Significant ULP Cases in 2016

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I have set forth below the significant ULP cases decided by the Board in 2016.

1. LEAD CASES

American Baptist Homes of the West, 364 NLRB No. 13

A panel majority (Pearce and Hirozawa) reversed the judge's finding that the Employer did not violate the Act by permanently replacing striking employees. The majority re-examined *Hot Shoppes, Inc.*, 146 NLRB 802, 805 (1964), and held that, under existing Board law, the General Counsel is not required to demonstrate that an employer was motivated by an unlawful purpose extrinsic to the strike in order to find permanent replacement of striking employees unlawful. Rather, the General Counsel can demonstrate an employer's "independent unlawful purpose" by showing that the hiring of permanent replacements was motivated by a purpose prohibited by the Act, including the desire to punish the strikers.

Following expiration of the parties' collective-bargaining agreement, the Union, with several weeks' notice to the Employer, engaged in a 5-day strike to obtain concessions in contract negotiations, followed by an unconditional to return to work. The Employer hired temporary employees for a period of three days and then began permanently replacing the striking employees, ultimately replacing approximately a third of its workforce. The Employer admitted that it was motivated by a desire to avoid future strikes and "wanted to teach the strikers and the Union a lesson."

According to the majority, *Hot Shoppes* relied on *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333 (1938), to reach the conclusion that an employer may permanently replace strikers for any reason, unless there is evidence of an "independent unlawful purpose." The Board in *Hot Shoppes* concluded that an employer's unlawful motivation could not be inferred merely based on hiring or planning to hire permanent replacements. Since the Board found a lack of evidence of unlawful motivation, it did not address what would have qualified as an independent unlawful purpose. According to the majority, *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963), clarified that an employer's purposes for replacing workers may be "wholly impeached by the showing of an intent to encroach upon protected rights." *Id.* at 227–28. Based on this precedent, and consistent with the principle that otherwise lawful acts can be rendered unlawful when motivated by improper intentions, the majority reasoned that "independent unlawful purpose"

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under *Hot Shoppes* includes an employer's replacement of striking workers with an intent to discriminate or to discourage union membership and does not require the unlawful purpose to be separate from the bargaining relationship or the underlying strike. The Board found this conclusion consistent with *Avery Heights*, 350 NLRB 214 (2007), *enforced sub nom. Church Homes, Inc. v. NLRB*, 30 Fed. Appx. 998 (2nd Cir. 2008), where the Board, with approval by the court of appeals, implicitly presumed that a desire to punish striking employees or break the union would constitute an independent unlawful purpose.

In this case, the panel majority concluded that the Employer's admitted motivation to hire permanent replacements to "teach the strikers and the union a lesson" and to "avoid any future strikes" constituted independent unlawful purposes under *Hot Shoppes* because it revealed an intent to punish employees for engaging in protected conduct—a retaliatory motive barred by the Act—and a desire to interfere with employees' future protected activity. Thus, the majority held that the Employer's refusal to reinstate the strikers was unlawful.

Member Miscimarra dissented, arguing that the majority improperly interpreted "independent unlawful purpose" to mean any antiunion or antistrike animus. According to Member Miscimarra, Congress did not empower the Board to pick and choose among economic weapons that parties might invoke in a collective-bargaining agreement. Member Miscimarra would conclude that an independent unlawful purpose exists only if the employer's unlawful objective is extrinsic to the strike itself and the parties' bargaining relationship.

***Miller & Anderson, Inc.*, 364 NLRB No. 39**

The Board majority (Pearce, Hirozawa, and McFerran) overruled *Oakwood Care Center*, 343 NLRB 659 (2004), and returned to the rule articulated in *M. B. Sturgis, Inc.*, 331 NLRB 1298 (2000), holding that a single bargaining unit can encompass both a company's own employees and employees jointly employed by the company and a supplying employer, without requiring employer consent. This decision follows the Board's significant joint employer holding in *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015), where it concluded that two or more statutory employers are joint employers of the same statutory employees if they "share or codetermine those matters governing the essential terms and conditions of employment."

The majority began its discussion by reviewing Board precedent prior to *Sturgis*, where the Board frequently found appropriate collective-bargaining units that combined employees solely employed by a single user employer and employees jointly employed by that user employer and a supplier employer, provided that the employees shared a community of interest. According to the majority, the Board's treatment of such combined units abruptly changed in *Lee Hospital*, 300 NLRB 947

(1990), where the Board, in reliance on a case dealing with a multi-employer unit, mistakenly stated that, absent an employer consent, employees could not be included in the same unit if they do not have the same employers. In *Sturgis*, the Board rejected *Lee Hospital*'s "faulty logic" that a user employer and the supplier employer—both of which employ employees to perform work on behalf of the same user employer pursuant to the user's arrangement with supplier—are equivalent to completely independent user employers in multi-employer bargaining units, where employer consent is required. In *Oakwood*, the Board reversed *Sturgis*, finding that Congress had not authorized the Board to direct elections in units encompassing the employees of more than one employer.

Examining Section 9(b), which authorizes the Board to decide an appropriate "employer unit" for collective-bargaining purposes, the majority found that the Act does not compel *Oakwood*'s conclusion. Contrary to the view in *Oakwood*, the majority found that traditional multi-employer bargaining involves employers that are entirely independent businesses, with nothing in common except that they operate in the same industry. Indeed, according to the majority, the Board developed the consent requirement in such cases because employers are physically and economically separate from each other, their employees are not jointly controlled, and there is no common user employer for all employees. By contrast, in a *Sturgis* unit, all of the employees are employed by the same user employer and thus fit comfortably within 9(b)'s sanctioning of an "employer unit."

The majority concluded that *Sturgis* effectuates fundamental policies of the Act that the *Oakwood* rule frustrates. *Sturgis* ensures that employees have freedom to exercise their right to self-organize by permitting jointly employed employees to choose the unit they wished to organize—provided their desired unit is appropriate under the traditional community of interests test—while also leaving both groups free to organize separately if they would prefer to do so. *Oakwood*, by contrast, denies employees in an otherwise appropriate unit freedom of association and potentially limits contingent employees' opportunity for workplace representation.

Responding to policy arguments, the majority rejected the conclusion that a return to *Sturgis* will lead to greater conflicts among various employers and employees and increase labor strife. During the many decades prior to *Oakwood*, such conflicts did not materialize. Indeed, the majority found that there is no evidence that collective bargaining involving a *Sturgis* unit is significantly more complicated than if jointly and solely employed employees were in separate bargaining units as envisioned by *Oakwood*. In both situations, the user and supplier employers would face the same obligations to bargain only over the employees with whom it has an employment relationship and only with respect to such terms and conditions that it possesses the authority to control. Indeed, the potential for such disputes over who has the responsibility to bargain over or pay for

certain items could be said to exist in every case involving joint employer bargaining, which has long been sanctioned by the Board and the courts.

Member Miscimarra dissented based on his view that the Act renders inappropriate a bargaining unit where one employer-participant has no "employer" relationship with some or most unit employees. In his view, there will be greater instability based on each bargaining unit's inclusion of some employees who lack an employment relationship with one of the employers as well as greater uncertainty as to whether bargaining will be required by the Board. According to Member Miscimarra, the Act and sound policy considerations preclude the Board from certifying such combined units absent employer consent.

***King Soopers*, 364 NLRB No. 93**

The Board majority (Pearce, Hirozawa, and McFerran) adopted a new remedial policy of awarding search-for-work and interim employment expenses regardless of discriminatees' interim earnings. This policy replaces the Board's previous practice of treating discriminatees' search-for-work and interim employment expenses as an offset against interim earnings.

The majority found that the practical result of the Board's traditional approach has been less than make-whole relief for the most seriously aggrieved victims of unlawful conduct, contrary to the central remedial principle underlying the Act. Under the duty to mitigate, discriminatees are required to find and maintain interim employment, potentially incurring significant expenses. Here, the discriminatee, who was unlawfully discharged for engaging in protected, concerted activity, incurred $6000 in search-for-work expenses because she had to move to a new state and pay for job training. Under the Board's traditional approach, the discriminatee would only receive $1500 of those expenses because they would be capped by the discriminatee's interim earnings.

The majority reasoned that its traditional approach has not only failed to make victims of unlawful conduct whole, but also may have discouraged discriminatees in their job search efforts. Under the old approach, discriminatees who were unable to find work would not receive any compensation for search-for-work expenses and those that found jobs where they made less than their expenses would not receive full compensation. According to the majority, the make-whole remedy should ensure that discriminatees are fully compensated for their losses and deter future violations. The majority noted that modifying its treatment of search-for-work and interim employment expenses to eliminate the offset will bring these payments in line with the Board's treatment of similar expenses incurred by discriminatees, such as medical expenses and retirement fund contributions. Finally, the majority explained that awarding search-for-work and interim employment expenses separately from taxable net backpay, with interest,

will avoid potential tax complications caused by the Board's traditional approach. The Board applied the new remedial policy retroactively in this case, as well as all pending cases.

Member Miscimarra dissented from the remedial changes adopted by the majority. In his view, the majority's revised remedial approach will produce a windfall in certain cases, and therefore, exceeds the Board's remedial authority. Additionally, Member Miscimarra believes that awarding search-for-work and interim employment expenses separately creates a substantial risk of protracted litigation that will delay the availability of backpay awards. Finally, Member Miscimarra would find that the Board's traditional approach is consistent with the practice of other agencies.

***E.I. Du Pont de Nemours,* 364 NLRB No. 113**

On remand from the Court of Appeals, the Board majority (Pearce, Hirozawa, and McFerran), reaffirmed the Board's prior holding that the Employer violated Section 8(a)(5) by making unilateral changes to unit employees' benefit plans after expiration of two collective-bargaining agreements and that the Employer could not rely on management rights clauses that expired under those agreements.

Since the late 1990s, two Union-represented bargaining units had incorporated an Employer-wide flexible benefits plan into their respective collective-bargaining agreements. The plan included a reservation of rights clause stating that the Employer reserves the sole right to change or discontinue the plan in its discretion, with any changes in price or level of coverage to be announced at the time of annual enrollment and not to change during a plan year. Pursuant to this reservation of rights clause, the Employer made regular changes to the plan without objection from the Union. However, following expiration of the collective-bargaining agreements, the Employer continued to make changes to the plan while the parties were negotiating successor agreements and the Union objected, asserting that bargaining over the changes was required.

In its prior decisions in these cases, 355 NLRB 1084 (2010) and 355 NLRB 1096 (2010), the Board had rejected the Employer's defense that the post-expiration changes to the benefit plan were privileged by an established past practice. The Board found that the Employer's past practice was based on its reservation of rights clause in the benefit plan, as incorporated in the two collective-bargaining agreements, and the Employer's ability to continue making such changes did not survive the expiration of those contracts. The Court found that the Board decisions were inconsistent with precedent, including the *Courier-Journal* cases, 342 NLRB 1093 (2004) and 342 NLRB 1148 (2004), where the Board excused postexpiration changes based on employer past practice, and directed the Board to conform to those prior cases or explain its return to a prior rule.

On remand, the Board overruled the *Courier-Journal* cases. The Board opted to return to the rule that unilateral, postexpiration discretionary changes are unlawful, notwithstanding an expired management rights clause or an ostensible past practice of discretionary changes based on the clause, as articulated in cases such as *Beverly Health & Rehab. Services*, 335 NLRB 635 (2001), *enforced in relevant part* 317 F.3d 316 (D.C. Cir. 2003), and *Register-Guard*, 339 NLRB 353 (2003). Otherwise, the Board reasoned, the expiration of a management rights clause would be meaningless and parties would have little incentive to bargain and agree on proposals if the employer retained absolute discretion to make changes after the contract expires. The Board noted that its decision had no effect on an employer's ability to make unilateral postexpiration changes where the employer had an established past practice of changes according to fixed criterion. Applying the same discretionary changes on unit employees as non-unit employees, however—as was the case here—would not be considered a fixed criterion.

Member Miscimarra dissented, arguing that the majority redefined the definition of change under the Supreme Court's decision in *NLRB v. Katz*, 369 U.S. 736 (1962), and that, under the Board's traditional application of *Katz*, an employer's action that is similar in kind and degree to what the employer did in the past is not a change. Member Miscimarra found that the Employer's similar types of changes to the employees' benefit plan, as compared to what it had made in previous years, were lawful pursuant to its long-standing practice. He further argued that the majority's decision misrepresented Board history in finding that the *Courier-Journal* cases, rather than *Beverly 2001* and *Register Guard*, were unexplained departures from long-established Board precedent.

***Total Security Management Illinois 1, LLC*, 364 NLRB No. 106**

In view of the Supreme Court's decision in *NLRB v. Noel Canning,* 134 S. Ct. 2550 (2014), the Board considered *de novo* whether an employer has a statutory obligation to bargain before imposing discretionary discipline on unit employees when a certified or lawfully recognized union has not yet entered into a collective-bargaining agreement with the employer, as considered in the Board's vacated Decision and Order in *Alan Ritchey, Inc.*, reported at 359 NLRB 396 (2012). The Board majority (Pearce, Hirozawa, and McFerran) answered in the affirmative, essentially adopting the holding in *Alan Ritchey*, but with one significant change to the remedial portion: an employer who has failed to bargain over discretionary discipline that resulted in an employee's discharge may now raise as an affirmative defense that reinstatement and backpay may not be awarded because the discipline was "for cause" within the meaning of Section 10(c).

In this case, the Union was certified as representative of a unit of Total Security's guards in August 2012 and in March 2013, before the parties had reached

agreement on an initial collective-bargaining agreement, Total Security discharged three guards without providing the union prior notice or an opportunity to bargain. Total Security had exercised discretion in discharging each of the employees and made no claim that it had a reasonable, good-faith belief that any of the three employees' continued presence on the job presented a serious, imminent danger to its business or personnel and thus no exigent circumstances were at issue.

