UPDATE TO 2019 SUPPLEMENT FOR COX & BOK’S

LABOR LAW (16th ed.)

From July 4, 2019 to August 7, 2020

by

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Page 58. Add after NLRB v. Catholic Bishop of Chicago:

In Bethany College, 369 NLRB No. 98 (2020), the Board extended Catholic Bishop of Chicago to faculty teaching in religious institutions of higher education, concluding that the exercise of Board jurisdiction over religious schools in matters involving faculty members will inevitably involve inquiry into the religious tenets of these institutions. Such inquiry would, in the Board’s view, impermissibly present a significant risk that the protections set forth in the Religion Clauses of the First Amendment of the Constitution would be infringed. In so doing, the Board overruled in relevant part Pacific Lutheran University, 361 NLRB 1404 (2014), adopting instead the D.C. Circuit’s three-pronged approach. That is, in determining whether to assert jurisdiction over the faculty of an educational institution claiming exemption in Catholic Bishop of Chicago, the Board will inquire only whether the institution (a) holds itself out to the public as a religious institution, (b) is nonprofit, and (c) is religiously affiliated. University of Great Falls v. NLRB, 278 F.3d 1335 (D.C. Cir. 2002); see also Duquesne Univ. NLRB, 947 F.3d 824 (D.C. Cir. 2020) (divided court sustains exclusion of adjunct faculty from the Act).

Page 59. Add to page 131 of the 2019 Supplement:

The Board has decided to retain jurisdiction over charter schools. KIPP Academy Charter School, 368 NLRB No. 48 (2020).

Page 72. Add after medical residents and graduate assistants:

On September 18, 2019, the Board issued a notice of proposed rulemaking asserting jurisdiction over private nonprofit colleges or universities with gross award revenue of not less than one million dollars, but exempting from the definition of an employee under section 2(3)
“students who perform any services, including, but not limited to, teaching or research assistant…in connection with their undergraduate or graduate studies...” at such institutions.

The Board explained that it considered those involved have a “primarily educational, not economic relationship” with these schools, spend a limited amount of time engaged in compensated tasks, and do so only while enrolled. It further stated that extending bargaining to them would be inconsistent with “academic freedom”.

Questions for Discussion

1. Over 64,000 graduate students are represented by unions in collective bargaining in public colleges and universities. Does “academic freedom” – the understood here as the freedom of institutions of higher education to control their academic affairs – differ in public institutions from private ones? Do the economic interests of a graduate teaching assistant at Columbia or New York University differ from those at Berkeley or the University of Wisconsin?

2. Some states, New York included, have “little Wagner Acts” reaching employees not covered by the federal law. If the Board adopts its proposal rule, could graduate assistants at Columbia University secure bargaining rights under New York law?

Page 74. Add to the discussion of unfair labor case processing:

On October 7, 2019, the NLRB’s General Counsel announced that that office’s initiative to expedite the handling of charges had resulted in a reduction of 17.5% in processing time.

According to a report in Bloomberg Law,

The NLRB reduced the average time between a union or employer’s filing of an unfair labor practice charge to a final disposition from 90 to 74 days, as of Sept. 30, the end of fiscal year 2019. It also reduced the number of cases that are still pending, from 281 at the end of the last fiscal year to 227 currently—the lowest level since 2012, the agency said.
In FY 2019, the NLRB received over 18,500 charges of unfair labor practice; 5,000 were settled before the issuance of a complaint, 800 were settled post complaint. The report explained,

The general counsel’s case processing changes included scrapping a system that prioritizes cases deemed to have major significance; limiting the use of subpoenas to get information from companies and unions accused of labor violations; and linking agency officials’ job performance to the case processing averages at their regional offices.

But it also observed that,

Career staff at the agency and worker advocates have criticizes the changes, saying the emphasis on speed and settlements gives an unfair advantage to businesses. Management lawyers and Republican politicians have countered that [General Counsel] Robb’s objectives would improve the agency’s efficiency while allowing it to function under a reduced budget.

Bloomberg reported on May 13, 2019, that since the Trump administration took office union unfair labor practice complaints fell by 11%. The number of charges filed had been falling since 2002, when 33,000 charges were filed.

