



**NATIONAL CENTER FOR THE STUDY OF COLLECTIVE BARGAINING  
IN HIGHER EDUCATION AND THE PROFESSIONS**

**35th ANNUAL NATIONAL CONFERENCE**

**Hunter College  
April 6-8, 2008**

*“New Models: A Joint Labor/Management Meeting”*

*Annual Legal Update*

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## **I. NATIONAL LABOR RELATIONS BOARD AND RELATED CASES**

### **A. Use of E-Mail during Campaigns**

#### *a. Guard Publishing Company d/b/a The Register-Guard*

In the 21<sup>st</sup> century, union campaigns will have to function in an ever expanding world of new technologies. None of these new technologies is more ubiquitous than e-mail. In the traditional world of solicitation rules, built up over decades by the NLRB and the courts, email is a curious addition. Part speech, part literature. Used by employees but owned by employers. How would the standard guidelines on employee solicitation be applied to this most critical communication mode?

For a number of years, the NLRB has circled the issues of union access to employer email systems and the limits of employee restriction to solicit fellow employees by email. In a most important case for future organizing campaigns and the use of employer e-mail systems, the National Labor Relations Board issued its long awaited decision in *Guard Publishing Company, d/b/a The Register-Guard and Eugene Newspaper Guild, CWA Local 37194*, 351 NLRB No. 70 on December 16, 2007.

The case arose when the company issued a memo indicating that the email system – along with its telephones, copying machines, fax machines and message machines – were not to be used for solicitation of any kind (although personal use of emails was permitted). The particular policy stated:

*Company communication systems and the equipment used to operate the communication system are owned and provided by the Company to assist in conducting the business of The Register-Guard. Communication systems are not to be used to solicit or proselytize for commercial ventures, religious or political causes, outside organizations or other non-job-related solicitations.*

The evidence showed that employees did use the email system to send and receive personal messages and there would also be occasional baby announcements, party invitations and the occasional offer of sports tickers or request for services such as dog walking. However, there was no evidence that employees used email to solicit support for or participation in any outside cause or organization other than the United Way, for which the company conducted a periodic charitable campaign.

The case arose when Suzi Prozanski, a unit employee and the local union president, received warnings for sending three emails to company employees. The first email came about when the Managing Editor notified employees that they should try to leave work early because police had notified the company that anarchists might attend a union rally being held that day. An employee, Bill Bishop, then sent an email clarifying that he understood that it was the *Company* who informed the police about supposed anarchists, not the other way around. Ms. Prozanski later learned that certain statements in Bishop's email were inaccurate and on May 4, 2000, sent another email to employees "to set the

record straight” on behalf of the union. While she composed the email on her break, she sent it out over the Company’s email system. For this, she was given a written warning.

She received another warning a few months later in August when she sent two emails, one asking employees to support the union’s position in negotiations by wearing green to work and the other asking employees participate in the union’s upcoming town parade. She sent these email from a computer in the union’s office but sent it to the employee’s work emails. Following her discipline, the union filed charges with the Board.

The Administrative Law Judge for the NLRB found that, since the company allowed the email to be used for personal matters, it was discriminating against employees who sent union-related emails.

The NLRB General Counsel urged the full Board to balance employees’ rights under Section 7 with employers’ business interests in regulating the use of emails and to accommodate both interests as much as possible, using the ancient guidance of *Republic Aviation*, 324 U.S. 793 (1945). In this day and age, however, General Counsel contended that the use of email is much more akin to oral solicitation than distribution of materials, or use of employer property like bulletin boards. Given the nature of emails and the fact that email has become “the most common gathering place” for communications on both work and non-work matters, the General Counsel proposed that broad employer rules prohibiting nonbusiness use of email should be deemed presumptively unlawful, absent a particularized showing of special circumstances. In addition, he argued, any employer who prohibits employees from sending union-related emails while allowing other personal emails is in violation of Section 8 (a) (1) of the Act for interfering with employees’ Section 7 rights.

The union added to this argument by contending that, where an employer allows employees to use the email system to communicate with each other on nonbusiness matters generally, the employees are already rightfully “on the employer’s property,” in the sense that they have been allowed access to the email system. Thus, the employer has no property interest any longer that needs protection. The Board should hold that whenever an employer allows its email to be used for nonbusiness use, it must allow employees to use the email system to communicate about unions or other concerted activity. The union did acknowledge that employers may restrict such email communications to nonworking time.

On the other hand, the company argued that the email system is the company’s equipment and private property and that the company has the right to regulate and restrict its use and that there is no section 7 right to use it for non business purposes. The email system is private property and subject to legal prohibitions on trespass. Comparisons to oral solicitation are inapposite because company property is involved. With respect to the claims of policy enforcement discrimination, the company argued that the correct comparison is not between personal emails and union-related emails. Rather, the company argued that in order to determine whether discriminatory enforcement has occurred, the Board should examine whether the employer has banned union-related

emails but has permitted other outside organizations to use the employer's equipment to sell products, to distribute "persuader" literature, to promote organizational meetings, or to induce group action.

The Board in a 3-2 decision (Members Liebman and Walsh dissenting) ruled that the company did not violate Section 8 (a) (1) by maintaining its email policy and did not violate Section 8 (a) (3) by issuing written warnings to Prozanski for the August emails. However, the company did violate Section 8 (a) (3) by issuing a written warning to her for her first May email dealing with the union rally.

The Board found first that employees had no statutory right to use the company's email system for Section 7 activity. An employer has "a basic property right" to "regulate and restrict employee use of company property." The email system was company property, and the company had a legitimate interest in maintaining the efficient operations of its email system. Employers who have invested in an email system have valid concerns about such issues as preserving server space, protecting against computer viruses and dissemination of confidential information and avoiding company liability for employees' inappropriate emails.

Noting that whether employees have a specific right under the Act to use an employer's email system for Section 7 activity was "an issue of first impression," the Board cited several cases where the Board had previously held that there is no statutory right to use employer equipment and property, such as telephones, bulletin boards, televisions, copy machines, and public address systems. And, in opposition to the dissent, the Board majority said the case of email should *not* be analyzed under the frame work of *Republic Aviation*. In that decision, of course, it was found that an employer rule that banned all solicitation during nonworking time, like lunch breaks and coffee breaks, was presumptively illegal because it entirely deprived employees of their right to communicate in the workplace, and if they could not at least do so during their nonworking time, then their Section 7 rights would be meaningless.

In the instant case, however, the company's ban on email for solicitation does not regulate traditional face to face solicitation, or employees' rights to distribute information and literature at the workplace. Citing *NLRB v. Steelworkers, (Nutone)*, 357 U.S. 357, 363 (1958), the Board underlined that the NLRA "does not command that labor organizations as a matter of law, under all circumstances, be protected in the use of every possible means of reaching the minds of individual workers, nor that they are entitled to use a medium of communications simply because the Employer is using it." They are not entitled to the most convenient or most effective way of communicating with employees, nor are employers otherwise forced to use their own property to help unions communicate.

... it is clear that use of the Respondent's email system has not eliminated face-to-face communication among the Respondent's employees or reduced such communication to an insignificant level.... Unlike our dissenting colleagues, we find that use of email has not changed the pattern of industrial life at the

Respondent's facility to the extent that the forms of workplace communication sanctioned in *Republic Aviation* have been rendered useless and that employee use of Respondent's email system for Section 7 purposes must therefore be mandated.

The decision went further, however, and, on the particulars of the discrimination claim, the Board established some clear guidelines as to when an employer discriminates in its policies on solicitation. In language that established considerable discretion for employers in this area, the Board found that the proper test in these cases is that "in order to be unlawful, discrimination must be along Section 7 lines. In other words, unlawful discrimination consists of disparate treatment of activities or communications *of a similar character because of their union or other Section 7 protected status.*" Thus, an employer would violate the Act if it permitted solicitation by one union but not another, or by anti-union but no pro-union solicitors.

**However**, nothing in the Act prohibits an employer from drawing lines on a non-Section 7 basis. That is, an employer may draw a line between charitable solicitations and non-charitable solicitations, between solicitations of a personal nature (e.g. a car for sale) and solicitations for the commercial sale of a product (e.g Avon products), between invitations for an organization and invitations of a personal nature, between solicitations and mere talk, and between business-related use and nonbusiness –related use. In each of these examples, the fact that union solicitation would fall on the prohibited side of the line does not establish that the rule discriminates along Section 7 lines. For example, a rule that permitted charitable solicitations but not non-charitable solicitations would permit solicitations for the Red Cross and the Salvation Army but it would prohibit solicitations for Avon and the union.

In applying this standard to the case before it, the Board found that Prozanski's August emails asking employees to wear green and to come to a union parade were both active calls for "employees to take action in support of their union." While the employer had indeed allowed personal messages and communications on its email system, there was no evidence that the company ever permitted employees "*to use email to solicit other employees to support any group or organization.*" Thus, Prozanski could be appropriately disciplined for sending out emails that garnered support for her organization.

On the other hand, her May email was not deemed solicitation and the Board found that it was indeed discriminatory for the employer to discipline her for sending it. Significantly the Board found that the May 4<sup>th</sup> email "did not call for action" but "simply clarified the facts surrounding the union's rally the day before." The fact that it was "union related," by itself, did not mean the employer could prohibit it, and indeed, the fact that the employer allowed personal use of email for other purposes was evidence that warnings for her May 4<sup>th</sup> email was indeed discriminatory.

The dissent began by attacking the majority of living in another world:

Today's decision confirms that the NLRB has become the "Rip Van Winkle of administrative agencies." [cite omitted]. Only a Board that has been asleep for the past 20 years could fail to recognize that email has revolutionized communication both within and outside the workplace. In 2007, one cannot reasonably contend, as the majority does, that an email system is a piece of communications equipment to be treated just as the law treats bulletin boards, telephones and pieces of scrap paper.

