Wal-mart Stores, Inc.*, 340 NLRB 220, 223 (2003) (employer's instruction to group of twenty-two putative Section 2(11) supervisors that they could not engage in union activity only violated Section 8(a)(1) with respect to the four who were actually statutory employees).

[29] *Cf. Lafayette Park Hotel*, 326 NLRB 824, 825 (1998) (maintenance of rules that would reasonably tend to chill employees in the exercise of their Section 7 rights violates Section 8(a)(1)), *enforced mem.*, 203 F.3d 52 (1999).

[30] *See, e.g.*, *Parexel International, LLC*, 356 NLRB 516, 518–19 and cases cited at n.9 (2011) (employer violated Section 8(a)(1) by discharging an employee to prevent her from discussing wages with other employees).

[31] *Id.* at 517, 519.

[32] *Id.* at 519.

[33] *Id.*

unlawful an employer's adverse action taken on the mistaken belief that an employee engaged in protected concerted activity is premised on the notion that the chilling of future protected activity violates the Act.[34]

Second, employer statements to employees that engaging in Section 7 activity would be futile violate Section 8(a)(1).[35] Thus, in *Sisters' Camelot*, the Board found that the employer violated Section 8(a)(1) by indicating that union organizing would be futile when it informed its canvasser employees, who had been misclassified as independent contractors and were attempting to organize, that it would never accept an employer-employee relationship with its workers.[36]

Third, the Board has also found misstatements of law to constitute an unlawful interference with employees' Section 7 rights if the statement reasonably insinuates adverse consequences for engaging in Section 7 activity.[37] For example, employer

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[34] *See, e.g., United States Service Industries, Inc.*, 314 NLRB 30, 31 (1994) ("[A]ctions taken by an employer against an employee based on the employer's belief the employee engaged in or intended to engaged in protected concerted activity are unlawful even though the employee did not in fact engage in or intend to engage in such activity." (internal quotation marks omitted)), *enforced,* 80 F.3d 558 (D.C. Cir. 1996) (unpublished table decision); *Metropolitan Orthopedic Associates, P.C.*, 237 NLRB 427, 427 n.3 (1978) ("The discharge of 4 employees in a unit of 13 employees because of Respondent's belief, albeit mistaken, that the[y] had engaged in protected concerted activities is an unfair labor practice which goes to the very heart of the Act"). *See also Parexel International, LLC,* 356 NLRB at 519, relying also upon *Majestic Molded Prods. v. NLRB,* 330 F.2d 603, 606 (2d Cir. 1964), and cases cited therein (holding unlawful a mass discharge undertaken without concern for whether all of the individual employees were engaged in protected activity).

[35] *See, e.g., M.D. Miller Trucking & Topsoil, Inc.*, 361 NLRB No. 141, slip op. 1 (Dec. 16, 2014) (concluding that employer's statement that employees' grievance would go nowhere constituted unlawful threat of futility); *North Star Steel Co.*, 347 NLRB 1364, 1365 (2006) (employer's statement that collective bargaining would not result in employees obtaining benefits other than what the employer chose to give them and unionization would lead employer to choose to give them less violated Section 8(a)(1), because employees "could reasonably infer futility of union representation.").

[36] 363 NLRB No. 13, slip op. at 6 (Sept. 25, 2015).

[37] *See, e.g., BP Amoco Chemical-Chocolate Bayou*, 351 NLRB 614, 617, 618 & n.22 (2007) (employer's flyer that misled employees by creating impression that employees would have to give up customary wage increases as a "lawful and ineluctable

statements that suggest that employees could "lose their jobs" as a consequence of engaging in an economic strike inaccurately describe employee rights under *The Laidlaw Corporation*[38] and therefore constitute unlawful threats of reprisal.[39]

In the instant case, the Employer's misclassification of its statutory employees as independent contractors operates as a restraint on and interference with its haulers' exercise of their Section 7 rights. In *Pacific 9 Transportation*, we concluded that an employer violated Section 8(a)(1) by misclassifying its drivers as independent contractors where it treated its drivers as employees on a daily basis, even though its agreement with the drivers, viewed in isolation, arguably would have created an independent contractor relationship.[40] Here, the Employer asserts in the language of its Agreement with its haulers that they are independent contractors, but, unlike in *Pacific 9 Transportation*, the Agreement itself would not arguably create an independent contractor relationship. Thus, neither the Employer's Agreement with its haulers nor the Employer's day-to-day practices arguably create an independent-contractor relationship. Accordingly, as in *Pacific 9*, the Employer's misclassification suppresses future Section 7 activity by imparting to its employees that they do not

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consequence" of bargaining violated Section 8(a)(1)); *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 799 n.2 (1980) (misstating law by implying that union would have right to demand that employees pay union fines and assessments and accede to contractual dues checkoff in order to retain their jobs, unlawful in context of other threats), *enforced*, 679 F.2d 900 (9th Cir. 1982) (table).

[38] In *The Laidlaw Corporation*, 171 NLRB 1366, 1368–70 (1968), *enforced,* 414 F.2d 99 (7th Cir. 1969), the Board delineated the rights accorded to economic strikers: they remain employees if they have been permanently replaced before they make unconditional offers of reinstatement, and must be placed on a preferential hiring list and reinstated when substantially equivalent positions become available.

[39] *See Fern Terrace Lodge,* 297 NLRB 8, 8–9 (1989) (statement that permanently "replaced striker is not automatically entitled to his job back just because the strike ends" unlawful, because economic strikers are automatically entitled to their jobs back, or, if their job is unavailable, preferential hiring to similar openings); *Larson Tool,* 296 NLRB 895, 895–96 (1989) ("you could lose your job to a permanent replacement," without further explanation, unlawful); *Hajoca Corp.,* 291 NLRB 104, 106 (1988) (informing employees they would be permanently replaced and would "no longer have jobs" if they went on an economic strike held unlawful), *enforced*, 872 F.2d 1169, 1177 (3d Cir. 1989).

[40] Case 21-CA-150875, Advice Memorandum dated Dec. 18, 2015.

possess Section 7 rights in the first place.[41] The Employer's misclassification works as a preemptive strike, to chill its employees from exercising their rights under the Act during a period of critical importance to its employees—the Union's organizing campaign.

Furthermore, in light of the Employer's extensive control over its haulers' day-to-day operations and the Employer's prohibition of its haulers' performing work for its competitors, the Employer's continued insistence that its haulers are independent contractors is akin to a misstatement of law that reasonably insinuates adverse consequences for employees' continued Section 7 activity. Because independent contractors may lawfully be terminated for engaging in Section 7 activity, the Employer's continued insistence to its employees during a union organizing campaign that they are independent contractors is tantamount to the Employer telling its employees that they engage in Section 7 activity at the risk of losing their jobs.

For these reasons, we conclude that, on these facts, the Employer's misclassification of its employees as independent contractors acts to interfere with and restrain its employees in the exercise of their Section 7 rights. The Region should seek a nationwide remedy in this case for all of the Employer's violations of Section 8(a)(1). As a remedy for the misclassification violation, the Region should seek an order requiring that the Employer cease and desist from interfering with, restraining, or otherwise coercing its employees in the exercise of their Section 7 rights by communicating to its drivers that they are independent contractors and not employees within the meaning of the Act. The order should also require that the Employer take affirmative action to rescind any portions of its Agreements with its haulers that purport to classify them as independent contractors and to post the appropriate notice.[42]

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[41] *Cf. Parexel International, LLC*, 356 NLRB at 519–20 (finding discharge violated Section 8(a)(1) because it was undertaken in order to be certain employee did not engage in future Section 7 activity).

[42] Finally, while the employee testimony in this case is limited to haulers at two of the Employer's locations, the evidence obtained by the Region from the Employer is sufficient to show that the Employer's haulers are employees. In this regard, an ALJ recently determined that the individuals performing work for a national app-based company are employees based on the testimony of one individual and documentary evidence. *See Arise Virtual Solutions, Inc.*, Case 12-CA-144223, JD-76-16 (NLRB Div. of Judges, Aug. 16, 2016). The Region can also argue, if necessary, that the question of whether individual haulers are employees for the purposes of applying the remedy is an issue for compliance. *See, e.g.*, *Boch Honda*, 362 NLRB No. 83, slip op. at 3 (Apr. 30, 2015) (leaving to compliance the question of what entities the respondent owned

Accordingly, the Region should issue a Section 8(a)(1) complaint, absent settlement, alleging that the Employer's misclassification of its employees as independent contractors violates Section 8(a)(1).

/s/
B.J.K.

H:ADV.18-CA-181821.Response.Menard [redacted]

or operated with respect to the scope of the remedy for unlawful handbook policies), *enforced*, 826 F.3d 558 (1st Cir. 2016).

*United States Government*
*National Labor Relations Board*
**OFFICE OF THE GENERAL COUNSEL**

# Advice Memorandum

**S.A.M.** DATE: May 20, 2015

TO: Ronald K. Hooks, Regional Director
Region 19

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Providence Sacred Heart Medical Center, Inland Imaging, LLC, and Inland Imaging Business Associates, LLC, a Joint and/or Single Employer
Case 19-CA-143095

Deferral Chron
240-3367-0113-0000
240-3367-0825-3300
240-3367-8312-0000
240-3367-8362-4000

The Region submitted this case for advice as to whether: (1) it is appropriate to defer a single and/or joint employer allegation related to a subcontracting dispute to the parties' contractual grievance and arbitration machinery; and (2) an individual discrimination charge should be deferred under the Board's new deferral standard set forth in *Babcock & Wilcox Construction Co.*[1] We conclude that deferral of the single and/or joint employer allegation is appropriate because it does not present a question concerning representation that militates against deferral and the Union's concern regarding inadequate discovery in arbitration is unwarranted. We further conclude that the individual discrimination charge should be deferred to the parties' grievance and arbitration process under the new standard announced in *Babcock* because the specific statutory right at issue was incorporated into the parties' collective-bargaining agreements.

## FACTS

Providence Health & Services operates Sacred Heart Medical Center and Children's Hospital ("the Employer") and has an established collective-bargaining relationship with the United Food and Commercial Workers International Union, AFL-CIO ("the Union"), which represents separate bargaining units of approximately 400 technical employees and 800 service and maintenance employees in the Employer's Radiology Department. Each unit has a collective-bargaining agreement in place: the technical unit agreement is effective January 1, 2013 through December 31, 2015; the service and maintenance unit agreement was effective February 29,

[1] 361 NLRB No. 132 (Dec. 15, 2014).

2013 through December 31, 2014. The parties are in the process of renegotiating each agreement separately.

Each contract has nearly identical subcontracting provisions in place that allow the Employer to "hir[e] another firm to do work that had previously been done within the organization by existing bargaining unit employees. The work may be done by the new firm either inside the organization or at another site."[2] The contracts also require the Employer, prior to making a subcontracting determination, "to meet with the Union to discuss the [Employer's] assessment and consider the feasibility of creating and/or implementing alternatives to the contracting that would satisfy [the Employer's] primary business needs." Further, if subcontracting will result in bargaining unit layoffs, the Employer must give the Union sixty days' notice and, at the Union's request, meet to discuss the effects. Finally, where layoffs will occur, "the [Employer] will make a good faith effort to obtain preferential hiring opportunities with the contracting entity for affected employees . . . ."

Article 5.6 of each contract also contains nearly identical "Equal Opportunity" language that prohibits "discrimination against any employee or applicant for employment because of race, color, creed, national origin, religion, sex, age, handicap, marital status, sexual orientation or *Union membership* unless any one of the foregoing factors constitutes a bona fide occupational qualification" (emphasis added).

In September 2014,[3] the Employer notified the Union that it was considering contracting out some of its imaging services to a third party and expected that this would result in the elimination of some positions in both units. The Union then submitted an extensive request for information and suggested several alternatives prior to the parties meeting to discuss the issue on September 26. During that meeting, the Employer stated that it was considering subcontracting imaging services to "Inland Imaging," a radiology service provider closely affiliated with the Employer's other hospitals. The Employer did not specify at this meeting which Inland Imaging entity it was considering for the work. The Employer had formed a joint venture with Inland Imaging Business Associates, LLC, which the Employer asserts is an independent entity. The joint venture is called Inland Imaging, LLC, and while the Employer has a 50% financial interest in that business, it is not involved in its management or daily operations.

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[2] The organization of the provisions differs in each contract, but the language is essentially the same. The technical unit contract houses the entire provision in Article 5.9. The service and maintenance contract splits the language between Article 5.9 and an attached memorandum of understanding.

[3] All dates hereinafter are in 2014 unless otherwise stated.

On October 23, the Employer gave the Union its final notice that it would subcontract bargaining unit work in several imaging departments to Inland Imaging Business Associates, LLC, which would affect employees in both units. On October 30, the Union filed a grievance under both the service and technical agreements alleging that the Employer had violated Article 5.9 of its agreements with the Union by: (1) contracting with "itself" because the Employer purportedly owns and controls the subcontractor; (2) failing to properly consider the Union's proposed alternatives to contracting out; and (3) failing to obtain preferential hiring treatment for all impacted bargaining unit members. The Employer's response to the grievance was that it did not subcontract the work to itself; rather, it had subcontracted the imaging work to Inland Imaging Business Associates, LLC. The Employer informed the Union in an email that although it and Inland Imaging Business Associates, LLC had formed a joint venture called Inland Imaging, LLC, the joint venture would not be performing the subcontracted work.

On December 8, the Employer notified the Union that imaging employees in several job classifications would be laid off effective December 31. Employees were then told that they could apply for employment with Inland Imaging at a job fair.[4] Most of the impacted employees attended the job fair, completed online applications, and were interviewed. Approximately 75% of employees who applied for Inland Imaging jobs were offered positions.[5] However, a long-time employee who was one of the Employer's most outspoken Union activists was not offered a position.

On December 16, the Union filed the instant charge, which tracks the grievance allegations and includes a Section 8(a)(3) allegation based on Inland Imaging's refusal to hire the Union activist. The Union then amended the charge to allege that the Employer, Inland Imaging, LLC, and Inland Imaging Business Associates, LLC, are single and/or joint employers.

The Employer seeks deferral of the charge to the parties' grievance and arbitration machinery, and it has agreed to waive any contractual time limitations on the filing and processing of grievances to arbitration. The Employer claims that the Section 8(a)(3) refusal-to-hire allegation, which is not part of the Union's grievance, is also suitable for deferral because the parties' contracts include a clause that prohibits discrimination based on, among other things, "Union membership." The Union opposes deferral primarily because it claims a question concerning representation

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[4] There is conflicting evidence as to whether the employees were applying for a job with Inland Imaging Business Associates, LLC, or Inland Imaging, LLC. Thus, we refer solely to "Inland Imaging" as the employing entity.

[5] The exact number is unknown because Inland Imaging, LLC and Inland Imaging Business Associates, LLC have failed to cooperate with the Region's investigation.

underlies the dispute and that the Board is best equipped to decide the single and joint employer issues. The Union also opposes deferral because it asserts that an arbitrator lacks authority to order adequate discovery on the single and joint employer issues.[6]

Since January 2015, many of the unit employees affected by the Employer's subcontracting decision have been employed and supervised by Inland Imaging. As a result, their wages have been reduced significantly and they have been removed from the Employer's 401(k) and health insurance plans.

## ACTION

We conclude that it is appropriate to defer the single and/or joint employer allegation to the parties' grievance and arbitration process because it does not present a question concerning representation that is typically resolved by the Board and the Union's concern regarding inadequate discovery in arbitration is unwarranted. Further, as to the Section 8(a)(3) refusal-to-hire charge, we conclude that deferral here is appropriate and should be analyzed using the Board's new standard enunciated in *Babcock* because the statutory right at issue was explicitly incorporated into the parties' collective-bargaining agreements.

### A. The Single and Joint Employer Questions are Appropriate for Deferral.

"Where an employer and a union have voluntarily elected to create dispute resolution machinery culminating in final and binding arbitration, it is contrary to the basic principles of the Act for the Board to jump into the fray prior to an honest attempt by the parties to resolve their disputes through that machinery."[7] While the Board promotes the collective-bargaining process by holding contracting parties to their agreed-on dispute resolution procedure, it retains jurisdiction over a dispute subject to that procedure to ensure that the matter has been resolved with reasonable promptness, that the grievance and arbitration procedures were fair and regular, and that the result reached is not repugnant to the Act.[8]

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[6] The Union appears to find inadequate the language in Article 14.5.3 of each contract, which states in relevant part that, "[i]f necessary, the [a]rbitrator shall resolve discovery rights of the parties as to grievances submitted to arbitration."

[7] *United Technologies Corp.*, 268 NLRB 557, 559 (1984).

[8] *Id.* at 561; *Collyer Insulated Wire*, 192 NLRB 837, 843 (1971). *See also Laborers Local 294 (AGC of California)*, 331 NLRB 259, 260 (2000) (finding post-arbitration deferral appropriate because, among other things, the arbitration proceedings were fair and regular where employees in a grievance against the union were represented by independent counsel, not union counsel, and the "arbitrator had all the relevant

Despite these policies favoring pre-arbitration deferral, a charge is generally not deferrable if it encompasses a representation question because that is a matter for the Board to decide rather than an arbitrator.[9] In *Marion Power Shovel*, the Board explained that representation questions are typically not deferrable because they "do not depend upon contract interpretation but involve the application of statutory policy, standards, and criteria."[10] Further, in *Asbestos Carting Corp.*[11] the Board found deferral of single employer and alter-ego issues inappropriate because those determinations would have raised a unit accretion issue that "involve[d] application of statutory policy, standards, and criteria [that] are matters for decision of the Board rather than an arbitrator."[12]

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[hiring hall] records to permit a fair resolution" of whether the union had breached the contract provisions on the exclusive hiring hall).

[9] *Marion Power Shovel Company, Inc.*, 230 NLRB 576, 577-78 (1977) (finding unit clarification issue not suitable for arbitration where conflicting claims to representation were present due to the employer's reorganization and expansion of its facilities).

[10] *Id.* at 577.

[11] 302 NLRB 197 (1991).

[12] *Id.* at 197. *See J. E. Higgins Lumber Co.*, 332 NLRB 1172, 1176 & n.4 (2000) (finding deferral of single and/or joint employer determination inappropriate because it was determinative issue as to unit placement of employees referred by temporary staffing agency who was alleged to be a joint employer with user employer). However, the Board will defer to arbitration in a representation context when resolution of the issue turns solely on the proper interpretation of the parties' collective-bargaining agreement. *See St. Mary's Medical Center*, 322 NLRB 954, 954 (1997) (finding that Regional Director acted appropriately by limiting scope of deferral to issue that turned solely on interpretation of recognition clause's exclusion language, but explicitly refusing to defer resolution of accretion issue); *Central Parking System*, 335 NLRB 390, 390-91 (2001) (citing *St. Mary's* in finding that deferral to arbitration was appropriate despite the presence of a representation issue because the primary issue turned on whether there was an "after-acquired" clause in the parties' agreement that would then resolve all other issues); *Appollo Systems, Inc.*, 360 NLRB No. 80, slip op. at 1-2 (Apr. 24, 2014) (citing *St. Mary's* in finding deferral to arbitration appropriate, including resolution of single employer issue, because case involved "classic questions of contract [that] are not the unique province of the Board . . . [and] may reasonably be left to the parties' contractual grievance and arbitration procedure").

On the other hand, arbitrators routinely resolve single and/or joint employer issues outside the representational context to determine whether a contracting party has violated the terms of an applicable collective-bargaining agreement. For example, in the *Walt Disney World Co. v. Carpenters Local 1820* arbitration proceeding, the union's grievance alleged that Disney had breached the parties' collective-bargaining agreement by subcontracting unit work to avoid hiring new bargaining unit maintenance employees.[13] Disney's defense, in part, was that the contract specified four exceptions that permitted subcontracting unit work, including where no full-time unit employee was laid off or terminated, which Disney asserted was applicable. In sustaining the union's grievance, the arbitrator concluded, among other things, that Disney and its subcontractor were a single employer under the Board's four-part test.[14] Based on this single employer finding, Disney breached the contract because "the contracting of a single employer with itself" was not a bona fide subcontracting arrangement that qualified for one of the four exceptions set forth in the collective-bargaining agreement.[15]

Here, deferral to arbitration is appropriate because the case presents a contract dispute similar to that in *Walt Disney World*, rather than a question concerning representation. Resolution of the Union's grievance revolves on a finding of single or joint employer status between the Employer and the Inland Imaging entities that will allow the arbitrator to determine whether the Employer breached the contract by subcontracting with itself. If the arbitrator finds single or joint employer status, the Employer will have breached its contractual obligations and the Union will receive the appropriate remedy in that forum. If the Employer and the other entities are found to be separate employers, that will not lead to a consideration of whether the Union

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[13] *See* 2009 WL 8160765, at § A (2009) (Hoffman, Arb.).

[14] *Id.* at § C.2. (citing, among other cases, *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 80 (1995)).

[15] *Id.* at § C.2. *See also Freeman United Coal Mining Co. v. Mine Workers District 12 & Local 12*, 2004 WL 6012757 at § Opinion (E) (2004) (Murphy, Arb.) (denying union's grievance that employer had breached the parties' contract by subcontracting unit work where the disputed work was performed after the employer had sold its processed coal and, therefore, the union no longer had jurisdiction over it; in reaching his overall conclusion, the arbitrator found that the employer and the entity performing the disputed work were not a single employer so that the union's jurisdiction ceased at the point of sale); *Mike-Sell's Potato Chip Co. v. Teamsters Local 957*, 90 LA 801 (1988) (Cohen, Arb.) (stating that resolution of single-employer status would allow arbitrator to then determine whether employer violated the driver-equipment and subcontracting provisions of the parties' collective-bargaining agreement).

represents Inland Imaging's employees. At no point will the arbitrator be required to apply statutory standards and criteria related to a question concerning representation.

Furthermore, the Union's concern regarding the arbitrator's alleged lack of authority to order discovery on the single and joint employer issues does not defeat the appropriateness of deferral. The Board's policy is to encourage collective bargaining by requiring parties to abide by the grievance-arbitration procedure they have established through negotiations.[16] The Union has failed to provide any explanation why an arbitration hearing here would not be fair and regular so as to preclude it from fully presenting its grievance. Most important, the Union specifically agreed in Article 14.5.3 of each contract to have the arbitrator resolve the parties' discovery rights in the arbitration proceeding. In light of these considerations, it would undermine the Act's principles for the Board to bypass the parties' contractual grievance-arbitration procedure.[17]

**B. Pre-Arbitration Deferral is Appropriate Here Under *Babcock* Because the Statutory Right at Issue Was Incorporated into the Parties' Contract.**

Recently, in *Babcock & Wilcox Construction Co.*,[18] the Board revisited its post-arbitration deferral standard because it did not adequately balance the protection of employee rights under the Act with the national policy of encouraging arbitration of disputes over the application or interpretation of collective-bargaining agreements. Under the new post-arbitration deferral standard, a threshold requirement is that the arbitrator explicitly have been authorized to decide the statutory issue, as set forth in the collective-bargaining agreement or by explicit agreement of the parties in a particular case.[19] The *Babcock* Board also determined that its modifications to the standard for reviewing arbitral awards necessitated a change in the criteria for administratively placing a Section 8(a)(3) charge on pre-arbitration deferral under

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[16] *See, e.g., United Technologies Corp.*, 268 NLRB at 559.

[17] In any event, the Region could consider in a potential post-arbitration review under *Spielberg/Olin* whether the Employer refused to provide relevant information that precluded the Union from fully presenting its grievance to the arbitrator. "The Board will not defer to arbitration awards where an employer has unlawfully withheld information relevant to the arbitration proceeding." *Western Golf & Country Club*, 335 NLRB 1085, 1089 (2001).

[18] 361 NLRB No. 132 (Dec. 15, 2014).

[19] *Id.*, slip op. at 2, 5.

*Collyer Insulated Wire*[20] and *United Technologies Corp.*[21] Because it would be futile to place a case on hold pending arbitration if it is clear from the outset that deferral to the ultimate award would be improper, the Board will no longer defer cases to the arbitral process unless the arbitrator is explicitly authorized to decide the statutory issue.[22] Although the Board did not indicate whether this new pre-arbitration deferral standard would apply prospectively or retroactively, we infer that the new pre-arbitral deferral standard will apply only if the new post-arbitral deferral standard would apply to the ultimate arbitration.[23] Therefore, the new standard for pre-arbitration deferral set forth in *Babcock* applies where the parties have already authorized an arbitrator, either contractually or explicitly for a particular case, to decide the unfair labor practice claims at issue.[24]

Here, we conclude that deferral of the Section 8(a)(3) allegation involving the Union activist is appropriate pursuant to *Babcock* because the parties' contracts explicitly authorize an arbitrator to decide whether the Employer discriminatorily refused to retain that employee.[25] The contracts contain "Equal Opportunity"

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[20] 192 NLRB at 841-42.

[21] 268 NLRB at 558.

[22] *Babcock*, 361 NLRB No. 132, slip op. at 12-13.

[23] *See* Office of the General Counsel, "Guideline Memorandum Concerning Deferral to Arbitral Awards, the Arbitral Process, and Grievance Settlements in Section 8(a)(1) and (3) cases," GC Memorandum 15-02, Feb. 10, 2015, at 11.

[24] *Babcock*, 361 NLRB No. 132, slip op. at 14. Where the parties' current contract does not authorize an arbitrator to decide the statutory issue and the parties will not agree to have the arbitrator do so, the Board will apply its previous deferral standard under *Collyer* and *United Technologies*. *Id.* *See also* GC Memorandum 15-02, at 9 (stating that for contracts executed prior to December 15, 2014, the applicable deferral standard depends on whether the arbitrator was explicitly authorized to decide the statutory question).

[25] If the arbitrator finds that the Employer and Inland Imaging are a single or joint employer, and orders rescission of the "subcontract," the employee will be reinstated along with the other displaced employees. In that event, although the arbitrator may not need to decide the discrimination question, the employee's statutory rights will have been protected. If the arbitrator finds that the Employer and Inland Imaging are separate entities, he will not resolve the discrimination issue because Inland Imaging is not a party to the contracts. In that event, the Region's post-arbitration *Spielberg/Olin* review should consider whether to go forward with the Section 8(a)(3) allegation against Inland Imaging, who is named as a respondent in the charge.

provisions that prohibit discrimination based on, among other things, "Union membership." The Supreme Court and the Board have long held that the term "membership," in the context of Section 8(a)(3), should be broadly construed.[26] In *Radio Officers'*, the Supreme Court explained that the term "membership" includes the "right guaranteed by the Act to join in or abstain from *union activities* without thereby affecting [an employee's] job" and that "[t]he language of §8(a)(3) is not ambiguous[;] [t]he unfair labor practice is for an employer to encourage or discourage membership by means of discrimination."[27] Therefore, the term "membership" in the contracts' "Equal Opportunity" provisions covers the panoply of rights protected under Section 8(a)(3) because it extends to "union activities" in support of membership. Accordingly, because the statutory right applicable to the discrimination charge here has been explicitly incorporated into the parties' contracts, the charge should be deferred to arbitration under the new standard set forth in *Babcock*.

Based on the preceding analysis, the Region should defer the current charge allegations to the parties' grievance and arbitration machinery.

/s/
B.J.K.

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[26] *See Radio Officers' Union v. NLRB*, 347 U.S. 17, 39-40 (1954); *Derr & Gruenewald Construction Co.*, 315 NLRB 266, 267, 270 (1994) (finding post-arbitral deferral appropriate in refusal-to-hire case where contract prohibited deeming an applicant unqualified because of his "union membership," which includes "union activities in the same way that the term 'membership' in Section 8(a)(3) of the Act has been interpreted to include such activities").

[27] *Radio Officers'*, 347 U.S. at 42 (emphasis added). *See, e.g.*, *Derr & Gruenewald Construction Co.*, 315 NLRB at 267, 270; *T. K. Productions*, 332 NLRB 110, 124 (2000) (quoting *Radio Officers'* for the proposition that the thrust of an 8(a)(3) violation is to discriminate for the purpose of encouraging or discouraging union membership).

*United States Government*
***National Labor Relations Board***
**OFFICE OF THE GENERAL COUNSEL**
# Advice Memorandum

S.A.M. DATE: January16, 2015

TO: Olivia Garcia, Regional Director
Region 21

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Millennium Reinforcing, Inc. Remedies/Compliance
Case 21-CA-112190

This matter is presented for consideration of whether this case is an appropriate vehicle to urge the Board to overrule its decision in *Oil Capitol Sheet Metal,*[1] which, for remedial purposes, eliminated the presumption of continued employment for a "salt" discriminatee and made it the burden of the General Counsel to prove that the "salt" discriminatee would have continued working for the employer. We believe *Oil Capitol* should be overruled, and that this is an appropriate vehicle to urge the Board to do so. Accordingly, the Region should issue a consolidated complaint and compliance specification in this matter, absent settlement, and urge the Board to reconsider its decision in *Oil Capitol* and return to the allocation of evidentiary burdens set forth in *Dean General Contractors.*[2]

## FACTS

The Employer, Millennium Reinforcing, Inc., is engaged in construction work, including rebar work, at several jobsites in California. The Union, the Iron Workers of California, is conducting an organizing campaign to represent the Employer's employees at various sites in San Diego, Los Angeles and San Jose. The relevant three jobsites in San Diego are (1) Kettner and Juniper, (2) 10th and J, and (3) 13th and Market.