First, the majority held that pre-imposition bargaining only applies to serious discipline that has an immediate impact on an employee's tenure, status, or earnings. Discipline of individual employees alters their terms and conditions of employment and implicates the duty to bargain if it is not controlled by pre-existing, nondiscretionary employer policies or practices. Like layoffs, disciplinary discharges are a mandatory subject of bargaining because any type of termination is unquestionably a change in the employee's terms of employment. Other serious disciplinary actions—such as suspension and demotion—also trigger the duty to bargain because they have an inevitable and immediate impact on employee's tenure, status, or earnings. On the other hand, other discipline, such as oral and written warnings, have a lesser impact on employees, as long as they do not trigger additional discipline under an employer's progressive disciplinary system, and thus the Board held that bargaining may properly be deferred until after such lesser discipline is imposed.

Next, the majority, in reliance on the approach in past Board cases concerning layoffs and wage changes, held that it will require bargaining before discretionary discipline is imposed. Accordingly, an employer must maintain the fixed aspects of its disciplinary system and bargain with the Union over the discretionary aspects, if any, such as whether to impose discipline in a particular case or the type of the discipline to be imposed. The Board expressly overruled *Fresno Bee*, 337 NLRB 1161 (2002), in this regard.

The majority also held, following the approach of *Alan Ritchey*, that an employer's obligation is simply to provide the union with sufficient notice and opportunity to bargain before discipline is imposed. Further, the employer is *not* required to bargain to agreement or impasse at this stage; rather, if the parties do not reach agreement, the employer may impose the disciplinary action and then continue bargaining to agreement or impasse. Finally, an employer may unilaterally impose discipline without advance notice to the union in a situation that presents exigent circumstances: where an employer has a reasonable, good faith belief that an employee's continued presence on the job presents a serious, imminent danger to the employer's business or personnel.

Finally, the Board elected to apply its holding prospectively, given the prior uncertainty surrounding *Alan Ritchey*'s validity. The Board also provided guidance that, in future cases, the Board's standard make-whole remedy for unlawful

unilateral changes would be granted, including reinstatement and backpay as necessary. However, unlike *Alan Ritchey*, employers will now have the opportunity raise as an affirmative defense that reinstatement and backpay may not be awarded because the discipline was "for cause" within the meaning of Section 10(c).

Member Miscimarra dissented from the majority's substantive analysis, disagreeing with the conclusion that decisions to impose discipline are changes subject to bargaining under existing Board precedent. Rather, Member Miscimarra found the majority's bargaining obligation irreconcilable with various existing legal principles, including *Fresno Bee*, and precluded by certain express provisions of the Act. Further, he argued that the bargaining obligation would create great uncertainty and spur extensive litigation. Member Miscimarra concurred with the majority in its decision not to apply its analysis retroactively.

***United States Postal Service*, 364 NLRB No. 116**

The Board majority (Pearce, Hirozawa, and McFerran), reversing the ALJ, clarified that the appropriate standard for evaluating proposed unilateral settlement terms offered by respondents—where the General Counsel and charging parties object—is whether the proposal provides a full remedy for all of the violations alleged in the complaint. In doing so, the majority held that the Board will no longer consider such "consent decrees" under the test articulated in *Independent Stave*, 287 NLRB 740 (1987), which asks whether the settlement substantially remedies the violations alleged in the complaint.

The General Counsel issued complaint alleging that the Employer threatened employees with more vigorous enforcement of work rules if they chose to be represented by a union steward or sought support and/or assistance from a union. Prior to the trial, the Employer proposed that the ALJ accept its unilateral settlement offer, which included a notice posting at a single location and a six-month sunset clause. Both the General Counsel and the Charging Party objected. The General Counsel argued that the Employer is a recidivist offender and the sunset clause would limit the General Counsel's ability to seek a default judgment if the Employer failed to comply. The Charging Party argued that the proposed notice posting was improperly limited to the one facility even though supervisors moved throughout the postal district. The ALJ accepted the Employer's offer as a consent decree, finding that it met the standards of *Independent Stave*.

The majority reviewed Board cases evaluating respondents' unilateral settlement offers. In *Electronic Workers IUE Local 201 (General Electric Co.)*, 188 NLRB 855 (1971), where the Board first accepted a respondent's unilateral settlement over the objections of the General Counsel and the charging party, the Board noted that it provided a full remedy for all of the alleged violations and that further proceedings could not result in a more favorable result for the General

Counsel or the charging party. In later cases, however, the Board analyzed such proposed settlements by applying the factors set forth in *Independent Stave*. In *Independent Stave*, the standard of assessing whether a settlement substantially remedied the violations alleged in the complaint was formulated to evaluate non-Board settlements: agreements between a respondent and a charging party or parties where the General Counsel is not a party. The majority noted that in those situations, compromises to the Board's remedial standards are justified based on deference to the charging party's own judgment concerning its interests as well as the policy favoring private dispute resolution. The Board in *Independent Stave* stated that each of the parties to a non-Board settlement had recognized the uncertainty of litigation and had weighed the risks before voluntarily reaching a compromise with the other party. Further, in non-Board settlements, a "substantially remedied" standard was justified based on the Board's long-standing policy of encouraging peaceful resolution of disputes.

The majority found that neither of the considerations underlying *Independent Stave* exist where the Board is considering a consent decree over the objections of the charging party and the General Counsel. In these circumstances, the charging party and the Respondent have not agreed to a private resolution of their dispute and neither party seeking relief from the Board has agreed to accept less than a full remedy. In the absence of such considerations, the Board found the former standard of *General Electric*—whether the proposal provides a full remedy for all of the violations alleged in the complaint—more appropriate. The majority further expressed that this "exacting" standard will avoid situations where an ALJ approves a proffered settlement order only to have the Board reject it and force the parties to litigate after an extended delay.

Member Miscimarra dissented, arguing that the majority has imposed an irrational constraint to reject "reasonable" consent decrees and thus has made it more difficult to achieve early resolution of disputes. *Independent Stave*, in his view, was intended to apply to all types of proposed settlement agreements, including those opposed by discriminatees and the General Counsel. Member Miscimarra would also continue to apply the *Independent Stave* standard to avoid the lengthy litigation process and preserve limited Board resources. Finally, he disagreed with the majority that the proffered settlement at issue in this case failed to provide a "full remedy," arguing that the 6-month sunset clause is irrelevant to the completeness of the remedy and sunset clauses are ordinarily permitted by the General Counsel in informal settlements where, like here, chance of default are low.

***William Beaumont Hospital*, 363 NLRB No. 162**

The full panel (Hirozawa, McFerran, and Miscimarra), affirming the ALJ, found that the Employer lawfully maintained work rules that, among other things, prohibited employees from making willful and intentional threats and engaging in

intimidation, harassment, humiliation, or coercion of employees, physicians, patients, or visitors. A panel majority (Hirozawa and McFerran), reversing the ALJ, found that the Employer unlawfully maintained work rules that prohibited employees from engaging in conduct that "impedes harmonious interactions and relationships" and making "negative or disparaging comments about the . . . professional capabilities of an employee or physician to employees, physicians, patients, or visitors." Dissenting, Member Miscimarra advocated that the Board abandon the first prong of *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646–647 (2004), which asks whether employees would reasonably construe work rules to restrict Section 7 activity, and adopt an alternate balancing test. The majority declined to revisit established precedent.

In his dissent, Member Miscimarra proposed a new balancing approach in lieu of *Lutheran Heritage*'s "reasonably construe" test. This proposed balancing test would weigh the potential adverse impact of a rule on protected activity against the legitimate justifications an employer may have for maintaining the rule.

In Member Miscimarra's opinion, *Lutheran Heritage* is faulty and should be overruled. In his view, the "reasonably construe" standard entails a single-minded consideration of NLRA-protected rights without taking into account the legitimate justification of an employer's policies. In many cases, according to Member Miscimarra, *Lutheran Heritage* invalidates facially neutral work rules solely because they are ambiguous in some respects. *Lutheran Heritage* also improperly limits the Board's own discretion and does not permit the Board to differentiate between different industries and work settings. Member Miscimarra also observed that *Lutheran Heritage*'s test has been difficult to apply and has created uncertainty.

Member Miscimarra believes the Board should follow the Supreme Court's admonition in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967), to "strike the proper balance between…asserted business justifications and the invasion of employee rights..." In his opinion, the Board must evaluate the potential adverse impact of the rule on NLRA-protected activity as well as the legitimate justifications an employer may have for maintaining the rule. The Board should then engage in a meaningful balancing of these competing interests and a facially neutral rule should be declared unlawful only if the justifications are outweighed by the adverse impact on Section 7 activity. While engaging in this proposed analysis, Member Miscimarra believes that the Board should differentiate among different types of NLRA-protected activities—those that are central to the Act and others more peripheral—and the Board should recognize those instances where the risk of intruding on NLRA rights is comparatively slight. Finally, according to Member Miscimarra, the Board may find that an employer may lawfully maintain a particular rule, notwithstanding some possible impact on protected Section 7

activity, but conclude that the rule cannot lawfully be applied against employees who engage in NLRA-protected conduct.

In support of his proposed standard, Member Miscimarra reviewed Supreme Court precedent, including *Republic Aviation v. NLRB*, 324 U.S. 793 (1945), where the Court required the Board to weigh the interests potentially advanced by a particular work requirement before concluding that the requirement's potential adverse impact on employee rights warrants a finding of unlawful interference with NLRA rights. Member Miscimarra also reviewed Board cases analyzing employer rules under *Lutheran Heritage* that demonstrate, in his view, an inconsistent application of the Board's standard and difficulties in predicting whether a particular rule would be found lawful or unlawful. As a result, Member Miscimarra believes that his proposed rule would satisfy precedent and create a more workable standard.

Applying his proposed rule to the facts of this case, Member Miscimarra would consider the uniqueness of a hospital setting, where there is an established public interest in protecting patients and family members from needless conflict. The rules at issue banned behavior that "impedes harmonious interactions and relationships" and prohibit employees from making "negative or disparaging comments about the . . . professional capabilities of an employee or physician to employees, physicians, patients, or visitors." Member Miscimarra discussed the context of the underlying case where the "negative" and "bullying" behavior of two unit nurses was found to be partially responsible for a patient death (the majority and Member Miscimarra agreed that the unit nurses' discharges were lawful). Next, considering the potential adverse impact of the hospital's rules on NLRA-protected activities, Member Miscimarra argued that there is a "comparatively slight" risk that such the rules would interfere with employees' protected Section 7 activities. Accordingly, Member Miscimarra would advocate "striking a proper balance" and find the rules lawful.

Loomis Armored US, Inc., 364 NLRB No. 23

The Board majority (Pearce, Hirozawa, and McFerran), reversing the ALJ, overruled *Wells Fargo Corp.*, 270 NLRB 787 (1984), and held that once an employer voluntarily recognizes a mixed-guard union as the representative of a unit of guards, the employer must continue to recognize and bargain with the union unless and until it is shown that the union has actually lost majority support among unit employees. In doing so, the majority rejected *Wells Fargo*'s expansive view of Section 9(b)(3) of the Act, which prohibits the Board from certifying a mixed-guard union as the collective-bargaining representative of a unit of guards.

Over the course of several months, the Employer withdrew recognition from six local unions representing units of the Employer's guards after expiration of

applicable collective-bargaining agreements. The Employer had voluntarily recognized each local union in years prior notwithstanding that the union represented both guards and other types of employees. At each location, the Employer refused to bargain further with the Union. The employer's only stated basis for withdrawing recognition was that the withdrawals of recognition were lawful under Section 9(b)(3) of the Act, as held by the Board in *Wells Fargo*.

According to the majority, in *Wells Fargo*, the Board recognized that Section 9(b)(3) was designed to shield employers from a requirement to recognize and bargain with a union in circumstances where there was a potential conflict of loyalties involving guard employees. The *Wells Fargo* majority then reasoned that the conflict of interest exists whether or not a mixed-guard union is certified by the Board and, therefore, the Board cannot order the employer to resume recognizing and bargaining with the union. Otherwise, according to the *Wells Fargo* majority, such an order would grant a union indirectly—by a bargaining order—what it could not obtain directly by Board certification. Accordingly, *Wells Fargo* held that an employer could lawfully withdraw recognition from a union representing its guard employees upon contract expiration, regardless of the origin of the bargaining relationship or the union's ongoing majority status.

The majority examined the language of the Act and concluded that the new rule was permissible. Section 9(b) empowers the Board to determine appropriate units for collective-bargaining and, in one of several provisos, excludes the Board from certifying labor organizations that represent both guards and employees other than guards. According to the majority, Section 9(b)(3) does not limit an employer's discretion to voluntarily recognize a mixed-guard union and a significant number of employers have availed themselves of this option. Examining Section 9(b)(3), the majority observed that it does not expressly address a situation where an employer has voluntarily recognized a mixed-guard union but then seeks to withdraw recognition.

The majority then reviewed legislative history and observed that Congress could have drafted Section 9(b)(3) to deprive mixed-guard unions of the Act's protections, including Section 8(a)(5)'s bargaining obligations. According to the majority, the legislative history demonstrates that Section 9(b)(3) was a compromise negotiated between those favoring complete exclusion and those favoring complete inclusion of guards from the Act's protection. The Board cited the Supreme Court's observation in the context of alleged agricultural workers that "administrators and reviewing courts must take care to assure that exemptions from NLRA coverage are not so expansively interpreted" to deny workers protection of the Act. Indeed, a summary of the bill enacting Section 9(b)(3) states that guards still retained their rights as employees under the Act.

The majority further found that policy interests strongly favor abandoning *Wells Fargo*. According to the majority, the statutory purpose to shield employers from recognizing and bargaining where there is a potential conflict of loyalties among guard employees is not compromised when the Board simply applies the otherwise universal rules of collective bargaining. Section 9(b)(3) permits employers to decide for themselves whether to recognize and bargain with such unions. In such circumstances, the employer has already acted on its own to voluntarily recognize the union and the Board's issuance of a bargaining order does no more than restore the status quo. In the majority's view, the relationship remains grounded in the employer's own decision to voluntarily recognize the union. Furthermore, finding an employer's withdrawal of recognition unlawful—absent a showing of loss of majority support—serves the Act's fundamental policy of fostering stable labor-management relationships. Citing *International Telephone & Telegraph Corp.*, 159 NLRB 1757 (1966), *enforced in relevant part* 382 F.2d 366 (3d Cir. 1967), the Board noted that where an employer has independently recognized a union while failing to hold a separate vote for professional employees, in contravention of Section 9(b)(1), the union is not later deprived of its bargaining rights. Here, permitting an employer to withdraw from a stable collective-bargaining relationship undermines a central purpose of the Act.

