



UPDATE: NATIONAL LABOR RELATIONS BOARD

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I.	INTRODUCTION	1
II.	PROTECTED EMPLOYEE ACTIVITY	1
A.	Scope of Protection	1
1.	Coverage Issues – Statutory Supervisors	1
2.	Protected, Concerted Activity	3
3.	Strike/Lockout	4
4.	Successor Liability	5
B.	Restraint or Coercion by Employers	5
1.	Refusal to Hire/Refusal to Consider	5
2.	Discriminatory Treatment and/or Salting	6
3.	Union Insignia	6
4.	Confidentiality Policies/Employee Handbooks	7
5.	Other Workplace Conduct Rules	8
6.	Surveillance/Interrogation/Threat of Reprisal	8
7.	Retaliation	9
8.	Union Access	10
C.	Restraint or Coercion by Union	11
1.	Union Discipline	11
2.	Unlawful Secondary Activity	11
3.	Section 8(e)/Hot Cargo Agreements	12
D.	Campaign and Election Activity	13
1.	Access to Employer’s Premises and Use of Employer’s Property	13
2.	Employer Speech and Interference	13
3.	Union Interference	14
4.	Promises of Benefits/Threats of Reprisal During Campaign	15
III.	THE DUTY TO BARGAIN	15
A.	Obligations in Bargaining	16
1.	Refusal to Bargain	16
2.	Waiver of Bargaining Obligation	17
3.	Mandatory Subjects of Bargaining	17
4.	Evaluation of Bargaining Table Conduct	18
5.	Employer Withdrawal of Recognition	19
B.	Successorship	21

IV.	REMEDIES.....	21
V.	ELECTIONS.....	22
	A. Appropriate Units.....	22
	B. Decertification/Recognition.....	22
	C. Union Elections.....	24
V.	NLRB INTERNAL PROCEDURES.....	25

I. INTRODUCTION

This article discusses selected recent developments in traditional labor law including certain notable recent decisions of the National Labor Relations Board (NLRB) and the U.S. Circuit Courts of Appeal, and Memoranda from the General Counsel of the NLRB.

II. PROTECTED EMPLOYEE ACTIVITY

Section 7 of the NLRA guarantees employees the right to engage in organizational and other concerted activities.

A. Scope of Protection

1. Coverage Issues – Statutory Supervisors

On September 29, 2006, the Board issued three long-awaited opinions, clarifying the definition of a supervisor under Section 2(11), in what are now referred to as the Kentucky River decisions. Previously, the Supreme Court, in NLRB v. Kentucky River Community Care, 532 U.S. 706 (2001), denied enforcement of an NLRB order and criticized the Board's explanation of the term "independent judgment" under Section 2(11). Consequently, the Board reexamined its interpretation of Section 2(11) in the lead case of the three decisions, Oakwood Healthcare, Inc., 348 NLRB No. 37 (2006), and established new guidelines to determine supervisory status. Although many anticipated that the three decisions would broadly clarify the meaning of supervisory status under the Act, the decisions concentrated on narrow aspects of the definition of supervisor.

The Oakwood Healthcare case arose in connection with the United Automotive Workers' ("UAW") attempt to organize all registered nurses ("RNs") at Oakwood Heritage Hospital in Taylor, Michigan. The hospital employed approximately 180 staff RNs, many of whom served as charge nurses. The charge nurses were responsible for "overseeing the patient care units" and assigning other employees to patients during the shift. A total of twelve RNs at the hospital served as permanent charge nurses, while 112 other RNs would sporadically rotate into the charge nurse position. Following the UAW's petition seeking a representation election, the Regional Director issued a finding that the charge nurses, whose supervisory status was in dispute, should be included in the bargaining unit. The employer timely filed a request for review, which the Board granted.

A Board majority (Battista, Schaumber, and Kirsanow) concluded that a certain number of charge nurses met the definition of a supervisor under the Act. However, the Board also held that a number of other charge nurses, including rotating charge nurses, did not have sufficient authority, duties, discretion, and accountability to meet the definition of a supervisor. Pursuant to Section 2(11), and citing the Kentucky River decision, the Board acknowledged that employees are deemed supervisors if: (1) they have the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action; (2) their authority requires the exercise of "independent judgment;" and (3) their authority is held "in the interest of the employer."

To distinguish between a “true supervisor” and a “straw boss” who may have “minor supervisory duties,” the Board focused on three statutory construction issues and defined the terms “assign,” “responsibility to direct,” and “independent judgment.” The Board first interpreted the term “assign” to refer to “the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e. tasks, to an employee.” Next, the Board evaluated the term “responsibility to direct” and found that “to be ‘responsible,’ the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly.” The Board then turned to the meaning of “independent judgment,” finding the term required that the employee act “free from the control of others and form an opinion or evaluation by discerning and comparing data”; the degree of discretion exercised must be more than “routine and clerical.”

Members Liebman and Walsh dissented and disagreed with the majority’s statutory definitions, which they believe will increase the number of potential statutory supervisors. The dissent criticized the majority’s definition of “assign” for including the basic assigning of tasks. Instead, they would have defined the term to mean the act of deciding “the basic terms and conditions of an employee’s job, i.e., position, work site, or work hours.” The dissent also argued that “responsibility to direct” should include only those who are effectively “in charge” of a “department-level work unit.” This would require substantial authority to use discretion and judgment to ensure that management’s objectives are accomplished. Along with this authority, an employee who is responsible for directing the work unit would be held accountable for the work of others. The dissent agreed with the majority’s test regarding “independent judgment.” In applying these definitions, the dissent would not have found that the charge nurses were supervisors under the Act.

In Jochims v. NLRB, 480 F.3d 1161 (D.C. Cir. 2007), the D.C. Circuit reversed a Board decision that a nurse was a supervisor and therefore lawfully terminated for circulating a petition protesting a proposed change in working conditions. In the first of two decisions in the case, Wilshire at Lakewood, 343 NLRB 141 (2004), the Board held that the employee was not a supervisor and that the nursing home committed an unfair labor practice by firing her for engaging in protected, concerted activity. The nursing home filed an appeal in the Eighth Circuit, but the Board decided to reconsider the case prior to the court hearing. Reversing course, the Board held that the nurse was a supervisor. Wilshire at Lakewood, 345 NLRB No. 80 (2005). In making its decision, Board emphasized that the nurse had discretionary authority to initiate the disciplinary process. Additionally, the nurse attended management meetings, was the highest ranking employee at the hospital on weekends, checked whether other employees performed their tasks and could orally correct employees. The nurse could write up employees, but only the administrator or director of nursing had final authority to issue discipline. On at least nine occasions, the nurse filled out employee counseling forms. The nurse also sent two employees home for gross misconduct based on management instructions and allowed two employees to leave work early because their children had medical emergencies. On one occasion, the nurse completed a performance evaluation for a probationary employee.

In refusing to enforce the Board decision, the D.C. Circuit held that the Board’s determination was flawed. The Court found that the “writeups were not considered to be

discipline” and that “there is nothing to indicate that [the nurse’s] writeups were deemed final and authoritative by management.” With respect to the two instances where the nurse sent employees home for gross misconduct, the Court held that the evidence before the Board indicated that the nurse was instructed by management and exercised no independent judgment in merely executing a management decision. Similarly, the Court held that the limited authority to let employees leave early because of an emergency does not constitute supervisory authority. Finally, the Court held that the completion of one performance evaluation did not indicate supervisory authority because the evaluation did not constitute discipline or directly affect the employee’s job status.

2. Protected, Concerted Activity

An important issue in determining whether an employee’s activity is protected by the Act is whether such activity is “concerted activity.”

In Amcast Automotive of Indiana, Inc., 348 NLRB No. 47 (2006), a Board panel majority (Battista and Schaumber) found a nonunion auto wheel manufacturer did not unlawfully discharge an employee for using company time and resources to surf the Internet. Hearing rumors that a company called KPS was purchasing the manufacturer’s facility, the employee used his employer-provided computer to access the Internet and research KPS on three separate occasions. The majority concluded that the employee’s Internet activity was not protected under Section 7, finding “insufficient evidence of a link between [his] Internet activity and the employees’ working conditions.” Battista and Schaumber viewed the “mere possibility of a future sale” as too “speculative and remote” for the employee’s Internet activity to be protected.

Member Walsh dissented, expressing the view that the employer intentionally retaliated against the employee for protected activity. He noted that the limited non-business-related Internet activity arose from the employee’s concerns regarding a potential sale and its impact on his coworkers (as well as his own 401k plan) and that the employee was therefore exercising his Section 7 rights.