On June 25, 2013,[3] as part of a coordinated Union salting campaign, the two discriminatees applied for work with the Employer. The two discriminatees are

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[1] 349 NLRB 1348 (2007), *petition for review dismissed sub nom. Sheet Metal Workers Local 270 v. NLRB*, 561 F.3d 497 (D.C. Cir. 2009).

[2] 285 NLRB 573 (1987).

[3] All dates hereinafter are in 2013, unless otherwise stated.

(b) (6), (b) (7)(C) and members in good standing with the Union, but are not paid organizers. The Union does, however, supplement their wages so that they won't suffer losses by working for a nonunion employer in order to engage in salting activity. On (b) (6), (b) (7)(C) the Employer hired them for iron rebar work. On July 1, they began work at the 13th and Market Street jobsite in San Diego. After four hours, the Employer transferred them to the 10th and J Street jobsite, where they continued to do reinforcing rebar work for about two weeks.

At about 6:30 a.m., on July 11, the job (b) (6), (b) (7)(C) observed the discriminatees handing Union pamphlets to six workers and talking to them about the Union. At around 9:45 a.m., the discriminatees informed their (b) (6), (b) (7)(C) that they were organizers for Local 229 and that they were there to represent the workers. At some point, the discriminatees stopped work for about 30-40 minutes, announcing that they were on strike.[4] Their (b) (6), (b) (7)(C) gave them a choice — work or sign out. They chose to continue to work, but they also continued talking to co-workers about the Union. Later that morning, the (b) (6), (b) (7)(C) directed the two discriminatees to go to the other side of the jobsite and clean up all of the scrap metal, work generally reserved for apprentices. Sometime before noon, the Employer's (b) (6), (b) (7)(C) approached them and asked what was going on. One of them told [redacted] they were organizers for Local 229 and trying to obtain better benefits for the workers and better pay. The (b) (6), (b) (7)(C) offered them individually a $2 per hour pay increase, but the discriminatees rejected the offer.

The discriminatees reported to work on Friday, July 12, and continued to talk to their co-workers about the Union. The (b) (6), (b) (7)(C) told a (b) (6), (b) (7)(C) to keep an eye on one of the discriminatees, further stating that if that discriminatee was not working or doing what [redacted] was supposed to be doing, the Employer would fire [redacted] The (b) (6), (b) (7)(C) videotaped that discriminatee's work in the morning. That same day, as the (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) picketed outside the Employer's 10th and J Street jobsite, [redacted] heard the Employer's (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) talking about discharging the discriminatees for insubordination. The (b) (6), (b) (7)(C) said that would be unnecessary as one had already failed to show up for scheduled work without calling and could be discharged for that reason. At the end of work that day, the (b) (6), (b) (7)(C) informed one of the discriminatees that it was winding down and did not have enough work for either discriminatee. The (b) (6), (b) (7)(C) told the discriminatee [redacted] needed to call the office about work on Monday, July 15. The discriminatee called the office after [redacted] left the jobsite. That call was not returned.

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[4] The two had spoken to the (b) (6), (b) (7)(C) about the timing of the strike beforehand.

On Monday, July 15, one of the discriminatees called the Employer's (b) (6), (b) (7)(C) and asked whether the Employer had any work for them. The (b) (6), (b) (7)(C) said things were slow, [redacted] did not have any work for them, and they could file for unemployment compensation because they had been laid off for lack of work.

The Employer asserted that it concluded that it only needed 17 of the then 19 employees for the remaining work at the 10th and J Street jobsite, and therefore it laid off the discriminatees. The Employer first asserted that it chose the two discriminatees for layoff because they were the slowest workers. The Employer later asserted that it had a last-in, first-out policy and that was the reason for their layoff. Work remaining to be done at the 10th and J Street jobsite after the discriminatees were laid off included uncompleted floors, cables to be run, and walls requiring rebar work. Work at the 13th and Market Street job ended on or about January 10, 2014. The Employer typically transfers employees from jobsite to jobsite and hired (b) (6), (b) (7)(C) from late July through November.

The discriminatees assert they had no specific understanding with the Union prior to going to work with the Employer as to the length of their "assignment." Neither was told by the Union that the Union would determine the length of their employment, and both [redacted] needed work and would have worked as long as possible for the Employer. The Union never utilized written salting agreements but had verbal agreements with the discriminatees that — consistent with contemporaneous Union policy and practices — required them to (1) agree to work for a non-union contractor and follow the work wherever it went — out of state or out of the city — until the company said there was no more work; (2) develop relationships with other employees; (3) do a good job for the company; (4) only talk about the Union before work, during breaks, during lunch and after work; (5) learn about the family issues faced by workers; and (6) come out with their Union support and affiliation at a time when support seemed to have gathered strength within the company. The Union's specific plans for this Employer centered around addressing its low wages, lack of proper overtime pay, inadequate safety training and OSHA violations. Union salting campaigns would last for a couple of days to up to three months. As noted above, the discriminatees would have continued to work for the Employer up to the present time and desire reinstatement.

The Region concluded that the two discriminatees were unlawfully laid off because of their union activity, and were discriminatorily assigned to clean up scrap metal and iron. The Region believes it can meet its burden of proof under *Oil Capitol*, and show that the discriminatees would have continued their employment with the Employer and should be reinstated with back pay.

## ACTION

We conclude that the Region should issue a consolidated complaint and compliance specification in this matter and assuming that the violations are proven, it should then argue in the compliance portion of the proceeding that under *Oil Capitol* these discriminatees would have worked for the entire length of the specification up to their reinstatement. The Region should also request that the Board reconsider its decision in *Oil Capitol* and return to the allocation of evidentiary burdens set forth in *Dean General Contractors.*[5]

In *Dean General Contractors*, the Board held that traditional make-whole remedies and a presumption of continued employment would apply in the construction industry despite employment patterns in that industry.[6] A respondent can rebut the presumption of continued employment by proving in compliance that it would not have transferred or reassigned the discriminatee after completion of the project at issue.[7]

In *Oil Capitol*, the Board rejected the rebuttable presumption of continued employment in the construction industry for salts and announced a rule requiring the General Counsel to produce affirmative evidence that a salt discriminatee would have worked for a respondent for the backpay period claimed in the compliance specification.[8] Furthermore, the Board ruled that if the General Counsel cannot prove that a salt discriminatee would have stayed at a job indefinitely, the discriminatee is not entitled to instatement or reinstatement.[9] The Board specified the following five factors as relevant to proving the length of a salting discriminatee's backpay period: (1) the discriminatee's personal circumstances during the backpay period; (2) union policies and practices with respect to other salting campaigns at the time of the discrimination; (3) specific union plans for the targeted employer; (4) instructions or agreements between the discriminatees and the union concerning the anticipated duration of the assignment; and (5) historical data regarding the duration of

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[5] 285 NLRB 573 (1987).

[6] *Id.* at 573-575.

[7] *Id.* at 575.

[8] 349 NLRB at 1349.

[9] *Id.* at 1354.

employment of the discriminatees and other discriminatees in similar organizing campaigns by the same union.[10]

The Region should urge the Board to overrule *Oil Capitol* for the following reasons, First, by reversing the burdens of proof in *Oil Capitol* so that the General Counsel must demonstrate that the salt discriminatee would have continued to work for the offending employer, the Board undermined the effectiveness of established remedial policies and violated the well-established principle that any remedial uncertainty is resolved against the wrongdoer.[11] Second, in so doing, the Board created a disfavored class of statutory employees, notwithstanding the Supreme Court's ruling in *Town & Country Electric, Inc.*[12] that even paid union salts are protected employees under the Act. Finally, the Board made this significant change in its nearly 30 year old policy, which had never been rejected by any appellate court, without either party having raised it, without the benefit of briefing on the issue,[13] and therefore, without the benefit of any empirical evidence or legal support for any of its conclusions, including its primary conclusion that a salt's intention is to stay on the job "only until the union's defined objectives have been achieved or abandoned."[14]

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[10] *Id.* at 1349.

[11] *See, e.g., Bigelow v. RKO Radio Pictures,* 327 U.S. 251, 265 (1946) (the "most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created"). *See also*, *Tualatin Electric, Inc. v. NLRB,* 253 F.3d 714, 718 (D.C. Cir. 2001) ("The principle that the party who acted unlawfully should bear the burden of producing evidence for the purpose of limiting its damages has as much force in a case involving salts as in any other.").

[12] 516 U.S. 85, 94-95, 98 (1995).

[13] The majority decision in *Oil Capitol Sheet Metal* cites to *Indian Hills Care Center,* 321 NLRB 144 (1996) as support for its unilateral action. 349 NLRB at 1353. However, as noted by the *Oil Capitol* dissent, *Indian Hills* dealt only with a respondent's ministerial acts regarding the time for compliance with Board orders, and not a wholesale "policy-driven reversal of precedent, which erects new obstacles to remedies for an entire class of discriminatees." 349 NLRB at 1358 n.12.

[14] *Oil Capitol Sheet Metal,* 349 NLRB at 1349 & 1351.

1. The Board's decision in *Oil Capitol* is contrary to well-established remedial principles.

Traditionally, the remedy in a Section 8(a)(3) termination or failure to hire case is a full make-whole remedy, consisting of reinstatement/instatement with backpay from the time of the unlawful discharge or refusal to hire until the employer extends an offer of employment.[15] The reinstatement/instatement remedies assure protection of the most fundamental of all § 7 rights — "the right of self-organization."[16]

Importantly, the majority approach in *Oil Capitol* frustrates that fundamental statutory purpose, since it may foreclose any remedy of reinstatement or instatement, absent the General Counsel proving that the salt discriminatee would have continued to work but for the unlawful discharge or unlawful refusal to hire. Reinstatement of a discriminatorily discharged employee or in the case of an unlawful refusal to hire, instatement, may not be a necessary remedy to make an employee whole for his monetary loses, but as the Supreme Court held in *Phelps Dodge* "to limit the significance of discrimination merely to questions of monetary loss to workers would thwart the central purpose of the Act, directed as that is toward the achievement and maintenance of workers' self-organization."[17] This principle is most significant in the case of salts because they seek employment for the express purpose of helping organize their fellow workers. The *Oil Capitol* Board's approach may effectively stymie organizational efforts of employees by enabling an employer to successfully ban the union activist from its worksite for the express purpose of preventing unionization. As the *Phelps Dodge* court noted, "[d]iscrimination against union labor in the hiring of men is a dam to self organization at the source of supply."[18]

Moreover, as a result of *Oil Capitol,* the employer will accomplish this at the risk of only a minimal backpay liability. Thus, by reversing the burden of proof for establishing that the salt discriminatee would have continued to work for the offending employer during the backpay period, the Board disregarded the well-established principle that "the wrongdoer shall bear the risk of the uncertainty which

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[15] *See* Section 10(c), 29 U.S.C. 160 §10(c); *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 194 (1941) (the full make whole remedy includes "not only compensation for loss of wages but also offers of employment to victims of discrimination.").

[16] *Phelps Dodge,* 313 U.S. at 195.

[17] *Id at* 193.

[18] *Id.* at 185.

his own wrong has created."[19] The D.C. Circuit, in expressly rejecting an employer's argument that the *Dean General Contractors* presumption should not be applied to salts, held that "the principle that the party who has acted unlawfully should bear the burden of producing evidence for the purpose of limiting its damages has as much force in a case involving salts as in any other."[20]

In sum, the *Oil Capitol* approach reduces the monetary risk to the employer of ridding itself of union activists by unlawful means, with the hope of forever foreclosing a reinstatement or instatement remedy, thereby permanently dashing any organizing efforts of its employees. This resulting departure from traditional remedial principles should not stand.

2. *Oil Capitol* fosters rather than prevents discrimination against salts and interferes with an organizing tool that the Supreme Court has implicitly found protected.

The *Oil Capitol* decision cannot be squared with the Supreme Court's decision in *Town & Country Electric*[21] that even *paid* union salts are employees protected under the Act. In *Town & Country Electric,* the Court upheld the Board's interpretation of the term "employee" to include salts as "consistent with several of the Act's purposes, such as protecting 'the right of employees to organize for mutual aid without employer interference[.]'"[22] In so doing, the Court implicitly recognized salting as a protected organizing tool. Yet, by recasting the evidentiary presumptions for remedying unlawful discrimination again salt discriminatees in *Oil Capitol,* the Board in effect interferes with that protected activity. Applying different evidentiary burdens in compliance cases involving salt discriminatees because they may abandon the employer ultimately fosters unlawful discrimination against them because any discriminatee may decide to leave a particular employer, for a whole host of reasons. Indeed, the Supreme Court observed that although a salt might quit, "so too might…a worker who has found a better job, or one whose family wants to move elsewhere."[23]

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[19] *Bigelow v. RKO Radio Pictures,* 327 U.S. at 265.

[20] *Tualatin Electric, Inc. v. NLRB,* 253 F.3d at 718.

[21] 516 U.S. at 94-96, 98 (1995).

[22] *Id.* at 90, quoting *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 798 (1945).

[23] *Id.* at 96.

Moreover, the Board's imprecision in defining who might be a salt, and including under this rubric both paid and unpaid salts, sweeps in a vast number of potential discriminatees for whom this evidentiary burden may well result in an amount of backpay that does not represent the full amount of monetary damages unlawfully caused by an offending employer. Thus, the new rule announced in *Oil Capitol* defines a "salt" as "those individuals, paid or unpaid, who apply for work with a nonunion employer in furtherance of a salting campaign[,]" and "salting" as the "act of a trade union in sending in a union member or members to an unorganized jobsite to obtain employment and then organize the employees."[24] The rationale for this rule as it applies to an unpaid salt discriminatee is far more tenuous because it is unlikely the union would ask such an individual to leave gainful employment even at the end of a campaign that it has abandoned, or that an unpaid salt would leave if asked to.[25] And, if the union should win the campaign and create a unionized workplace, the rule's logic fails completely because an unpaid salt may well to decide to work at such a facility indefinitely.

Moreover, determining whether a discriminatee that is not on the union's payroll is in fact a "salt" under the *Oil Capitol* definition will not always be simple. For example, employees who are hired after a "salting campaign" starts but who later support it, are presumably not included under the definition, but their statuses will likely be litigated owing to an employer's incentive to truncate the backpay period. The same circumstances exist with an employee who simply on his own initiative begins an organizing campaign by contacting a union. Virtually every union-affiliated discriminatee in every organizing drive case in the building and construction industry is subject to a challenge by an employer that he/she was a salt, frustrating the important statutory imperatives concerning workers' self-organization.

3. The Board's decision in *Oil Capitol* had no evidentiary or legal basis.

In *Oil Capitol* the Board basically relied on four specific cases for its proposition that salts never intend to remain with the Employer permanently.[26] None of those

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[24] *Oil Capitol Sheet Metal,* 349 NLRB at 1348 n.5.

[25] The *Oil Capitol* majority asserts that the union controls the unpaid salt because he or she is still subject to the union's disciplinary rules. 349 NLRB 1349 n.6. However, as the dissent observed, "union members are free to resign from the union, and to avoid discipline, at any time. *Pattern Makers League of North America v. NLRB*, 473 U.S. 95, 100 (1985)." 349 NLRB at 1362 n.31.

[26] *See* 349 NLRB at 1351-52, nn.12 & 13, citing *Hartman Brothers Heating & Air Conditioning v. NLRB,* 280 F.3d 1110, 1111 (7th Cir. 2002) (court enforced Board

cases cite "any evidence that salts usually, let alone uniformly, quit at the end of every organizing campaign, or that unions typically know in advance how long a particular campaign will last."[27] The decision does not otherwise cite to scholarly studies or empirical data that would support the proposition that salts generally abandon their employment. And indeed, there is evidence that salting campaigns vary dramatically in duration and can last from several months to several years.[28] Thus, beyond the majority's self-selection of cases, the *Oil Capitol* Board's supposition that salts generally abandon their employment, the primary reason for changing the existing evidentiary burdens, was wholly unsupported in the *Oil Capitol* record.

Nor was there any evidentiary support for the conclusion that unions are in a superior position to provide evidence relevant to what the expected duration of a salt discriminatee's employment would have been absent the unlawful discrimination. There is uncertainty with regard to the length of time that any discriminatee would have worked absent a discriminatory refusal to hire or discriminatory discharge precisely because of the employer's unlawful action. There is no empirical evidence that unions devise pre-determined ending dates for campaigns unrelated to the factual circumstances that unfold in any individual campaign. Absent such a pre-

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order of backpay for salt even where salt may have lied on employment application and in dictum observed, without authority, that "salts do not intend to remain in the company's employ after the plant or other facility is organized"); *American Residential Services of Indiana,* 345 NLRB 995, 996-997 (2005) (finding only that apprentice program that required third-year electricians to take six months off to engage in union organizing was a legitimate reason for an employer to deny employment to an alleged discriminatee based on a nondiscriminatory lack of availability); *Aneco, Inc.,* 333 NLRB 691, 694 (2001), *petition for rev. granted in part, denied in part and remanded,* 285 F.3d 326 (4th Cir. 2002) (union policy "*at times*" contemplated "it would be advantageous for salts already employed by a non-unionized company, to leave their employment with that company.") (emphasis added); and *Allied Mechanical Services,* 346 NLRB 326, 326-329 (2006) (examples of three salts who went on strike within a few weeks of being hired).

[27] *Oil Capitol*, 349 NLRB at 1359 (Members Liebman and Walsh, dissenting).

[28] *See, e.g., Tambe Electric, Inc.*, 346 NLRB 380, 383 (2006) (5 years); *Aztech Electric Co,* 335 NLRB 260 (2001), *enfd. in part,* 323 F.3d 1051 (D.C. Cir. 2003) (3 years); *WestPac Electric*, 321 NLRB 1322, 1327 (1996) (8 months).

determined ending date, "[t]he fact of discrimination makes it impossible to know how long a salting campaign would have progressed, absent the discrimination...."[29]

Lastly, there is no support for the *Oil Capitol* majority's conclusion that application of the *Dean General Contractors* presumption of continued employment in cases involving unlawful discrimination against salts results in backpay awards for speculative consequences of the unfair labor practices, with such awards amounting to punitive sanctions.[30] As the dissent pointed out, "the Board and courts have recognized that all backpay awards are necessarily 'approximations.'"[31] And the Supreme Court has held that backpay—specifically authorized under Section 10(c) of the Act—is not punitive but rather a compensatory make-whole remedy.[32] As noted above, allocating the burden of proof to the employer who creates the uncertainty by its unlawful act is not punitive but is simply a matter of equity. Every employer, including those in the building and construction industry, has a right to submit evidence to mitigate its backpay liability. In these circumstances, it is not punitive to allocate the burden of proof against the employer, who as the wrongdoer creates uncertainty, as opposed to the union, who has engaged in no wrongdoing, and at the expense of the discriminatee, who as a Section 2(3) employee is entitled to protection under the Act.

Accordingly, the Region should issue a consolidated complaint and compliance specification for reinstatement and backpay under the current *Oil Capitol* standards. At the compliance stage, the Region should urge that the Board overturn *Oil Capitol* for the reasons stated herein.

/s/
B.J.K.

H:ADV.21-CA-112190.Response.Millenium2 (b)(6), (b)(7)(C)

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[29] *Oil Capitol Sheet Metal,* 349 NLRB at 1360 n. 22 (Members Liebman and Walsh, dissenting).

[30] *See id.* at 1351-52.

[31] *Id.* at 1361 (Members Liebman, and Walsh, dissenting), citing to *NLRB* v. *Ferguson Electric Co., Inc.,* 242 F.3d 426, 431 (2nd Cir. 2001), *Glens Trucking Co.,* 344 NLRB 377, 380 (2005).

[32] *See NLRB v. Strong,* 393 U.S. 357, 359 (1969) (upholding Board order directing employer to pay fringe benefits that were required under collective-bargaining agreement negotiated on its behalf).

*United States Government*
*National Labor Relations Board*
**OFFICE OF THE GENERAL COUNSEL**
# Advice Memorandum

**S.A.M.** DATE: July 31, 2015

TO: Kelly Selvidge, Acting Regional Director
Region 27

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: DMM, LLC d/b/a High Level Health
Case 27-CA-146734

177-2484-1200
177-2484-1201-2500
177-5500
260-6776

The Region submitted this case for advice on (1) whether to assert jurisdiction over an enterprise that grows, processes, and sells medical and recreational marijuana in the state of Colorado and (2) whether certain workers (known as "water techs"), whose job duties include cultivating marijuana plants in an artificial warehouse setting, are "agricultural laborers" excluded from the Act's protection. We conclude that the Board should assert jurisdiction because the enterprise meets the jurisdictional standard applicable to retail enterprises in general. We further conclude that the water techs are not "agricultural laborers" under Section 2(3) of the Act and that restrictions in a related rider to congressional appropriations for the Board are inapplicable because this case does not concern a "bargaining unit."

## FACTS

### Background

Discount Medical Marijuana, LLC d/b/a High Level Health (the Employer) operates sites in Denver, Colorado known as "grow facilities," where its employees grow and process medical and recreational marijuana. The Employer then sells the marijuana via wholesale to other sellers and via retail to consumers. The company's gross sales revenue exceeded $500,000 during the most recent calendar year. The Employer purchases marijuana-specific growing equipment through specialized shops and non-specialized equipment at the local Home Depot store. The Employer's operations are legal under Colorado law and regulated by that state's marijuana statutes.

The grow facility concerned in this case is housed in a warehouse consisting of two floors and a basement. The warehouse includes sixteen "grow rooms." Each grow room contains rows of artificial lamps, the light output of which is regulated to induce

maximum plant growth and allow for year-round cultivation. Fans, air conditioners, and dehumidifiers are used to maintain optimal temperature and humidity levels in each grow room. The Charging Party worked at the grow facility as one of eight water technicians ("water techs"). Water techs are responsible for germinating and planting marijuana seeds; creating plant "clones"; and transplanting, watering, feeding, spraying (with pesticides and fungicides), and harvesting marijuana plants. At times, water techs have also engaged in some incidental duties, such as promoting the company's products at industry trade shows, providing security for the facility, and constructing grow rooms.

**Water techs discuss wages; two are terminated**

On (b) (6), (b) (7)(C) 2015, the Charging Party attended a performance review meeting with the Employer's (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) The Charging Party received a positive evaluation, with the (b) (6), (b) (7)(C) saying that (b) (6), (b) (7)(C) was going to receive a raise to $14.00 per hour. The Charging Party noted that that would in fact be a wage decrease because (b) (6), (b) (7)(C) was already earning $15.00 per hour for (b) (6), (b) (7)(C) weekend-shift work. The (b) (6), (b) (7)(C) replied that the Charging Party was being returned to the lower-paying weekday shift and that $14.00 per hour would be a raise relative to the lower wage level for that shift. The Charging Party stated that, in (b) (6), (b) (7)(C) view, (b) (6), (b) (7)(C) was being demoted. After further discussion, one of the (b) (6), (b) (7)(C) told the Charging Party not to discuss wages with (b) (6), (b) (7)(C) coworkers. The Charging Party challenged that instruction, but the (b) (6), (b) (7)(C) maintained that employees were prohibited from discussing wages. At some point during the meeting, the Employer distributed a new handbook broadly restricting various employee activities, including discussions regarding personnel information. The meeting ended, and the Charging Party returned to work.

When leaving work for the day, the Charging Party spoke to Employee A, a fellow water tech. The Charging Party told Employee A that (b) (6), (b) (7)(C) thought the water techs should get together for dinner the following evening to discuss their performance reviews and other work-related issues. Employee A agreed. Later that evening, the Charging Party discussed (b) (6), (b) (7)(C) performance review and the wage issue with (b) (6), (b) (7)(C), also a water tech at the grow facility. During that conversation, the (b) (6), (b) (7)(C) received a group text message from another water tech stating that the employees should hold out for higher pay.

The Charging Party reported to work the next morning and, at about 9:00 a.m., attended a meeting with the (b) (6), (b) (7)(C) and the (b) (6), (b) (7)(C) from the day before. Also at the meeting were three other water techs, including Employee A. One of the (b) (6), (b) (7)(C) began by telling the employees that the Employer had learned of the prior evening's group text message and suspected that they had been involved with it. The (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) told the employees that they were not to discuss wages, stated that they were causing dissension, and accused them of trying to form a "pseudo-union" to destroy the company. The (b) (6), (b) (7)(C) then threatened to fire them. Employee A

responded that [redacted] had problems with working conditions and the new employee handbook and that other employees felt the same way. One of the managers replied that if the employees had any problems, they needed to come to management instead of talking with one another. At the end of the meeting, the [redacted] decided not to fire anyone, said there had been a "miscommunication," and sent the employees back to work. The Charging Party then met privately with one of the [redacted]. [redacted] stated [redacted] interest in rising through the company's ranks, to which the [redacted] replied that the Charging Party was a great employee but needed to keep [redacted] nose down. The [redacted] came by and briefly spoke to the [redacted] in private. When the [redacted] returned, [redacted] demeanor had changed, and [redacted] told the Charging Party that issues "like this"—which the Charging Party understood to be a reference to the meeting earlier that day—were the only thing that could hold [redacted] back.

At about 10:30 a.m., the [redacted] and [redacted] again met with the Charging Party and Employee A. The [redacted] told them that they were being terminated for "just cause." Employee A became angry and left the room. The Charging Party asked what constituted "just cause." The [redacted] and a [redacted] replied that the Charging Party and Employee A had caused dissension and that that was not allowed. Aside from the jurisdictional questions presented here, the Region has determined that the Employer violated Section 8(a)(1) by prohibiting the Charging Party and Employee A from discussing wages and then terminating them for doing so.

## ACTION

We conclude that the Board should assert jurisdiction over the Employer because it meets the jurisdictional standard applicable to retail enterprises. We further conclude that the discharged water techs are "employees" under Section 2(3)—not "agricultural laborers"—and that restrictions found in a related congressional appropriations rider do not apply in the circumstances of this case.

### A. The Board should assert jurisdiction over the Employer.

In *Wellness Connection of Maine*,[1] we concluded that (i) an enterprise involved in the medical marijuana industry falls within the Board's jurisdiction if it meets otherwise applicable jurisdictional standards and (ii) jurisdiction should be asserted over such an enterprise, notwithstanding the illegality of its operations under federal law. Those conclusions followed from the broad nature of the Board's jurisdiction and the potential for labor disputes involving such enterprises to substantially affect

[1] *Northeast Patients Group d/b/a Wellness Connection of Maine*, Cases 01-CA-104979 and 01-CA-106405, Advice Memorandum dated Oct. 25, 2013.

interstate commerce.[2] In rejecting the argument that the Board should decline jurisdiction because such enterprises are formally illegal under federal law, we noted that the Department of Justice (DOJ) has indicated that prosecuting state-regulated medical marijuana operations is not an enforcement priority and that it has refused to seek to preempt Colorado's law permitting recreational marijuana use.[3] We also observed that the Occupational Safety and Health Administration (OSHA) has exercised jurisdiction over employers in the medical marijuana industry. Finally, we explained that an employer's violation of one federal law does not give it license to violate another (i.e., the Act).[4]

The jurisdictional standard applicable here is the Board's standard for retail enterprises.[5] That standard requires gross annual volume of business of at least $500,000 and that the enterprise fall within the Board's statutory jurisdiction.[6] The Board's statutory jurisdiction extends to all such conduct "affecting commerce" as might constitutionally be regulated under the Commerce Clause, subject only to the rule of *de minimis*.[7]

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[2] *Id.* at pp. 6-9.

[3] *Id.* at pp. 5 & nn.18-20, 10.

[4] *Id.* at pp. 10-11.

[5] An enterprise like the Employer, which is engaged in both retail and wholesale operations, falls within the Board's jurisdiction if it meets the jurisdictional standard applicable to *either* retail *or* wholesale enterprises, provided that neither aspect of the business is *de minimis*. *DeMarco Concrete Block Co.*, 221 NLRB 341, 341 (1975). If the Region determines that the Employer also meets the standard applicable to wholesale enterprises, *see Siemons Mailing Service*, 122 NLRB 81, 81, 85 (1959) (setting standard for nonretail enterprises at annual outflow or inflow, direct or indirect, across state lines of at least $50,000), that would provide an additional, independent jurisdictional basis.

[6] *Carolina Supplies & Cement Co.*, 122 NLRB 88, 89 (1959).

[7] *NLRB v. Fainblatt*, 306 U.S. 601, 604-08 (1939); *see also J. M. Abraham, M.D., P.C.*, 242 NLRB 839, 839 (1979) (employer's receipt of Medicare funds established Board's statutory jurisdiction); *Int'l Longshoremen & Warehousemen's Union (Catalina Island Sightseeing Lines)*, 124 NLRB 813, 814-15 (1959) (regulation of employer by another federal agency under the Commerce Clause established Board's statutory jurisdiction).