Page 87. Add at end of discussion of “New Election Rules” at page 135 of the 2019 Supplement:

Despite the 2014 Rule’s modest overall impact, in 2017, the newly constituted Trump Board issued a “Request for Information,” inquiring whether the 2014 Rule should be retained, modified, or replaced. On December 18, 2019, the Board issued a new election rule (“2019 Rule”) that effectively would have repealed significant portions of the 2014 Rule. See Representation-Case Procedures, 84 Fed. Reg. 69,524 (Dec. 18, 2019). It did so without having undergone a formal rulemaking process. The 2019 Rule’s purported purpose is to “promote[] efficiency and expeditious final resolution of the question of representation, even if the election itself is not conducted as quickly as it may have been under the 2014 amendments.” Id. at 69,529.
In March 2020, the AFL-CIO filed suit challenging the validity of the 2019 Rule. While the Rule was originally set to take effect on April 16, 2020, the Board postponed the effective date to May 31, 2020. On May 30, 2020, the United States District Court for the District of Columbia held five provisions of the Rule to be unlawful because their enactment did not fall within an exception to the Administrative Procedures Act’s notice-and-comment rulemaking requirements. See AFL-CIO v. NLRB, --- F. Supp. 3d ---, Civ. No. 20-cv-0675, 2020 WL 3041384 (D.D.C. June 7, 2020) (explaining the reasons for the May 30 order). Those sections would have changed the 2014 Rule’s election provisions by (1) allowing the parties to litigate most voter eligibility and inclusion issues prior to the election; (2) instructing that the Regional Director normally will not schedule an election before the 20th business day after the date of the direction of election; (3) mandating that employers furnish the required voter list to the Regional Director and other parties within five business days (rather than the two business days under the 2014 Rules) following the issuance of a direction of election; (4) limiting a party’s selection of election observers to individuals who are current members of the voting unit whenever possible; and (5) instructing that the Regional Director not to issue certifications following elections if a request for review is pending or before the time has passed during which a request for review could be filed.

However, the court held that the five provisions were severable from the remaining provisions of the 2019 Rule and neither invalidated nor enjoined enforcement of the Rule’s remaining sections. On June 1, 2020, the Board announced that it was implementing all of the provisions of the Rule that the court’s order had not been invalidated. See NLRB Gen. Counsel Guidance Memorandum on Representation Case Procedure Changes, GC 20-07 (June 1, 2020),
available at https://www.nlrb.gov/guidance/memos-research/general-counsel-memos. The gist of the most salient surviving provisions are as follows:

• Pre-Election Hearings: Pre-election hearings will generally be scheduled 14 business days (rather than the 8 calendar days under the 2014 Rules) from notice of the hearing, and Regional Directors will have greater discretion to postpone hearings.

• Notice of Petition for Election: Employers must post and distribute the Notice of Petition for Election within five business days after service of the notice of hearing (rather than two calendar days under the 2014 Rules).

• Non-Petitioning Party’s Statement of Position: Non-petitioning parties must file a Statement of Position within eight business days after service of the notice of hearing (rather than seven calendar days), and Regional Directors will have greater discretion to grant extensions.

• Petitioning Party’s Statement of Position: Petitioners must file a Statement of Position responding to the issues raised in any non-petitioning party’s Statement of Position. This Responsive Statement of Position is due three business days before the hearing.

• Post-Hearing Briefs: Parties are permitted to file post-hearing briefs with the Regional Director following pre-election hearings (rather than only upon special permission of the Regional Director). Post-hearing briefs are permitted for postelection hearings as well. Such briefs are due within 5 business days, and Hearing Officers may grant an extension of up to 10 business days for good cause.

• Requests for Review:
Filed within 10 Business Days after Direction of Election: If the Board either
does not rule on a request for review or grants the request before the election,
balloons will be impounded and remain unopened pending a decision by the Board.

Filed more than 10 Business Days after Direction of Election: Parties may still
file a request for review of a direction of election more than 10 business days after
the direction, but the pendency of such a request for review will not require
impoundment of the ballots or postponement of issuing a Tally of Ballots.

Post-Election: Consistent with the practice, parties may wait to file a request for
review of a direction of election until after the election has been conducted and
the ballots counted.