In Syracuse University, 350 NLRB No. 63 (2007), a Board majority (Battista and Schaumber) determined that Syracuse’s Staff Complaint Process (SCP) was not a labor organization under Section 2(5) of the Act because its purpose was not to deal with the employer on terms and conditions of employment. According to the Board, the term “dealing with” in Section 2(5) of the Act contemplates a process between the employer and employees wherein proposals are made to the employer and management responds by either rejecting or accepting the proposals. It contemplates a back and forth dealing or negotiation between the parties. The purpose of the SCP was to have a process for the adjudication of complaints by non-bargaining unit employees and allow employees to assist in resolving employee complaints. Employees volunteered to be members of the SCP as panelists, advocates and mediators. The fact that SCP had final decision-making authority, coupled with the absence of any dealing or negotiation between the SCP and management, resulted in the Board’s finding that the SCP was not a labor organization under Section 2(5) of the Act.

3. Strike/Lockout

In Sutter Health Center d/b/a Sutter Roseville Medical Center, 348 NLRB No. 29 (2006), the union informed the employer of its intentions to strike two weeks before the strike was to begin and made an offer to return to work the day following the strike. In response, the employer informed the union and its employees that it would schedule replacement workers for five days to provide continuous care for its patients and would also close its cafeteria. A Board panel (Battista, Liebman, and Schaumber) affirmed the ALJ's holding that the employer violated Sections 8(a)(1) and (3) by informing unit employees that their reinstatement would be delayed and by delaying their reinstatement for four days following the strike. In addition to finding that the employer violated 8(a)(3) by delaying the reinstatement of strikers replaced by the employer's in-house management employees, the Board also concluded, contrary to the ALJ, that the employer also unlawfully delayed the reinstatement of strikers replaced by other in-house, nonunit employees. The Board found no reason to distinguish between the replacement workers. The Board further reasoned that the employer failed to prove that it had a legitimate business reason for its actions. Unlike the situation in Drug Package Co., 228 NLRB 108 (1977), where a five day grace period was provided to allow the employer time to complete administrative tasks associated with discharging replacement workers before the strikers could return to work, the employer here had two weeks notice that the strike would last only one day. Accordingly, the prestrike period allowed the employer sufficient time to make arrangements to return the replacement workers to their prestrike positions when the strike ended.

In Bud Antle, Inc., 347 NLRB No. 9 (2006), a Board majority (Battista and Schaumber) disagreed in part with the ALJ decision that the employer violated the Act by delaying reinstatement of 24 formerly locked-out employees and treating the formerly locked-out employees as new employees during their first four weeks back on the job for the purpose of assignment of overtime. After a 14-year lock-out, the employer offered reinstatement to all locked-out employees in December and gave the employees until January to accept the position. Upon receiving 24 letters seeking reinstatement by January, the employer offered a start date in February. Given the unusual circumstances of this case, the Board majority found that the employer had a legitimate and substantial business justification in delaying post-lock-out reinstatement until January because of the need to determine the identity and number of returning employees. Further, given the 14-year lock-out, the Board majority noted the efficiencies that would be created by starting and training a potentially large number of returning workers all at once.

However, the Board panel (Battista, Schaumber, and Liebman) agreed with the ALJ that the employer did not have a legitimate and substantial business justification for further delaying reinstatement after January. The employer's reasons for delaying the reinstatement date included a Monday start date, which was the beginning of a pay period, allowing employees a reasonable amount of time to give their current employer's two-weeks notice, and accommodating a plant manager who had been a supervisor prior to the lock-out and was on vacation. The Board majority (Battista and Schaumber) found that a Monday start date was nothing more than an administrative convenience, there was no evidentiary support for the employer's assumptions regarding the need for a two-week notice period, and other managers were available to conduct the training. Therefore, the Board majority found that the employer did not possess a legitimate and substantial business justification for delaying reinstatement through February.

The Board majority also disagreed with the ALJ regarding the overtime claims. The Board majority found that it should take four weeks for the returning employees with their type of experience to become proficient in the employer's modernized operations. Therefore, the employer properly limited the overtime opportunities during the employees' initial four-week training period.

Member Liebman dissented, finding the Board majority erred in denying make-whole relief to all of the locked-out employees whose reinstatement was unlawfully delayed by the employer. Further, Member Liebman dissented with regard to the overtime issue, noting that the reinstated employees must be treated as qualified to perform their jobs, even with the modernized equipment, unless their inability to perform was actually demonstrated and not merely assumed.

4. Successor Liability

In Lebanite Corporation, 346 NLRB No. 72 (2006), a Board panel majority (Battista and Schaumber) found that a manufacturer was not a Golden State successor liable for the unfair labor practices of its predecessor. The Board explained that the Golden State successorship doctrine should not be applied when the successor's potential liability for unfair labor practices could not be adequately reflected in the purchase price or remedied with an effective indemnity clause. Or, as the Board stated, "[t]he test [for finding successor liability under Golden State] is whether there was an opportunity to structure the *transaction itself* in a way that would allow the employees to be made whole *and* would also protect the purchaser." (emphasis in original). Here, Lebanite leased its property, plant, and equipment to Oregon Panel, its successor. The lease was terminable by either party with 30-days notice, and, therefore, the total payments could amount to far less than the potential liability for unfair labor practices. Consequently, Oregon Panel could not protect itself from this potential liability through a reduction of the lease price. Additionally, the Board found that an indemnification clause would be ineffective to protect Oregon Panel because Lebanite was in financial distress at the time of the lease arrangement.

Member Liebman dissented in part, taking the position that the majority improperly focused on the interests of Oregon Panel to the exclusion of the public interest and the "victimized" employees. According to Member Liebman, if a successor is on notice of potential liability, as was the case with Oregon Panel, the Board must presume the successor had the opportunity to avoid or mitigate its potential liability.

B. Restraint or Coercion by Employers

1. Refusal to Hire/Refusal to Consider

In Jesco, Inc., 347 NLRB No. 92 (2006), a Board panel (Battista, Liebman, and Kirsanow) affirmed the ALJ's determination that the employer discriminated against union applicants at three worksites. The Board analyzed the facts under FES, 331 NLRB 9 (2000), and reasoned that the employer was hiring at the time and that qualified union members applied but were not hired. The employer's anti-union animus was established at each site. At the Jackson site, the employer posted a "not hiring" sign and refused to allow eleven union members to apply even though the employer contracted with an agent to advertise for the needed electricians. At

the Holly Springs site, the superintendent stated that he did not hire the union applicants because he thought they would strike or leave for some other reason. At the Yazoo City site, qualified union members were permitted to apply but none were chosen. Accordingly, the employer had an intention to hire and hired nonunion employees after union members were turned away. The burden then shifted to the employer to show it would have made the same decision regardless of the applicants' affiliation with the union. The Board rejected the validity of the employer's asserted defense that the union members applied at times when the employer was not hiring and that it relied on its facially-neutral hiring policy of obtaining recommendations from other employees and transferring employees from other sites. In fact, several nonunion applicants were chosen over the union members even though they did not meet the stated hiring criteria.

The Board reversed the ALJ's finding that the employer's use of restrictive language, stating "This Application Valid for 30 Days Only . . . for Yazoo Prison Project Only," unlawfully limited the viability of union members' applications. The Board concluded that this limitation was neutral and applied to union and nonunion applicants alike.

2. Discriminatory Treatment and/or Salting

In Oil Capitol Sheet Metal Inc., 349 NLRB No. 118 (2007), a Board majority (Battista, Kirsanow and Schaumber) overruled its earlier decision in Ferguson Electric, 330 NLRB 514 (2000) and held that when the evidence establishes a discriminatee's status as a union salt, the Board will no longer apply the presumption of indefinite employment in determining gross backpay amounts. Rather, the General Counsel will now be required to present affirmative evidence of indefinite employment to meet its burden of proving the reasonableness of the claimed backpay period, which could include the salt's personal circumstances, union policies/practices with respect to salting campaigns, specific plans for the employer, and historical data regarding the duration of employment of salts in similar salting campaigns. The majority found that the regular presumption creates a punitive, speculative award in cases involving salts rather than a more proper remedial award.

Members Liebman and Walsh dissented on the grounds that no party in the case raised or briefed the issue and the decision was made without a "sound legal or empirical basis." The dissent argued that by creating such an approach, the Board placed salts in a uniquely disfavored class of discriminates, directly violating the Supreme Court's ruling that salts are a protected class of employees under the NLRA. Furthermore, the dissent argued, the new approach violates the fundamental rule that the Board resolve uncertainties as to backpay against the wrongful employer.