Here, the Employer meets the jurisdictional standard for retailers, having admitted that its gross sales revenue exceeded $500,000 during the most recent calendar year. Furthermore, the Board has statutory jurisdiction because the Employer's operations, although apparently confined to the state of Colorado, necessarily affect the interstate marijuana market such that labor disputes involving the Employer would undoubtedly affect interstate commerce.[8]

Because the Employer meets the jurisdictional standard for retailers, the Board should assert jurisdiction, as in *Wellness Connection of Maine*. Indeed, the rationale of that case is fully applicable here and disposes of any contrary arguments, including those based upon federal marijuana laws.

## B. The discharged water techs are "employees" and not "agricultural laborers."

### 1. The water techs are "employees" under the Board's traditional interpretation of Section 2(3).

The Act's protections apply to workers who qualify as "employees" under Section 2(3). That provision's definition of "employee" excludes "any individual employed as an agricultural laborer." The Board receives considerable deference in interpreting that provision.[9] Early in its administration of the Act, the Board held, in *Park Floral Co.*,[10] that workers who cultivate plants in artificial environments, like greenhouses,

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[8] *See Gonzalez v. Raich*, 545 U.S. 1 (2005) (holding that the Commerce Clause permits the prohibition of purely local cultivation and use of marijuana because the total aggregate incidence of such activity has a substantial effect on the national market for marijuana). We further note that DOJ and OSHA have asserted jurisdiction over operations like the Employer's, and the Board has held that regulation of an employer by another federal agency under the Commerce Clause was sufficient to establish the Board's statutory jurisdiction. *Catalina Island Sightseeing*, 124 NLRB at 814-15. The Employer's purchases of supplies from interstate retailers like Home Depot would provide additional support for finding statutory jurisdiction, provided that the Region is able to obtain evidence showing that such purchases are not *de minimis*.

[9] *Bayside Enters., Inc. v. NLRB*, 429 U.S. 298, 302 (1977) (such a "conclusion by the Board is one we must respect even if the issue might with nearly equal reason be resolved one way rather than another" (internal quotation marks omitted)).

[10] 19 NLRB 403 (1940).

are covered "employees" and not excluded "agricultural laborers."[11] The *Park Floral* decision involved greenhouse workers (known as "growers") whose duties included cultivating, watering, and cutting plants and flowers, as well as regulating the temperature of the greenhouse.[12] In determining that the Act protected those workers, the Board relied on the "industrial," as opposed to "agricultural," nature of their labor. The Board explained that an "agricultural laborer" under Section 2(3) "is a person employed by the owner or a tenant of a farm on which products in their raw or natural state are produced."[13] While the work of an "agricultural laborer" may include "perform[ing] services on such farm in connection with the cultivation of the soil," the Board found that the cultivation performed by the greenhouse workers was "not done on a farm"; rather, the "[p]lanting, care, and growing of the plants and flowers ha[d] been removed from the farm and from the natural conditions which there obtain, and [were] carried on under artificial conditions and as a specialized process."[14] Thus, the Board concluded that "[t]he work in the greenhouses is industrial in nature rather than agricultural in the common understanding of that term."[15]

Here, the water techs' work is virtually identical to that of the growers in *Park Floral*. Indeed, to the extent that there are any differences, the water techs' work is even more "industrial" in character. For example, unlike greenhouses, which ordinarily rely on natural sunlight, the water techs work in grow rooms entirely lit by artificial means. That allows for careful manipulation of the marijuana plants' growth phases and enables optimal year-round production—something far removed from natural farm conditions. Thus, under the Board's traditional reading of Section 2(3), the Charging Party and Employee A, as well as the Employer's other water techs, are "employees" entitled to the Act's protection.

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[11] *Id.* at 414 (1940); *see also Knaust Bros., Inc.*, 36 NLRB 915, 917-18 (1941) (workers who grow mushrooms in artificial environments, such as temperature-controlled growing houses, are "employees" under Section 2(3)); *Great Western Mushroom Co.*, 27 NLRB 352, 358-59 (1940) (same).

[12] 19 NLRB at 411.

[13] *Id.* at 413-14.

[14] *Id.* at 414 (further noting that plants were grown "in soil-filled containers kept in glass-covered, heat-regulated houses" and that "[p]roduction [was] continuous throughout the year and not affected by the change of the seasons").

[15] *Id.*

**2. The congressional rider that restricts the Board's use of appropriated funds does not apply in this case.**

Each year since 1946, Congress has attached a rider to appropriations legislation for the Board that restricts the agency from using funds for certain purposes.[16] The current rider, which in all relevant respects is identical to the previous riders, states in pertinent part:

> *Provided*, That no part of this appropriation shall be available to organize or assist in organizing agricultural laborers or used in connection with investigations, hearings, directives, or orders concerning bargaining units composed of agricultural laborers as referred to in section 2(3) of the Act of July 5, 1935, and as amended by the Labor-Management Relations Act, 1947, and as defined in section 3(f) of the Act of June 25, 1938 [i.e., Section 3(f) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 203(f)] . . . ."[17]

As the rider states, the Board cannot spend appropriated funds for certain purposes involving "agricultural laborers," as that term is defined under Section 3(f) of the FLSA. The meaning of "agriculture" under Section 3(f) has been extensively examined in judicial decisions and administrative regulations.[18] And the Board has found that, under Section 3(f), duties like those performed by the water techs are "agricultural,"[19] a conclusion supported by Department of Labor regulations.[20] Consequently, in determining whether the rider restricts the Board from acting in the present case, we assume that the water techs are "agricultural laborers" within the meaning of Section 3(f).

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[16] *See Bayside Enters.*, 429 U.S. at 300 & n.6.

[17] Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. 113-235, 128 Stat. 2510.

[18] *See Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 762-63 (1949); 29 C.F.R. § 780.103 *et seq*.

[19] *William H. Elliott & Sons Co.*, 78 NLRB 1078, 1078-80 (1948) (applying Section 3(f) and finding workers who cultivated roses in greenhouses were "agricultural laborers").

[20] 29 C.F.R. § 780.106 ("It is immaterial whether the agricultural or horticultural commodities are grown in enclosed houses, as in greenhouses or mushroom cellars, or in an open field.").

However, the rider has limited applicability. Its plain text requires application of FLSA Section 3(f) only with respect to those Board activities as to which funding is specifically restricted. In addition, it is well established that congressional appropriations riders must be narrowly construed because of the cursory legislative review that such provisions receive[21] and because under "the express rules of both Houses of Congress, . . . appropriations measures may not change existing substantive law."[22] Moreover, the Board is disinclined to exclude workers from the Act's protection, even where express statutory exclusions, including the "agricultural laborer" exception, are concerned.[23] Finally, the rider has never led the Board to overrule *Park Floral*'s holding that greenhouse workers are "employees" under Section 2(3). While the Board in *Elliott & Sons Co.* refused to apply the Act to a unit including greenhouse workers, that case concerned the processing of a representation petition and, for reasons elaborated upon below, is inapposite in an unfair labor practice case like the present matter.[24] Thus, in refusing to apply the *Park Floral* rule, the Board did not adopt a new interpretation of the term "agricultural laborer" under Section 2(3) itself.

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[21] Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 456-57 & n.183, 474 (1989) ("Courts construe appropriations provisions quite narrowly in light of judicial understandings about the character of the appropriations process, in which careful legislative deliberation is highly unlikely."); *see also Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978) (noting that "repeals by implication" are disfavored, particularly when "the subsequent legislation is an *appropriations* measure" (quoting *Comm. for Nuclear Responsibility v. Seaborg*, 463 F.2d 783, 785 (D.C. Cir. 1971)) (emphasis in original) (internal quotation marks omitted)).

[22] *Tenn. Valley Auth.*, 437 U.S. at 155; RULES OF THE HOUSE OF REPRESENTATIVES, 114th Cong., R. XXI(2)(b) (2015), *available at* http://clerk.house.gov/legislative/house-rules.pdf ("A provision changing existing law may not be reported in a general appropriation bill . . . ."); *see also* RULES OF THE SENATE, 114th Cong., R. XVI(4) (2015), *available at* http://www.rules.senate.gov/public/index.cfm?p=RuleXVI.

[23] *Mississippi Chemical Corp.*, 110 NLRB 826, 828 & n.7 (1954) (rejecting broad reading of the "agricultural laborer" exception and stating that "[a]n amendatory act may not be construed to change the original act or section further than expressly declared or necessarily implied"); *see also Vencor Hospital-Los Angeles*, 328 NLRB 1136, 1138 (1999) ("[T]he Board is cautious in finding supervisory status because supervisors are excluded from the protections of the Act. . . . [It] must guard against construing supervisory status too broadly to avoid unnecessarily stripping workers of their organization rights." (internal quotation marks omitted)).

[24] 78 NLRB at 1078-80.

With the foregoing in mind, we conclude that the rider does not apply here because the present case will not entail the Board's use of appropriated funds either (i) "in connection with investigations, hearings, directives, or orders concerning bargaining units composed of agricultural laborers," or (ii) "to organize or assist in organizing agricultural laborers."

**a. This case does not involve Board action "in connection with investigations, hearings, directives, or orders concerning bargaining units composed of agricultural laborers."**

The rider precludes the Board from using appropriated funds "in connection with investigations, hearings, directives, or orders concerning bargaining units composed of agricultural laborers." That restriction is inapplicable here because this case does not concern a "bargaining unit." Although neither the rider nor the Act defines the term "bargaining unit," the Act strongly indicates the absence of one in a case such as this, where no party has invoked the Board's representation procedures and where the employer has not voluntarily recognized an exclusive representative of its employees for the purposes of collective bargaining.

In providing for exclusive representation, Section 9(a) refers to "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a *unit appropriate for such purposes*." That provision thus expressly links the concept of "a unit appropriate for collective bargaining," i.e., a "bargaining unit," to the existence of a designated or selected representative. Further support for that conclusion can be found in Section 9(c). Specifically, Section 9(c)(1)(A)(i), which provides for Board processing of representation petitions, refers to petitions filed by "an employee or group of employees" but does not use the term "bargaining unit." By contrast, Section 9(c)(3) mandates a 12-month bar on representation elections in "any bargaining unit" following a valid election therein. Read together and alongside Section 9(b), which provides for Board determination of an "appropriate unit," those provisions suggest that, in the context of representation elections, a "bargaining unit" arises only after the Board has found a unit appropriate for collective-bargaining purposes.[25]

Moreover, Section 7 recognizes the right to "bargain collectively" as distinct from other protected, concerted activities, as it specifically guarantees the right "to engage in other concerted activities for the purpose of collective bargaining *or* other mutual

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[25] *See Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83, slip op. at 12-13 (Aug. 26, 2011) (summarizing Board representation procedures), *enforced sub nom. Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013).

aid or protection."[26] The right to engage in activities for "other mutual aid or protection" does not require the existence of a bargaining unit.[27]

This interpretation of the rider's language accords with Board precedent following the 1946 enactment of the first appropriations rider. The vast majority of cases applying the rider's incorporation of Section 3(f) for purposes of determining "agricultural laborer" status have been representation cases and so necessarily involved "bargaining units."[28] In the handful of unfair labor practice cases where the Board has applied the rider, the unfair labor practices were clearly related to already-established bargaining units or Section 7 rights closely linked to collective-bargaining.[29]

No certified or voluntarily recognized collective-bargaining representative is involved in the present case. The workers here were unrepresented, and there is no pending petition for a representation election. In addition, the Employer's unlawful actions consisted of prohibiting wage discussions and discharging the Charging Party and Employee A for engaging in such discussions—activity constituting "other concerted activit[y] . . . for the purpose of mutual aid or protection" under Section 7.[30]

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[26] (Emphasis supplied.)

[27] *See NLRB v. Guernsey-Muskingum Electric Co-op., Inc.*, 285 F.2d 8, 12 (6th Cir. 1960) (affirming Board's finding that employer unlawfully discharged employee due to his work-related complaints "even though no union activity [was] involved, or collective bargaining . . . contemplated" (internal quotation marks omitted)).

[28] *See, e.g.*, *Mississippi Chemical Corp.*, 110 NLRB at 827 ("[I]t is admitted that the Board is now precluded, by the rider to its current appropriation act . . . from processing representation cases involving 'agricultural laborers,' as defined in [S]ection 3(f) of the [FLSA.]").

[29] *E.g.*, *Cochran Co.*, 112 NLRB 1400, 1403-06, 1409 (1955) (involving employer's refusal to bargain with union); *Dofflemeyer Bros.*, 101 NLRB 205, 206 (1952) (involving employer's retaliatory discharges in response to concerted walkout by a labor organization to obtain wage increase), *enforcement denied*, 206 F.2d 813 (9th Cir. 1954); *Steinberg & Co.*, 78 NLRB 211, 212-17 (1948) (involving employer's discrimination against workers due to their union membership and activity), *enforcement denied*, 182 F.2d 850 (5th Cir. 1950). We note that the Board did not carefully examine the rider's scope in these cases because it found that the employees were not agricultural laborers, even under the 3(f) standard.

[30] *Parexel International*, 356 NLRB No. 82, slip op. at 4 (Jan. 28, 2011).

Consequently, because this case does not concern a "bargaining unit," it will not entail the Board expending appropriated funds "in connection with investigations, hearings, directives, or orders concerning *bargaining units* composed of agricultural laborers." (Emphasis supplied.)

**b. This case does not involve Board action "to organize or assist in organizing agricultural laborers."**

This case also will not involve the Board using appropriated funds "to organize or assist in organizing agricultural laborers" as prohibited by the rider. As an initial matter, the Board plainly does not "organize" or "assist in organizing" workers of any sort. Rather, Section 7 of the Act expressly grants to *employees* the right to "self organization" and to "form, join, or assist labor organizations," among other things. The Board's statutory role in unfair labor practice cases is to preserve such employee rights. Accordingly, it would be a strained interpretation of the Act to conclude that the Board itself engages in organizational activity when carrying out its statutory duties.

Moreover, even if this phrase is interpreted broadly to apply to the Board's use of funds to protect the activities of agricultural employees, the phrase "organize or assist in organizing" suggests the presence of some activity reasonably linked to a labor organization and not "other concerted activit[y] . . . for the purpose of other mutual aid or protection." In that connection, the Railway Labor Act (the "RLA") is instructive because it is the only federal statute that contains the phrase "organize or assist in organizing."[31] Because the RLA lacks language guaranteeing the right of employees to engage in "other concerted activities" for the purpose of "mutual aid or protection," courts have construed its protections more narrowly than the Act's.[32] Unlike the Act, the RLA is "directed particularly at . . . the initial step in collective bargaining—the determination of the employees' representatives," and so its protections do not extend to employee activities without a direct relationship to unionization.[33] The rider's use of the phrase "organize or assist in organizing" is best interpreted to apply, as under the RLA, to activity closely related to unionization and not to activity protected under the Act's "mutual aid or protection" clause. Since the Charging Party and Employee A

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[31] 45 U.S.C. § 152 Fourth.

[32] *Johnson v. Express One Int'l, Inc.*, 944 F.2d 247, 251-52 (5th Cir. 1991) (lack of "mutual aid or protection" clause in RLA means that nonunion employees covered by that statute do not have a *Weingarten* right to have a coworker present during investigatory interviews).

[33] *Id.* at 252-53 (internal quotation marks omitted).

were discharged for engaging in activity protected by the "mutual aid or protection" clause of Section 7, and not for organizational activities, the rider does not apply here.

Because the rider is inapplicable to this case, Section 2(3) is the sole provision governing whether the water techs are "employees" or "agricultural laborers." As the *Park Floral* rule remains valid where the rider does not apply, the water techs are "employees" under the Act.

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) by prohibiting wage discussions and terminating the Charging Party and Employee A for doing so.[34]

/s/
B.J.K.

ADV.27-CA-146734.Response.HighLevelHealth.[redacted]

[34] The Region is also investigating the Employer's new handbook rules, which it has determined contain several unlawfully overbroad provisions applicable to water techs and other grow facility employees. Assuming that the Region issues complaint on that allegation, the analysis here would support the unlawfulness of the provisions insofar as the water techs are concerned. The status of the other employees does not appear to be in question.

*United States Government*
***National Labor Relations Board***
**OFFICE OF THE GENERAL COUNSEL**

# Advice Memorandum

S.A.M. DATE: November 21, 2016

To: Cornele A. Overstreet, Regional Director
Region 28

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Oliveria Clips, Inc. d.b.a. Great Clips
Cases 28-CA-177975, 28-CA-177978,
28-CA-177979

512-5012-0133-1100
512-5012-0133-1600
512-5012-0133-4400
512-5012-3322

The Region submitted these cases for advice as to whether they are an appropriate vehicle to (1) urge the Board to expand its holding in *Purple Communications, Inc.*[1] to include employee use of fax machines for Section 7 purposes and (2) urge the Board to overturn the discrimination standard articulated in *Register Guard.*[2] We conclude that these cases are an appropriate vehicle to expand the rationale of *Purple Communications* and find that the Employer's prohibition against employees using the Employer's fax machines for nonbusiness purposes on nonworking time is unlawful. We also conclude that the Region should urge the Board to overturn the *Register Guard* discrimination standard and hold that an employer cannot prohibit the use of its equipment for Section 7 purposes if it allows employees to use its equipment for any personal purposes.[3]

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[1] 361 NLRB No. 126, slip op. at 1, 14 (Dec. 11, 2014).

[2] 351 NLRB 1110, 1117-18 (2007), *enforced in relevant part sub nom. Guard Publishing Co. v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009), *reaffirmed as modified*, 357 NLRB 187, 188 & n. 7 (2011).

[3] (b) (5)
(b) (5)

FACTS

**The Employer's Fax Machines and Business Use Policies**

Oliveria Clips, Inc. d.b.a. Great Clips (the Employer) owns and operates 26 hair salons in several cities across the Phoenix metropolitan area. Some of the Employer's salons are separated by more than 70 miles.

Each of the Employer's salons has a fax machine in the salon's break room or in an office adjacent to the break room. The Employer regularly uses the fax machine to circulate information to each salon, such as reports on employee productivity. Employees communicate with the Employer by using the fax machine to, for example, submit requests for vacation days or FMLA paperwork. Employees and supervisors also use the fax machines for personal business, including transmitting documentation related to mortgages, child support, and immigration.

The Employer maintains a policy that states that all salon equipment, including fax machines, are company property and employees are "strictly prohibited from using Company property for any reason other than conducting Company business." The policy further states that "any employee who uses Company property for any reason other than the conducting of Company business is subject to immediate termination."

**The Employer Begins Strictly Enforcing Productivity Goals**

In April 2016,[4] the Employer announced to its employees that it would begin strictly enforcing a company productivity policy. The policy provides that the Employer may deduct a percentage of hair stylists' wages if they are not meeting company goals for seeing clients within a certain allotted time or selling a certain amount of hair care products. Supervisors and managers also met with stylists one-on-one to discuss their productivity and how their pay would be affected as a result of the newly enforced policy.

After the announcement and one-on-one meetings, stylists at the East Guadalupe Road salon began discussing the newly enforced policy. In early June, Stylist A drafted a letter to the Employer objecting to the wage reduction policy. The letter was addressed directly to the Employer and stated, *inter alia*, that "none of us like or think it is fair…to lose percentages of our hourly wages in such a sudden manner when we have earned the raises over the years…" The letter also argued that the

[4] All dates *infra* are 2016 unless otherwise noted.

Employer's expectations of stylists' productivity – in particular the 16 and a half-minute time slot allotted for interacting with each customer – were "nearly impossible to meet" and that the requirement to sell a certain amount of products was "more than absurd." The letter concluded by stating that, "we are only asking for current earned pay to be left alone [or] we will stage a walk out at every salon you own, call the media, and make the public very aware of the mistreatment that we are being faced with," and left blank lines below the text for signatures.

Stylist A shared the protest letter with [redacted] coworkers at the East Guadalupe Road salon. [redacted] coworkers told [redacted] that they discussed the letter with stylists at other locations and that those employees were interested in seeing the letter as well. Since it would be impractical to drive to 25 other salons to share the letter and solicit signatures, Stylist A faxed the letter from a local copy shop to all of the Employer's salons. Stylist A and two coworkers also signed a copy of the letter, and Stylist A then faxed the copy with those three signatures to the East Guadalupe Road salon.

**The Employer Terminates Stylist A and Stylist B after They Send and Receive the Protest Letter Using the Company's Fax Machines**

On [redacted], Stylist A's next scheduled work day, Stylist A arrived at work and [redacted] supervisor told [redacted] that [redacted] needed to speak with [redacted]. Stylist A accompanied [redacted] to the supervisor's office, where a manager was also present. The supervisor told Stylist A, "you faxed this letter from our fax machine and we have proof." The supervisor asked [redacted] to sign an involuntary employment separation form, stating that [redacted] had faxed a "personal message" to multiple locations asking employees to sign a letter that threatened a walkout to protest employee wage reductions. The separation form also stated that the letter was sent to "fax machines which are company property." Stylist A refused to sign the form. The Employer also discharged Stylist B, an employee at a different location, shortly after [redacted] attempted to retrieve the protest letter from [redacted] salon's fax machine in the presence of the salon manager. The Region has concluded that the Employer discharged both stylists in response to their protected concerted activity, in violation of Section 8(a)(1).

**The Employer's Position on Special Circumstances**

The Employer denies that its employees use fax machines in the course of their work and thus asserts that no showing of special circumstances is necessary to justify restricting employees from using its fax machines for personal use on nonwork time. The Employer stated, however, that the "business use only" policy was implemented because, in the past, an employee used a company computer to search the Internet for pornography and there was no company policy in effect to justify that employee's termination. The Employer is also concerned that faxes sent to all salons using the Employer's fax machines and paper could be misinterpreted as a company-sponsored

notice. The Employer also explained that employees may use the company's fax machines for personal reasons if they obtain permission from the Employer.

ACTION

We conclude that these cases are an appropriate vehicle to expand the rationale of *Purple Communications* and urge the Board to find that the Employer's prohibition against employees using the Employer's fax machines for nonbusiness purposes on nonworking time is unlawful. We also conclude that these cases are an appropriate vehicle to urge the Board to overturn the *Register Guard* discrimination standard, return to the prior standard, and hold that an employer cannot prohibit the use of its equipment for Section 7 purposes if it allows employees to use its equipment for any personal purposes. Under that standard, the Employer unlawfully discharged Stylists A and B based on their use of the Employer's fax machines for Section 7 activity.[5]

**A. Similarities Between Fax Communication and Email and Advancements in Technology Weigh in Favor of Extending *Purple Communications* to Employer Fax Machines**

In *Purple Communications*, the Board overruled *Register Guard*'s holding that employees have no statutory right to use their employer's email system for Section 7 purposes and adopted the presumption 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."[6] To justify a total ban on employees' nonwork use of email, including Section 7 use on nonworking time, an employer must demonstrate that "special circumstances make the ban necessary to maintain production or discipline."[7] Where a total ban is not justified, an employer "may nonetheless apply uniform and consistently enforced controls over their email systems to the extent that such controls are necessary to maintain production and discipline."[8] Although the Board's decision in *Purple*

[5] (b) (5) [redacted]

[6] 361 NLRB No. 126, slip op. at 14.

[7] *Id.*, slip op. at 1.

[8] *Id.*; *see T-Mobile USA, Inc.*, 363 NLRB No. 171, slip op. at 2 n. 6, 21-22 (Apr. 29, 2016) (Board adopted ALJ decision finding that employer failed to establish that ban

*Communications* specifically focused on an employer's email system, the Board noted that "[o]ther interactive electronic communications…may ultimately be subject to a similar analysis."[9]

Communication by fax shares many of the same features as email that were discussed by the Board in *Purple Communications*, and these attributes weigh in favor of extending employees' presumptive rights to include using fax machines for Section 7 activities on nonworking time. Like email, sending and receiving faxes is a critical means of Section 7 communications among employees who work for the same employer but at different locations or on different days or shifts, and do not have access to email or the internet at work. Like email, communication over fax permits employees to wait to retrieve or send faxes when they are on nonworking time, and employees can easily ignore faxes that they are not interested in receiving.[10] Additionally, not all employees have access to a fax machine outside of the workplace.[11] Thus, the similarities between email and fax communication weigh in favor of extending the presumptive right of employees to use such means of communication for Section 7 activities on nonworking time.[12]

Furthermore, telephone and fax machine technology has undergone substantial changes in the decades since the Board last considered employees' use of employer telephones. In two 1980's cases that were decided on discriminatory enforcement grounds, *Churchill's Supermarkets* and *Union Carbide Corporation*, administrative law judges suggested in dicta that an employer could bar employees from using telephones for personal use.[13] However, as the Board discussed in *Purple*

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on nonbusiness use of employer communication systems was necessary to maintain production and discipline).

[9] 361 NLRB No. 126, slip op. at 14 n.70.

[10] *Cf. Purple Communications*, 361 NLRB No. 126, slip op. at 15 & n. 72 (noting the similar attributes of email).

[11] *Cf. id.*, slip op. at 6 n. 18 (recognizing that due to costs and other circumstances, "some employees do not privately use any electronic media").

[12] *Cf. Windsor Care Center of Sacramento*, Case 20-CA-168369, Advice Memorandum dated July 20, 2016 at 5-7 (arguing in favor of extending *Purple Communications* to the company-provided internet system).

[13] *Churchill's Supermarkets*, 285 NLRB 138, 139, 155 (1987), *enforced mem.* 857 F.2d 1474 (6th Cir. 1988); *Union Carbide Corp.*, 259 NLRB 974, 980 (1981), *enforced in relevant part*, 714 F.2d 657, 663-64 (6th Cir. 1983).

*Communications*, "telephone systems of 35 years ago…are, at best, distant cousins of the sophisticated digital telephone systems that are now prevalent in the workplace."[14] Indeed, concerns about "tying up the line" would have been widely understood as valid when telephone systems had limited capacity and function, as opposed to now with the advent of multiple lines, call waiting, voice mail, and other modern characteristics.[15] Similarly, today, fax machines operating over the internet, or even those that use a traditional analog phone line, queue incoming transmissions as necessary, and users can program the next outgoing fax even as the machine is sending or receiving another one. Thus, as technology has advanced, the management interests at issue in regulating employee use of telephones and fax machines have changed. And to the extent that *Churchill's Supermarket* and *Union Carbide* can be read to uphold an employer's ban on personal use of an employer's telephone system or fax machines that operate over a telephone system, they should be overruled.

These facts in particular make a compelling case for applying Section 7 protections to employer fax machines. Here, stylists work for the same company at 26 different locations and may be situated as much as 70 miles apart from one another, yet they have no access to employer email as a means of communicating with each other. As was the case here, it would be impracticable if not impossible for employees to visit every salon location to engage with their coworkers for Section 7 purposes. The stylists are also unlikely to have personal contact information for all other stylists. In this case, Stylist A knew that [redacted] concern over the Employer's pay structure was of grave concern to [redacted] immediate coworkers. By faxing the protest letter to coworkers at other salons, including Stylist B, Stylist A was attempting to solicit further support and potentially engage with the Employer on behalf of a larger constituency. Fax machines for these employees in particular are a valuable tool that permits them to communicate with each other just as in different work environments, email communication might be the natural way for other types of employees to engage in Section 7 activity.

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[14] *Purple Communications*, 361 NLRB No. 126, slip op. at 9. Although the Board noted the similarities between email and phones and questioned the broad dicta in *Churchill's Supermarkets* and *Union Carbide*, the Board ultimately concluded that the case before it did not squarely present the issue of employees' personal use of employer telephones and declined to address it. *See id.*, slip op. at 9 & n. 38.

[15] *See id.*, slip op. at 9 n. 38; Brief of the General Counsel to the Board in *Purple Communications*, Cases 21-CA-095151, et al., dated June 16, 2014 at pp. 9-10 n. 4.

**B. The Employer's "Business Use Only" Policy Is Unlawful under an Expansion of *Purple Communications***

The Employer asserts that its employees do not have access to the Employer's fax machines in the course of their work. The Region's investigation revealed, however, that employees use the fax machines located in salon break rooms or adjacent offices to communicate with the Employer by, for example, submitting requests for vacation time or FMLA documentation. And there is no dispute that the Employer maintains a policy that all company equipment, including fax machines, can be used only for company business and employees are subject to termination for violating this policy. Since the evidence demonstrates that employees have access to the Employer's fax machines in the course of their work, the Employer's "business use only" policy would violate the Act if *Purple Communications*' holding is extended to include fax machines, unless the Employer can establish special circumstances.