The dissent's position can be summarized in its next statements:

National labor policy must be responsive to the enormous technological changes that are taking place in our society. Where, as here, an employer has given employees access to email for regular, routine use in their work, we would find that banning all nonwork related "solicitations" is presumptively unlawful absent special circumstances. no special circumstances have been shown here. Accordingly we dissent from the majority's holding that the Respondent's ban on using email for "non-job related solicitations" was lawful.

We also dissent in the strongest possible terms from the majority overruling of bedrock Board precedent about the meaning of discrimination as applied to Section 8(a)(1) by allowing employees to use an employer's equipment or media for a broad range of nonwork-related communications but not for Section 7 communication.

To the dissenting members, the Board majority drew the wrong parallels between email systems and more "static" pieces of equipment like bulletin boards or telephones. Use of email does not limit available space, for example, as a union notice on a bulletin board might. One employee using email does not affect any other use of the email system by others.<sup>1</sup>

The dissent stated that the Board's contention that the employees were not otherwise restricted in the exercise of their Section 7 rights and have alternative means to communicate was irrelevant. The availability of alternative means of communication should only be a factor for when dealing with nonemployees on the employer's property, as was the case in *Lechmere v. NLRB*, 502 U.S.527 (1992)

Finally, the dissent saw no basis for the majority's view on discriminatory enforcement, claiming that the majority discarded the Board's longstanding test for discriminatory enforcement of a rule, replacing it with a standard that allows the employer virtually unlimited discretion to exclude Section 7 communications so long as the employer couches its rule in facially neutral terms. The fact that this employer

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<sup>1</sup> Evidence showed that since the company received about 4000 email messages a day, "one or more employees using the email system would not preclude or interfere with simultaneous use by management or other employees."

allowed free use of the email system for all types of personal communications – but restricts those communications dealing with support for a union – by itself should have been enough to find a violation.

*a. Columbia University*

Earlier in the year, in another ruling dealing with email – this time dealing with the need to provide an organizing union with email addresses -- the Board found that an employer did not violate the Act or engage in objectionable election conduct when it refused to provide the union with the email addresses of eligible employees prior to an election. *Trustees of Columbia University*, 350 NLRB No. 54 (2007)

In this case, an election was scheduled among the crew members of a research vessel owned by Columbia University. The vessel was at sea for most of the preelection period between the filing of the Petition for Representation on March 19 until the scheduled election date of May 29. While there was no evidence that crew was able to receive U.S. mail while at sea, it was undisputed that the crew did have access to email aboard the vessel when they were not on watch. E-mail messages were limited in length because they were transmitted in batches four or five times a day via satellite, which is very expensive. Internal email among members of the crew was also available.

At the preelection conference, the petitioning union requested that, in addition to the names and addresses of eligible votes as required by the *Excelsior Underwear*, 156 NLRB 1236 (1966), that it also be given the email addresses of the crew members. The union argued that the unique circumstances of this case – the lack of access to U.S. mail during much of the preelection period – warranted the email information. The hearing officer rejected the request.

After losing the election, the union filed timely objections, claiming that the employer’s refusal to provide the employees’ email addresses “thwarted the manifest purpose of the *Excelsior* rule; that is, to achieve important statutory goals by ensuring that all employees are fully informed about the arguments concerning representation and can freely and fully exercise their Section 7 rights.”

In its decision, the Board panel noted that the employer fully complied with the *Excelsior* rule by providing the names and addresses of the eligible employees. It noted that no Board decision has ever held that the failure to provide email addresses constitutes objectionable conduct. Under these circumstances, the Board majority could not agree that the employer failed to “substantially comply” with the *Excelsior* rule. The employer’s list was complete and accurate.

In addition, the Board underlined that the petitioner was a maritime union “with vast experience and a long history of organizing and representing employees at sea.” Not only did it have access to employees for months before the petition was filed, but when it agreed to the election date, it was well aware that the employees would be at sea for most

of the preelection period and with full knowledge that the Board had never required employer disclosure of email addresses in any prior decision.

The Board also noted that the employer itself never used email to communicate with the employees during the campaign, and that the union won the election among the *licensed* crew unit under the same conditions.

As if looking ahead to its *Register Guard* decision a few months later, the Board majority added:

We observe a multitude of unanswered and difficult questions exist regarding the potential ramifications, for both employers and employees, of requiring employers to furnish employee email addresses. For example, what costs might be imposed on an employer if a union were able to send emails to employees' workplace email addresses? What if electronic mailings were sufficiently voluminous to impair an employer's ability to conduct business electronically? What becomes of the employer's right not to furnish a forum, "on" its (virtual) property, for a third party to express its views? What would be the interplay, if any, between newly imposed requirements and the Board's current law relative to union access to an employer's property? Could employers continue existing email monitoring programs without engaging in unlawful surveillance? Are employee privacy rights at stake? Plainly, the Board's expertise does not encompass the rapidly expanding universe of information technology, and persons who know much more than we do about these matters will likely raise additional issues that we cannot even formulate without guidance. All of these issues should be fully briefed and considered before the Board departs from longstanding, well-understood precedent.

In dissent, Member Walsh argued that the employer did not substantially comply with the *Excelsior* requirements under the circumstances of this case. Noting that technical compliance with *Excelsior* has sometimes not been enough, Member Walsh cited cases where employers were required not only to provide permanent home addresses, but also post office box numbers and temporary addresses. In this case, Walsh wrote, the fundamental purpose of *Excelsior* was not effectuated, since employees could not receive information from the union to help them make an informed choice. Member Walsh was not advocating the email addresses would have to be provided in every election case. In most cases, email addresses would not be necessary for the purposes of the *Excelsior* rule to be satisfied. In response to the majority's view that the union did not have to agree to the election date, Member Walsh submits that "there is no reason why petitioner should be forced to choose between a prompt election or an informed electorate."

## **B. Yeshiva and other Bargaining Unit Cases**

### *a.. Point Park University*

In *Point Park University*, NLRB Reg. Dir., No. 6-RC-12276, 7/10/07), the NLRB Regional Director concluded, for the second time, that full time faculty at Point Park University were not managerial employees under *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), and therefore have the right to unionize. The case was on remand from U.S. Court of Appeals for the District of Columbia Circuit. The Court had ruled that the Board had failed to articulate the factors that were significant in originally finding the faculty to be non-managerial.

On remand, the Regional Director noted that the Court “correctly observed that the proper analysis turns on the type of control faculty exercise over academic affairs at the institution.” In using this standard, the Regional Director observed that the key factors under this standard would be “the ability [of the faculty] to determine what undergraduate and graduate programs are offered, as well as changes in degree programs, including structural changes and all other changes in course offerings having effects beyond the academic department, grading, teaching methods and admission, retention and graduation of students.”

The Point Park faculty did not possess such authority. The Regional Director noted a “divergence of the interests of faculty and the administration,” underlining the faculty’s lack of input as to the structure of the institution, including both the change from department-based to school-based governance and the decision to seek university status. He explained that a “well-defined administrative hierarchy” essentially decides on such issues as programs, courses, tuition, enrollment, admissions criteria, grading systems, grades and various academic programs and policies.” The record showed many cases where the administration made academic changes without faculty input or overrode faculty decisions. Therefore, after analyzing this record, the Regional Director upheld the union’s prior certification.

### *b. Carroll College*

In *Carroll College, Inc. and International Union, United Automobile, Aerospace & Agricultural Implement Workers of America-UAW*, 350 NLRB No. 30 (2007), the Board, in a refusal to bargain case, found that the underlying representation case holding that faculty unit employees were not managerial employees under *Yeshiva* should be upheld. While the College had asked the Board to reexamine the question in light of *Lemoyne-Owen College*, 345 NLRB No. 93 (2005)- where managerial status had been found - the Board here found that case distinguishable.

As found by the Acting Regional Director in the representation case, the proposals of the Respondent’s faculty committees regarding degree requirements, curriculum, and the addition and deletion of majors and courses are independently reviewed by

the Respondent's administration and have been rejected by the administration. Further, the Respondent's administration can prevent proposals by the several faculty committees from ever being considered by the school's academic steering committee. This differs markedly from *LeMoyne-Owen College*, where the evidence showed that faculty proposals related to courses, curriculum, and degree requirements were always approved and implemented by the administration and the college's board of trustees without independent review or modification.

It had also been found that the College's administration exercises substantial independent control over the content of the curriculum, and the addition and deletion of courses and majors; that, although the faculty effectively determine the admission of students who fall below traditional admissions standards, this factor is not enough to support a finding that the faculty are managerial. Moreover, the faculty's authority regarding admissions is "tempered by the administration's unfettered authority to adjust the admissions formula and to set enrollment limits and determine the overall size of the student body." Finally, it was noteworthy that the administration had changed the structure of the College from one to two schools despite faculty opposition.

...although the Respondent's faculty members determine the content of the courses they teach, set their office hours, design their syllabi, and create their attendance policies, these facts are insufficient to establish that faculty exercise managerial authority. The Acting Regional Director deemed it noteworthy that faculty do not determine or effectively recommend their class sizes, the scheduling of their courses, or the academic year.

The College had also asked the Board to revisit whether the institution's exercise of religion would be substantially burdened by unionization on campus under the principles of the Religious Freedom Restoration Act. Under RFRA, if the governmental action substantially burdens the free exercise of religion, the government must show a compelling interest for doing so. Without much comment, the Board also found that the ruling below that the College's exercise of religion would not be substantially burdened should be affirmed.

*c. Pace University*

In *Pace University v. National Labor Relations Board*, (DC Cir., 2008), the D.C. Circuit Court of Appeals agreed with the decision of the NLRB that a bargaining unit consisting of adjuncts who taught at least three credits should be upheld. This case dealt with the question of whether the Board's Election Order which defined the *eligibility of voters* in a manner different from its definition of *the bargaining unit itself* could allow an employer to contend that the unit should be limited only to those who were eligible to vote.