3. Union Insignia

In Sam's Club, a Div. of Wal-Mart Stores, Inc., 349 NLRB No. 94 (2007), the employees were required to wear name badges, which were affixed to the front of badge backers and attached to lanyards worn around the neck. During a union organizing campaign, the employees affixed union buttons to their lanyards or badge backers, wore lanyards provided by the union bearing the union's logo, and wore badge backers with certain union rights attached to the back. While the pins and lanyards were visible to customers, the statements of union rights were not. The employer subsequently implemented a policy that prohibited pins and stickers on the name

badge, required corporate-approved badge backers, and required that all lanyards have a break-away snap for safety reasons. As a result, employees were unable to put union pins or buttons on their badges or lanyards, wear the badge backers stating their union rights, or wear the union-provided lanyards which did not have break-away snaps.

A Board panel (Battista, Schaumber, and Liebman), first recognized the general rule that an employer may limit or ban the display or wearing of union insignia at work if special circumstances exist and which outweigh the adverse effect on employees' Section 7 rights. The Board rejected the employer's argument that its policy on badge backers was justified because it wanted to "project a clean, professional, world-class image." The Board, however, disagreed with the ALJ and concluded that the employer did demonstrate special circumstances outweighing the employee's right to wear lanyards bearing the union's logo. The Board found that because the employer's workplace was not risk free, and because name badges could get caught in merchandise or machinery, there was a legitimate safety concern in requiring break-away lanyards. According to the Board, the rule requiring the use of break-away lanyards did not interfere to any significant extent with the employees' right to wear union insignia because they were still allowed to wear it in other ways.

4. Confidentiality Policies/Employee Handbooks

Many employers include in their employee handbooks language that precludes employees from disclosing the employer's confidential information, such as information not readily available to the general public. The Board historically has found violations of Section 8(a)(1) when employer policies specifically prohibited employees from discussing their own terms and conditions of employment. See Vanguard Tours, Inc., 300 NLRB 250 (1990), enfd in part, 981 F.2d 62 (2d Cir. 1992) (rule prohibiting employees from discussing wages and hours had chilling effect and was unfair labor practice).

In Longs Drug Stores California, Inc., 347 NLRB No. 45 (2006), a Board panel (Battista, Schaumber, and Liebman) affirmed the ALJ decision that an employer violated Section 8(a)(1) by maintaining overbroad confidentiality provisions in an employee handbook. The handbook provision stated that "Your pay is confidential company information and should not be discussed with fellow employees." The Board panel concluded that these general provisions were unlawful. A Board panel majority (Battista and Schaumber) disagreed with the ALJ that the election in which the union lost be set aside. It found that although a violation of Section 8(a)(1) which occurs during the critical period prior to an election is generally conduct which interferes with the free choice of an election, the confidentiality provisions of the handbook fell within an exception. Here, the majority held that the confidentiality provisions were so minimal or isolated that it was virtually impossible to conclude that the misconduct could have affected the election results. It noted that the confidentiality provisions were not adopted in response to the union organizing campaign and there was no evidence that the employer called the employees' attention to the provisions when it distributed the handbooks or during the pre-election period.

Member Liebman dissented, insisting that the Board cannot properly conclude that the confidentiality provisions were "virtually impossible" to have affected the election results.

5. Other Workplace Conduct Rules

In Endicott Interconnect Tech., Inc. v. NLRB, 453 F.3d 532 (D.C. Cir. 2006), the D.C. Circuit vacated the Board's Order and held that an employer did not violate the Act by terminating an employee who violated a company policy against disparaging the employer. The prior year, by a 2-1 majority (Liebman and Schaumber), the Board found that the employer unlawfully terminated an employee who engaged in protected activity by commenting on the company decision to lay off 200 employees. In response to layoffs by the company, the employee made disparaging remarks against his employer to a newspaper reporter and on an Internet message board hosted by the newspaper. The employee's Internet posting included a response to an anti-union message left by another employee. The comment was a broad statement in favor of union representation for employees, and it included criticism of recent management of the company. The panel majority concluded that the employee's actions were protected by the Act because they related to an ongoing labor dispute with the employer. Members Liebman and Schaumber concluded that the comments were not "so disloyal, reckless or maliciously untrue" as to forfeit protection under federal labor law. Chairman Battista dissented, asserting that the employer lawfully terminated the employee for cause "because of his disloyal and disparaging statements against [the company]."

The D.C. Circuit found that the employee's comments were so disloyal to the company to remove it from Section 7's protection allowing the company to lawfully discharge the employee for his actions. The court analyzed the Board's two part test under which an employee's communications to a third party are deemed to be protected under section 7. First, the communication must be related to an ongoing labor dispute. Second, the communication must be "not so disloyal, reckless or maliciously untrue as to lose the Act's protection." The Court held that the Board misapplied the second prong of the test by ignoring the detrimental disloyalty of the employee's speech in this case. The employee was quoted to say the company had "gaping holes" in its business and that there were "voids in the critical knowledge base for a highly technical business." These comments were made during a critical time for the company and the comments resulted in an immediate phone call from its largest customer with concern about the company's ability to meet its needs. According to the Court, the company had cause to discharge the employee immediately, but instead, it gave him another chance, which he violated within two weeks. Accordingly, the company did not violate the Act by terminating the employee for cause.

6. Surveillance/Interrogation/Threat of Reprisal

In U-Haul Company of California, 347 NLRB No. 34 (2006), a Board panel majority (Battista and Schaumber) held that the employer did not violate Section 8(a)(1) of the Act by interrogating an employee at an employee meeting. A pro-union employee distributed union materials discussing a competitor's unionization to other employees in the parking lot prior to work time. Several days later at an employee meeting, a manager asked the employee what he knew about the competitor's union. The manager also stated that the union would cost the employees initiation fees and monthly dues and that although he was not in favor of it, to go ahead and vote it in even though the employees would not gain anything from it. The majority found the question was not coercive because it asked about union activity at a different location and did not ask about the employee's union activity. Further, the manager did not ask the

employee to reveal his union sentiments. The Board majority also found that the manager was lawfully allowed to express his opinion about the union.

Member Liebman dissented, finding that the manager had singled out the employee in front of 30 other employees and questioned him in a confrontational manner. She viewed the questioning as an early warning against supporting the union.

7. Retaliation

In Detroit Newspaper Agency v. NLRB, 435 F.3d 302 (D.C. Cir. 2006), the D.C. Circuit criticized the Board's approach to the Wright Line analysis and remanded the Board decision in 342 NLRB 1268 (2004) for clarification and further consideration.

In this case, an employee was reinstated to his position two and one half years after a strike. Less than a month after his return to work, the employee was terminated for insubordination when he told his supervisor that he would not perform certain duties even if it meant he would be suspended or fired.

The D.C. Circuit analyzed three reasons given by the Board for holding that the employee was discharged for taking part in protected activity and found each lacked a sufficient factual basis. Nevertheless, the D.C. Circuit chose to remand the case for further analysis of an alternative rationale – a fourth reason implicitly relied upon by the Board – that the employee was subject to disparate treatment compared to nonstrikers who had committed similar acts of insubordination. The court found this reasoning to have merit but concluded that the Board improperly analyzed the issue under the second prong of the Wright Line test – whether the employee would have been treated the same absent the alleged protected conduct. Therefore, the court remanded the case back to the Board for it to explain whether the disparate treatment was one of the factors considered in determining the first prong of the Wright Line test, and whether it would reach the same result in light of the D.C. Circuit's holding that the other three findings were not supported by substantial evidence.

On September 25, 2006 (and again on October 12, 2006), NLRB General Counsel Ronald Meisburg issued a memorandum to the regional offices clarifying the General Counsel's burden under Wright Line. The General Counsel, under the Wright Line, must establish that an employee's protected activity was a motivating factor for the alleged adverse employment action. The Board applies a burden-shifting analysis to determine whether the General Counsel carried this burden. The General Counsel meets his initial burden by showing that (1) the employee was engaged in protected activity, (2) that the employer had knowledge of that activity, and (3) that the employer harbored anti-union animus. The burden then shifts to the employer to prove it would have taken the same adverse employment action regardless of the employee's protected activity. Traditionally, the Board used evidence of pretext solely to counter and diminish the employer's ability to meet its burden.