• Oppositions to Requests for Review: Oppositions are explicitly permitted in response to
all types of requests for review, and the practice of permitting replies to oppositions and
briefs on review only upon special leave of the Board has been codified.

• Business Day Calculation: All applicable time periods are calculated based on business
days as opposed to calendar days. The Rule also defines how business days are
calculated, including clarification that only weekend days and federal holidays are not
designated business days in time period calculations.

See id. at 1-3.

On July 7, the district rejected the remainder of the AFL-CIO’s claims, thereby leaving in
force these portions of the 2019 Rule. AFL-CIO v. NLRB, Civ. No. 20-cv-0675, 2020 WL
Finally, it is important to note that the 2019 Rule did not alter an employer’s duty to furnish *Excelsior* lists to unions prior to an election, nor did it reduce or limit the expanded information requirement set forth by the 2014 Rule. However, in a Notice of Proposed Rulemaking published July 29, 2020, the Board has proposed amending the rule to eliminate the requirement that employers provide available personal email addresses and available home and personal cellular telephone numbers of all eligible voters. *See* Representation-Case Procedures: Voter List Contact Information; Absentee Ballots for Employees on Military Leave, 85 Fed. Reg. 45553 (July 29, 2020).

**Page 94. After Republic Aviation:**

Wynn Las Vegas, LLC, 369 NLRB No. 91 (2020), expanded the meaning of “solicitation” to expand the application of a lawful “no solicitation” rule. Solicitation no longer requires the tendering or even the mention of a union authorization; any speech urging support for or voting for a union constitutes solicitation.

**Page 96. Add after discussion of Beth Israel Hosp.:**

In Wal-Mart Stores, Inc., 368 NLRB No. 146 (2019), the Board sustained a rule allowing union logos and graphics to be worn so long as they are “small” and “non-distracting”. The restrictive policy was lawful per se as applied to areas where employees “encounter customers in the course of performing their jobs”. In other areas the rule is subject to a balancing test weighing the employer’s “legitimate justification”. In the case, no such justification was found in non-customer contact areas. Member McFerran dissented that the prior test had been one of
needful “special circumstances” to restrict the employees right to display union logos and graphics, not an open-ended invitation to consider “legitimate justifications”.

Page 105. Add after Boeing set out on page 137 in the 2019 Supplement:

In Velox Express, Inc., 368 NLRB No. 61 (2019), the Labor Board’s Republican majority held that section 8(a)(1) was not violated by an employer’s requiring employees to sign agreements that classified them – wrongly – as independent contractors. It held the text of the agreement to be an expression of “legal opinion” sheltered by section 8(c). It also opined that to make mischaracterization an unfair labor practice per se would impose uncertainty and the threat of liability for good faith efforts to structure the relationship as one of independent contractorship. Member McFerran dissented on the ground that employees would understand that by signing they had waived the rights that accrue to employers under the Labor Act, such being the meaning of the distinction. She also opined that a statement of legal opinion can be a threat, citing Dal-TexOptical Co., 137 NLRB 1782 (1962).

Among the several post-Boeing decisions is Baylor Med. Center, 369 NLRB No. 43 (2020), governing the terms of a severance agreement offered to leaving employees. If agreed to, the employee was bound by two key provisions at issue before the Board: a non-disclosure term that restricted the person from disclosing in any manner confidential information including financial and personal information regarding employees; and a “no participation” provision whereby the departing employee would not assist or participate in any claim brought by a third party against the Company. In the Board’s opinion, contrary to the ALJ, neither of these violated Section 7: the agreement was voluntary and as it governed the conduct of persons no longer employed by the Company the NLRA did not infringe on the signers’ Section 7 rights nor those
of coworkers. By footnote, a 2001 decision holding a “non-participation” obligation to violate the Act per se, was overruled.

Questions about Baylor U. Med. Center

1. Is the Board correct that a restriction offered to someone who is not in the proximate relationship of an employee to their soon-to-be former employer is not subject to the Labor Act? Please reconsider this when you take up the Lechmere case on page 106.