The majority decided to apply the new rule prospectively only, reasoning that employers have relied on *Wells Fargo*'s decades-old precedent and could face costly liability if the Board were to apply the decision retroactively. The Board, therefore, dismissed the complaint.

Member Miscimarra dissented, arguing that the Board should continue to adhere to *Wells Fargo*. In his view, *Wells Fargo* represents a reasonable middle position and its holding is most consistent with the compromise struck when Congress enacted Section 9(b)(3) and prohibited the Board from certifying mixed-guard unions. Member Miscimarra also argued that no compelling reasons warrant reconsideration of *Wells Fargo* at this time.

2. Section 8(a)(1)

a. Off-duty Access to Employer Property

***Capital Medical Center*, 364 NLRB No. 69**

The panel majority (Pearce and Hirozawa), affirming the ALJ, found that the Employer violated Section 8(a)(1) by attempting to prevent two off-duty employees from picketing at the hospital's non-emergency entrances. The majority also found that the Employer violated Section 8(a)(1) by threatening the employees with discipline and arrest for engaging in the picketing and by summoning the police.

Several months after the expiration of the collective-bargaining agreement, the Employer (an acute care hospital) and the Union had been unable to reach agreement. The Union gave notice as required under Section 8(g) that it planned to engage in informational picketing and handbilling on the Employer's property. Off-duty unit employees handed out handbills at two hospital entrances and picketed on the public sidewalk without incident. Two employees peacefully held picket signs near the main lobby entrance of the hospital—they did not speak with patients or visitors or chant or block the entrance. The Employer repeatedly told the two employees to leave and later threatened them with discipline and arrest. Eventually, the Employer summoned the police in attempt to stop the picketing.

The majority found that *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), and its progeny provided the applicable analytical framework to examine employer interference with employees' on-premises picketing. Although *Republic Aviation* involved solicitation and literature distribution, the Board in *Town & Country Supermarkets*, 340 NLRB 1410 (2004), applied *Republic Aviation* to both handbilling and picketing, finding the employer's prohibition of both activities unlawful absent a showing that such a prohibition was necessary to maintain order or discipline. Here, the majority concluded that application of that precedent to on-premises picketing by employees would provide the necessary balancing between protection of employees' Section 7 rights and the Employer's and patients' interests. The majority emphasized that it was not invalidating all restrictions on hospital picketing because, in the acute care hospital setting, restrictions on Section 7 activity in non-patient care areas are valid if the employer shows that the prohibition is needed to prevent patient disturbance or disruption of health care operations. The majority found that the Employer failed to meet its burden of showing that prohibiting the type of picketing that occurred in this case—a quiet, stationary two-person picket outside of the hospital building—was necessary to prevent patient disturbance or disruption of health care operations.

Member Miscimarra dissented and would have found that the Employer did not violate Section 8(a)(1) by prohibiting the on-premises picketing. Member Miscimarra disagreed with the majority's application of *Republic Aviation* and its progeny to on-premises picketing, which, in his view has a significantly greater impact on legitimate employer interests than solicitation, handbilling, and other forms of communication. According to Member Miscimarra, the majority's holding contradicts Supreme Court precedent recognizing that picketing is qualitatively different from handbilling, and improperly discounts Board and court cases holding that hospitals have an especially important interest in preventing on-premises picketing of patients and visitors.

b. Invoking a Contractual Right

***Omni Commercial Lighting, Inc.*, 364 NLRB No. 54**

The panel majority (Pearce and Hirozawa), affirming the ALJ, found that the Employer violated Section 8(a)(1) by discharging an employee because of his protected concerted activity. The majority found that, by asserting what he honestly and reasonably believed were his rights under the applicable collective-bargaining agreement, the employee engaged in protected conduct under *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984).

The Union offered three different collective-bargaining agreements to electrical employers, which cover different types of lighting work and have varying levels of wages and benefits. The Charging Party mistakenly believed, based on his conversations with the Employer and the Union, that the Employer had signed on to the same collective-bargaining agreement applicable to his former employer. After receiving a letter from the Union recommending ratification of a newly appointed maintenance agreement, which included a wage increase, the Charging Party approached the Employer to ask why he had not received the increase and learned that the Employer had signed a more limited agreement. The Charging Party insisted that the work he performed for the Employer was outside the scope of the work set forth in that limited agreement and that he was entitled to higher wages and benefits under the maintenance agreement. After the Charging Party suggested that the Employer discuss the agreement with the Union, the Employer fired him.

The majority found that the Charging Party held a reasonable and honest belief that the maintenance agreement governed his employment with the Employer. Citing *City Disposal Systems*, the majority explained that the Charging Party did not lose protection even though he was incorrect in his belief that he had a contractual right to the benefits that he sought. Therefore, the majority found that the Employer violated Section 8(a)(1) by discharging the Charging Party.

Member Miscimarra, dissenting, would find that the Charging Party's activity fell outside the scope of *City Disposal Systems*. In his view, the Charging Party's assertion of rights was not protected because it did not implicate the collective-bargaining agreement that the Employer and the Union had actually executed.

c. Confidentiality Clause in Settlement Agreement

***S. Freedman and Sons, Inc.*, 364 NLRB No. 82**

The panel (Miscimarra, Hirozawa and McFerran), affirming the ALJ, found, *inter alia*, that the Employer violated Section 8(a)(4) and (1) by terminating an employee for participating in Board proceedings. The panel majority (Miscimarra and Hirozawa), reversing the ALJ, found that the Employer did not violate Section 8(a)(1) by conditioning the employee's reinstatement on signing a settlement agreement that included a confidentiality clause.

A Union steward was terminated for damaging Employer property, pursuant to a collective-bargaining agreement provision. After the Union met with the Employer, the steward was offered and accepted a settlement agreement that converted his termination into a suspension on the condition that he waive his right to file a grievance and agreed not to discuss the terms of the settlement agreement with others. Member McFerran, dissenting in part, found that the confidentiality agreement was not narrowly tailored in that it potentially impacted the ability of the steward to help other employees with their grievances.

The majority observed that the settlement agreement contained a waiver of the Section 7 right to discuss discipline for the purpose of mutual aid and protection. However, Board law permits an employer to condition a settlement on an employee's waiver of Section 7 rights if the waiver is narrowly tailored to the facts giving rise to the settlement and the steward received some benefit in return for the waiver. The majority found that, here, the steward received the benefit of reinstatement for a terminable offense in return for the waiver. Further, the majority found that the waiver was narrowly tailored because the steward was prohibited from discussing only the terms of the settlement, not any future discipline. And, although the confidentiality agreement could conceivably affect the steward's ability to assist other employees with future claims, the Union retained the ability to share the terms of the agreement because it was not bound by the confidentiality clause.

Dissenting, Member McFerran would find that the confidentiality agreement was not narrowly tailored and interfered with employees' Section 7 rights. Member McFerran cited to *Metro Networks*, 336 NLRB 63, 67 (2001), where the Board held that the nondisclosure provision of a severance agreement unlawfully chilled employees' Section 7 rights and could have prevented the employee from providing information to the Board. Member McFerran found the circumstances here similar because the nondisclosure requirement prevented the steward from discussing his discipline with his coworkers, the Union, or the Board. Further, in her opinion, the provision barred the steward from exercising his Section 7 right to share the terms of his settlement with his coworkers and impaired his coworkers' Section 7 right to

call upon the steward for support in seeking a lesser punishment for themselves in similar circumstances. Finally, Member McFerran argued that the confidentiality provision would undermine the solidarity principle underlying employees' right to act concertedly for mutually and protection, citing *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 6 (2014).

d. Dress Codes

***Medco Health Solutions of Las Vegas, Inc.*, 364 NLRB No. 115**

On remand from the Court of Appeals, the panel majority (Hirozawa and McFerran), reaffirmed the Board's prior holding that the Employer failed to establish special circumstances to justify requiring an employee to remove a T-shirt critical of a nonmonetary incentive program called the "WOW program," and violated Section 8(a)(1) by ordering the employee to remove the T-shirt and impliedly threatening him with discharge over his opposition to the program. The majority also reaffirmed its prior holding that the Employer's dress code was unlawful under *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).

The Employer, which operates a mail order pharmacy and call center, implemented the WOW program to encourage superior performance and maintain morale. An employee, who was a Union officer, wore a T-shirt with the Union logo that contained the slogan "I don't need a WOW to do my job." The Employer observed the employee wearing the T-shirt in the employee cafeteria and told him to remove it because it was insulting and violated the employer's dress code. According to the Employer, customer tours, which occurred about once or twice a week at the facility, justified a total ban on the T-shirt.

In the prior decision, reported at 357 NLRB 170 (2011), the Board had adopted the ALJ's findings that the Employer violated Section 8(a)(1) by ordering the employee to remove the T-shirt; by impliedly threatening him with discharge; and by maintaining an overly broad work rule prohibiting apparel containing "confrontational, . . . insulting, or provocative" statements. On remand, the Court directed the Board to address whether the Employer established special circumstances justifying its demand that the employee remove the shirt and to explain why the dress code was unlawful under *Lutheran Heritage*.

The majority, in agreement with the prior Board decision, found that the Employer failed to establish special circumstances justifying the T-shirt ban. Responding to the Court's request for clarification, the majority stated that the burden is on the Employer to prove the existence of special circumstances and the exception is a narrow one. An employer may prove special circumstances exist when the wearing of union insignia may unreasonably interfere with the public image that the employer has established, as part of its business plan, through

appearance rules for its employees. The majority stated that it does not dispute that the WOW program is an important part of the Employer's business plan to attract and retain customers. However, the majority found that the Employer had not demonstrated that its appearance rules were tied to the program and there was insufficient evidence to show that the T-shirt would interfere with an established public image.

The majority distinguished cases where the Board found that employers were justified in prohibiting employees from wearing clothing disparaging the employers' products. Here, by contrast, the employee speech at issue concerned working conditions and the Board will not infer a negative impact on customer relationships based on speculation and conjecture. Rather, according to the majority, when employees' apparel addresses terms and conditions of employment, the Board requires the employer to show that the apparel adversely affects its business and that, based on this deleterious effect, the ban on wearing such clothing outweighs employees' statutory rights. The majority further found that, even if the Employer had shown that protection of the reputation of its WOW program constituted special circumstances, it failed to demonstrate the necessity of a total ban on the anti-WOW T-shirt because there was insufficient evidence that a partial ban would be impractical.

Dissenting, Member Miscimarra would find that the Employer demonstrated special circumstances justifying its prohibition of the anti-WOW T-shirt because the T-shirt's message had an inherent tendency to undermine the employer interest at stake. Member Miscimarra further challenged the majority's additional finding that a total ban was not justified because he would find that employees had more than fleeting contact with customers.

***Grill Concepts Services*, 364 NLRB No. 36**

The panel (Pearce, Hirozawa and McFerran), overruling the ALJ, found that the Employer failed to demonstrate special circumstances justifying a prohibition on servers wearing pro-union buttons on their uniforms.

The Employer operates a "traditional American Grill restaurant." During the Union's organizing campaign, some employees began wearing one-inch diameter buttons, featuring the Union's name in red and black lettering on a white background or in white and black lettering on a red background. When employees were seen wearing the buttons at the restaurant, supervisors sent them home early or threatened to impose discipline. The Employer's handbook contained no prohibition on buttons, pins, or other insignia.

The panel reiterated that the Board will recognize special circumstances exist when the display of union insignia unreasonably interferes with a public image that

the Employer has established, as part of its business plan, through appearance rules for its employees. Further, neither the fact that employees are required to wear a uniform, nor the fact that customers may be exposed to union insignia, is alone sufficient to constitute special circumstances. And, an employer rule limiting the right to wear union insignia must be narrowly tailored to such special circumstances.

Here, the Employer claimed that union buttons would unreasonably interfere with the Employer's public image as a "traditional American grill restaurant" where customers could come to get "predictable, reliable" service, and the server's role is to "be seen and not heard"—to "deliver food and [ ]not make any statements of any kind, other than supporting our restaurant." The panel found that the employer had presented no evidence of how the Union's small, inconspicuous, and non-inflammatory buttons would unreasonably interfere with the server's ability to provide reliable service or interfere with the Employer's public image. According to the panel, if the Board were to find special circumstances here, the exception would become so broad as to ultimately consume the rule.

The panel distinguished *W San Diego*, 348 NLRB 372 (2006), where the employer's aim was to provide a "Wonderland" hotel experience where guests could fulfill their fantasies and desires and get whatever they want whenever they wanted. Based on the narrow factual circumstances there, the Board found special circumstances justified prohibiting employees from wearing union insignia. Here, by contrast, the panel found that the Employer had provided no comparable evidence.

e. Rules

In GC 15-04, the General Counsel set forth certain categories of rules and listed cases under each category that were either dismissed or complaint issued. Utilizing these same categories, the following is a list of Board cases in which the Board decided whether the rules were lawful or unlawful.

I. Employer rules regarding confidential information

Unlawful

- ***Battle's Transportation, Inc.***, 362 NLRB No. 17, slip op. at 1–3 (Feb. 24, 2015).
- ***Lily Transportation Corp.***, 362 NLRB No. 54, slip op. at 1, 1 n.3, 8 (Mar. 30, 2015).
- ***Boch Honda***, 362 NLRB No. 83, slip op. at 1 n.4. (Apr. 30, 2015), *enforced*, Nos. 15-1653, 16-1721, 2016 WL 3361733 (1st Cir. June 17, 2016).

