

Significant ULP Cases in 2005

By

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I have set forth below the significant ULP cases decided by the Board in 2005.

1. Section 8(a)(1)

a. Surveillance

1. Michigan Road Maintenance Co., 344 NLRB No. 77.

A majority of the Board (Battista and Schaumber) dismissed an allegation that the Employer violated Section 8(a)(1) by creating an impression of surveillance. In this case, the Employer's operations manager told an employee not to "start that union stuff on this property," just after the employee finished placing union flyers on cars parked in the employer's parking lot. The employee asked the manager how he "knew what was going on down there," to which the manager replied that, "he knew."

The Board found that the manager's statement lacked the "surveillance quality" because the union activity was in the open, and thus there was no reason for the employee to believe that the manager acquired his knowledge by spying on the activity. Moreover, the employee's question of how the manager "knew what was going on" evidenced only the employee's subjective belief that the manager would not know what was going on "down there" unless he had been surveilling employees' union activities. In those circumstances, the Board found the evidence insufficient to determine whether the employee reasonably could have concluded from the manager's statement that union activity was being monitored. The manager's statement that "he knew" did not fill that evidentiary gap.

The Board distinguished this case from Sam's Club, 342 NLRB No. 57, slip op. at 1-2 (2004), where an employer's store manager created the impression of surveillance by telling an employee that he had heard the employee had circulated a petition. In those circumstances, where the employee had not circulated the petition openly, the Board applied the applicable test and concluded that "under the circumstances, the employee reasonably could conclude from the statement in question that his protected activities are being monitored." In this case, because the employee openly placed flyers on vehicles parked on the Employer's own property, he would not reasonably conclude that his union activity was being monitored.

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Member Liebman dissented based on her view that the employee reasonably could have assumed from the manager's statement that his activities were under surveillance. The employee's response ("How did you know what is going on down there?") demonstrates that he suspected surveillance, and the manager's rejoinder "that he knew" did not negate the possibility of surveillance, but tended to reinforce it.

2. Spartech Corporation, 344 NLRB No. 72.

The Board (Battista and Liebman, Schaumber dissenting) held that the Employer created an impression of surveillance in violation of Section 8(a)(1) when its agent told an employee, in the course of the upcoming Union election, that the Employer's vice president knew who had attended a union meeting held a day or two earlier. The Board found it inappropriate to assume that the employees expected their Union meeting to be open to management observation merely because of the employee's reply to the Employer that the employees did not care if the Employer knew who had attended the meeting because they were not hiding "this" from anyone. The Board, citing Fred'k Wallace & Son, 331 NLRB 914 (2000), stated that the test for finding an impression of surveillance is whether an employee could reasonably assume from the employer's statement that the employee's union involvement has been under surveillance. The Board quoted Flexsteel Industries, 311 NLRB 257 (1993) in explaining that the purpose behind finding an impression of surveillance is to ensure that employees feel free to participate in union activities without fear that the employer is noting who is involved in union activities, and how. The Board also cited Flexsteel for the proposition that the Board does not require evidence that employees intended their union activities to be covert in order to find that an unlawful impression of surveillance had been created. The Employer's statement here would reasonably tend to discourage participation in union activities.

Member Schaumber dissented and would dismiss the complaint allegation. Specifically, Schaumber noted that the Union meeting was held in an open park near the Employer's premises, there was no indication that the employees had attempted to hide the meeting from the Employer, and the employee responded to the Employer's comment that the employees didn't care about the Employer's action because they were not hiding "this" from anyone. Because of the openness of the meeting and its proximity to the Employer's plant, Schaumber, citing Schrementi Bros., 179 NLRB 853 (1969), would find that the General Counsel had not established that the employee would reasonably assume that the Employer had been informed of the meeting through surveillance rather than through legitimate means.

3. Aladdin Gaming, LLC, 345 NLRB No. 41

The Board (Battista and Schaumber; Liebman, dissenting in part) concluded that the Employer did not engage in unlawful surveillance when, on two separate occasions during an organizing campaign, a manager stood near employees who were soliciting others to sign authorization cards and, after listening to their conversations, spoke to the employees against the Union. Both incidents occurred in an employee dining room where managers and employees commonly dined. The Board noted that the managers' observation of the open union activity was unaccompanied by coercive conduct, and that they had a Section 8(c) right to assert their views regarding unionization.

Member Liebman, dissenting, would find that the conduct constituted unlawful surveillance in violation of Section 8(a)(1). In her view, the high-level managers—the Employer's vice president and director of human resources—interrupted private employee conversations and stifled free speech.

b. Employer Rules

1. Stanadyne Automotive Corp., 345 NLRB No. 6

The Board (Battista and Schaumber; Liebman, dissenting in part) concluded that the Employer did not violate the Act when its president, during a campaign meeting with employees, said:

[I]t has come to my attention that some union supporters, not all, but some, are harassing fellow employees. You can disagree with the Company position; you can be for the Union. You can be for anything you want to, but no one should be harassed. Harassment of any type is not tolerated by this company and will be dealt with.

Relying on its decision in Lutheran Heritage Village-Livonia, 343 NLRB No. 75 (2004), the Board noted that the president's comments did not explicitly restrict protected activity. Applying the three-part test to determine whether such statements violate Section 8(a)(1), the Board first found that employees would not reasonably construe the statement to prohibit Section 7 activity. Rather, the statement addressed unprotected harassing conduct. Second, the Board found that the rule was promulgated in response to unsolicited reports of improper behavior, and not in response to the employees' union activities. In this regard, the Board noted that employers are required by various State and Federal laws to address workplace harassment, and that reasonable employees would not assume that the statement was a restriction on Section 7 activity, particularly considering the president's comment that employees were free to support the Union. Finally, there was no evidence that the rule against harassment was applied to restrict the exercise of Section 7 rights.

Member Liebman, dissenting on this point, would find the rule unlawful. In her view, the rule was expressly promulgated in direct response to union

activity. Furthermore, consistent with her dissent in Lutheran Heritage, she relied on the president's failure to describe what he meant by harassment, which would lead reasonable employees to understand the prohibition as reaching protected union solicitation.

2. Guardsmark, LLC, 344 NLRB No. 97

The Board (Battista and Schaumber; Liebman, dissenting in part) concluded that the Employer, which provides uniformed guard services, did not violate the Act by maintaining a rule prohibiting employees from fraternizing or becoming overly friendly with the client's employees or co-employees. Applying the Lutheran Heritage Village-Livonia, 343 NLRB No. 75 (2004), test for rules that do not explicitly restrict activities protected by Section 7, the Board reasoned that employees would reasonably understand the rule to prohibit personal entanglements rather than protected activities. In the Board's view, inferring that the rule condemned speaking to others about terms and conditions of employment would be "an unreasonable stretch." The Board also noted the strong justification for such a rule, given the security concerns inherent in the Employer's business.

Member Liebman, dissenting on this point, noted that the Employer has a separate rule prohibiting dating or becoming overly friendly with a client's employees or co-employees. Considering the dictionary definition of "fraternization"—association in a brotherly manner—to be the essence of workplace solidarity, she concluded that the rule reasonably would be understood by employees to restrict their Section 7 right to join together for mutual aid or protection. Applying the test of whether a reasonable employee could interpret a rule to cover protected activity, Member Liebman would find the rule unlawful.

3. Palms Hotel and Casino, 344 NLRB No. 159

The Board (Battista and Schaumber; Liebman, dissenting in part) concluded that the Employer did not violate the Act by maintaining a rule forbidding employees from engaging in "any type of conduct, which is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with fellow" employees. Under its Lutheran Heritage Village-Livonia, 343 NLRB No. 75 (2004), test for rules that do not explicitly restrict protected activities, the Board noted that the Employer did not promulgate the rule in response to union activity or apply it to restrict the exercise of Section 7 rights. The Board went on to determine that employees would not reasonably construe the rule to prohibit Section 7 activity. Thus, the explicitly prohibited conduct is not inherently entwined with Section 7 activity, and while the rule could be interpreted to apply to protected conduct that subjectively offends another employee, the rule was not applied or intended to apply to that situation. Separately, the Board (Battista and Liebman; Schaumber, dissenting) adopted the ALJ's finding that the Employer violated Section 8(a)(1), within the meaning of

Lutheran Heritage, by maintaining a rule prohibiting loitering on company premises before or after working hours.

Member Liebman, dissenting, would find that the rule violated Section 8(a)(1), concluding that an employee would reasonably construe the rule's language as including protected activity, and would thus be chilled in his exercise of Section 7 rights. She noted the rule's ambiguity as well as its explicit reference to conduct having *the effect of* offending, threatening, or intimidating a coworker. Thus, to avoid discipline, an employee would be wise to curtail protected solicitation activity that another employee could perceive as violating the rule.

4. KSL Claremont Resort, Inc., d/b/a Claremont Resort and Spa, 344 NLRB No. 105

The Board (Battista, Liebman and Schaumber) concluded that the Employer did not violate the Act by issuing and maintaining a rule prohibiting "negative conversations" about associates and managers. The rule was included in a list of ten Employer policies distributed as a reminder to employees. Some policies dealt with customer service issues, such as keeping voices soft and low; other policies dealt with working conditions such as clocking in and out.

The Board found the rule lawful under Lutheran Heritage Village-Livonia, 343 NLRB No. 75 (2004) where the Board held that a rule which does not expressly restrict Section 7 activity will violate Section 8(a)(1) only upon a showing that: (1) employees would reasonably construe the language to prohibit Section 7 activity; or (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict Section 7 activity. The Board concluded that the rule's prohibition of "negative conversations" about managers would reasonably be construed by employees as barring them from discussion with their co-workers complaints about managers that affect their working conditions. The rule thus would cause employees to refrain from engaging in these protected discussions.

5. North Hills Office Services, Inc., 345 NLRB No. 107

The Board (Battista and Schaumber, Leibman dissenting) concluded that the Employer did not violate the Act when it instructed an employee not to speak to union representatives on the Employer's property where the representatives, as non-employees, were not authorized to be on the property.

The Employer maintained a rule stating, "Only people who are employed by [the Employer] can be on the property." During a union organizing drive, an off-duty employee on two occasions spoke with an organizer in the Employer's parking lot. On the first occasion, the Employer told the employee that she could not talk to a "stranger inside the parking lot" but that she had every right to talk to anyone not on the company's property. On the second occasion, the Employer

told the employee that she must leave the property to talk to the organizer and that she could continue her conversation off the property some 25 feet away.

The Board concluded that, even assuming that the employee's speaking with the organizer was protected activity, the Employer did not interfere with that activity by simply reminding the employee of the Employer's access rule and directing her to not abet its violation. The Board noted that the Employer told the employee that she could talk to anyone off the property and invited the employee to continue the conversation a short distance away. The Board found no meaningful distinction between directing the employee not to talk to the non-employee organizer and directing the organizer to leave.

Member Leibman dissented noting that on neither occasion had the Employer attempted to eject the organizer from its property. Member Leibman concluded that the Employer acted unlawfully because it "actually tolerated the union organizer's presence . . . [w]hat it did not tolerate was its employee talking to a union organizer." (Emphasis in original).

6. Ellison Media Company, 344 NLRB No. 136

The Board (Battista, Liebman and Schaumber) concluded that a supervisor's ordering an employee to stop "gossiping" with another employee over a sexually suggestive remark allegedly made by that supervisor violated the Act because the order reasonably tended to interfere with the employee's Section 7 right to discuss sexual harassment complaints with fellow employees.

Following the suggestion of a fellow employee, an employee confronted a supervisor about his alleged sexually suggestive remark. The employee later drafted to his fellow employee an email describing his confrontation with the supervisor. However, the employee mistakenly sent the email to the supervisor. The supervisor showed the employee that email, told him that "this has to stop now", and then specifically referred to the employee's "gossiping" with his fellow employee. Both employees later reported the supervisor's sexually suggestive remark to the Employer's Human Resource Manager. The Employer eventually issued a written warning to the supervisor for violating the Employer's sexual harassment policy.

The Board concluded that the supervisor's order to stop "gossiping" violated Section 8(a)(1) because a reasonable employee would not have interpreted the order narrowly as applying to only the email concerning the employee's confrontation with the supervisor. Rather, a reasonable employee would have interpreted the order broadly as also applying to what had prompted the confrontation: the employees' discussion of the supervisor's sexually suggestive remark. Since employee discussion of workplace sexual harassment is protected activity, the supervisor's order violated the Act.

2. Section 8(a)(3)

a. Accretion

1. Frontier Telephone of Rochester, Inc., 344 NLRB No. 153

The Board (Battista, Schaumber; Liebman dissenting in part) reversed the ALJ and held that an employer violated Section 8(a)(1), (2), and (3) and that a union violated Section 8(b)(1)(A) by agreeing to accrete an unrepresented group of the employer's internet help-desk technicians (IHD techs) into an existing bargaining unit of customer service representatives (CSRs), applying the "restrictive policy" towards accretion and factors set forth in E.I. Dupont de Nemours, Inc., 341 NLRB No. 82 (2004), which permit accretion only when the group of employees sought to be added to an existing unit "have little or no separate identity and share an overwhelming community of interest".

The Board noted that although some community-of-interest factors favored an accretion (geographic proximity, functional integration, and "ultimate management authority"), they were offset by several factors, including the two deemed by the Board to be most "critical" to an accretion—employee interchange (of which there was very little) and common daily supervision (which was lacking). It also found that additional factors supported the finding that a lawful accretion did not occur: the important differences between the techs' and CSRs' terms and conditions of employment; the fact that the CSRs and IHD techs were subject to different leave and benefit policies; that the compensation formulas for the techs and CSRs were fundamentally different; and bargaining history. Member Liebman did not rely on differences in terms and conditions of employment that were the result of collective bargaining, noting that benefits of CSRs were subject to negotiations, which necessarily do not control benefits of nonunit employees. "Any resulting disparity should not provide a separate basis for excluding employees from a bargaining unit if those employees otherwise meet the Board's test for accretion," she explained (note 12).

b. Recall of Strikers

1. Peerless Pump Co., 345 NLRB No. 20

In a case involving the Laidlaw (171 NLRB 1366 (1968)) rights of former economic strikers, the Board (Battista, Schaumber, Liebman) examined an employer's use of a "recall list" it required former strikers to sign; the employer then filled vacancies in order first with unreinstated "crossovers" who had signed the list prior to the end of the strike, then with those covered by the union's unconditional offer to return who had signed the list, and lastly with those former strikers who had not signed the list. Members Liebman and Schaumber (Battista dissenting in part) agreed with the ALJ that the employer violated Section 8(a)(3) by failing to reinstate or place on a nondiscriminatory recall list, former strikers

on whose behalf the union made an unconditional offer to return, and failing to maintain and use a nondiscriminatory recall procedure by giving preference for recall to (a) crossover employees who abandoned the strike prior to its conclusion and (b) former striking employees encompassed by the union's unconditional offer to return who complied with the employer's unlawful sign-up requirement. In a different majority, Chairman Battista and Member Schaumber (Liebman dissenting) reversed the ALJ's findings that the employer violated Section 8(a)(3) and (1) by failing to provide notice and an opportunity for former striking employees to apply for nonequivalent positions posted in the plant, and violated Section 8(a)(1) by threatening former strikers with loss of their reinstatement rights through the letter advising former strikers to come in to sign the recall list.

Chairman Battista, dissenting in part, would have found that the employer violated the Laidlaw rights of strikers by implementing a recall list which placed the employees for whom the union made an unconditional offer to return beneath those who had sought reinstatement earlier. He would have found the employer's "first come, first served" order of recall lawful.

Contrary to her colleagues, Member Liebman would not have reversed and dismissed any portion of the 8(a)(3) allegations or the 8(a)(1) threat allegation. She would have found that the employer's job posting system for nonequivalent positions, limited to those employees actually working, discriminatorily denied unreinstated former strikers the opportunity to apply for other positions for which they were entitled to be fairly considered.

Chairman Battista and Member Schaumber also reversed the ALJ's findings that the employer's "recall list" violated Section 8(a)(5) as a unilateral implementation of discriminatory procedures which adversely affected the recall rights of former striking employees, and as a bypassing of the union and direct dealing with former strikers about the terms and conditions of reinstatement. They found that the 8(a)(5) allegations were time-barred under Section 10(b), as not being "closely related" under Redd-I, 290 NLRB 1115 (1988), to the timely Section 8(a)(3) charge. Member Liebman found it unnecessary to pass on the 8(a)(5) allegations because she stated that a remedy for such violations would be cumulative to other relief granted.

c. FES

1. Dalton Roofing Service, Inc., 344 NLRB No. 108

The Board (Battista, Liebman, Schaumber) reversed the ALJ and held that the Employer did not unlawfully refuse to hire three employees on account of their union affiliation, because the General Counsel failed to satisfy his initial burden of establishing that the Employer harbored anti-union animus, as required under FES, 331 NLRB 9, 12 (2000), *enfd.* 301 F.3d 83 (3d Cir. 2002). The Board first concluded that there was no direct evidence of anti-union animus; the

Employer had no history of unfair labor practices and there existed no other allegations of any independent violations of the Act. Furthermore, the Board rejected the ALJ's inference of anti-union animus stemming from the absence of one of the applicant's application from the Employer's files, finding no basis upon which to conclude that the Employer either deliberately misfiled or destroyed the application. The Board also rejected reliance on the Employer's stated preference for applicants who were accustomed to earning wages within the range the Employer would pay, which, absent more, would not establish discriminatory motive. Finally, the Board held that the Employer's specific reasons for not hiring the Union-affiliated applicants were not pretextual.

The Board also concluded that the Employer did not unlawfully change its hiring policy by requiring applicants to complete applications on its premises. Assuming such a change in policy occurred, the Board held that the General Counsel failed to establish that the change was either motivated by anti-union animus or that it had the reasonable tendency to interfere with organizational activities. In so concluding, the Board noted that the on-premises policy did not unduly affect applicants with union sympathies and, in any case, would impose no obvious additional burden on applicants who would have to come to the Employer's premises for an interview in any case.

2. Progressive Electric, Inc., 344 NLRB No. 52

The Board (Battista, Schaumber; Liebman, dissenting in part) concluded that the Employer violated Sections 8(a)(3) and (1) by engaging in an overall scheme to refuse to consider applicants for employment, and to refuse to hire them because of their Union affiliation. Evidence of this scheme included: false statements to applicants that they would be called should vacancies occur ; false notices to applicants that applications were no longer accepted; and soliciting applications by placing "blind" employment ads in newspapers that effectively concealed its identity from prospective applicants. However, the Board reversed the ALJ and concluded that the use of blind ads, in and of themselves, did not constitute an unlawful change in the Employer's hiring practices. The Board noted that the "blind ad" procedure was not disparately applied to union applicants, and that it did not limit the ability of any applicant to submit an application.