2. Is the Board correct that a contract restricting a person from aiding or participating with another in that person’s dispute with an employer is not spoken to by the Act? Please read the Norris-LaGuardia Act and Section 7 of the Labor Act and reconsider this when you analyze the Epic Systems decision on page 202 of the 2019 Supplement.

Page 116. Add after Lechmere:

In Tobin Center for the Performing Arts, 368 NLRB No. 46 (2019), the Center leased space for several companies in the performing arts. One of its leasees was the San Antonio Symphony. Another was the Ballet San Antonio. The Ballet had used musicians of the Antonio Symphony to perform, but for a production of Sleeping Beauty it decided to use recorded music. The affected musicians handed out leaflets on the Center’s property before the performances of the ballet protesting the failure to use live performance. The leaflet said *inter alia*: “You’ve paid full price for half the product. San Antonio deserves better! DEMAND LIVE MUSIC!” The police were called by the Center’s management, the leafleters were asked to cross the street to a public sidewalk, which they did, and an unfair labor practice charge ensued.

find that off duty employees of a leasee had the section 7 right to leaflet where they did. The Board’s Republican majority disagreed and restricted *New York-New York* to those employees “who regularly and exclusively” work for a contractor on a property owner’s property. Although the musicians were not “complete strangers” on the property, their section 7 rights “should reasonably correspond to lesser rights of access…when off duty.” As to those employees who, unlike these musicians, do have access rights on the third party’s premises under this new test, they, too, can be excluded “if they can effectively communicate their message” by other means; *e.g.*, newspapers, billboards or other media in the “ordinary flow of communication”.

**Questions for Discussion**

Does the standard announced in this case differ from *Jean County*, discussed in but found inapplicable in *Lechmere*? (It would be well here to review *Jean County*.) In *Kroger Limited Partnership I-Mid Atlantic*, 368 NLRB No. 64 (2019) (discussed *infra* in connection with the casebook page 140), the Board’s Republican majority did rely on *Jean County*. But that case was not mentioned here. Did it not apply? Had it been applied, what would have been the result? What, then, is the status of that test?

**PAGE 123. Caesar’s Entertainment, 368 NLRB No. 143 (2019), overrules Purple Communications, set out in the casebook, returning to the approach set forth in The Register Guard, 351 N.L.R.B. 1110 (2007).**

**Page 140. Add After “A Note on Discriminatory Application”:**

In *Kroger Limited Partnership I-Mid-Atlantic*, 368 NLRB No. 64 (2019), the Administrative Law Judge applied *Sandusky Mall Co.*, 329 NLRB 618 (1979), to allow a non-
employee union agent access to the employer’s property to solicit customers to boycott the employer because the employer’s no solicitation prohibition, otherwise lawful, had been discriminatorily applied; i.e. because the employer had allowed a variety of charitable and civic organizations – the Girl Scouts, the Salvation Army – to fundraise on its property. The Board’s Republican majority overruled Sandusky Mall. “Discrimination” such as would allow access refers to activities “similar in nature” to that which the union engaged in. The majority reasoned that the courts had rejected the more generalized notion of Sandusky Mall, which rested on no “principled” ground. Moreover, insofar as the protest or boycott sought to be engaged in is dissimilar to the civic, charitable, and commercial activities the employer allows the amount of that allowed activity conducted on the employer’s premises is irrelevant. Accordingly, insofar as organizational solicitation might be concerned, an employer must allow a union to do so only if it allows other membership drives, e.g. by fraternal or religious organizations, which would be activity of a “similar nature.”

Member McFerran dissented on grounds of the distinction drawn being contrary to the Supreme Court’s teachings in Babcock & Wilcox and Stowe Spinning and, as a practical matter, that it singles out union speech for proscription.

**Question for Discussion**

Why should any discriminatory application of a lawful non-solicitation rule – other than allowing one union to do so while forbidding all others – be an unfair labor practice? What is the “principled ground” for such a rule?

*Page 151. Add to Problem for Discussion:*
2. In the face of a union organizing drive the Company commenced an intensive anti-union campaign emphasizing the generosity of the company’s current compensation and contending that a third party could not improve the company’s relationship with its employees. The company circulated a letter to the workforce stating that the union could not guarantee any increase in pay – that “the Company would begin the negotiating process from scratch.” Has the Company violated § 8(a)(1)? Hendrickson USA, LLC v. NLRB, 932 F.3d 465 (6th Cir. 2019).