Responding to Detroit Newspaper Agency, the General Counsel issued direction on how evidence should be analyzed and argued to both the ALJ and the Board. Referring to the two-part Wright Line test, he observed:

Although this burden shifting scheme is clear and established, there is some confusion, as Detroit Newspaper Agency indicates, as to whether evidence showing that the employer has proffered a false or pretextual explanation should be utilized only to rebut the employer's defense or both to satisfy the General Counsel's initial burden and rebut the defense. Despite some recent Board cases that would suggest to the contrary, ***evidence that the legitimate explanation proffered by the employer is either false or pretextual is evidence of an anti-union motive*** and, thus, should be ***used to support the General Counsel's initial burden as well as to rebut a defense.***

(Emphasis added.) The General Counsel emphasized that the meaning of “*prima facie* case” in Wright Line cases differs from the definition applied in the Title VII context. Under the Wright Line analysis, the phrase refers to the “overall burden of persuading the factfinder that the employer engaged in unlawful discrimination.” Warning that proof of employer knowledge, anti-union animus, and timing (between the protected activity and adverse employment action) may “invariably suffice” to shift the burden of persuasion to the employer, the General Counsel advised regional offices:

marshal all the relevant evidence that convincingly supports the proposition that, on the record as a whole, a preponderance of the evidence establishes that union or other protected activity was a motivating factor in the adverse employment decision at issue.

(Emphasis in original.)

On remand in Detroit Newspapers Agency, 350 NLRB No. 38 (2007), a Board panel (Liebman, Schaumber, and Walsh) dismissed the complaint holding that there was not sufficient evidence of disparate treatment.

8. Union Access

In Media General Operations v. NLRB, 181 LRRM 2632 (4th Cir. 2007), the Fourth Circuit enforced a Board order holding that an employer violated Section 8(a)(1) of the Act by barring union agents from using the employer's e-mail system for union business. The employer had an e-mail policy that restricted use of the e-mail system to matters related to company business which stated that “[t]he e-mail system is provided to employees at Company expense to assist them in carrying out the Company's business.” In practice, employees used the e-mail system for a variety of non-business uses, such as personal messages, charitable announcements and union matters. The only discipline resulting from e-mail usage was against two employees for distributing pornography. This laxity in enforcement changed, however, when the employer informed the union president that he could not use the e-mail system for union messages. The union president received two verbal warnings. The Board held that the disparate enforcement of the e-mail policy violated Section 8(a)(1) of the Act.

Enforcing the Board's order, the Fourth Circuit noted that an employer may not interfere with its employee's ability to communicate union messages or discriminate between union communications and non-union communications. In the case at bar, the Fourth Circuit noted that the employer made no efforts to enforce the policy against any violations other than the union messages. Indeed, hourly and management employees used the e-mail system to convey news about their personal lives, arrange social events and inform employees about charitable activities. Restriction of union access while allowing employees unfettered access was, in the Fourth Circuit's view, a clear violation of Section 8(a)(1). The case contained a number of other unfair labor practices which were affirmed by the Court.

C. Restraint or Coercion by Union

1. Union Discipline

In Knicht v. International Longshoremen's Assn., 457 F.3d 331 (3rd Cir. 2006), the court held that the union violated its members due process rights under the Labor Management Reporting and Disclosure Act by refusing to allow members subject to discipline the right to record the disciplinary hearing. The court also held that a union member was not given a full and fair hearing because one member of the hearing committee had publicly expressed contempt for a group with which the union member was affiliated. The court said that the prejudgment of one decision maker (out of a group of three) was sufficient to taint the proceeding.

2. Unlawful Secondary Activity

In Sheet Metal Workers Local 15 v. NLRB, 491 F.3d 429 (D.C. Cir. 2007), the D.C. Circuit refused to enforce the Board's order barring a union from picketing and threatening to picket two separate neutral employers, a department store and a hospital. Both neutral employers filed charges with the Board, which issued a decision barring the union from picketing or threatening to picket those employers because the threat to picket contained no assurance that the union would limit its picketing to a reserved gate, as required by the Board's interpretation of Moore Dry Dock, 92 NLRB 547 (1950), and the picketing that did take place violated Section 8(b)(4)(ii)(B).

The D.C. Circuit first found that the union's failure to assure the department store that it would limit picketing to a reserved gate did not violate Section 8(b)(4)(ii)(B) of the Act. The D.C. Circuit adopted the Ninth Circuit's decision in United Ass'n of Journeymen, Local 32 v. NLRB, 912 F.2d 1108 (9th Cir. 1990), which held that the Board "could not presume that a union's threat to picket the job was a threat to picket contrary to the law, when picketing at the job could be done in a lawful manner." Because the union's letter contained no suggestion that it intended to engage in any unlawful activity, the Court vacated the Board's decision.

With respect to the "picketing" at the hospital, the D.C. Circuit again refused to enforce the Board's order. Initially, the Court determined that the union's conduct, which consisted of a mock funeral procession, passed constitutional muster under the Supreme Court's abortion protest cases. Then, the D.C. Circuit reviewed the line of cases which permits Congress to prohibit secondary boycotts and picketing. The D.C. Circuit held that the activity was a combination of street theater and handbilling, lacking the coercive character of picketing,

contrary to the Board and an Eleventh Circuit decision. Union representatives did not physically or verbally interfere with hospital patrons and did not patrol the area in the sense of creating a symbolic barrier. The Court remanded the case to the board to consider two issues it did not decide--whether the union violated Section 8(b)(4)(ii)(B) by displaying a balloon rat or by holding a leaflet chest-high as a placard.

In Chicago Dist. Council of Carpenters Pension Fund v. Reinke Insulation Co., 464 F.3d 651 (7th Cir. 2006), the pension and welfare fund sued an employer alleging failure to make contributions to the fund as required by the contract. After the employer withdrew from a multi-employer bargaining association, the union sought an audit of the employer's pension fund, finding that the employer was delinquent in its contributions. The trial court granted summary judgment in favor of the employer on the union's claims.

Immediately after the audit, the union started picketing and handbilling, which led the employer to lose business as well as some hourly employees. As a result, the employer counterclaimed alleging defamation, false light, and trade libel, as well as tortious interference with contract, violation of Illinois Consumer Fraud Act, violation of Illinois Uniform Deceptive Trade Practices Act and violations of § 303 of the LMRA. The trial court granted summary judgment in favor of the union on the employer's counterclaims. The Seventh Circuit affirmed, holding that the state law claims of tortious interference and violations of the Illinois Consumer Fraud Act were subject to Garmon preemption because the challenged activities were protected or regulated by federal law. The employer also argued that the union's picketing violated § 303 as unlawful secondary picketing. The employer argued that the picketing was directed at an attempt to force the employer to reenter the multi-employer bargaining association, rather than because of the alleged pension fund problems. The court rejected this argument, finding that the timing and circumstances of the picketing as related to the withdrawal from the association was insufficient to support the claim.

3. Section 8(e)/Hot Cargo Agreements

In a much-anticipated decision, a Board panel majority (Schaumber and Walsh), in Heartland Industrial Partners, LLC, 348 NLRB No. 72 (2006), found Heartland, a leveraged buyout firm, and the United Steelworkers did not violate Section 8(e) of the Act when they entered into an agreement governing union organizing at companies acquired by the firm. Under the arrangement, Heartland agreed to cause any acquired company to execute an agreement with the United Steelworkers adopting a position of neutrality during an organizing campaign, granting union access to its premises during any campaign, furnishing the union with employee names and addresses, and consenting to card-check recognition. The acquired companies would also be required to bargain with the union within 14 days of recognition and submit to interest arbitration any issues remaining open after 90 days of bargaining. Section 8(e) forbids parties from entering into an agreement in which an employer "agrees to refrain from dealing in the product of another employer or to cease doing business with any other person." The General Counsel argued that the agreement had an unlawful cease-doing-business object in that it operated as a restriction on Heartland's investments. Rejecting this argument, the majority concluded that the agreement, on its face and in application, did not limit Heartland's discretion to invest in or acquire any company it chooses. The majority reasoned that Heartland's failure to compel an acquired company to accept the neutrality/card-check recognition agreement, as

required by its agreement with the United Steelworkers, would not necessarily result in Heartland ceasing business with the acquired company. The agreement provided for enforcement through arbitration. Schaumber and Walsh observed, “the challenged clauses on their face contain no provision that would allow an arbitrator to order Heartland to cease doing business with [an acquired company]”; they refused to infer that an arbitrator would enter such an order, in derogation of the Act. Consequently, the majority concluded that a cessation of business between Heartland and an acquired company was not sufficiently foreseeable to warrant a finding that the agreement, on its face, violated Section 8(e). The majority chose not to address the broader issues of neutrality and card-check recognition.