In December of 2003, the New York State United Teachers petitioned the NLRB for certification as the representative of adjunct and part time faculty members at Pace

University. Pace objected to the petition on various grounds. Nonetheless, after a hearing, the Board ordered an election and set the eligibility standards as follows:

Included in the unit: All adjunct faculty members, part-time instructors and all adjunct faculty member and part time instructors who work in a non-supervisory dual capacity for the Employer, employed by the Employer. ....Eligible to vote in the election are those in this unit who have received appointments and teach or have taught at least three credits and/or 45 hours in any semester in any of two academic years during the three year period commencing with the 2001-2002 academic year and ending with the 2003-2004 academic year.

The Union won the election and was certified. A dispute arose thereafter about whether the unit included only those adjuncts eligible to vote. The University contended that any other adjuncts were “casual” employees and not eligible for inclusion in the unit. The Union filed a unit clarification petition, and in response, the Regional Director stated that the unit included all adjuncts who taught at least three credits and/or 45 hours in one semester *regardless of whether they had been eligible to vote*. The University appealed to the full Board who denied the Request for Review, particularly noting that the University had not challenged the scope of the unit originally. The University refused to bargain with the Union for this unit.

Following a refusal to bargain determination by the Board (*Pace University*, 349 NLRB No. 10 (2007)), the case went up to the Court of Appeals. The Court denied the appeal.

The record of the representation proceeding demonstrates that Pace had reason, ability and opportunity to challenge the description of the unit but repeatedly declined to do so. The Regional Hearing officer opened the February 2004 hearing on Pace’s objection to the Union’s proposed unit by discussing the dual objective of the hearing – to determine the scope of the bargaining unit and the criteria for voter eligibility. .... When asked during the hearing on several occasions by the Hearing Officer to identify its position on the issues, Pace stated only a general objection that these issues were intertwined and sought to have granted its pending motion to dismiss the certification petition, for a stay and transfer to the Board and for recusal and transfer to a different Region. ***Pace neither explained how the issue of unit scope and voter eligibility were intertwined nor presented the arguments it presents in its brief to the court that the Act and Board precedent require all members in the unit to be eligible to vote.*** By contrast, Pace argued the law school adjuncts should not be included in the bargaining unit, which led to a stipulation of the parties.

After the hearing, Pace sought clarification of two footnotes in the Regional Director’s Election Order but also failed to argue at that time that adjuncts who are “casual employees” should be excluded from the bargaining unit.

The Court noted that general objections is not tantamount to litigating specific concerns and found Pace’s failure to articulate its position fatal on appeal.

There were then available arguments that Pace could have made that it now contends are dispositive, for example, in contending there is a lack of a community of interest between adjuncts who have served for longer than three credit hours in one as opposed to several academic years.....

To the extent Pace now contends that the Board was required to make an exception to its non-litigation rule due to Pace's reasonable reliance on an error in the Amended Election Order, there is neither an exception that would apply nor a basis for the exception it seeks. Pace does not maintain there was either new evidence or new governing law. Instead, Paces suggests that there was no need to litigate the "casual employee" definition or member-voter distinction until the unfair labor practice proceeding because it believed "the issue had been resolved in its favor." ...

Pace pointed to a typographical error appearing once in the narrative portion of the election order -- but which did not appear in the part of the order defining the actual bargaining unit --which led it to believe that casual adjuncts who did not meet the election eligibility requirements would not be part of the unit.

Any confusion arising from the added text [to the amended election order] should have prompted experienced counsel to seek clarification or to state Pace's understanding on the record, not wait to raise the issue long after the election had occurred and the Board had certified the Union.

The Court concluded:

The court need not reach Pace's challenges to the Board's adoption of a distinction between unit membership and voter eligibility. Because Pace failed to make known its objections to the scope of the proposed bargaining unit when it had reason, ability and opportunity to do so during the representation proceeding, the Board did not abuse its discretion in applying the non-relitigation rule.

*d. Research Foundation of the SUNY Office of Sponsored Programs*

In *Research Foundation of the SUNY Office of Sponsored Programs and Local 1104, Communication Workers of America*, 350 NLRB No.18 (2007), the Board ruled that research project assistants (RPA's) at the University's Albany, Buffalo and Syracuse locations were employees within the meaning of the Act, distinguishing the case from *Brown University*, 342 NLRB 483 (2004)

In this case, the Board observed that the Research Foundation of the SUNY Office of Sponsored Programs was a not-for-profit educational corporation; however, it was stipulated not to be an academic institution and therefore does not issue academic degrees. The Board noted in its decision that the employer is not a college or university;

does not admit students and does not confer degrees. The RPAs in question are employed solely by the employer, not by SUNY.

The undisputed evidence demonstrates the existence of an economic relationship between the RPAs and the employer rather than an educational relationship, as in *Brown*. Pursuant to an agreement with SUNY, the employer receives, administers and manages government and private donor awards for SUNY's sponsored research programs. Under that agreement, the employer employs research and other personnel, including the RPAs, "who shall be deemed employees of the employer and not the University." The RPAs are employed and received compensation, including benefits, under awards administered by the employer; their compensation is subject to the employer's compensation benchmarks; and they are placed on the employer's payroll by the employer's Human Resources office. In addition, the parties stipulated that the employer's labor and employment policies apply to the RPAs. The RPAs therefore clearly have an economic relationship with the employer.

Even though RPAs must be enrolled at SUNY to work for the employer; that their work bears a relationship to their SUNY dissertations and that they end their RPA careers once they graduate from SUNY, such evidence "demonstrates the RPAs primarily educational relationship with SUNY, not with the employer."

### **C. Definition of "Supervisor" under the NLRA**

The NLRA excludes supervisors from its coverage. Section 2 (11) of the Act defines a supervisor as:

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

This definition has been a source of hundreds of cases over the years as the Board sorts out representation questions. Possession of authority to engage in any one of the enumerated supervisory functions is sufficient to confer supervisory status on an individual, provided the authority is held in the interest of the employer and its exercise is not of a merely routine or clerical nature but requires the use of independent judgment. *Oakwood Healthcare, Inc.*, 348 NLRB No. 37, slip op. at 2 (2006).

In *Metropolitan Transportation Services*, 351 NLRB No. 43 (2007), one of the key questions was the supervisory status of an employee who was allegedly discriminated against because of his union support. In this case, the alleged discriminate, Dale Stripling,

was deemed to be a supervisor by the employer. But according to the charge, the employer allegedly violated Section 8(a)(1) by interrogating and threatening him on March 1 and 2, and that it violated Section 8(a)(3) by discharging Stripling on March 3 and suspending six mechanics that same date for walking out in solidarity with Stripling. The employer said Stripling was a supervisor and thus not entitled to the protection of the Act; the union and the General Counsel for the Board disagreed.

The Board majority found that Stripling possessed sufficient supervisory authority to be deemed a statutory supervisor. The evidence had shown that a higher company official named George had given him his authority and specifically told Stripling the following: “These guys work for you. You go out there and you tell them that they are to get the tire changed on the vehicle and if any one of them refuses you, you are to send them home or to terminate them.” The Board added:

George reiterated Stripling’s disciplinary authority in a meeting a few hours later with Stripling, Dowd, and Maintenance Director John Turney, stating that he “made it clear to [Stripling] that this is the exact reason why we put you [Stripling] in the position that you are in. If these guys refuse to do what you are asking them to do, you are to either send them home, write them up, or terminate them.”

Despite this, the ALJ below had found no supervisory status because he deemed Stripling to be a mere conduit for the higher level manager; that Stripling’s exercise of disciplinary authority pursuant to those orders was limited to emergency situations, and that this “prearranged response for emergencies would not involve the exercise of independent judgment by Stripling.” The Board majority disagreed.

Nothing in George’s statements to Stripling limited Stripling’s authority to discipline employees to emergency situations or indicated that Stripling would be merely a conduit for George’s orders. There was also no indication that George intended to otherwise limit Stripling’s authority by, for example, conducting an independent investigation of Stripling’s disciplinary decisions. It may well be that George told Stripling what to do vis-à-vis the mechanic who refused to change a tire, but George acted because Stripling had failed to act. Moreover, in chastising Stripling for his failure to exercise disciplinary authority, and again at the meeting later the same day, George made clear that Stripling was empowered to impose differing levels of discipline. Absent any suggestion that Stripling should consult with George (or anyone else) before acting, the determination of what discipline to impose would necessarily depend on Stripling’s independent judgment of what the situation warranted. See *Oakwood Healthcare*, supra, slip op. at 8 (stating that independent judgment involves action “free of the control of others”). Thus, Stripling was a statutory supervisor because he possessed the authority to discipline employees using independent judgment.

In *Oak Park Nursing Care Center*, 351 NLRB No. 9 (2007), LPNs at a nursing care facility were deemed to be supervisors because they complete “employee counseling forms” regarding certified nursing assistants. The Board explained why it reversed the Regional Director in this case.

While the Regional Director found that the LPNs do have the authority to fill out employee counseling forms, he concluded that the LPNs’ role in doing so was merely a reportorial role that did not evince any supervisory authority. His finding in this respect was based, in large part, on his determination that the counseling forms neither constitute discipline, nor automatically lead to discipline. Contrary to the Regional Director, however, it is clear that the counseling forms are a form of discipline because they lay a foundation, under the progressive disciplinary system, for future discipline against an employee. [cites omitted] For at least two CNAs, Freddie Kendricks and Mark Mack, the progressive disciplinary process, which was initiated by LPNs filling out employee counseling forms, resulted in discharge and suspension, respectively.

The Board noted that “the counseling forms do constitute a form of discipline because they not only affect an employee’s job status, i.e., suspension or discharge.”

Moreover, the LPNs here have the discretion to document employee infractions on the counseling forms. In this respect, the LPNs alone decide whether the conduct warrants a verbal warning or written documentation. Because the LPNs here have the discretion to write-up infractions on employee counseling forms, we believe that they are vested with the authority to exercise independent judgment in deciding whether to initiate the progressive disciplinary process against an employee. See *Oakwood Healthcare*, supra, slip op. at 10 (“the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices.”).