Page 168. Add after Midland Life:

[Chairman Ring and Member Kaplan appended a footnote in St. Luke’s Hosp., 368 NLRB No. 49 (2019), that they “would be open to reconsidering” Midland National Life.]

Page 179. Add to Problems for Discussion:

7. The management of the Emmett Worth Company recently became aware of a union organizing drive lead by one of its best employees, Dashiell Finnegan. The Company’s Senior Vice President, Henry Hanns, entered the men’s restroom after an inspection of the work floor. He encountered Finnegan, whom Hanns had known for some years and with whom he had a good relationship. “Hey, Dash,” Hanns said, “what’s going on with this Union stuff?” Has the Company committed an unfair labor practice? Buzzuto’s Inc. v. NLRB, 927 F.3d 672 (2d Cir. 2019).

Page 225. Add following Nichols Aluminum:

Problem for Discussion
Marta Hary, a materials distributor, has worked for the Emmett Worth Company for four years and has gotten a good evaluation. She was active in a campaign for unionization, but the union lost the representative election. She redoubled her efforts – engaging in an angry exchange with management in a captive audience assembly (in which employees were forbidden to speak) – which effort resulted in a union victory. Ms. Hary served on the union’s bargaining committee which secured a collective agreement.

While on duty Ms. Hary was told to deliver parts to the Number 2 line. She refused because, she said, “that’s not my job,” her job was to service the Number 1 line. Her supervisor filed a disciplinary complaint, the company investigated, and Ms. Hary was discharged for insubordination. The NLRB’s General Counsel issued a complaint of violation § 8(a)(3). The ALJ held that Ms. Hary’s union activism was well known to the Company and that the basis of her discharge – insubordination – was pretextual because other workers had engaged in the same work refusals and had not been discharged. Applying Wright Line, the ALJ held Ms. Hary’s discharge to have violated the Act. The Company has argued to the Board that the General Counsel has failed to prove by a preponderance of the evidence that the discharge was motivated by Ms. Hary’s union activity. How should the Board rule? Electrolux Home Pdts., Inc., 368 NLRB No. 34 (2019).

Add to page 167 of the 2019 Supplement at the end of Question 1:
See also Denton County Elec. Coop., Inc., v. NLRB, 952 F.3d 695 (5th Cir. 2020) (refusing to enforce order requiring public reading of the Board’s remedial order).

Page 256. Add re “Blocking Charges”:
On August 6, 2019, the Board published a Notice of Proposed Rulemaking that would change the “blocking charge” rule. It would provide that an election be conducted and that the ballots be impounded until the unfair labor practice and its effect on the fairness of the election “if any” has been determined. On April 1, 2020, the Board published the Final Rule, which, among other things, abolishes blocking charges in their entirety and adopts instead a “vote-and-impound” procedure in cases where a party alleges specific substantial unfair labor practices during the run-up to an election. See Representation-Case Procedures: Election Bars; Proof of Majority Support in Construction-Industry Collective-Bargaining Relationships, 85 Fed. Reg. 18,366, 18,367 (Apr. 1, 2020). The AFL-CIO has filed suit challenging the validity of this portion of the rule.

Page 257-58. Add re “Contract Bar” rule:

On July 7, 2020, the Board requested amicus briefs on “whether the Board should (1) rescind the contract-bar doctrine, (2) retain it as it currently exists, or (3) retain the doctrine with modifications.”

Page 301. Add to the end of the discussion of Hy Brand Industrial Contractors on page 172 of the 2019 Supplement:

On February 26, 2020, the Board adopted a final rule on Joint Employer Status. 85 Fed. Reg. 11184 (Feb. 26, 2020), 29 CFR § 103.40. To be a joint employer the company must possess and exercise substantial direct and immediate control over one or more essential terms or conditions of employment.
Page 329. Add at the end of Problem 2:

In Stern Produce Co., Inc., 368 NLRB No. 31 (2019), the Board’s Republican majority held the three and a half year period from the company’s unfair labor practices – which they characterized as “extensive and serious” – to the date of its decision created an unacceptable “risk” that a Gissel bargaining order would not be judicially enforced and they refused to order it. Member McFerran dissented.