Chairman Battista dissented, insisting that the agreement between Heartland and the United Steelworkers was “aimed squarely at the labor relations” of the acquired companies and was therefore a secondary agreement proscribed by Section 8(e), similar to union-signatory clauses. Chairman Battista observed that Heartland could be made to pay for a breach of the agreement, through a breach-of-contract suit, and that the agreement effectively compelled the firm not to do business with acquired companies, unless they would be bound to neutrality and card-check recognition provisions.

D. Campaign and Election Activity

1. Access to Employer’s Premises and Use of Employer’s Property

Under established Board law, an employer cannot lawfully bar off-duty employees from coming onto the exterior (non-working area) of its property (e.g., parking lots and gates) absent some legitimate business justification. Tri-County Medical Center, Inc., 222 NLRB 1089 (1976). However, an employer may establish rules prohibiting off-duty employees from accessing the interior of its facility or other work areas, as long as the rules are clearly disseminated and consistently applied to all employees.

2. Employer Speech and Interference

In United Steelworkers of America AFL-CIO-CLC v. NLRB, 482 F.3d 1112 (9th Cir. 2007), the Ninth Circuit affirmed a Board order which adopted an ALJ’s findings of fact but declined to issue a Gissel remedy as recommended by the ALJ. After losing a representation election, the union filed objections to the election as well as unfair labor practice charges that the employer discriminated against several employees and interfered with the employees’ exercise of their Section 7 rights. According to the charges, the employer fired two employees, disciplined a third, threatened a fourth worker, and unlawfully removed union literature during the organizing campaign. The ALJ held that the company’s actions constituted serious unfair labor practices and recommended to the NLRB that the company be ordered to take traditional corrective steps, including reinstating the terminated employees with back pay, expunging disciplinary records, and posting a notice concerning employees’ NLRA rights. The ALJ also recommended the issuance of a Gissel bargaining order requiring the company to recognize and bargain with the union. The Board affirmed the ALJ’s recommended findings of fact and conclusions of law, but declined to issue a Gissel remedy. Contrary to the ALJ, the Board found that the traditional cease-and-desist, in conjunction with other affirmative remedies, would ensure a fair re-run election. The union petitioned for review, arguing only that the Board’s abused its discretion by

giving a conclusory explanation for its decision not to adopt the ALJ's recommendation for a Gissel bargaining order.

Rejecting the union's contention, the Ninth Circuit held that the Board is not required to offer an "extraordinary explanation" for its decision to order an un-extraordinary remedy. Specifically, the Ninth Circuit noted that the Board adopted all of the ALJ's findings of fact and conclusions of law, as well as all remedies except the Gissel bargaining order. In effect, the only point of contention between the Board and the ALJ was whether the employer's conduct—which all parties accepted as stated in the ALJ's opinion—warranted the issuance of a Gissel bargaining order. Using its expertise, the Board decided that the ordinary remedies would create an atmosphere sufficiently clear of anti-union animus to permit a fair re-run election. Although the courts require that the Board clearly articulate its reasons for issuing a Gissel bargaining order due to its extreme nature, those concerns are absent in a case where the Board chooses to issue the preferred standard remedy of a rerun election. As a result, the Board did not abuse its discretion by rejecting the ALJ's recommendation of a Gissel order in a summary fashion.

In Unifirst Corporation, 346 NLRB No. 52 (2006), the employer operated a commercial laundry facility in which employees have been represented since the 1950s. In late 2000 or early 2001, the union proposed a midterm change to the collective bargaining agreement – the employer would shift money it paid unto the union's pension plan to the union's health and welfare fund. The employer rejected the proposal. In response, the union distributed leaflets criticizing the employer. Angry over the leaflets, the general manager met with the bargaining unit employees, addressed the union's criticisms, and discussed 401(k) and profit-sharing plans available to non-bargaining unit employees. Subsequently, an employee filed a decertification petition signed by 21 employees.

Under current Board law, employers may make truthful statements to employees concerning benefits available to their represented and unrepresented employees, may compare wages and benefits at their facilities, and may offer an opinion based on such comparisons. However, an employer violates Section 8(a)(1) when it promises improved benefits contingent on employees giving up union representation. A Board panel (Battista, Liebman, and Schaumber) found that the employer did not make impermissible promises of benefits. It further concluded that the employer did not violate the Act by conducting a poll to determine the status of union support among its employees. Lastly, the Board panel held that the employer did not violate Section 8(a)(5) by withdrawing recognition, refusing to bargain, and refusing to comply with information requests because it had evidence that the union lacked majority support, as demonstrated by the poll.

3. Union Interference

In Randell Warehouse of Arizona, Inc., 347 NLRB No. 56 (2006), a Board majority (Battista, Schaumber, and Kirsanow) overruled its earlier opinion ("Randell I"), which held that the union's unexplained photographing of employees while distributing campaign literature was not objectionable because it was not accompanied by other coercive conduct. Randell I overruled prior Board precedent, which had held that both union and employer photographing was objectionable even if the photographs were not accompanied by other coercive conduct. Upon reconsideration, the majority determined that employees have a right to accept or reject the

union's literature, and photographing them when they make that choice would unreasonably interfere with employee free choice, regardless of whether the party photographing them is a union or an employer. Additionally, the union did not provide the employees with any legitimate justification for the photographing. Accordingly, the majority ordered a second election.

Members Liebman and Walsh, in dissent, stated that they would support the Board's original decision in Randell I. The dissent recognized that employers are in a greater position of power to coerce employees than unions because employees are economically dependent on the employer. Moreover, the employer also has the authority to fire, discipline, impose harsher working conditions, cut pay, and deny benefits.

4. Promises of Benefits/Threats of Reprisal During Campaign

In Children's Center for Behavioral Development, 347 NLRB No. 3 (2006), a Board panel majority (Battista and Schaumber) found that otherwise lawful statements by an employer, expressing its opinions about the union, did not amount to an unlawful threat simply as a consequence of other workplace violations. The unrelated violations, according to the majority, did not demonstrate a pervasive atmosphere of hostility toward employees' union activity, such that may convert any otherwise protected employer statement into an unlawful threat. The majority also held that the employer did not violate the Act by terminating a service offered to the employees by the United Way. The Board found that the employer terminated its relationship with the United Way because it was displeased with an attempt by a United Way board member to inject himself into the employer's union negotiations. According to the majority, it was irrelevant that the United Way intervened at the request of the union; United Way's actions were not protected by the Act.

Member Liebman dissented in part, suggesting that the employer's statements were unlawful when viewed against "the background of other unfair labor practices" committed by the employer. Member Liebman further asserted that under the Wright Line analysis the employer unlawfully punished its employees for seeking the assistance of the United Way.

In Airport 2000 Concessions, LLC, 346 NLRB No. 86 (2006), a Board panel majority (Battista and Schaumber) overturned an ALJ's finding that an employer unlawfully solicited grievances of its employees during a union organizing campaign. The Board found that although the employer did solicit grievances from its employees it made no promises to remedy the complaints. It is the remedying of the grievance, explained the Board, that is the essence of a violation, not the mere solicitation of complaints. The Board panel majority did narrow its finding, however, by explaining that the solicitation of grievances continues to raise a rebuttable presumption of an unlawful implied promise to remedy those grievances. In the case at hand, though, the employer met its burden to rebut this presumption.

Member Liebman dissented, finding that the employer did not adequately rebut this presumption.

III. THE DUTY TO BARGAIN

Section 8(a)(5) of the NLRA sets forth employers' obligations to bargain collectively with representatives of their employees.

A. Obligations in Bargaining

1. Refusal to Bargain

In E.I. DuPont de Nemours and Co. v. NLRB, 489 F.3d 1310 (D.C. Cir. 2007), the Court of Appeals enforced an order of the NLRB finding that the employer did not impermissibly declare an impasse concerning negotiations for a new contract but did impermissibly declare an impasse regarding subcontracting negotiations. Moreover, the Court rejected the union's argument that the employer impermissibly separated the bargaining regarding the contract from the bargaining regarding the subcontracting.

The contract between the parties had been in effect since 1977 and contained an evergreen clause which permitted the parties to terminate or propose changes to the agreement at any time. In 1993, the employer sought to negotiate a settlement agreement focusing on the elimination of pyramiding overtime pay both for hours worked over eight hours in a day and for hours worked over forty in a week, and implementation of a cost sharing formula for health care. When the parties were unable to reach an agreement, the employer implemented its last, best, and final offer. Subsequently, the parties entered into an agreement in which the employer relented on the pyramiding and health care cost sharing issues.