In another case decided last year, the Board had to assess the question of whether the pro-union activity of an alleged supervisor was sufficient to overturn a union election. In the case of *Madison Square Garden*, 350 NLRB No. 8, (2007), a Board majority, applying the standards of *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004), ruled that a union election victory should be set aside based on the pro-union conduct of low level supervisors working for an openly anti-union employer. The Board first analyzed its standards by going back to the *Harborside* decision.

The *Harborside* Board took the opportunity of the remand to rearticulate Board law and formulated a two step inquiry to apply in cases involving objections to an election based on prounion supervisory conduct:

- 1) Whether the supervisor’s prounion conduct reasonably tended to coerce or interfere with the employees’ exercise of free choice in the election.

This inquiry includes: a) consideration of the nature and degree of supervisory authority possessed by those who engage in the prounion conduct and b) an examination of the nature, extent, and context of the conduct in question.

2) Whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct

In the case at hand, the Board noted that the supervisors had solicited cards for the union and the employees had reason to believe the supervisors knew who signed such cards. The activity was intense for a preelection period; the employer did not disavow the activity of the supervisors; and the election was close enough (five vote margin) to have been affected by the supervisors conduct. For such reasons, overturning the election was appropriate.

#### **D. Other Election Conduct**

##### *a. Sunshine Piping, Inc.*

In *Sunshine Piping, Inc.*, 350 NLRB No. 90 (2007), the Board, in a 3-1 decision, ruled that certain statements to employees by a company foreman about union strength were insufficient to establish the impression that the employees were under surveillance.

In this case, during an organizational campaign, several employees were openly soliciting support for a union during their non-working time on company premises. Some were wearing organizational buttons. On one occasion, a company foreman, during a conversation with two employees who were union supporters, said he had just met with the company president who asked whether two employees “had been to the union hall.” The foreman told the employees that he confirmed that the employees in question were union supporters and that “about 80% of the shop” has signed authorization cards. The administrative law judge found the first statement innocuous but did find that the statement that 80% of the employees had signed cards “reasonably suggested that the Respondent was closely monitoring employees’ union activity and thus unlawfully created an impression of surveillance.” The ALJ relied on *United Charter Service*, 306 NLRB 150 (1992).

Upon appeal, the Board majority reversed. It found *United Charter Service* inapplicable to the instant fact setting because in that case, the employees had engaged in their activity off site and the company officials’ statements revealed detailed knowledge of that off site activity, including specific knowledge of what was being discussed at organizational meetings.

In this case, by contrast, the employees’ card solicitation activities were conducted openly on the Respondent’s premises during or immediately before the

start of the work day. Although [foreman] Phelps' "80%" statement indicated that the Respondent was aware of the evident success of the employees' openly conducted card drive, the statement also reasonably suggested that the Respondent has observed this open activity on its property.... We find that employees would not reasonably conclude from Phelps' "80%" statement that their protected activity had been placed under surveillance.

In dissent, Member Liebman contended that "by professing to have precise, quantified knowledge of the percentage of employees who support the union, Phelps certainly suggested to [the two employees] a sustained, close-range observation of their union activities, or else that he has an inside source. Either way, his statement would reasonably have led employees to believe that their organizing activities were under rigorous surveillance."

*b. Local Joint Executive Board of Las Vegas v. NLRB*

In *Local Joint Executive Board of Las Vegas v. NLRB*, (9<sup>th</sup> Cir, No. 05-75515, 1/28/08), the Ninth Circuit upheld an NLRB ruling that two human resources managers for the Alladin Hotel did not engage in improper surveillance of union activity in violation of the Act by interrupting employees who were asking others to sign union cards.

In this case, a vice president of human resources approach two employees during lunch who were considering signing union cards and said, "I would like to make sure you have all of the facts before you sign that card." Another HR representative had told another employee while he was considering signing a card that he "shouldn't be signing things that she wasn't sure about because what she was signing was something like a contract." The union claimed that lawful speech can become unlawful when it is made in the middle of concerted activity, such as signing union cards.

The Court noted that the Board conclusion that the actions of the HR reps were "brief, spontaneous interruptions" and were not coercive should be upheld. "Verbally interrupting organizing activity does not necessarily violate Section 8 (a) (1)."

*c. Medieval Knights, LLC*

In *Medieval Knights, LLC*, 350 NLRB No. 17 (2007), the union filed objections to an election in which it lost 18-16. The objections alleged that in a meeting prior to the election the employer advised employees that "should the union win the election, the employer would drag out negotiations for at least a year," thus threatening employees that electing the union as their bargaining agent would be futile. The Board found that this conduct was not objectionable and upheld the election results.

In reviewing the facts, the Board noted that labor consultants hired to help the employer with the campaign held a meeting with employees in which they explained the process of collective bargaining. Among other things, they noted that an employer did not have to agree with specific union proposals; that all negotiations were different; and that the bargaining process could take weeks, months or even more than a year. The consultant indicated that “an employer, by giving into lesser items or addendums to the contract but not really agreeing to anything, agreeing to things like a bulletin board for the union at the job site, agreeing to restricted unit work, things like that, that would make them show they were bargaining in good faith but not really getting anything done.” It was undisputed that the presentation was about a hypothetical employer.

The Board emphasized that the discussion of bargaining was clearly in the realm of the hypothetical, that there was no evidence that the employer itself would engage in this delaying approach to bargaining. The Board found that “employees can distinguish between a hypothetical exercise about bargaining and the employer’s description of its actual or planned bargaining strategy. (see *Days Inn Management*, 299 NLRB 735 (1990)) The Board underlined that it has generally found that descriptions of bargaining like this one “merely point out the possible pitfalls for employees in the collective bargaining process.” *Standard Products*, 281 NLRB 141, 163 (1986).

Member Walsh dissented, claiming that “the clear implication of List’s [the consultant’s] statement was that if the employees selected the union, the employer would engage in, and get away with, sham bargaining.” He added that the consultant who made the presentation was an “experienced antiunion consultant” and his audience consisted of “laypersons.”

It is not likely that the employees would regard List as speaking about “possible pitfalls” and “hypothetical bargaining parties.” Rather, it was more reasonable that the employees would consider the statement within the context of their own employment and infer that, should they reject List’s antiunion campaign and vote for union representation, the employer would nevertheless rely on this strategy to avoid ever coming to terms.

*d. Yale-New Haven Hospital*

In October of 2007, an arbitrator ruled that Yale-New Haven Hospital must pay \$4.5 million to a labor union and employees for interfering with an election that would have allowed employees to unionize. The Hospital and the Union, District 1199 of the SEIU, had signed a “fair election” agreement as a condition for the city’s approval of a new cancer center. While the agreement included pledges not to disparage each other and to conduct a factual campaign, the hospital also committed to not initiate one-on-one conversations with workers; not conduct mandatory meetings; not use consultants to abrogate the agreement, while also promising to abide by the arbitrator’s rulings. The arbitrator, Margaret Kern, said the Hospital ruined chances for a fair election by intimidating employees and spreading misinformation. (AP, October 24, 2007) Instead of abiding by the agreement, according to the arbitrator, the Hospital held some 98 captive

audience meetings about unionization; emphasized so-called “hot button” issues, like union dues; and, through its consultants, kept a running count of election leanings. The arbitrator wrote:

Employees were deprived of the right to truthful information, the right to do their job uninterrupted by solicitation, and the right not to participate in captive audience meetings.

## **E. Preemption**

Since the time of our founding fathers, the fundamental tension in our constitutional system resides in the relative power and authority of the federal government and state governments. In the legal world, this issue often arises under the heading of preemption – the principle that in some regulated areas of society Congress through its legislative authority has preempted the field, and states cannot pass legislation that does violence to that federal oversight.

In recent years, preemption cases continued to arise in the labor law sector. Many of these cases have focused on attempts by state legislatures to limit the right of employers to use state funds received indirectly or directly for anti-union communications and activity. Such statutes have generally required employers to remain neutral, at least to the extent that state funds could not be used for communication about unions.

Differing opinions by courts of varying jurisdictions have left this issue ripe for Supreme Court review. Thus, in November of 2007, the Supreme Court agreed to consider whether a California law that bars employers from using state funds to oppose unionization is preempted by the National Labor Relations Act. *Chamber of Commerce of the United States v. Brown*, U.S. No. 06-939, cert granted 11/20/07. The Ninth Circuit in a 12-3 decision the previous year had held that the law was not preempted because “California’s exercise of its sovereign power to control the use of its funds does not conflict with national labor policy as expressed in the NLRA (463 F. 3d. 1076, 180 LRRM 2641 (9<sup>th</sup> Cir. 2006)). The law in question bars private employers that receive state grants of any amount of more than \$10,000 annually in state program funds from using the funds to “assist, promote or deter union organizing.” The law also covers private contractors that do business with the state, private employers that conduct business on state property and all public employers. The statute requires covered employers to certify that no state funds will be used in violation of the statute and to maintain records to demonstrate that the funds have not been used for improper purposes. (see Daily Labor Report, BNA, 11/21/07).

The various groups seeking Supreme Court review contended, among other things, that the Ninth Circuit’s decisions conflicted with the Second and Seventh Circuit decisions in *Healthcare Association of NY State v. Pataki*, 471 F.3d 87, 180 LRRM 3265 (2006) and *Metro Milwaukee Assn of Commerce v. Milwaukee County*, 431 F. 3d 277,

178 LRRM 2609 (7<sup>th</sup> Cir., 2005) respectively, both of which found preemption for similar state laws.

## **F. Challenges to Union Majority Status**

In *Dana Corporation and International Union, United Automobile, Aerospace, and Agricultural Implement Workers*, 351 NLRB No. 28 (9-29-07), the National Labor Relations Board modified its recognition bar doctrine in cases *where the union's original majority status was based on a card check rather than a Board-supervised election*. In the case of Board supervised secret ballot elections, no Board election can be held in the bargaining unit for at least 12 months following the election. But in cases where an employer voluntarily recognizes a union, the rules barring a decertification petition had been less clear. Under prior law, an employer's voluntary recognition of a union in good faith and based on a demonstrated majority status immediately bars an election petition filed by an employee or by a rival union "for a reasonable period of time." *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966). Any collective bargaining agreement negotiated during this insulated period bars Board elections for up to three years of the contract's term.