As the Board held in *Purple Communications*, in order to establish a "special circumstances" defense to its prohibition against Section 7 protected use of its electronic communications systems, an employer "must demonstrate the connection between the interest it asserts and the restriction" it imposed.[16] It is "the rare case where special circumstances justify a total ban" on personal use.[17] Where a total ban is not justified, the Employer may apply uniform and consistently enforced controls that are necessary to maintain production and discipline.[18] However, with respect to such controls, special circumstances will be established "only to the extent that those interests are not similarly affected by employee…use that the employer has authorized."[19]

Here, the Employer claims that it created its "business use only" policy to prevent employees from viewing pornography on company equipment and that it is concerned that faxes sent to all salons using the Employer's fax machines and paper could be misinterpreted as a company-sponsored notice. Neither of the Employer's claims justifies a complete ban on personal use of its fax machines. As to the Employer's interest in preventing employees from accessing pornography, the Employer could

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[16] *Purple Communications*, 361 NLRB No. 126, slip op. at 14 ("The mere assertion of an interest that could theoretically support a restriction will not suffice").

[17] *Id.*

[18] *Id.*

[19] *Id.* (footnote omitted).

design a narrower restriction to prevent such inappropriate use of its equipment without restricting use for Section 7 activities on nonwork time, and, in any event, this concern has little relevance to fax communication. As to the second concern, a reasonable employee would not presume that every fax sent over the Employer's equipment or received at a salon fax originates with the Employer. In this case, for example, the protest letter was addressed to the Employer and immediately referred to "our pay reduction," clearly indicating that the fax originated with employees. Therefore, to the extent that the Employer has offered either concern as justification for its prohibition, it has failed to demonstrate a connection between its interests and its total ban on personal use of salon fax machines.[20]

Further, to the extent that the Employer claims to permit personal use of the salon fax machines provided that employees obtain prior approval, a work rule that requires employees to secure permission from their employer prior to engaging in Section 7 activities on nonwork time generally is unlawful because it chills employees from engaging in protected activities.[21] Although it is not clear that the Employer can even show a uniform and consistently applied prior-approval requirement, in any event, the Employer has not demonstrated how such a requirement is necessary to maintain production and discipline. In fact, it is difficult to understand how use of the fax machine for Section 7 purposes would affect production and discipline any more than the personal use that the Employer previously has authorized. As it stands, absent a legitimate business reason for requiring prior approval of all personal use of the salon fax machines on nonwork time, the Employer's policy infringes on the exercise of employees' Section 7 rights.[22]

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[20] Although the Employer has not raised the issue of the costs associated with employee use of its fax machines, we note that the Board in *Purple* rejected the argument that an employer's interest in its personal property would permit an employer to lawfully ban all employee use of its equipment for Section 7 purposes. *See id.*, slip. op. at 10. The Board overruled *Johnson Technology*, 345 NLRB 762 (2005) (holding that an employer's property rights in a sheet of recycled copier paper permitted the employer to prohibit employee use of that paper for publicizing a union meeting), noting that "such an absolutionist approach to property rights cannot be reconciled with the Act." *Id.*, slip op. at 10 n.47.

[21] *See Brunswick Corp.*, 282 NLRB 794, 794-95 (1987) (finding unlawful an employer rule that required employees to obtain permission before engaging in union solicitation in work areas during non-work time, and in the lunchroom and lounge areas during non-work time); *TeleTech Holdings, Inc.*, 333 NLRB 402, 403 (2001) (finding unlawful rule requiring prior authorization to distribute literature).

[22] *Cf. Lafayette Park Hotel*, 326 NLRB 824, 827 (1998) (finding lawful an employer rule requiring employees to obtain permission to use the restaurant or cocktail lounge

## C. The Board Should Return to the Pre-*Register Guard* Discrimination Standard

The Region should also use these cases as a vehicle to urge the Board to return to the discrimination standard prevailing prior to *Register Guard* and find that the Employer unlawfully terminated Stylists A and B under the prior standard.

In *Purple Communications*, the Board overruled *Register Guard*'s holding regarding employees' rights to use employer email systems, but did not address *Register Guard*'s definition of discrimination under Section 8(a)(1).[23] In *Register Guard*, the Board redefined discrimination under Section 8(a)(1) as the "unequal treatment of equals."[24] Under this standard, an employer violates Section 8(a)(1) if a policy, on its face, draws lines based on Section 7 activity but does not violate Section 8(a)(1) by distinguishing between business and nonbusiness use, charitable and noncharitable solicitations, personal and commercial solicitations, individual and organizational solicitations, and solicitations and mere talk.[25]

Prior to *Register Guard*, the Board consistently held that when an employer permits employees to engage in nonwork-related solicitations or other use of employer property, it must similarly allow Section 7-related uses. For example, in *Blue Circle Cement Co.*, the Board found that the employer violated Section 8(a)(1) by discharging an employee who used the company's photocopier to copy materials related to his protected, concerted activity while the employer permitted employees to use photocopiers for other nonwork-related purposes, such as copying materials related to church events and little league baseball schedules.[26] The standard adopted in

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to entertain friends and guests because reasonable employees would not interpret the rule as requiring approval for Section 7 activity and there were legitimate business reasons for requiring the permission), *enforced mem.* 203 F.3d 52 (D.C. Cir. 1999).

[23] *See Purple Communications*, 361 NLRB No. 126, slip op. at 5 n.13.

[24] 351 NLRB at 1117.

[25] *Id.* at 1118. The Board also noted that an employer would violate the Act if it permitted employees to use email to solicit for one union but not another, or if it permitted solicitation by antiunion employees but not by prounion employees. *Id.*

[26] 311 NLRB 623, 624-25, 628 (1993), *enforced,* 41 F.3d 203 (5th Cir. 1994); *see also Benteler Industries,* 323 NLRB 712, 714 (1997) (finding employer violated Section 8(a)(1) by refusing employees' requests to post union-sponsored literature on bulletin boards while permitting other employees to post personal, nonwork-related notices),

*Register Guard* fails to recognize that the essence of a Section 8(a)(1) violation is interference with Section 7 rights, not discrimination.[27] The *Register Guard* standard ignores the fact that Section 7 guarantees employees the affirmative right to engage in concerted activity for mutual aid or protection, not just the right to be free from discrimination, and that the affirmative right should only be restricted to the extent necessary to accommodate an employer's interest in production and discipline.[28] An employer's discriminatory treatment of Section 7-related communications is relevant to a Section 8(a)(1) violation only because allowance of other nonwork communications undermines the employer's business justification for interfering with Section 7 rights.[29]

The Region concluded that the Employer violated Section 8(a)(1) under *Register Guard*'s discrimination standard because it has tolerated some personal use of its fax machines in the past, but applied the policy to terminate Stylists A and B for using its fax machines for Section 7 activity. Nonetheless, the Employer could argue that it permits employees to use salon fax machines for personal financial or legal matters, but it prohibits any solicitation over its equipment. In that case, the policy would not entail discrimination strictly along Section 7 lines. Thus, under *Register Guard*, the Employer's reframed policy would not violate Section 8(a)(1) even though it would in effect prohibit most Section 7 activity while tolerating other personal use of its equipment. Therefore, the Region should use these cases as a vehicle to argue that, in order to protect Section 7 rights, the Employer should not be able to make such a distinction and should only be permitted to restrict Section 7 activity to the extent necessary to accommodate its interest in production and discipline.

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*enforced mem.* 149 F.3d 1184 (6th Cir. (1998); *Saint Vincent's Hospital*, 265 NLRB 38, 40 (1982) (prohibiting distribution of union literature while permitting personal solicitations), *enforced in relevant part*, 729 F.2d 730 (11th Cir. 1984). Prior to *Register Guard*, in cases involving access by nonemployees, the Board recognized two exceptions where disparate treatment did not constitute unlawful discrimination under Section 8(a)(1): where an employer permitted only a small number of isolated "beneficent acts"; and where solicitation approved by the employer related to its business functions and purposes, such as a blood drive in a hospital setting. *See Lucile Salter Packard Children's Hospital at Stanford v. NLRB*, 97 F.3d 583, 587-88 (D.C. Cir. 1996), *enforcing* 318 NLRB 433 (1995).

[27] *Register Guard*, 351 NLRB at 1129 (Liebman and Walsh dissenting).

[28] *Id.* at 1123-24, 1129 (Liebman and Walsh dissenting) (relying upon *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945)).

[29] *Id.* at 1129 (Liebman and Walsh dissenting).

Accordingly, the Region should issue complaint, absent settlement, consistent with the foregoing.

/s/
B.J.K.

ADV.28-CA-177975.Response.GreatClips [redacted]

*United States Government*
*National Labor Relations Board*
**OFFICE OF THE GENERAL COUNSEL**
# Advice Memorandum

S.A.M. DATE: February 10, 2015

TO: James G. Paulsen, Regional Director
Region 29

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: CSC Holdings, Inc. and Cablevision Systems New York City Corp.
Case 29-CA-135822

524-3350-2800
530-6067-2050-4200
530-6067-2050-4900
530-6067-2060-0100
530-6067-2080-3700
530-6067-2090
596-0420-5500
596-0440-0100

This case was submitted for advice as to whether the Employer violated Sections 8(a)(3) and (5) by creating and maintaining a disparity in wages and total compensation between represented and unrepresented employees while, at the same time, using these disparities in an unlawful anti-Union campaign. We agree with the Region that the Employer violated Section 8(a)(5) by its discriminatorily-motivated bargaining position that unit employees can only receive a total compensation package that is less than that given to unrepresented employees, given its unlawful conduct away from the bargaining table. We further conclude, however, that any Section 8(a)(3) allegation based solely on the Employer's unlawful denial of the 2012 wage increases is barred by Section 10(b) of the Act.

## FACTS

For a more extensive review of the facts prior to mid-2013, see the Administrative Law Judge's Decision in Case 02-CA-085811, et al., JD(NY)-47-14 (December 4, 2014). In brief, for more than three years, beginning after the Union began organizing employees in Brooklyn in late 2011, the Employer has engaged in a campaign to defeat or decertify the Union in Brooklyn, the Bronx, and elsewhere, a campaign that has involved unlawful conduct already the subject of two consolidated complaints.

In late January 2012, the Union was elected as the representative of the Employer's Brooklyn employees. By this time, the Union was also in the midst of an organizing campaign amongst the Employer's Bronx employees. In early February 2012, the Employer's CEO made a televised speech to all of its unrepresented

employees. In that speech, the Employer's CEO talked about a number of changes the Employer intended to implement, including raising employee compensation. The CEO then said he was "disappointed" by the Brooklyn vote for the Union, and that he thought that if he had made the changes he was discussing a year earlier, that "maybe that vote would have been different in Brooklyn." The Administrative Law Judge (ALJ) in Case 02-CA-085811, et al., in finding the subsequent wage increases unlawful, found that the CEO's speech clearly demonstrated that Respondent intended to make the changes necessary to thwart further unionization (i.e., wages and benefits increases), and that the speech was "a virtual admission that these raises and benefits were motivated by Respondent's desire to thwart unionization throughout the footprint, including in the Bronx."

In mid-April 2012, during the Union's organizing campaign in the Bronx, the Employer's CEO gave another speech by teleconference to all of its unrepresented employees. He gave employees an update on changes the Employer intended to make, including new pay levels, grade changes (all affected employees would be moving up a salary grade), and career progressions, under which employees would receive wage increases, increased benefits, and a rollback of health insurance co-pay rates. He said that these changes would result in wages increases of $15 million per year. In late April 2012, the CEO held a meeting with the Employer's Bronx employees, in which he reiterated the new wages and benefits increases, and said that, with the Union, implementing new changes would have to go through the Union and the Employer would have to get the Union's permission.

The wages and benefits changes became effective May 1, 2012, with unrepresented employees receiving average wage increases of 14 to 15%, with additional benefits increases, including reduced health insurance co-pay rates.[1] The Employer did not grant any wage increases to its Brooklyn employees, or offer any wage increases to the Union.

The Union filed a representation petition for a unit of Bronx employees, and an election was scheduled for late June 2012. Two days before the election, the Employer's CEO again met with the Bronx employees to urge them to vote against the Union in the representation election. He emphasized the wages and benefits increases the employees had received, and said that:

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[1] The Employer asserts that the increased wages and benefits were accompanied by a quid pro quo of higher performance standards and a greater risk of discharge. There is no evidence in the record of any such linkage, nor did the Employer make this argument in litigating Case 02-CA-085811, et al. Rather, as found by the ALJ in that case, there was "compelling evidence that Respondent's decision to announce and implement wage increases was motivated by the intent to thwart union organization."

> As it stands now, Bronx employees can speak directly with management to discuss any issues, good or bad, without union interference. This direct relationship is what enables management to implement positive changes quickly, in a rapidly changing technological and competitive environment. Unfortunately, this is not the case for the employees in Brooklyn who voted to let the [Union] speak for them, because the Company cannot unilaterally increase their pay or improve their benefits, as those issues are now subject to negotiation with the union. In fact, since January when the union was voted in to represent the Brooklyn employees, nothing positive has happened.

The CEO also told the Bronx employees, "We do not want to leave you behind." After the meeting ended, there were questions and answers between the CEO and employees. One employee asked, "Are you really going to leave Brooklyn behind?" The CEO answered, "Yes, why would I train and invest in our employees when I have to relate to the Union and not to employees?"

The Union lost the Bronx representation election by a margin of 121 to 43.

Based on these events, the ALJ in Case 02-CA-085811, et al., concluded that there was "compelling evidence that Respondent's decision to announce and implement wage increases was motivated by the intent to thwart union organization." And, while not alleged or litigated in Case 02-CA-085811, et al., the same evidence also demonstrates that the denial of the wage increases to the Brooklyn unit employees was discriminatorily motivated, to punish them for having selected the Union.

Beginning in May 2012, the Employer and the Union began negotiations for a collective-bargaining agreement covering the Brooklyn unit. At the outset of negotiations, the Union made a complete proposal, including wages and benefits. The Employer made no economic proposals at this time and proposed that the parties bargain first only over non-economic issues, not discussing economic issues until all non-economic issues were resolved. The Region has concluded that the Employer insisted on only bargaining over non-economic issues, and refused to discuss economic issues from May 2012 to March 2013. During this period, the parties reached a large number of tentative agreements on a variety of non-economic subjects, including grievance arbitration, union security, payroll deduction of union dues, management rights, and contracting.

After the Union filed a series of unfair labor practice charges between July 2012 and August 2013, Regions 2 and 29 issued complaint (consolidated in Region 29) in Case 02-CA-085811, et al. The consolidated complaint alleged, *inter alia*, that the Employer violated the Act by: (1) granting the wage increases to its Bronx employees; (2) promising benefits if employees did not select the Union; (3) threatening to reduce benefits and impose more onerous working conditions if employees did select the

Union; (4) discharging 22 striking employees; and (5) surface bargaining, including by refusing to bargain over economic issues until agreement was reached on all non-economic matters from May 2012 until March 2013. There was no allegation in any of the charges, or in the consolidated complaint, that the denial of the wages and benefits increases to the Brooklyn employees violated the Act, and the Region expressly sought no remedy as to the Employer's Brooklyn unit employees not receiving the wage increases unlawfully granted to the Employer's unrepresented Bronx employees. The ALJ found violations on all of these allegations, except that he found no surface bargaining. In particular, the ALJ found that the Employer did not unlawfully insist on only bargaining over non-economic issues and refuse to bargain over economic issues. The Region will be filing exceptions to the ALJ's dismissal of this allegation.

In April 2013, the Employer made its first wage proposal, which provided for a small formal wage increase for the Brooklyn unit employees -- a 1.5% increase on an employee's anniversary date, and a 3% increase upon placement into a higher grade -- less than unit employees were already due to receive as regular merit increases, and far less than the 14-15% average wage increases granted to the unrepresented employees in May 2012. In July 2013, the Employer made another wage proposal -- a 3% increase in each of the first two years, and a 5% increase if an employee is progressed into a higher grade, with no guarantee of any such grade increases -- still far less than the amount previously granted to the unrepresented employees. In September 2013, the Employer made a third wage proposal -- a 3.5% increase in each of the first two years, and a 6.5% increase if an employee is progressed into a higher-graded position, also with no guarantee of any such grade increases -- again far less than the amount previously granted to the unrepresented employees. The Employer did not make any new wage proposals between September 2013 and November 2014.

The parties reached additional tentative agreements on other subjects, including an enhanced health insurance benefit higher than that given other employees (including the unrepresented Bronx employees). In total, the parties have reached at least 53 tentative agreements, as well as several others expressly conditioned on reaching a package agreement including the open issues. The parties are far apart on the few remaining open issues, however, which include hours of work, discipline and discharge, and wages.

In the summer of 2014, the Employer began a renewed anti-Union campaign in the Brooklyn unit. The Employer replaced its Brooklyn managers with the managers from the Bronx who were in place when the Union lost the representation election there; the new management team immediately began to speak with employees at weekly meetings about the value of not having a union, and generally disparaged the Union. The Employer discharged a key Union supporter, and disciplined another. The Employer also made certain unilateral changes, solicited employee complaints and grievances, promised its employees increased benefits and improved terms and

conditions of employment if they abandoned their support for the Union, and threatened to arrest or cause the arrest of its employees if they engaged in protected Union activity.

In September 2014, the Employer conducted an unlawful poll of employees, asking whether they still wanted to be represented by the Union.[2] The day before the unlawful poll, the Employer's CEO held a mandatory meeting where he made several unlawful statements, including: (1) threatening that the employees in Brooklyn would continue to receive a lower wage rate than unrepresented employees, would lose certain benefits, and, impliedly, would lose employment, if the employees continued to support the Union; and (2) promising to increase employee pay, and to pay the Union to disclaim interest in representing the Brooklyn unit employees, if the employees voted against the Union. In particular, the Employer's CEO expressly told employees that "issues like parity and pay, et cetera, do not expect Cablevision to change its position on that" and, in response to an employee's question as to what employees had to do to get the higher wages, "This vote tomorrow is the best idea I can come up with at the moment.... If I were there I'd tell you, you can do this in order to make money."[3]

Based on charges filed between August and October 2014, the Region issued a consolidated complaint alleging the above conduct to be unlawful.[4] This consolidated complaint is currently scheduled for hearing in April 2015.

Beginning in the summer of 2014, the Employer emphasized at the bargaining table that it would not agree to wage parity, ostensibly because of the "value" of the parties' tentative agreements, including those over non-economic issues. The Employer's bargaining representatives expressly acknowledged that their valuation of

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[2] The Employer claims that it held this poll because it was "confused" about the Union's continuing majority support. In this regard, in late July 2014, the Union proferred a petition supporting the Union's bargaining position, signed by approximately 75% of the bargaining unit. Soon thereafter, the Employer claims, it was informed that some employees had circulated a petition, signed by approximately 38% of the unit, seeking to have the Employer withdraw recognition from the Union.

[3] According to the Employer, the vote in the unlawful poll showed that the Union no longer retains majority support.

[4] In October 2014, a decertification petition was filed by a Brooklyn unit employee. The Regional Director dismissed the decertification petition, as the pending unfair labor practice charges prevented a question concerning representation. The Employer has a pending request for review of that dismissal.

the parties' tentative agreements was subjective, and that they were "just making judgments" about how the tentative agreements should affect their wage proposal.

In November 2014, the Union asked in bargaining if the Employer would grant Brooklyn employees wage parity if they gave up the tentatively-agreed enhanced health insurance benefit. The Employer's bargaining representative said "No," but indicated that such a move might have the effect of "moving the needle" on wages. The Union said it was only interested in trading the benefit for wage parity with the unrepresented employees.

At the parties' next bargaining session, in December 2014, the Employer made its first new wage proposal since September 2013. The Employer proposed that, if the Union gave up the tentatively-agreed enhanced health insurance benefit, the unit employees would get a slightly larger wage increase than it had previously proposed -- a 4.5% increase in each of the first two years, instead of 3.5% -- although still far less than the amount previously granted to the unrepresented employees.

The Employer also gave the Union a chart assigning dollar values to certain of the bargaining items as to which the parties had previously tentatively agreed. The Employer stated that it was willing to offer bargaining unit employees a total package valued up to the amount that, in the Employer's evaluation, was equal to the total package given to unrepresented employees. The Employer acknowledged the subjective nature of its valuations and asserted that, if the values it used for the tentative agreements were inflated, that only helped the Union, if it was willing to trade them for wages and benefits.

After the Union asked questions about this proposal, and made a formal information request for the data used to create the values the Employer used in its chart, the Employer clarified that its proposal was not strictly based on just its evaluation of the monetary costs of the various tentative agreements to the Employer, but also on the Employer's subjective estimates of the value of the tentative agreements (including those over non-economic issues) to the employees and the Union, above and beyond the cost to the Employer, as well as on other, unidentified, "secondary factors." The Employer reiterated that it was focused on "overall parity" between unit members and the Employer's unrepresented employees. The consequence of this position was that unit members could only receive a total monetary package approaching that of the unrepresented employees if the Union were to forgo most or all of the tentative agreements In other words, since the Employer's valuation of "overall parity" was based on the cost to the Employer *plus* its subjective estimate of the additional "value" of non-economic items to employees and the Union, the total monetary compensation available to bargaining unit employees would necessarily be less than that given to the unrepresented employees, unless the Union were willing to forgo all or most of the parties' tentative agreements.

Throughout the fall and winter of 2014-2015, the Employer's bargaining representatives continued to make clear its firmly-held position that the Employer would not agree to any collective-bargaining agreement that provided for a total package that exceeded the compensation received by unrepresented employees. Thus, for example, in September 2014, an Employer bargaining representative stated that they were "not prepared to accept" "parity plus." In December 2014, one Employer bargaining representative said, "there's only so much we'll pay for the contract, it has to be equal to what we otherwise spend in the footprint," followed by another Employer bargaining representative saying, "If you look at the values, they have to be adjusted, we have to look at them since the value of those items exceed the value of the footprint salary, and it's never been your or our intention to be in a situation in which we had a value to Brooklyn which was greater than the value to the footprint in terms of dollars." And, in January 2015, an Employer bargaining representative said, "we have to make sure these numbers are properly discounted or prorated so that if we're going to be getting to wage parity, we want to make sure it doesn't go over wage parity, so these numbers have to be slightly discounted."

On August 28, 2014, the Union filed the charge in the instant case, alleging that the Employer violated Sections 8(a)(3) and (5) by engaging in bad faith bargaining regarding wages, and by discriminatorily failing and refusing to pay the Brooklyn employees the same or similar wages as all other employees in the company because of the Brooklyn employees' decision to unionize.

## ACTION

We conclude that the Employer violated Section 8(a)(5) by its discriminatorily-motivated bargaining position that unit employees can only receive a total compensation package that is less than that given to unrepresented employees, given its unlawful conduct away from the bargaining table. We further conclude, however, that any Section 8(a)(3) allegation based solely on the Employer's unlawful denial of the 2012 wage increases is barred by Section 10(b) of the Act.

Section 8(d) does not compel the participants in a bargaining relationship to reach agreement, but they must exhibit an intent to reach an accord.[5] Satisfaction of this obligation is not met by a party's commitment to execute a contract only on its own terms.[6] Rather, there must be "the serious intent to adjust differences and to

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[5]*NLRB v. Herman Sausage Co., Inc.*, 275 F.2d 229, 231, *rehearing denied* 277 F.2d 793 (5th Cir. 1960), *enforcing* 122 NLRB 168 (1958).

[6]See *Wal-Lite Div. of U.S. Gypsum Co.*, 200 NLRB 1098, 1101 (1972), *enforcement denied on other grounds*, 484 F.2d 108 (8th Cir. 1973).

reach an acceptable common ground."[7] Determining whether a party had the proper intent requires scrutiny of the totality of its conduct, both at and away from the bargaining table.[8] Furthermore, "[a]ll aspects of. . . bargaining and related conduct must be considered in unity, not as separate fragments each to be assessed in isolation."[9] And, although an employer may seek concessions without violating Section 8(a)(5),[10] concessionary demands may be unlawful if they are "designed to frustrate agreement on a collective bargaining contract."[11]

In evaluating the Employer's conduct, it is well established that the Board may use conduct that occurred prior to the 6 month Section 10(b) period as background evidence to shed light on a respondent's motivation for conduct within the 10(b) period, so long as the General Counsel's case does not rely solely on the evidence proffered as background evidence.[12] Thus, the Employer's current conduct must be evaluated in light of its long course of unlawful anti-Union conduct, including the denial of the 2012 wage increases.

As a general rule, absent an unlawful motive, an employer may give wage increases to its unrepresented employees without making such wage increases applicable to employees represented in collective bargaining by a union.[13] The Board

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[7] *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 485 (1960). *See also NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952).

[8] *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984); *American Stores Packing Co.*, 142 NLRB 711, 720 (1963), *enforced* 58 LRRM 2635 (10th Cir. 1965); *Modern Manufacturing Co., Inc.*, 292 NLRB 10, 11 (1988).

[9] *"M" System, Inc.*, 129 NLRB 527, 547 (1960).

[10] *See, e.g., Concrete Pipe & Products Corp.*, 305 NLRB 152, 153 (1991), *review denied* 983 F.2d 240 (D.C. Cir. 1993).

[11] *Reichhold Chemicals*, 288 NLRB 69 (1988), *reconsidering* 277 NLRB 639 (1985), *review denied in pertinent part* 906 F.2d 719, 726-27 (D.C. Cir. 1990).

[12] *See, e.g., Machinists Local 1424 (Bryan Mfg. Co.) v. NLRB,* 362 U.S. 411, 416-417 (1960); *Grimmway Farms,* 314 NLRB 73, 74 (1994) *enforcement denied in part on other grounds* 85 F.3d 637 (9th Cir. 1996) (the Board considered a work stoppage outside the 10(b) period as background evidence for a respondent's refusal to rehire employees); *Douglas Aircraft Co.,* 307 NLRB 536, fn. 2 (1992) *enforced* 66 F.3d 336 (9th Cir. 1995) (the Board considered pre-10(b) period discipline as evidence of animus to evaluate a discharge within the 10(b) period).

[13] *See, e.g., Shell Oil Company,* 77 NLRB 1306, 1310 (1948).

has made it clear, however, that an employer violates the Act by discriminatorily denying represented employees wages or benefits granted to unrepresented employees, while failing or refusing to offer such wages or benefits in negotiations.[14]

Thus, for example, in *South Shore Hospital*, an employer gave wage increases to its unrepresented employees, but discriminatorily did not offer the wage increases to the union in collective-bargaining negotiations. As here, the employer initially refused to bargain over economic issues at all -- in that case for approximately six months. Unlike here, the employer then offered wage parity to the union, but without applying the wage increases retroactively to make the represented employees whole. The Board found that the employer's discriminatorily-motivated withholding of the wage increases and bad-faith bargaining violated Sections 8(a)(3) and (5) of the Act, particularly noting that the employer there persisted in its bad-faith conduct by making clear to the union that it would not grant retroactivity under any circumstances. The Board emphasized that such conduct unlawfully confronts the union with a Hobson's choice: the union can either capitulate to the employer's discriminatory bad-faith bargaining position, and thereby abdicate in large measure its statutory role as an employee representative, or it can remain without any contract at all while the unit employees continued to suffer the loss of wages and benefits being enjoyed by other employees -- wages and benefits which would have been theirs had they not selected the union. Whichever path the union chooses, it can only lead to undermining it in the eyes of the employees as an effectual employee representative. And, as the employer's withholding of wages and benefits was an integral part of its unlawful course of conduct, it must also be viewed as repugnant to statutory policy.[15] Similarly, in *Chevron Oil Co.*,[16] the Board found that an employer violated the Act by failing to bargain in good faith, and discriminatorily withholding from unit employees wage increases and improved benefits that it granted to its unrepresented employees.

In the instant case, the Employer has done precisely what the Board found unlawful in *South Shore Hospital* and *Chevron Oil*. In May 2012, the Employer gave

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[14] *See, e.g., South Shore Hospital*, 245 NLRB 848, 857-62 (1979), *enforced*, 630 F.2d 40 (1st Cir. 1980); *Chevron Oil Co.*, 182 NLRB 445, 449-50 (1970), *enforcement denied in pertinent part on other grounds* 442 F.2d 1067, 1074 (5th Cir. 1971); *Fieldcrest Cannon*, 318 NLRB 470, 471, 560-63 (1995), *enforcement denied in pertinent part* 153 LRRM 2617, 2625-35 (4th Cir. 1996); *Eastern Maine Medical Center*, 253 NLRB 224, 241-247 (1980), *enforced* 658 F.2d 1, 7-10 (1st Cir. 1981).

[15] *South Shore Hospital*, 245 NLRB at 861, quoting *Chevron Oil Co.*, 182 NLRB at 450.