In 1995, the parties also began negotiating over finishing work, which resulted in the employer agreeing that 85% of the finishing work would be kept in-house rather than subcontracted. In 1998, the parties resumed negotiations over a new contract and continued to negotiate through March of 2001. In April of 2001, the employer notified the union that, as a result of a feasibility study, it determined that it would subcontract all finishing work by May 1 unless the union submitted a plan with comparable cost savings. Also in April, the employer declared an impasse in the contract negotiations and implemented its last, best, and final offer which included the pyramiding and health care proposals it had been seeking. On May 1, the employer declared an impasse on the subcontracting negotiations and began to subcontract the work.

The Court upheld the Board's decision that the employer did not violate the Act by declaring an impasse regarding the contract negotiations. The Union argued that the Board holding was against established precedent because it allowed the respondent to have an impermissible amount of discretion over health care, which was a mandatory subject of bargaining. The Court found that the employer's last, best, and final offer did not give it such extensive authority over health care, but only gave it limited discretion to allocate increases among the various elements of the health care plan. However, the employer's declaration of an impasse over subcontracting was found to be impermissible because the employer failed to respond to certain information requests. The employer claimed that there must be "but for" causation but the Court found that to be unnecessary. The Court found that the Board properly stated that there was a causal connection between the impasse and the failure to provide information which was sufficient for the finding of a violation. Moreover, the separation of the issues for bargaining was permissible given the history of the parties of bargaining over the issues separately and the evergreen clause in the contract which allowed the parties to negotiate components of the contract while the other contract terms remain in effect.

2. Waiver of Bargaining Obligation

The Board historically has refused to recognize waivers of statutory rights absent express and unambiguous language supporting the waiver. As the Supreme Court stated in Metro. Edison Co. v. NLRB, 460 U.S. 693 (1983), the waiver must be “clear and unmistakable” in order to be recognized. In some instances, where the parties incorporate by reference the language of a benefit plan, a waiver contained in the plan will be enforced. Mary Thompson Hosp., 296 NLRB 1245 (1989), enfd, 943 F.2d 741 (7th Cir. 1991). In Mary Thompson Hosp., a provision of the collective bargaining agreement specifically incorporated an entire pension benefit plan, including reservation of rights language, into the contract. Thus, the Board held that the employer had the right to terminate the pension plan, as the plan stated, “should circumstances force [it] to do so.”

In Provena Hospitals d/b/a Provena St. Joseph Medical Center, 350 NLRB No. 64 (2007), a Board majority (Liebman and Walsh) affirmed the ALJ’s holding that the employer violated Section 8(a)(5) of the Act by unilaterally and without notice to the union implementing a staff incentive policy, but reversed the ALJ on the issue of the unilateral implementation of a new attendance and tardiness policy, finding no violation. The Board majority applied the clear and unmistakable waiver standard which states that an employer may not make any unilateral changes to terms and conditions of employment absent a clear and unmistakable waiver of the right to bargain over the issue. In applying this standard, the Board found that the employer violated the Act in its implementation of the incentive plan because the contract did not contain an agreement about an incentive pay and there was no evidence of bargaining over the issue during bargaining for the contract to the extent that the union would have waived its right to bargain over the issue. However, the Board found that several parts of the management rights clause gave the company the right to modify the time and attendance policy without bargaining with the union.

The dissent (Battista) argued that the Board should apply the contract coverage test used in the 7th and D.C. Circuits. Since both issues were mentioned to some extent in the contract, Chairman Battista contended that the matter should have been deferred to the parties’ contractual grievance and arbitration procedure for resolution.

3. Mandatory Subjects of Bargaining

In AG Commc’n Sys. Corp., 350 NLRB No. 15 (2007), a Board panel (Battista, Schaumber and Walsh) found that the employer did not owe a duty to the union to bargain over its decision to integrate with another company, but it did owe a duty to the union to bargain over the effects of its decision. After a decision was made that Lucent would acquire 100% of AG’s stock, Lucent decided to move 250 AG installers represented by IBEW into the bargaining unit of approximately 2,700 Lucent installers represented by CWA. Lucent notified CWA of its decision, but waited until only weeks before the change to tell IBEW. Despite IBEW’s request for effects bargaining, neither Lucent nor AG responded. The Board first found that, following Lucent’s purchase of AG, the two employers constituted a single employer.

The Board next concluded that Lucent’s decision to purchase AG in its entirety, close AG operations, and completely integrate the two companies, including the two bargaining units, was

a “core entrepreneurial management decision exempt from bargaining” under First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981). However, the Board did note that the employer’s refusal to engage in effects bargaining over its decision to integrate violated Section 8(a)(5). The panel split over the appropriate remedy for the employer’s violation. The majority (Battista and Schaumber) found that there was no reason to order the standard Transmarine remedy which requires that the employer bargain over the effects of its decision and provides unit employees with limited backpay. The majority noted that there was no evidence that the AG unit employees received inferior terms under their new collective bargaining agreement and it found important the fact that the employer bargained with CWA for many of the matters that would be the substance of bargaining with IBEW and therefore a “positive outcome for former AG installers was achieved.” “

Member Walsh dissented to the remedy ordered by the majority, arguing that the standard remedies were required to address the “purposeful misconduct” in failing to notify IBEW for five months and then refusing to bargain over the effects and “to ensure that meaningful bargaining takes place.”

In North American Pipe Corporation, 347 NLRB No. 78 (2006), a 2-1 Board majority (Battista and Schaumber) upheld the ALJ’s findings and concluded that the employer’s award of 100 shares of stock to unit employees was not a mandatory subject of bargaining. Rather, the one-time stock award, which was distributed to all employees as part of the company’s initial public stock offering, was a gift. Therefore, it did not require the employer to notify or bargain with the union.

Member Walsh dissented. He determined that the grant of stock constituted wages because it was tied to “employment-related factors,” including years of service and working hours and, therefore, should be considered a mandatory subject of bargaining.

In Phelps Dodge Magnet Wire Corp., 346 NLRB No. 84 (2006), in response to a lawful impasse in bargaining, an employer unilaterally implemented its final proposal. The new employment terms included changes to a provision that granted super seniority to union officials. After these new terms were implemented, the employer entered into a reduction-in-force applying the new seniority system. The union argued that the employer was obliged to bargain over the application of super seniority to the layoff. A unanimous Board panel (Battista, Liebman and Schaumber) found otherwise. Although the unilaterally imposed employment terms did not amount to a collective bargaining agreement, the terms were lawfully in effect at the time of the layoff. According to the Board, it was therefore appropriate to treat the employment terms as a contract and the dispute simply as one of contract interpretation. In such contract disputes, the employer needs only a “sound arguable” basis for its interpretation.

4. Evaluation of Bargaining Table Conduct

a. Union Access to Information/Information Requests

One aspect of the bargaining relationship that has come under increased scrutiny is the employer’s duty to provide information to the union.

A 2-1 Board majority (Battista and Schaumber), in ACF Indus., 347 NLRB No. 99 (2006), agreed with the ALJ's finding that the employer did not violate Section 8(a)(5) and (1) of the Act by implementing its final offer because the parties had bargained in good faith to a valid impasse. Notably, just three days before the employer implemented its final offer and after 12 bargaining sessions over several months, intercession of a Federal mediator, and repeated rejections of the employer's proposals by the union membership, the union submitted an extensive information request concerning health-and-welfare benefits (a subject of two to three months of bargaining) and requested further bargaining. The employer replied, stating that it saw no useful purpose in another meeting and that the union's information request was "disingenuous" because the union waited until the "eve of implementation" in making the request. The employer provided the requested information approximately three months after implementing its final offer. The majority held that this delay did not violate the Act. Agreeing with the ALJ, it found that the union's information request was "purely tactical and was submitted solely for purposes of delay." In this instance, where the employer had "a legitimate doubt as to whether the union was truly interested in the information for purposes other than forestalling the lawful implementation," the majority was unwilling to fault the employer for not furnishing the information more promptly.