Page 343. Add after the discussion of Lamons Gasket Co.:

On April 1, 2020, after engaging in a formal rulemaking process, the Board published a Final Rule codifying the voluntary recognition doctrine announced in Dana Corp., and abrogated in Lamons Gasket -- requiring notice of union recognition to be posted and allowing a 45-day period to entertain a petition against a newly recognized union. Representation-Case Procedures: Election Bars; Proof of Majority Support in Construction-Industry Collective-Bargaining Relationships, 85 Fed. Reg. 18,366 (April 1, 2020). The AFL-CIO has filed suit challenging the validity of this rule.


Page 420. Add to Problem for Discussion:

In 2011, the parties started to bargain on wages. In 2013, the union, which had been opposing the Company’s existing performance pay system, decided to support it as the unit
members were reaping substantial pay due to technological advances over the past two years.

The Company also changed its position and sought to abandon the performance pay system. Late in 2014, the Union proposed a two-tier system, grandfathering incumbent workers who would continue to get performance pay; it argued that attrition, from 11 to 13% a year, would assuage the company’s cost concerns. The Company rejected the proposal, arguing that the attrition rates the Union referenced were for its non-unionized workers and that the attrition rate for the (well-paid) union workers was actually about 5%.

No further bargaining took place until January 2016, when the Company wrote to the Union that its 2014 offer was its “best and final proposal.” The Union then demanded to meet. No meeting occurred. In early April, the Company replied to the Union that further bargaining would be futile and unless the Union accepted the Company’s offer would implement it by April 23, which it did. The Board found that there was no impasse at the time: that the Union’s two-tier proposal was a “white flag,” even if the parties were near impasse. Should the Board’s order be enforced? Dish Network Corp. v. NLRB, 953 F.3d 370 (5th Cir. 2020).

Pages 452-455. Substitute for the discussion of Waiver:

On September 10, 2019, the Board handed down MV Transportation, 368 NLRB No. 66 (2019). The Republican majority rejected the “clear and unmistakable” test for whether a management rights clause in a collective bargaining agreement waives the duty to bargain over changes in mandatory bargaining subjects. It adopted a test of “contract coverage.” The former had been accepted by a majority of the courts of appeals; the latter by two – most notably the D.C. Circuit – with an attempt at a mid-course charted by the Second Circuit summarized in the casebook. Member McFerran entered an exacting dissent.
Page 560: Add following *Epic Systems* set out in the Supplement pages 202-233:

**Question for Discussion**

A non-unionized Employer maintained an arbitration policy that precluded resort to the courts for the vindication of labor protective law. A group of employees nevertheless commenced group action against the employer in federal district court alleging violation of both the Fair Labor Standards Act and state wage and hour law. The Employer thereupon amended its policy to preclude group actions.

1. Was the filing of the lawsuit, in violation of company policy, protected section 7 activity?
2. If it was, was the adoption of the prohibition on collective claims, lawful under *Epic Systems*, a violation of § 8(a)(1)?
3. Would a discharge for pursuit of a collective claim in violation of the Employer’s policy be violative of § 8(a)(1)?

*Cordúa Restaurants, Inc.*, 368 NLRB No. 43 (2019).

Page 573. Add after Media General Operations:

**A Note on Profane or Offensive Outbursts**

*General Motors, LLC, 360 NLRB No. 127 (2020)*

(overruling *Atlantic Steel* and applying *Wright Line* to employee use of profanity or epithets implicating civil rights law)
See also Constellium Rolled Pdts. Ravenswood, LLC v. NLRB, 945 F.3d 546 (D.C. Cir. 2019) (remanding to consider relationship of potentially offensive speech to non-discrimination law).

Page 579. Add to end of Problem 4:

OUR Walmart is a group of Walmart employees, assisted by the United Food and Commercial Workers Union, working to improve the wages, hours, and working conditions of Walmart employees. It engages in occasional strikes, four of which are documented below: the first, in October, 2012, of 58 employees in Los Angeles; the second, in November, 2012, of 100 workers nationwide – on so-called Black Friday; the third, involved over 100 employees who went out on strike for five to six days in May and June, 2013; and the fourth, on Black Friday the following year, November, 2013, a nationwide walkout involving an unknown number of employees.