[16] 182 NLRB at 449-50.

the unrepresented employees wage increases to thwart the Union organizing campaign, and denied the wage increases to the Brooklyn unit employees to punish them for selecting the Union or, in the words of the Employer's CEO, to leave the Brooklyn unit employees behind and ensure that "nothing positive" happened for them. When the parties began negotiations, the Employer insisted on only bargaining over non-economic issues for close to a year. When the Employer finally made its first wage proposal in April 2013, its proposal was far less than the wage increases granted to the unrepresented employees, and only provided for a small formal wage increase that would have been less than unit employees were already due to receive as regular merit increases. The Employer slightly increased it wage proposal twice in 2013, but always to an amount that was still far less than the amount previously granted to the unrepresented employees. Thereafter, the Employer made no new wage proposals for more than a year, emphasizing during this period that it would not agree to wage parity, ostensibly because of the "value" of the parties' tentative agreements, including those over non-economic issues. When the Employer finally did make a new wages proposal in December 2014, it offered only a slight wage increase, still far less than the amount previously granted to the unrepresented employees, and only on the condition that the Union concede the health insurance benefit to which the parties had already tentatively agreed. Most importantly, the Employer continued to adhere to its firmly-held position that the Employer would not agree to any collective-bargaining agreement that provided for a total package that exceeded the compensation received by unrepresented employees, based on the Employer's subjective and inflated valuation of the parties' tentative agreements.

The Employer's animus and discriminatory motivation is clear. In the first wave of unlawful employer conduct, addressed in Case 02-CA-085811, et al., the Employer unlawfully granted the wage increases to the unrepresented employees, promised benefits to employees if did not select the Union, threatened to reduce benefits and impose more onerous working conditions if employees did select the Union, and discharged 22 striking employees. Then, in the renewed anti-Union campaign that began in the summer of 2014, the Employer replaced its Brooklyn managers with managers from the Bronx who immediately began disparaging the Union. The Employer discharged a key union supporter, and disciplined another. The Employer made certain unilateral changes, solicited employee complaints and grievances, promised its employees increased benefits and improved terms and conditions of employment if they abandoned their support for the Union, and threatened to arrest or cause the arrest of its employees because they engaged in protected Union activity. Finally, in September 2014, the Employer conducted an unlawful poll of employees, and the Employer's CEO threatened the employees in Brooklyn that they would continue to receive a lower wage rate than unrepresented employees, would lose certain benefits, and, impliedly, would lose employment, if the employees continued to support the Union, and promised to increase the Brooklyn employees' wages (and to

pay the Union to disclaim interest in representing the Brooklyn unit employees), if the employees voted against the Union.[17]

The connection between the Employer's bargaining position and its anti-Union campaign is perhaps best exemplified by the Employer's CEO's statements before its unlawful poll that "issues like parity and pay, et cetera, do not expect Cablevision to change its position on that" and, in response to an employee's question as to what employees had to do to get the higher wages, "This vote tomorrow is the best idea I can come up with at the moment.... If I were there I'd tell you, you can do this in order to make money." That message was entirely consistent with the Employer's bargaining position that, under its concept of "overall parity" and its use of its subjective "costs plus value" valuations, unit employees would necessarily receive less than other employees, and less than the same employees would have received if they had not selected the Union. These messages, that employees will always receive lower wages and benefits if they want to continue to be represented by the Union, and that the only way they can approach the wages and benefits they would otherwise have gotten without the Union would be to forego collective bargaining, are inimical to the Employer's obligations under Section 8(a)(5).

Based on the above analysis, we would also have found that the Employer violated Sections 8(a)(3) of the Act by its denial of the wage increases to the Brooklyn unit employees represented by the Union, if this conduct was the subject of a timely charge. As discussed below, however, we conclude that any complaint allegation regarding the Employer's conduct in 2012 and 2013 is barred by Section 10(b) of the Act.

Section 10(b) requires that a charge be filed no later than six months after the commission of the allegedly-violative act. This period begins to run when the charging party receives clear and unequivocal notice, whether actual or constructive, of the acts that constitute the alleged unfair labor practice.[18]

Here, the initial denial of the wage increases occurred in May 2012, almost two years before the 10(b) period in the instant case began in February 2014. The Union

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[17] Given this entire course of unlawful conduct, the Employer demonstrated its anti-Union animus and discriminatory motivation even if it did not engage in unlawful surface bargaining by refusing to bargain over economics for close to a year. Thus, a contrary finding on the surface bargaining allegation in Case 02-CA-085811, et al., would not affect our conclusion that the Employer violated Section 8(a)(5) of the Act by its current bargaining position and unlawful conduct away from the table.

[18] *See, e.g., John Morrell & Co.*, 304 NLRB 896, 899 (1991), *enforced mem.* 998 F.2d 7 (D.C. Cir. 1993); *Strick Corporation*, 241 NLRB 210 fn. 1 (1979).

argues that the charge in the instant case should be considered timely, as it was only in July 2014 that the Union knew or should have known that the Employer would not offer the Union wage parity for the represented employees in the Brooklyn unit. This argument, however, ignores the ample evidence of the Employer's discriminatory motivation for the withheld wage increases before that time.

Nor does the use of the continuing wage disparity in the Employer's anti-Union campaign, or the Employer's current failure to offer wage parity in bargaining, somehow revive the timeliness of any allegation regarding its denial of the 2012 wage increases. It is well established that an employer's allegedly discriminatory, but time-barred, change in wages does not become timely simply because the effects of the change continue,[19] or because the employer fails or refuses to reconsider the change within the 10(b) period.[20] Therefore, we conclude that any Section 8(a)(3) allegation based solely on the Employer's unlawful denial of the 2012 wage increases is barred by Section 10(b) of the Act.

Accordingly, the Region should amend the outstanding consolidated complaint to include an allegation that the Employer violated Section 8(a)(5) of the Act by its discriminatorily-motivated bargaining position that unit employees can only receive a total compensation package that is less than that given to unrepresented employees, but should dismiss, absent withdrawal, the allegation that the Employer violated Sections 8(a)(3) by denying the Brooklyn unit employees the 2012 wage increases. In addition to a bargaining order and other appropriate relief, the Region should seek reimbursement of the Union's bargaining costs during the Section 10(b) period. In *Frontier Hotel & Casino*,[21] the Board held that such a remedy was necessary to both

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[19] *See, e.g., Goodall Company,* 86 NLRB 814, 815, 844 (1949) (rejecting the argument that an unlawful wage increase is a "continuing violation" because it is reflected in weekly or other recurring payments).

[20] *See, e.g., Bonwit Teller, Inc.,* 96 NLRB 608, 610 (1951), *enforcement denied on other grounds* 197 F.2d 640 (2nd Cir. 1952), *cert. denied* 345 U.S. 905 (1953), *overruled on other grounds, Livingston Shirt Corp.,* 107 NLRB 400 (1953) (holding that even though an employer's initial decision to discontinue wage reviews may have violated the Act, "the mere failure of the Respondent during the 6-month limitation period to modify or rescind that decision" cannot be regarded as a continuing violation of the Act because "any other view would tend to nullify the purpose of Congress in enacting Section 10(b)").

[21] *Frontier Hotel & Casino*, 318 NLRB 857, 859 (1995) *enforcement granted in pertinent part sub nom. Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997). *See also Fallbrook Hospital*, 360 NLRB No. 73, slip op. at 2-3 (April 14, 2014); *Regency Service Carts*, 345 NLRB 671, 672 (2005) (reimbursement of bargaining expenses

make the charging party whole for the resources that were wasted due to the respondent's unlawful conduct, and to "restore the economic strength that is necessary to ensure a return to the status quo ante at the bargaining table." In *Teamsters Local 122 (August A. Busch & Co.)*, the Board emphasized that reimbursement of bargaining expenses "reflects the *direct causal relationship*" between a respondent's unlawful conduct and the costs a charging party incurs while bargaining.[22] The Board has further made it clear that merely reaching tentative agreements on some subjects during bargaining will not preclude reimbursing a union's bargaining expenses, where the respondent had no intent to ultimately enter into a collective-bargaining agreement.[23]

Here, the Employer has made clear that it has no intent of reaching agreement with the Union, except on its own discriminatorily-motivated terms. The Employer's intent, coupled with its other Section 8(a)(1), (3), and (5) violations, contributed to an overall course of bad-faith bargaining that "infected the core" of the parties' bargaining process. Therefore, the Region should seek a remedy that includes reimbursement of Union negotiating expenses in order to restore the status quo ante.

/s/
B.J.K.

cc: Injunction Litigation Branch
ADV.29-CA-135822.Response.Cablevision [redacted]

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appropriate where employer demonstrated unwillingness to enter contract by stating bluntly: "you want a contract, we don't" and "we're not going to be reasonable…I'll sit here for the next three years.").

[22] 334 NLRB 1190, 1195 (2001), *enforced* 2003 WL 880990 (D.C. Cir. 2003).

[23] *See HTH Corp.*, 356 NLRB No. 182 (June 14, 2011), *enforced* 693 F.3d 1051 (9th Cir. 2012) (although parties met in 37 bargaining sessions and reached approximately 170 tentative agreements, reimbursement of bargaining expenses appropriate where employer simply went through the motions of bargaining in an effort to run out the initial certification year); *Whitesell Corporation*, 357 NLRB No. 97 (September 30, 2011) (although parties reached several tentative agreements, reimbursement of bargaining expenses still appropriate where employer attempted to undermine union, made regressive proposals, unilaterally altered working conditions of employees, failed to answer information requests in timely manner, and where several of the tentative agreements were only reached under certain ground rules that the employer agreed to in order to avoid contempt proceedings).

*United States Government*
*National Labor Relations Board*
**OFFICE OF THE GENERAL COUNSEL**

# Advice Memorandum

**S.A.M.**

DATE: July 31, 2015

TO: Mori Rubin, Regional Director
Region 31

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: *Henry Mayo Newhall Memorial Hospital*
Case 31-CA-145452

512-7587
512-5072-5600
530-6050-0120
530-6050-4133-1200
775-8740

This case was submitted for advice as to whether the Employer violated the Act by insisting that the Union agree to a contractual mandatory arbitration provision that waives employees' right to engage in collective legal activity. We conclude that the Employer did not violate the Act, as grievance arbitration is a mandatory subject of bargaining.

## FACTS

For many years, California Nurses Association (the Union) has represented a unit of registered nurses employed by Henry Mayo Newhall Memorial Hospital (the Employer). In December 2014, the parties began negotiating for a successor collective-bargaining agreement.

From the outset of bargaining, the Employer put forth a series of proposals that would require unit employees to bring certain statutory claims against the Employer only through the parties' grievance arbitration system, and only on an individual basis. While the Employer has somewhat modified its proposals during the parties' negotiations, all of its proposals would require employees to individually arbitrate claims brought under a wide variety of statutes, including Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the Fair Labor Standards Act. However, nothing in the Employer's proposals would preclude unit employees from filing an unfair labor practice charge with the Board.

At the parties' first bargaining session, the Employer's bargaining representative stated that the parties would not reach an agreement without this provision. In later sessions, the Employer's representative told the Union that this provision was

"important language" to the Employer, and that the Union "would not get another dollar" without the inclusion of the provision, and that a successor agreement would not be reached without it. The Employer's representative provided an anecdote about a lawsuit filed by a non-unit employee that had only worked for the Employer for a month before filing the lawsuit. At the next bargaining session, the Employer's representative took a large gray three-ring binder that was approximately 10 inches thick, raised it above [redacted] head, and threw it on the table, while saying that it was from that lawsuit. When a Union representative asked why the Employer's representative was engaging in such dramatic behavior, the Employer's representative responded that [redacted] did it to "get it through [the Union representative's] thick head that there would not be an agreement unless the Union agreed to include this language." Thereafter, throughout the entire course of bargaining, the Employer's representative has continued to reiterate that there will be no agreement without a mandatory individual arbitration provision.

In January 2015, the Union filed the charge in the instant case, alleging the Employer is violating Section 8(a)(5) of the Act by insisting that the Union agree to a mandatory individual arbitration provision as a condition to reaching a collective-bargaining agreement. The Union asserts that it cannot lawfully agree to such provisions or waive employees' Section 7 right to engage in collective legal activity against the Employer, and that the Employer's proposals are unlawful under *Murphy Oil USA, Inc.*[1] and *D.R. Horton, Inc.*,[2] because the proposed mandatory individual arbitration provisions would interfere with employees' Section 7 right to engage in collective legal activity.[3]

## ACTION

We conclude that the Employer did not violate the Act, as grievance arbitration is a mandatory subject of bargaining. It is well established that the arrangements for arbitration of employment disputes are terms or conditions of employment and a mandatory subject of bargaining.[4] For example, in *Utility Vault Co.*, the Board found

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[1] 361 NLRB No. 72 (2014).

[2] 357 NLRB No. 184 (2012), *enforcement denied*, 737 F.3d 344 (5th Cir. 2013).

[3] The Region's investigation has adduced no evidence that would indicate any indicium of bad-faith bargaining, other than the Employer's insistence on the proposals at issue in the instant case.

[4] *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 199 (1991), citing *United States Gypsum Co.,* 94 NLRB 112, 131 (1951).

that an employer violated Section 8(a)(5) of the Act by unilaterally implementing a mandatory arbitration agreement, "[b]ecause the arbitration of such claims is a mandatory subject of bargaining."[5] Indeed, we have previously concluded that a comprehensive mandatory individual arbitration agreement similar to that at issue in the instant case was a mandatory subject of bargaining, although we noted that the Board has not expressly held so.[6] While these cases have arisen in circumstances where employers were alleged to have failed to meet their bargaining obligations, Section 8(d) of the Act expressly sets forth the mutual obligation of *both* parties to bargain over mandatory subjects, enforced against employers through Section 8(a)(5) and against unions through Section 8(b)(3).

Thus, like an interest arbitration clause, a mandatory arbitration agreement that encompasses virtually all disputes that may arise in employees' working relationship with their employer is "intertwined with and inseparable from" mandatory terms of conditions of employment (including dispute resolution, discrimination, and other employment conditions) such that it is a mandatory subject of bargaining.[7] In this regard, while the Board has consistently found unlawful bad-faith bargaining where an employer refuses to agree to an effective grievance and arbitration procedure while, at the same time, insisting on a broad management rights clause and a no-strike clause,[8] the Board has also found that an employer did not violate the Act by,

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[5] 345 NLRB 79, 79 n.2 (2005). See also id., at 83 ("Whether these mandatory subjects should be resolved by arbitration is a matter for collective bargaining").

[6] *Montecito Heights Healthcare & Wellness Center*, Cases 31-CA-129743 and 31-CA-129747, Division of Advice case-closing e-mail dated September 16, 2014 (employer violated Section 8(a)(5) by unilaterally implementing a mandatory individual arbitration agreement for statutory claims).

[7] *Id. See generally Smurfit-Stone Container Enterprises*, 357 NLRB No. 144, slip op. at 3 (2011), *enforced sub nom. Rock-Tenn Services, Inc. v. NLRB*, 594 Fed.Appx. 897 (9th Cir. 2014) (citing *Sea Bay Manor Home for Adults*, 253 NLRB 739, 740 (1980), *enforced mem.* 685 F.2d 425 (2nd Cir. 1982)).

[8] *See, e.g., San Isabel Electric Services,* 225 NLRB 1073, 1079 n.7, 1080 (1976) (the employer's proposals "would strip the union of any effective means of representing its members"), and cases cited therein; *A-1 King Size Sandwiches,* 265 NLRB 850, 860 (1982), *enforced* 732 F.2d 872 (11th Cir. 1984), cert. denied 469 U.S. 1035 (1984).

*inter alia*, insisting in bargaining on a particular grievance-arbitration provision, in the absence of other indicia of bad-faith bargaining.[9]

As arbitration is a mandatory subject of bargaining, the mere insistence in bargaining on an arbitration proposal does not, by itself, violate the Act. It is well established that, although an employer has a duty to negotiate with a "sincere purpose" to reach agreement, the Board cannot force an employer to make a concession on any specific issue or to adopt any particular position.[10] A party is entitled to stand firm on a position that it reasonably believes is fair and proper, and "an adamant insistence on a bargaining position is not of itself a refusal to bargain in good faith." Rather, while the employer is obliged to make *some* reasonable effort in *some* direction to compose its differences with the union, it is necessary to scrutinize an employer's *overall* conduct to determine whether it has bargained in good faith.[11] In the instant case, the Region's investigation has adduced no evidence showing any indicium of bad-faith bargaining, other than the Employer's insistence on the proposals at issue in the instant case.

However, while arbitration of employment disputes is a mandatory subject of bargaining, the Board and Courts have recognized that the commitment to arbitrate is different from most other mandatory subjects of bargaining -- because it is a "voluntary surrender of the right of final decision which Congress . . . reserved to [the] parties."[12] As the Supreme Court emphasized, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. . . The law compels a party to submit his grievance to arbitration only if he has contracted to do so."[13] Hence, "under the NLRA arbitration is a matter of consent."[14] For this reason, unlike most other mandatory subjects of bargaining,

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[9] *See, e.g., Chevron Chemical Company*, 261 NLRB 44, 46, 60, *enforced* 701 F.2d 172, (5th Cir. 1983) (grievance-arbitration provision limited to matters of discipline and discharge).

[10] *See, e.g., Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984),

[11] *Id.*

[12] *Litton*, 501 U.S. at 199, quoting *Hilton–Davis Chemical Co.,* 185 NLRB 241, 242 (1970).

[13] *Id.* at 200, quoting *Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 582 (1960).

[14] *Id.* at 201.

arbitration clauses are excluded from the general prohibition on post-contract unilateral changes, and parties are not required to continue to arbitrate disputes that arise after contract expiration.[15] Moreover, as arbitration is a matter of consent, even though an employer can lawfully insist on an arbitration provision in bargaining, it may not unilaterally implement an arbitration provision, even if the parties have reached a bona fide impasse.

However, as arbitration provisions, including comprehensive mandatory individual arbitration provisions, are mandatory subjects of bargaining, there is no reason that the Union could not lawfully agree to the Employer's proposals -- it is well established that "the union may contract the employee's terms and conditions of employment, and provisions for processing his grievances, the union may even bargain away his right to strike during the contract term . . ."[16] In this regard, we conclude that a union can waive employees' substantive right to engage in collective legal activity against the Employer. While a union generally can waive employees' Section 7 rights during collective bargaining, if it does so clearly and unmistakably,[17] a union cannot waive the statutory rights of individual employees to engage in activities pertaining to decisions regarding union representation, i.e., whether to retain their bargaining representative, to change their bargaining representative, or to have no bargaining representative at all.[18] In *Magnavox*, the Supreme Court held that a union is not empowered to waive employees' individual Section 7 right to distribute literature on employer property in non-work areas because that activity implicated employees' exercise of their right to choose a bargaining representative. The Court contrasted a union's waiver of the right to strike -- which is primarily economic in nature and presupposes that the selection of the bargaining representative remains free -- with a waiver of rights that effectuate employees' free choice of their bargaining representative, such as employee distribution of literature at the workplace.[19]

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[15] *Id.* at 205-09 (refusing to apply a presumption of arbitrability in the context of an expired bargaining agreement, "for to do so would make limitless the contractual obligation to arbitrate").

[16] *NLRB v. Allis-Chalmers Manufacturing Co.,* 388 U.S. 175, 180 (1967) (citations omitted).

[17] *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

[18] *NLRB v. Magnavox Co. of Tennessee*, 415 U.S. 322, 325-26 (1974).

[19] *Id.*, at 325.

While *Magnavox* and its progeny have generally focused on precluding union waiver of employees' right to distribute literature or engage in solicitation,[20] the Board has applied the same principle in other contexts related to employees' Section 7 right to express their views regarding their union representation. For example, in *Universal Fuels*,[21] the Board held that a union could not agree to a rule that prohibited employees from communicating about pay or benefits -- even though the rules were "not expressly related to status of an incumbent union," the maintenance of the rules was "equally destructive of employees' rights to oppose or support an incumbent union." Similarly, in *American Federation of Teachers of New Mexico*,[22] the Board found that a union could not agree to an employer prohibition of "lobbying . . . on personnel matters," which employees would reasonably understand as encompassing questions of union representation and collective bargaining. In all of these cases, the rights found not to be waivable under *Magnavox* expressly or implicitly had a nexus to employees' free choice of bargaining representative. As the Supreme Court has emphasized, "a union may bargain away its members' economic rights, but it may not surrender rights that impair the employees' choice of their bargaining representative."[23]

In contrast, the Employer's proposals in the instant case would require unit employees to bring certain statutory claims *against the Employer* only through the parties' grievance arbitration system, and to only bring their claims *against the Employer* on an individual basis.[24] As to whether a union and an employer can lawfully agree to an arbitration clause that waives employees' right to bring their claims in court, the Supreme Court has expressly held that they can.[25] And, as to

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[20] *See, e.g., Samsonite Corporation*, 206 NLRB 343, 347 n.4 (1973) (publishing and distributing a newsletter criticizing the union's support of various provisions in the employment contract and protesting unsafe working conditions); *Yellow Cab Inc.*, 210 NLRB 568, 569, 569 n.3 (1974) (distribution); *Eastex, Inc.*, 215 NLRB 271, 271–72 (1974), *enforced* 550 F.2d 198 (5th Cir. 1977), *affirmed* 437 U.S. 556 (1978) ("a union cannot waive the Section 7 solicitation rights of the employees it represents").

[21] 298 NLRB 254, 256 (1990).

[22] 360 NLRB No. 59, slip op. at 4, fn. 2 (2014).

[23] *Metropolitan Edison*, 460 U.S. at 705-706, quoting *Magnavox*, 415 U.S. at 325.

[24] Nothing in the Employer's proposals would preclude unit employees from filing an unfair labor practice charge with the Agency.

[25] *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 252, 256, 260 (2009) ("The decision to fashion a collective-bargaining agreement to require arbitration of employment-

whether a union and an employer can lawfully agree to an arbitration clause that waives employees' right to bring claims against their employer collectively, we note that, while such waivers involve employees' substantive Section 7 rights, they do not impair the employees' choice of their bargaining representative or involve expression against or for their union in any way. Rather, where such waivers are expressly limited to waiving employee rights to engage in collective legal activity against their employer, as here, there is no aspect of this waiver that relates to employees' choice of their bargaining representative or expression regarding their union representation. Thus, the principles set forth in *Magnavox* are not applicable, and we conclude that a union and an employer *can* lawfully agree to an arbitration clause that waives employees' right to bring claims against their employer collectively.

This conclusion is consistent with the Board's decisions in *Murphy Oil* and *D.R. Horton*.[26] Thus, in *Murphy Oil*, the Board expressly distinguished unlawful arbitration agreements imposed on unrepresented employees from lawful arbitration agreements agreed to by a union. The Board noted that "courts have understood the NLRA to permit *collectively-bargained* arbitration provisions,"[27] and stated that:

> An individual arbitration agreement, imposed by employers on their employees as a condition of employment and restricting their rights under the NLRA, is the antithesis of an arbitration agreement providing for union representation in arbitration that was reached through the statutory process of collective bargaining between a freely chosen bargaining representative and an employer that has complied with the statutory duty to bargain in good faith.[28]

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discrimination claims is no different from the many other decisions made by parties in designing grievance machinery. . . The NLRA provided the [u]nion and the [employer] with statutory authority to collectively bargain for arbitration of workplace discrimination claims, and Congress did not terminate that authority with respect to federal age-discrimination claims").

[26] We agree with the Region that, if the proposals at issue in the instant case had been unilaterally imposed on unrepresented employees, they would be unlawful under *Murphy Oil* and *D.R. Horton*.

[27] 361 NLRB No. 72, slip op. at 10 (emphasis in original).

[28] *Id.*

Perhaps even more significantly, when Member Johnson noted in dissent "a union's undisputed power to waive rights employees otherwise would possess,"[29] the Board majority responded by accepting this proposition and explaining:

> That an employer may collectively bargain a particular grievance-and arbitration procedure with a union is not to say that it may unilaterally impose any dispute-resolution procedure it wishes on unrepresented employees, including a procedure that vitiates Section 7 rights.[30]

Similarly, in *D.R. Horton*, the Board acknowledged that the Supreme Court has held that unions may agree to arbitration clauses in collective bargaining that waive employees' rights to bring actions in court,[31] and underscored that "[i]t is well settled . . . that a properly certified or recognized union may waive certain Section 7 rights of the employees it represents -- for example, the right to strike -- in exchange for concessions from the employer.[32] The Board stressed that:

> The negotiation of such a waiver stems from an *exercise* of Section 7 rights: the collective-bargaining process. Thus, for purposes of examining whether a waiver of Section 7 rights is unlawful, an arbitration clause freely and collectively bargained between a union and an employer does not stand on the same footing as an employment policy . . . imposed on individual employees by the employer as a condition of employment. [33]

Thus, in contrast to unrepresented employees, as to which an employer's unilateral imposition of a mandatory individual arbitration agreement acts to extinguish employees' right to act collectively, such a provision agreed to in collective bargaining vindicates represented employees' right to act collectively. Indeed, the collective-bargaining process is itself the exercise of employees' right to act collectively.

Finally, we note that the Board reasoned in *Murphy Oil* that an employer's imposition of an individual mandatory arbitration agreement is unlawful because it "reflects and perpetuates precisely the inequality of bargaining power that the Act

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[29] *Id.*, slip op. at 48, n.68.

[30] *Id.*, slip op. at 15.

[31] 357 NLRB No. 184, slip op. at 10, citing *Pyett, supra.*

[32] *Id.*, citing *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280 (1956).

[33] *Id.*

was intended to redress," and "strips [employees] of the collective, equalizing power that Section 7 envisions."[34] The Board has explained the effect of such an agreement is that, "at the earliest and most crucial stages of adjustment of any dispute, the employee is denied the right to act through a representative and is compelled to pit his individual bargaining strength against the superior bargaining power of the employer."[35] Such concerns further support the lawfulness of mandatory arbitration agreements agreed to by a representative union. Whether or not the Union and the Employer here ultimately agree to a provision addressing collective legal activity, it is the process of lawful collective bargaining that is mandated by the Act, not any particular substantive outcome that may result from that process.

Therefore, as: (1) the Employer and the Union could lawfully agree to the Employer's proposals; (2) either the Employer or the Union could lawfully insist in bargaining on a particular arbitration provision -- a mandatory subject of bargaining -- in the absence of other indicia of bad-faith bargaining; and (3) these conclusions are consistent with *Murphy Oil* and *D.R. Horton*, we conclude that the Employer did not violate the Act by insisting that the Union agree to its proposed arbitration provisions. Accordingly, the Region should dismiss the charge in the instant case, absent withdrawal. However, as discussed above, because arbitration is a matter of consent, and a party can be required to submit to arbitration only if it has *agreed* to do so, the Employer may not unilaterally implement these provisions, even if the parties reach a bona fide impasse in bargaining.

/s/
B.J.K.

ADV.31-CA-145452.Response.Henry Mayo Newhall Memorial Hospital [redacted]

[34] 361 NLRB No. 72, slip op. at 13.

[35] *D.R. Horton*, 357 NLRB No. 184, slip op. at 5, quoting *J. H. Stone & Sons*, 33 NLRB 1014, 1023 (1941), *enforced in relevant part*, 125 F.2d 752 (7th Cir. 1942).

*United States Government*
*National Labor Relations Board*
**OFFICE OF THE GENERAL COUNSEL**
# Advice Memorandum

SAM

DATE: December 30, 2015

TO: George Velastegui, Regional Director
Region 32

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Taylor Farms Pacific, Inc., et al.
Cases 32-CA-116854, et al.

The Region submitted this case for advice as to whether: (1) the Employers' alleged unfair labor practices preclude the holding of a fair rerun election such that a remedial *Gissel* bargaining order for the bargaining unit comprised of Taylor Farms employees is appropriate,[1] and, if so (2) whether the procedural rule in *Irving Air Chute Co*[2] precludes such a remedy. We conclude that a *Gissel* bargaining order remedy is appropriate in this case and that *Irving Air Chute* does not preclude the issuance of a *Gissel* bargaining order under the circumstances presented here.

## FACTS

Taylor Farms Pacific, Inc. ("TFP") is a major producer of fresh-cut fruits and vegetables and prepared food products. Its operations are conducted out of two facilities in Tracy, California that are commonly known as the MacArthur and the Valpico facilities. The MacArthur facility generally employs around 1000 employees and the Valpico facility, a mile away, generally employs 200-250 employees. The employees of the two facilities consist of direct employees of TFP and jointly employed employees of TFP and Abel Mendoza, Inc. ("AMI") or Slingshot Connections, LLC ("SSC").[3] The

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[1] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

[2] 149 NLRB 627, 630 (1964), *enfd.* 350 F.2d 176 (2d Cir. 1965).

[3] We agree with the Region that the evidence demonstrates that TFP is a joint employer with AMI and with SSC (neither agency appears to be a joint employer with the other agency). Despite this joint-employer determination, we will refer to AMI and SSC employees and managers only by their immediate employer's name for purposes of clarity.

employees work on a commingled basis on various production lines, each of which is headed by a crew leader who may be a TFP, AMI, or SSC employee. Each employer employs roughly a third of the employees at each facility. TFP also operates a third plant in Salinas, California, which is unionized and not involved in this case.

In 2013, the Teamsters[4] ("the Union") began an organizing campaign at the two non-unionized TFP facilities. In September and October 2013, the Union made house visits to employees and, due to the positive response, began soliciting signed authorization cards on October 22, 2013. The Union's campaign was successful in obtaining 468 signed cards (out of about 1050 employees at both facilities at that time) between October 22 and 31, 2013.