Member Liebman, in dissent, found the employer's delay unreasonable and violated Section 8(a)(5). She took issue with the majority's characterization of the information request as "purely tactical," and therefore in bad faith. In this regard, Member Liebman noted that an information request cannot be treated as in bad faith "if at least one reason for it can be justified."

b. Unreasonable Conduct

In Teamsters Local 287, 347 NLRB No. 32 (2006), a Board panel (Battista, Liebman, and Schaumber) adopted the ALJ decision that the union violated Section 8(b)(3) of the Act by unduly delaying a ratification vote on a tentative agreement. However, the Board panel disagreed with the ALJ's refusal to implement the terms of the collective-bargaining agreement retroactively to July 2, 2004. The Board majority found that the complete agreement, subject to employee ratification, was reached on July 2. The union negotiator expressed uncertainty only regarding one provision, involving Saturday work, but that provision was accepted by the employees in a straw vote on July 2. The union did not hold the ratification vote, however, until August 22. Noting the Board's broad discretion to fashion "a just remedy" to fit the circumstances of each case, the Board majority found that but for the union's unlawful delay of the ratification vote, the agreement would have been ratified and become final as of July 2. Further, the Board majority noted that any uncertainty about whether the employees would have ratified the tentative agreement if they had voted on July 2 should be resolved against the union as the wrongdoer.

5. Employer Withdrawal of Recognition

Deciding an issue of first impression, the Board in Shaw's Supermarkets, 350 NLRB No. 55 (2007), held that an employer may rely on evidence of actual loss of majority support to withdraw recognition from a union after the third year of a contract of longer duration. The employer in the case had a five-year contract with the union. In the fourth year of the contract, a

bargaining-unit employee filed a decertification petition with the Board. The petition was supported by slips signed by bargaining-unit employees stating that the employees did not want the union to represent them. The employer received additional slips of the same nature less than one month later. An accounting firm retained by the employer to count and verify the slips determined that a majority of the bargaining-unit employees had signed the slips. The Board recognized that, pursuant to Levitz Furniture Co. of the Pacific, 333 NLRB 717 (2001), an employer may withdraw recognition of a Union if the employer has evidence that the union has lost majority support. The Board sought, in rendering its decision, to determine the appropriate parameters at which “the policy goals of stability in labor relations and employee freedom of choice – which are sometimes competing objectives – can best be satisfied and reconciled.” The Board held that these goals are best reconciled if an employer, “relying on untainted evidence of a union’s actual loss of majority support, [can] withdraw recognition of the union after the third year of a contract of longer duration.”

In American Golf Corp. d/b/a Badlands Golf Course, 350 NLRB No. 28 (2007), the full Board considered whether the employer lawfully withdrew recognition from the union a little over six months after being ordered to resume bargaining by the Board. A Board majority (Battista, Schaumber, and Kirsanow), overturning the ALJ ruling, found the withdrawal to be lawful. As background, the parties engaged in bargaining for approximately nine months after the union was certified in December of 1999. The parties were unable to reach an agreement, and the union “went away” for nearly a year and a half. In January of 2002, the union requested additional bargaining. In response, the employer withdrew recognition from the union which led to an unfair labor charge and a bargaining order. The parties resumed bargaining in November of 2002 and continued to bargain through May 19, 2003 when they had reached an agreement on all but one issue – whether to include a wage rate chart in the contract. However, on May 23, 2003, the employer received a handwritten note signed by the majority of the unit employees stating that they no longer wished to be represented by the union as well as a copy of the decertification petition the employees had filed with the Board. In June, the employer withdrew recognition from the union. Subsequently, the union sent several information requests to the employer, who refused to respond.

The ALJ applied the standards set forth in Lee Lumber and Building Materials Corp., 334 NLRB 399 (2001) which provided for an insulated six month period after a bargaining order within which the employer could not withdraw recognition. Lee Lumber also set forth the following factors to be used to determine whether the six month period should be extended in certain circumstances:

- (1) whether the parties are bargaining for an initial contract, (2) the complexity of the issues being negotiated and the complexity of the parties’ bargaining processes, (3) the amount of time elapsed since the parties began to bargain and the number of bargaining sessions, (4) the amount of progress made in negotiations and the parties proximity to agreement, and (5) whether the parties are at impasse.

The Board agreed that the Lee Lumber standard should apply but disagreed with the ALJ’s analysis that the period should be extended. The Board majority found that the General Counsel did not show that, given more time, the parties would be able to reach an agreement and

did not meet his burden of demonstrating that majority free choice should be set aside in favor of extending the insulated six month period of bargaining.

The dissent (Liebman and Walsh) disagreed with the majority's analysis under Lee Lumber. According to the dissent, the majority improperly included the bargaining period before the original bargaining order when analyzing the bargaining under Lee Lumber. In response, the majority stated that it was not holding that pre-remedial bargaining is always included in the "reasonable period" under the Lee Lumber standard, but that the pre-remedial bargaining is relevant to determining whether the remedial bargaining has continued for a reasonable amount of time.

B. Successorship

In Road & Rail Services, Inc., 348 NLRB No. 77 (2006), a Board panel majority (Schaumber and Walsh) affirmed the ALJ's ruling and agreed that the employer was a "perfectly clear" successor under Burns and, as such, did not violate Section 8(a)(2) and (3) by recognizing and bargaining with the union and executing a contract memorializing the terms and conditions of employment for unit employees not yet hired by the employer. The majority emphasized that the employer never expressed any intention to invoke the right of an "ordinary" Burns successor to establish its own initial terms and conditions of employment. The employer expressed its intention to hire, and did hire, the work force of its predecessor when it commenced operations. Before doing so, however, the employer bargained with the union for certain changes to the existing terms and conditions of employment.

In dissent, Chairman Battista maintained that the employer violated the Act by recognizing the union and entering into a contract with it prior to hiring any of the predecessor's employees, when it remained unclear whether the union enjoyed or would enjoy majority status.

IV. REMEDIES

On May 29, 2007, NLRB General Counsel Ronald Meisburg issued a memorandum regarding circumstances that could warrant additional remedies when unfair labor practice violations interfere with bargaining for an initial contract. The memorandum directs the regions to focus on both the effect of the unfair labor practices on the bargaining process and on the parties' relative bargaining strengths. Additionally, the memorandum identifies certain high impact violations that seriously undermine the bargaining process including: outright refusals to bargain; refusals to meet at reasonable times; failure to endow bargaining agents with adequate authority; failure to provide critical information; interjection of extraneous issues into the negotiations; and, unlawful discharges of union supporters (particularly employee-negotiators).

The regions are directed to submit to the Division of Advice cases involving unfair labor practices during bargaining for an initial contract. While noting the potential effectiveness of Section 10(j) injunction relief in the context of violations causing serious or irreparable harm to the initial contract bargaining process, the memorandum also notes the potential appropriateness of the following additional extraordinary remedies: (1) requiring bargaining on a prescribed or compressed schedule; (2) periodic reports on the status of bargaining; (3) a minimum six-month extension of the certification year; and, (4) reimbursement of bargaining costs.

V. ELECTIONS

A. Appropriate Units

In Research Found. of State Univ. of N.Y., 350 NLRB No. 18 (2007), and Research Foundation of City Univ. of N.Y., 350 NLRB No. 19 (2007), the Board concluded that graduate students employed as research assistants at university-affiliated research foundations were employees under the NLRA and therefore entitled to unionize. A Board panel majority (Kirsanow and Walsh) found that the regional director erred in relying on the Board's decision in Brown Univ., 342 NLRB 483 (2004), to conclude that the research assistants were not employees within the meaning of the NLRA. In Brown, the Board ruled 3-2 that teaching assistants, research assistants, and proctors had a "predominately academic, rather than, economic relationship with their school," and were not protected. Unlike in Brown, however, the majority found that here the undisputed evidence clearly demonstrated the existence of an economic relationship between the research assistants and the employer rather than an educational relationship. The majority found that the students were employed by a foundation that was not a university and did not confer academic degrees, and although the research assistants were enrolled as students at the campus where they worked, their pay rates and health care benefits were set by the corporation, which maintained its own labor and employment policies separate from those of the university.

Chairman Battista dissented, concluding that the relationship between the research assistants and the employer was primarily educational rather than economic. Chairman Battista stressed the fact that the research assistants were required to be enrolled as a full-time student at the university in order to receive and maintain their positions with the employer. They had to actively conduct research to obtain their degrees at the university and serving as a research assistant with the Employer satisfied that requirement.