Member Liebman, dissenting in part, would have adopted the ALJ's conclusion that the Respondent violated Sections 8(a)(3) and (1) by placing blind ads for the discriminatory purpose of screening out Union applicants. Liebman noted that the Employer departed from its customary practice at the onset of the Union organizing activity, with no business explanation, by using blind newspaper ads. Member Liebman found that this conduct, standing alone, was no different than the hurdles to employment put in place by the employers in Starcon, Inc., 323 NLRB 977, 982 (1997), enfd. in rel. part and remanded, 176 F.3d 948 (7th Cir. 1999), and Masiongale Electrical-Mechanical, 331 NLRB 534, 539

(2000). Chairman Battista and Member Schaumber concluded, on the other hand, that the variety of new rules imposed by the employer in Starcon, which severely limited the ability of volunteer union organizers to apply, and the requirement by the employer in Masiongale that an avowed union applicant submit to an in-person background check with a private detective, were of a different character than the use of blind ads here.

3. Zurn/N.E.P.C.O., 345 NLRB No. 1

The Board (Battista, Schaumber; Liebman, dissenting in part) held that the Employer discriminated against Union applicants by refusing to hire some of them, but only in certain circumstances, rather than in the operation of its entire hiring process. Initially, the Board held that the Employer's hiring policy 303, which gave preference to current or former employees and to referrals by its own employees (including managers), was not inherently discriminatory, either by its own terms or by its operation. Rather, the Board found that, on its face, policy 303 was a rational hiring practice for an employer that is trying to attract a qualified, dependable work force. Moreover, the evidence did not indicate that the Employer discriminatorily implemented the policy, which existed long before the Union organizing campaign. Although practically, the policy at the Employer (a nonunion company) reinforced its selection of nonunion applicants, it would not necessarily lead to a nonunion workforce or otherwise blacklist Union applicants, who may be of lower priority, but still valuable to a nationwide employer with far-flung worksites. Moreover, the fact that policy 303 resulted in the hiring of a project workforce comprised of about 10% union-affiliated applicants established that it did not constitute an impermeable barrier to union applicants.

Nevertheless, the Board concluded that by deviating from its policy 303 for the purpose of avoiding hiring Union supporters, the Employer unlawfully failed to hire 23 Union-affiliated applicants. The Board held that by departing from policy 303's stated intention protocols more than 3892 times, a greater number than the total number of to select the most qualified applicants for a job opening, the Employer instead demonstrated that its hiring decisions were motivated in part on antiunion animus. The Board further rejected the Employer's defenses, cognizable under FES, that it would have rejected the Union applicants even in the absence of their Union affiliations, where its defenses were based primarily on its discredited application of policy 330 in these instances. However, the Board further concluded that in light of the fact that the Employer hired in accordance with policy 303 in 146 of 169 hiring decisions, it committed unfair labor practices only when it deviated from the policy, and not in the application of the policy in the great majority of instances.

Member Liebman, dissenting in part, concluded that by engaging in a significant pattern of 23 unlawful hiring violations that discriminated "wholesale" against qualified union applicants, the Employer violated Section 8(a)(3) each time it applied policy 303 to hire a nonunion applicant over a qualified Union

applicant. Member Liebman found that record evidence established that in 23 suspect hiring decisions the Employer (1) manipulated policy 303 by aggressively seeking to generate applicants who could be given priority, regardless of the ostensible purpose of the policy; (2) applied policy 303 disparately by refusing to give Union applicants the priority that they were entitled to; and (3) deviated from policy 303 repeatedly, thus undermining any claim that its hiring decisions generally were driven by the policy, rather than by antiunion animus. Liebman concluded that the Employer's repeated failure to follow policy 303 precluded it from relying on the policy to defend even those decisions that do appear to conform to it.

Chairman Battista and Member Schaumber, on the other hand, rejected Member Liebman's conclusion that these limited deviations from a facially lawful policy yielded an inference that the entire hiring process was unlawfully motivated. They concluded that the Employer's unlawful deviations from a facially neutral hiring policy in 23 of 169 instances for the purpose of avoiding hiring Union supporters was not so massive that one could infer that the entire process was unlawfully motivated. In this context, they distinguished Member Liebman's reliance on Fluor Daniel, Inc., 333 NLRB 427 (2001), enf. 332 F.3d 961 (6th Cir. 2003), cert. denied 125 S. Ct. 964 (2005), in which the employer deviated from its facially neutral hiring hires at the projects at issue. Absent such a scenario of massive, wholesale violations (as in Fluor Daniel), the General Counsel is required, and here failed to establish, each and every violation.

d. Wright Line

1. Neptco, Inc., 346 NLRB No. 6

The Board (Battista, Schaumber; Liebman dissenting in part) concluded that the General Counsel failed to meet his initial burden under Wright Line of establishing that the Employer's discharge of two employees for insubordination was motivated by union animus. The Board found that the ALJ's finding of animus was based solely on conjecture. Specifically, about one week before the discharges, a supervisor asked one of the employees, an open union advocate, how the Union was going, and the employee replied that the Union was "limping along." The ALJ inferred from this exchange that the supervisor must have conveyed the employee's remarks to the plant manager, and that the plant manager instructed another supervisor to "crack down" on the employee in order to extinguish any remaining union support. The Board found, however, that there was no evidence that the first supervisor repeated the employee's comment to the plant manager, or that the plant manager told the second supervisor that they needed to take action regarding the union supporters. The Board accordingly rejected the ALJ's finding that the discharges ensued from the employee's statement. The Board noted that where, as here, there is no evidence of anti-union animus on the part of the Employer, the burden never shifts to the Employer to justify the discipline under Wright Line principles. In the absence of evidence of

animus, the ALJ erred in determining that the level of discipline applied was itself unlawful or that the Employer was exploiting an opportunity to get rid of union supporters. The Board also specifically rejected the ALJ's conclusion that the proffered reasons for the discharges were false.

Member Liebman, dissenting in part, would find that the General Counsel met his burden of establishing that the discharges were unlawfully motivated. She noted that it was undisputed that the Employer knew that the two employees were union activists, and the Employer's explanation for summarily firing them does not withstand scrutiny. The ALJ had discredited the testimony of the Employer's witnesses, rejecting as pretextual their explanations for recommending that the employees be discharged. Member Liebman rejected the majority's contention that the ALJ substituted his definition of insubordination for that of the Employer; rather, in her view, the ALJ disbelieved the Employer's witnesses' testimony that *they* considered the employees to be insubordinate, and found this explanation to be false. It is well established that when an employer's stated motives for its actions are found to be false, the Board may infer that the employer's true motive is an unlawful one, and the evidence presented here warrants such an inference. Further, the Employer completely disregarded its established disciplinary policy in dealing with the two employees; before the discharges, a supervisor announced that the Employer was "cleaning house"; and the discharges eliminated the core of the Union's faltering support.

2. Waste Management of Arizona, 345 NLRB No. 114

The Board (Battista, Schaumber; Liebman dissenting in part) found that the General Counsel met his burden under Wright Line of establishing that the discharged employee's union activity was a motivating factor in his discharge, since the Employer was well aware of the employee's union activity and the employee had been the specific target of two other ULPs committed by the Employer. However, the Employer met its Wright Line burden of showing that it would have discharged the employee even in the absence of his union activity. The employee screamed profanities at a manager in a crowded work area, and repeatedly refused the manager's requests to speak to him in private, preferring to loudly curse at him in front of other employees. The employee's conduct was insubordinate, it disrupted the workplace, and it undermined the manager's authority. Although the employee had been the object of prior Sec. 8(a)(1) remarks and a prior pay shortage, neither of these was the cause of his present outburst. Rather, his outburst was caused by a dispute concerning his receiving less pay for fewer hours because of bad weather, and there is no claim that this reduction in pay was unlawful, or substantial. Further, although the Employer had tolerated some insubordination from employees in the past, the General Counsel did not show that the Employer had tolerated behavior comparable to the employee's behavior here.

Member Liebman, dissenting in part, would find that the Employer had not met its burden under Wright Line of showing that the employee would have been discharged even if he had not engaged in union activity. The employee had previously been the target of an unlawful interrogation, a threat of loss of pay, and a threat of futility of organizing, and had also previously received less pay than he was entitled to receive. Thus, in light of these incidents, what appeared to be a second pay shortage certainly established a degree of provocation. Given this, and the fact that workers often used profanity in the workplace, and the employee's spotless employment record (he was a 7-year veteran with excellent evaluations and no prior disciplinary record), Member Liebman does not accept that the Employer would have discharged him over this one incident even if he had not been a union supporter, especially in light of the Employer's clearly expressed intent to fire all union supporters.

3. Lee Builders, Inc., 345 NLRB No. 32

The Board (Battista, Liebman; Schaumber dissenting in part) reverses the ALJ's conclusion that the Employer had met its Wright Line rebuttal burden of showing that it would have discharged the employee even in the absence of his union activities. The Board stated that the ALJ's finding was based on a factual mistake and, as a result, an erroneous disparate treatment analysis. The employee was discharged within weeks of being unlawfully interrogated about his union activity, and the General Counsel established that the employee's protected activity was a motivating factor in his discharge. The ALJ found that pursuant to the Employer's then-existing drug policy which required termination of employees who tested positive for drugs after a workplace accident, the Employer terminated the employee for testing positive for marijuana after a workplace injury. The General Counsel contended that the Employer's asserted reason was pretextual, and demonstrated that the Employer failed to discharge another employee who had also tested positive for marijuana after a workplace accident at a time when the same drug policy was in effect. The ALJ erroneously found that this other employee was tested before the Employer's current drug policy was in effect. The Employer failed to provide any explanation for why it did not discharge the other employee who also failed a drug test at a time when the same drug policy was in effect, and thus the Board found that the Employer failed to meet its Wright Line rebuttal burden.

Member Schaumber, dissenting in part, would not find that the ALJ's factual error of finding that the other employee was discharged before the Employer's drug testing policy was effective was fatal to the Employer's Wright Line rebuttal. Rather, he would find that the discharged employee was not similarly situated to the other employee. The discharged employee had problems with work performance and attendance, and had been involved in two workplace accidents during a short period of time. In contrast, the other employee had failed a single drug test after a single workplace injury, and there is no evidence that he had any work performance or attendance problems.

4. Krystal Enterprises, Inc., 345 NLRB No. 15

The Board (Battista, Schaumer; Liebman dissenting in part), found that the Employer's discharge of an employee was lawful because the Employer satisfied its rebuttal burden under Wright Line of establishing that it would have discharged the employee because of his violations of the Employer's sexual harassment policy, even in the absence of his union activities. The employee had repeatedly and seriously violated the Employer's sexual harassment policy, both at a company party and on other occasions. Upon receiving a complaint from a co-worker, the Employer conducted a thorough investigation, interviewing 15 employees, and as a result of this investigation disciplined five employees in addition to this employee (none of these other employees were known union supporters). The record demonstrates that the Employer consistently investigated and took action when, as here, it received a complaint of sexual harassment. Although there were times when other employees and managers engaged in sexually oriented conduct and the Employer did not respond to these incidents, these were incidents in which no employees complained about the conduct to the Employer. When an employee complained about sexually oriented conduct, the Employer consistently took action. Thus, the Board did not find disparate treatment, and concluded that the Employer met its Wright Line burden.

Member Liebman, dissenting in part, noted that, as the majority also found, the Employer engaged in a 4-month course of unlawful activity aimed at this employee, culminating in his unlawful suspension 3 days before his discharge. Member Liebman stated that the Employer's sexual harassment policy was a sham, regularly dishonored by employees and supervisors alike, and the Employer's assertion that it discharged this employee for violating the policy was a pretext. The employee's sexually oriented behavior was no more than par for the course at this workplace, and his discharge reflected disparate treatment. The Employer's claim that in investigating this employee it was acting consistently with its practice of investigating complaints from employees is disingenuous, since the record clearly establishes that several of its supervisors and managers witnessed first-hand, and even participated in, some of the abundant sexual horseplay and misconduct involved in this case. The Employer cannot, therefore, seriously claim that the reason it did not take action in those other incidents was because no one complained about them – since much of that misconduct was witnessed by and participated in by managers, no complaint from an employee was needed to alert the Employer to the misconduct. Member Liebman further argued that the record established that the Employer orchestrated the co-worker's complaint about the discriminatee's behavior; the co-worker testified that he witnessed approximately 1,800 incidents of sexual horseplay and misconduct during the 4-month period prior to the discharge, but never complained about any of this until his complaint here. Finally, although the Employer also disciplined some other employees for sexual misconduct as a result of its investigation here,

most of the many other instances of sexual misconduct known to the Employer went undisciplined.

3. Section 8(a)(5)

a. Unilateral Changes

1. Berkshire Nursing Home, LLC, 345 NLRB No. 14

The Board (Battista, Schaumber, Liebman dissenting in part) reversed the ALJ and found that the Employer's unilateral change in employee parking locations did not violate Section 8(a)(5) because the change was not "material, substantial, and significant." Prior to the change, which prohibited most employee parking in the back lot, employees were permitted to park in either the back lot for the side lot on a first-come, first-served basis.

The Board found that the difference between walking from the back lot, about one minute, and walking from the side lot, about 3-5 minutes, as not sufficiently significant but rather, at most, a minor inconvenience to employees. The Board specifically stated that employee preference is not the proper analysis for determining whether the Employer unlawfully changed a mandatory bargaining subject, but rather whether the change was "material, substantial, and significant." The Board further disagreed with the dissent's view that differences in quality between the two lots met this standard. Security issues involving the side lot had already been addressed before the change, and there was no evidence that these issues increased after the change. The Board also disagreed with the dissent's finding that there was a violation because employees were disadvantaged by the change; although this factor may sometimes be relevant, it is insufficient standing alone to meet the standard. As to the ALJ's crediting an employee witness that the side lot was more dangerous in inclement weather, the Board noted that the ALJ also generally credited Employer witnesses and, on its review of all their testimony, the Board concluded that the General Counsel failed to show that there was a significant difference in safety between the two lots.

The Board agreed with the ALJ that this change fell between the unlawful change from on-site to distant off-site parking in United Parcel Service, 336 NLRB 1134, and the lawful prohibition on parking in the first row of the parking lot in Advertiser's Mfg. Co., 280 NLRB 1185, but disagreed with the ALJ and the dissent in finding that the change here was closer to Advertiser's Mfg. The Board also distinguished the dissent's citation of Frank Leta Honda, 321 NLRB 482, where there were numerous unilateral changes and the change in parking was not only more distant, but also resulted in employee cars being blocked in, and Dynatron/ Bondo Corp., 324 NLRB 572, 587, where the parking rule change included violations resulting in warnings and towing, which the Board viewed as material.

Member Liebman, in her dissent, argued that the parking change clearly disadvantaged employees, as the back lot was preferred and now available only to the owners and select employees, and that the majority's finding that the change was not "material, substantial, and significant" was unsupported by the precedent applying that standard. As to distance and effort, Member Liebman noted that the almost direct entrance to the facility from the back lot was substantially different from a 5-minute walk, which could be as much as a quarter mile away, and represents a significant change at the beginning and end of an employee's work day.

Member Liebman further stated that the record evidence demonstrated the inferiority of the side lot in terms of safety, contrary to the majority's reliance on increased lighting and security assistance prior to the change, since the Employer subsequently allowed midnight shift employees to use the back lot. She also noted employee testimony that several fell slipping during inclement weather and that it took longer to remove snow from the side lot than the back lot, that employees had raised this issue to management, and that management clearly was aware that the back lot was more desirable than the side lot.

Member Liebman finally found this case to be analogous to Frank Leta Honda, where increased distance and other disadvantages such as employees' being unable to see if their vehicles were being blocked in satisfied the material, substantial, and significant standard. Member Liebman also found a significantly greater scope and effect on unit employees than in Advertiser's Mfg., relied on by the majority, since the parking change in that case involved, at most, a few employees having to walk a few additional yards.

2. Larry Geweke Ford, 344 NLRB No. 78

The Board (Battista, Liebman, and Schaumber) adopted the ALJ's conclusion that the Employer violated Section 8(a)(5) by refusing to bargain with a newly-certified Union regarding the implementation of a changed health insurance plan. Whenever the Employer had previously changed health insurance, it did so for all its employees. Citing Courier-Journal, 342 NLRB No. 113, the Employer maintained that since it had always made health-care changes on a companywide basis, it had no bargaining obligation with the Union.

The ALJ distinguished Courier-Journal, where the Board had held that the employer's unilateral health-care changes were made pursuant to a past practice. Successive contracts between the employer and union gave the employer the right to act unilaterally in this area, so long as changes affecting the unit were consistent with those affecting non-unit employees. Further, the employer had exercised this right with union acquiescence during both contract terms and contract hiatuses. The ALJ found that here, in contrast, the Employer and newly certified Union had no past relationship, and therefore no past practice of

permitting the Employer to make unilateral changes in health-care or any other mandatory subject without bargaining to impasse with the Union. The ALJ also noted that while the Employer's past practice was to have the same companywide health insurance plan, that fact did not believe it of its new bargaining obligation, citing Mid-Continent Concrete, 336 NLRB 258.

Member Schaumber wrote separately (n.1) to observe that he agreed with the ALJ's distinction of Courier-Journal, which contained an established past practice of employer unilateral action, while there was no real past practice here because the Employer's health-care changes had always been discretionary and variable, made on an ad hoc basis. Further, the Employer did not contend here that it was faced with a discrete, recurring event to which it had to expeditiously respond and which would have privileged implementation after notice and an opportunity to bargain. Therefore, this case is distinguishable from TXU, 343 NLRB No. 137. However, Member Schaumber disagreed that prior acquiescence of a union is necessarily essential to a past practice analysis. Rather, he agreed with former Member Hurtgen's dissent in Eugene Iovine, 328 NLRB 294, 295, that unilateral action pursuant to an established past practice is a lawful continuation of the status quo, and it does not matter whether the practice predates the selection of a union.

3. Long Island Head Start Child Development Services, 345 NLRB No. 74

The Board (Battista, Liebman, and Schaumber) agreed with the ALJ that the Employer violated Section 8(a)(5) by unilaterally changing health carriers after the expiration of its contract with the Union. The Employer relied upon a provision in the management rights clause enabling it to unilaterally change employee benefit plans. The Board agreed with the ALJ that union waivers of its bargaining rights do not survive the contract in which they are contained unless, unlike here, the parties make clear their intent to do so. The ALJ also noted that the Board has permitted unilateral changes where privileged by "established past practice," citing Courier-Journal, 342 NLRB No. 113. He observed that unlike the employer in that case, the Employer here had maintained the same insurance carrier for 10 years and, on the one occasion when it sought a changed contribution rate, it negotiated with the Union. In these circumstances, the Board agreed with his conclusion that Employer had no established past practice of exercising its own discretion in changing health insurance plans.

4. Bath Iron Works, 345 NLRB No. 33

The Board (Battista, Schaumber; Liebman dissenting) held that the Employer did not violate Section 8(a)(5) and (d) by merging its Bath Iron Works Pension Plan into the larger pension plan of its corporate parent, without the consent of the three Charging Party Unions. The judge had found that the merger was a mandatory subject of bargaining, that the Employer had modified the

collective-bargaining agreements without the Unions' consent, that the Unions had not clearly and unmistakably waived their statutory right to bargain over the merger, and thus, that the merger of the plans violated the Act.