During late October or early November 2013, TFP began to distribute and make available a flyer entitled "The Truth About The Union" at the two facilities.[5] Among the other assertions in the flyer, points 8, 9, and 15 (out of 16 overall points) informed the employees that unionizing could result in lost jobs. Specifically, the flyer stated:

> 8. If the union gets into Taylor Farms, and the additional costs cause us to raise our prices to our customers, that could cause us to lose our business and result in decreased sales and less work.
>
> 9. With the union it is easier to terminate any employee because the supervisors will document any violation of company rules, no matter how small, this could result in termination of employees and the union would not be able to do anything in their favor when the Company has the proper documentation to support their disciplinary action.
>
> 15. If the union wins an election and gets a contract with the Company, our customers could start doing business with another company, if our cost rise or they are not satisfied with our performance.

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[4] Teamsters Local 601 sought to organize the two TFP facilities with assistance from the International Union.

[5] Employee testimony suggests that this flyer was disseminated over time and in a variety of ways. Some employees say they saw it on break room tables. Others say that they saw it posted in various locations, including break room doors, break room walls, and bulletin boards. One employee stated that [redacted] was requested to help hang a poster-size version of the flyer on a door. Still others say this flyer was distributed by low- or mid-level supervisors. Regarding the timing of the flyer, the Region notes that the evidence concerning the timing of the flyer's distribution is inconsistent.

In [redacted] 2013, the Union engaged in its first handbilling activity at the TFP facilities. At the same time, AMI terminated a Union supporter. This occurred the day after this employee participated in a Union rally outside of TFP's Valpico facility and after which TFP [redacted] interrogated [redacted] about [redacted] role with the Union. The Union later relied on the termination of this emp ee to support its organizing drive.

In late October or early November 2013, TFP MacArthur [redacted] and [redacted] and [redacted] held a meeting with four AMI ees and told them that if the Union came in they would have to become TFP employees and provide documentation regarding their immigration status or they would lose their jobs. The [redacted] also told these employees that, because of the Union, TFP could close or move to another state and that its customers would leave because Union wages would be higher, causing TFP to raise its prices. The managers also told these employees that if the loss of customers resulted in workers being discharged, the AMI and SSC employees would be the first to go. At least one of the four employees discussed this meeting with coworkers.

On November 14, 2013, the Union held a large public rally in front of TFP's MacArthur facility, which was attended by local political leaders and the media. That rally included an interview with an employee who accused TFP of using child labor. Shortly thereafter, TFP released a second flyer to its employees containing threats that the Union's attacks could lead to customer loss and stating that "[i]f we lose customers we lose work, if we lose work, we have to reduce our employees. . . ." Employees testified that they saw this flyer in break rooms at the Valpico facility, posted by the time clock at the MacArthur facility, received it in the mail along with their paychecks, and that it was distributed directly to them by various TFP managers and supervisors.

During November 2013, TFP held small meetings for 15 to 18 TFP employees that were led by TFP [redacted] and Valpico [redacted] A TFP employee recalls the [redacted] stating that if the Unio es would have to work for TFP and that workers without proper immigration documents would be discharged. AMI employees testified that during November they attended meetings with TFP and AMI [redacted] at which they were again threatened with job loss. The threats again were related to immigration status (i.e., if the employees unionized, they would have to become TFP employees and would be terminated if they were unable to produce proper documentation) and job loss for the agency employees (i.e., AMI and SSC employees could be discharged and other agency employees hired as replacements). During November, TFP also granted a benefit to employees by issuing $20 Thanksgiving gift cards to employees who previously had not received this benefit.

In [redacted] 2013, AMI interrogated and then discharged a second employee who was a known Union supporter. The discharge occurred under suspicious circumstances, including a significant delay in investigating the employees' alleged

misconduct of behaving unprofessionally with truck delivery drivers. The Union again used this termination to obtain employee support for the organizing campaign. After employees began placing Union stickers on their helmets referencing the discharge of this employee, TFP imposed a ban on wearing those Union stickers. The Union obtained 70 additional signed cards during the month of November.[6]

In December 2013, TFP learned from the Union's website that it planned to engage in picketing activities at certain TFP customer locations with support from a sister Teamsters Local. On December 12, 2013, TFP distributed a third flyer to its employees, which contained the TFP logo at the top and the names of TFP (b) (6), (b) (7)(C) and TFP (b) (6), (b) (7)(C) at the bottom. This third flyer criticized the Union's proposed a s you, the people they are trying to get to join them and your families in danger of possibly losing your jobs and putting your families' economic security at risk." As with previous flyers, TFP goes on to speculate that it will lose customers and be "forced to reduce the workforce, or possibly even close due to lack of business." The flyer stresses that the Union is putting each employee's "family's financial security at risk" and "putting each of [the employees] at risk of financial loss" during the holiday season.

On December 17, 2013, the Union demanded recognition from TFP, but it received no response.[7] On (b) (6), (b) (7)(C) SSC discharged an employee it believed to be supporting the Union campaign.[8] SSC discharged the employee allegedly due to various work-related incidents for which was never formally or informally disciplined. The discharge occurred shortly after a TFP (b) (6), (b) (7)(C) learned that this employee was telling coworkers in the pack out area that they should be getting paid more for their work and that they needed to request a raise.

On December 19, 2013, the Union held rallies at the Valpico and MacArthur facilities, which were attended by local politicians and clergy, and it also sent picketers to two or three TFP customer locations. In response to the Union's rallies, TFP offered employees pro-company shirts and solicited them to participate in an anti-Union rally while the Union rally was taking place. Also on December 19, TFP held mass employee meetings at which plant closure threats were communicated to employees. At this

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[6] The signed cards were from employees of TFP, AMI, and SSC combined, and not from TFP employees alone.

[7] The Union's demand letter, which stated that it had the support "of your workforce," did not distinguish between the employees of TFP, AMI, or SSC.

[8] Unlike with the prior two discharges, the Union did not rely on this event to garner further employee support for the organizing campaign.

meeting, and others in the month of December, TFP (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) told employees that the Union's conduct wou to lose business and result in job loss for them.

By the end of December 2013, the Union obtained 11 more signed authorization cards, and it reached a card majority in the TFP unit—but not in the AMI or SSC bargaining units. Specifically, the Union produced 231 signed authorization cards for the TFP unit that can be authenticated. This represents signed cards from 60 percent of the TFP unit employees.

At the end of December 2013, the Union experienced a decrease in support for the organizing campaign. In January 2014, the Union reported a brief resurgence of employee support, with some employees again wearing their Union shirts to work and joining the Union's handbilling activities. In January and February, the Union obtained an additional 44 signed authorization cards from TFP, AMI, and SSC employees combined.

In early February 2014, at a meeting with approximately 15 SSC employees, SSC (b) (6), (b) (7)(C) renewed the immigration-related threat by stating that if they wanted to be TFP employees, their papers would be checked. (b) (6), (b) (7)( also stated that (b) (6), (b) (7)( did not want them to join the Union and that if employees did not like their jobs they could leave and find another one. TFP Valpico (b) (6), (b) (7)(C) was also present and concurred with (b) (6), (b) (7)(C) comments.

On February 19, 2014, the Union filed representation petitions seeking to represent three separate bargaining units of TFP, AMI, and SSC employees. The next day, the Union filed with the Region a request to proceed to an election notwithstanding the nine pending unfair labor practice charges it had filed, three of which involved the terminations from (b) (6), (b) (7)(C) to (b) (6), (b) (7)(C) 2013. On February 21, 2014, the Union requested that the Region seek a *Gissel* bargaining order remedy, relying on the numerous unfair labor practices at the facilities and asserting that those unfair labor practices had "destroyed the laboratory conditions required for conducting a fair election."[9] The Union did not reference its request to proceed in this letter to the Region.

On March 6, 2014, the Union and each employer entered a stipulated election agreement, setting the election for March 27 and 28. Subsequently, TFP continued its anti-Union campaign. TFP labor consultant (b) (6), (b) (7)(C) began to hold meetings with groups of 10 to 30 employees from both TFP and AMI at which employees were

[9] That same day, the Union's attorney also sent a letter to the Region objecting to the postponement of the hearing in the R-cases.

told that a lot of plants had closed because of unionization and that employees could lose their jobs by supporting the Union. (b) (6), (b) (7)(C) also told the employees that if the Union got into TFP, the company would use E-verify to check their immigration status and that AMI and SSC employees would be left out. [redacted] also stated that if the Union requested terms that TFP could not afford, it would most likely close.

Also in late March 2014, a few days before the election, TFP (b) (6), (b) (7)(C) held a large captive audience meeting at which [redacted] stated that if employees continued fighting [redacted] was going to have to close the plant. (b) (6), (b) (7)(C) also stated that if production decreased [redacted] would have to close the plant and move it to another state, and if work orders continued to decrease [redacted] would move part of the company's operations to its facility in Salinas, California.[10]

On March 27, 2014, the election began without incident. On the second day, March 28, the Union rescinded its request to proceed at the close of the election, and the Region impounded the ballots. By letter dated May 8, 2014, the Union again requested that the Region seek a *Gissel* bargaining order remedy for the alleged unfair labor practices, and the Region did, in fact, commence an investigation to determine whether there was sufficient evidence to do so.

Over a year later, in mid-2015, the Region requested that the Union give it permission to count the ballots from the TFP bargaining unit to potentially demonstrate the impact that the unfair labor practices had on the election. On June 16, 2015, the Region counted the ballots from the TFP unit, which showed 154 votes for and 168 votes against the Union.[11] Pursuant to the Board's Rules, the Union had until June 23 to file its objections to the election.[12] On June 29, 2015, outside the seven-day deadline, the Union filed its official objections.

Under the rule in *Irving Air Chute*, the Board will not grant a *Gissel* bargaining order remedy in a case where a majority of the unit employees did not vote for the union and the union failed to file timely and meritorious objections to the results of the election.[13] The Union maintains that its correspondence to the Region of February 21

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[10] As noted above, TFP's Salinas facility is unionized. Although this was a widely attended meeting, we note that the Region reports having only a few witnesses who can testify to the substance of (b) (6), (b) (7)(C) statements.

[11] There were 43 determinative challenged ballots. The ballots from the AMI and SSC bargaining units have not been counted.

[12] 29 C.F.R. 102.69(a).

[13] 149 NLRB at 630.

and May 8, 2014, in which it requested a *Gissel* remedy, constituted the requisite election objections and, therefore, there is no impediment to seeking a *Gissel* remedy in this case under current Board law. The Union further argues that even if the Region does not believe it timely filed objections, it should seek a *Gissel* remedy because the requirement of meritorious objections in *Irving Air Chute* elevates form over substance and should be overturned. The Employer relies on *Irving Air Chute* to assert that a *Gissel* remedy cannot be obtained in this case.

## ACTION

We conclude that a *Gissel* bargaining order remedy is appropriate in this case because the number and severity of the unfair labor practices at the facilities have precluded the holding of a free and fair election. We also conclude that *Irving Air Chute* does not preclude a *Gissel* bargaining order in this case because the principles underlying the *Irving Air Chute* rule are not at issue here.

### I. A *Gissel* Bargaining Order Remedy Is Warranted to Remedy the Employer's Unfair Labor Practices.

The number and severity of the unfair labor practices at TFP's facilities have precluded the holding of a free and fair election. The Employer committed multiple hallmark violations, including the threats of job loss and plant closure that were made in the flyers TFP distributed in late 2013, in statements by various (b) (6), (b) (7)(C) at employee meetings, and in a captive audience meeting held by (b) (6), (b) (7)(C) during the critical period in (b) (6), (b) (7)(C) 2014, and the job loss threats related to E-verify/immigration status that were made by TFP (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) from TFP, AMI, and SSC. In addition, the non-hallmark violations discussed below further support the need for a *Gissel* remedy.

In *Gissel*,[14] the Supreme Court upheld the Board's authority to issue a remedial bargaining order based on union authorization cards from a majority of employees rather than an election where an employer has committed unfair labor practices so serious that they make a fair election unlikely. The Board examines a number of criteria in determining whether to impose a *Gissel* bargaining order remedy, [15] including (1) the presence of "hallmark" violations (such as threats of plant closure and

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[14] 395 U.S. at 614-615.

[15] See GC Memorandum 99-08, "Guideline Memorandum Concerning *Gissel*," dated November 10, 1999.

job loss[16] and the discharge of union adherents[17]); (2) the number of employees affected by the violation (either directly or by dissemination of knowledge of their occurrence among the workforce);[18] (3) the identity of the perpetrator of the unfair labor practice;[19] (4) the timing of the unfair labor practices;[20] (5) direct evidence of impact of the violations on the union's majority;[21] (6) the size of the bargaining unit;[22] (7) the

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[16] *See, e.g., T&J Trucking Co.*, 316 NLRB 771, 773 (1995), *enfd.* 86 F.3d 1146 (1st Cir. 1996)(Table); *Garney Morris, Inc.*, 313 NLRB 101, 103 (1993), *enfd. mem.* 47 F.3d 1161 (3d Cir. 1995); *NLRB v. Horizon Air Services, Inc.*, 761 F.2d 22, 31 (1st Cir. 1985); *Indiana Cal-Pro, Inc. v. NLRB*, 863 F.2d 1292, 1301-02 (6th Cir. 1988), *enfg.* 287 NLRB 796 (1987).

[17] *See M.J. Metal Products*, 328 NLRB 1184, 1185 (1999), *enfd.* 267 F.3d 1059 (10th Cir. 2001).

[18] *See Evergreen America Corp.*, 348 NLRB 178, 180 (2006), *enfd.* 531 F.3d 321 (4th Cir. 2008); *NLRB v. General Fabrications Corp.*, 222 F.3d 218, 233 (6th Cir. 2000), *enfg.* 328 NLRB 1114, 1115 (1999); *Cardinal Home Products, Inc.*, 338 NLRB 1004, 1010-1011 (2003); *Aqua Cool,* 332 NLRB 95, 97 (2000); *NLRB v. Horizon Air Services,* 761 F.2d at 31; *Abramson, LLC*, 345 NLRB 171, 176-77 (2005); *Garvey Marine*, 328 NLRB 991, 993 (1999), *enfd.* 245 F.3d 819 (D.C. Cir. 2001); *Blue Grass Industries*, 287 NLRB 274, 276 (1987).

[19] *M.J. Metal Products*, 328 NLRB at 1185; *Consec Security*, 325 NLRB 453, 454 (1998), *enfd. mem.* 185 F.3d 862 (3rd Cir. 1999); *NLRB v. Horizon Air Services*, 761 F.2d at 31.

[20] *See, e.g., Bakers of Paris*, 288 NLRB 991, 992 (1988), *enfd.* 929 F.2d 1427, 1448 (9th Cir. 1991). *See also M.J. Metal Products*, 328 NLRB at 1185; *State Materials, Inc.*, 328 NLRB 1317 (1999)(unfair labor practices began immediately after union organizing campaign commenced); *Joy Recovery Technology Corp.*, 320 NLRB 356, 368 (1995), *enfd.* 134 F.3d 1307 (7th Cir. 1998) (employer's "prompt" response); *America's Best Quality Coatings Corp.*, 313 NLRB 470, 472 (1993), *enf'd.* 44 F.3d 516 (7th Cir.), *cert. denied.*

[21] *J.L.M., Inc.*, 312 NLRB 304, 305 (1993), *enf. den. on other grounds* 31 F.3d 79 (2d Cir. 1994); *NLRB v. Horizon Air Services*, 761 F.2d at 32.

[22] *Compare Garvey Marine, Inc.*, 328 NLRB at 993 (gravity of impact of unfair labor practices heightened in small, 25 employee unit), *with Beverly California Corp.,* 326 NLRB 232, 235 (1998) *enf. den. on other grounds*, 227 F.3d 817 (7th Cir. 2000) (*Gissel* not warranted where unit was "sizeable" (approx. 100 employees) and violations generally did not affect a significant number of employees).

likelihood the violations will recur;[23] and (8) the change in circumstances after the violations. Based on a consideration of these factors, we have concluded that a *Gissel* remedy is warranted here.

Initially, the threats of job loss and plant closure contained in TFP's flyers and reiterated in various meetings attended by employees were hallmark violations unprotected by Section 8(c) of the Act. The Board has long held that threats of plant closure and job loss have a "devastating and lingering effect on employees, an effect that most effectively can be remedied by an order to bargain."[24] An employer's predictions of the negative impact of unionization are lawful under Section 8(c) only if "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control."[25] Where an employer fails to meet its burden to demonstrate the objectivity of its assertions, the Board finds a violation.[26]

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[23] *General Fabrications Corp.*, 328 NLRB 1114, 1115 (1999), *enf.* 222 F.3d 218 (6th Cir. 2000).

[24] *L.S.F. Transportation, Inc.,* 330 NLRB 1054, 1086 (2000), *enfd.* 282 F.3d 972 (7th Cir. 2002) (citing *White Plains Lincoln Mercury*, 288 NLRB 1133, 1140 (1988)). *See also Cohen Bros. Fruit Co.*, 166 NLRB 88, 90 (1967) ("Threats of loss of work and income are a type of threat likely to have the most substantial impact upon employee attitudes and reactions."); *General Stencils, Inc.*, 195 NLRB 1109, 1109 (1972), *enf. den. on other grounds* 472 F.2d 170 (2d Cir. 1972) ("A direct threat of loss of employment, whether through plant closure, discharge, or layoff, is one of the most flagrant means by which an employer can hope to dissuade employees from selecting a bargaining representative."); *NLRB v. Jamaica Towing*, 632 F.2d 208, 213 (2d Cir. 1980) (a threat of plant closure "is the one serious threat of economic disadvantage which is wholly beyond the influence of the union or the control of the employees").

[25] *NLRB v. Gissel Packing Co.*, 395 U.S. at 618.

[26] *See, e.g., DTR Industries*, 350 NLRB 1132, 1132-33 (2007), enfd. 297 Fed.Appx. 487 (6th Cir. 2008) (employer's predictions of job loss due to unionization were not supported by objective facts; similar statements made by the employer earlier in the campaign were lawful because the employer had explained why customers might move some of their business to another supplier based on the employer's industry experience and knowledge of the customer base); *Contempora Fabrics, Inc.*, 344 NLRB 851, 851, 862-64 (2005) (employer unlawfully predicted customer loss and plant closure without providing an objective basis for its predictions).

In the instant case, TFP's threats of job loss and plant closure, accompanied by those from (b) (6), (b) (7)(C) of joint employers AMI and SSC, were purely speculative and lacked an objective factual basis. There is no evidence that any customer had communicated to TFP the intention to stop purchasing products from TFP if its employees became unionized. TFP has not identified a single specific cease-doing-business threat. Indeed, TFP's Salinas facility is unionized and has retained its customers. In short, TFP and its two joint employers did not have an objective basis for threatening employees that unionization would result in lost customers and, as a result, job loss or plant closure.

The cases that TFP relies on to assert that its statements in the flyers and during employee meetings were protected by Section 8(c) are distinguishable from the present circumstances. In *Curwood, Inc.*,[27] and *Super Sagless Spring Corp.*,[28] the employer provided evidence that its customers had communicated their concerns about the effects of unionization and, therefore, the employer's predictions of job loss were based on objective facts.[29] In *TNT Logistics North America, Inc.*,[30] the majority found the employer's prediction that it would lose a specific customer, Home Depot, was protected because it was undisputed in the record that Home Depot was anti-union, did not use any unionized carriers, and that the employer's contract with Home Depot was soon to expire.[31] In *Buck Brown Contracting Co.*,[32] the Board found no violation where the employer predicted it would lose its contract if there were "union problems" on the site and where a non-union company, also doing work for the contractor, was poised to take over.[33]

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[27] 339 NLRB 1137 (2003).

[28] 125 NLRB 1214 (1959).

[29] Member Liebman dissented from the majority's finding in *Curwood* that the threats of job loss were supported by objective evidence because the employer disclosed that evidence at trial—after the fact and not to the employees who received the job loss threat—and because it was not evident from the evidence provided that the employer's customers were expressing negative views of unionization.

[30] 345 NLRB 290 (2005).

[31] Member Liebman dissented in *TNT Logistics* because the employer did not provide an objective factual basis for its predictions. *See* 345 NLRB at 293 & fn.2.

[32] 283 NLRB 488 (1987).

[33] In *Superior Coach Corp.*, 175 NLRB 200 (1969), also cited by TFP, the Board did not pass on the General Counsel's exceptions concerning the ALJ's failure to find a

In addition to the plant closure and corresponding job loss threats, the repeated threats to discharge employees based on their immigration status were hallmark violations. The Board has held that job loss threats by an employer "touching on employees' immigration status warrant careful scrutiny, as they are among the most likely to instill fear among employees."[34] Significantly, TFP and its joint employers were willing to tolerate potential undocumented status until the employees began exercising their Section 7 rights to engage in Union activities. The subsequent threats regarding immigration status should be deemed highly coercive.

Moreover, the effect of these hallmark violations on the unit employees was exacerbated because they originated from high-level managers, including TFP's (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C),[35] were made directly to most (if not all) of the TFP unit employees, and occurred in direct response to the Union's organizing campaign, including during the critical period before the election in late March 2014. Indeed, the Union went from having 231 signed cards in the TFP unit, which represented 60 percent of the unit employees, in late December 2013 to obtaining only 154 votes and losing the election in late March 2014.[36] This significant loss of employee support provides objective evidence of the negative effect of the unfair labor practices.

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violation where a supervisor threatened employees with job loss if the union won the upcoming election because the Board's Order "would not be materially changed regardless of [the] holding." *Id.* at 200, fn.1.

[34] *Labriola Baking Co. & Juventino Silva*, 361 NLRB No. 41, slip op. at 2-3 (2014) (citing *Viracon, Inc.*, 256 NLRB 245, 246-247 (1981)).

[35] The involvement of high ranking company officials in the unlawful conduct exacerbates its impact. *See, e.g., Mercedes Benz of Orland Park*, 333 NLRB 1017, 1018 (2001), *enfd.* 309 F.3d 452 (7th Cir. 2002) (citing *M.J. Metal Products*, above); *Consec Security*, 325 NLRB at 455 ("When the antiunion message is so clearly communicated by the words and deeds of the highest levels of management, it is highly coercive and unlikely to be forgotten"); *L.S.F. Transportation, Inc.*, above (citing *Q-1 Motor Express*, 308 NLRB 1267, 1268 (1992), *enfd.* 25 F.3d 473 (7th Cir. 1994)); *General Stencils, Inc.*, above.

[36] *See J.L.M. Inc.*, 312 NLRB at 305 ("clear dissipation of union support" revealed by the stark drop from card majority of 128 to only 62 votes in election); *Koons Ford of Annapolis, Inc.*, 282 NLRB 506, 508-9 (1986), *enfd.* 833 F.2d 310 (4th Cir. 1987) (dissipation of union support evidenced by drop from 38 valid authorization cards to 27 votes for the union at the election).

In addition to the threats of job loss and plant closure at the two TFP facilities, it is evident that TFP and its two joint employers made clear to the unit employees in a multitude of ways that any interest in the Union would have a negative impact on their employment. Thus, although the threats of job loss and plant closure in the flyers and at employee meetings alone are sufficient to warrant a *Gissel* bargaining order, the Employer's other violations further support the need for this remedy. Those violations included: discharging three employees in late 2013, unlawfully polling employees in mid-December 2013 by distributing pro-company t-shirts and inviting employees to join an anti-Union rally, interrogating an employee about [redacted] role with the Union, granting employees benefits in the form of a $20 Thanksgiving gift card, directing employees not to discuss the Union, and prohibiting employees from wearing Union stickers on their helmets without any justification.[37]

## II. *Irving Air Chute* Does Not Preclude a Gissel Bargaining Order Remedy in this Case.

In *Irving Air Chute*, the Board found that the employer had engaged in objectionable conduct, set aside the election that the union had lost, and ordered the employer to bargain.[38] But the Board stated in dicta that, "[w]ere the election not set aside on the basis of objections in the present representation case, we would not now direct a bargaining order even though the unfair labor practice phase of this proceeding itself established the employer's interference with the election."[39] The Board has held to this principle in subsequent cases.

For instance, in *Bandag, Inc.*,[40] the Board refused to issue a *Gissel* bargaining order remedy because the union, although it had filed timely objections, withdrew those

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[37] *See Evergreen America Corp.*, 348 NLRB at 180 (relying on "the coercive impact of the [employer]'s nonhallmark violations" in addition to hallmark violations to decide that a bargaining order was an appropriate remedy); *General Fabrications Corp.*, 328 NLRB at 1115 (considered hallmark and nonhallmark violations when deciding that a *Gissel* bargaining order was appropriate); *Harrison Steel Castings Co.*, 293 NLRB 1158, 1158-59 (1989) (predictions of job loss because of increased administrative costs of having a union were unlawfully coercive in context of employers other unlawful conduct, including interrogations, prohibitions on distribution of union literature, discriminatorily denying pro-union employees overtime, and two discriminatory discharges).

[38] 149 NLRB at 627.

[39] *Id.* At 630.

[40] 225 NLRB 72 (1976).

objections. The Board reasoned that by withdrawing its objections, the union had chosen not to contest the results and "removed any question as to the election's finality."[41] In *NTA Graphics, Inc.*,[42] the union had failed to timely file objections to the election but continued to argue for a bargaining order based on the employer's alleged unfair labor practices. The Board denied the union's request for a bargaining order, reasoning that "*Irving Air Chute* stands for the proposition that a party that does not object to an election has implicitly agreed to be bound by its result."[43]

The principle of finality underlying *Irving Air Chute,* and further expounded upon in *Bandag* and *NTA Graphics*, is also articulated by the Board in Rule 102.69(a), which requires election objections to be filed within seven days of the tally of ballots. The Board has strictly interpreted this rule, finding that objections filed shortly after the deadline could not stop the certification of election results.[44]

However, other Board cases are in tension with these principles. For example, the Board has a "longstanding policy which permits a Regional Director to set aside an election based on conduct which he has discovered during his investigation, even though that particular conduct had not been the subject of a specific objection."[45] The Board's rationale for this policy is its "obligation to provide voters with the 'laboratory conditions' under which they may exercise their franchise in a free and informed manner."[46] Indeed, if a Regional Director "receives or discovers evidence during his investigation that shows that the election has been tainted, he has no discretion to ignore such evidence and it is reversible error if he fails to set aside the election."[47]

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[41] *Id.* at 72. The Board later granted a bargaining order in *Bandag, Inc.*, 228 NLRB 1045 (1977) (*Bandag II*), because, upon reconsideration, it found that the union had not, in fact, withdrawn all of its objections.

[42] 303 NLRB 801 (1991).

[43] *Id.* at 804.

[44] *See e.g., American Federation of Casino*, 166 NLRB 544, 549 (1967).

[45] *White Plains Lincoln Mercury*, 288 NLRB 1133, 1136 (1988) (citing *American Safety Equipment Corp.*, 234 NLRB 501, 501 (1978), *enf. den. on other grounds* 643 F.2d 693 (10th Cir. 1981) and *Dayton Tire & Rubber Co.*, 234 NLRB 504, 504 (1978)).

[46] *American Safety Equipment Corp.*, 234 NLRB at 501.

[47] *Nelson Tree Service, Inc.*, 361 NLRB No. 161 (2014) (citing *American Safety Equipment Corp.*, above).

Similarly, despite the *Irving Air Chute* rule, the Board has ordered a *Gissel* bargaining order remedy in cases where the union did not file meritorious objections—relying instead upon conduct alleged by the union in an unfair labor practice charge—in order to ensure that employee sentiment regarding union representation was not trumped by a procedural formality. Thus, in *White Plains Lincoln Mercury*, the ALJ overruled the union's objections but found that the employer committed serious unfair labor practices that were not encompassed by those objections. Applying *Irving Air Chute*, the ALJ concluded that no *Gissel* bargaining order could issue because there were no meritorious objections. The Board disagreed and reversed, reasoning that an election may be set aside—and a bargaining order issued—based on conduct not specifically objected to but uncovered during the Regional Director's investigation of the unfair labor practices.[48] And,in *Dawson Metal Products,* the Board imposed a *Gissel* bargaining order notwithstanding that the ALJ had properly denied all the specific objections to the election.[49] The Board in *White Plains* described the essence of its holding in *Dawson* as follows: "when the unlawful conduct is, *a fortiori*, conduct that interferes with a free choice in an election, it cannot be treated as somehow falling outside the legitimate and appropriate scope of the investigation of the election process simply because it was not cited in the specific objections to the election."[50]

Moreover, in *Avis Rent-A-Car*,[51] the Board held that an employer's timely filing of an unfair labor practice charge regarding objectionable conduct was sufficient to

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[48] 288 NLRB at 1139. *White Plains Lincoln Mercury* also involved the resolution of a determinative challenged ballot.

[49] 183 NLRB 191 (1970), *enf. den. on other grounds* 450 F.2d 47 (8th Cir. 1971). In *Dawson*, the employer had committed various Section 8(a)(1) violations, including interrogating employees, promising them benefits, and physically threatening union supporters, which the ALJ concluded had interfered with the election results.