- ***Rio All-Suites Hotel & Casino***, 362 NLRB No. 190, slip op. at 2–3 (Aug. 27, 2015).
- ***Menorah Medical Centers***, 362 NLRB No. 193, slip op. at 1 n.3, 15–16, 21–23 (Aug. 27, 2015).
- ***Rocky Mountain Eye Center, P.C.***, 363 NLRB No. 34, slip op. at 1 n.1, 7–8 (Nov. 3, 2015).
- ***Advanced Services***, 363 NLRB No. 71, slip op. at 1, 1 n.4, 2 n.5, 2–3, 7–8 (Dec. 22, 2015).
- ***Century Fast Foods, Inc.***, 363 NLRB No. 97, slip op. at 1 n.3, 11 (Jan. 20, 2016).
- ***Ralph's Grocery Co.***, 363 NLRB No. 128, slip op. at 3 (Feb. 23, 2016).
- ***Alternative Entertainment***, 363 NLRB No. 131, slip op. at 1 n.1, 6, 8 (Feb. 22, 2016).
- ***Victory Casino Cruises II***, 363 NLRB No. 167 (Apr. 22, 2016).
- ***T-Mobile USA, Inc.***, 363 NLRB No. 171, slip op. at 2, 2 n.6 (Apr. 29, 2016)
- ***Jack in the Box, Inc.***, 364 NLRB No. 12, slip op. at 1, 9 (May 24, 2016).
- ***Schwan's Home Service***, 364 NLRB No. 20, slip op. at 1–4, 6 (June 10, 2016).
- ***Long Island Association for AIDS Care, Inc.***, 364 NLRB No. 28, slip op. at 1, 6–7 (June 14, 2016).
- ***California Commerce Club, Inc.***, 364 NLRB No. 31, slip op. at 1, 1 n.2 (June 16, 2016).
- ***Grill Concepts Services***, 364 NLRB No. 36, slip op. at 1 n.4, 24–26 (June 30, 2016).
- ***Michigan State Employees Association***, 364 NLRB No. 65, slip op. at 2–4 (Aug. 4, 2016).
- ***Chipotle Mexican Grill***, 364 NLRB No. 72, slip op, at 1 n.3, 6–7 (Aug. 18, 2016).
- ***G4S Secure Solutions (USA) Inc***., 364 NLRB No. 92 (Aug. 26, 2016).

Lawful

- ***Rio All-Suites Hotel & Casino***, 362 NLRB No. 190, slip op. at 3 n.6 (Aug. 27, 2015).
- ***Minteq International, Inc.***, 364 NLRB No. 63, slip op. at 6 (July 29, 2016).

- ***G4S Secure Solutions (USA) Inc***., 364 NLRB No. 92, slip op. at 4 (Aug. 26, 2016)

II. Employer rules regarding employee conduct toward the Company and supervisors

Unlawful

- ***Grill Concepts Services***, 364 NLRB No. 36, slip op. at 1 n.4, 20–21, 23–24 (June 30, 2016).
- ***Minteq International, Inc.***, 364 NLRB No. 63, slip op. at 7 (July 29, 2016).

III. Employer rules regulating employees' conduct toward fellow employees

Unlawful

- ***William Beaumont Hospital***, 363 NLRB No. 162, slip op. at 1–6 (Apr. 13, 2016).
- ***T-Mobile USA, Inc***., 363 NLRB No. 171, slip op. at 2–3 (Apr. 29, 2016).
- ***Valley Health System LLC***, 363 NLRB No. 178, slip op. at 1–2 (May 5, 2016).
- ***Southern Bakeries, LLC***, 364 NLRB No. 64, slip op at 5–6 (Aug. 4, 2016).

Lawful

- ***William Beaumont Hospital***, 363 NLRB No. 162, slip op. at 1–2, 32–33 (Apr. 13, 2016).

IV. Employer rules regarding employees' interaction with third parties

Unlawful

- ***Grill Concepts Services***, 364 NLRB No. 36, slip op. at 25–26 (June 30, 2016).
- ***Minteq International, Inc.***, 364 NLRB No. 63, slip op. at 6–7 (July 29, 2016).

V. **Employer rules restricting employees' use of Company logos, copyrights, and trademarks**

Unlawful

- ***Boch Honda***, 362 NLRB No. 83, slip op. at 1–2 (Apr. 30, 2015), *enforced*, Nos. 15-1653, 16-1721, 2016 WL 3361733 (1st Cir. June 17, 2016).

VI. **Employer rules restricting photography, recordings, or personal electronic devices**

Unlawful

- ***Battle's Transportation, Inc.***, 362 NLRB No. 17, slip op. at 3–5 (Feb. 24, 2015).
- ***Whole Foods Market, Inc.***, 363 NLRB No. 87 (Dec. 24, 2015).
- ***T-Mobile USA, Inc.***, 363 NLRB No. 171, slip op. at 2, 4–5 (Apr. 29, 2016).

VII. **Employer rules restricting employees from leaving work**

None.

VIII. **Employer conflict-of-interest rules**

Unlawful

- ***Schwan's Home Service***, 364 NLRB No. 20, slip op. at 4–5 (June 10, 2016).
- ***Grill Concepts Services***, 364 NLRB No. 36, slip op. at 22–23 (June 30, 2016).

3. Section 8(a)(3)

***Advanced Life Systems, Inc.*, 364 NLRB No. 117**

The panel (Pearce, Miscimarra, and Hirozawa), affirming the ALJ, found that the Employer violated Section 8(a)(5) by discontinuing its established practice of granting annual Christmas bonus payments and violated Section 8(a)(1) by making coercive statements to unit employees before and after the representation election about discontinuing periodic wage increases and annual Christmas bonuses. The panel majority (Pearce and Hirozawa), affirming the ALJ, further found that the

Employer violated Section 8(a)(3) by discontinuing periodic wage increases and Christmas bonuses because of unit employees' union activity.

The Employer informed new hires that they could expect periodic wage increases once every six months and Christmas bonuses. After the Union began an organizing campaign, the Employer's owner and president told an employee that the Employer would not be able to give raises if the Union was elected. After the Union won the election, the Employer unilaterally discontinued wage increases and Christmas bonuses. When an employee asked the Employer why he had not received his expected pay raise, the Employer responded that his lawyer had advised him that he needed to freeze employees' pay because of the Union.

The full panel found that the Employer violated Section 8(a)(1) by making coercive statements to unit employees before and after the representation election about discontinuing the periodic wage increases and Christmas payments. The panel also found that the Employer had an established practice of granting annual Christmas bonuses and had unlawfully instituted a unilateral change, in violation of Section 8(a)(5), by discontinuing this practice.

The panel majority, applying *Wright Line*, 251 NLRB 1083 (1980), *enforced* 662 F.2d 899 (1st Cir. 1981), further found that the Employer violated Section 8(a)(3) by discontinuing the wage increases and Christmas payments. The majority found that the General Counsel had shown union activity by the employees, the Employer had knowledge of that activity, and there was evidence of anti-union animus, demonstrated by the Employer's coercive statements. Further, the majority found that the Employer had not met its rebuttal burden to show that it would not have granted the wage increases and Christmas payments even absent employees' union activity. Specifically, the majority found that the Employer's purported justifications regarding health insurance costs were unsupported and clearly pretextual.

Member Miscimarra dissented from the finding that the Employer violated Section 8(a)(3). Member Miscimarra would find that the Employer was following its duty to refrain from making unilateral wage changes pending bargaining with the Union for an initial collective-bargaining agreement and the Employer's statements to this effect did not constitute evidence of antiunion discrimination.

4. Section 8(a)(5)

a. Alter-ego

***Island Architectural Woodwork, Inc.*, 364 NLRB No. 73**

The panel (Pearce, Hirozawa, and McFerran), reversing the ALJ, found that Verde Demountable Partitions is an alter ego of Island Architectural Woodwork, and that the companies violated Section 8(a)(5) and (1) by failing to recognize and bargain with the Union as the collective-bargaining representative of their Verde unit employees and by failing to honor the collective-bargaining agreement as to those unit employees.

The panel, in agreement with the ALJ, found that the companies had substantially identical business purposes, operations, premises, and equipment, and that these factors supported finding an alter ego relationship. The panel emphasized that Verde was created for the purpose of manufacturing a product that Island was producing just prior to Verde's creation and that this seamless transition was indicative of an alter ego relationship. Furthermore, Verde hired Island employees, depended on the expertise of Island personnel, and the companies' common business purposes were reflected in a broad range of other activities.

Contrary to the ALJ, however, the panel further found that the factors of substantial financial control and an improper motivation to avoid Island's bargaining obligations also supported finding alter ego status. Although lacking common ownership, the panel found that Island exerted substantial financial control over Verde by defraying its expenses, deferring payments for certain assets, and allowing Verde to operate rent-free in a portion of Island's factory.

The panel further found that the evidence demonstrated that Verde was created to evade Island's bargaining obligation. In particular, Island had attempted to conceal from the Union Verde's creation and Island's relationship to Verde. The panel noted that certain documents establishing Verde's legal existence were not signed until the day before they were produced pursuant to the General Counsel's subpoena. Furthermore, Island repeatedly insisted to the Union that Verde employees were not part of the unit and suggested that Verde was created to avoid the Union's labor costs. Rejecting the ALJ's finding that the creation of Verde had not resulted in any harm to the existing complement of Island's bargaining-unit employees, the panel found that two former Island employees who continue to perform bargaining-unit work for Verde were excluded from the benefits of the collective-bargaining agreement and that unit employees remaining at Island saw their bargaining power diminished.

Finally, the panel found that the companies also violated Section 8(a)(5) when Island insisted, as a condition of reaching a successor collective-bargaining agreement, that the Union agree to exclude Verde's employees from the scope of the bargaining unit, a permissive subject of bargaining.

b. Failure to Furnish Information

***United States Postal Service*, 364 NLRB No. 27**

The panel (Pearce, Miscimarra and Hirozawa), affirming the ALJ, found that the Employer violated Section 8(a)(5) by failing to provide or unreasonably delaying in providing the Union with requested information related to the Employer's subcontracting of unit work to Staples. The panel majority (Pearce and Hirozawa) ordered immediate, unredacted production of all outstanding information because the Employer failed to timely raise a confidentiality defense.

After receiving notice that the Employer plan to launch a one-year pilot program with Staples, under which the Employer's most popular products and services would be sold at 84 Staples locations in five cities, the Union requested information related to this announcement. The Employer delayed providing the Union some of the information. The panel unanimously found that the information was plainly relevant from the circumstances and that the Employer failed to respond to the information request in a timely manner.

As to the remedy, the panel majority (Pearce and Hirozawa) rejected the ALJ's remedial order and ordered immediate, unredacted production of all outstanding information. The majority emphasized that the Employer's belated production of largely redacted documents evidenced a policy of delay and frustration rather than one of accommodation and that further bargaining concerning the production of information would frustrate the purposes of the Act. The majority also found that, by failing either to timely assert a confidentiality interest or propose an accommodation to address the Union's interest in obtaining relevant requested information, the Employer waived its opportunity to raise those defenses. According to the majority, the Employer intentionally delayed its responses to the Union's information request for two months, thereby frustrating the Union's ability to bargain over the impact of the pilot program. The majority concluded that permitting the Employer to make a belated assertion of a confidentiality interest would reward the Employer for its intentional delay.

Member Miscimarra dissented with regard to the remedy and would have adopted the ALJ's recommended remedy of immediate production subject to certain redactions, along with ordering the Employer to bargain with the Union over a nondisclosure agreement and then provide the Union with the unredacted information.

A different panel majority (Miscimarra and Hirozawa) adopted the ALJ's recommended narrow cease-and-desist order; Chairman Pearce would have issued a broad cease-and-desist order due to the Employer's proclivity to violate the Act by failing to properly respond to information requests.

c. Unilateral Changes

***Comau, Inc.*, 364 NLRB No. 48**

The panel majority (Pearce and Hirozawa), affirming the ALJ, found that the Employer violated Section 8(a)(5) by announcing the temporary shutdown of a facility and the transfer of Union-represented employees and their work to other facilities without providing the Union notice and an opportunity to bargain over the effects of the shutdown and transfer.

On December 1, 2011, the Employer informed the Union that it would be temporarily shutting down its Wisne facility and transferring Union-represented employees and their work to two other facilities. That same day, the Employer began moving equipment out of the Wisne facility. Shortly after, the parties met at the Union's request and the Employer described the shutdown and transfer, and told the Union which facility each of the 12 unit employees would be transferred to. The Employer agreed to switch the assignment of two unit members who were present at the meeting. After the unit employees began working at the other facilities, the Employer announced that it would apply more restrictive work rules regarding overtime, attendance, discipline, and seniority. After the Union objected, the Employer conceded that it would apply the wages and benefits of the collective-bargaining agreement but argued that the agreement's work rules did not carry over to other facilities and refused to apply them.

The panel majority, citing, *inter alia*, *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681–82 (1981), stated that an employer is obligated to bargain over the effects of the temporary closure and relocation of work even when it does not have a duty to bargain over the decision itself. Further, the employer must provide timely notice before implementation in order for meaningful bargaining to occur. Here, the majority found that the timing of the Employer's announcement, along with ordering employees to report to their new posts in a matter of days, was a fait accompli that precluded meaningful effects bargaining and, therefore, the Union did not waive its right to bargain. Even though the parties were able to agree to switch the job assignments of two employees, the majority did not view this single accommodation as supporting the conclusion that the parties engaged in meaningful effects bargaining and the Employer thus violated Section 8(a)(5) by its failure to bargain.

The majority further concluded that the Employer violated Section 8(a)(5) by unlawfully modifying the collective-bargaining agreement. Although nothing in the collective-bargaining agreement expressly stated that the contract's terms would continue to apply to unit employees when working at other facilities, the majority relied on the extrinsic evidence that the agreement's work rules were applied to unit members when they performed work at the Employer's other facilities in the past.

Finally, the full panel found that, by applying new work rules, the Employer unilaterally changed employees' terms and conditions of employment in violation of Section 8(a)(5). Here, the panel found that the Union did not clearly and unmistakably waive its right to bargain over these changes through language in the contract and further, the Employer had presented the Union with a fait accompli.

