2022 UPDATE TO

DAU-SCHMIDT, MALIN, CORRADA, CAMERON & FISK

LABOR LAW IN THE CONTEMPORARY WORKPLACE, 3RD ED.

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Preface to the 2021 UPDATE

This electronic "UPDATE" is intended to be used in conjunction with the casebook— Dau-Schmidt, Malin, Corrada, Cameron & Fisk, *Labor Law in the Contemporary Workplace*, *3rd Ed* (2019). The UPDATE contains notes on and/or edited versions of major labor law cases and developments since the publication of this book. Page references in the UPDATE indicate the page or pages of the casebook where the new material should be inserted or, in some cases, now-outdated material should be omitted.

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A. INTRODUCTION

On page 2, at the end of note 3, insert the following:

After these disputes were settled, some state legislatures sought to increase the penalties for striking teachers with fines, jail time or revocation of their teaching license. Graham Vyse, *In the State Where Teacher Strikes Started, Lawmakers Aim to Prevent More*, Governing the States and Localities, June 14, 2019, https://www.governing.com/topics/education/gov-west-virginia-teachers-strike-bill.html. Is this likely to promote the fair negotiation of teacher wages and industrial peace?

B. A BRIEF HISTORY OF AMERICAN LABOR LAW

On page 89, before the last sentence in note 5, insert the following:

The legislatures of some of the affected states have since tried to increase the penalties for teacher's who engage in strikes threatening fines, jail time or the revocation of teaching licenses. Graham Vyse, *In the State Where Teacher Strikes Started, Lawmakers Aim to Prevent More*, Governing the States and Localities, June 14, 2019, https://www.governing.com/topics/education/gov-west-virginia-teachers-strike-bill.html.

On page 102, after the last sentence in note 5, insert the following:

6. *Collective Action in the Covid-19 Pandemic:* On December 31, 2019 Chinese Health officials informed the World Health Organization about a cluster of 41 patients, most connected to the Huanan Seafood Wholesale Market, with a mysterious pneumonia. Later that same month, China reported the first death linked to the virus, now called Covid-19, and the virus was reported in Thailand (January 13), Japan (January 16), South Korea (January 20) and the United States (January 20). In the global economy of the information age the virus quickly spread across the world and deaths from the virus rose steadily until they totaled over 700,000 world-wide at the time of this writing. The virus is particularly dangerous for older people with a death rate of about 30% for people over 80 years old; people with pre-existing conditions such as heart disease, chronic respiratory disease, diabetes and obesity; and men with males suffering almost twice the death rate of women in every age group. The incidence of the virus has fallen particularly hard on the poor, particularly Black and Hispanic workers, because they often live in more cramped circumstances, have poorer access to medical care and have jobs with greater exposure to possible infection. The virus seems primarily spread through airborne infection and people who work indoors in cramped circumstances with recirculated air seem particularly vulnerable to infection. Meat packing plants are a prime example of a particularly vulnerable workplace with the close working conditions, recirculated refrigerated air, and the need to shout over the sound of machinery increasing the discharge of expectorate from fellow workers. Front-line healthcare workers and workers in indoors high contact service jobs like hair stylists and waiters are of course also at high risk.

The seriousness of the Covid-19 pandemic lead to private and government efforts to slow the rate of transmission by modifying or suspending activities to allow for social distancing to slow the rate of infection and "flatten the curve" so as not to over-burden available health facilities and provide time to develop treatment protocols and a vaccine. On March 12, 2020, the NBA suspended the playing of its season fearing that games would expose fans and players to the virus. Shortly after that, most colleges and universities suspended in-person classes and moved to on-line instruction and suspended most sports, including the NCAA National Basketball Tournament. On March 19, 2020, California became the first state to adopt a mandatory "shelter in place" or "say at home" policy by executive order for the general population, exempting certain "essential businesses and jobs." By early April, all but 6 states had "shelter in place" orders in effect and all states placed restrictions on which businesses could operate and how some work was to be performed. Common restrictions include: state-wide facemask requirements, prohibitions on mass gatherings, the temporary closure of certain businesses like bars and restaurants, worker safety protections and paid sick leave. *2020 State and Local Government Responses to COVID-19* (August 5, 2020) https://www.stateside.com/blog/2020-state-and-local-government-responses-covid-19. For his part, President Trump banned travelers from China (January 31) and Europe (March 12), declared a National Emergency to provide $50 billion in federal funds to fight the pandemic and secure a vaccine (March 13) and withdrew the US from the World Health Organization (July 7).