[50] *White Plains Lincoln Mercury*, 288 NLRB at 1138. See also *Pure Chem Corp.,* 192 NLRB 681 (1971) ("Simply stated, a 'meritorious objection' is anything that would justify setting aside the election, whether that misconduct was raised by the union in its objections or discovered subsequently by the Agency's own procedures in resolving the questions raised as to the propriety of the election"; allowing an employer to "avoid the ramifications of [its coercive conduct] simply because the [union] failed to frame the scope of such conduct within [its] objections would frustrate the rights of employees which are of paramount importance.").

[51] 324 NLRB 445 (1997).

constitute timely-filed "objections," stating: "[t]hat the allegations were contained on an unfair labor practice charge form and were not explicitly identified as election objections does not, by itself, undermine the otherwise clearly expressed intent by the employer to allege the occurrence of conduct interfering with the election."[52] The Board distinguished *Bandag* and similar cases because "there was no contention in those cases…that the unfair labor practice charges were intended to serve as objections to the election."[53]

Here, although the Union filed untimely objections (as opposed to timely but non-meritorious objections), the Regional Director has determined that there were serious unfair labor practices that precluded the holding of a fair election. And, the Union filed timely charges that it intended to serve as objections to the election. Therefore, the principles enunciated in *White Plains Lincoln Mercury* and *Avis Rent-A-Car* should apply, and the policy rationale underlying *Irving Air Chute* and subsequent cases -- that without meritorious objections the election tally represents the final, agreed-to result -- is not implicated.

Thus, notwithstanding its failure to file timely objections, the Union has made it clear that it has not agreed that the election results reflect an uncoerced expression of employee sentiment regarding union representation. The Union informed the Region through its correspondence of February 21, 2014 (pre-election) and May 8, 2014 (post-election but before the tally of ballots) that it contested the conduct of the election and requested that the Region seek a *Gissel* bargaining order.[54] And, the Region has, in fact, been investigating the propriety of seeking a *Gissel* remedy—an investigation that had been ongoing for over a year when the seven-day objection period expired in this case—and made its request that the Union permit a counting of the ballots as part of that investigation. Finally, regardless of the absence of timely-filed objections, the R-case proceeding is open because of the 43 determinative challenges, and the ALJ will have both the R-case and C-case before him when he considers and decides this case. In these circumstances, the principles underlying the *Irving Air Chute* rule are not applicable, and the failure to issue a bargaining order would elevate form over substance, compromise the integrity of the Board's election processes, and improperly defeat the statutory rights of the employees.

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[52] *Id.* at 446.

[53] *Id.* at 445.

[54] And the Union did, albeit after the deadline for filing objections, file formal objections to the election on June 29, 2015.

Accordingly, the Region should issue complaint, absent settlement, and seek a *Gissel* bargaining order.

/s/
B.J.K.

ADV.32-CA-116854.Response.TaylorFarmsPacific3 (b)(6), (b)(7)(C)

*United States Government*
*National Labor Relations Board*
**OFFICE OF THE GENERAL COUNSEL**

# Advice Memorandum

S.A.M. DATE: February 4, 2016

TO: George Velastegui, Regional Director
Region 32

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: AT&T/Pacific Bell Telephone Company
Case 32-CA-156076

506-6090-3200-0000
512-5012-2500-0000
512-5012-3300-0000
512-5012-3367-0000
512-5036-0117-3333
530-6067-4055-0100
530-6067-4055-4000
530-6067-5000-0000

This case was submitted for advice as to whether (1) the Employer violated Section 8(a)(1) of the Act when it removed or instructed employees to remove stickers, including pro-union stickers, from their personally-assigned cubicles, shelves, and trucks, and (2) whether the Employer violated Section 8(a)(5) of the Act by unilaterally changing its established past practice of allowing employees to affix stickers with pro-union messages to cubicles, shelves, and trucks.

We conclude that the Employer violated Section 8(a)(1) of the Act by asking employees to remove stickers from their assigned cubicles and shelves and by removing employees' stickers from their assigned trucks. The Board has ruled that employees have a Section 7 right to wear union insignia, including stickers, while at work and has never held that this right does not extend to employees displaying stickers or other insignia on employer property that is assigned to individual employees for their own use. The Region should argue that when an employer cedes its property by assigning it to particular employees for their own use, the right to display union insignia extends to that property, absent a showing of special circumstances. Therefore, since the Employer has not shown special circumstances here, it violated Section 8(a)(1). We also conclude that the Employer violated Section 8(a)(5) of the Act when it unilaterally changed the past practice of allowing employees to display pro-union messages on the cubicles, shelves, and trucks. As an established past practice, permitting employees to display these pro-union messages had become a term and condition of employment. Moreover, the change had a substantial, material, and significant impact on the employees' working conditions.

## FACTS

### Background

AT&T/Pacific Bell Telephone Company (the Employer) provides telecommunications services in California. The two Employer facilities at issue in this case are in Fresno, California and Hanford, California. Communication Workers of America, Local 9408 (the Union) represents 200 unit employees based out of these facilities who work in the Employer's construction and engineering departments. Unit employees employed at the two facilities are classified as splicing technicians and outside plant technicians.

The Employer and Union have a long history of collective bargaining. Their most recent collective-bargaining agreement is in effect through April 9, 2016. Section 3.06 of the parties' collective-bargaining agreement, titled "Bulletin Boards," contains sub-item B, which states, in pertinent part:

> Unless otherwise agreed upon in advance by the Companies, the Union agrees not to post or distribute Union material any place on the Companies' premises other than on Union bulletin boards.

Additionally, since at least 2011, the Employer has maintained work rules entitled "Construction and Engineering West Guidelines" that contain a section titled "Motor Vehicle Driving Practices." That section states, in pertinent part:

> No materials or objects shall be attached by any means to the exterior of a company vehicle unless approval for such attachment has been obtained from management. Approval may be revoked at any time.

### Usage of Personal Storage Spaces and Trucks

i. Shelves and Cubicles Assigned for Employee Personal Use

For the past four to five years, employees at the Fresno and Hanford facilities have kept their personal belongings in two types of open storage compartments located in the facility crew rooms. Employees use these Employer-provided spaces to store their belongings, including jackets, photographs, food, and other personal items.

One set of storage compartments consists of shelves, akin to bookshelves, that line the crew room's walls. The shelving units are assigned to individual employees and the employee's name is affixed to the compartment shelf. The second type of

storage compartment consists of cubicles or modules that also line the crew room's walls. The cubicles or modules are also assigned to individual employees.[1]

ii. Employer-Owned Vehicles

The Employer has a fleet of about 150 trucks at its Hanford and Fresno facilities. Approximately eighty-five of the trucks are based at the Employer's Fresno facility and are assigned to bargaining unit employees in the splicing department. The rest of the trucks are based out of Hanford.

Splicing technicians are assigned a truck on a long-term basis. The truck number is listed on the employee's time card, and the Employer uses the truck number to track down where splicing technicians are working. Splicing technicians load their equipment into the vehicle, use the truck during their shift, and park the truck at the Employer's facility at the end of the shift.

**Employer's Past Practice Regarding Stickers on Employer's Property**

i. Stickers on Cubicles and Shelves

The Union asserts that for more than ten years, the Employer had allowed employees at both the Fresno and Harford facilities to routinely affix stickers and banners to their assigned cubicles and shelves. These have included sports team stickers, flag decals, "union strong" and "union proud" stickers, and other items, such as "Monster" drink decals. In addition, when the parties entered negotiations for collective-bargaining agreements, employees would routinely affix stickers with messages in support of the Union's bargaining positions, such as "Don't affect the healthcare." The (b) (6), (b) (7)(C) asserts that before the employees were instructed to remove stickers from their personal spaces, Union material had been distributed and/or posted in other places at the facilities besides Union bulletin boards for years.

[1] In late 2014, the Employer also installed stacks of lockers in the Fresno crew rooms. The lockers are known as company lockers and they resemble security boxes. The lockers are assigned to individual employees, who use the lockers to store their company-owned computers, cell phones, and keys. The Employer has not assigned company lockers to employees at the Hanford facility. The employees have consistently been instructed not to place stickers on company lockers, and they have never placed any stickers on the lockers since they were installed in late 2014. Since the lockers are not at issue in this dispute, we have not addressed them in this memorandum. However, we note that the analysis regarding the personal shelves and cubicles, below, would apply to personally-assigned lockers as well.

ii. Stickers on Company-Owned Trucks

The Union also asserts that for the past eight to ten years, unit splicing technicians at Fresno and Hanford have regularly affixed stickers to their assigned trucks. The stickers have included football and baseball team decals, flags, and United States Marine Corps stickers, as well as pro-Union stickers with messages such as "Proud to be Union," "Overtime pay brought to you by Union labor," "Vacations: brought to you by Union labor," and "Safety: brought to you by Union labor." The Union claims that approximately seventy-five percent of all the trucks had stickers affixed on them. The Union's (b) (6), (b) (7)(C) asserts that if an employee affixed a sticker considered problematic or obnoxious, for example, a sticker that had foul or offensive language, a manager would request that [redacted] speak to the employee and request that the employee remove the sticker. During all such instances in the past, the employee removed the sticker after the Union's (b) (6), (b) (7)(C) spoke with the employee, and the Employer did not remove any stickers on its own from trucks during these years.

**Employer Reissues and Enforces Policy Regarding Stickers on Trucks**

In March 2015, the Employer re-distributed copies of its Construction and Engineering West Guidelines to unit employees and asked them to sign forms acknowledging their receipt.[2] The Union asserts that before the Employer re-issued the Construction and Engineering West Guidelines in March 2015, it had not enforced the guidelines at the Fresno and Hanford locations during the previous eight to ten years. The Employer denies the Union's assertion and claims that it has always enforced its rule regarding unapproved stickers on its trucks.

Over the course of a weekend in late June or early July 2015, the Employer removed most of the stickers that employees had affixed to Fresno-based trucks, which the Union estimated to be approximately 100 to 150 stickers. The only stickers that were left on the vehicles were company-logo stickers with messages like "don't text and drive."[3] The Employer's (b) (6), (b) (7)(C) told the Union's (b) (6), (b) (7)(C) that [redacted] had ordered the removal of the stickers according to the Guidelines.[4]

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[2] A May 2011 version of the Construction and Engineering West Guidelines also contained the same language as the one distributed to the unit employees in 2015. The Union does not dispute that the May 2011 guidelines could have been distributed to unit employees in 2011.

[3] The Employer did not remove any stickers from the Hanford trucks. It appears that the unit employees removed stickers from the trucks at the Employer's request.

Following the mass removal of the stickers from the Fresno trucks, supervisors asked two unit employees to remove stickers that they had affixed on their trucks. A supervisor told one of these employees that failure to remove the stickers would be considered "insubordination." Subsequently, both employees complied by removing the stickers from their trucks. No employee has been disciplined for failing to remove stickers from the trucks. The Union's (b) (6), (b) (7)(C) states that the Union has decided to stop distributing stickers to employees for the time being because employees may be disciplined for affixing them to their trucks.

**The Employer Enforces the Contract Provision Regarding Posting Union Material on its Property**

Around July 15, 2015, the Fresno supervisors instructed employees to remove all unapproved stickers, flags, and banners from their personal-use storage spaces. Most employees complied with the instruction and only left personal photographs and company-issued stickers on display. One employee affixed a San Francisco Giants poster to [redacted] storage cubicle after the Employer asked employees to remove unauthorized stickers, flags, and banners. [redacted] supervisor has not asked [redacted] to remove it. Also, a few stickers that state "Don't affect the health care" remain on display in Fresno cubicles.

Employees at the Hanford facility did not contact the (b) (6), (b) (7)(C) regarding any Employer instructions to remove stickers and other materials from personal spaces. However, the (b) (6), (b) (7)(C) asserts that [redacted] performed a visual inspection of the area and observed that there were no stickers, banners, or flags in the employees' assigned storage spaces, whereas they had been on display previously.

## ACTION

We conclude that the Employer violated Section 8(a)(1) of the Act by asking employees to remove stickers from their assigned cubicles and shelves and by removing employees' stickers from their assigned trucks. The Board has ruled that employees have a Section 7 right to wear union insignia, including stickers, while at work and has never held that this right does not extend to employees displaying

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[4] An incident that may have prompted the Employer to remove stickers from the vehicles involved a unit employee's complaint to the Employer that the employee had concerns about another unit employee's "Transformers" sticker on his truck, which could possibly indicate gang affiliation. The Employer began removing stickers from its trucks shortly afterward.

stickers or other insignia on employer property that is individually assigned to employees. The Region should argue that when an employer cedes its property by assigning it to individual employees for their own use, the right to display union insignia extends to that property, absent a showing of special circumstances. Therefore, since the Employer has not shown special circumstances here, it violated Section 8(a)(1). We also conclude that the Employer violated Section 8(a)(5) of the Act when it unilaterally changed the past practice of allowing employees to display pro-union messages on the cubicles, shelves, and trucks. As an established past practice, permitting employees to display these pro-union messages had become a term and condition of employment. Moreover, the change had a substantial, material, and significant impact on the employees' working conditions.

**The Employer Violated Section 8(a)(1)**

Section 7 of the Act protects the right of employees to wear attire and insignia, including stickers, addressing employment-related issues while at work.[5] This statutory right applies to employer-owned uniforms and hats worn at work.[6] An employer may only restrict employees from wearing Section 7-related messages at work by presenting substantial evidence of "special circumstances" sufficiently important to outweigh Section 7's guarantees.[7] The Board has struck a different balance regarding employees' rights to affix Section 7 messages to certain other employer property. In this regard, the Board has held, for example, that employees

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[5] *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801-03 (1945) (upholding right of employees to wear union buttons while on the job); *AT&T Connecticut*, 356 NLRB No. 118, slip op. at 1 (Mar. 24, 2011) (upholding right of employees who perform work inside customers' homes to express employment-related grievances by wearing "prisoner" T-shirts reading "Inmate #" and "Prisoner of AT$T [the employer]"), *enforcement denied,* 793 F.3d 93 (D.C. Cir. 2015).

[6] *Northeast Industrial Service Co., Inc.*, 320 NLRB 977, 979 (1996) (prohibiting placement of 1-3 inch stickers on company-issued hardhats unlawful); *Windemuller Electric*, 306 NLRB 664, 669-70 (1992) (requiring employees to remove union stickers from company-owned hardhats unlawful), *enforcement denied in relevant part,* 34 F.3d 384 (6th Cir. 1994); *Malta Construction Co.*, 276 NLRB 1494, 1494-95 (1985) (finding employees have statutory right to wear union insignia on company-issued hardhats), *enforced*, 806 F.2d 1009 (11th Cir. 1986).

[7] *See generally P.S.K. Supermarkets*, 349 NLRB 34, 35 (2007) (finding that grocery store, which required employees to wear company-provided uniforms, did not establish special circumstances warranting ban on union buttons).

have no statutory right to affix stickers to bulletin boards and walls.[8] Absent a statutory right to display insignia on employer property, a Section 8(a)(1) violation will only be found if an employer's restrictions are discriminatory, e.g., the employer precludes employees from affixing union stickers but allows employees to affix other types of materials.[9]

However, the Board has yet to squarely address whether the statutory right to display union insignia on employer-provided hardhats and uniforms also extends to other property that, unlike bulletin boards or walls, the employer has individually assigned to employees for their own use. In *J. C. Penney, Inc.*, the Board adopted an Administrative Law Judge's finding that an employer lawfully restricted employees from placing union stickers on their individually-assigned company-provided lockers because the employer had not discriminatorily enforced its policy against unapproved postings.[10] In that case, however, the issue of whether the employees had a statutory right to place union stickers on their lockers was not before the judge and was not addressed by the Board.

On the other hand, the Board's decision in *Sprint/United Management Co.* suggests that the Board would find a Section 7 right to affix union materials on employer property that has been assigned to individual employees for their own use.[11] There, the Board found that employees had a Section 7 right to *distribute* union

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[8] *See, e.g., Honeywell, Inc.*, 262 NLRB 1402, 1402 (employees have no statutory right to use an employer's bulletin board), *enforced*, 722 F.2d 405 (8th Cir. 1983); *Cashway Lumber, Inc.*, 202 NLRB 380, 382 (1973) (employer lawfully told employees that they could place stickers on their own property but would be terminated if they place stickers on the employer's property; ALJ, adopted by the Board, held that employees' rights to engage in Section 7 activity at work did not include posting stickers on employer's adding machine, walls, and other property absent evidence of disparate enforcement).

[9] *See, e.g.*, *Mammoth Mountain Ski Area*, 342 NLRB 837, 841-42 (2004) (employer unlawfully prohibited employees from placing union stickers on their company-provided lockers when "hundreds" of other stickers were allowed on lockers).

[10] *J.C. Penney, Inc.*, 322 NLRB 238, 239 (1996), *enforced in relevant part*, 123 F.3d 988 (7th Cir. 1997). The Board also adopted the ALJ's finding that the employer violated Section 8(a)(1) by removing union stickers from an employee's company-supplied work cart because the employer regularly permitted employees to decorate their work carts with other materials without restriction. *Id.*

[11] *Sprint/United Management Co.*, 326 NLRB 397, 399 (1998).

materials by placing them in employer-owned lockers that were individually assigned to employees. The Board rejected the employer's contention that it could lawfully prohibit this distribution, which was based on the same principles underlying an employer's right to reserve its bulletin boards for its exclusive use, because the employer had "already ceded the locker space" to employees when it individually assigned the lockers.[12] Because the lockers were not in a work area and the employer provided no other legitimate justification for removing and confiscating union flyers from the lockers, the employer violated Section 8(a)(1).[13]

We conclude that the Region should argue, as in the *Sprint/United Management Co.* distribution case, that when an employer cedes control of its property by individually assigning it to employees for their own use, the employees have a Section 7 right to affix union materials to that property absent a showing of special circumstances. That principle should apply whether the employer property at issue is a hardhat, a uniform, a locker, or, as in the instant case, a storage unit or a truck. Once the employer has relinquished control of the property by individually assigning it to the employees, it has diminished the strength of its property interest so that it no longer retains the exclusive-use rights articulated in the Board's bulletin board cases. In other words, the employer's property interest does not outweigh the employees' Section 7 rights, and therefore the employer can only restrict the employees' Section 7 rights if it shows a substantial interference with its *management* interests, i.e., "special circumstances."[14]

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[12] *Id.*

[13] *Id. See also AT & T*, 362 NLRB No. 105, slip op. at 25-27 (June 2, 2015), where the judge concluded that the Employer violated Section 8(a)(1) by prohibiting employees from placing union stickers on the Employer's vehicles, laptops, and lockers at two other facilities because the employees had a Section 7 right to place stickers on company property that was "issued to employees for their use." We note that, although the Board accepted the judge's ruling without exceptions being filed regarding this violation, the Board did not disagree with the judge's conclusion. Furthermore, in rejecting the judge's recommended nationwide remedy, the Board found that the remedy should apply only at the two locations where the judge found that the Employer had "unlawfully implemented and enforced" its rules to prohibit stickers on its vehicles, laptops, and lockers. *Id.*, slip op. at 1 n.3. This indicates that the Board is likely to agree that employees have a Section 7 right to affix Union stickers on personally-assigned Employer property, absent a showing of special circumstances.

[14] *See Purple Communications, Inc.*, 361 NLRB No. 126, slip op. at 12 (Dec. 11, 2014) (citing *Republic Aviation*, 324 U.S.793, 804 n.10 (1945)) (a restriction on oral

Applying these principles here, we conclude that the Employer unlawfully restricted employees' rights to affix Union stickers and other insignia on property that it assigned to employees on an individual basis, i.e., trucks used by splicing technicians, and personal cubicles and shelves. The splicing technicians are assigned their trucks on a long-term basis, the truck number is listed on the employee's time card, and the Employer uses the truck number to track down where splicing technicians are working. Splicing technicians load their equipment into the truck, use the truck during their shift, and park the truck at the Employer's facility at the end of the shift.[15] Likewise, the shelving units are assigned to individual employees, the employee's name is affixed to the compartment shelf, and the cubicles or modules are also assigned to individual employees. Thus, the evidence demonstrates that, like the employer in *Sprint/United Management Co.*, the Employer has ceded control of the above property by individually assigning the property to the employees.

Furthermore, the Employer has not presented substantial evidence of special circumstances sufficiently important to outweigh the employees' Section 7 rights to affix union stickers and other materials to the individually-assigned trucks or storage units. The Board has found special circumstances when displaying union insignia would likely jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established as part of its business plan.[16] The Employer has not argued that special circumstances warranted its blanket ban, and any such argument would be undermined by the Employer's historic practice of allowing the employees to post pro-union stickers on its cubicles, shelves, and trucks over many years.

Therefore, the Employer violated Section 8(a)(1) of the Act when it removed or instructed employees to remove stickers, including pro-union stickers, from their personally-assigned trucks, cubicles, and shelves.

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solicitation on nonworking time must be justified by "special circumstances" that make the restriction necessary in order to "maintain production or discipline").

[15] In contrast, the Employer does not assign the bucket trucks to its outside plant employees on a long-term basis, and the Region should not allege that employees have a statutory right to attach union stickers or other insignia to these vehicles.

[16] *P.S.K. Supermarkets*, 349 NLRB at 35.

**The Employer Violated Section 8(a)(5)**

An employer's practice becomes an established term and condition of employment if it occurs with enough regularity and frequency that employees would reasonably expect the practice to continue or reoccur on a regular and consistent basis.[17] As a term and condition of employment, an established past practice generally cannot be changed without offering the unit employees' collective-bargaining representative notice and an opportunity to bargain, absent a waiver of this right.[18] However, an employer only has a duty to bargain if the unilateral change it makes in an established past practice is "material, substantial, and significant,"[19] and the burden is on the General Counsel to prove that the changes meet this requirement.[20]

Applying these principles, we first conclude that the Employer had an established past practice of permitting the unit employees to affix Union stickers on its storage shelves and cubicles and on its trucks. For four to five years, the Employer had allowed employees to regularly and routinely affix stickers, including pro-Union stickers, to their individually-assigned storage spaces. Similarly, for eight to ten years, the Employer permitted unit employees to regularly affix stickers to their assigned trucks, and the Employer never disciplined employees or removed the stickers. The practice occurred with enough regularity that the employees could

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[17] *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349, 353-54 (2003) (finding that issuance of production-related bonuses and gifts was not an established past practice, because it did not occur on a regular and consistent basis, but rather occurred intermittently and at the employer's discretion), *enforced per curiam*, 112 F. App'x 65 (D.C. Cir. 2004); *Sunoco, Inc.*, 349 NLRB 240, 244 (2007) ("An employer's practices, even if not required by a collective-bargaining agreement, which are regular and long-standing, rather than random or intermittent, become terms and conditions of unit employees' employment, which cannot be altered without offering their collective-bargaining representative notice and an opportunity to bargain over the proposed change."); *Garden Grove Hospital & Medical Center*, 357 NLRB No. 63, slip op. at 6 (Aug. 26, 2011) (employer's mistakenly granted reserve sick leave benefit occurred with enough regularity and consistency without interruption—every pay period for nine months—that employees could reasonable expect it to continue).

[18] *J&J Snack Foods Handhelds Corp.*, 363 NLRB No. 21, slip op at 15 (Oct. 1, 2015); *Garden Grove Hospital & Medical Center,* 357 NLRB No. 63, slip op. at 6; *Sunoco, Inc.*, 349 NLRB at 244.

[19] *J&J Snack Foods Handhelds Corp.*, 363 NLRB No. 21, slip op at 15.

[20] *Id.* (citing *North Star Steel Co.*, 347 NLRB 1364, 1367 (2006)).

reasonably expect to have the right to place stickers and banners both on their company-issued trucks and in their assigned storage space. The Employer only asked that stickers be removed if an employee affixed a sticker considered problematic or obnoxious, for example, stickers that had foul or offensive language. Even then, a manager would request that the Union's (b) (6), (b) (7)(C) speak to the employee and request that the employee remove the sticker. Therefore, the Employer established a practice and, hence, a term and condition of employment, permitting this conduct.[21]

We further conclude that the Employer changed that practice in June and July of 2015. The evidence is clear, and the Employer does not deny, that after re-issuing its policies and putting employees on notice, the Employer began restricting employees from placing stickers on personal cubicles, shelves, and trucks. Thus, removing the stickers from the trucks and requesting that employees remove all stickers from the cubicles and shelves were unilateral changes. Finally, it is undisputed that the Employer instituted the changes without first giving the Union notice and an opportunity to bargain.[22]

Finally, we conclude that the changes were "material, substantial, and significant" because the Employer communicated that the changes were enforcing a work rule and a contract provision. The Board has held that if an employee's failure to comply with a unilaterally changed working condition would entail discipline, the changes are material, substantial, and significant.[23] At the Fresno facility, the

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[21] Although the Employer denies that it historically allowed employees to affix stickers, other than company stickers, on their assigned trucks, shelves, or cubicles, this claim is directly contradicted by the Union's (b) (6), (b) (7)(C). Moreover, the fact that the Employer reissued the work rule regarding posting materials on trucks and reiterated the contractual provision regarding posting materials on other Employer property suggests, contrary to the Employer's claims, that it had not consistently been enforcing those restrictions beforehand.

[22] The Employer argues that Section 3.06 (Bulletin Boards) of the parties' collective-bargaining agreement was a waiver of employees' right to post stickers on storage shelves and cubicles, such that there was no obligation to bargain. Because the provision states that the "Union agrees not to post or distribute Union material" on the Employer's premises, other than on Union bulletin boards, and states nothing about *employee* postings, we conclude that this provision does not clearly and unmistakably waive the Union's right to bargain about *employees* affixing stickers to the Employer's property.

[23] *See, e.g., Flambeau Airmold Corp.*, 334 NLRB 165, 166 (2001) (unilateral change regarding sick leave material, substantial, and significant, in part, because "the evidence that the [employer] threatened to impose discipline on employees who

Employer told at least one employee that failure to remove stickers from [redacted] truck would be considered "insubordination," which is universally considered adequate grounds for discipline. As a result, at least two employees complied by removing the stickers. Moreover, although there is no evidence as to what the employees at the Hanford facility were told, employees removed stickers and banners from their storage units. And, although the Employer did not openly threaten to discipline employees if they failed to stop placing stickers on its property, the Employer retains the right to enforce its work rules, and employees would reasonably believe that they would be disciplined for violating work rules.[24] Indeed, the [redacted] states that the Union would direct employees not to post stickers at the facilities for fear of the employees being disciplined. Therefore, the changes are material, substantial, and significant.

Based on the foregoing, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) and 8(a)(5).

/s/
B.J.K

ADV.32-CA-156076.Response.AT&T Pacific Bell.[redacted](2)

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breached the new policy is sufficient, ipso facto, to show that [it] considered the issue significant and that the unit employees would think likewise knowing that infractions of the new rule could place their employment status in jeopardy"); *Ferguson Enterprises, Inc.*, 349 NLRB 617, 618 (2007) (change is material and substantial where discipline results or is simply threatened); *Postal Service*, 341 NLRB 684, 687 (2004) (employer's contention that unilaterally implemented policy was not material was "belied by the threat of discipline" for violating the policy).

[24] *See International Business Machines Corp.,* 333 NLRB 215, 221 (2001) (finding that employees would "reasonably conclude" that they would be disciplined for continuing to display pro-union signs in employer's parking lot in contravention of employer rule barring large signs, even without a threat of disciplinary action, because employees were specifically told that their actions violated company policy), *enforced*, 31 F. App'x 744 (2d Cir. 2002).

*United States Government*
*National Labor Relations Board*
**OFFICE OF THE GENERAL COUNSEL**

# Advice Memorandum

S.A.M.

DATE: May 31, 2016

TO: George P. Velastegui, Regional Director
Region 32

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Google, Inc.
Case 32-CA-164766

506-0170
506-2001-5000
506-4033-1200
506-6080-0800
512-5012-0125
512-5012-3322
512-5036-0117

The Region submitted this case for advice as to whether Google, Inc. ("the Employer") violated Section 8(a)(1) of the Act by issuing a final written warning to the Charging Party after [redacted] and like-minded coworkers posted complaints about workplace diversity policies on the Employer's internal social networking platform and requested clarification of what comments they could post on that platform without violating the Employer's rules. The Region also requested advice on whether a nationwide notice posting would be necessary to remedy the alleged unlawful discipline.

We conclude that the Charging Party's comments on the Employer's internal social networking platform constituted concerted activity that did not lose the Act's protection, and therefore the Employer violated Section 8(a)(1) by issuing [redacted] a final written warning and threatening [redacted] for engaging in that conduct. We further find that the Employer violated Section 8(a)(1) by maintaining workplace rules that are unlawfully overbroad. Finally, we conclude that a nationwide notice posting to remedy the violations is appropriate.