Member Miscimarra dissented in part, disagreeing with the finding that the Employer's announcement and implementation of changes regarding the temporary shutdown and transfer were presented as a fait accompli. Member Miscimarra also dissented from the finding that the change in work rules applied to the transferred unit employees constituted an unlawful mid-term modification of the collective-bargaining agreement.

***Children's Hospital and Research Center of Oakland d/b/a Children's Hospital of Oakland*, 364 NLRB No. 114**

On remand from the Court of Appeals, the panel (Miscimarra, Hirozawa, and McFerran) held that the Employer violated Section 8(a)(5) and (1) because it had a continuing duty to arbitrate grievances that arose during its bargaining relationship with the Union, even though employees had selected a new bargaining representative.

The Employer had a collective-bargaining agreement with the Union, including a grievance and arbitration provision, effective until April 30, 2014. In 2012, while three grievances were pending, the unit employees selected a new union as their bargaining representative. The day before the new representative was certified, the Union requested that all three grievances be submitted to arbitration and the Employer refused. In its initial decision, reported at 360 NLRB No. 56 (2014), the Board, affirming the ALJ, found that the Employer had a continuing duty to arbitrate the pending grievances.

On remand, the Court directed the Board to explain how imposing an obligation on the employer to arbitrate grievances with a superseded union can be reconciled with Section 9(a)'s "exclusivity principle," which states that unions chosen by a majority of employees are the exclusive representative of all unit employees.

The panel explained that, under existing Board precedent, employers have a duty to arbitrate grievances arising under an expired contract with a decertified union, as long as no union has superseded it. And, consistent with federal case law, employers have *no* duty to arbitrate those grievances with a newly certified union. Thus, under current law, there was no mechanism to require arbitration of employees' grievances arising under an old contract once a new union had been certified. The panel found that the purposes of the Act were best effectuated by requiring employers to arbitrate pending grievances arising under a collective-bargaining agreement with the union that was party to that agreement, even if the union had been superseded. Permitting an employer to avoid arbitration of grievances arising under an expired contract would be inconsistent with important statutory policies—namely, the vindication of employees' right to bargain through representatives of their own choosing, the strong federal policy in favor of arbitration to resolve labor disputes, and employees' freedom to choose their representatives. The panel reasoned that a new union is unfairly handicapped in bargaining if existing terms and conditions of employment have not been fully realized and, furthermore, employees will be deterred from choosing a new union if they risk losing vested rights. Finally, the panel found that neither the Section 9(a) exclusivity principle nor the corresponding "negative duty" not to bypass the majority representative by dealing with another union in violation of Section 8(a)(2) precluded its holding.

***IMI South, LLC, d/b/a Irving Materials*, 364 NLRB No. 97**

A panel majority (Pearce and Hirozawa), reversing the ALJ, found that the Employer violated Section 8(a)(5) and (1) by unilaterally transferring a portion of bargaining-unit work from union-represented mechanics at a facility in Louisville, Kentucky to unrepresented employees at its facility in New Albany, Indiana.

For many years, the Union has represented a unit of employees, including truck mechanics, at the Employer's facility in Louisville, Kentucky. The parties' collective-bargaining agreement expressly states that Louisville mechanics maintain and repair the Employer's trucks operating in Kentucky. And, although not expressly stated in the agreement, since at least 1993, Louisville mechanics have also maintained and repaired the Employer's trucks operating in southern Indiana. In 2011, during bargaining for a successor collective-bargaining agreement, the Union offered a proposal to expressly incorporate this past practice. The Employer rejected this proposal, stating that it wanted to maintain flexibility, and failed to mention that the Employer was already planning to open a new maintenance shop in New Albany, Indiana. Around October 2011, while Louisville unit employees were engaged in an economic strike, the Employer hired two mechanics at the New Albany shop. Several months later, prior to the conclusion of negotiations, the Union's lead negotiator became aware of the maintenance work

being performed in New Albany but did not mention it during negotiations. The parties reached agreement on a new collective-bargaining agreement in 2012.

To begin its analysis, the majority reviewed the judge's findings that the Employer had a long-standing practice of assigning maintenance work in southern Indiana to bargaining-unit mechanics at its Louisville facility and that it was obligated to bargain with the Union over any change to that practice. Further, the judge found that the Employer had never notified the Union that it was planning to transfer bargaining-unit work. Contrary to the judge, however the majority found that the Employer had not shown that the Union had waived its right to bargain over the change. The majority found that the generally-worded zipper clause in the parties' collective-bargaining agreement did not mention the transfer of unit work and was not sufficient to demonstrate a clear and unmistakable waiver. Further, the majority reasoned that the normal function of zipper clauses is to maintain the status quo, not to facilitate unilateral changes. Although a zipper clause may establish a waiver when the clause is significantly expanded or discussed during bargaining, here, the zipper clause never changed from prior agreements and was never discussed during bargaining. Likewise, the majority found that the language in the agreement discussing its scope as limited to Kentucky was not evidence of a waiver, given that the long-standing practice included southern Indiana mechanical work.

Next, given the limited discussion during bargaining of the Union's proposal to expressly codify the scope of the agreement, the majority found that the parties had never discussed the Employer's authority to relocate bargaining-unit work and the Union had not "consciously yielded" its right to bargain over the transfer of work. And, as the Employer had failed in its affirmative duty to give notice of its decision, the Union's knowledge that some maintenance work was being performed at New Albany during the strike could not be deemed a waiver of its right to bargain over the permanent transfer of unit work. Finally, the majority found that even if the Union could be charged with the knowledge of a permanent change, the Employer had unlawfully implemented it by the time the Union learned of it, making it a fait accompli.

The majority also reversed the judge and found that the Employer violated Section 8(a)(3) by failing to reinstate mechanics who engaged in the economic strike.

Dissenting, Member Miscimarra found that, under *Dubuque Packing*, 303 NLRB 386 (1991), *enforced in relevant part sub nom. United Food and Commercial Workers v. NLRB,* 1 F.3d 24 (D.C. Cir. 1993), the Employer had no obligation to bargain over its decision. Although Member Miscimarra would find that the Employer had a potential obligation to bargain over the effects of its decision, he found that the Union waived its right to bargain by failing to request

bargaining. He also dissented from the finding that the Employer unlawfully failed to reinstate the striking mechanics.

***StaffCo of Brooklyn, LLC*, 364 NLRB No. 102**

The panel majority (Pearce and Hirozawa), affirming the ALJ, found that the Employer violated Section 8(a)(5) by terminating its contributions to the bargaining-unit employees' pension plan upon the expiration of the collective-bargaining agreement without first notifying the Union and affording it an opportunity to bargain.

Under the parties' collective-bargaining agreement, the Employer agreed to contribute to the New York State Nurses Association Pension Plan on behalf of unit employees. The agreement incorporated the pension plan's continuation of coverage policy, which states that an employer's participation in the fund shall be terminated upon expiration of a collective-bargaining agreement if the employer has not provided the plan with a new collective-bargaining agreement. When the parties' contract extension was scheduled to expire, the Employer refused to sign another extension. After the agreement expired, the Employer maintained wages and all other terms and conditions of employment under the expired contract but ceased all pension contributions.

Reviewing established case law, the majority stated that pension plan contributions required under an expired collective-bargaining agreement are terms and conditions of employment that survive contract expiration, and such contributions may not be unilaterally discontinued or otherwise altered absent a bargaining impasse or waiver. Finding no "clear and unmistakable" waiver in the pension plan's continuation of coverage policy, the majority distinguished *Cauthorne Trucking*, 256 NLRB 721 (1981), *enforced in part* 691 F.2d 1023 (D.C. Cir. 1982), where the Board found that the union had agreed to contract language expressing a clear intent to relieve the employer of any obligation to make payments after contract expiration. The majority noted that *Cauthorne* has been applied narrowly. Here, by contrast, the majority found that the language incorporated in the collective-bargaining agreement set forth the pension plan's rules with respect to the Employer's status under the plan but did not relieve the Employer of its statutory obligation as a party to an expired collective-bargaining agreement to maintain the status quo.

Dissenting, Member McFerran found that the language in the pension plan permitted the Employer's unilateral discontinuation of its pension fund contributions when the collective-bargaining agreement expired. Further, Member McFerran would find that the parties' course of conduct confirmed the parties' intent to permit the Employer to discontinue its pension contributions upon expiration of the agreement.

***Ardit Co.*, 364 NLRB No. 130**

The panel majority (Pearce and McFerran) found that the Employer violated Section 8(a)(5) and (1) when it unilaterally implemented changes to unit employees' terms and conditions of employment after expiration of a Section 8(f) prehire agreement where the Union had previously been selected as the Section 9(a) representative.

The Employer announced that it would implement changes to unit employees' terms and conditions of employment—including wages, health insurance and pension contributions—upon the expiration of its Section 8(f) pre-hire agreement with the Union. After the Employer announced the changes, the Union petitioned for a representation election under Section 9(a). The Union won the election but was not certified for almost a year due to the Employer's challenges. Before the certification, the Employer proceeded with its previously announced plan to change terms and conditions of employment and also laid off nine unit employees. The Employer did not bargain with the Union over the changes or the layoffs.

Citing *Mike O'Connor Chevrolet*, 209 NLRB 701 (1974), *enforcement denied on other grounds* 512 F.2d 684 (8th Cir. 1975), the majority stated that once a union wins a representation election and establishes its 9(a) status, the employer is no longer permitted to use make unilateral changes even while objections to the election remain pending. Here, the majority stated that, at the time the Employer announced its intended changes, it could not lawfully implement unless it obtained the Union's consent or waited until the expiration of the parties' 8(f) agreement. However, by the time the 8(f) agreement expired, the Union had been chosen as the 9(a) representative. Thus, the majority reasoned that the Employer was obliged to bargain with the Union without interruption, first under 8(f) and then under 9(a), and by proceeding to act unilaterally after the expiration of the 8(f) agreement, the Employer acted unlawfully.

According to the majority, finding the Employer's conduct unlawful under the circumstances is consistent with Board law as well as the Act's fundamental policy to promote stable collective-bargaining relationships. The majority reasoned that preventing employers from acting unilaterally during the transition from an 8(f) to a 9(a) relationship ensures that the parties' negotiations for a new collective-bargaining agreement will begin from the true status quo. The majority also stated that its finding was not inconsistent with the rule that a nonunion employer that has announced an intention to make changes while nonunionized may, once employees select union representation, proceed with the previously announced change. Here, the Employer was in a fundamentally different position because it had a continuous bargaining obligation with the Union.

The majority also found that the layoffs were unlawful, dismissing arguments that the Employer's actions were excused by economic exigencies or the management-rights clause in the expired 8(f) agreement.

Dissenting, Member Miscimarra would find that the Employer was required by Section 8(a)(5) to implement any previously announced changes after the election. Member Miscimarra would also find that the unilateral layoffs did not violate Section 8(a)(5) because the Employer did not change its established past practice of conducting layoffs without notice to the Union.

d. Successor

***Creative Vision Resources, LLC*, 364 NLRB No. 91**

The panel majority (Pearce and Hirozawa), reversing the ALJ, found that the Employer was a "perfectly clear successor" under *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), and therefore violated Section 8(a)(5) by failing to provide the union with notice or an opportunity to bargain before imposing initial terms and conditions of employment.

Prior to June 2011, Richard's Disposal operated its waste disposal company by contracting with a labor supply company to provide a group of Union-represented employees. Prompted by concerns over the labor supply company's treatment of the employees as independent contractors, Richard's vice president formed the Employer as a new labor supply company to hire the workers and supply them to Richard's. In May 2011, the Employer distributed applications to approximately 20 existing employees and informed them of certain changes in their terms and conditions of employment, including that the Employer would pay a hourly wage and would deduct taxes and social security from their paychecks. The Employer also asked another current employee to assist in passing out applications, without telling him about any planned changes to employees' working conditions, and that employee passed out approximately 50 applications to other existing employees. Existing employees who wish to retain their jobs after the transition were merely required to complete an application and a W-4 tax form; no interviews were conducted. On June 2, its first day operating as the supplier, the Employer gathered the employees and told them that, starting immediately, they would be working for the Employer and, among other things, they would be paid hourly and taxes would be deducted from their paychecks. Some of the employees refused to work under the new terms but 44 existing employees stayed on, forming a majority of the initial work force. On June 6, after learning that the Employer had replaced the former labor supply company, the Union demanded that the Employer recognize and bargain with the Union and the Employer refused.

The panel majority found that the Employer was a perfectly clear successor because it did not effectively communicate that it intended to set its own initial terms of employment. Citing *Canteen Co.*, 317 NLRB 1052, 1053–54 (1995), *enforced* 103 F.3d 1355 (7th Cir. 1997), the panel explained that a new employer has an obligation to bargain over initial terms when it displays an intent to employ the predecessor's employees without making clear that their employment will be on different terms from those in place with the predecessor. Here, the Employer clearly intended to retain as many existing unit employees as possible and, under *Burns* and its progeny, the announcement of new working conditions on the day it began operating was made too late for the Employer to set initial terms without bargaining. Furthermore, the Employer's communications to approximately 20 existing employees and unsubstantiated rumors heard by others did not qualify as a clear announcement of intent to establish new working conditions as required by *Spruce Up Corp.*, 209 NLRB 194, 195 (1974), *enforced per curiam* 529 F.2d 516 (4th Cir. 1975). To allow a successor to avoid a bargaining obligation in these circumstances, the panel reasoned, would invite abuse by employers who would be encouraged to announced changes to only a select few incumbent employees, while allowing the majority to believe that working conditions would not change.

Member Miscimarra dissented to the finding that the Employer was perfectly clear successor because he would find that the Employer effectively communicated its intent to set new terms prior to inviting existing employees to accept employment. In particular, Member Miscimarra would find that the tax forms distributed to the existing employees in their application packets signaled a fundamental change that they would no longer be treated as independent contractors. Further, Member Miscimarra would find that the Union's failure to demand recognition or bargaining until June 6 independently precluded a finding that the Employer was a perfectly clear successor when it began operations on June 2.