The majority concluded that, under a reasonable interpretation of the collective-bargaining agreements and the Plan documents, the Employer had the authority to implement the merger without the Unions' consent. In reaching that conclusion, the Board held that the "clear and unmistakable waiver" standard applied by the judge was not the correct standard for cases alleging 8(d) contract modification, where the remedy would require adherence to the contract for its term, but was appropriate only in cases alleging an unlawful unilateral change, where the remedy was less severe, i.e., restoration and bargaining to impasse. In cases where the General Counsel was alleging a contract modification, the majority concluded that the issue was whether the Employer had a "sound arguable basis" for its interpretation of the contract, such that the change arguably was not a modification of the contract. See NCR Corp., 271 NLRB 1212, 1213 (1984) and other similar cases. (note: because the majority found that the "clear and unmistakable waiver" test was not applicable in the 8(d) context, they found it unnecessary to pass on the continued validity of that standard in light of several circuit courts' preference for a "contract coverage" standard).

Applying a "sound arguable basis" standard, the majority found that the Employer had demonstrated that the plan documents were incorporated into the collective-bargaining agreements and that those documents arguably gave the Employer the authority to implement the merger without the Unions' consent. The General Counsel's argument that the Plan documents were not part of the collective-bargaining agreements and did not contain a right to merge the Plan was "reasonable," but no more so than the Employer's interpretation of the agreements and Plan documents. Accordingly, the General Counsel failed to prove that the Employer had modified its contracts with the Unions.

In dissent, Member Liebman contended that the majority erred in rejecting the traditional "clear and unmistakable waiver" approach, arguing that such an approach had been used by the Board in very similar cases and was appropriate whenever an employer relied on a contractual privilege in defending unilateral conduct; there clearly was no clear and unmistakable waiver, especially since the Unions had objected to any merger when the Employer had raised it as a possibility in bargaining and had then withdrawn the issue. Member Liebman further contended that, even under a "sound arguable basis" standard, the General Counsel had adequately demonstrated a violation since the Plan documents expressly made any modifications "subject to the applicable provisions of any collective-bargaining agreement" and the collective-bargaining agreements provided for the particular plan in effect at that time and contained no language authorizing unilateral changes.

5. Sea Mar Community Health Centers, 345 NLRB No. 69

The Board (Battista and Schaumber; Liebman dissenting) reversed the ALJ and held that the Employer did not violate Section 8(a)(5) and (1) by unilaterally closing a dental lab in one of its clinics because this was not a mandatory subject of bargaining. The Employer's policy, companywide, was to subcontract lab work to outside commercial labs. Approximately a year before the events in question, the Employer's Dental Director created a dental lab, utilizing a single lab technician to manufacture dental appliances in-house, at one of the clinics, without his superiors' knowledge. He later continued to maintain the lab in direct contravention of an express order by the Employer's CEO. When the CEO discovered the continued existence of the lab, the Employer unilaterally closed it without bargaining over the decision or effects with the Union.

The majority, noting that the case presented an "unusual factual scenario," found that Fibreboard Paper Products v. NLRB, 379 U.S. 203, and cases in that line, were distinguishable because they involved management decisions to discontinue or change "some facet of its business that the employer had knowingly established and operated." Here, however, the Employer had never knowingly established and operated the dental lab. Notwithstanding the lab's operation for over a year, there thus was no change in "an established term or condition of employment in the manner contemplated by Katz and its progeny." Rather, the Employer's order to end this "rogue operation," once it was discovered, was a "core entrepreneurial decision" not subject to the duty to bargain. Although the majority acknowledged that the Director was an agent of the Employer in some respects, they found that operation of the dental lab was outside the scope of the authority given him by the Employer, and therefore that his establishment and maintenance of the lab could not bind the Employer.

Member Liebman argued in dissent that the Board repeatedly had rejected employer attempts to disclaim responsibility for supervisors' acts on the basis that they were "unauthorized." As a senior management official responsible for the clinical aspects of the dental practice in all of the Employer's clinics, the Dental Director was an Employer agent, both actually and apparently, and operation of the lab was within his general area of authority. Member Liebman further asserted that, from the employees' perspective, there was a clear change in terms and conditions of employment irrespective of the "internal management issue between [the Director] and his superiors."

b. Transfer of Unit Work

Wackenhut Corp., 345 NLRB No. 53

The Board (Liebman and Schaumber; Battista concurring in part and dissenting in part) rejected the Employer's argument that its unilateral elimination of bargaining unit positions and transfer of bargaining unit work outside the unit were mandated by the contract bid specifications of a third party. Since these

changes were not so mandated, they were not privileged by First National Maintenance v. NLRB, 452 U.S. 666 (1981), and the Employer violated Section 8(a)(5).

The Employer provides guard and security services at a nuclear power plant owned by Florida Power & Light (FPL). Prior to the events at issue in the case, the Employer employed sergeants and security officers (among others), who were represented in two different units. The security officers included CAS/SAS employees who operated various alarm stations. In accordance with what it allegedly perceived to be FPL's requirements in a new bid specification, the Employer eliminated the sergeant position (sergeants were either promoted to supervisory positions or demoted to security officer positions) and transferred all CAS/SAS position work to newly-created lieutenant positions (CAS/SAS employees were either promoted to those positions or reassigned to other security employee duties).

The majority found that, although the Employer may have believed that the FPL specifications required these changes, in fact they did not. Regarding the elimination of the sergeant position, the bid specifications did not expressly require elimination of that position and provided for another job classification title which could easily have been filled by the sergeants. With regard to the CAS/SAS operators, the majority found that the Employer had merely removed the operators from the bargaining unit and reclassified them as nonunit lieutenants who did not exercise 2(11) duties; i.e., the Employer had interpreted the specifications to require that the CAS/SAS work be performed by non-unit personnel, not (as the Employer could have interpreted them) to require that this operation be staffed only with supervisors. The specifications could only lawfully have required the latter, as no employer can require that employees who are otherwise entitled to the Act's protections be prohibited from joining bargaining units. Since the specifications did not require the changes the Employer made, the Employer could not rely on them as a defense for what otherwise would be clearly unlawful conduct.

Chairman Battista concurred with the majority's decision that the Employer violated Section 8(a)(5) with regard to the sergeants, although he did not agree that the Employer unlawfully changed the unit absent consent but only that the Employer unlawfully transferred work from the unit without bargaining to impasse. Chairman Battista dissented from the decision regarding the CAS/SAS employees, finding that the FPL specification clearly required that this work be performed by non-unit personnel and, therefore, there could be no violation by the Employer because the decision was dictated by FPL.

c. Mandatory Subject of Bargaining

1. Utility Vault Co., 345 NLRB No. 4

The Board (Battista, Schaumber, Liebman) agreed with the ALJ that an employer violated Section 8(a)(5) and (1) of the Act by unilaterally implementing a "Dispute Resolution Procedure" (DRP) that required newly-hired unit employees to agree individually to arbitrate claims involving their terms and conditions of employment, including such claims as wrongful termination and alleged failure to pay wages and benefits, because the arbitration of such claims is a mandatory subject of bargaining. The Board also found that by requiring new employees to sign the DRP agreements within three days as a condition of employment, the employer bypassed the union and engaged in unlawful direct dealing. Finally, the Board agreed that the employer independently violated Section 8(a)(1) to the extent that the DRP required employees to forego access to the Board; Battista found it unnecessary to pass on that issue as it would not have had a material effect on the remedy.

d. Withdrawal of Recognition

1. Laurel Baye Healthcare of Lake Lanier, LLC, 346 NLRB No. 15.

This case arose out of the UFCW's recent disaffiliation from the AFL-CIO. In this case, the Acting General Counsel issued a complaint alleging that the Employer violated Section 8(a)(1) and (5) of the Act by refusing the Union's request to bargain and to furnish information following the Union's certification. The Employer claimed that the certification was invalid because, among other things, the disaffiliation of the Union from the AFL-CIO "raises issues as to whether a disaffiliation vote was held and, if so, whether such a vote was conducted with adequate due process safeguards." Further, the Respondent contended that the "organizational changes mandated by the disaffiliation ... are arguably sufficient to destroy any substantial continuity with the previously affiliated Union." Ruling on the Acting General Counsel's motion for summary judgment, the panel unanimously found that the Employer violated Section 8(a)(5) by refusing to bargain with the Union.

Reviewing prior disaffiliation cases, the Board held that disaffiliation from the AFL-CIO, standing alone, is insufficient to raise a genuine issue as to the identity of the certified labor organization. Therefore, the Union's decision to disaffiliate from the AFL-CIO, by itself, is not the kind of change in circumstance that the Board has traditionally required to be subject to a vote of union members. The Board further found that the Employer failed to suggest it might adduce at a hearing any evidence indicating that the disaffiliation created any confusion concerning the identity of the certified representative. Moreover, the Board relied on the fact that the disaffiliation occurred after the refusal to bargain and there would be "no useful purpose served by permitting the employer to defend the propriety of an earlier refusal to bargain by relying on subsequent events that had nothing to do with the refusal."

2. Nott Company, 345 NLRB No. 23.

In this case, the Board majority (Schaumber and Battista) found that the Employer lawfully terminated a 40-year collective-bargaining relationship with the Union during the term of a collective-bargaining agreement. The Employer owned an exclusive statewide franchise to sell, rent, and service forklifts. The Union historically represented a single unit of the Employer's shop and field service mechanics employed at four locations. At the time relevant here, the unit consisted of 14 employees. The Employer lost its original franchise, but then purchased the assets of a similar operation, and hired the 14 unrepresented employees of that operation who performed essentially the same work as the Employer's original unit employees. Within a short time, the Employer consolidated all the employees into one location. At no time after the consolidation did the Union demonstrate majority support among the employees in the consolidated unit. The Employer withdrew recognition from the Union and failed and refused to honor the extant collective-bargaining agreement.

The General Counsel and the Charging Party argued that contract-bar and "expansion of unit" principles governed this case. They argued that since the previously represented employees constituted a substantial percentage of the unit following consolidation with the unrepresented employees, and since there was otherwise a substantial continuity in the operations, the collective-bargaining agreement remained in effect and barred the repudiation of the contract and withdrawal of recognition.

The Board, instead, concluded that an accretion analysis was appropriate and that, in light of the fact that the previously represented employees were no longer a majority in the new overall unit, there was no longer a bargaining obligation at all in that unit. The Board recognized that, in some accretion cases, a party seeks to add a new group of employees to an extant unit of union-represented employees and that, in such cases, there is no question as to the union's representation of the previously extant unit. There is only a question as to the new employees. By contrast, in this case, the Employer challenged the majority status of the entire unit. However, the Board found it appropriate to apply the accretion analysis in this situation, as well.

The Board applied an accretion analysis because an accretion analysis is ordinarily applied in situations involving consolidation of a represented group with an unrepresented group. The Board emphasized that it has followed a restrictive policy in regard to accretion because it forecloses the employees' basic right to select their bargaining representative, and that it will not, "under the guise of accretion, compel a group of employees ... to be included in an overall unit without allowing those employees the opportunity of expressing their preference in a secret election...."

In this case, the Board found no accretion because the unrepresented group sought to be accreted was equal in number to the existing represented group (14 former unrepresented employees versus 14 previously represented employees).

The Board will refuse to "accrete" a larger or equal number of employees into a smaller certified unit when the case involves a group of preexisting employees with a separate history of representation or nonrepresentation. Relying on [Geo. V. Hamilton, Inc., 289 NLRB 1335 \(1988\)](#), and [Central Soya Co., 281 NLRB 1308 \(1986\)](#), the Board found that although there was an integration of functions and work forces, because the unrepresented and represented groups of employees were equal in number there could be no accretion. Further, where there is an integration, but no accretion, an employer is not obligated to continue to bargain with the union, even as to an existing group of employees. Thus, the Board held that the Employer did not violate the Act when it withdrew recognition from the Union. The Board found that the important policy of industrial stability was "trumped" by the statutory policy of employee free choice.

In a dissent, Member Liebman argued that the majority failed to reconcile the competing doctrines of employer free choice -- under the guise of a "consolidation" of employees, which affects neither the bargaining unit's work nor the employer's business operation -- with the well-established principles under which unions enjoy a conclusive presumption of majority support during the term of a collective-bargaining agreement. In Member Liebman's view, as a matter of law, the Union was entitled to a conclusive presumption of majority status through the term of its contract with the Respondent. Under the applicable contract-bar principles, the increase in the size of the bargaining unit was not substantial enough to create an exception to the conclusive presumption. In addition, there was absolutely no change in the nature of the Respondent's operation or in the functions of the employees in the overall unit. Thus, there were no "changed circumstances" that would negate the conclusive presumption. In addition, Member Liebman argued that the majority's result in this case cannot be reconciled with Board precedent in analogous circumstances, and that its underlying premise that the Act itself makes employee free choice the primary statutory policy—as opposed to economic stability through collective-bargaining - is clearly mistaken.

e. Refusal to Supply Information

1. Regency Service Carts, 345 NLRB No. 44

The Board (Battista, Liebman, Schaumber dissenting in part) affirmed the judge's finding that the Employer violated Section 8(a)(5) and (1) by failing and refusing to bargain in good faith and by failing to timely supply information requested by the Union. The Board found that the totality of the Employer's conduct throughout the negotiations demonstrated that the Employer unlawfully endeavored to frustrate the possibility of arriving at any agreement with the Union. Not only did the Employer make several comments indicating bad faith, but it also employed a number of dilatory tactics aimed at frustrating successful negotiations, including, but not limited to, unlawfully delaying in providing the Union with relevant information. Indeed, the Employer's conduct demonstrated

that it engaged in surface bargaining. Here, the Employer had submitted a proposal for a drug-testing policy that the Union reasonably understood was modeled, at least in part, on the Federal Drug Free Workplace Act. During a bargaining session in August 2000, the Union asked whether the Employer had been awarded federal contracts greater than \$100,000, and the dollar amount of federal contracts the Employer had bid on or was awarded over the last three years. The Union explained that it could change its position more easily if portions of the Employer's drug testing proposal were contained in that statute and if inclusion of those portions in the contract was necessary for the Employer to obtain federal contracts. The Employer's negotiator responded, "I didn't say our proposal was based on that [statute]. . . we didn't propose it because [we are] obligated . . . we just want it." The Employer refused to supply the information and offered no explanation for its refusal.

Once the Union requested facially relevant and necessary information, it was the Employer's burden to either supply the information or explain why it was not relevant. The majority found that the Employer did not at that time, or thereafter provide an explanation until November 2000, when it finally informed the Union that it had not been awarded any federal contracts for the last 2 years and did not meet the threshold dollar amount for coverage under that statute. In view of the Employer's less than clear and forthright response, the majority disagreed with the dissent's view that the Employer clearly informed the Union about its reasons for not providing the information and that the Union failed to demonstrate the relevance of the request. Contrary to the dissent's interpretation, the majority found that the Employer's actual response was equivocal and evasive, at best. Thus, the Employer never answered the question of whether the proposal was in fact based on the statute. The fact that the Employer did not say that it was so based did not answer the question. Similarly, the fact that the Employer just "wanted" the proposal did not answer the question. Therefore, the Employer's answer could not serve as a valid or legally sufficient rebuttal of the relevancy of the Union's request. Instead, the majority found that it was part of a pattern of the Employer's untimely and unresponsive reactions to the Union's information requests. Even if the Employer's response was clear, as the dissent contends, the majority still would find that the information was relevant. The Union's request for information regarding federal contracts was made in the context of negotiations over the Employer's proposed drug-testing policy, a mandatory subject of bargaining. Moreover, information concerning bargained matters is relevant precisely because such information can enhance the prospects for agreement. The fact that the Employer may not have based its proposal on federal requirements was not dispositive. If there were such requirements, the Union was more willing to compromise, and the prospects for an agreement would be enhanced, which was precisely what the Union told the Employer. Consistent with its position, the Union needed to know whether the Employer was covered by the statute. Even the Employer itself recognized the relevance by advising the Union that it did not meet the threshold dollar amount, even if it waited almost four months to reveal that information. On these facts, it was not,

as the dissent contends, a “sweeping new definition of relevance” to say that information that can enhance the prospect for an agreement is relevant to the collective-bargaining process.

Member Schaumber dissents with respect to the majority’s finding that the Employer unlawfully failed to timely respond to the Union’s August 2000 information request. He finds that the requested information--the dollar amount of the Employer’s government contracts--was not presumptively relevant because such information does not directly relate to the bargaining unit members’ terms and conditions of employment. Unlike the majority, he also finds that the information’s relevance was never demonstrated by the Union. Therefore, the Employer was under no obligation to provide it. He would find, contrary to the majority, that the Employer’s response was sufficiently clear to communicate to the Union that the Employer was not claiming coverage under the Drug Free Workplace Act as the reason for its drug testing proposal. Further, he rejects that the Union demonstrated relevance by claiming that the information, if provided, “could have enhanced the prospects for agreement.” Thus, the majority cites no precedent for such a “sweeping new definition of relevance,” which would extend to any financial information of an employer, including data relating to profitability, pricing and executive salaries.

2. Mission Foods, 345 NLRB No. 49

The Board (Battista, Schaumber and Liebman dissenting in part) granted the Union’s Motion for Summary Judgment and ordered the Employer to bargain with the Union and to furnish the Union with information it requested, with the exception of employee social security numbers; a list of all local, state, and federal laws, statutes, ordinances, or regulations that the Employer believes govern its business operations; a copy of all company policies that relate to any of these laws; a list of all notices required by state or federal law to be posted in the workplace; information concerning citations, indictments, criminal complaints, civil lawsuits, or charges involving discrimination filed against the Employer in the last 5 years, including all employees who were involved in the charges, and the names of all employees who have been charged or convicted of any criminal offense; a list of the name of each supervisor, manager, or other person who was involved in each merit pay evaluation; employment application forms; and copies of all materials that have been posted on company bulletin boards. In granting summary judgment, the Board found that the Employer did not raise any representation issue that was properly litigable in the unfair labor practice proceeding and that there were no factual issues warranting a hearing.

The Board rejected the Employer’s assertion that Union’s purpose in requesting voluminous information was a harassment tactic, and that because the request was not made in good faith, it should be denied. Here, the Employer’s sole argument supporting its contention was the volume of the Union’s request. Such an assertion, without more, was insufficient to overcome the presumption of good faith, particularly in light of fact that most of the Union’s information

request on its face appeared to involve relevant information requested to fulfill its role as collective-bargaining agent. See e.g., Honda of Hayward, 314 NLRB 443, 449 (1988). The assertion that the information request was overbroad and burdensome did not excuse the Employer's failure to comply with the request. Thus, the Employer's failure to raise, at the time of the request, any issue concerning the burden of complying with the Union's request undermined the claim of burdensomeness. Id. at 450. An employer may not simply refuse to comply with an overbroad request, but must request clarification or comply with the request to the extent that it encompasses necessary and relevant information. Superior Protection, Inc., 341 NLRB No. 35, slip op. at 3 (2004). The Employer failed to proffer any evidence in support of its assertion that the requests would be unduly burdensome, and did not make any effort to reach a mutually acceptable accommodation with the Union. Nor would the Board excuse the Employer's failure to comply where the information requested pertained to nonunit employees to the extent that such information could be construed to pertain to unit employees. See, e.g., Metro Health Foundation, Inc., 338 NLRB 802, fn. 2 (2003).