The two employers in this case had voluntarily entered into a card check agreement with the unions and, in December of 2003, each had recognized the union as the representative of units of their employees. But before contract negotiations began, employee petitioners filed a petition with the Board for a decertification election.

In dealing with this issue, the Board said it will strike a balance between the interest of employee free choice and the promotion of stable labor relations. In this case, it established a policy that no election bar will be imposed after a voluntary card check agreement *unless* 1) employees in the unit are given notice of the recognition and of their right, within 45 days, to file a decertification petition; 2) 45 days pass from the date of notice without the filing of a petition. Thus, unlike Board supervised elections, in cases where there is a card check recognition, disgruntled employees, or rival unions, who wish to file a decertification may immediately do so within a 45 day window period. Once that period passes, however, the union's majority status will be irrebuttably presumed for a reasonable period of time to enable the parties to engage in negotiations for a first collective bargaining agreement. Once any such agreement is reached, such a contract will further bar elections for up to three years.

The Board used this case to discuss in detail the reasons why Board-supervised elections are to be preferred in determining employee free choice and selection of a union representative. Specifically, the Board noted:

1. The secret ballot process insulates employees from group pressure in a way that a card check process does not. The Board noted that "workers sometimes

sign union authorization cards not because they intend to vote for the union in the election but to avoid offending the person who asks them to sign, often a fellow worker, or simply to get the person off their back, since signing commits the worker to nothing.” Consequently, “there is good reason to question” whether card signings accurately reflect employee free choice.

2. There is a greater likelihood that employees will make an informed choice after a contested Board election than in the card check process. In a card check situation, it is unlikely that employees will have the same degree of information about the pros and cons of unionization that they would in a contest election.
3. The election process tests the employees’ free choice decision in a single moment in time, rather than the rolling period that card check processes involve – a period in which employees may sign a card and then change their mind. This is especially true since unions may take a year or more to gradually obtain a card check majority.
4. Board elections have built-in protections against an employer’s use of improper election tactics.

In dissent, Members Liebman and Walsh bemoan “the radical departure from well settled judicially approved precedent,” and contend that the new policy “subjects the will of the majority to that of a 30% minority and destabilizes nascent bargaining relationships.” The dissent contended that the Board decision undercut the preferred policy of voluntary recognition, creating a chaotic 45 day period right at the outset of such voluntary recognition periods, allowing a minority of employees to disrupt an honest recognition of a majority union.

The Board’s discussion of the preferred approach of secret ballot elections in determining employee choice – and the dissent’s counter argument on the alleged favored element of voluntary recognition – could serve as opening arguments for advocates on both sides in the continuing legislative debates – both at the federal and state levels – of changing labor statutes to allow for required card check majority approaches instead of, or in addition to, secret ballot elections.

### **G. What is a Labor Organization?**

*In Syracuse University and Teamsters Local 317 and Staff Complaint Process*, 350 NLRB No. 63 (2007), the Board was faced with the question of whether Syracuse University’s Staff Complaint Process (SCP) was a labor organization within the meaning of Section 8 (a) (2) of the National Labor Relations Act. The Board concluded that it was not.

The SCP was a complaint resolution procedure that was designed to resolve employee relations issues between non bargaining unit employees and their supervisors.

The University introduced the new procedure in 2003, and it began to train volunteer employee participants on the techniques of mediation and problem solving. The SCP operated during working time using facilities and supplies provided by the University. The Human Resources department played an active role in the SCP, with the staff complaint coordinator being an HR employee. HR does the training of volunteers and serves as a resource for questions about the SCP. Managers and supervisors are eligible to serve as staff advocates and mediators, and panel members.

Use of the SCP by an employee is an option. In the informal stage of the SCP, the complainant and the supervisor whose action gave rise to the complaint engage in mediation in an attempt to settle the dispute. Complainant chooses a mediator from the SCP pool and may seek the assistance of an SCP advocate, who will assist and support the complainant throughout the process. If no settlement, the matter goes to a formal stage in which a hearing panel is convened to conduct a hearing on the complaint, receive evidence from the parties and render a decision. After decision, either party may appeal the panel's decision to a different three member review panel comprised of members from the pool of volunteers. The review panel may rehear the case or limit proceedings to specific issues raised on appeal. The review panel's decision is final and binding.

In the meantime, the Teamsters field a petition later in 2003 for an election among the University's parking services employees. The Teamsters were opposed by the University administration, who touted the value of the SCP. The Teamsters filed unfair labor practice charges against Syracuse claiming the SCP was a labor organization dominated by the employer and thus in violation of Section 8 (a) (2).

The administrative law judge agreed with the Teamsters, concluding that the SCP was a "plan" or "agency" created by the University where employees participate in a bilateral process with management for the purpose of resolving employee grievances with their supervisors. He found that staff employees "deal" with management on the complainant's behalf and thus perform functions that are representational in nature. All of this, concluded the judge, was in violation of the Act. The Board panel, however, disagreed.

Citing *Electromation, Inc.*, 309 NLRB 990, (1992), enfd 35 F. 3d 1148 (7<sup>th</sup> Cir., 1994), the Board first explained that in these cases, the Board's analysis is two-fold. First, the Board considers whether the entity involved is indeed a "labor organization" under Section 2 (5) of the Act. The Board noted:

The Board will find a committee is a labor organization under Section 2 (5) if (1) employees participate; 2) the organization exists, at least in part, for the purpose of "dealing with" employers; 3) these dealings concern conditions of employment or other statutory objects, such as grievances, labor disputes, etc.; and 4) if an employee representation committee or plan is involved, there is evidence that the committee is in some way representing the employees." Second, if the organization satisfies these criteria, the Board considers whether the employer has engaged in any of the forms of conduct proscribed by Section 8 (a)(2), i.e.

domination or interference with the organization's formation or administration, or unlawful support.

In this case, the Board concluded that the SCP is not a labor organization because "its purpose is not to 'deal with' the employer on terms and conditions of employment. Rather, its purpose was limited to an adjudicatory function. The SCP does not make proposals to management of any type on bargainable topics; it simply renders a decision as to the propriety of management's action. While a management official may sit as a member of a three member panel, there was no evidence that the managerial official "deals with" the two other employees as if they were on opposing sides. Rather, they sit as a panel and make a group decision. The lack of back and forth discussions on the panel's recommendation was deemed important. Here there is simply an adjudication and, except for one appeal, the case is closed. There is no "dealing" back and forth between the SCP and management officials at odds with the entity's recommendations.

## H. Union Salts

In 1995, the Supreme Court approved the Board's long standing rule that the statutory definition of "employee" under the National Labor Relations Act (Section 2(3)) was broad enough to include professional union organizers who obtain employment with an employer for the purpose of organizing that employer's work force. *NLRB v Town & Country Electric*, 516 U.S. 85, 150 LRRM 2897 (1995). Last year, in *Toering Electric Co.*, 351 NLRB No. 18 (2007), a 3-2 Board majority ruled that an applicant for employment is not entitled to protection against discrimination based on union affiliation or activity unless the applicant is "genuinely interested" in an employment relationship with the employer.

In this case, a local of the IBEW announced a "salting" campaign targeting nonunion employers with the goal of "driving the nonunion element out of the business." The campaign strategy included the alternative of "imposing such costs on the nonunion employer as will cause it to scale back its business, leave the salting union's jurisdiction entirely, or go out of business altogether." A key tactic in this strategy was to file unfair labor practice charges at every opportunity, especially by having many union employees apply for jobs and then file charges when rejected for employment. In dealing with nonunion employer Toering Electric, a union organizer answered an advertisement for help by sending not only his own resume but those of three other local union members. In the cover letter to the company, the organizer identified all four of the applicants as apprentices or journeymen with the local union as the source of the resumes. A month later the same organizer submitted 14 other resumes of union members to the company. Several of these contained no work history, another five were stale and one was from an employee who had previously rejected a job with the company a few months earlier. The company rejected the applications, with the office manager testifying that the fact that they were stale and incomplete led him to believe that the individuals were really not interested in employment.

In dealing with this case, the Board was mindful of the overall strategy of the union, namely, to drive the non union employer out of business, in part by running up huge litigation costs in defending countless unfair labor practice charges. The Board believed that the purposes of the Act would not be served by protecting such conduct. The Board in part wanted “to allay reasonable concerns that the Board’s processes can be too easily used for the private, partisan purposes of inflicting substantial economic injury on targeted nonunion employers rather than for the public, statutory purpose of preventing unfair labor practices that disrupt the flow of commerce.”

Since the relationship between an employer and a “putative job applicant who has no genuine interest in working for that employer is not the economic relationship contemplated and protected by the Act,” the Board would not provide protection for such job applicants. The majority wrote:

Simply put only those individuals genuinely interested in becoming employees can be discriminatorily denied that opportunity on the basis of their union affiliation or activity; one cannot be denied what one does not genuinely seek.

Criticizing some of the prior Board cases, the majority noted that applicants had been afforded protection “even when they engaged in conduct clearly intended to provoke a decision *not* to hire them, or engaged in antagonistic behavior toward the employer that it wholly at odds with an intent to be hired.”

Such conduct has included mocking a hiring official’s Asian accent while soliciting workers to quit their jobs and work for a union contractor; putting an arm around a hiring official’s shoulder and threatening stating that “you’re messing with the union now,” entering an employer’s office en masse to apply while videotaping the proceedings, and making outrageous and defamatory statements about the employer at a public meeting.