***Paragon Systems, Inc.*, 364 NLRB No. 75**

The panel (Pearce, Hirozawa and McFerran), affirming the ALJ, found that the Employer was not a "perfectly clear successor" under *Burns Security Services*, 406 U.S. 272 (1972).

The Employer was awarded a contract in June 2013 to provide security services for a federal agency and, under Executive Order 13495, the Employer was obligated to offer employment to the existing contractor's employees. In mid-June, the Employer posted a memo informing the predecessor's employees that it would be holding a job fair on June 29 and invited the incumbent officers to go to the Employer's website to complete an online application. The memo also stated that offers of employment were contingent upon passing performance standards and attending required training. At the job fair, the Employer issued employees offer

letters that outlined initial terms and conditions of employment that differed from those in effect under the predecessor's collective-bargaining agreement. The Employer subsequently announced additional changes in terms and conditions at an orientation session held August 24. After September 1, the Employer recognized the Union as the collective-bargaining representative.

The panel found that the Employer was not a perfectly clear successor when it posted the job fair memo because it did not display an intent to retain the incumbent officers. The panel reasoned that the memo only communicated that the Employer would be considering the incumbent officers as applicants and was not an invitation to accept employment. Further, the job fair memo made no reference to the Executive Order or the officers' right of first refusal and there was no evidence that the officers knew of the Employer's legal obligations. As a result, the panel found that there was no evidence that employees would interpret the job fair memo as an actual offer of employment and be misled into believing that they were being offered employment with under existing terms and conditions.

***Data Monitor Systems, Inc.*, 364 NLRB No. 4**

The panel (Pearce, Hirozawa and McFerran), affirming the ALJ, found that the Employer was not a "perfectly clear successor" under *Burns Security Services*, 406 U.S. 272 (1972), and therefore did not violate Section 8(a)(5) by failing to provide the Union with notice or an opportunity to bargain before imposing initial terms and conditions of employment.

The Employer was awarded a contract to provide services at Wright-Patterson Air Force Base effective September 1, pursuant to under Executive Order 13495. The Union had a collective-bargaining agreement with the existing contractor, which required seniority to be used in lay-offs and assigning hours of work. In late July, the existing contractor distributed the Employer's application packet to unit employees and instructed them to sign up for an interview with the Employer. In early August, the Union met with the Employer and the Employer stated that it was not going to hire all the employees in the incumbent workforce and would not be using seniority to decide which employees to retain. Around the same time, the Employer interviewed all unit employees who applied and ultimately offered employment to 60 out of approximately 90 existing employees. The terms offered to incumbent employees were different from the terms of the existing collective-bargaining agreement.

The panel found that the Employer did not become a perfectly clear successor when it distributed job applications through the existing contractor and told employees to sign up for an interview if they were interested in employment. The panel reasoned that this was not the equivalent of an invitation to accept employment and the Employer did not mislead employees into believing that they

would be retained without changes in working conditions. The panel found that at the time employees were invited to interview, the Employer was in a preliminary stage of its hiring process and had not yet decided which employees it intended to hire and the application packets reflected that the incumbent employees were treated as applicants. In short, the panel found that nothing in the Employer's conduct suggested that completing an application was simply an administrative formality, distinguishing *Cadillac Asphalt Paving Co.*, 349 NLRB 6, 11 (2007), where, by contrast, employees were asked to complete applications and W-4 forms simply to update the successor's records. Finally, the panel found that, under the Executive Order, the Employer was permitted to hire fewer employees and choose which employees to hire by its own criteria, and there was no evidence that existing employees knew of the Employer's legal obligation to offer them a right of first refusal.

***Adams & Associates, Inc.*, 363 NLRB No. 193**

The panel (Pearce, Hirozawa and McFerran), affirming the ALJ, found that the Employer violated Section 8(a)(5) by failing to provide the Union with notice or an opportunity to bargain before imposing initial terms and conditions of employment. In contrast to the ALJ, the panel also found that that the Employer was a "perfectly clear successor" under *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), and its initial setting of terms was independently unlawful on this basis.

The predecessor employer and the Union had a collective-bargaining agreement effective through March 9 covering the residential advisors (RAs) at a Job Corps Youth Training Center. On February 7, the predecessor informed the Union that a new company and its subcontractor, the Employer, would be operating the Center as of March 11. The Union wrote to the Employer and the Employer responded that it would discuss and/or negotiate a collective-bargaining agreement, if required, once the transition was complete. On February 13, the Employer's representative met with the incumbent employees and stated that they had been "doing a really good job" and that the Employer "didn't want to rock the boat" and "wanted a smooth transition." The representative explained that the Employer was reducing the number of RAs but was also creating a new position that the existing RAs could apply for, and assured them that he was "99% sure" that they would all have jobs. The next day, the Union demanded recognition and the Employer did not respond. Over the next few weeks, the Employer extended offer letters which contained different terms and conditions of employment from the current collective-bargaining agreement, including that employment would be at-will and employees would be required to resolve employment-related disputes through mandatory arbitration. The Employer began operating the Center with a majority of incumbent employees.

According to the panel, the Employer became a perfectly clear successor when it met with employees on February 13 and clearly manifested an intent to retain the incumbent employees, citing *Canteen Co.*, 317 NLRB 1052, 1053–54 (1995), *enforced* 103 F.3d 1355 (7th Cir. 1997). The Employer's announcement on February 13 that it would be reducing the number of RAs did not signal to incumbent employees that terms and conditions of employment would change. Rather, the Employer's assurances that it would retain "99%" of current employees demonstrated the Employer's intent to retain a sufficient number of incumbent RAs to continue the Union's majority status. The panel found that the Employer did not inform employees that employment would be on new terms until the hiring process was nearly complete and, therefore, as of February 13, the Employer was a perfectly clear successor with a responsibility to bargain over initial terms and conditions.

***Nexeo Solutions, LLC*, 364 NLRB No. 44**

The panel majority (Pearce, Hirozawa and McFerran), affirming the ALJ, found that the Employer was a "perfectly clear successor" under *Burns Security Services*, 406 U.S. 272 (1972), and therefore violated Section 8(a)(5) by failing to provide the Union with notice or an opportunity to bargain before imposing initial terms and conditions of employment.

In early November 2010, unit employees learned that the Employer was purchasing the predecessor's assets and planned to retain all employees. During the next two months, the predecessor and the Employer jointly communicated with employees on several occasions and assured them that their current compensation and benefits would continue. Existing employees did not have to re-apply to remain in their positions. In mid-February, the Employer met with the Union and stated that it would not be assuming the predecessor's collective-bargaining agreements. Around the same time, Employer distributed offer letters which included changes to employees' existing terms and conditions of employment, including ceasing contributions to the Union-sponsored pension fund and providing different health and vision benefits. After April 1, when the Employer began operating the business, the Employer also changed the practice of using seniority for work assignments and layoffs.

Citing *Canteen Co.*, 317 NLRB 1052, 1053–54 (1995), *enforced* 103 F.3d 1355 (7th Cir. 1997), the panel majority stated that the bargaining obligation attaches when the successor expresses an intent to retain the predecessor's employees without making it clear that employment will be conditioned on acceptance of new terms. Here, the majority found that the Employer's messages to unit employees between November and mid-February indicated that it intended to retain all unit employees and that each would receive substantially comparable wages and benefits. Based on these assurances, the majority found that employees were lulled into believing that employment conditions would be comparable and were deprived

of the opportunity to seek other employment. The majority emphasized that the Employer authorized the predecessor's CEO to communicate with employees on its behalf. The majority also found that, despite three meetings and exchanges of proposals, the Employer and the Union had not reached impasse prior to April 1 when the Employer implemented the changes set forth in the offers of employment.

Member Miscimarra dissented in part. He would find that the Employer was not a perfectly clear successor because the communications to employees were made by the predecessor, rather than the Employer. Member Miscimarra would also find that the Employer's first communications to unit employees clearly portended employment under different terms. Member Miscimarra agreed with the panel's finding that the Employer violated Section 8(a)(5) by changing certain employment practices after it began operations because those changes were not part of the initial terms that were announced and implemented.

5. Section 8(b)(1)(a)

a. Hiring Halls

***IATSE Local 838 (Freeman Decorating)*, 364 NLRB No. 81**

The panel majority (Pearce and Hirozawa) found that the Union did not violate Section 8(b)(1)(a) by maintaining an attendance rule that conditioned hiring hall users' eligibility for job referral upon payment of fines for noncompliance with that rule.

The Union operates an exclusive hiring hall for the Employer's trade shows and maintains an attendance rule that imposes a series of progressive assessments on hiring hall referents who are late or fail to report to assigned jobs. Fines begin at $25 for tardiness and increase to $200 for a third absence. A referent is automatically suspended from the hiring hall until those assessments are paid to the Union.

The majority began with the principle that when a union interferes with a referent's employment status for reasons other than failure to pay dues or other uniform fees, a rebuttable presumption arises that the interference is intended to encourage union membership in violation of Section 8(b)(1)(A), citing *Operating Engineers Local 18 (Ohio Contractors Assn.)*, 204 NLRB 681 (1973), *enforcement denied on other grounds* 555 F.2d 552 (6th Cir. 1977). Here, the majority found that the General Counsel established that presumption because the Union's attendance rule affects referents' employment status by suspending workers from the referral list until their assessments are paid. Next, the Board found that the rule is consistent with the union's duty of fair representation because there was no indication that it is arbitrary, discriminatory, or has been applied in bad faith. The

majority then considered whether the rule is necessary to the Union's effective performance of its representative function, noting that the Board defers to a union's judgment when determining what conduct is reasonable to perform its representative function. Here, the majority found that the Union's attendance rule was reasonable because it imposed a series of fair and predictable incremental assessments and, given the limited length of trade shows, it was rational for the Union to take preemptive managers to deter hiring hall users from committing attendance infractions.

Member McFerran dissented, arguing that the Board should apply stricter scrutiny. Member McFerran would find that, lacking any evidence in support of its position, the Union had failed to carry its burden to show that the denial of employment was essential to the effective operation of the hiring hall. Member McFerran would find that the denial of employment was used solely to punish users' failures to pay fines to the Union, rather than to address the underlying attendance issues or cover the Union's administrative costs.

b. Dues Collection

***UNITE HERE! Local 5 (Hyatt Corp.)*, 364 NLRB No. 94**

The panel majority (Pearce and Hirozawa), affirming the ALJ, found that a Union letter sent to both members and nonmembers seeking to collect dues for a time when no security clause was in effect did not restrain or coerce nonmembers in the exercise of their statutory rights.

The Union has represented bargaining-unit employees since 2006. For several years, the parties did not have a collective-bargaining agreement. In April 2012, the Charging Parties and other employees sent letters to the Union withdrawing their membership. The Union and the Employer reached a successor collective-bargaining agreement effective August 11, 2013; the Union honored the nonmember requests for withdrawal and the employees were only charged core representational fees. However, several months later, on March 31, 2014, the Union sent letters to the Charging Parties and other nonmembers stating that they had account balances for nonpayment of dues which could result in suspension from Union membership. The letters stated that the Employer would deduct the arrearages from employees' pay but the employees were responsible if there were insufficient funds to cover the amount of dues owed.

The panel found that the Union did not violate Section 8(b)(1)(A) by demanding dues payments from nonmembers during the period when no security clause was in effect. The panel distinguished *Service Employees Local 121RN (Pomona Valley Hospital Medical Center)*, 355 NLRB 234, 235 (2010), *enforced mem.* 440 Fed. Appx. 524 (9th Cir. 2011), where the Board found that a Union flyer

wrongfully asserted that employees remained obligated to pay dues and fees under an expired contract. Here, by contrast, the majority found that the letter was sent more than seven months after the parties' successor collective-bargaining agreement took effect and only sought arrearages for unpaid membership dues—as opposed to core representational fees—solely based on the Union's own internal membership rules. Further, the majority found that the letters only spoke to adverse consequences for members and, since the Charging Parties were already nonmembers, they would have found this inapplicable and less coercive. Under the circumstances, the majority concluded that the only objectively reasonable view was that the letter was mistakenly directed and the Charging Parties would not reasonably view the March 31 letter as an attempt to restrain or coerce them in the continued exercise of their statutory rights.

Member McFerran dissented. She would find that the Union's letter could reasonably be construed as coercive because it demanded dues from employees who did not owe them and made clear that the Union would take steps to collect the money it erroneously claimed was owed. Member McFerran relied on the fact that the Union only attempted to clarify its actions after the Charging Parties had filed an unfair labor practice and the Employer had deducted from paychecks and then refunded the amounts wrongly billed.

6. Section 8(b)(4)(D)

a. Work Preservation

***Operating Engineers Local 18*, 363 NLRB No. 184**

The panel (Pearce, Hirozawa and McFerran), affirming the ALJ, found that the Union violated Section 8(b)(4)(ii)(D) by filing and maintaining pay-in-lieu grievances with the object of forcing the Charging Party Employers to assign construction work to employees represented by the Union.

In two prior Section 10(k) proceedings, the Board found reasonable cause to believe that a strike and threats to strike by the Union constituted prohibited 8(b)(4)(D) conduct seeking to enforce claims to disputed work. In each case, the Board awarded the disputed work to employees represented by a different union. The Union refused to comply with the Board's awards and continued to process pay-in-lieu grievances against the employers and also filed a new grievance against one of the employers. In these grievances, the Union sought to secure monetary damages in lieu of the disputed work.

The panel, citing, *inter alia*, *Machinists Lodge 160 (SSA Marine, Inc.)*, 360 NLRB No. 64, slip op. at 3 (2014), stated that a union's pursuit of contractual claims to obtain work that the Board has awarded in a 10(k) determination to another

group of employees, or to secure monetary damages in lieu of the work, violates Section 8(b)(4)(ii)(D) because it undermines the finality of the Section 10(k) award. Examining the Union's work preservation defense, the panel found it unnecessary to rely on the ALJ's bargaining-unit analysis. Regardless of what units are appropriate, the panel stated that the relevant inquiry is whether the Union was attempting to expand its work jurisdiction to claim work that had never been performed by Union-represented employees, citing *Laborers Local 265 (Henkel's and McCoy)*, 360 NLRB No. 102, slip op. at 4–5 (2014). Here, since the Union acknowledged that it was trying to acquire work that it had lost long ago, the panel concluded this was in fact "work acquisition, not work preservation." Based on the Union's failure to establish a work preservation defense, the panel found that the Union violated Section 8(b)(4)(ii)(D) by seeking to undermine the Board's 10(k) awards by maintaining and filing pay-in-lieu grievances.