Walmart has discharged the 54 employees who walked out in the May-June, 2013, protest. Do three walkouts at various locations over an eight to nine month period render a walkout unprotected? Would a walkout on the anniversary date of a national labor protest be unprotected if the employees proclaim an intent to do so annually on that date until their demands are met? Walmart Stores, Inc., 368 NLRB No. 24 (2019).

Page 653. Add to Problem for Discussion:

Preferred Building Services (Preferred) provides janitorial services to commercial enterprises. One of its customers is Harvest Properties which manages a building at 55 Hawthorne Street. KGO Radio is a tenant at 55 Hawthorne Street. Preferred subcontracted the
Harvest Properties’ work to OJ Services (OJS). Several of OJS’ employees complained to it about their wages and working conditions. Their complaints were not adjusted and they picketed in front of 55 Hawthorne Street and handed out handbills calling on KGO “to take responsibility in ensuring that their janitors receive higher wages, sick pay, workers’ compensation and protection against harassment.”

Preferred terminated its contract with Harvest; as a result, OJS’s contract to service Harvest’s properties was cancelled and those employees were fired. (Harvest then contracted with a unionized contractor to provide janitorial services.) The dismissed employees filed charges of unfair labor practice and the General Counsel issued a complaint of violation of § 8(a)(3) against Preferred and OJS, which were conceded to be joint employers. The companies argued that the employees’ activities were prohibited by § 8(b)(4)(ii)(B): that OJS’ employees were picketing Harvest to pressure it – a “neutral” employer – to cease doing business with Preferred until it, Preferred (whose ability to pay was contingent on Harvest), increased the wages of the janitors working in the building it managed. If the picketing violated § 8(b)(4) it could not have been protected. Is the companies’ § 8(b)(4) claim correct? Ortiz Janitorial Services, 366 NLRB No. 159 (2018).

Page 803. Add to Problem for Discussion:

4. Article II, Section 5, of the collective bargaining agreement set out on page 108 of the 2019 Supplement obligates the Company to deduct and remit union dues to the union. The collective agreement has expired. The Company has refused to extend its terms pending a new agreement coming into force and it has ceased to remit union dues. Does the refusal to remit dues violate § 8(a)(5)? Valley Hospital Med. Ctr, 368 NRLB No. 139 (2019).
Page 809. Add at end of the decision on the top of the page:


Return to MV Transp., 368 NLRB No. 66 (2019), discussed in this Update to Casebook pages 452-455. The Company has added a biometric authentication device using a fingerprint to its existing card-scan timekeeping system. It has not bargained with the Union about it. The Union has filed a grievance and an unfair labor practice charge of violation of § 8(a)(5). The Board has deferred this case pending the arbitration. In the arbitration the Company relies on its reserved Management Right set out in the collective bargaining agreement on page 108 of the 2019 Supplement. The Arbitrator found the change to be a “substantial change in working conditions” given the importance of the biometric device to employees’ privacy interests and that as it had not expressly been dealt with in the Management Rights article the Company had to bargain about it before initiating its use. The award made no mention of MV Transp. or of Metropolitan Edison (casebook page 618). Should the Board defer to the award and issue a bargaining order or should it dismiss the § 8(a)(5) complaint? Assume the Board dismisses the complaint, the Company refuses to enforce the arbitrator’s award, and the Union seeks to enforce it. How should the court rule?

Page 866. Add to Problems for Discussion:
5. In Problem 4, the collective agreement provides that its’ arbitration provision is the “role and exclusive” way an employee can vindicate any Title VII claim. However, the Union has agreed that an employee has the right to proceed in arbitration individually if the union declines to take her Title VII case; but, she must appear before the arbitrator selected jointly by the Union and the employer under the collective agreement. She has no role to play in arbitral selection. Does this violate her right to due process? Abdullayeva v. Attending Homecare Services, LLC, 928 F.3d 218 (2d Cir. 2019).