The Board was particularly concerned about “batched” applications sent in by union officials, where there is doubt that the applications were authorized by the individuals, or even if authorized, whether the individual involved ever really wanted to go to work for the employer. In many cases, such batched applications were submitted “for the sole purpose of creating a prima facie cases of statistical discrimination.”

In laying out the order and burden of proof in this cases for the future, the Board said that General Counsel for the Board will be required to show that there was an application made by an individual or that a union or someone else acting the employee’s behalf applied for the employee. At that point, the employer may contest the “genuineness” of the application “through evidence including, but not limited to the following: evidence that the individual refused similar employment with the respondent employers in the recent past; incorporated belligerent or offensive comments on his or her application; engaged in disruptive, insulting or antagonistic behavior during the application process; or engaged in other conduct inconsistent with a genuine interest in employment.”

One the employer has set forth such evidence, the General Counsel may rebut it and prove by a preponderance of the evidence that the individual in question was genuinely interested in the job.

In dissent, Members Walsh and Liebman contended that the Board majority was continuing to roll back protections for union salts “who seek to uncover hiring discrimination by nonunion employers and to organize their workers.” The dissent underlined that salts “perform a critical function under the Act” by ferreting out employment discrimination in the hiring process.

In disputing the analytical framework used by the Board majority, the dissent notes:

Current law is flatly contrary to the majority’s apparent presumption that unfair labor practice charges filed by salts have no merit unless it can be proven that the salt would have accepted a job offer. To repeat what should be obvious: the merits of a charge- whether an employer engaged in antiunion discrimination –have no necessary connection to the applicant’s interest in the job.

The dissent conceded that salts may generate unfair labor practice cases, but “it is the employers who are committing the unfair labor practices. One would think that *such* conduct would be the Board’s chief concern.”

The dissent wrote that “by removing certain applicants from the scope of Section 2 (3), the majority effectively decrees that such applicants are not entitled to any protection under the Act – not only under Section 8 (a) (3) but also Section 8 (a) (1). It is hard to imagine a view of the law more at odds with the National Labor Relations Act and its aims.” While an applicant’s interest in a job may be unknown, that interest may be irrelevant to an employer whose policy is to refuse to hire union applicants and who act on that basis.

See also *Oil Capital Sheet Metal*, 349 NLRB No. 118 (2007). Union salts that have been discriminated against will no longer be entitled to a presumption that they would have remained employed indefinitely but for the failure to hire them.

## **I. Union Dues**

### *a. Teamsters Local 570 Chambers & Owen, Inc.*

In *Communications Workers v Beck*, 487 U.S. 735 (1988), the Supreme Court ruled that a union may not expend funds collected under a union security clause on activities unrelated to collective bargaining, grievances adjustments or contract administration over the objections of dues-paying nonmember employees. Subsequently, in *California Saw & Knife Works*, 320 NLRB 224 (1995), *enfd. sub nom. Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998), *cert. denied sub nom. Strang v. NLRB*, 525 U.S.

813 (1998), the NLRB determined that it would assess unions' *Beck* obligations "under the duty of fair representation owed by a union to all members of a collective bargaining unit it represents." A union will be deemed to breach that duty if its actions are "arbitrary, discriminatory or in bad faith."

In *Teamsters, Local 579 Chambers & Owen, Inc.*, 350 NLRB No. 87 (2007), the issue before the NLRB was whether that duty of fair representation requires a union to provide *Beck* objectors with information sufficient to reasonably evaluate the propriety of the union's reduced fee calculation before the objectors decided whether to challenge that calculation. The Board concluded that "basic considerations of fairness dictate that objectors receive such information before being forced to pursue a challenge."

The union in this case argued that it essentially complied with its obligations by providing the objecting employee with its major categories of expenditures and the portions of each category that the union considered "representational and nonrepresentational." However, the union said it had no obligation to provide further information about its affiliates' expenditures. The General Counsel argued to the contrary, and contended that *Hudson*<sup>2</sup> requires unions to provide *Beck* objectors with separate financial disclosures for each affiliate with which they share funds derived from nonmember objectors' dues and fees.

While existing Board law<sup>3</sup> had required unions that pay per capita taxes to its affiliates to disclose information about how the affiliates determined the chargeability to the objectors of the per capita taxes *only after* an objector had filed a challenge, the Board would now hold that "this affiliate information must be furnished to a *Beck* objector at the second stage so that he or she can determine *whether* to file a challenge."

Thus, for example, if the union's affiliate expended 60% of the per capita tax money on matters that the affiliate deemed chargeable and 40% on matters that the affiliate deemed nonchargeable, the union would be required to disaggregate the affiliate's expenditures into major categories and break down each category into chargeable and nonchargeable percentages – just as it must do for its own expenditures. It would not be sufficient to simply state that 60% of the per capita tax money was spent on chargeable matters and 40% on nonchargeable matters.

.Members Liebman and Walsh dissented and would preserve the framework established by the *Dynacorp* and *California Saw* decisions.

*b. Seidemann v. Bowen*

In *Seidemann v. Bowen*, -- F. 3d --, 2007 WL 2416533 (2<sup>nd</sup> Cir, 2007), a professor at CUNY challenged the union's agency fee procedures, claiming such

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<sup>2</sup> *Teachers Union Local 1 v. Hudson*, 475 U.S. 292 (1986),

<sup>3</sup> *Teamsters Local 166 (Dyncorp Support Services)*, 327 NLRB 950 (1999)

procedures violated the First Amendment. The professor based his claim on the fact that nonmember employees were being charged for political and ideological expenditures in violation of the First Amendment.

The Professional Staff Congress, which represented the professor, had a procedure by which nonmembers could challenge the use of their fees. Originally, those procedures provided that, prior to the annual objection period, the union would provide the agency fee payers with information regarding the previous year's rebatable expenditures. The objection procedures are sent to each agency fee payer on an annual basis. The agency fee payers have a one month period to mail their objections. They are then entitled to an advanced rebate for the projected pro rata amount of expenditures not related to the collective bargaining process. If the objector is dissatisfied he may appeal within 35 days. The matter will then be submitted to a neutral arbitrator.

The professor objected to the fact that he had to object each year, and that the union would not accept his continuous objections. He further challenged the requirement that persons in his position identify the percentage of political and ideological expenditures in dispute as a precondition to arbitration.

In its discussion, the Court reviewed the case law surrounding agency fee payers and union obligations. The first issue addressed is whether requiring agency fee holders to object annually to payment of expenses other than for costs of collective bargaining meet the mandate of unions using "narrowly drawn" objection procedures to protect the First Amendment rights of agency fee payers. *Andrews v. Educ. Assn of Cheshire*, 829 F. 2d 335, 229 (2<sup>nd</sup> Cir, 1987). On this question, the Court followed the reasoning of the Fifth Circuit and held that although the burden of making an initial objection is on the employee, nothing in the law would "suggest that merely because an employee must initially make his objection known, a union may thereafter refuse to accept a dissenter's notice that his objection is continuing."

Here the PSC's annual objection requirement burdens employees in exercising their constitutionally protected right to object, and the union has proffered no legitimate need for disallowing continuing objections. While PSC suggests that it wants to take advantage of inertia on the part of would-be dissenters who fail to object affirmatively, thus preserving more union members, that rationale cannot carry the day in light of *Hudson's* and *Andrews's* requirements that procedures for objecting be drawn narrowly.... We hold the annual objection requirement imposed on the PSC in this case is an unnecessary burden on an employee's exercise of First Amendment rights.

In addition, the Court also found that the union's requirement that agency fee payers object to the specific percentage of expenditures in dispute as a pre-condition to arbitration is also unconstitutional. PSC required that in order for an objector to obtain arbitration of a disputed fee, "s/he must indicate to the union local president the percent of agency fees that s/he believes is in dispute." Noting that the Supreme Court has consistently rejected the notion that "dissenters must object with particularity," the Court

agreed that such a requirement “places an additional unnecessary burden on objectors in violation of the Court’s holding in *Hudson*.”

The union argued that the fact that it returned his dues did not render the matter moot because the union did not establish that its unlawful conduct would not recur. This is a “formidable burden” not met by the PSC in this case.

### **J. Discontinuance of Dues Checkoff**

In *Hacienda Hotel, Inc. Gaming Corp.*, 351 NLRB No. 32 (2007), the Board held that an employer did not violate Section 8 (a) (5) of the Act when it unilaterally discontinued dues check off after the parties’ collective bargaining agreements expired. The Board reasoned that in the circumstances of this case, the dues checkoff clause in the contract “contained explicit language limited the Respondent’s dues-checkoff obligation to the duration of the agreements.”

The contracts in question expired on May 31, 1994, and the Respondent continued checkoff of dues until June 1995 when they stopped checking off dues after notifying the union of that intent. The union filed charges claiming that such unilateral action was violative of the Act.

The Board based its decision on *Bethlehem Steel Co.*, 136 NLRB 1500 (1962) and its progeny that an employer’s obligation to continue a dues checkoff arrangement with ceases with the end of the contract that created the obligation.

Contrary to the dissent, we find that the language limiting dues checkoff to the duration of the respective collective bargaining agreements explicitly included in the dues checkoff provision itself distinguishes that provision from other contract terms subject to the unilateral change doctrine articulated in *NLRB v. Katz*, 369 U.S. 736 (1962) pursuant to which most contractually established terms and conditions of employment are mandatory subjects of bargaining and cannot be changed unilaterally on contract expiration..... In agreeing to this language [that the check off continues “for the duration of the agreement”], we find that the Union thereby explicitly waived any right to the continuation of dues checkoff as a term and condition of employment after the expiration of the collective bargaining agreement.

In a separate concurring opinion, Member Battista would place less emphasize on the precise language in the dues checkoff provision.