7. Section 8(e)

***Rochester Regional Joint Board Local 14A*, 363 NLRB No. 179**

The panel (Pearce, Hirozawa and McFerran), reversing the ALJ, found that the Union did not violate Section 8(e) by maintaining a collective-bargaining agreement containing a successorship provision that the Union attempted to enforce against the employer (Xerox) when it announced a plan to subcontract.

The Union and Xerox are parties to a collective-bargaining agreement containing an article titled "Successorship," which states that Xerox shall not transfer business to another entity unless the transferee has agreed to assume all of Xerox's obligations under the collective-bargaining agreement. The provision also defines "transfer of business" to mean "transfer by sale, lease or otherwise of ownership of or operational control over a significant portion of [Xerox's] current production functions or facilities." When Xerox subcontracted its HVAC maintenance, cleaning and other services to another entity, the Union filed a grievance alleging that Xerox violated the successorship article by transferring "operational control over the maintenance functions" without complying with the requirement that the transferee assume the collective-bargaining agreement. The Union also sought to enjoin Xerox in federal court from proceeding with its subcontracting plan.

The panel found that the collective-bargaining agreement's successorship article was a lawful agreement permitted under Section 8(e). According to the panel, Section 8(e) is designed to protect genuinely neutral employers and their employees by prohibiting parties from entering into an agreement under which the employer will "cease doing business" with another employer. The Board and courts have held that "doing business" within the meaning of Section 8(e) does not include the sale or transfer of a business and, therefore, agreements requiring a successor

employer to assume the obligations of the collective-bargaining agreement do not violate Section 8(e). The panel distinguished between legitimate agreements aimed at protecting the wages and job opportunities of unit employees as compared with unlawful agreements aimed at regulating the policies of other employers and serving to further general union objectives, citing *Chicago Dining Room Employees Local 42 (Gaslight Club)*, 248 NLRB 604, 607 (1980). Here, the panel found that the term "lease" should not be read in isolation and that the plain language of the article provided that it was only triggered by a transfer of the business where Xerox would retain no operational control of the transferred work. Therefore, the panel found that the article places no restrictions on a lessee unless there was a transfer of ownership or operations and the provision was a lawful successorship agreement under Section 8(e).

8. Deferral to Arbitration

Good Samaritan Hospital, 363 NLRB No. 186

The Board panel (Pearce, Hirozawa and McFerran), affirming the ALJ, concluded that deferral of a Section 8(a)(5) charge—regarding an alleged unilateral transfer of bargaining-unit work to non-unit supervisors—to the parties' arbitration procedure under *Collyer Insulated Wire*, 192 NLRB 837, 839 (1971), was appropriate.

In November 2013, the Employer sent the Union a notice of its intent to eliminate the 52 charge nurse positions. At the same time, all staff were informed that a new nonbargaining-unit position, department supervisor, would be established. After these announcements, some charge nurses voluntarily retired and the remainder moved into other positions, including the new nonbargaining-unit position. The Union filed a grievance claiming that the Employer violated multiple provisions of the parties' collective-bargaining agreement. The Union argued before the arbitrator that the Employer violated the layoff provisions of the collective-bargaining agreement, including failing to utilize inverse bargaining-unit seniority. The Employer argued that the agreement's management rights clause permitted the Employer to eliminate job classifications. It also argued that no layoffs had occurred because none of the charge nurses were permanently terminated. Agreeing with the Employer, the arbitrator found that there were no layoffs because no bargaining-unit members lost their jobs. The arbitrator further found that the contract's management rights provision permitted the Employer to "restructure" and eliminate the charge nurse positions. The Region issued complaint alleging that the Employer unilaterally transferred bargaining-unit work to non-unit supervisors, thereby changing terms and conditions of employment and modifying the parties' collective-bargaining agreement in violation of Section 8(a)(5).

The ALJ found that the contractual and statutory issues were factually parallel and the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. The ALJ observed that the arbitrator fully considered the issue of transfer of bargaining-unit work to supervisors and found that the department supervisors perform no bargaining-unit work, thus resolving the unfair labor practice allegation. The Board panel adopted the ALJ's findings but noted that it did not rely on the judge's "additional suggestion" that deferral was appropriate because the arbitrator found that the contract permitted the Employer to eliminate the charge nurse position. The Region's complaint did not allege that the Employer violated the Act by eliminating the charge nurse position and, therefore, this issue was not before the Board.

***Cooper Tire & Rubber Co.*, 363 NLRB No. 194**

The Board panel (Pearce, Hirozawa and McFerran), affirmed the ALJ's conclusion that an arbitrator's decision was "clearly repugnant" to the Act under *Speilberg Mfg. Co.*, 112 NLRB 1080, 1082 (1955),[1] because the discriminatee's statements on the picket line were protected as they did not reasonably tend to coerce or intimidate employees in their rights under the Act or raise a reasonable likelihood of an imminent physical confrontation.

During a contract dispute, the Employer locked out bargaining-unit employees and replaced them with temporary replacement workers, most of whom were African-American. The Union set up picket lines and the Employer's security guards recorded employees' picketing activity. One evening, the discriminatee joined the picketing outside the plant's main entrance. According to the surveillance video, closed vans carrying replacement workers drove towards the main gate while picketers on both sides held up signs and yelled objections. After a van had passed, the discriminatee, standing with his hands in his coat pocket, yelled towards the gate, "Hey, did you bring enough KFC for everyone?" A few moments later, facing the other picketers across the street, the discriminatee said, "Hey, anybody smell that? I smell fried chicken and watermelon." In response, picketers across the street laughed. There were no allegations of violence or physical intimidation on that evening or any time during the picketing. The Employer discharged the discriminatee based on these recorded statements, claiming that they violated the Employer's anti-harassment policy. The Union filed a grievance under the parties' collective-bargaining agreement and the dispute went before an arbitrator. The arbitrator found that the discriminatee was discharged for just cause because his statements were prohibited under the Employer's anti-harassment policy.

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[1] The Board applied *Speilberg* and *Olin Corp.*, 268 NLRB 573, 573–74 (1984), because the Board decided in *Babcock and Wilcox Construction Co.*, 361 NLRB No. 132 (2014), to apply its modified post-arbitral deferral standards in Section 8(a)(3) cases prospectively only.

The ALJ reviewed the standard for evaluating employee conduct on the picket line under *Clear Pine Mouldings*, 268 NLRB 1044, 1046 (1984), *enforced* 765 F.2d 148 (9th Cir. 1985). Although serious acts of misconduct may disqualify an employee from the protection of the Act, the inquiry under *Clear Pine Mouldings* is whether statements may reasonably tend to coerce or intimidate employees in their rights protected under the Act or whether those statements raised a reasonable likelihood of an imminent physical confrontation. The ALJ found that the discriminatee's statements, while "racist" and "offensive," were not violent in character. The statements were unaccompanied by threatening behavior or physical acts of intimidation and were made after the van carrying the replacement workers had passed, while the discriminatee stood with his hands in his pockets. Rejecting the employer's arguments that "making racist comments is not protected activity," the ALJ observed that the discriminatee's statements cannot be evaluated in isolation or in the context of a normal workplace environment because the Board distinguishes between conduct occurring in the workplace and conduct occurring on the picket line, where the Board tolerates repulsive and offensive statements. Finding that the arbitrator's award was "not susceptible to an interpretation that is consistent with the Act," under *Olin Corp.*, 268 NLRB 573, 573–74 (1984), the ALJ concluded that deferral was inappropriate.

The Board panel adopted the ALJ's findings and agreed that deferral was inappropriate, noting that the arbitrator's statement that the conduct was "even more serious" contradicted the Board's standard for evaluating picket-line misconduct under *Clear Pine Moldings*. The Board also distinguished the facts of *Spielberg Mfg. Co.*, 112 NLRB 1080, 1082 & fn. 6 (1955), where the Board deferred to an arbitrator's finding that the employer lawfully refused to reinstate four striking employees based on allegations that they persistently shouted profane and racist insults at individuals over several days of picketing. Here, the panel observed that the discriminatee made his racially offensive statements about replacement workers after a closed van carrying those workers had passed.

***Verizon California, Inc.*, 364 NLRB No. 79**

The Board panel (Pearce, Hirozawa and McFerran), reversing the ALJ,'s concluded that deferral of a Section 8(a)(3) charge—regarding an employee invoking his rights under *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 256–57 (1975)—to an arbitration award was "palpably wrong" and "not susceptible to an interpretation consistent with the Act," under *Speilberg Mfg. Co.*, 112 NLRB 1080, 1082 (1955) and *Olin Corp.*, 268 NLRB 573, 573–74 (1984).[2]

The Employer's work rules require field technicians to call their local managers if a field job takes more than 1.8 hours to complete. On June 2, the discriminatee was placed on a performance improvement plan that required him to

[2] *See supra* n.1.

improve his job productivity and follow all work rules, including contacting his manager regarding all long-duration jobs. On June 3, the discriminatee was counseled by his manager regarding his failure to call in during a long-duration job the previous day. On the morning of June 8, the manager questioned the discriminatee for 45 minutes regarding his stops the day before. That afternoon, the discriminatee worked a long-duration job but did not call in. The following day, the manager called the discriminatee to solicit explanations for two stops that he made the previous day, while also recording in her notes that she wanted the discriminatee to address the latest long-duration job pursuant to his PIP. The discriminatee told the manager that he did not feel comfortable discussing the matter without a Union representative. The manager refused the request and, after the discriminatee refused to continue the conversation without representation, the manager suspended the discriminatee. The Union grieved the suspension pursuant to the parties' grievance and arbitration provision. The arbitrator found for the Employer, concluding that, based on the manager's testimony, the discriminatee's expectation that he might be disciplined as a result of the inquiry was unreasonable.

Applying the *Spielberg/Olin* standards, the ALJ concluded that the arbitrator's award was not repugnant to the Act. The Board panel disagreed, finding that the arbitrator's award could not be reconciled with *Weingarten*. The panel noted that, under *Olin*, there is no requirement that the arbitration award be totally consistent with Board precedent. But, when an award is not even susceptible to an interpretation consistent with the Act, the Board will not defer. Here, the panel observed that the evidence presented at the arbitration hearing demonstrated that the Employer warned the discriminatee on several occasions about his long-duration jobs, the discriminatee had worked a long-duration job without contacting his manager on the previous day, and the manager did not inform the discriminatee that the interview would not lead to discipline. Examining those facts from point of view of a reasonable employee, as required under a proper *Weingarten* analysis, the panel concluded that the discriminatee's belief that discipline might result was reasonable under the circumstances. Therefore, the panel concluded that the arbitrator's finding was "palpably wrong" and deferral was inappropriate.

***Weavexx, LLC*, 364 NLRB No. 141**

The panel majority (Miscimarra and McFerran), reversing the ALJ, concluded that deferral of a Section 8(a)(5) charge—regarding a change to unit employees' pay dates without notice to the Union—to the parties' arbitration procedure was appropriate.

From at least 2002, the Employer paid its employees every Thursday. In 2014, the Employer changed to a biweekly pay cycle where employees would be paid

every other Friday. The Employer did not offer to bargain with the Union regarding these changes. The Union grieved the change pursuant to the parties' grievance and arbitration provision and an arbitrator denied the grievance. The ALJ found that deferral was not appropriate because the arbitrator relied on "extracontractual management prerogatives" to determine that the Employer was privileged to implement the changes.

The majority reasoned that deferral is appropriate where one interpretation of the arbitrator's decision is consistent with the Act, even if the Board would not necessarily reach the same result, citing *Smurfit-Stone Container Corp.*, 344 NLRB 658, 659–60 (2005). Here, the panel reasoned that, although the arbitrator discussed the Employer's inherent management prerogatives, the award contained sufficient textual evidence to establish that the arbitrator relied upon the management-rights clause in the parties' collective-bargaining agreement. The panel further found that, under *Olin Corp.*, 268 NLRB 573, 573–74 (1984), the contractual issue was factually parallel to the unfair labor practice issue and the arbitrator was presented generally with the facts relevant to the unfair labor practice and therefore deferral was appropriate.

Chairman Pearce dissented. He would find that the arbitrator failed to consider the unfair labor practice issue because the arbitrator focused exclusively on the Union's past practice argument and did not analyze whether or not the collective-bargaining agreement privileged the Employer's actions.

9. **Protected Concerted Activity**

***Wal-Mart Stores, Inc.*, 364 NLRB No. 118**

The panel majority (Pearce and Hirozawa), affirming the ALJ, found that the Employer unlawfully disciplined six employees for engaging in a work stoppage in violation of Section 8(a)(1).

Six unrepresented employees worked as temporary remodeling associates at a large Wal-Mart location. From the beginning of the remodeling project, the employees complained that their supervisor called them lazy, yelled at them and made offensive, racist comments. After engaging in a strike and submitting a written statement to the Employer concerning the supervisor and their lack of permanent positions, the employees planned a work stoppage with the assistance of OUR Wal-Mart and a union. On the day of the work stoppage, the employees stopped work early in the morning, prior to the store's scheduled opening time. For the next hour and a half, the employees engaged in a peaceful protest, mostly confined to a small customer service area near the main store entrance. Nonemployees joined the protest after the store opened and the group displayed a banner, wore matching T-shirts, held signs and took photographs. After the

employees moved to an area close to the front store entrance, the Employer told the employees they should either return to the customer service area or leave the store because they were blocking customers. Three minutes later, the employees returned to the customer service area. Shortly after, uniformed police officers arrived. The six employees left the customer service area to clock out and the nonemployee protesters left the store. Following the protest, the Employer issued a second level discipline to five of the employees and a third level discipline to one employee who had an active prior infraction.