The restrictions on work imposed to slow the transition of the virus caused an unprecedented mass lay-off of employees resulting in the largest one month increase in unemployment in US history and an unemployment rate of 14.2 % in April of 2020, the highest since the Great Depression. In an attempt to maintain workers and small businesses through the work stoppage, and thus maintain the economy, Congress passed and President Trump signed a series of relief bills including the Families First Coronavirus Response Act (FFCRA) and the Coronavirus Aid, Relief and Economic Security Act (CARES Act). The statutes provided for: paid sick leaves for workers who contracted or were exposed to Covid-19 (Emergency Paid Sick Leave Act in FFCRA), paid family leaves for workers whose family members got sick or lost childcare due to the virus (Emergency Family and Medical Leave Expansion Act in FFCRA), unemployment compensation benefits for small business people or independent contractors (the Pandemic Unemployment Assistance (PUA) program in the CARES Act), a $600 per week supplement to unemployment compensation (the Federal Pandemic Unemployment Compensation (FPUC) program in the CARES Act) and $660 billion in business loans that could be forgiven if they were used for payroll (the Payroll Protection Program (PPP) in the CARES Act). In 2021, as the pandemic has receded and many workplaces return to more normal operations, many workers have hesitated to return to work. The reasons for this hesitancy vary depending on the worker, but they include continuing concern about exposure to the virus, the availability of supplemental unemployment compensation, the lack of affordable childcare options and concern about children's exposure during the pandemic, a reevaluation of the desire to work in various jobs taking time away from family for low wages and poor working condition, and workers deciding to take this opportunity to retrain for different jobs. In response to this hesitancy, governors in about twenty states acted to end their state's participation in the federal supplemental unemployment compensation provided under the CARES Act.

Although the state executive orders and federal laws provide a basic outline for the conduct of employment during the pandemic, the problems caused by the contagion have provided impetus for collective action and collective bargaining. There has been a lot of discontent among those workers required to remain on the job and hazard infection with inadequate personal protective equipment under clearly hazardous working conditions. At the same time workers who were once viewed as "low-skilled" and "expendable" have suddenly found themselves designated "essential." Both organized and unorganized workers have engaged in demonstrations for safer working conditions, hazard pay and better sick leave policies. For organized workers bound by no strike agreements, these demonstrations have generally not constituted full-fledged strikes. For example, unionized Pittsburgh sanitation workers rallied to demand hazard pay and better personal protective equipment while union workers at the General Electric factory in Lynn, Massachusetts held silent demonstrations to complain about safety conditions and to agitate for switching production to ventilators and UAW painters at the Fiat Chrysler plant in Warren, Michigan held a one-shift walk-out to protest the company's treatment of ill workers. Nonunion workers also have the right to take collective action under §7 of the National Labor Relations Act and have undertaken strikes to protest unsafe conditions at Amazon warehouses in Staten Island and New York, Amazon-owned Whole Foods grocery stores in Chicago and Perdue poultry plants in Georgia. Robert Combs, *ANALYSIS: Covid-19 Has Workers Striking. Where Are the Unions?*, Bloomberg Law Analysis (April 14, 2020) https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-covid-19-has-workers-striking-where-are-the-unions. Using mid-term collective bargaining, unions have led the way in negotiating new safety procedures, hazard pay and sick leave. For example, the UFCW and Kroger negotiations helped set the standard for the treatment of grocery store employees during the pandemic. *Kroger, UFCW Announce Increased Pay, Benefits for Grocery Workers on Front Lines of Coronavirus Outbreak* (March 31, 2020) http://www.ufcw.org/2020/03/31/krogercoronavirus/.