Even if the parties, unlike here, failed to express this intention in their collective bargaining agreement, I would further find that dues checkoff should be included among those provisions that come to an end at the expiration of the contract. That is, I conclude that dues checkoff should be considered among the very few exceptions to the *Katz* general rule that mandatory subjects of bargaining continue

as terms and conditions of employment after contract expires. Among the class of mandatory subjects that are excluded from the unilateral change doctrine, i.e. do not survive contract expiration, are no-strike clauses and correlative arbitration clauses.

The dissent (Members Walsh and Liebman) disagreed. While recognizing that the employer may not have a *contractual* obligation to continue dues checkoff, it does have a *statutory* obligation to continue it. Criticizing the majority's approach, the dissent argues that that approach "under which standard language limiting the employer's contractual obligations to the term of the agreement removes the employer's statutory obligation to maintain existing terms and conditions of employment post contract expiration, would effectively drain the *Katz* doctrine of any force."

## **K. Union Mergers and Recognition**

### *a. The Raymond F. Kravis Ctr. for Performing Arts*

In *The Raymond F. Kravis Ctr. for Performing Arts*, 351 NLRB No. 19 (2007), the Board reversed precedent and ruled that an employer's obligation to recognize and bargain with an incumbent union following a union merger or affiliation continues unless the changes resulting from the merger or affiliation are so significant as to alter the identity of the bargaining representative. Even if the merger or affiliation was accomplished without due process safeguards, including providing members with the opportunity to vote, an employer is still not relieved of its bargaining obligation. The three member panel of Battista, Liebman and Kirsanow decided the case.

In finding that a merger or affiliation does not raise, by itself, a question concerning representation, the Board noted:

A question concerning representation in relation to an incumbent union is presented when an employer has a good faith reasonable uncertainty whether a majority of unit employees continues to support the union. Evidence to show such uncertainty can include antiunion petitions signed by unit employees, statements by employees concerning personal opposition to the union, employees' statements regarding other unit employees' antiunion sentiments and employees' statements expressing dissatisfaction with the union's performance as the bargaining representative.

We find that the lack of a membership vote concerning union affiliation is insufficient to raise a question concerning representation, that is, to make it "unclear whether a majority of employees continue to support the reorganized union. A membership vote reveals employees' sentiments on an issue. By the same token, when there is no vote, the employees' sentiments remain unstated. Thus, unlike antiunion petitions or other expressions of employee dissatisfaction

with the union, the absence of a vote indicates nothing about employee sentiment regarding support for the incumbent union.

The Board will continue to look at the question of whether the merger or affiliation is “so significant” a change as to alter the identity of the bargaining representative. This may occur “when the changes are so great that a new organization comes into being – one that should be required to establish its status as a bargaining representative through the same means that any labor organization is required to use in the first instance,” citing *Western Commercial Transport, Inc.* 288 NLRB 241 (1988). Such changes –which will be viewed in their totality - may be in the areas of dues and fees, organizational changes, internal complaint procedures, replacement of known union representatives, changes in the constitution and bylaws, modification of referral systems, changes in benefit trust plans, etc.

*b. Highland Hospital Corp.*

In *Highlands Hospital Corp.*, 2007 U.S.App. LEXIS 27567, the employer had withdrawn recognition from a union for allegedly losing majority support after a decertification petition had been filed by a nurses’ committee. The committee had informed the employer by letter that a majority of nurses had indeed signed the decertification petition and that a number of others were reluctant to sign for fear of repercussions. The letter said that 38 of 71 nurses had shown “support for decertification” either by signing the petition or by oral comment. The employer canceled future negotiations and announced it would withdraw recognition upon the expiration of the contract.

In its decision below, the NLRB (2006 NLRB LEXIS 376) had found that the withdrawal of recognition was not lawful because the employer had not shown “actual loss of majority support” as required by *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001). In particular, the showing of interest petition in part reflected support for an election without necessarily implying opposition to the union, and the petition contained valid signatures from less than half the nurses. Before the *Levitz* case, employers could rebut the presumption of union majority by showing no more than a good faith doubt about the union’s majority status. But in *Allentown Mack Sales & Service*, 522 U.S. > 359 (1998), the Supreme Court interpreted “doubt” to mean uncertainty, “a less stringent standard than the Board’s prior approach, which defined doubt as disbelief.

The Court indicated that the Board could adopt a different standard if it so chose, and in the *Levitz* case, the Board had done that, now requiring employers “to show actual loss of majority support, rather than good faith doubt” about the union’s majority status.

Applying this test to the case at hand, the Board concluded that the company had simply failed to prove the loss of majority support. Even though several other nurses who had not signed the petition had testified at the hearing that they did not support the union, such evidence was unavailing because at the time that the company had withdrawn

recognition, it had not know about these nurses' lack of support. On appeal, the D. C. Circuit Court of Appeals agreed with the Board's findings.

## L. Strike Replacements

In *Jones Plastic & Engineering Company*, 351 NLRB No. 11 (2007), the Board ruled that, even though strike replacements were told they were "at will" employees, they were nonetheless "permanent strike replacements" for purposes of determining the rights of striking employees under the NLRA.

After an economic strike began at the employer's facilities, strike replacements were hired. Each replacement employee completed a standard job application which included the following provision: "I understand and agree that my employment is for no definite period and may... be terminated at any time without any previous notice." In addition, in the company handbook, there was a statement that read "Employment at will is our Company policy. The Company may terminate employment for any reason." Upon hire, the strike replacements also signed a form which read:

I [name of replacement] hereby accept employment with Jones Plastic & Engineering Company Camden Division (hereinafter "Jones Plastic") as a permanent replacement for [name of striker] who is presently on strike against Jones Plastic. I understand that my employment with Jones Plastic may be terminated by myself or by Jones Plastic at any time, with or without cause. I further understand that my employment may be terminated as a result of a strike settlement agreement reached between Jones Plastic and the USWA Local Union 224, or by order of the National Labor Relations Board.

About four months after the strike began, the Union made an unconditional offer to return to work on behalf of all striking employees. The company sent a letter to the union informing them that the company had a full complement of permanent replacements and that returning strikers would be placed on a preferential hiring list. Some were later offered their jobs back.

The overarching question before the Board was whether the majority view in the case *Target Rock Corp.*, 324 NLRB 373 (1997), enfd. 172 F. 3d 921, (D.C. Cir., 1998) which held that "at will" employment is evidence that striker replacements are not permanent replacements should continue to be the governing law. Then, in the particulars of this case, the question was whether the company's new hires were permanent or temporary replacements.

As background, the respective rights of economic strikers and replacement workers have been well established. An economic striker who makes an unconditional

offer to return to work is entitled to immediate reinstatement unless the employer can show legitimate and substantial business justification for refusing to reinstate the worker. *NLRB v. Fleetwood Trailer*, 389 U.S. 375, 378 (1967). One such reason is an employer's permanent replacement of an economic striker as a means of continuing his operation during a strike. *MacKay Radio v. NLRB*, 304 U.S. 333, 345 (1938). Thus, at the conclusion of a strike, an employer is not bound to discharge those hired to fill the places of economic strikers if it made assurances to those replacements that their employment would be permanent.

In *Target Rock*, the Board found that a written statement of "at will" employment in a application forms for replacement workers was fatal to the employer's contention that they were permanent replacements for strikers. There was some disagreement in the Board majority in that case as to whether a statement of "at will" employment was per se evidence of temporary status or whether it would merely be one factor in making that determination.

In this instant case, the Board noted that the company had issued statements to the replacement workers that they were indeed permanent replacements for striking employees, and many of the forms even named the striker that the new hire was permanently replacing. The Company told the strikers at one point it was hiring permanent replacements for them. In some cases the new hires were orally told they were permanent replacements as well. Such evidence would clearly show that the new hires were permanent.

On the other hand, the at will disclaimer could be viewed as a strong piece of evidence militating against permanent status. The Board, however, did not find that disclaimer sufficient to overcome the other evidence of permanency.

The Board distinguished the *Target Rock* majority's reliance on *Belknap v. Hale*, 463 U.S. 491 (1983), a case which held that, while the inclusion of certain conditions in an offer of employment to a replacement would not necessarily foreclose finding the offer was permanent, an at will disclaimer could not be one of those "conditions." The Board here ruled that this was not a proper interpretation of *Belknap*.

The *Target Rock* majority interpreted *Belknap* as excluding at will employment offers to striking replacements from the category of conditions that would not necessarily foreclose a finding that the offers were permanent. On the contrary, the Court in *Belknap* did not "make clear" that at will employment status was inconsistent with permanent employment. That issue was not even presented in *Belknap*.

The Board found better case law support in the 1951 case *Kansas Milling Co.*, 97 NLRB 219, 225, where probationary employees were found to be permanent replacements even though they could be discharged without cause at any time. The Board in that case stressed that in hiring these employees on a probationary basis first, the company was simply following its normal practices. Assurances to these employees that they could

look forward to permanent positions if they were able to qualify for the jobs on which they were placed established their status as permanent employees. See also, *Anderson, Clayton & Co.*, 120 NLRB 1208 (1958) (replacements serving 6 month probationary periods during which employer was free to discharge them “without recourse” were nevertheless permanent strike replacements.); *Solar Turbines*, 302 NLRB 14 (1991)(requirement to submit to physical tests and drug and alcohol testing prior to starting work did not detract from permanent replacement status.)

In this regard, we stress, as the Board did in *Kansas Milling* and *Solar Turbines*, that the Respondent “was following its normal employment practices” by offering the replacements employment on an at will basis.”

Indeed, the Board said that if it required greater assurances of tenure by an employer to replacements, such a ruling “would permanently disadvantage the strikers (who would remain at will employees) in contravention of the Act’s fundamental principles,” citing *NLRB v Erie Resistor*, 373 U.S. 221 (1963)(award of superseniority to nonstrikers was unlawful because it penalized employees for striking in a manner that created continuing obstacles to the future exercise of those rights.).