## FACTS

The Employer is engaged in the business of developing and providing information technology, web development, internet-related services, online advertising technologies, search systems, cloud computing, and related software. It has approximately 60,000 employees worldwide and is headquartered in Mountain View, California. The Charging Party began working for the Employer on January 12, 2015

as a software engineer.[1] [redacted] is responsible for writing code, debugging operating systems, and performing related tasks.

The Employer hosts an intranet employee discussion forum, known as internal Google Plus ("G+"), that is only visible to and accessible by its employees.[2] Any employee assigned to any Employer facility in the world can post messages on G+ "threads" relating to any topic, work and non-work alike. Many employees post items of interest relating to their working assignments, their personal lives, and current events.

Shortly after [redacted] was hired, the Charging Party began observing and participating in conversations on G+. In March, after [redacted] posted a meme, i.e., a photographic image with text, in a G+ discussion thread, the Employer gave [redacted] a verbal counseling for [redacted] post. The thread included a discussion of a [redacted] coworker's reported sexual harassment, and the Charging Party's post stated, "I am [redacted] ... has a complete breakdown over some dude's cheesy pickup line ... things you should never say in a thread about harassment." Many of the Charging Party's coworkers took offense with the meme and reported it to Human Resources. A Human Resources Business Partner informed the Charging Party that [redacted] should not post comments like that.[3]

The Charging Party believed that certain employees were being harshly and unfairly criticized within the G+ online community for expressing unpopular social, political, and workplace policy viewpoints. Specifically, the Charging Party believed that employees were unfairly denounced when they spoke out against the Employer's various workplace diversity and social justice initiatives and stated that the programs disfavored [redacted]. The posted criticisms of such opinions were often contentious and included calls for those expressing the unpopular viewpoints to be disciplined or even terminated. Because the Employer allows coworkers to submit comments to another employee's supervisor, and those comments can in turn be used in evaluating the employee, the Charging Party also believed that [redacted] could be disciplined if commenters on G+ who disagreed with [redacted] submitted comments to [redacted] supervisor.

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[1] All dates are in 2015.

[2] This internal forum is not to be confused with the public version of G+, which is a social media platform open to the general public. All references to G+ in this memorandum are solely to the Employer's internal discussion forum.

[3] The Charging Party does not include the verbal counseling that [redacted] received in March as part of the current charge.

On April 22, the Charging Party observed a comment thread where employees harshly criticized a coworker for expressing [redacted] views against the Employer's "diversity town hall" webcasts. The coworker had written, "I've yet to see effective 'increasing diversity' efforts which do not bring unfairness against [redacted] (e.g. lowering the hiring bar for minorities, or arranging events where [redacted] are or feel excluded)." The coworker received negative feedback on the same discussion thread from other employees, including supervisors. These included comments such as, "Frankly, I could care less about being 'unfair' to [redacted]. You already have all the advantages in the world." Others called for the coworker to be reported for [redacted] comment. The coworker's manager later joined the discussion thread and apologized for the coworker's comments, saying they were "not acceptable behavior" and that [redacted] would resolve the matter "on the official channels." After reading the thread, the Charging Party sent an email to Human Resources supportive of the coworker and complaining about how employees had treated the coworker for criticizing the Employer's workplace diversity initiatives. Human Resources pledged to look into the matter further.

On April 24, the Charging Party began talking with four like-minded coworkers on a separate G+ discussion thread regarding their own experiences working for the Employer.[4] The group discussed what they perceived to be the mistreatment of employees, such as themselves, who hold unpopular workplace views (including calls for their discipline), the Employer's failure to react to reported concerns regarding such mistreatment, and some suggestions on preserving evidence.

On May 8, one of the Charging Party's colleagues (who was also on the April 24 discussion thread) wrote an open letter to Human Resources and posted it on G+. The letter challenged Human Resources' handling of complaints by employees holding unpopular workplace views. The Charging Party commented on the thread where the letter was posted, echoing the author's complaints that Human Resources failed to respond adequately to harassment complaints.

On May 20, the Charging Party emailed Human Resources and again complained about the mistreatment of coworkers on G+ for expressing views inconsistent with those held by a majority of employees. The Charging Party raised concerns about employees being criticized for their political beliefs and targeted for their race or gender, and concerns about expressing unpopular opinions regarding workplace policies that could result in their discipline. Human Resources replied and, thereafter, held two videoconferences with the Charging Party. During the video conferences, a Human Resources representative said that [redacted] was aware of the issues and had acted on them where it was appropriate.

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[4] It is unclear if this thread was private or viewable by all employees.

On August 6, an Employer Senior Vice President ("the Vice President") posted a G+ thread calling for workplace civility and imploring readers to create a supportive working environment. The Vice President additionally shared an email from a [redacted] software engineer about negative experiences [redacted] had working as a [redacted] in the technology industry. The Charging Party directed the following comment on the thread to the Vice President:

> [m]any Googlers have claimed that it is "harassment" or some other rule violation to critique articles that push the Social Justice political agenda. A few Googlers have openly called for others to be fired over it. Do you support this viewpoint, and if so, can we add a clear statement of banned opinions to the employee handbook so that everybody knows what the ground rules are?

After a few employees negatively responded to [redacted] comment, the Charging Party continued to question the Employer's official stance on this issue. Eventually, the Vice President replied, "I think to ask for a rule book is missing the point. But if you want a succinct summary: don't do what you're doing here. Contact me privately if you want to know more." The thread continued with several comments from other employees, both in support of the Charging Party's original question and in opposition.

Later that same day, after the Vice President's response in the discussion thread, the Charging Party emailed the Vice President and asked several follow-up questions including: "Did I violate any policies by posting in your G+ thread? If so, which ones?"; "Do you think it's reasonable for Googlers to 'dogpile' on fellow employees who express unpopular opinions in good faith, or would you consider that harassment?"; and "Do you think it's reasonable for Googlers to call for coworkers to be fired based on expressing unpopular opinions, or does that cross a line?" The Vice President responded, declining to answer any of the questions directly but noting that [redacted] found the "context" of the Charging Party's comment "inappropriate." The Charging Party replied in a lengthy email, citing a number of circumstances where [redacted] believed like-minded coworkers were mistreated for expressing their views on G+. [redacted] again asked a number of questions about the Vice President's views on the Employer's policies. The Vice President refused to engage, deferring to Human Resources and remarking, "I am not required to reply[;] I choose to spend my time on other matters."

Around this same time, the Charging Party communicated over email with fellow employees to protest the Vice President's and other employees' responses in the August 6 discussion thread. They further discussed how to frame arguments to management and considered the possibility of hiring a lawyer. The Charging Party thereafter created a new internal mailing list ("g+/freespeech") to promote the group's perspectives. Additionally, the Charging Party worked with other employees to draft an email to the Employer protesting the negative treatment they had experienced for

expressing their views. They also sought to relay comments made by managers on G+ about "blacklisting" employees whom they would not select for assignments because of their controversial opinions. The email was eventually sent by one of the employees (not the Charging Party, who also was not copied on the email) to upper management.

On the morning of (b) (6), (b) (7)(C), the Charging Party received an invitation from a Human Resources Manager for a meeting that afternoon. In between this invitation and the meeting, the Charging Party spoke with [redacted] supervisor, who holds the title (b) (6), (b) (7)(C). The Charging Party asked whether [redacted] was being discharged. The (b) (6), (b) (7)(C) replied that [redacted] was not being discharged, but would receive a stern warning. The (b) (6), (b) (7)(C) then told the Charging Party that [redacted] was doing enormous damage to [redacted] career by getting involved in these threads.

The Charging Party attended the meeting later that day, along with the Human Resources Manager and the (b) (6), (b) (7)(C). The (b) (6), (b) (7)(C) began the meeting by referencing the August 6 thread responding to the Vice President. The (b) (6), (b) (7)(C) said the Charging Party's comments in the thread were inappropriate, and that the Charging Party was being given a final written warning. The final written warning states that the Charging Party was being disciplined for violating the Employer's Appropriate Conduct Policy and Code of Conduct.[5] During the meeting, the Charging Party protested the final written warning by saying it was retaliation for filing complaints with Human Resources. The Human Resources Manager denied this and said that the Employer had taken action against other employees for inappropriate postings, but did not mention their names. Also during the meeting, the (b) (6), (b) (7)(C) reiterated what [redacted] had told the Charging Party that morning, namely to stop getting involved in these threads and focus on [redacted] work. According to the Employer's disciplinary policy, the next step after a final written warning is termination.

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[5] The Employer asserted in the final written warning that the Charging Party had violated the Appropriate Conduct Policy's prohibitions on "disorderly or disruptive conduct, including derogatory name-calling, abusive or profane language, intimidation or coercion of co-workers or any 'un-businesslike' behavior toward co-workers, TVCs, clients or visitors" and "insubordination, including refusal of a work assignment or improper language toward a manager or management representative." It also asserted that the Charging Party had violated the following provision from its Code of Conduct: "Each Googler is expected to do his or her utmost to create a respectful workplace culture that is free of harassment, intimidation, bias and unlawful discrimination of any kind."

## ACTION

We conclude that the Charging Party's comments on G+ constituted concerted activity that did not lose the Act's protection, and therefore the Employer violated Section 8(a)(1) by issuing [redacted] a final written warning and threatening [redacted] for engaging in that conduct. We further conclude that the provisions of the Employer's Appropriate Conduct Policy and Code of Conduct listed in the final written warning are unlawfully overbroad in violation of Section 8(a)(1). Finally, we conclude that a nationwide notice posting and electronic distribution of the posting are appropriate remedies given the circumstances.

### A. The Charging Party's G+ Comments Constituted Concerted Activity that Did Not Lose the Act's Protection.

Section 7 of the Act provides that employees have the right to engage in "concerted activities" for "mutual aid or protection."[6] Conduct is concerted when it is "engaged in with or on the authority of other employees," or when an individual employee seeks "to initiate or to induce or to prepare for group action" or to bring group complaints to management's attention.[7] An individual acts on the authority of other employees even if not directly told to take a specific action if the concerns expressed by the individual employee to management are a "logical outgrowth of the concerns expressed by the group."[8] Mutual aid or protection "focuses on the *goal* of concerted activity; chiefly, whether the employee or employees involved are seeking to 'improve terms and conditions of employment or otherwise improve their lot as employees.'"[9]

Applying these principles, the Charging Party's August 6 comments on G+ and emails to the Vice President were concerted activity because they were the logical

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[6] 29 U.S.C. § 157. *See, e.g., Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 3 (Aug. 11, 2014).

[7] *Id.*, slip op at 3 (quoting *Meyers Industries, Inc. (Meyers II)*, 281 NLRB 882, 885, 887 (1986), enfd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988)).

[8] *Mike Yurosek & Son,* 306 NLRB 1037, 1038-39 (1992) (finding four employees' individual decisions to refuse overtime work were logical outgrowth of concerns they expressed as a group over new scheduling policy), supplemented by 310 NLRB 831 (1993), enfd. 53 F.3d 261 (9th Cir. 1995).

[9] *Fresh & Easy Neighborhood Mkt., Inc.*, 361 NLRB No. 12, slip op. at 3 (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978)).

outgrowth of [redacted] prior conversations with coworkers about their terms and conditions of employment. Namely, the Charging Party's comments sought clarification from management about workplace rules, and protested the treatment of employees who hold unpopular viewpoints regarding the Employer's workplace diversity initiatives. These were the exact topics that the Charging Party and [redacted] fellow employees previously had discussed among themselves and had expressed to Human Resources in multiple emails and postings on G+.[10] While the Charging Party made the August 6 posting individually, [redacted] comments were clearly connected to [redacted] ongoing efforts to clarify and protest workplace policies in concert with like-minded coworkers. Moreover the comments, disseminated openly on G+, induced discussion and a group response when some coworkers replied favorably to the Charging Party's post. Likewise, the Charging Party's later emails to the Vice President sought information on workplace policies in furtherance of [redacted] and [redacted] coworker's ongoing efforts to clarify disciplinary rules.[11] Thus, the Charging Party's actions sought workplace changes on behalf of [redacted] coworkers.[12]

At the same time, the Charging Party's actions were for "mutual aid or protection" because they were aimed at improving employment conditions and clarifying permissible workplace behavior, which had potential employment consequences for the Charging Party and like-minded coworkers.[13] Namely, the

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[10] *See Five Star Transportation*, 349 NLRB 42, 43-44, 47 (2007) (finding drivers were engaged in protected concerted activity where, after meeting as a group to discuss a change in bus contractors, they sent individual letters to school committee expressing a common desire to retain their negotiated terms and conditions of employment under prior contractor), enfd. 522 F.3d 46 (1st Cir. 2008); *Hahner, Foreman & Harness, Inc.*, 343 NLRB 1423, 1424 (2004) (employees engaged in concerted activity when they raised separate complaints to management after discussing complaints together).

[11] *Hitachi Capital Am. Corp.*, 361 NLRB No. 19, slip op. at 1-2 (Aug. 8, 2014) (employee acted concertedly when she sent several emails to management questioning a workplace policy that the employer knew was of general concern to the workforce).

[12] *See Every Woman's Place*, 282 NLRB 413, 413 (1986) (concerted activity where employee sought clarification of workplace policies on behalf of group), enfd. 833 F.2d 1012 (6th Cir. 1987); *cf. Long Ridge of Stamford*, 362 NLRB No. 33, slip op. at 1-2 (March 24, 2015) (finding employee "clearly engaged in protected concerted activity when he informed [employer's administrator] of employees' concerns regarding recent disciplinary actions and other terms of employment").

[13] *See Five Star Transportation*, 349 NLRB at 47 (letters written by individual employees to employer were protected concerted activity for mutual aid or protection because the letters expressed concerns "within the context of the [employees'] common desire to retain their negotiated terms and conditions of employment").

Charging Party sought information on how the Employer would enforce its workplace harassment rules, and if [redacted] and [redacted] coworkers would be disciplined for expressing disagreement with the Employer's workplace diversity policies, which they perceived as having negative consequences for [redacted] like themselves.[14] "'[P]roof that an employee action inures to the benefit of all' is 'proof that the action comes within the 'mutual aid or protection' clause of Section 7."[15]

Finally, the Charging Party's postings and emails did not lose the protection of the Act. Whether an employee's otherwise lawful Section 7 conduct is sufficiently egregious to lose the Act's protection is based on a balancing of the familiar *Atlantic Steel* factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice.[16] The Board has repeatedly recognized that an employer may not discipline an employee merely because the employee's comments make coworkers "feel uncomfortable."[17] Rather, protected activity often includes opinions and actions on contentious subjects that may cause some discomfort.

Applying the *Atlantic Steel* factors, none of the Charging Party's comments lost the protection of the Act. First, the discussion took place in an internal online forum (not in public or in front of customers), and without any in-person confrontation with supervisors or coworkers. Second, the subject matter of the comments was directly

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[14] We note that the Board in *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 1, 4 n.9, 6-7, overruled the mutual aid or protection analysis in *Holling Press, Inc.*, 343 NLRB 301, 302 (2004), relied on by the Employer here.

[15] *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 5 (citations omitted).

[16] *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979). We note that because the Charging Party did not in any way embarrass or impugn the Employer in public, the test used by the Board in *Triple Play Sports Bar & Grille* appears inapplicable. *See* 361 NLRB No. 31, slip op. at 3-4 (Aug. 22, 2014) (applying tests from *Jefferson Standard* and *Linn* to determine whether employees' off-duty, offsite use of social media to communicate workplace complaints with coworkers or with third parties lost the Act's protection), enfd. sub nom. *Three D, LLC v. NLRB,* 629 Fed. Appx. 33 (2nd Cir. 2015). While *Triple Play* is the applicable precedent for evaluating if an employee's public social media activity, which may be observed by third parties, including customers, lost the Act's protection, an employee's communications on an internal forum seem more properly evaluated under the traditional *Atlantic Steel* test.

[17] *Chartwells, Compass Group, USA*, 342 NLRB 1155, 1157 (2004).

tied to terms and conditions of employment, namely the Employer's workplace diversity and disciplinary policies. Third, the nature of the Charging Party's comments does not favor a loss of protection. [redacted] did not curse, make threats, or use abusive language toward co-workers. Indeed, the Charging Party's comments were similar in tone and tenor to those of other employees on the August 6 thread, and also similar to those made in other G+ threads.[18] Only the fourth factor would weigh in favor of a loss of protection, since the Employer's unfair labor practices occurred after, rather than before, the Charging Party commented on the Vice President's thread. Thus, taken together, the *Atlantic Steel* factors favor finding that the Charging Party did not lose the Act's protection.

### B. The Employer Violated Section 8(a)(1) By Issuing the Charging Party a Final Written Warning and Threatening [redacted] for Engaging in Protected Concerted Activity.

An employer violates Section 8(a)(1) of the Act by interfering with an employee exercising his or her Section 7 rights.[19] The Employer does not dispute that it issued the Charging Party a final written warning for [redacted] comments on the August 6 thread. Because we have found that the Charging Party's August 6 postings constituted protected concerted activity, we conclude that the Employer violated Section 8(a)(1) when it issued the discipline in response to that activity.[20]

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[18] *See, e.g., Kiewit Power Constructors Co.,* 355 NLRB 708, 710-11 (2010) (finding statements by two employees that things would "get ugly" and that one of them would bring in his boxing gloves if employer continued to enforce its break-in-place policy remained protected), enfd. 652 F.3d 22 (D.C. Cir. 2011).

[19] 29 U.S.C. § 158(a)(1). *See, e.g., EF Int'l Language School,* 363 NLRB No. 20, slip op. at 11 (Oct. 1, 2015); *Parexel Int'l, LLC*, 356 NLRB 516, 518 (2011) (finding employer's attempt to prevent future protected concerted activity by discharging an employee for discussing wages violated Section 8(a)(1)); *Chromalloy Gas Turbine Corp.*, 331 NLRB 858, 863 (2000) (finding employer violated Section 8(a)(1) by discharging employee for speaking out against new break policy and how managers scheduled work during a group meeting), enfd. 262 F.3d 184 (2d Cir. 2001); *CKS Tool & Engineering of Bad Axe*, 332 NLRB 1578, 1578 n.1, 1584-86 (2000) (finding employer violated Section 8(a)(1) by discharging employee for raising group concerns about productivity in a group meeting called by the employer to discuss productivity and efficiency).

[20] In finding that the Employer violated Section 8(a)(1) by issuing the Charging Party a final written warning, we do not rely on a theory of violation based on *Continental Group*, 357 NLRB 409, 412 (2011), which modified the rule for when discipline pursuant to an unlawful overbroad work rule may, in and of itself, violate Section 8(a)(1). While we conclude below that the work rules referenced in the final

We agree with the Region that no motive analysis is necessary in this case because the Employer has not offered a separate and independent basis for the Charging Party's discipline.[21] The Employer concedes that it disciplined the Charging Party for [redacted] comments on G+ regarding workplace policies—but contends that the comments were inappropriate and caused [redacted] to lose the Act's protection. Because we have already concluded that the comments did not lose the protections of the Act under *Atlantic Steel*, the discipline violated Section 8(a)(1)—regardless of the Employer's motivations.[22] We also note that because the Charging Party was disciplined for [redacted] protected concerted activity on August 6, which involved direct contact with the Employer's Vice President, it is unnecessary to determine whether the Employer had knowledge of the Charging Party's previous protected concerted activities.[23]

We also conclude that the Employer independently violated Section 8(a)(1) by threatening the Charging Party on two separate occasions. The first threat occurred on the August 6 thread when the Vice President stated "don't do what you're doing here" in response to the Charging Party's questions about the Employer's policies. The Vice President's comment instructed the Charging Party to cease [redacted] questioning, and suggested [redacted] comments were in violation of the Employer's work rules. As already discussed above, the Charging Party's comments were protected concerted activity, and therefore the Vice President's attempt to inhibit that activity violated

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written warning are unlawfully overbroad, in light of the strong evidence showing that the Employer unlawfully disciplined the Charging Party for engaging in protected concerted activity, we do not find it necessary to argue a *Continental Group* theory of violation in the alternative. Moreover, if the Board were to decide here that the Charging Party's statements lost the Act's protection we could not prevail under that alternate theory in any event. *Id.* at 412.

[21] *See, e.g., Chromalloy Gas Turbine Corp.*, 331 NLRB at 864 ("where protected concerted activity is the basis for an employee's discipline, the normal *Wright Line* analysis is not required").

[22] *Phoenix Transit Sys.*, 337 NLRB 510, 510 (2002), enfd. mem. 63 Fed. Appx. 524 (D.C. Cir. 2003).

[23] *See Timekeeping Sys., Inc.*, 323 NLRB 244, 244 (1997) (finding unnecessary to pass on whether the employer was aware of employee's additional concerted activity, because the employer was aware of the protected email that led to the employee's discipline).

Section 8(a)(1).[24] Similarly, the (b) (6), (b) (7)(C) repeated statements on (b) (6), (b) (7)(C) that the Charging Party was doing enormous damage to [redacted] career by getting involved in the G+ threads were unlawful threats because they discouraged the Charging Party from engaging in protected activity and implied that the Employer would issue [redacted] further discipline if [redacted] continued to exercise [redacted] Section 7 rights.[25]

We note that both the final written warning and management's threats indicated the Charging Party was reprimanded for discussing employment conditions on G+. Our determination that this violated the Act should not be construed to mean that an employer is prohibited from demanding that employees advance company policies and viewpoints. Companies are permitted to base hiring and advancement decisions on employees' adherence to their legitimate policy objectives, so long as they do not inhibit protected concerted activity. Here, however, the Employer disciplined and threatened the Charging Party for discussing terms and conditions of employment, and inquiring about how workplace policies would be applied. This is clearly protected activity, and accordingly the Employer's actions violate the Act.

### C. The Employer Violated Section 8(a)(1) By Maintaining Unlawfully Overbroad Rules.

The mere maintenance of a rule that would "reasonably tend to chill employees in the exercise of their Section 7 rights" constitutes a violation of Section 8(a)(1).[26] The unlawful effect of such a rule is "to inhibit employees who are considering engaging in legally protected activities by convincing them to refrain from doing so rather than risk discipline."[27] The Board has developed a two-step inquiry to determine whether an employer rule or policy would have such an effect.[28] First, a rule is unlawful if it

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[24] *See EF Int'l Language School,* 363 NLRB No. 20, slip op. at 11 (finding employer unlawfully threatened employee by, among other things, stating she should not discuss work-related matters via group emails, and instead instructed the employee to take the matter up with management in person).

[25] *Id. See also Desert Springs Hospital Medical Center*, 363 NLRB No. 185, slip op. at 2-3 (May 10, 2016) (finding human resources director threatened employee with unspecified reprisal by stating during investigatory meeting that "it will be trouble for you" if she informed coworkers of the meeting or her discipline for pro-union activity).

[26] *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999).

[27] *Continental Group*, 357 NLRB at 411.

[28] *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-47 (2004).

explicitly restricts activity protected by Section 7. Second, even if it does not explicitly restrict Section 7 activities, a workplace rule violates Section 8(a)(1) if: (1) employees would reasonably construe the rule's 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.[29] We find that the rules the Employer referred to in the Charging Party's final written warning violate Section 8(a)(1) under these principles.

First, employees would reasonably construe the specific provisions quoted from the Appropriate Conduct Policy as prohibiting Section 7 activity. Those provisions bar "disorderly or disruptive conduct, including derogatory name-calling, abusive or profane language, intimidation or coercion of co-workers or any 'un-businesslike' behavior toward co-workers, TVCs, clients or visitors" and "insubordination, including refusal of a work assignment or improper language toward a manager or management representative." A reasonable employee would read those rules to prohibit concerted discussions and complaints regarding the Employer's workplace policies or treatment of employees because such discussions could be considered "disruptive," "un-businesslike," or "improper language toward a manager."[30] Similarly, employees would reasonably construe the Code of Conduct's instruction that "[e]ach Googler is

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[29] *Id.* at 647. *See also William Beaumont Hosp.*, 363 NLRB No. 162, slip op. at 2 (April 13, 2016).

[30] *See, e.g., Valley Health Sys. LLC,* 363 NLRB No. 178, slip op. at 1-2 (May 5, 2016) (finding unlawful rule prohibiting behavior that "brings discredit" to the employer, "or is offensive to patients or fellow employees"); *Casino San Pablo*, 361 NLRB No. 148, slip op. at 3 (Dec. 16, 2014) (finding rule prohibiting "insubordination or other disrespectful conduct" unlawful); *First Transit, Inc.*, 360 NLRB No. 72, slip op. at 2 n.5, 12 (April 2, 2014) (finding unlawful rule prohibiting employees from "conducting oneself during nonworking hours in such a manner that the conduct would be detrimental to the interest or reputation of the Company"); *Sheraton Anchorage*, 362 NLRB No. 123, slip op. at 1 n.4 (June 18, 2015) (finding that employees would reasonably fear that employer prohibitions on "conflict[s] of interest" and "behavior that violates common decency or morality or publicly embarrasses the" employer apply to "any conduct the Respondent may consider to be detrimental to its image or reputation or to present a 'conflict' with its interests, such as informational picketing, strikes, or other economic pressure"), incorporating by reference 359 NLRB No. 95, slip op. at 56 (April 23, 2014); *Southern Maryland Hospital*, 293 NLRB 1209, 1222 (1989) (rule prohibiting "derogatory attacks on . . . hospital representative[s]" found unlawful), enfd. in relevant part 916 F.2d 932, 940 (4th Cir. 1990); *Beverly Health & Rehabilitation Services*, 332 NLRB 347, 348 & nn.5, 6, 357 (2000) (rule that prohibited "[m]aking false or misleading work-related statements concerning the company, the facility or fellow associates" found unlawful), enfd. 297 F.3d 468 (6th Cir. 2002).

expected to do [redacted] or her utmost to create a respectful workplace culture that is free of harassment, intimidation, bias and unlawful discrimination of any kind" to prohibit protected concerted activity. Section 7 activity can often involve contentious issues, which may be considered disrespectful toward or harassment of a coworker. As the Board held in finding a similar rule prohibiting "[i]nsubordination … or other disrespectful conduct" unlawful, "concerted employee protest of supervisory activity and employee solicitation of union support from other employees are protected activities under the Act, and employees [] could reasonably believe that both forms of activity might be prohibited by" such a broadly worded rule.[31]

**D. The Region Should Seek a Nationwide Remedy.**

Where an employer violates Section 8(a)(1) by disciplining an employee, the traditional remedy includes a physical notice posting at the location where the violation occurred, as well as electronic distribution of the notice (such as by email, posting on an intranet or internet site, and/or other electronic means) if the employer "customarily communicates" with its employees by such means.[32] Where an employer violates Section 8(a)(1) by maintaining an unlawfully overbroad workplace rule, the traditional remedy of posting a notice is generally ordered at each location where the rule is in place, as well as electronic distribution in the manner described above, along with rescission of the unlawful rule and notice to the employees that the unlawful rule has been rescinded and will no longer be enforced.[33]

Here, the Region should seek a nationwide notice posting to remedy the Section 8(a)(1) violations discussed above. The Charging Party's protected concerted activity took place on the Employer's internal networking site, which is visible to all of its employees companywide. The Vice President unlawfully threatened the Charging Party on August 6 over this same internal, companywide site in response to questions about the Employer's workplace policies and work rules. Further, the unlawful rules the Employer then relied on to discipline the Charging Party apply to

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[31] *University Medical Center*, 335 NLRB 1318, 1321 (2001), enf. denied in relevant part sub nom. *Cmty. Hosps. of Cent. Cal. v. NLRB*, 335 F.3d 1079, 1088-89 (D.C. Cir. 2003). *See also Cincinnati Suburban Press*, 289 NLRB 966, 966 n.2, 975 (1988) (finding unlawful rules prohibiting "false, vicious, or malicious statements concerning any employee, supervisor, the [c]ompany, or its products" and "improper or unseeming conduct").

[32] *J. Picini Flooring,* 356 NLRB 11, 11, 13 (2010).

[33] *See, e.g., MasTec Advanced Technologies*, 357 NLRB 103, 109, 110 (2011); *Guardsmark, LLC*, 344 NLRB 809, 811-12 (2005), enfd. 475 F.3d 369, 380-81 (D.C. Cir. 2007).

all Employer locations. Accordingly, a nationwide posting is proper to remedy each of those violations. In addition, because the (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) unlawful threats and the final written warning are inextricably intertwined with the prior threat the Vice President directed at the Charging Party, those violations also should be included in the same nationwide posting. As noted above, during the disciplinary meeting on (b) (6), (b) (7)(C), the (b) (6), (b) (7)(C) discussed the August 6 thread where the Vice President made [redacted] unlawful threat in response to the Charging Party's protected concerted activity, and the final written warning was based on the Charging Party's comments on that thread. The Region should additionally seek electronic distribution of that notice over the forums by which the Employer customarily communicates with its employees, including G+, if that is appropriate. Finally, the Region should seek a rescission of the unlawful rules, as well as an affirmative order requiring the Employer to notify all employees that the overbroad rules have been rescinded and will no longer be enforced.

Accordingly, the Region should issue complaint, absent settlement, based on the analysis set forth above.

/s/
B.J.K.

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