Because the General Counsel failed to establish that certain information sought was presumptively relevant, i.e., a list of all local, state, and federal laws, statutes, ordinances, or regulations that the Employer believes govern its business operation, a copy of all company policies that relate to any of these laws, and a list of all notices required by state or federal law to be posted in the workplace, the majority found that the Employer did not unlawfully fail to comply with the requests for this information. In so finding, the majority distinguishes Living and Learning Centers, 251 NLRB 284, 285 and fn.2 (1980), *enfd.* 652 F.2d 209 (1st Cir. 1981), wherein the Board found that a request for a list of all state agencies and statutes governing an employer's operations "as a day care center" to be presumptively relevant. Such agencies and statutes obviously concern health and safety matters peculiar to such an institution and the employees working there have a presumptive interest in such matters. The majority found no such limitation here. Similarly, the majority found that the General Counsel failed to establish that information concerning citations, indictments, criminal complaints, civil lawsuits, or charges involving discrimination filed against the Employer was presumptively relevant. See, e.g., Polymers, Inc., 319 NLRB 26, 27 (1995). Although information concerning merit pay systems and evaluations is presumptively relevant, see, e.g., Maple View Manor, 320 NLRB 1149, 1150-1151 (1996), the General Counsel did not establish that the names of the individuals involved with such evaluations were presumptively relevant. Because the Board has not yet passed on whether employment applications forms or material posted on bulletin boards are presumptively relevant, the majority found it inappropriate to grant summary judgment with respect to the Employer's alleged failure to provide that information. Likewise, because the Union failed to provide any reason why it needed the employees' social security numbers, the Board denied summary judgment with respect to the Employer's alleged failure to provide that information. See Metro Health, *supra*, 338 NLRB at 803, fn. 2 and

cases cited therein. With the exception of the social security numbers, the Board found that the Employer's assertion that the information sought by the Union was confidential did not excuse the Employer's failure to comply with the request. Here, the Employer only made a blanket claim of confidentiality and it also failed to make an offer to accommodate the Union's legitimate interest in relevant information. See U.S. Testing Co. v. NLRB, 160 F.3d 14, 20 (D.C. Cir. 1998).

Member Liebman dissents with respect to the majority's failure to order the Employer to provide a list of all local, state, and federal laws, statutes, ordinances, or regulations that the Employer believes govern its business operation, a copy of all company policies that relate to any of these laws, and list if all notices required by state or federal law to be posted in the workplace. She is not persuaded by the majority's attempt to distinguish Living and Learning Centers. Unlike the majority, she does not read that case as restricted to "day care centers." In her view, that phrase merely described the kind of business in which that particular employer was engaged and was not a limitation on the Board's holding. Additionally, the interest that the majority acknowledges that employees working in a day care center have in health and safety matters, she finds applies with equal force to the Employer's employees who manufacture food products. Moreover, even if this request for information was broader than that requested in Living and Learning Centers, the Employer's blanket refusal to comply with the Union's request still must be justified, since an employer may not simply refuse to comply with an overbroad request, it must request clarification or comply with the request to the extent that it encompasses necessary and relevant information. Superior Protection, supra, 341 NLRB No. 116, slip op. at 3. She also finds that information that state and federal laws require an employer to disclose clearly relate to working conditions, and, therefore, she would find such information to be presumptively relevant. Unlike the majority, she finds it unnecessary to pass on the issue of whether the requested employment application form was presumptively relevant. She observes that, because the Employer failed to raise any specific issue of material fact regarding the Union's request for "company policies or procedures related to the hiring process," the Employer's obligation to provide that more extensive information encompasses the limited request for the employment application form. Further, she would find that copies of all materials posted on bulletin boards was presumptively relevant because "bulletin board use [is] among those conditions of employment which the Act requires to be the subjects of collective bargaining. NLRB v. Proof Co., 242 F.2d 560, 562 (7th Cir. 1957).

3. SBC Midwest, 346 NLRB No. 8

The Board (Battista, Schaumber, Liebman not participating in the decision on the merits) concluded that the Employer violated Section 8(a)(5) and (1) by unlawfully failing to provide the Union with information on the extent of subcontracting, but not by failing to provide pricing information and copies of so-called contracts. Reversing the judge, the Board found that the Employer complied with the Union's request for information concerning the subcontractors'

identities and the nature and location of the subcontracted work. The Board will not fault the Employer for identifying subcontracted work by city or municipality, particularly where the Union asked only for the “location of the work being done,” without stating the degree of specificity desired—e.g., by city, zip code, or street intersection.

The Board found that the requested information regarding the extent of subcontracting is relevant to the Union’s grievance processing activities. Even assuming that the Union did not need information on the extent of subcontracting in order to prevail in a grievance proceeding, that information was relevant for other purposes. The Board and courts have long recognized that information may be relevant because it helps weed out nonmeritorious grievances. NLRB v. Acme Industrial Co., 385 U.S. 432, 437-438 (1967). By that same reasoning, information may be relevant if it weeds out grievances that, though possibly meritorious, are not worth pursuing. Having a meritorious grievance did not mean the Union would necessarily wish to pursue it. If the amount of subcontracted work at a particular site was minimal, the Union might well have decided that pursuing the grievance was not worth the time or expense involved. The Union would need to know not simply that the unit work had been subcontracted at that location, but how much work was involved. Information concerning the amount of subcontracting work is relevant for that reason. The extent of subcontracting is also relevant to the remedy for any contract violation.

Unlike the information on the amount of subcontracting, the Board found that pricing information and copies of the so-called contracts are not relevant to the Union’s grievance handling duties. The Union needed to know information concerning the kinds, amount, and location of the work being subcontracted for grievance handling purposes. Had that information been provided, as it should have been, pricing information would have been superfluous. As for the copies of contracts, their relevance was never demonstrated. Copies of the so-called contracts between the Employer and its subcontractors would have been of no use to the Union in assessing or processing subcontracting grievances as they did not reflect the work actually being subcontracted, let alone the extent or location, since those documents merely set forth a contractor’s rates for certain tasks.

4. Central Telephone Co., 341 NLRB No. 99

The Board (Battista, Schaumber, Walsh dissenting in part) held that the Employer did not unlawfully fail to provide the Union with notes prepared during the course of an investigation into alleged misconduct by four union officers/employees, since the notes were protected from disclosure under the work product doctrine. The work product privilege is not absolute. In determining whether a document qualifies as work product, federal courts of appeals have applied two standards. Several circuits ask “whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.” Senate of Puerto Rico v. U.S. Dep’t of Justice, 823 F.2d 574, 586 fn. 42 (D.C. Cir.

1987)(quoting 8 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2024 (1970))(emphasis added). Under this test, work product protection will be accorded where a “document was created because of anticipated litigation, and would not have been created in substantially similar form but for the prospect of that litigation.” United States v. Adlman, 134 F.3d 1194, 1195 (2d Cir. 1998). That test is distinguished from the “primary motivation” test recognized primarily by the Fifth Circuit, which asks whether the primary motivation behind a document’s creation was to aid in anticipated litigation. United States v. Davis, 636 F.2d 1028, 1042 (5th Cir. 1981), cert. denied 454 U.S. 862 (1981).

Applying these standards, the majority concluded that the Employer’s human relations specialist’s investigation notes were prepared in anticipation of litigation and not in the ordinary course of business. Thus, the scope and character of this particular investigation was because of the possibility of litigation. Further, the primary motivation behind the extensive investigation was to aid the Employer in the substantially likely event that the Union pursued litigation against the Employer as a result of the discharges. The fact that the Employer’s human resources specialist and director of employee relations immediately contacted the Employer’s in-house attorney upon receiving information about the alleged misconduct supports the Employer’s contention that it subjectively anticipated litigation. Furthermore, the Employer’s fear of litigation was objectively reasonable, since the discharge of the four union officers/employees, for actions taken in their capacity as union officials, would likely (albeit not inevitably) result in the Union’s pursuing arbitration or filing an unfair labor practice charge. See In re Sealed Case, 146 F.3d 881, 884 (D.C. Cir. 1998)(party representative “must at least have had a subjective belief that litigation was a real possibility, and that belief must have been objectively reasonable”). Ultimately, the Union did decide to pursue arbitration with regard to each termination. Under these circumstances, the majority concluded that the investigation notes, compiled by the human relations specialist in anticipation of foreseeable litigation, were plainly within the scope of work product privilege. The majority does not dispute the dissent’s observation that notes taken in the ordinary course of business do not fall within the ambit of work product protection. The majority simply disagrees with the dissent’s application of the law to the facts. Contrary to the dissent, documents do not automatically lose their work product protection because no specific claim has yet arisen. See, e.g., Adlman, supra, 134 F.3d at 1196. The Union failed to demonstrate the required “substantial need” in order to overcome the privilege here.

Member Walsh, dissenting in part, disagrees with the majority’s finding that the Employer did not violate Section 8(a)(5) and (1) by failing to produce notes recording statements made by employees during interviews conducted as part of the Employer’s factual investigation into alleged misconduct of four union officers/employees. In holding these notes to be protected work product, he finds that the majority disregards the universally followed principle that documents

prepared in the “ordinary course of business” or for “other non-litigation purposes” are not protected work product. Thus, he finds that the majority extends the work product doctrine beyond its intended scope and unjustifiably impairs the ability of unions to protect their members’ contracted and statutory rights. Far from establishing that the notes were created in anticipation of litigation, he finds that the testimonial evidence compels the finding that the investigation was performed in the ordinary course of business for the nonlitigation purpose of determining whether the four union officials had engaged in misconduct so that the Employer could determine whether discharge was appropriate. Accordingly, the investigation notes were not prepared “because of” litigation or for the “primary motivating purpose” of aiding in anticipated litigation, and therefore do not fall within the protection of the work product doctrine. Finally, he concludes that the prospect of litigation was too far removed from the preparation of the interview notes because the event that could give rise to such a prospect—the discharge of the four union officers—had not even occurred at the time the investigation was conducted. Indeed, the purpose of the investigation was to determine whether to take that action.

e. Gissel Bargaining Order

1. T-West Sales and Service, Inc., d/b/a Desert Toyota, 346 NLRB No. 3

The Board (Battista, Schaumber; Liebman dissenting in part) concluded that a Gissel bargaining order was unwarranted. The unfair labor practices directed towards the 31-employee unit included interrogations, solicitation of grievances, impliedly promising benefits, and promulgating and maintaining an unlawful no-solicitation rule. With the exception of the no-solicitation rule, none of these unfair labor practices occurred on a unit-wide basis, and, in fact, only two unit employees were directly affected by them and there was no evidence of dissemination. These violations, without more, would not warrant a remedial bargaining order. However, the Employer also unlawfully discharged the principal employee organizer, and made statements to another employee linking that discharge to the discriminatee’s organizing activities. Threats of loss of employment and the actual discharge of an active union supporter are “hallmark” violations frequently relied on to support a bargaining order, but the commission of “hallmark” violations does not always allow for the imposition of this extraordinary remedy. The Board found that here, the discharge and threat did not impact a significant portion of the bargaining unit, and that the Employer’s unlawful conduct, even though committed in some cases by high-ranking officials, could be adequately redressed by traditional remedies. The Board further noted that any lingering effects caused by the unlawful discharge would be remedied by the reinstatement and backpay order.

Member Liebman, dissenting in part, would find a Gissel bargaining order warranted. In her view, the Employer committed hallmark violations, not only discharging the primary union activist, but also indirectly threatening another employee whom it questioned about the discriminatee’s union involvement.

Threats of discharge and actual discharge of union activists are among the most flagrant interferences with Sec. 7 rights, and are likely to more enduringly disrupt election conditions than other unfair labor practices. Here, the discharge was exacerbated by the Employer's statements to another employee linking the discharge to the discriminatee's union activities. In fact, a Union organizer testified that three formerly active union supporters told him that they did not attend a union meeting following the discharge because they did not want to lose their jobs. At least one of the unfair labor practices the dissemination of an unlawful no-solicitation rule, impacted the employees on a unit-wide basis. Further, the probable impact of unfair labor practices is increased when, as here, a relatively small bargaining unit is involved. Moreover, the Employer made no effort to neutralize the effect of its unlawful actions.

2. The Guard Publishing Company, d/b/a The Register Guard,
344 NLRB No. 150

The Board (Battista, Schaumber; Liebman dissenting in part) concluded that the three Sec. 8(a)(1) violations committed by the Employer -- granting a wage increase, soliciting employee grievances and promising to remedy them, and soliciting employees to withdraw their union authorizations -- did not warrant the imposition of a Gissel bargaining order. The Board stated that this case was similar to Yoshi's Japanese Restaurant, 330 NLRB 1339 (2000), in which the Board found a Gissel bargaining order was not warranted where the Employer had solicited grievances, promised to remedy them, granted wage increases, interrogated employees, and threatened plant closure. The Board noted that it had declined to impose Gissel bargaining orders in cases where the violations were of greater severity than those committed here, such as Hialeah Hospital, 343 NLRB No. 52 (2004), Desert Aggregates, 340 NLRB No. 38 (2003), and Jewish Home for the Elderly, 343 NLRB No. 117 (2004). The Board further noted that even though unit employees continue to benefit from the Employer's unlawful grant of a wage increase, it was sufficient to order the Employer to withdraw the increase if that is what the Union wants, or, if the Union wants to keep the increase, to order the Employer to cease such conduct and to apprise employees of this remedy.

Member Liebman, dissenting in part, would find that the nature and extent of the Employer's ULPs warranted a Gissel bargaining order. Contrary to the majority, Member Liebman would additionally find that the Employer unlawfully discharged a leading union activist, and she noted that the wage increase and the discharge are "hallmark" violations, which will normally support the issuance of a bargaining order. Further, the severity of the Employer's unlawful conduct was exacerbated by the involvement of its high-ranking official, who participated in each of the unfair labor practices. She also found it significant that most of the unfair labor practices affected the entire bargaining unit. She stated that traditional remedies cannot eradicate the impact of the Employer's unlawful conduct, noting that unlawfully granted benefits have "a particularly long-lasting

effect on employees and are difficult to remedy by traditional means.” Parts Depot, 332 NLRB 670, 675 (2000). She stated that wage increases serve as a constant reminder of the Employer’s use of economic weapons to defeat the Union, and that “[i]t is difficult to conceive of conduct more likely to convince employees that with an important part of what they were seeking in hand union representation might no longer be needed.” Tower Records, 182 NLRB 382, 387 (1970), enf. 1972 WL 3016 (9th Cir. 1072).

3. Abramson, LLC, 345 NLRB No. 8

The Board (Battista, Schaumber; Liebman dissenting in part) concluded that the Employer’s unlawful conduct did not warrant a Gissel bargaining order. The Employer threatened employees with job loss, loss of benefits, and plant closure if the Union won the election. Although these are serious “hallmark” violations, the commission of “hallmark” violations does not necessarily require the imposition of a bargaining order where, as here, the “hallmark” violations did not impact a significant portion of the bargaining unit. The Employer’s unfair labor practices occurred either in one-on-one situations or during individual jobsite meetings of a few of its crews, and they were not disseminated further. Specifically, the unfair labor practices affected three of the eight work crews -- assuming every crew member attended the meetings and was attentive to all that was said, approximately 35 employees out of an 80-employee unit were subjected to the threats. Further, any lingering effects due to the Employer’s unlawfully refusing to return a principal union supporter to work following a post election layoff will be remedied by the reinstatement and back pay order. The imposition of these remedies will send a strong message that interference with employees’ Sec. 7 activities will not be tolerated. The Board stated that its conclusion that a Gissel bargaining order is unjustified is consistent with Board precedent.

In finding a Gissel bargaining order inappropriate, Member Schaumber noted the substantial passage of time between the election and the issuance of this decision, rendering its enforceability problematical. Chairman Battista relied on delay as a factor in denying a Gissel order.

Member Liebman, dissenting in part, would find that a Gissel bargaining order is warranted. The Employer’s unfair labor practices included repeated threats of plant closure and loss of jobs, which not only are “hallmark” violations, but are “among the most flagrant” of unfair labor practices. In light of the Union’s otherwise-unexplained overwhelming loss of support, the majority’s assertion that the Employer’s unfair labor practices did not impact a significant portion of the unit is unsupportable. The Employer also repeatedly threatened loss of travel lodging and meal benefits, which would drastically reduce the employees’ compensation package, given that they often worked at remote job sites for extended periods of time. The severity of the Employer’s conduct was also exacerbated by the involvement of its high-ranking officials. Further, the Employer did not cease its unlawful conduct after the Union lost the election, but

continued to refuse to recall certain union supporters to work. Where an employer continues unfair labor practices even after the employees have voted against the union, such conduct evidences a strong likelihood of a recurrence of unlawful conduct in the event of another organizing effort.

4. National Steel Supply, Inc., 344 NLRB No. 121

4

The Board (Battista, Liebman, and Schaumber) concluded that a Gissel bargaining order was warranted under “category I” of the Gissel standard, which involves “exceptional cases” marked by unfair labor practices so outrageous and pervasive that traditional remedies cannot erase their coercive effects. The Employer’s response to the union campaign was swift and severe, beginning with an interrogation and threats of job loss by the Employer’s highest ranking officer; a few days later, the Employer unlawfully warned and then terminated the employee whom it perceived to be a leader of the organizing effort; that same day, within hours of the Union’s demand for recognition, the Employer refused to reinstate 27 of the 31 unit employees – over 85% of the unit – after they engaged in a protected strike; and then 10 days later, the Employer terminated the strikers. The Board stated that there is a strong likelihood that the Employer’s unfair labor practices will have a pervasive and lasting effect on the employees’ exercise of their Sec. 7 rights. Threats of job loss and the actual discharge of union adherents are “hallmark” violations, which are highly coercive because of their potentially long-lasting impact. Further, mass discharges leave no doubt as to the response that the employees can reasonably fear from their employer if they persist in their support for a union. Terminating a majority of the unit is unlawful conduct that “goes to the very heart of the Act” and is not likely to be forgotten. Further, the impact of the violations is heightened by the small size of the unit and the direct involvement of the Employer’s highest ranking officers.