### **M. Unilateral Changes After Bargaining Impasse**

In *Mail Contractors of America v. NLRB*, (D.C. Cir, No. 06-1338, 2008), the Court of Appeals for the D.C. Circuit ruled that an employer was free to change “trucker relay points” following an impasse in bargaining.

The company transports bulk mail for the U.S. Postal Service among its 17 terminals nationwide. Because the terminals are far apart, its trucks are typically driven to and from “relay points” between terminals where one driver turns the truck over to another who takes the truck on towards its destination. The union contract allows the company, under the management rights clause, “the right to decide the location of its terminals and relay points” without further bargaining. While this language was in place, the company nonetheless had bargained with the union over changing relay points during the life of the contract, even though it was not required to do so.

During the strike, the company did change one of the relay points when one driver refused to go to a specified relay point and thus the company changed it to a closer one, a decision that affected the compensation received because of the mileage difference.

The Union filed charges claiming the company could not change relay points without bargaining.

In analyzing this case, the Board explained the relevant case law. When an employer and a union reach an impasse over a mandatory subject of bargaining, either party may resort to economic warfare and the employer’s statutory duty to maintain the status quo during the post contract negotiations ends. The employer may then make unilateral changes that are “reasonably comprehended” within his preimpasse proposals.

The rationale for this rule is that the employer's unilateral imposition of the final offer breaks the impasse and therefore encourages future collective bargaining. Some unilateral action has been precluded by the Board and the Courts when allowing such unilateral action would be destructive of the bargaining process.

In a series of cases in the early 1990s involving McClatchy Newspapers, the D.C. Circuit placed additional restrictions on the right of management to impose final offers after impasse. In a case involving a unilateral discretionary pay scheme, the Court noted:

If ... an employer can make unconstrained wage adjustments, the futility of union may be driven home to each employee in much the same way the unilateral change doctrine seeks to avoid. Admittedly, the unilateral change doctrine generally presumes that implementing changes post-impasse does not hurt collective bargaining. But if the employer can indefinitely adjust employee wages .. impasse will not longer be a temporary phenomenon. Where the employer has the unconstrained authority to adjust wages to respond to changing conditions, it will have substantially smaller incentives to restart collective bargaining. *NLRB v. McClatchy Newspapers, Inc., (McClatchy II)* 964 F. 2d 1153, 1172 (D. C. Cir., 1992). See also, *McClatchy IV*, 131 F. 3d 1026, 1032 (D.C. Cir., 1997)

The upshot of the Court's reasoning was that the employer was prohibited only from implementing a wage system in which it would have determined wages on a purely discretionary basis; nothing in the decision would bar an employer from implementing a final offer in which wages were determined according to fixed criteria.

In the instant case, the Board below had ruled against the company. However, the Court, in reversing that decision, first observed that the issue was not centered on wages. Noting its own reasoning in *McClatchy*, the Court noted that "we expressly predicated our disapproval of the Board's decision upon the distinction between wages and "scheduling or a host of other decisions generally thought closely tied to management operations." Here "the placement of a relay point is a quintessentially managerial decision; its location presumably will affect the efficiency of the company's operations but it will have no material effect upon the company's wage bill, [since some drivers benefited and some drivers lost as a result of the change]."

In addition, the Court thought that the Board's decision below "impedes an employer's ability after impasse to implement its final offer to a far greater extent than had any prior decision." The Court found that the administrative law judge and Board below had essentially engaged in a broad side against the implementation-after-impasse doctrine – an attack that the Court would not approve. The very purpose of the implementation doctrine is to "break the impasse and therefore encourage future bargaining." Further, while the union's power may be diminished under the facts of this case, the Court noted it is not the Board's role "to equalize disparities of bargaining power between employer and union." The Court upheld the company's action and reversed the Board.

## N. Union Waiver of Right to Bargain

In *Provena Hospitals*, 350 NLRB No. 64 (2007), the employer implemented a staff incentive policy and a new attendance and tardiness policy. The union contended that the employer had a duty to bargain over these policies; the employer argued the union waived the right to bargain over such changes.

The Board began its analysis by noting that these cases “presents us with the opportunity to explain and reaffirm our adherence to one of the oldest and most familiar of Board doctrines, the clear-and-unmistakable waiver standard, in determining whether an employer has the right to make unilateral changes in unit employees’ terms and conditions of employment during the life of a collective bargaining agreement.” This standard, the Board noted, requires bargaining partners to unequivocally and specifically to express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply. These cases are particularly scrutinized when the alleged source of the waiver is a management rights article in the collective bargaining agreement.

The Board majority (Members Liebman and Walsh) stated that the clear and unmistakable waiver doctrine is still sound and castigated the minority opinion of Chairman Battista for suggesting that it be replaced with the “contract coverage” approach. Under this latter test, where there is a contract clause that is relevant to the dispute, it can reasonably be said that the parties *already have bargained* about the subject and have reached some accord. Thus, there is no refusal to bargain.

Applying the standard to this case, the Board found that the employer violated the act by implementing an incentive policy – which would have given nurses a \$500 bonus for working extra holiday shifts.

There is no express substantive provision in the contract regarding incentive pay. Moreover, there is no evidence that incentive pay was consciously explored in bargaining or that the Union intentionally relinquished its right to bargain over the topic. In the absence of either an explicit contractual disclaimer or clear evidence of intentional waiver during bargaining the Respondent was not authorized to act unilaterally on this undisputedly mandatory subject of bargaining.

On the other hand, the Board found no violation with respect to a newly implemented disciplinary policy on attendance and tardiness.

Application of our traditional standard reveals that several provisions of the management rights clause, taken together, explicitly authorized the respondent’s unilateral action. Specifically, the clause provides that the Respondent has the right “to change reporting practices and procedures and/or to introduce new or improved ones”; to make and enforce rules of conduct”; and “to suspend, discipline and discharge employees.” By agreeing to this combination of provisions, the Union relinquished its

right to demand bargaining over implementation of a policy prescribing attendance requirements and the consequences for failing to adhere to those requirements.

Chairman Battista dissented in the case, urging his colleagues to adopt the “contract coverage” doctrine in examining these issues.

Under this test, where there is a contract clause that is relevant to the dispute, it can reasonably be said that the parties have bargained about the subject and have reached some accord. Thus, there has been no refusal to bargain. In sum, the issue is not whether the union has waived its right to bargain. The issue is whether the union and the employer *have bargained* concerning the relevant subject matter.

Chairman Battista noted that this test has been adopted by both the Seventh Circuit and the D. C. Circuit. See *NLRB v. U.S. Postal Service*, 8 F. 3d 832 (D.C. Cir., 1993); *Chicago Tribune Co. v. NLRB*, 974 F. 2d 933 (7<sup>th</sup> Cir., 1992). See also *Bath Marine Draftsmen’s Assn. v. NLRB*, 475 F. 3d 12 (1<sup>st</sup> Cir., 2007)

In addition, Battista noted that the waiver test pursued by the majority “poses conflicts between the Board and the grievance-arbitration process.”

An arbitrator, viewing the same case through the normal principles of contract interpretation, would find that the clause privileges the conduct, albeit not “clearly and unmistakably” so. Phrased differently, the Board would start with the proposition that the unilateral change in unlawful, unless the right to bargain had been “clearly and unmistakably” waived. An arbitrator would ask whether the union has met its burden of establishing a breach of contract. Thus, there is a danger of different results depending on the choice of forum. The union is encouraged to come to the Board, rather than to the agreed-upon grievance-arbitration process.

Applying his contract coverage approach, Battista saw no problem with the attendance policy because, like the Board majority saw it, the Management Rights sections cited were explicit enough to allow the action. While the majority viewed this as a waiver, Battista simply saw it as an issue covered by the contract.

However, on the staff incentive issue, Battista saw no violation by the employer because the contract did have provisions on “extraordinary pay” for extra hours worked and also that there were provisions elsewhere that allowed management “to take any and all actions it determines appropriate... to maintain efficiency and appropriate patient care.” He saw such clauses as “relevant to the dispute about overtime work and the compensation to be paid therefore.... This dispute is grist for the arbitral mill. An arbitrator could reasonably conclude that the respondent did not breach the contract when it implemented the [incentive]system. Conversely, an arbitrator could conclude that “extraordinary pay” does not include “incentive pay” and that the latter exceeded the provision of the contract.” In either case, he would leave this dispute to the grievance and arbitration provisions of the collective bargaining agreement.

### **O. Discharge Based on Improperly Obtained Evidence.**

In *Anheuser-Busch, Inc.*, 351 NLRB No. 40 (2007), the Board majority overruled precedent and held that employees discharged on the basis of evidence the employer obtained through video surveillance implemented without notice or bargaining with the union in violation of Section 8 (a) (5) cannot be reinstated under Section 10 (c) 's provision barring the Board from reinstating employees discharged for cause.

### **P. Union Access to Information**

In *Disneyland Park*, 350 NLRB No. 86 (2007), the Board dismissed a Section 8 (a) (5) charge against an employer that failed to provide a union with requested information regarding subcontracts. The Board ruled that the union must claim that a particular provision of the contract is being breached and set forth facts to support that claim.

### **Q. Retiree Benefits**

In *USW v. Retirement Income Plan for Hourly-rated Employees of ASARCO*, (9<sup>th</sup> Cir, 1/708, Case no. 05-16833), the Ninth Circuit Court of Appeals held that 20 employees who lost their jobs following a permanent closing of their plan were entitled to arbitrate – along with their union – the issue of whether the employer should have allowed them to “creep” into their two year layoffs in determining whether they met the eligibility requirements for full pension benefits. The Court rejected the plan’s argument that “the presumption of arbitrability” of this dispute did not apply because the employees were retired. Citing decisions from other circuit courts, the Ninth Circuit affirmed that there is a presumption of arbitrability when a union files a grievance on behalf of a group of retirees. The case had arisen after the plan refused to arbitrate the dispute and the union filed a lawsuit to compel arbitration under Section 301 of the NLRA and Section 502 of ERISA.

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