B. Decertification/Recognition

In Medieval Knights LLC, 350 NLRB No. 17 (2007), a Board panel majority (Schaumber and Kirsanow) overruled the Petitioner's objections and certified the results of the election, despite the hearing officer's recommendations that the employer's behavior warranted a new election. During a union campaign at the employer's facility, the employers hired consultants to "educate" employees and management about the election process. At a meeting one week before the election, a consultant conducted an exercise on collective bargaining, during which he stated that a hypothetical employer did not have to agree to any specific proposals, that all negotiations were different, and that the bargaining process could take weeks, months or even more than a year. The credited testimony showed that the consultant stated that during negotiations "an employer, by giving into lesser items or addendums on the contract, would be able to stall out the negotiations because they would still be bargaining in good faith but not really agreeing to anything[.]" Witnesses could not remember whether the consultant said the fictional company "could" or "would" engage in such bargaining tactics.

Recognizing that absent a threat or a promise of benefits, an employer may explain the advantages and disadvantages of collective bargaining, the majority found the consultant's

statement reasonable. The majority emphasized that the statement was made during an exercise involving hypothetical bargaining parties and the consultant never stated that the employer would engage in such tactics. The majority concluded that employees can distinguish between a hypothetical exercise about bargaining and an employer's description of its actual strategy.

Member Walsh dissented, finding that the clear implication of the consultant's statement was that if the employees selected the union, the employer would engage in, and get away with, sham bargaining. Accordingly, under the circumstances, the employees were not likely to regard the consultant as speaking about "possible pitfalls" and "hypothetical bargaining parties."

In TruServ Corporation, 349 NLRB No. 23 (2007), a Board majority (Battista, Schaumber, and Kirsanow) overruled the Board's decision in Douglas-Randall, Inc., 320 NLRB 431 (1995) and its progeny and returned to the doctrine enunciated in Passavant Health Center, 278 NLRB 483 (1986). Douglas-Randall, Inc. held that where the parties have entered into a settlement of outstanding ULP charges, and the settlement requires recognition and bargaining with the union, any petition challenging the union's majority status that is filed after the allegedly unlawful conduct, but before the settlement, must be dismissed. Relying on this authority, the Acting Regional Director dismissed a decertification petition filed after allegedly unlawful conduct by the employer (including unilateral changes to healthcare and pension benefits) and before settlement of the ensuing ULP case. The majority reversed this administrative dismissal, reinstated the petition, and remanded the case to the Acting Regional Director to process the petition. In doing so, the three Republican members of the Board held that, "after the unfair labor practice case has been settled, the decertification petition can be processed and an election can be held after the completion of the remedial period associated with the settlement of the unfair labor practice charge." Significant to this result, the Board majority observed that the employer conduct in question was only alleged, not proven or admitted, to be unlawful. According to the majority, the decertification petition should be processed even where the post-petition settlement includes a contract reached between the parties – i.e., the contract bar doctrine would not apply because the petition was filed prior to the contract. Lastly, the Board majority identified three scenarios in which a decertification petition should not be processed: (1) the execution of the settlement agreement precedes the petition filing; (2) the Regional Director concludes that the employer instigated the petition or that the employees' showing of interest in support of the petition was solicited by the employer; or (3) the settlement includes an agreement by the decertification petitioner to withdraw the petition.

Members Liebman and Walsh dissented and would adhere to Douglas-Randall, Inc. They observed, "the Board's task is to strike an appropriate balance between the establishment and maintenance of stable collective-bargaining relationships and employees' freedom of choice in deciding whether they want to engage in collective bargaining and whom they wish to represent them." According to the dissenting members, Douglas-Randall, Inc. struck the proper balance between the various competing interests underlying the Act. Members Liebman and Walsh viewed the majority's decision as "zealously embrac[ing]" the Passavant decision "under the guise" of protecting employees' Section 7 rights while ignoring the competing interest of labor stability.

C. Union Elections

In Madison Square Gardens CT, LLC, 350 NLRB No. 8 (2007), a Board panel majority (Battista and Schaumber) disagreed with the regional director's conclusion that the employer's supervisors' pro-union activities during a union campaign were not objectionable and ordered a second election. Four of the employer's front line supervisors signed a flyer stating they were committed to forming, and would be available to discuss, a union. Certain of the front-line supervisors additionally handed out authorization cards to employees and they all actively campaigned during the weeks before the election. Shortly before the election, the employer met with employees to talk about the employer's opposition to the campaign and additionally requested that its supervisors oppose the campaign or at least remain neutral. The four front-line supervisors denied his request and continued to campaign for the union. The union subsequently won the election 27 to 22.

Because the supervisors engaged in pro-union activity, the majority evaluated the possibility of coercion under the two-step inquiry enumerated in Harborside Healthcare, Inc., 343 NLRB 906 (2004). The majority found that the front-line supervisors held meaningful authority over the employees, as the people having the most day-to-day contact with the employees and the ability to begin disciplinary procedures. Accordingly, the majority found that employees could reasonably fear that if they did not sign a card they could get punished. The majority also found that the nature, extent, and content of the supervisor's pro-union conduct was severe. The majority also found that the pro-union supervisory activities materially impacted the election's outcome, noting that the conduct "had the potential to affect a critical number of employees, given that [the union] prevailed by only 5 votes...and at least five employees were solicited by supervisors to sign authorization cards."

Member Liebman dissented on the grounds that Harborside Healthcare was wrongly decided, it should not be applied retroactively to conduct that was lawful at the time it occurred, and the solicitation was not objectionable because mitigating circumstances tempered any possible impact of the solicitation. Member Liebman emphasized that no supervisor ever explicitly or impliedly threatened or made promises, the employer openly opposed the campaign, the employees likely knew of the employer's position, and there were mitigating factors, such as limited authority of the supervisors, a time lapse, and a general lack of harassing incidents.

In Trustees of Columbia Univ., 350 NLRB No. 54 (2007), the Board held that an employer's failure to provide the Petitioner with unit employees' e-mail addresses did not constitute objectionable conduct. The employer operated a research vessel and stipulated that a unit of all unlicensed crew members of the vessel constituted an appropriate unit. The vessel and crew are typically at sea for several days or weeks at a time, during which time the crew had access to the employer's e-mail system. At a pre-election hearing, the Petitioner requested that the employer be required to provide the Petitioner with the e-mail addresses of eligible voters because of the unique circumstances at issue. The hearing officer denied the Petitioner's request and the Regional Director affirmed the Hearing Officer's denial, stating that "there is no Board law . . . which gives me the authority to direct the Employer to provide the union with the e-mail addresses of employees." In rendering its decision, the Board noted that by providing the Regional Director with a complete and accurate list of unit employees and their home addresses, the employer fully complied with existing Board precedent interpreting Excelsior Underwear,

Inc., 156 NLRB 1236 (1966). The Board concluded that it “does not believe [it] is in a position to extend Excelsior . . . without the benefit of amicus briefing and a fully developed record.”

VI. NLRB Internal Practices and Procedures

On September 25, 2007, NLRB General Counsel Ronald Meisburg issued a memorandum identifying “novel, complex, or unsettled legal questions” that the regional offices must submit to the NLRB Division of Advice. It is the role of the advice division to give substantive legal advice to the General Counsel and the regional offices on novel or complex issues, in cases of national interest, and in developing and changing areas of the law.

The memo identifies four categories requiring mandatory referral to the advice division. The first category covers cases involving an absence of precedent and certain identified policy priorities. Included in this category are alleged unfair labor practices occurring during bargaining for an initial contract, cases with novel legal theories, cases where the region is urging overturning of Board precedent, cases involving the legality of neutrality or card check agreements, key Beck issues, and the supervisory status of charge nurses. The second category covers cases requiring the development of a litigation strategy in light of adverse circuit court law or new Board precedent. The second category includes, in part, cases involving the validity of union mergers, affiliations and disaffiliations; novel forms of conduct such as use of banners, inflatable rats, corporate campaigns and coordinated shopping that could run afoul of Section 8(b)(4)(i) or (ii) or 8(b)(7); challenges to rules restricting the non-business use of employer supplied communication mediums such as e-mail, Internet access, cell phones, and digital devices; cases involving alter ego liability or piercing the corporate veil, and certain unilateral action cases involving contract authorization issues not subject to deferral to arbitration. The third category labeled as “difficult legal issues,” includes, in part, alleged agreements to boycott another employer, undocumented worker issues, certain successor employer bargaining issues, and the validity of partial lockouts. The fourth category covers issues that traditionally required referral to the advice division including, for example, injunction litigation under Section 10(j) or 10 (l), formal settlement agreements that the region recommends be accepted unilaterally, Equal Access to Justice Act cases where payment of claims is recommended, certain requests for subpoena authority and bankruptcy cases.