4. Section 8(b)(1)(A)

a. fines

1. IBT Local 688 (Frito Lay), 345 NLRB No. 96

The Board (Battista, Schaumber, Liebman dissenting) affirmed the judge’s finding that the Union violated Section 8(b)(1)(A) by threatening its members with intraunion disciplinary proceedings, initiating disciplinary proceedings, and then fining three members who refused to honor a third-party picket line. The disciplined members were driver-sales representatives, whose duties included driving to grocery stores, selling products, writing up new orders, and stocking display areas. After an economic strike led to a lockout at three grocery chains, another union set up picket lines. Sales representatives were told by their Union steward that they could be fined \$200 a day for crossing those picket lines. Subsequently, three members were charged with violating the Union’s bylaws by crossing the picket lines and performing their normal duties, for which each was

fined \$1,000. The sales representatives were covered by a bargaining contract with a no-strike provision (article 18) as well as a clause prohibiting employer discipline of any employee who refuses to cross a lawful picket line (article 17). The judge found, and the majority agreed, that the Union's conduct contravened its obligations under the no-strike clause in parties' agreement, which, in the absence of relevant extrinsic evidence, clearly and mistakably waived the right to engage in sympathy strikes. In so finding, the judge applied Indianapolis Power Co., 291 NLRB 1039 (1988), enfd. 898 F.2d 524 (7th Cir. 1990), where the Board held that broad no-strike clauses are to be construed to include sympathy strikes, unless, "the contract as a whole or extrinsic evidence demonstrates that the parties intended otherwise." In Indianapolis Power, supra, the Board found that, absent contrary evidence, the inclusion of a no-strike clause in a contract barring "any strike" would establish that the parties had clearly and unmistakably intended to bar sympathy strikes. Id.

The majority rejected the Union's contention that the judge erred by finding that article 17 did not allow the Union to authorize a sympathy strike. First, the majority agreed with the judge that there was no extrinsic evidence in the record demonstrating that the parties intended to allow sympathy strikes. Second, the majority agreed that the clear language of article 18 "reflects the intent of the parties" and obligates the Union to refrain from authorizing any strikes, including sympathy strikes or work stoppages. Third, the majority found that article 17 is not an exception to article 18, which states that the "only" exceptions to the prohibition on any strikes or work stoppages are the conduct described in articles 13 and 25. Article 17 "permits an employee to freely choose to honor a third party-picket line," while article 18 forbids the Union to force the employee to honor the third-party picket line. Article 17 gives contractual protection to an employee's right under Section 7 to honor a picket line. Although article 17 does not itself give such added contractual protection to an employee's Section 7 right to refrain from honoring a picket line, neither does it take that statutory right away. Thus, that Section 7 right remains untouched and is further aided by article 18 to the extent it forbids the Union from causing a strike or work stoppage by coercing an employee to honor the picket line. Machinists, Oakland Lodge 284 (Morton Salt Co.), 190 NLRB 208 (1971), enfd. in relevant part and remanded 472 F.2d 416 (9th Cir. 1972), relied on by the dissent is clearly distinguishable. Although the Board held in that case that a no-strike clause did not bar sympathy strikes, the no-strike clause specifically included an exception for an employee honoring the picket line of another union. Article 18 contains no exception for that circumstance. Article 17 refers specifically to the right of an individual "employee," and states that the individual will not breach the contract, or be subject to discharge, if he honors a picket line, However, article 18 addresses the obligation of the Union to refrain from authorizing "any strike or work stoppages." Thus, the right afforded to an individual employee under article 17 in no way affects the prohibition on the Union from directing its members to engage in a sympathy strike or work stoppage in violation of article 18. The majority rejects the dissent's contention that a refusal to cross a third-party picket

line is not a strike or work stoppage, since such a contention is at odds with the common definition of “strike” and “work stoppage” and the plain language of the parties’ contract. Likewise, the majority rejects the dissent’s argument that article 18 is a general prohibition and article 17 is a specific permission, and that the specific provision trumps the general one. Each article addresses different conduct and the Board is bound to follow the plain language of each. Each and every provision should be given operative effect if it is possible to do so.

Member Liebman, dissenting, contends that a union is free to discipline its members for crossing another union’s picket line, so long as this does not coerce employees to engage in conduct that violates a bargaining agreement. She finds that the Union could not have coerced the workers to violate the contract because the contract “permits employees to refuse to cross third-party picket lines.” The Union committed an unfair labor practice only if the Union’s discipline compelled member-employees to violate the contract. Because Article 17 “permits employees to honor third-party picket lines,” she finds it “self-evident” that the Union’s pressure on employees to honor a third-party picket line could not cause employees to violate the parties’ contract. Rather, the Union effectively compelled employees to engage in conduct expressly protected by the contract. Under Article 17, crossing a third-party picket line is not an activity required of employees. Therefore, the Union’s action of encouraging employees to honor a third-party picket line would seemingly not constitute “interference with the activities required of employees” under the contract. The majority’s attempt to distinguish Machinists fails. It should make no difference that the language protecting employees’ right to honor third-party picket lines is in a separate article from the no-strike provision, rather than contained within the no-strike provision, as in Machinists. The contract must be viewed as a whole, and so articles 17 and 18 must be read together. To the extent that article 17 privileges the refusal to cross a third-party picket line, it is arguable that this particular conduct cannot properly be defined as a “strike” or “work stoppage” for purposes of article 18. Contrary to the majority’s argument, she finds that the contract need not expressly denominate article 17 as an “exception” to article 18, if the conduct article 17 privileges does not fall within the prohibition of article 18 in the first place.

5. Section 8(b)(3)

a. Refusal to Bargain

1. Steelworkers Local 14693 (Skibeck, PLC), 345 NLRB No. 46

The Board (Battista, Liebman, Schaumber; Liebman dissenting in part) held that the Union violated Section 8(b)(3) by purporting to disclaim interest in certain employees in an existing bargaining unit. In contrast to the ALJ, who focused primarily on whether the Union’s actions constituted an effective disclaimer of interest in representing employees, the Board relied on the nature of

the Union's conduct that constituted its refusal to bargain. The Union, in an attempt to comply with an arbitrator's ruling, had unilaterally asserted that it would no longer represent certain employees in the contractual bargaining unit and implied that the contract would no longer apply to those employees. In so doing, the Union, in essence, unilaterally changed the scope of the unit, which the Board has long recognized may not be unilaterally altered by either party. The majority (Chairman Battista and Member Schaumber) found it unnecessary to reach the issue of whether the Union's conduct also violated Section 8(b)(1)(A), because such a finding would not add materially to the remedy.

Member Liebman, in her partial dissent, would dismiss the allegation that the disclaimer also violated Section 8(b)(1)(A) because it somehow tended to restrain or coerce employees. She noted that the Union disclaimed interest solely to comply with an arbitrator's ruling requiring it to do so and not to retaliate against employees for engaging in protected activities. And, although the disclaimer violated the Union's duty to bargain, a violation of Section 8(b)(1)(A) cannot be established derivatively by finding a violation of Section 8(b)(3).

6. Section 8(b)(4)

a. Work Preservation v. Jurisdictional Dispute

1. IAM District 190, Lodge 1414 (SSA Terminal, LLC), 344 NLRB No. 126

The Board (Battista, Liebman, and Schaumber) quashed the notice of hearing after concluding that the dispute is a work preservation dispute and not a jurisdictional dispute subject to 10(k) proceedings. The work in dispute involved the monitoring, plugging, and unplugging of refrigerated cargo containers (reefer work) for SSA Terminal, LLC, at its Howard Terminal at the Port of Oakland in California.

ILWU Locals 10 and 75 moved to quash the notice of hearing, arguing that the dispute involves a work preservation claim rather than the kind of jurisdictional dispute contemplated by Section 8(b)(4)(D) and 10(k) of the Act. ILWU contended that SSA created this dispute by assigning the work in question, which had historically and consistently been performed by ILWU-represented longshoremen, to IAM-represented machinists in violation of the SSA/ILWU collective-bargaining agreements. ILWU further contended that SSA was seeking to obtain a Board order confirming its right to assign the work to IAM and releasing it from its contractual obligations to ILWU, and thus that SSA was not an "innocent" employer caught between two rival unions for which Section 10(k) was designed to protect. SSA and IAM argued that a bona fide jurisdictional dispute was properly before the Board, and that the Board should award the work

to IAM-represented machinists on the basis of employer preference and economy and efficiency of operations.

The Board found that the evidence failed to establish a traditional jurisdictional dispute between two rival groups of employees claiming the same work, with an innocent employer caught in the middle. Rather, it concluded that SSA created the dispute by unilaterally assigning to IAM-represented machinists work historically performed by ILWU-represented longshoremen, and thus that it was a true work preservation dispute. Accordingly, it was not appropriate for resolution under Section 10(k).

7. Deferral to Arbitration

1. Smurfit-Stone Container Corp., 344 NLRB No. 82

The Board (Battista, Schaumber; Liebman, dissenting), reversing the ALJ, finds that deferral to the arbitrator's decision that the Respondent had the right to unilaterally implement the new attendance policy is warranted. After noting that that the arbitral process was fair and regular, the Board addressed whether the arbitrator adequately considered the unfair labor practice, in particular whether the contractual issue is factually parallel to the unfair labor practice issue, whether the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice, and whether the decision is susceptible to an interpretation consistent with the Act.

With regard to whether the arbitrator adequately considered the unfair labor practice at issue, the Board notes that Dennison National Co., 296 NLRB 169 (1989) is controlling. The Board found that the arbitrator adequately addressed the statutory issue of whether the Respondent's adoption of a new absence control policy constituted a unilateral change by determining the contractual issue of whether the management rights clause of the parties' collective bargaining agreement permitted the Respondent's implementation of a new policy. The Board finds that a reasonable interpretation of the arbitrator's decision is that the management rights clause authorizes the implementation of the absence control policy.

In addressing whether the arbitrator's decision is clearly repugnant to purposes and policies of the Act, the Board finds that the arbitrator's decision is susceptible to an interpretation consistent with Act. The Board, while conceding that the arbitrator's decision here is not a model of clarity, finds that the arbitrator's decision, taken as a whole, is at least susceptible to the interpretation that it was based on the construction of the management-rights clause.

In addition, the Board rejects the General Counsel's argument that the arbitrator's decision is clearly repugnant to the Act because the arbitrator did not find that the management rights clause constituted a clear and unmistakable

waiver of the Union's right to bargain over the absence control policy. The Board notes that it has consistently found that an arbitral award "can be susceptible to the interpretation that the arbitrator found a waiver even if the arbitral award does not speak in [terms of a clear and unmistakable waiver]."

Contrary to the dissent, the Board distinguishes Columbian Chemicals Co., 307 NLRB 592 (1992), enfd. mem. 993 F.2d 1536 (4th Cir. 1992). Here, the arbitrator's decision, while discussing the theory that management enjoys certain inherent rights, is susceptible to the interpretation that he relied upon the management rights clause and is not dependent on an inherent management prerogative theory.

Member Liebman, in her dissent, argues that the arbitrator's decision is not susceptible to an interpretation consistent with the Act. Member Liebman notes that even if the arbitrator's invocation of the inherent management-rights theory could be considered dicta, deferral is still unwarranted. Member Liebman notes that under well-established Board law, the management rights clause may not even arguably be interpreted as waiving the Union's right to bargain over a change in the attendance policy. The clause makes no reference to attendance or to the employer's right to establish rules or policies of any sort, nor does the clause assert that management retains the authority to act unilaterally except as limited by the parties' agreement. Therefore, deferral is inappropriate.

2. Aramark Services, Inc., 344 NLRB No. 68

The Board (Battista, Schaumber; Liebman, dissenting), contrary to the ALJ, found that the arbitrator's decision that the Respondent properly disciplined the Charging Party for harassing other employees in connection with circulating a union petition, and the arbitrator's order that Respondent reinstate the Charging Party without backpay was not "clearly repugnant to the Act" within the meaning of Spielberg Mfg. Corp., 112 NLRB 1080 (1955), and Olin Corp., 268 NLRB 573 (1984). The Board found that the General Counsel did not show that the arbitrator's decision was "palpably wrong" – i.e., not susceptible to any interpretation consistent with the Act. Thus, deferral to the arbitrator's decision is appropriate and the complaint is dismissed.

The Board noted that under Olin/Spielberg, an arbitrator need not decide a case the way the Board would have decided it and that the Board will defer to the arbitrator's findings unless they are not susceptible to an interpretation consistent with the Act. With regard to the remedy, an arbitration award that otherwise meets Olin/Spielberg standards can be appropriate for deferral even if the award provides a lesser remedy than the Board would have ordered, i.e., reinstatement without backpay.

The Board notes that the issue in the arbitration as to whether there was just cause for Charging Party's discharge was factually parallel to Charging

Party's unfair labor practice charge. The Board finds that the arbitrator's reason for finding the individual's conduct was unprotected because of her harassment of coworkers is a sufficient basis to remove her conduct from protection of the Act. The Board also noted that the arbitrator analyzed the case consistent with the Board's approach to determining when union solicitation loses the protection of the Act. Thus, the Board finds that the arbitrator's decision is not palpably wrong and deferral is appropriate.

Member Liebman, in her dissent, argued that the arbitrator's decision was palpably wrong and deferral to the award is inappropriate. Member Liebman notes that the individual was disciplined for conduct occurring during her solicitation of signatures for a petition involving a union steward and the individual did nothing wrong to lose the Act's protection. Member Liebman notes that the arbitrator improperly relied on subjective reactions of other employees in finding that she harassed her coworkers. In Member Liebman's view, Board precedent establishes that the protected nature of union solicitation is not dependent on the "idiosyncratic" reaction of the employee and that union solicitations do not lose their protection simply because a solicited employee rejects them and feels "bothered" or "harassed" or "abused" by them. Member Liebman argues that the arbitrator strayed much too far from Board precedent for the Board to defer to his decision.

8. Jurisdiction

1. Carroll College, Inc., 345 NLRB No. 17

The Board affirmed the Acting Regional Director's decision and direction of election, holding that the Employer was not exempt from application of the Act by virtue of the Religious Freedom Restoration Act (RFRA). Thus, the Board found that the Employer had not shown that application of the Act will substantially burden its ability to freely exercise its sincere religious beliefs in any way. In applying that test, the Board accepted the D.C. Circuit's analysis in University of Great Falls v. NLRB, 278 F.3d 1335 (D.C. Cir. 2002), which held that a ruling that an entity is not exempt from Board jurisdiction under NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979), does not automatically foreclose a RFRA claim that requiring that entity to engage in collective bargaining would substantially burden its exercise of religion.

2. Salvation Army, 345 NLRB No. 38

The Board (Battista and Liebman; Schaumber, concurring) upheld the administrative law judge's finding that the Employer, which operates a residential pre-release service for persons released from prison or serving probationary sentences, violated Section 8(a)(1) by terminating a resident advisor for engaging in protected concerted activities. In so doing, the Board decided not to apply the

jurisdictional test of University of Great Falls v. NLRB, 278 F.3d 1335 (D.C. Cir. 2002), which the Board accepted in Carroll College, Inc., 345 NLRB No. 17 (2005), because although the Employer is a religious institution, its function with respect to the facility involved in this case is not one of religious education. Following Hanna Boys Center, 284 NLRB 1080 (1987), enfd. 940 F.2d 1295 (9th Cir. 1991), cert. denied 504 U.S. 985 (1992), the Board decided that the Employer's operation primarily is concerned with rehabilitative care, and that the sensitive issues raised by the Board's assertion of jurisdiction over religiously affiliated educational institutions are not present in this case.

Member Schaumber agreed with the Board's assertion of jurisdiction, but wrote separately to provide a fuller discussion of the applicable case law.

3. Air Line Pilots Association, 345 NLRB No. 51

The Board (Battista, Schaumber; Liebman dissenting) asserted jurisdiction over the matter and affirmed the judge's finding that the Respondent Union's pursuit of a grievance and counterclaim constituted unlawful secondary activity and that the object of the Respondent Union's conduct was to require DHL and its subsidiary Airborne to cease doing business with ABX, in violation Section 8(b)(4)(ii)(A) and (B) and 8(e).

The parties' dispute centers on whose pilots should fly the cargo handled by Airborne after its merger with DHL. DHL subsidiary DHL Airways entered into a collective-bargaining agreement with the Respondent Union in 1998. The agreement provided that all flying performed on behalf of the company or its successors would be performed by the Respondent Union's pilots. In 2001, after being acquired by a foreign company, DHL spun off its airline unit into a separate, U.S.-owned entity known as ASTAR. The new company entered into a contractual arrangement with DHL to provide the same air operations that the subsidiary unit had provided. In 2003, DHL merged with competitor Airborne Inc. Its pilots were represented by International Brotherhood of Teamsters. Following the merger, Airborne's air operations were spun off into a separate entity, which became ABX. Pilots who worked for Airborne became ABX employees, and ABX provided the same services as it previously had to Airborne's ground operation, which itself became a subsidiary of DHL. Although the merger altered their corporate structures, DHL and Airborne continued to operate their businesses in the same fashion as before, with pilots flying the same airplanes on the same routes. After the merger, the Respondent Union sought to extend its contractual status as the exclusive source of pilots for DHL to cover both DHL and Airborne. In August 2003, the Respondent Union filed a grievance against DHL, alleging that DHL's contract with ABX violated the collective-bargaining agreement provision that reserved pilot work for the Respondent Union's pilots. After DHL sought a declaratory judgment in a federal district court stipulating that the collective-bargaining agreement did not prohibit ABX from providing air services to DHL, the Respondent Union filed a counterclaim

requesting an injunction restraining DHL from contracting air services to ABX until arbitration could be conducted.

The threshold issue before the Board is whether the judge properly found that the Board has jurisdiction over the matter. Here, the Respondent Union and the dissent concede that the Respondent Union meets the definition of a labor organization under the National Labor Relations Act (NLRA). Although most of the Respondent Union's members are employed by air carriers covered by the Railway Labor Act (RLA) and not the NLRA, it acknowledges that it is still a labor organization for the purposes of the NLRA because it represents a unit of pilots who are employees under the NLRA because they are employed by Ross Aviation, an employer covered by the NLRA. According to the majority, once an entity is found to be a labor organization, it is subject to all of the prohibitions of Section 8(b). Observing that it is not aware of any case suggesting that a union can be covered by the NLRA under certain circumstances and not for others, the majority finds the Respondent Union is covered by Section 8(b)'s dictates.

In asserting that the Board lacked jurisdiction, the Respondent Union and dissent cite Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 70 LRRM 2960 (1969), a case in which the union, like here, represented both RLA- and NLRA-covered employees. The Supreme Court held in that case that even though the union was a labor organization for NLRA purposes, the Board lacked jurisdiction because the dispute was a "railway labor dispute, pure and simple." Thus, the dispute's nexus with the NLRA was limited to the union's representation of employees not implicated in the dispute in question. The majority, however, does not read Jacksonville Terminal as counseling against jurisdiction because the instant dispute is not a "pure" RLA dispute. Whereas in Jacksonville Terminal, all the participants in the dispute were covered by the RLA, here one of the employers—DHL—is covered by the NLRA and DHL is the object of the Respondent Union's allegedly unlawful coercion. The essence of the dispute, which the Board has been asked to resolve according to the majority, is not between only RLA-covered entities. Rather, the Respondent Union (an NLRA-covered labor organization) chose to enmesh DHL (an NLRA-covered employer) in its dispute with ABX (an RLA employer). Although the dissent characterizes the issue here as a conflict between two statutory regimes, the majority finds that the dissent has failed to explain why the Board should defer to the RLA, when the Respondent Union brought itself within the Board's jurisdiction by choosing to represent employees covered by the Act. Additionally, the majority states that it does not see how enforcing the NLRA's secondary boycott prohibition subverts the RLA. Although the RLA does not proscribe secondary activity, neither was it enacted to promote it.