The majority, citing *Quietflex Mfg. Co.*, 344 NLRB 1055 (2005), noted that work stoppages are protected by Section 7 and the Board seeks to accommodate employees' Section 7 rights and an employer's property rights by striking an appropriate balance between the two. The majority applied the *Quietflex* factors to analyze the work stoppage and found that nine out of 10 factors favored finding the work stoppage protected. Those factors included that the stoppage sought to resolve immediately pressing problems, was peaceful, lasted for a short duration, was largely confined to the customer service area of the Employer's store, resulted in little to no disruption of the Employer's ability to serve its customers, and employees had no adequate means to present a group grievance to management. As a result, the majority concluded that the work stoppage was protected and that the employer's discipline of the six employees violated Section 8(a)(1).

Member Miscimarra dissented, arguing that the Board should find the protest unprotected under *Restaurant Horikawa*, 260 NLRB 197 (1982), where the Board articulated special deference to retail employers to prescribe sales floor disruptions as a means of protecting the customer/retailer relationship. Even applying the *Quietflex* factors, however, Member Miscimarra would find the protest unprotected based on 1) the length of time, 2) the fact that the protesters blocked the customer service area and disrupted customers' experience and 3) because the protesters could have availed themselves of the Employer's open door policy to present their grievance to the Employer.

***M.D.V.L., INC.*, 363 NLRB No. 190**

The Board panel (Pearce, Hirozawa and McFerran), affirming the ALJ, found that the Employer violated Section 8(a)(1) by discharging an employee for engaging in protected concerted activity.

The Employer fired the discriminatee after he, along with his coworkers, challenged the Employer's safety history and supported a coworker's demand letter for unpaid overtime. Affirming the ALJ, the Board panel rejected the Employer's argument that the coworker's demand letter for unpaid wages was a purely personal claim and therefore the discriminatee's conduct relating to the letter was not protected concerted activity. The Board reasoned that, even assuming the letter

raised a purely personal claim, the Board has held concerted employee actions to further a personal claim protected, citing *Portola Packaging Inc.*, 361 NLRB No. 147, slip op. at 3 & n.11 (2014). Additionally, the Board found that the discriminatee engaged in protected concerted activity by discussing safety concerns with his coworkers and the Employer.

***Oncor Electric Delivery Co.*, 364 NLRB No. 58**

The Board panel (Pearce, Hirozawa and McFerran), affirming the ALJ, found that the Employer violated Section 8(a)(3) by discharging an employee after he testified before a state legislature regarding safety hazards associated with the Employer's electric utility meters.

The discriminatee was a long-term employee whose job responsibilities included responding to power outages at customers' homes. In 2012, while serving as the Union's chief negotiator for bargaining a successor collective-bargaining agreement, the discriminatee told the Employer that he would be testifying before the state legislature regarding the Employer's smart electric meters. The next day, while appearing as a representative of the Union, the discriminatee testified about safety hazards associated with smart meters. In particular, he spoke about his service calls involving smart meters "burning up and burning up the meter bases" and causing damage to customers' homes. The Employer discharged the discriminatee following his testimony.

The panel, citing *GHR Energy Corp.*, 294 NLRB 1011, 1014 (1989), *enforced mem.* 924 F.2d 1055 (5th Cir. 1991), began by finding that the discriminatee's testimony was concerted because he testified on a matter of ongoing concern to the Union and in his capacity as a Union official. The panel then found that the discriminatee's testimony was for the purpose of "mutual aid and protection" within the meaning of Section 7 and had an "immediate relationship to employees' interests" as employees, citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978) because: 1) it was motivated by an attempt to gain leverage in negotiations; 2) the Employer had control over the installation of smart meters discussed in the testimony, and 3) the testimony related to an ongoing Union concern regarding the safety of bargaining-unit employees. Finally, the panel found that the testimony, which was based on the discriminatee's firsthand experience, did not lose the protection of the Act because the statements were not "maliciously untrue," citing *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007), *enforced mem.* 358 Fed. Appx. 783 (9th Cir. 2009), and dismissed the Employer's "highly technical argument" to the contrary.

***NC-DSH, LLP*, 363 NLRB No. 185**

The Board panel (Pearce, Hirozawa and McFerran), affirming the ALJ, found that the Employer violated Section 8(a)(3) by disciplining the Charging Party for discussing an upcoming representation election with a coworker. The panel also reversed the ALJ and found that the Employer violated Section 8(a)(1) by threatening the Charging Party with unspecified reprisals if she did not comply with the Employer's directives not to discuss an investigation of her discussions and related discipline.

The Charging Party was actively involved in the Union's organizing efforts and, while off-duty, called her coworker's personal cell phone and said "what the fuck is this I'm hearing that everybody is saying…that everyone [in an area of the Employer's hospital] wants to…wait a year to see what the hospital do and then unionize again…I'm so sick of hearing this mother fucking shit. I just want it to be over." Shortly after, the Employer's human resources director met with the Charging Party and informed her that the hospital was investigating allegations that the Charging Party had threatened employees before the election and that she was suspended pending completion of the investigation. The human resources director also told the Charging Party that she was to refrain from sharing what was discussed at their meeting with others, including the suspension, and stated that "it will be trouble for [the Charging Party]" if she did not follow those instructions.

Adopting the judge's finding that the Employer violated the Act by disciplining the Charging Party for engaging in protected activity, the panel discussed the Board's standard for determining if employees' protected conversations lose protection of the Act. The panel found that the proper standard to apply is "one that considers all the circumstances surrounding the conduct at issue," citing *Honda of America Mfg.*, 334 NLRB 751, 752 (2001), *enforced mem.* 73 Fed. Appx. 810 (6th Cir. 2003). Here, the panel found the phone conversation did not lose protection because: 1) the Charging Party was off duty when she called her coworker; 2) the Charging Party did not know that her coworker was on duty until the end of their conversation; 3) only the coworker heard the Charging Party's statements; 4) the Charging Party's use of profanity was unaccompanied by any threat of harm and was not unusual during conversations with this coworker; and 5) the coworker was not in a patient care area when she answered the Charging Party's phone call. The panel noted that the Board applies *Atlantic Steel Co.*, 245 NLRB 814 (1979), to analyze whether an employee's face-to-face workplace communications directed at a supervisor or manager were so "opprobrious" that the employee lost protection of the Act. But here, even applying *Atlantic Steel*, the panel found that the Charging Party's use of profanity did not cause her to lose the Act's protection.

Reversing the ALJ, the panel also found that the human resources director's statement that there would be "trouble" if the Charging Party discussed the Employer's investigation or her suspension constituted a threat of unspecified reprisal in violation of Section 8(a)(1). Applying the Board's objective test, the panel found that the statements "conveyed in the clearest terms" that the Charging Party could receive further discipline if she spoke about her meeting with the director, her discipline, the Employer's investigation, or her union activity. Therefore, the panel found that he Employer unlawfully threatened the Charging Party with unspecified reprisals if she continued to exercise her Section 7 rights.

***UniQue Personnel Consultants, Inc.*, 364 NLRB No. 112**

The panel majority (Pearce and Hirozawa), affirming the ALJ, found that the Employer violated Section 8(a)(3) by discharging the Charging Party for seeking advice from a coworker about how to respond to discipline for violating the Employer's dress code, which the Charging Party believed was applied unfairly and inconsistently.

While working as an administrative assistant, the Charging Party received verbal and written discipline for violating the Employer's dress policy. The Charging Party discussed with a coworker that she believed her supervisors were overly critical of her and that she was being unfairly singled out for violating the dress code. After attending a golfing event wearing the same required outfit as other female employees, the Charging Party received a written final warning for violating the dress code and spoke with a few coworkers about the discipline. She also told another coworker, as they were leaving work for the day, about the discipline and also asked the coworker whether she should speak with higher management at an upcoming company picnic. That coworker complained to the Employer that the Charging Party was disrupting his work and the Employer decided to discharge the Charging Party.

The panel discussed the Board's decision in *Fresh and Easy Neighborhood Market, Inc.*, 361 NLRB No. 12, slip op. at 3 (2014), where the Board found that an employee engaged in protected, concerted activity by asking coworkers to support her efforts to bring a sexual harassment claim to management even though the employee was the sole target of the harassment. Here, the panel found that the conduct was similarly concerted because the Charging Party sought to enlist the assistance of her coworker by asking for advice about how to respond to a matter concerning terms and conditions of employment. The panel also found that the Charging Party's activity was for the purpose of mutual aid or protection because her goal was to address a workplace policy, applicable to all employees, which the Charging Party believed was being applied unfairly.

Member Miscimarra dissented. Member Miscimarra would not find the conversation between the Charging Party and the coworker concerted because he would find that the Charging Party was only soliciting advice concerning her own terms and conditions of employment.

1. Remedy

a. Transmarine

***Pennsylvania State Corrections Officers Assn.*, 364 NLRB No. 108**

The panel majority (Pearce and Hirozawa), affirming the ALJ, found the parties did not reach a lawful impasse during effects bargaining pursuant to an order under *Transmarine Navigation Corporation*, 170 NLRB 389 (1968), and the Region's failure to process a decertification petition did not warrant terminating the backpay period at an earlier date.

On March 7, 2012, the Region dismissed a decertification petition based on pending unfair labor practice proceedings. On March 23, the Board issued an order, reported at 358 NLRB 108 (2012), finding that the Employer violated Section 8(a)(5) by failing to engage in effects bargaining over its decision to discharge five employees and ordered a *Transmarine* backpay remedy. On April 4, the Union and the Employer met to engage in effects bargaining. The Employer offered the Union two weeks' back pay without deductions for interim earnings with the following caveats: 1) it would deduct one week's severance pay that it had already paid to the employees, and 2) for four of the employees, the other week's pay would treated as a credit against damages it hoped to recover in future lawsuits for allegedly fraudulent mileage reimbursements. Shortly after, the Union mailed the Employer a counteroffer including, *inter alia*, two weeks' severance pay and payment for all unused leave. On April 11, the Employer rejected the Union's counteroffer and declared impasse. The parties did not engage in any further effects bargaining and the Employer did not pay any backpay. Around September 28, the Union became defunct and was no longer available to bargain.

Under *Transmarine*, an employer that has failed to engage in effects bargaining is ordered to bargain over the effects of the underlying unlawful decision and give affected employees backpay for a period beginning five days after the date of the Board's order and ending either when effects bargaining results in an agreement or a bona fide impasse, providing that backpay shall be no less than two weeks' pay. *Id.* at 390. The majority noted that, in order to restore economic inducement for an employer to bargain without delay, an employer must pay *Transmarine* backpay in addition to whatever the parties agree in effects bargaining is owed to the discriminatees. Here, the majority found that the Employer proposed reducing the *Transmarine* minimum amount, insisting to

impasse on its offer of two weeks' back pay with one week's pay deducted and the other week's pay treated as a credit against potential future lawsuit damages. Therefore, according to the panel, the Employer never made a proposal that met its effects-bargaining obligation and there was no lawful impasse on April 11. The panel also found that, even if the Employer was permitted to bargain over the Board's *Transmarine* backpay remedy, insisting to impasse on its offer was impermissible because it was a modification of the *Transmarine* requirement that an employer pay employees a minimum of two weeks' backpay minus only interim earnings. And finally, the majority concluded that the Region properly refused to process the decertification petition based on the pending unfair labor practice proceedings and noted that the petition could not have been reinstated until after the Employer remedied its violation. Therefore, the majority affirmed the judge's conclusion that the backpay period ran from March 28 (5 days after the Board's order) to September 28, 2012, the approximate date on which the Union became defunct and was no longer available to bargain.

Member Miscimarra dissented, arguing that the majority misconstrued the Employer's proposal as an effort to negotiate or renegotiate the *Transmarine* backpay remedy. He would find that the parties reached a lawful bargaining impasse on April 11 and that the Employer therefore owed only 2 weeks of backpay.

b. Pierce the Corporate Veil

Ace Masonry, Inc., 363 NLRB No. 181

The Board panel (Pearce, Miscimarra and McFerran), affirming the ALJ, pierced the corporate veil of Ace Unlimited and held three individuals jointly and severally liable for remedial payments owed for unfair labor practices, while also finding that a fourth individual and his solely owned corporation were not jointly and severally liable under the pierce-the-corporate-veil doctrine. Reversing the ALJ, the panel found that the fourth individual and his corporation were jointly liable for assets fraudulently conveyed to them.

In a prior proceeding, the Board adopted an ALJ decision finding that Bella Masonry, LLC was the alter ego of Ace Masonry, LLC d/b/a Ace Unlimited. The Board found that the companies violated Section 8(a)(5) of the Act when they refused to abide by three collective bargaining agreements and were ordered to make affected employees whole.

Here, the panel found that Lisa Bellavigna, the sole owner of Ace Unlimited, was personally liable for Ace's remedial obligations. The panel dismissed the argument that Lisa Bellavigna was justified in removing funds from Ace's bank accounts to satisfy the claims of Ace's subcontractors, finding that the New York statute at issue did not permit her to shield the funds from being recovered to

satisfy Ace's unfair labor practice liability. Next, the panel noted that the Board will piece the corporate veil of closely held corporations to reach non-owner family members who play an active role in the corporation's operation and in the underlying misconduct. In this regard, the panel found that Lisa's husband, Robert Bellavigna, was individually liable because he actively participated in Ace's unfair labor practices and also in Lisa's efforts to escape liability by diverting corporate assets into his and Lisa's personal bank accounts. Next, the panel found that another family member, Domenick Bellavigna, was not jointly and severally liable under piercing-the-corporate veil doctrine. The panel did find however, that Domenick and his corporation were jointly liable for an amount of money received for services rendered to Bella Masonry at a rate greatly in excess of market value.

Member Miscimarra dissented in part. Placing the burden of proof on the General Counsel to establish the extent to which Domenick Bellavigna and his corporation did not provide fair consideration for the amount of funds received from Bella Masonry, Member Miscimarra would find them liable for a lesser amount.