Page 926. Add After Problem 2:

2a. For many years the Big Walnut Consolidated School Dist. Unit 6 has let the contract for the provision of school bus transportation to Levitate Transport, LLC. Levitate’s Unit 6 workforce consists of 55 drivers. Levitate has a collective agreement with the Transport Workers’ Union for Levitate’s drivers. As the District’s bussing contract approached its termination date of April 30, the District put the contract out for bids. DeVose Student Transport, Inc., a non-unionized company, put in a bid.

On March 2, John Moncure, DeVose general manager, called a meeting of the drivers; 40 showed up. Moncure told them that once the District’s contract was approved, DeVose would offer employment to those current employees who submitted an application and met its hiring criteria, which included a background check, physical examination, and drug screening; i.e. criteria that were common in bus transportation employment. In responding to employee questions, Moncure told them that DeVose “wanted to hire as many individuals as possible,” that it would recognize the Union if it hired “51 percent of the existing workforce,” and that it “typically hires 80 to 90 percent of the existing workforce.”
The District gave the contract to DeVose on May 17. On May 23, DeVos informed unit employees of its hiring procedure, which notice was accompanied by a memorandum stating terms and conditions of employment that were less beneficial than the terms of the collective agreement with Levitate. Earlier, on May 18 the Union demanded to bargain with DeVose on behalf of the drivers from the basis of its collective agreement with Levitate as the status quo ante for bargaining. DeVose did not respond. DeVose’s hiring was complete on July 11: it hired 38 drivers, 36 of whom had worked for Levitate. It agreed to recognize the union and to bargain on the basis of the terms and conditions it had circulated on May 23. The Union insisted that DeVose adhere to the terms of the Levitate collective agreement and that the bargaining would proceed on the basis of that being the status quo. The Union’s lawyer responded that as it was “perfectly clear” on March 2 that DeVose intended to retain the incumbent complement of drivers, DeVos was obligated to bargain with the Union in establishing the initial terms of hire. The Company’s lawyer was equally insistent that what it said on March 2 did not make it perfectly clear that DeVose intended to retain all of Levitate’s drivers, which is what the law requires in order for its predecessor’s bargaining agreement to be the status quo for its duty to bargain. Which is correct? First Student, Inc., v. NLRB, 935 F.3d 604 (D.C. Cir. 2019) (reviewing authority, Judge Silberman dissenting).

Page 1054. Add to Problems:

9. Lysa Simson is a machine operator for Wunderlick Bakeries, Inc., in Chicago, Illinois. Wunderlick’s employees are represented by the Bakery Workers Union. The Union’s contract with Wunderlick provides: “All employees shall be required to verify and submit their attendance and hours of work during each pay period using time-keeping methods such as
electronic timecards or time clocks”. Wunderlick has contracted with Biometrics, Inc., to install a handprint identification as part of its electronic timecard system. The Union has not objected, but Ms. Simson has.

Illinois has enacted a Biometric Information Privacy Act, 740 ILCS 14/1 (BIPA) et. seq. The law prohibits all private entities from collecting biometric information without informing the employee and receiving a “written release executed by the subject of the biometric identifier…or the subject’s legally authorized representation,” nor disclose the identifier subject to the same condition. As Ms. Simpson never provided written authorization to the collection and disclosure of her biometric information she has sued Wunderlick and Biometrics for violation of the BIPA. Both have moved to dismiss the suit on the ground of § 301 preemption. How should the court rule?

Page 1153. Add at end of Section B:


Page 1208. Add at the end:

The press has noted that several Democratic candidates running for the party’s nomination for the Presidency have made the strengthening of organized labor a political priority. Noam Scheiber, Candidates Grow Bolder on Labor, and Not Just Bernie Sanders, New York Times, Oct. 12, 2019.

On May 2, 2017, H.R. 2474, 116th Cong., 1st sess., the “Protect the Right to Organize Act of 2019,” was introduced in the House. It would strengthen the Labor Act in several
respects. On Sept. 25, 2019, the bill cleared the House Education and Labor Committee by vote of 26 to 21, i.e. a straight party line vote. The House has also passed the Forced Arbitration Injustice Repeal Act (H.R. 1423), that would invalidate agreements requiring the arbitration of employment as well as consumer, antitrust, and civil rights disputes.