Member Liebman, dissenting, contends that the Board does not have jurisdiction because this dispute is in essence covered by the RLA. Noting that the dispute involves an RLA-covered union and an RLA-covered employer, and that it concerns RLA-covered employees, she argues that the majority presented

no persuasive reason for invoking jurisdiction. She assumes that the Respondent Union is a labor organization under the NLRA, even though only 0.27 percent of its members are employed by non-RLA-covered employers. Nevertheless, she finds that the primary controversy here is between the Respondent Union and ABX, which is not an NLRA employer, and it concerns the rights of pilots who are not NLRA employees. Thus, the real question before the Board is which statutory regime--NLRA or RLA--governs the instant dispute. Jacksonville Terminal, supra, suggests that the RLA governs, since this case involves an RLA carrier and labor organization. Furthermore, in seeking declaratory judgment in federal court, DHL asserted that the case was a representational dispute within the jurisdiction of the National Mediation Board, which decides RLA-related disputes. With a federal lawsuit to adjudicate the parties' rights under the RLA pending, and with Supreme Court precedent suggesting that the Board does not have jurisdiction, she finds that the Board should decline to decide this case.

9. Protected Activity

1. Quietflex Manufacturing Co., 344 NLRB No. 130

The Board (Battista, Schaumber; Liebman dissenting) dismissed the complaint alleging that the Employer violated Section 8(a)(1) by discharging employees for refusing to vacate its parking lot where those employees engaged in a peaceful 12-hour work stoppage to protest their terms and conditions of employment. The majority rejected the General Counsel's contention that the instant matter should be analyzed under Tri-County Medical Center, 222 NLRB 1089 (1976), in which the Board found that the employer acted unlawfully in preventing an off-duty employee from distributing union literature in an outside area of its facility. In dismissing the complaint, the majority, like the judge, applied the principles set forth in Cambro Manufacturing Co., 312 NLRB 634 (1993) and Waco, Inc., 273 NLRB 746 (1984), where the work stoppages occurred inside the employers' facilities.

A group of 83 on- and off-duty Hispanic employees gathered in the company parking lot beginning at 7 a.m. Refusing to return to work, they presented a list of grievances. They complained that the company was paying more to the Vietnamese workers and treating them better than the Hispanic workers. They asked for a pay raise, improved vacation and holiday pay, and better working conditions. The Employer's management asked several employees to meet inside the plant, but they responded that they wanted to communicate as a group. A few hours later, the Employer's president told the assembled employees that he would not be able to grant the requested pay increase but was willing to discuss other issues raised in their grievance list. The employees rejected the president's suggestions that he meet with them in two days in three groups, according to their shift, and that he meet immediately with delegates selected by the employees. The president then directed the workers to either return to work or leave the company property. They responded that they would not leave or return

to work until all their demands were met. The president spoke to the employees again at 6:15 p.m. and renewed his offer to meet with delegates or conduct shift meetings. The employees declined and again said they would not leave until their demands were met. The president then read a statement in English, ending with an announcement that the employees would be fired if they did not leave the Employer's property by 7 p.m. A supervisor then repeated the statement in Spanish, but he said the police would be called if the workers did not leave. He did not say they would be fired if they did not leave by the deadline. The workers stayed until 7:15 p.m., when a sheriff's deputy arrived. When the employees attempted to return to work three days later they were told they had been fired. However, after learning that the employees might not have understood the warning that they would be fired if they did not leave by 7 p.m., the Employer offered reinstatement to all the employees.

The majority found that work stoppages are a protected method of applying economic pressure. However, the majority observed that in Cambro, supra, 312 NLRB 635, the board said: "At some point, an employer is entitled to exert its private property rights and demand its premises back." Previous board rulings identified a number of factors to be considered in determining whether a lawful work stoppage lost the protection of the Act: the employees' reason for the work stoppage; whether the work stoppage was peaceful; whether the work stoppage interfered with production or access to the property; whether employees had adequate opportunities to present grievances to management; whether the employees were warned that they would be fired if they did not leave the premises; the duration of the work stoppage; whether the employees had union representation; whether employees stayed on the premises after their shift ended; whether employees attempted to seize the employer's property; and the ultimate reason for firing the employees. Although Cambro, unlike this case, involved an inside work stoppage, the majority found, equally applicable here, the principle articulated in Cambro that employees are entitled to persist in their protest for a reasonable period of time, after which the employer is entitled to assert its rights as to its entire premises.

The majority noted that previous Board decisions have sought "to balance competing employer and employee rights, focusing on the degree of impairment of the employees' Section 7 rights if access is denied, compared to the degree of impairment of the employer's private property rights if access is granted. Indeed, "the duty of the Board is to accommodate both rights with as little destruction of one as is consistent with the maintenance of the other." NLRB v. Babcock & Wilcox Co., 251 U.S. 105, 112 (1956). In striking an appropriate balance between the Employer's and the employees' competing interests, the majority concluded that the factors favoring the Employer's property interests outweighed the employees' interests in airing their grievances to management and that the 12-hour duration of the employees' action here was unreasonable, particularly in view of the Employer's attempts to respond to their concerns. Certain factors weighed in favor of the 83 employees' rights. Thus, the majority found that the

work stoppage remained peaceful and did not take place inside the plant, the workers did not block access to the plant, they did not prevent other employees from working or deprive the Employer of the use of its property, they were not represented by a union, and there was no formal grievance procedure. But the majority also found that the 12-hour work stoppage by both on-duty and off-duty employees far exceeded the limited duration of work stoppages found protected by the Board. Although the Employer did not have a grievance procedure, it provided the employees numerous opportunities to present their complaints to management after the workers assembled in the parking lot. However, the employees made it clear that they would not leave the premises until all of their demands were met. The majority concluded that the employees were not discharged for engaging in protected activity on the Employer's premises. Rather, they were discharged for their refusal to leave the property after 12 hours of protest and notice of the demand that they leave by 7:00 p.m. Thus, after many hours of protest, the employees' continued presence on the Employer's property no longer served an immediate protected interest, and the Employer was entitled to assert its private property right.

Member Liebman, dissenting, assumed for the sake of argument that "at some point" the Employer would have the right to reclaim its parking lot from the protesting employees. She finds that point was not reached here, even after 12 hours, if proper weight is given to the nature and context of the employees' protest. The majority's conclusion that the Employer's property rights outweighed the employees' rights strikes her as destroying concrete labor law rights to preserve an entirely abstract property right, surely not the sort of careful accommodation that the Supreme Court had in mind. She finds that the employees' assembly served a protected interest at the very least until they had an opportunity to communicate and join with all of the company's employees as they arrived for work. This activity clearly was protected until employees in all three shifts were presented with the opportunity to withhold their labor and make common cause with the assembled employees. With no union to represent them, the workers were required to organize themselves. She observes that freedom of communication is essential to the exercise of employees' Section 7 right to self-organization. In contrast, the Employer's property right in this situation "was nominal" and the 12-hour assembly "did no real harm" to the Employer's property interest. She criticizes the majority for relying on prior decisions involving in-plant work stoppages, which present "a fundamentally different situation." She finds that the majority's assertion that the workers were fired because of their refusal to leave the property, rather than their protected activity, amounts to an "illusory" distinction. Vindicating an employer's property rights cannot justify punishing employees who exercise their statutory rights. She concludes that the majority here has deprived immigrant workers of a peaceful means of protest and self-organization, which did no real harm to their employer's legitimate interests.

2. Endicott Interconnect Technologies, Inc., 345 NLRB No. 28

The Board (Liebman, Schaumber; Battista dissenting) found that the comments of an employee who was fired for discussing his employer's decision to lay off employees in a local newspaper and on one of the newspaper's internet message boards constituted activity protected by the Act, not disloyal conduct warranting his discharge for cause. The Employer produces printed circuit boards for the computer industry. Two weeks after it purchased the business from IBM, the Employer permanently laid off approximately 200 employees. In response, the Union asked one of its members, who was not laid off, to speak to a local newspaper about the layoffs. He was subsequently quoted in a newspaper article as stating that the firings left "gaping holes in this business," and that "many of the people with specific knowledge of unique processes were let go, leaving voids in the critical knowledge base for the highly technical business." After the article was published, the Employer's co-owner told the employee that his comments disparaged the Employer in violation of the company handbook and warned him that he would be fired if it happened again. The employee subsequently responded to an anti-union message posted on one of the newspaper's internet message boards. In it, he said the Employer "was being tanked by a group of people that have no good ability to manage it."

The majority found that the judge's decision was in accord with NLRB v. Electrical Workers Local 1229 (Jefferson Standard), 346 U.S. 464 (1953), and its progeny. As explained by the Supreme Court in Jefferson Standard, supra, and more recently in Mountain Shadows Golf Resort, 330 NLRB 1238, 1240 (2000) "employee communications to third parties in an effort to obtain their support are protected where the communication indicated it is related to an ongoing dispute between the employees and the employers and the communication is not so disloyal, reckless or maliciously untrue as to lose the Act's protection." In applying the Jefferson Standard doctrine, the Board relies on the definition of a "labor dispute" in Section 2(9) of the Act. That definition comprehends disputes concerning either employment conditions or representation for collective bargaining. The presence of a union or a collective-bargaining relationship is not required. All that is required is a controversy that relates to terms or conditions of employment. Thus, the majority concluded that the permanent layoff of hundreds of employees as implemented by the Employer here was, by definition, a change in "employment conditions." Any labor dispute arising from those layoffs, regardless of whether or not a union was involved, constituted a "labor dispute." Viewed in context, the majority found that the newspaper article and the internet posting each provided more than enough information for an ordinary reader to understand that a controversy involving employment was at issue. From the newspaper article, it is apparent that the employee's interest was in the layoff's impact on employment conditions for workers continuing at the plant. Thus, there was identifiable an labor dispute. Similarly, the internet posting identified two employment controversies. The employee's statement about "job losses" clearly referred to the layoff of the 200 employees. The statement also referred to the ongoing dispute over union representation. Moreover, the majority found that the

requisite nexus between the employee's statements and those labor controversies was apparent. Disagreeing with the dissent's view that there was no connection between the employee's comments and the labor disputes, the majority found that the context of the article and of the posting—and not simply an evaluation of the employee's statements in isolation—made the required nexus clear. A layoff affects those who remain working, and not just those laid off. The remaining employees had a legitimate employment interest in the continuing viability of the Employer after the layoff which may be expressed through protected speech. Finally, the majority found that the employee's statements were not so egregious under the circumstances that the Act's protection should be lost. Thus, the Board has permitted far more offensive statements to retain their protected character. In context, his statements evinced no more than the kind of bias and hyperbole that the Board has found within the acceptable limits of Section 7 in Jefferson Standard situations. Accordingly, his conduct was protected in each instance.

Chairman Battista, dissenting, finds that the employee was fired for cause because of his disloyal and disparaging statements that he made against the Employer in the newspaper article and the internet posting. Unlike the majority, he finds that neither of the employee's statements discussed a "labor dispute" as defined by Jefferson Standard, supra, and its progeny. He observes that the statements had to clearly reveal to the public that a labor dispute was involved to avoid an unwarranted threat to a company's business based on a misapprehension of the nature of the communication. Although he agrees with the majority that the content of the employee's statements related to a term or condition of employment, those statements were not necessarily protected. Thus, he finds that the labor dispute here was about the plight of the employees who were being laid off, and the Union's opposition to that layoff. The employee's statements in the article, however, made the different point that the layoff would be detrimental to the quality of the Employer's product. Thus, the employee was not disciplined for what the article said, but his views as reported in the article. He also finds that the employee's internet posting lacked a clear nexus to the labor dispute concerning the layoffs. Although there was a reference to a potential loss of jobs, the major thrust of the posting was an attack on a third-party posting and on others who were perceived as being antiunion. The one clear reference was not about the plight of those laid off, but rather about the Employer's business. In light of the Employer's prior warning, the internet posting was insubordinate, he finds. Accordingly, the Employer was within its right to discipline the employee because of the newspaper article, and to discharge him for cause because of the internet posting.

3. DaimlerChrysler Corp., 344 NLRB No. 154

The Board (Battista, Schaumber; Liebman dissenting in part) reversed the judge's finding that the Employer violated the Act when it (1) placed an employee, who was a union steward, on notice of possible discipline in connection with his authoring e-mail messages regarding employee use of pool cars. The majority found that, through the three e-mail messages, the employee

was in effect encouraging unit employees to engage in a deliberate “slowdown.” It is well settled that employees who engage in deliberate “slowdowns” of work or encourage others to do so are engaged in activities not protected by the Act, and their discipline for such activity does not violate the Act. Davis Electric Contractors, Inc., 216 NLRB 102 (1975)(citing Elk Lumber Co., 91 NLRB 333, 337, 338 (1950)). First, the employee explicitly encouraged unit employees to “back track” so they would not save the Employer’s time, in an apparent attempt to obtain “more favorable pool car utilization.” Second, contrary to the parties’ contract, the employee encouraged employees to “shoot down” the Employer’s attempts to schedule group use of the pool cars. Thus, the actions advocated in the e-mails would confound the Employer’s efforts to provide pool cars consistent with the parties’ contract and would result in lost work time. Here, there was no claim made or evidence introduced that the employee sent the e-mails because he believed the Employer was violating the bargaining agreement either in the manner in which it provided pool cars or by requiring employees to use their own cars. Cf. Cleveland Pneumatic Co., 271 NLRB 425 (1984), enfd. 777 F.2d 339 (6th Cir. 1985). Rather, the employee’s e-mails were an attempt to frustrate and interfere with the Employer’s operations in order to modify the current contract or to obtain leverage in some future negotiation. The majority disagreed with the dissent’s view that the notice of possible discipline was “overbroad” in that it “could reasonably be interpreted as a threat of punishment simply for . . . attempting to enforce the terms of the parties’ contract.” First, the employee was not attempting to enforce the contract. Second, given the parties’ mature and established bargaining relationship and the employee’s status as an experienced union steward, he would not reasonably understand that the Employer’s reference to “potential improprieties” encompassed anything other than those portions of his e-mails calling for a “slowdown.”

The majority also reversed the judge’s finding that the Employer’s issuance of a warning to that employee, because of his abusive language towards a supervisor, violated the Act. Here, the employee approached the supervisor in an open area and sought to have an immediate grievance investigation meeting with the supervisor over an employee’s discharge. The supervisor suggested that the meeting take place the following week. In response, the employee, in a loud voice, called the supervisor an “asshole” and stated “bullshit, I want the meeting now.” After this exchange, the employee began to leave the area, but the supervisor asked him to stay. The employee approached the supervisor in an “intimidating manner” and loudly said, “fuck this shit,” and that he did “have to put up with this bullshit.” During this encounter, there were quite a few other employees in the immediate area. Where an employee engages in indefensible or abusive misconduct during otherwise protected activity, the employee forfeits the Act’s protection. Whether the Act’s protection is lost depends on the balancing of four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee’s outburst; and (4) whether the outburst was, in any way, provoked by an employer’s unfair labor practice. Atlantic Steel Co., 245 NLRB 814, 816 (1979). Applying these factors, the majority found that

the employee's conduct cost him the protection of the Act. Although the subject matter of the discussion weighed in favor of protection, the other three factors, place, provocation, and nature of the employee's conduct weighed against protection. Here, the employee's outburst occurred in an open area full of cubicles occupied by supervisors and employees, and was overheard by at least three people. In such a place, the employee's conduct would reasonably tend to undermine the supervisor's authority. The employee's outburst was insubordinate and profane, and although use of profanity was common in the workplace, there was no evidence that such language was common, much less tolerated, when used repeatedly in a loud attack on a supervisor that other workers could overhear. Finally, there was no evidence that the employee's outburst was provoked by any unlawful conduct by the supervisor. Accordingly, the majority found that the Employer lawfully disciplined the employee for his abusive conduct toward the supervisor.

Member Liebman, dissenting, agrees with the judge that the Employer's notice of disciplinary investigation to the employee/union steward for allegedly fomenting a "slowdown" was unlawfully coercive under Section 8(a)(1). She finds that the warning was unlawful even if the employee fomented an unprotected "slowdown," because it made no distinction between the protected and unprotected content of his e-mails. To the extent that the employee was undisputedly defending unit employees' explicit contractual right to decline to use personal cars for work, his activity was fully protected under Section 7. She finds that the warning was so unspecific that it could reasonably be interpreted as a threat of possible punishment for enforcing the parties' contract. Because the warning given was "overbroad," the Employer's defense—that it was contractually obligated to give advance warning of a disciplinary investigation that might lead to discipline—necessarily must fail, she finds. Contrary to the majority, she also finds that the employee did not lose the Act's protection by using profanities in a grievance-related conversation with a supervisor, and that the written warning he was given based in part on that conversation violated Section 8(a)(3) and (1). Although she agrees with the majority that the second factor in Atlantic Steel, supra, weighs in favor of finding protection, and that the first and fourth factors tend to weigh against protection, she gives the third factor—the employee's outburst—far less weight than the majority does, since profanity was used by both sides in the grievance process. Because the employee was clearly engaged in protected activity, she would find that his profanity on that one occasion did not cause him to lose the protection of the Act.

4. Service Employees International Union, Local 1, 344 NLRB No. 135

The Board (Battista, Liebman, Schaumber) reversed the judge's dismissal of the complaint allegation that the Employer Union violated Section 8(a)(1) of the Act by discharging its employee, a business representative, for complaining about and seeking a change in the Union's system for assigning work to its business representatives. The judge found that the Union lawfully discharged the business representative under the balancing test articulated in Operating

Engineers Local 370, 341 NLRB No. 114 (2004), wherein the Board held that, where a union-employer discharges a paid employee in a key position for activity that is critical of the union but also protected by Section 7, the employee's right to engage in such activity must be balanced against the union's legitimate interest in ensuring loyalty, support, and cooperation. Finding that the employee's activity regarding the new assignments was protected, and that the Union discharged the employee because of that protected activity, the judge nevertheless determined that the employee's discharge did not violate the Act because the Union's legitimate countervailing interest in administering its affairs in the manner it deemed most effective outweighed the employee's Section 7 rights.

Although the Board agreed with the judge that the Operating Engineers framework applies here, it found, unlike the judge that, under the particular circumstances, the balance favored the employee's Section 7 rights over the Union's interest. The Board found that the employee engaged in Section 7 activity when he attempted to induce group action among his coworkers to confront the employer about their shared concerns over the changes to the business representatives' daily job functions and when he subsequently raised those shared concerns with the Union's president. In determining whether the employee's Section 7 interest was outweighed by the Union's interest here, the Board regarded two considerations as particularly significant. First, this employee's Section 7 interest was more compelling than the employee's "arguable" Section 7 interest in Operating Engineers. Here, the employee engaged in classic protected concerted activity: he sought to band together with his coworkers to improve their daily working conditions. In contrast, the employee in Operating Engineers insisted on a change in the collective-bargaining agreement that had no impact on his and his fellow organizers' working conditions. Second, the Board found that this employee's activity was much less likely, when compared to the employee's activity in Operating Engineers, to impair the Union's legitimate interest in assuring its business representatives' loyal support of its policies. Even though the employee here complained about the Union's new system, there was no evidence that the employee "did anything to undermine or interfere with [its] implementation." Thus, his conversations were limited to in-house discussions with his fellow business representatives and with union officials. In contrast, the employee in Operating Engineers repeatedly aired his criticism during union membership meetings. As a result, the Board found that the Union's interest commanded less weight in the balancing required by Operating Engineers. Accordingly, the Board concluded that the Union violated the Act by discharging the employee because of his Section 7 activity.

5. Stanford Hotel, 344 NLRB No. 69

The Board (Battista, Liebman, Schaumber) held that the Employer violated Section 8(a)(1) by threatening to discharge an employee if he did not agree to be excluded from the collective-bargaining unit, and violated Section 8(a)(1) and (3) by subsequently discharging him. The Employer's general manager contended that the employee was a supervisor and thus not eligible for

union membership. At a meeting with the Union's agent to determine whether the employee was a supervisor, the manager continued to insist that the employee was a supervisor and threatened that employee in Korean that, if he did not tell the Union's agent that he was a supervisor, he would be fired. The employee responded by calling the manager a liar and a bitch. The manager rose to leave, stating that he could not continue the meeting. The employee then called the manager a "f—ing son of a bitch" in English. Another employee who had entered the lunchroom heard this latter remark. The manager discharged the employee that evening and sent him a letter stating: "You are terminated . . . for gross improprieties in your conduct with hotel management."

The Board found that the employee engaged in protected activity when he met with the Union's agent and the Employer's manager and asserted his right to union representation and inclusion in the collective-bargaining unit. When an employee is discharged for conduct that is part of the *res gestae* of protected concerted activities, the pertinent question is whether the conduct is sufficiently egregious to remove it from protection of the Act. *Aluminum Co. of America*, 338 NLRB 21 (2002). In making this determination, the Board examines the following factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979). Here, because the factors of place, subject matter, and provocation favored protection, while only the factor of the nature of the employee's conduct did not, the Board found that the employee did not lose the protection of the Act by his conduct. As for the first factor, the employee's outburst occurred away from his normal working area in an employee lunchroom in the basement of the building. When the meeting began, no other employees were present, and when the manager entered the room, the employee closed the door to maintain privacy. Despite the employee's efforts, one employee overheard the intemperate remarks. On balance, however, the Board found this factor weighed in favor of protection. Because the employee's conduct occurred in the context of his attempted assertion of a fundamental right under the Act, the Board also found that the second factor weighed in favor of protection. As for the third factor, the Board found that, because the employee's outburst was profane and offensive, it weighed against a finding that the employee's outburst was protected. Thus, there was no evidence that employees regularly used foul language in the hotel or in conversations with the manager and both the employee and the manager agreed that that cursing was inappropriate at the hotel. Finally, the fourth factor weighed in favor of protection because the employee's outburst was the direct and temporally immediate response to the manager's unlawful threat to discharge him if he did not declare himself ineligible for union representation.

10. Remedies

a. Liquidated Damages

1. Ryan Iron Works, Inc., 345 NLRB No. 56

The Board (Battista, Liebman; Schaumber, dissenting in part) concluded, in agreement with the ALJ's decision that the Respondent is obligated to make payments to the Union's Pension Fund for the strike replacement employees and for certain other employees, plus interest on those amounts. In determining whether payment of liquidated damages is appropriate, the Board, applying Merryweather Optical Co., 240 NLRB 1213 (1979), found that the provisions of the governing documents of the Fund clearly provide for specific liquidated damages. Thus, Merryweather Optical dictates that the contractual terms be enforced. The Board notes that the ALJ erred in finding a necessity for additional evidence that liquidated damages in the amount of 20 percent are needed to make the Fund whole. Under Merryweather Optical, such evidence is needed only when the documents governing the funds do not specify the amount of liquidated damages. Thus, in this case, because the provisions in the governing documents of the Fund clearly provide for specific liquidated damages, Respondent is obligated to make payments to the Fund as well as liquidated damages in the amount of 20 percent.

Member Schaumber, dissenting in part, agreed with the majority on Respondent's obligations to make payments to the Pension Fund but he would not order Respondent to pay liquidated damages in the amount of 20 percent of its delinquent contributions. In his view, the Board's practice of awarding liquidated damages, even absent evidence demonstrating their relationship to losses actually suffered, should be reexamined. In applying Merryweather Optical, Member Schaumber argues that an award of liquidated damages is not an appropriate make-whole remedy in this case as the Fund has failed to demonstrate that payment of any liquidated damages is necessary to make it whole for losses incurred as a result of the Respondent's unfair labor practices. Member Schaumber would limit any award of liquidated damages to 5 percent, the minimum amount stated in the pension plan documents as he finds that 20 percent liquidated damages are called for only when a lawsuit is filed by Fund Counsel.

b. Litigation Expenses

1. 675 West End Owners Corp., 345 NLRB No. 27

The Board (Battista, Liebman and Schaumber) finds that a compliance hearing should be held to determine the litigation costs expended by the Union and the General Counsel as a result of Respondent's bad faith in the conduct of the litigation by violating the ALJ's instructions regarding the subpoenas. The subpoenas involved Respondent's requests for information already in Respondent's possession and revoked by the ALJ and audiotapes of the hearing.

The Board found that litigation costs incurred because of Respondent counsel's willful violations of the ALJ's instructions regarding subpoenas are appropriate in this case. The Board noted that although the D.C. Circuit in Unbelievable, 118 F.3d 795 (D.C. Cir. 1997), reversing in relevant part Frontier Hotel & Casino, 318 NLRB 857 (1995), found that the Board does not have the power to impose litigation costs under Section 10(c), the Court did not expressly reach the issue of whether the Board has the power to award litigation costs under appropriate circumstances such as here where there is bad faith in the conduct of litigation.

Chairman Battista would not award litigation costs in this case. The alleged disobedience of the judge's instructions was a discrete event and if the allegation is true, he notes that it is cognizable under Section 102.177 of the Board's Rules and Regulations, as is the other alleged misconduct by counsel in this case. Chairman Battista notes that he is not reaching issue of the Board's power to award litigation costs. In Chairman Battista's view, the D.C. Circuit in Unbelievable held that, absent clear language in Section 10(c), the Board lacked the remedial power to award litigation costs.

c. Individual Liability

1. A.J. Mechanical, Inc., 345 NLRB No. 22

The Board (Battista, Schaumber; Liebman dissenting) dismissed the compliance specification with regard to allegations that Respondent's co-owner and his wife should be personally liable for backpay owed to employees as a result of unfair labor practices committed by the non-defunct Respondent. The ALJ, applying the two-prong test in White Oak Coal Co., 318 NLRB 732 (1995), enf. mem. 81 F. 3d 150 (4th Cir. 1996), found that these individuals failed to maintain separate legal identity from A.J. Mechanical and that adherence to the corporate shield would unjustly result in the evasion of the defunct Respondent's backpay obligations incurred through unfair labor practices that the Respondent, through its owner and others, committed. Thus, the corporate veil should be pierced and both owner and his wife are personally responsible, jointly and severally with Respondent A.J. Mechanical for the backpay obligation.

The Board, assuming *arguendo* that the General Counsel established that the separate identity of A.J. Mechanical had not been maintained under first prong of White Oak Coal Co., found that the timing of the distribution of corporate assets does not support ALJ's finding that adherence to the corporate form would lead to evasion of legal obligations. The majority note that the process of distribution of assets began prior to the filing of the unfair labor practice charges and to issuance of complaint and the shareholder distributions were merely a continuation and completion of a process that had begun before unfair labor practice charges were filed.

Member Liebman, in her dissent, argued that the corporate veil should be pierced even though the process of draining funds began before the filing of unfair labor practices, since the process was part of a strategy to defeat the Union and the Board's remedies. Member Liebman noted that most of the backpay owed to employees is the result of Respondent's shutdown after the Union was certified and the Company unlawfully refused to bargain with the Union. In addition, Member Liebman notes that the funds distributed after the first unfair labor practice charge was filed exceed the monetary liability. In Member Liebman's view, while the owner was entitled to close his business in response to employees' union activities, he was not free to strip the company of its assets and thereby effectively defeat the Board's order.

d. Broad Order

1. Postal Service, 345 NLRB No. 25

The Board (Battista, Liebman; Schaumber, dissenting in part) found that a broad cease and desist order was appropriate remedy for Respondent's repeated violations of its statutory duty to provide information. The Board, under standard in Hickmott Foods, 242 NLRB 1357 (1979), found broad cease-and-desist order is appropriate based on several factors. The Board noted that in less than two years, Respondent had committed a series of Section 8(a) (5) violations involving repeatedly refusing to provide information as the same facility. Another factor that supports imposition of a broad order includes that the violations in the instant case occurred after the Board issued an uncontested narrow cease and desist order in a prior case involving the same parties. The Board also noted that when the Union's information requests pertain to grievance investigation, as here, the Respondent's repeated unlawful refusals to provide such information have the potential to hide other misconduct. It was also noted that Respondent presented a weak defense. Also, violations at this facility must be considered against a background of two decades of wide and repeated information refusal violations by Respondents in several facilities nationwide. In addition, the Board recently issued a broad cease-and-desist order against Respondent for similar repeated information refusals at other facilities. The last factor the Board noted was that on same day Board issued this decision, Board issued decision in Postal Service, 345 NLRB No. 26 (2005), imposing a broad cease-and-desist order against Postal Service in Albuquerque, New Mexico facility where management not only committed Section 8(a)(5) information request violations but also committed numerous unfair labor practices which provides further reason to anticipate from its past course of unlawful actions that it is likely to violate employees' Section 7 rights "in any manner" in the future and should be enjoined from doing so.

Member Schaumber, dissenting in part, citing to Hickmott and NLRB v. Express Publishing Co., 312 U.S. 426 (1941), contends that a broad order is inappropriate in this case. Member Schaumber notes that the failure to respond to four information requests in violation of a single subsection of Section 8(a) does

not satisfy the stringent Hickmott standard. In Member Schaumber's view, to justify a broad order under Express Publishing Co., the conduct must demonstrate a general disregard for fundamental statutory rights and raises the threat of continuing and varying efforts to frustrate those rights in the future. Member Schaumber adds that recidivism alone is insufficient to impose a broad order.

2. King Soopers, Inc., 344 NLRB No. 103

The Board (Battista, Liebman and Schaumber) found that employer violated Section 8(a)(5) by refusing to furnish and delaying in providing requested information involving reports taken in connection with investigations of employees' alleged violations of work rules. In rejecting argument that a broad cease-and-desist order under Hickmott Foods, 242 NLRB 1357 (1979), is warranted, the Board noted that neither the General Counsel nor the Charging Party excepted to the ALJ's failure to grant a broad cease-and-desist order. The Board further rely on considerations cited in King Soopers, Inc., 344 NLRB No. 104 (2005), where Board denied General Counsel's request for a broad cease-and-desist order against Respondent.

Member Liebman would grant a broad cease-and-desist order under Hickmott Foods, based on violations found in this case and violations found in other proceedings before the Board, as this shows Respondent has demonstrated a proclivity to violate the Act.

11. Status

a. Independent Contractors

1. St Joseph News-Press, 345 NLRB No. 31

The Board (Battista, Schaumber, Liebman dissenting) held that the Employer's newspaper carriers and haulers are not employees under Section 2(3) of the Act, but are independent contractors excluded from the Act's protection under the standard set forth in Roadway Package Systems, 326 NLRB 842 (1998), and Dial-A-Mattress Operating Corp., 326 NLRB 884 (1998). The majority dismissed the complaint alleging that the Employer committed numerous violations against the independent contractors, including discharging the carriers because of their union activities. Contrary to the judge, the majority found that post-Roadway cases in which the Board has found employee status were distinguishable. See, e.g., Stamford Taxi, Inc., 332 NLRB 1372 (2000); Corporate Express Delivery Systems, 332 NLRB 1522 (2000), *enfd.* 292 F.3d 777 (D.C. Cir. 2002); Slay Transportation Co., 331 NLRB 1292 (2000). The majority noted that the Board's reasoning in Roadway and Dial-A-Mattress in no way diminishes the weight of the Board's earlier cases which addressed both the right of control test along with other common law factors.

The Employer publishes a daily newspaper. Haulers pick up the bundled papers at the plant and bring them to common drop points, where carriers pick them up. Carriers deliver papers to the Employer's customers. They also place papers in newspaper racks, deliver them to dealers, and drop newspapers at the post office to be mailed to subscribers. The majority found that a comparison of the common law factors in this case with those factors in Roadway and Dial-A-Mattress demonstrate, on balance, that the carriers are independent contractors. The majority noted the following factors in finding that the carriers here are independent contractors: the carriers provide their own "tools" of work, i.e., their vehicles; they receive little training from the Employer; they are not supervised by the Employer while performing the work; they have the ability to impact their own compensation; they may hire their own employees; they may work for more than one party; they can solicit new business; they can subcontract their routes to others; they are free to change the order of delivery, to disregard customers' delivery requests without fear of discipline, and refuse to deliver to customers they deem unlikely to pay or to whom it would not be economically feasible to deliver; they sign contracts which state they are independent contractors, the Employer does not withhold income taxes from the carriers' pay, and they do not wear company uniforms or insignia. The majority, nonetheless, also found several factors that weigh in favor of employee status including that the work of the carriers is an integral part of the Employer's business, the fact that the work performed by the carriers is not particularly skilled, the long-term nature of the relationship between the carriers and the Employer, and how other workers compare to the carriers.

Addressing the argument that the carriers should be found to be employees because of their asserted lack of bargaining power, the majority explained that the status of persons as employees and independent contractors does not turn on differences in their relative bargaining power. The dissent's approach is contrary to the statute, precedent and common law and there is no support for the idea that economic factors should be used in balancing the common law's approach to agency and that such an intrusion of economic issues could result in significant instability. The common law of agency, as applied by the Board, does involve an analysis of the business relationship; consequently some of the factors considered are obviously "economic" in nature. But it does not, and under the current state of the law, cannot, follow that the Board must import economic dependence or differences in economic strength as factors in applying the common law of agency.

Member Liebman, dissenting, contends that the Employer's substantial economic advantage over the carriers results in a relationship of economic dependence on the newspapers and is persuasive evidence that the carriers are employees, who are substantially dependent on the Employer for their livelihood, not independent contractors who are economically independent business people. She finds it hard to reconcile the majority's approach here with the Board's recent ruling in Brown University, 342 NLRB No. 42 (2004), where the Board majority

rejected strong adherence to the common law approach to defining “employee” and instead looked to the economic relationship. The majority concedes that there is considerable evidence otherwise demonstrating that the carriers are employees, rather than independent contractors. When those factors are matched with the evidence establishing the carriers’ economic dependence on the newspaper, she finds that the result is clear under the common-law agency test that the carriers are employees under Section 2(3). Similar contractor-like relationships have become prevalent in more and more workplaces as companies increasingly seek flexibility in a more competitive economic climate. The economic dependency evident in many of these “contract labor” relationships makes the question of labor law coverage worthy of fresh evaluation. It is critical, then, she explains, for the Board to acknowledge the role that economic dependence plays in both traditional and newer, nontraditional employment relationships. She finds, however, that the majority has chosen to apply a rigid, outdated version of the common law agency test, one which ignores relevant economic factors and contradicts the true spirit of the common law: flexibility and growth to match a society in constant development.

b. Managerial (Faculty)

1. LeMoyne-Owen College, 345 No. 93

The Board (Battista, Schaumber, Liebman dissenting) held that the Employer’s faculty members are managerial employees under NLRB v. Yeshiva University, 444 U.S. 672 (1980) and excluded from coverage under the Act. This supplemental decision follows a remand from the U.S. Court of Appeals for the District of Columbia Circuit of the Board’s previous decision reported at 338 NLRB No. 92 (2003), in which the Board found that the Employer violated Section 8(a)(5) and (1) by failing and refusing to recognize the employees’ certified representative and ordered the Employer to recognize and bargain with the Union. The court remanded the case for further proceedings, finding that the Board failed to address “how its disposition is consistent with its contrary holdings in the post-Yeshiva cases that appear to have presented similar facts.”

The majority determined that the faculty, whether acting as individual faculty members, through committees, or in the faculty assembly, make or effectively recommend decisions in a majority of the critical areas identified in Yeshiva and the subsequent cases applying it. The faculty governing document, the faculty handbook, states that the faculty have primary responsibility of “recommending academic policy.” The record evidence of the actual decision-making by the faculty supports the grant of authority contained in the handbook. With regard to the curriculum, the faculty effectively controls curriculum decisions, including courses of study, adding and dropping courses, degree and degree requirements, courses of study and course content, majors and minors, academic programs and divisions, the addition and deleting of courses, course content, teaching methods, grading, academic retention, lists of graduates, selection of honors, admission standards, syllabi, and textbooks. The faculty also

have made effective decisions in several nonacademic areas, including tenure standards and selections and faculty evaluation procedures. The majority disagrees with the Regional Director's analysis, which largely questioned the independence and effectiveness of the faculty's recommendations. The Regional Director disputed the independence of the faculty standing committees and the faculty assembly because they included non-faculty members. However, it is undisputed that the curriculum committee, academic standards committee, and the faculty assembly, which approve many academic decisions, are overwhelmingly comprised of faculty members. The Regional Director also disputed the effectiveness of faculty recommendations because of the "potential" for the decline in faculty influence as the recommendations proceed through the administrative hierarchy. The evidence, however, established that the faculty's recommendations have been routinely approved by the administration. Based on well-settled law, the majority finds that the faculty play a major and effective role in the formulation and effectuation of management policies and that they are managerial employees. Accordingly, the majority dismissed the complaint, vacated the Union's certification, and dismissed the petition.

Member Liebman, dissenting, finds that the majority neglects the principle that statutory exclusions must be interpreted narrowly to avoid denying rights, which the Act is intended to protect. Instead, the majority (1) broadly interprets previous cases finding managerial status and concludes that those cases dictate a finding of managerial status here, and (2) relies on evidence concerning the effectiveness of the faculty's recommendations with regard to curriculum and other matters that is far too thin to support a finding of managerial status. She concludes that the Employer has not met its burden of proof and has not adduced sufficient evidence that the faculty's recommendations are actually effective. Thus, she would reaffirm the Board's prior decision and find that the Employer violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union.

2. Point Park University, 344 No. 17

The Board (Battista, Liebman, Schaumber) granted the General Counsel's Motion for Summary Judgment in this test of certification Section 8(a)(5) proceeding, since all representation issues raised by the Employer were or could have been litigated in the prior representation proceeding. In its answer and its response to the Notice to Show Cause, the Employer urged the Board to order a hearing and/or reopen the record in this case in order to take evidence on changed circumstances since the close of the hearing, which is relevant to the issue of the managerial status of the faculty. Thus, the Employer contended that since the close of the hearing, the faculty has exercised its managerial authority in a number of situations, and that such information is highly relevant and should be considered by the Board. Additionally, the Employer argued that the Board should stay the proceedings in this case, pending the issuance of the Board's decision in LeMoyne-Owen College, 345 NLRB No. 93 (2005), after remand from the D.C. Circuit in LeMoyne-Owen College v. NLRB, 357 F.3d 55 (2004).

The Board found both these arguments to be without merit. With respect to reopening the hearing in order to take evidence on changed circumstances since the close of the hearing, it is well established that the Board does not “determine voter eligibility on the basis of after-the-fact considerations.” Arlington Masonry Supply, Inc., 339 NLRB 817, 820 fn. 15 (2003). As for staying the proceedings in this case, the Board addressed the LeMoyne-Owen decision in its unpublished Order issued on June 23, 2004, denying the Employer’s request for review except for permitting one individual to voter under challenge. The Board stated: “We are mindful of the Court of Appeals for the District of Columbia’s decision in LeMoyne-Owen College v. NLRB, 357 F.3d 55 (2004), that, in deciding the managerial status of the faculty, here, we must consider how our disposition of the case is consistent with precedent. We find that the Regional Director’s decision, which includes a thorough discussion of the facts and precedent, addresses the court’s concerns.” Because the Employer did not offer to adduce any newly discovered and previously unavailable evidence, nor identified any special circumstances that would require the Board to reexamine the decision made in the representation proceeding, the Board denied the motion to reopen the record and granted the Motion for Summary Judgment.

c. Supervisors

1. Wilshire at Lakewood, 345 NLRB No. 80

The Board (Battista, Schaumber, Liebman dissenting) reversed its September 30, 2004, decision, which held 2-1 that a registered nurse (RN) was not a supervisor and that the Employer violated the Act by firing her for circulating a petition protesting a proposed change in working conditions. After the Employer filed an appeal with the U.S. Court of Appeals for the Eighth Circuit, the Board decided sua sponte to reconsider the prior ruling. On reconsideration, the majority found that the RN is a supervisor under Section 2(11) and not protected by federal labor law. With respect to discipline, the RN’s authority to correct employee infractions included the ability to issue, at her discretion, a disciplinary write-up of the infraction, which was placed in the employee’s personnel file. While the Board’s original decision found little significance to these write-ups insofar as they did not necessarily lead to further disciplinary action in every instance, the fact remains that these write-ups played a significant role in the disciplinary process, and they were initiated by her independent determination that the committed infraction was egregious enough to warrant the write-up. She also exercised independent judgment in sending employees home and in evaluating an employee’s performance. Thus, on two occasions she independently initiated discussions with managerial officials after observing misconduct, leading to her sending the employees home, and on two other occasions she independently granted employee requests to leave early to attend to personal matters. The majority also relied on certain secondary indicia of supervisory authority, including the RN’s title, her status as the highest-ranking and highest-paid employee on the weekends, and her participation in managerial

meetings. The majority found it unnecessary to address whether the RN exercised independent judgment in responsibly directing other employees.

Member Liebman, dissenting, finds that the RN merely reported information to management officials, did not take or effectively recommend any disciplinary action, and merely received notice on two occasions that an employee had to leave early because of an emergency involving the employee's child. She observes that such bare reporting of information has never provided the basis for finding supervisory status. The reports the RN provided clearly contained no recommendations whatsoever and they did not represent adverse action themselves. Indeed, the reports did not lead with any predictability to discipline. Filling out part of one probationary employee's evaluation without making any specific recommendation was inadequate to support a supervisory finding. The early departures of two employees for a child's medical emergency was "obviously compelled" and "not dependent" upon the RN's approval. Because the majority avoided deciding whether this individual exercised independent judgment to responsibly direct employees, they did not have to resolve the issue left open by NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706 (2001). To avoid that issue, however, the majority departed from Board precedent governing the supervisory criteria that it did rely on. She finds this step to be unwise--as is the majority's sua sponte reversal of the Board's original decision in this case.

2. Riverboat Services of Indiana, 345 NLRB No. 116

The Board (Battista, Liebman, Schaumber) held that the Employer violated Section 8(a)(1) by threatening its employees and discharging three individuals employed as assistant chief engineers because of their protected concerted activities in contacting the Coast Guard about their working conditions. The Employer argued that the complaint should be dismissed because the assistant chief engineers were supervisors under Section 2(11) and not protected by the Act. The Board disagreed, citing NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706 (2001), in which the Supreme Court upheld the Board's rule that the burden of proving supervisory status under Section 2(11) rests with the party asserting it. The Board agreed with the judge that the Respondent failed to adduce any evidence that the assistant chief engineers exercised independent judgment in disciplining, managing, or directing the work of unlicensed crew or in standing watch. The record showed that their authority was limited and circumscribed. As to discipline, the record contained no probative evidence that their involvement in discipline went beyond referring problems to their supervisors. Although the assistant chief engineers testified that unlicensed engine room employees were expected to follow their instructions, the record revealed that such employees' duties were limited to routine maintenance and repair and were directly supervised by the chief engineer. The Employer failed to specify through documentary evidence or probative testimony, any directions an assistant chief engineer would give an unlicensed employee involving deviation from well-established routine. Without evidence that direction of the work of

unlicensed employees involved independent judgment, the Employer's argument that the assistant chief engineers' direction of crew members demonstrates supervisory authority must fail. Finally, although assistant chief engineers were expected to take charge of the engine room when the chief engineer was absent, they did not regularly stand watch without a chief engineer, and the chief engineer was rarely absent from the vessel and was accessible by telephone and radio at all times. Such limited authority does not establish supervisory status.

d. Agency

1. Albertson's Inc., 344 NLRB No. 141

The Board (Battista, Liebman, and Schaumber, concurring in part and dissenting in part) adopt the judge's finding the Employer's bookkeeper was an agent of the Employer when she, in effect, instructed two employees not to engage in protected activities, that her statements were attributable to the Employer and that the Employer violated Section 8(a)(1) through those statements. The Board's test for determining whether an employee is an agent of the employer is whether the alleged agent's position and duties, and the context in which the conduct occurs, establish that employees would reasonably believe that the alleged agent was reflecting company policy and speaking and acting for management. See Pan-Osten Co., 336 NLRB 305, 306 (2001). One of the bookkeeper's duties was to serve as a witness when the store manager met with female employees during interviews which involved discipline or counseling. It was in this capacity that she sat in on the meetings in which the manager expressed his disapproval of the employees complaining about working conditions. The majority finds that the bookkeeper was more than a neutral witness at these meetings, since she was there at the behest of the manager and in his interest. Her remarks were reflective of those of the manager and he did not disagree with her remarks. The employees testified that the bookkeeper's authority was substantial. Thus, employees would reasonably understand that she was reflecting the wishes of management. Because her remarks were substantively 8(a)(1) violations, and since she spoke in part for management, a violation was established. The majority disagrees with the dissent's analysis and conclusions, noting that there is no requirement in the Board's test for agency status that an alleged employee agent must be a "conduit" for management in order to be found the employer's agent.

Member Schaumber, dissenting, finds that the bookkeeper was not the Employer's agent when she sat in on meetings during which the store manager met with two employees. Consequently, he would reverse the judge's findings that the bookkeeper's comments at those meetings are attributable to Employer and that the Employer violated Section 8(a)(1) through her comments at those meetings. He agrees with the majority and the judge regarding the test for determining agency status. In applying that test, however, he is mindful that it is the burden of the party asserting that an individual has acted with apparent

authority to establish the agency relationship and that the party who has the burden to prove agency must establish an agency relationship with regard to specific conduct that is allegedly unlawful. Pan-Osten Co., supra. He finds that the General Counsel failed to meet this burden. Finding that an employer has used an individual as a “conduit” for the conveying of information from management to employees is a “key aspect” in the analysis of whether the individual acted with apparent authority in respect to the conduct in consideration. See Mays Electric Co., 343 No. 20, slip op. at 5 (2004). In the present case, it is clear that the bookkeeper did not serve as a “conduit,” i.e., one who transmits information from management to employees.

12. Section 10(b)

1. Media General Operations, Inc., d/b/a Richmond Times-Dispatch and Richmond Newspapers Professional Association, 346 NLRB No. 11

The Board (Liebman and Schaumber; Battista, concurring in part), in this case involving disparate enforcement of a computer/ e-mail policy, reversing the administrative law judge, found that a complaint allegation was timely because the Union had clear and unequivocal notice of a separate, independent act of disparate enforcement within the 10(b) period. Citing Seton Co., 332 NLRB 979 (2000), in which the Board set forth the evidence of disparate enforcement occurring outside the limitations period, but found unlawful only the enforcement occurring within the period, the Board emphasized that as in Seton, it was only relying on the unlawful conduct occurring within the 10(b) period. That the Employer had also disparately enforced its rules outside the 10(b) period, which was not alleged as unlawful in the complaint, would not “forever immunize the [Employer] from allegations that it unlawfully enforced its rule through new actions taken within the statutory period.” Therefore, the complaint allegation was timely, and the Employer violated Section 8(a)(1).

Chairman Battista concurred in the conclusion that Section 10(b) did not bar the allegation that the Employer disparately enforced its computer/ e-mail policy, explaining that although the Employer gave clear and unequivocal notice of its discriminatory practice outside the 10(b) period, thereafter the Employer did not consistently apply that policy, and the Union would have reasonably believed that the Employer was no longer following that policy. When the Employer renewed its disparate treatment within the 10(b) period, the Union filed its unfair labor practice charge. Thus, because the Union filed the charge after the new application of the policy, there was no time bar. If the Employer had consistently applied that policy following the first unequivocal notice, however, the Chairman would have found the charge to be time barred.

In addition, Chairman Battista noted that, in his view, Seton Co., cited by the majority, was inapposite as in that case the argument was focused on whether allegations were “closely related” under Redd-I, 290 NLRB 1115 (1988), to an

earlier and timely filed charge. In response, the majority agreed that Seton found a complaint allegation to be closely related to a timely filed charge, but that Seton was relevant to the question of 10(b) and disparate enforcement of a policy because in that case, the Board found violations based on disparate enforcement occurring within the 10(b) period.

2. Ohio and Vicinity Regional Council of Carpenters (The Schaefer Group, Inc.), 344 NLRB No. 37

The Board (Battista, Schaumber; Liebman, concurring), in this Section 8(b)(1)(A) case, reversing the administrative law judge, held that under Section 10(b) of the Act, the complaint was time barred as the Charging Party had clear and unequivocal notice outside the 6-month limitations period that the Union would not seek enforcement of an arbitrator's award. Noting that the 10(b) period begins to run at the time the Charging Party first has "knowledge of the facts necessary to support a ripe unfair labor practice" (quoting St. Barnabas Medical Center, 343 NLRB No. 119 (2004)), the Board explained that the relevant unfair labor practice was the Union's alleged breach of its duty of fair representation to the Charging Party in the handling of the employee's grievance.

The Board found that the Charging Party had notice of the Union's decision not to seek enforcement of an arbitration award by late February 2000, well outside the six-month period prior to filing the charge, and that the 10(b) period began to run at that time. The Board explained that the Charging Party was aware of the Union's alleged unlawful conduct and that he knew that he could file an unfair labor practice charge against the Union. Thus, according to the Charging Party, he sent a letter in late February 2000, to the Board's Regional Office asking that the Board investigate the Employer, complaining of the lack of enforcement of the arbitrator's award; the Charging Party did not file a charge at that time against the Union. Thereafter, the Charging Party had no contact with the Union about enforcing the award until December 2000. Contrary to the administrative law judge, the Board concluded that although in December 2000, the Union indicated that it would seek to enforce the arbitration award, the Union's belated efforts could not revive the Charging Party's unfair labor practice claim; that limitations period expired in August 2000. The Union's efforts included a failed November 2001 to enforce the award in federal district court, itself dismissed as time barred under the applicable one-year state statute of limitations. The Union's decision not to appeal the district court's dismissal, communicated to the Charging Party in July 2003, did not render an August 2003 unfair labor practice charge timely.

Member Liebman concurred in the result without opinion.

3. Aljoma Lumber, 345 NLRB No. 19

In this Section 8(a)(1), (3), and (5) case, the Board (Battista, Liebman, and Schaumber) dismissed a Section 8(a)(5) and (1) complaint allegation, reversing the administrative law judge, finding both that the Employer timely raised an affirmative defense that the allegation was time barred, and that the allegation itself was time barred. As the Board stated, a Section 10(b) defense is an affirmative defense that must be timely raised either in the pleadings or at the hearing, or is deemed waived. In this case, the Employer timely raised the defense at the hearing, and the judge allowed the Employer to amend its answer to include the defense. Additionally, the Union had actual or constructive notice of the conduct that constituted the alleged unfair labor practice more than 6 months before the unfair labor practice charge was filed. The notice was of a unilateral change in unit employees' work hours. The Board rejected the General Counsel's contention that the 8(a)(5) and (1) allegation was timely because it was "closely related" under Redd-I, Inc., 290 NLRB 1115, 1118 (1988), to timely filed allegations. To satisfy the Redd-I test, (1) the otherwise untimely allegation would involve the same legal theory as the timely filed charge's allegation; (2) the otherwise untimely allegation would arise from the same factual circumstances or sequence of events as the timely filed charge's allegation; and (3) the respondent would raise the same or similar defenses to both allegations. The Board concluded that the record did not support a finding that the allegations were closely related under Redd-I. Although two allegations apparently involved the same legal theory, the General Counsel had not met his burden of showing that both allegations arose out of the same facts as it was not clear what factual circumstances were underlying the timely filed charge, and what was known indicated that it was entirely separate from the conduct occurring outside the 10(b) period, involving different unilateral changes and affecting the terms and conditions of employment of specific individuals rather than an entire shift of employees. With the lack of clarity in the record as to the conduct underlying the timely filed charge, the Board could not find that the Employer would raise the same defense to both allegations. Therefore, the finding of a Section 8(a)(5) and (1) violation in this regard was reversed and the allegation dismissed on 10(b) grounds.

4. Alternative Services, Inc., 344 NLRB No. 99

The Board (Battista, Liebman, Schaumber) granted the Employer's motion and dismissed the complaint pursuant to Section 10(b) of the Act. On May 19, 1994, the Charging Party Union filed unfair labor practices charges with the Michigan Employment Relations Commission (MERC) against the Employer, a group home provider, and the State of Michigan. At the time, the Board applied a discretionary jurisdictional standard over private employers receiving government funding. Res-Care, Inc., 280 NLRB 670 (1986). Subsequently, the Board issued Management Training, Inc., 317 NLRB 1355 (1995), reversing the Res-Care discretionary jurisdictional standard. The Board did not address whether it would retroactively apply its new jurisdictional standard. On March 31, 1997, the Michigan legislature amended its Public Employee Relations Act to exempt

residential care workers from being classified as state employees under MERC's jurisdiction. Citing lack of jurisdiction, MERC dismissed the underlying case on November 10, 1997.

With respect to the Employer's motion to dismiss, the Board recognized that the 6-month limitation period of Section 10(b) does not begin to run until the charging party has "knowledge of the facts necessary to support a ripe unfair labor practice charge." St. Barnabas Medical Center, 343 NLRB No. 119, slip op. at 3 (2004). The Board noted, however, that it has never held—nor has it previously been asked to decide—whether the doctrine of equitable tolling applies to a situation where, as here, a charging party excusably does not know of the existence of a cause of action before the Board and timely files charges in a non-Board state forum which, at the time of the filing, had competent jurisdiction over the matter. Assuming, arguendo, that the doctrine of equitable tolling applies in this circumstance, the Board held that it does not excuse the failure of the Charging Party to file the instant charges with the Board until February 1998. The doctrine requires the exercise of reasonable diligence on the part of a charging party. Here, exercising reasonable diligence, the Board found that the Charging Party should have known by March 31, 1997, at the very latest, that MERC clearly lacked jurisdiction and that the proceedings before MERC would be dismissed. It should have filed its charges with the Board in a timely manner thereafter. The Board noted that, although it need not decide whether the Charging Party should have known at an even earlier date that MERC lacked jurisdiction, it found that date was arguably July 28, 1995, when Management Training Corp. was decided. Even if it were to toll Section 10(b) through March 31, 1997—the most recent date—the Charging Party failed to bring the instant charges to the Board for nearly 11 months—almost double the time provided by Section 10(b). In light of this delay, the Board granted the Employer's motion to dismiss the complaint.

13. It's All in the Footnote

a. Request for Information

1. Chairman Battista & Member Schaumber if not bound by Board precedent would apply Collyer to requests for information.

Pacific Bell, 344 NLRB No. 11

Daimler Chrysler, 344 NLRB No. 94

2. In a request for out of unit information, Chairman Battista and Member Schaumber do not necessarily agree with Board precedent that a union can simply state a reason for the request but would require a statement of facts supporting the request.

Contract Flooring, 344 NLRB No. 117

b. Alter ego

Chairman Battista's position is that G.C. must show, inter alia, an intent to avoid the bargaining obligation under the Act to prove alter-ego status.

Crossroads Electric, 343 NLRB No. 112

Liberty Source, 344 NLRB No. 137

c. 8(b)(7)(c)

Chairman Battista and Member Schaumber do not pass on the correctness of the Board's Villa Bar (157 NLRB 588) decision.

International Transportation, 344 NLRB No. 22

d. Withdrawal of Recognition

Chairman Battista and Member Schaumber express no view as to whether Levitz, 333 NLRB 717, was correctly decided

Seaport Printing, 344 NLRB No. 34

e. Remedy

1. Chairman Battista and Member Schaumber have concerns whether Dean General, 285 NLRB 573, was correctly decided and leave the issue to a compliance hearing.

Cheney Construction, 344 NLRB No. 9

Starcon, Inc., 344 NLRB No. 127

2. Chairman Battista and Member Schaumber do not pass on the validity of all the factors required for an effective repudiation of unfair labor practices as set forth in Passavant Hospital, 237 NLRB No. 138.

Meijer, Inc., 344 NLRB No. 115.

3. Chairman Battista and Member Schaumber express no opinion on whether reinstatement and backpay are the appropriate for unlawful failure to use a hiring hall.

M&M Backhoe Service, 345 NLRB No. 29.

f. 10(b)

Chairman Battista and Member Schaumber express no opinion on Ross Stores, 329 NLRB 573. In Ross Stores, the Board allowed a late filed charge to stand, despite a 10(b) objection, on the ground that the conduct was part of an overall campaign to thwart union organizing.

Randall Manufacturing, 345 NLRB No. 12

g. Request for non unit information

Chairman Battista and Member Schaumber do not necessarily agree with Board precedent that a union seeking non unit information need only state a reason for the request. It must instead inform the employer of the facts tending to support its request.

Contract Floor Systems, 344 NLRB No. 11
Pulaski Construction Co., 345 NLRB No. 61

h. Picketing for a Neutrality Agreement

Chairman Battista and Member Schaumber believe that serious legal issues warranting careful consideration are presented when a union engages in picketing to obtain a neutrality/card check agreement.

Venetian Casino Resort, 345 NLRB No. 82