The waning of the pandemic has left renewed interest in union organizing in many industries. The contraction of the labor market due to retirements, layoffs and resignations during the pandemic has left a seller's market for labor in many industries for the first time since the 1970s. Employers in service industries, including fast food restaurants, now find they generally have to offer a $15/ hour starting wage (more than twice the federal minimum wage) in order to fill positions. Workers in many other occupations are also very short supply, including: skilled laborers, accountants, restaurant and hotel workers, laborers, sales, IT staff, teachers, engineers, drivers and nurses. This newfound demand excess demand for their services, combined with recollections of poor treatment during the pandemic, has emboldened many workers to seek higher wages and benefits through organization and collective bargaining. High profile union wins at Amazon's warehouse in New York city and at almost 200 Star Bucks locations nationwide, join less visible union victories among news workers and in the Silicon Valley. Gallup polling from September 2021 shows 68% of Americans approve of labor unions — the highest reading since a 71% approval rating in 1965. Kate Rogers, *Covid Upended the Labor Market, and Now These Workers are Using Their Leverage to Push for Unions*, CNBC (March 29, 2022) https://www.cnbc.com/2022/03/29/amazon-starbucks-workers-push-for-unions-after-covid-upended-labor-market.html.

The United States has sought to accommodate the interests of employers and employees in the Covid-19 pandemic through executive order, legislation, individual bargaining and collective

bargaining. Are there advantages to resolving these disputes through collective bargaining in which the representatives of the workers sit down and discuss how to best resolve these problems with the representatives of management? Would you rather weather the pandemic in a union or non-union shop?

CHAPTER 2: COLLECTIVE ACTION IN THE WORKPLACE

A. INTRODUCTION

On page 124, add note 5

5. In Chapter 6 you will learn that most concerted refusals to work classify as strikes. While strikes are generally protected by the Act, employers may "permanently replace" economic strikers. *NLRB v. Mackay Radio & Telegraph Co*., 304 U.S. 333 (1938), *supra* at 773. However, Section 502 of the Labor Management Relations Act, 29 USC § 143 states:

> … nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this chapter.

Hence refusals to work, concerted or otherwise (individual), motivated by an employee good faith belief that there is an abnormally dangerous condition for work would not classify as strikes. Hence, employers would not be able to permanently replace those kinds of strikers.

Would the walkout in *Washington Aluminum* classify as one of those refusals to work because employees had a good faith belief that there was an abnormally dangerous condition for work?

In these Section 502 cases, the General Counsel must demonstrate by a preponderance of the evidence that (1) the employees believed in good faith that their working conditions were abnormally dangerous; that their belief was a contributing cause of the work stoppage; that the employees' belief is supported by ascertainable, objective evidence; and that the perceived danger posed an immediate threat of harm to employee health or safety. TNS v. NLRB, 296 F.3d 384 (2002) (*cert. denied*).

6. In addition to the NLRA, the Occupational Health and Safety Act (OSH Act) provides in Section 11(c)(1) that:

> No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under this Act or has testified or is about to testify in any such processing or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act.

Interpreting that section of the OSH Act, the Occupational Safety and Health Administration (OSHA) has promulgated a rule, codified as 29 CFR § 1977.12 (b)(2), which states:

> However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition

> causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.

Assume that an employer, a manufacturer, built overhead conveyors in the plant to transport appliance components it manufactures throughout the plant. To protect employees from objects that occasionally fall from these conveyors, the employer installed a horizontal wire-mesh guard screen approximately 20 feet above the plant floor. This mesh screen was welded to angle-iron frames suspended from the building's structural steel skeleton.

Maintenance employees of the employer must remove objects from the screen and perform maintenance work on the conveyors themselves. To perform these duties, maintenance employees usually stand on the iron frames, but sometimes find it necessary to step onto the steel mesh screen. Assume that one worker got seriously hurt and another died when, standing on the wire mesh, the wire mesh tore, leading them to fall. As a result of these accidents, two workers complained to management, but management did not adequately remedy the dangerous conditions. After being instructed by their supervisor to do their maintenance work as usual, the two workers refused. They were suspended without pay for the rest of the day.

Would these workers be protected by Washington Aluminum and receive their pay? Would they be protected by the OSH Act and its regulations, so that they can receive their pay? *See* Whirlpool Corp. v. Marshall, 445 US 1 (1980) (determining that an employer could not take adverse action against two employees who had refused to perform cleaning operations "because of a genuine fear of death or serious bodily harm.")

7. On May 1, 2020, in the midst of the novel coronavirus pandemic, many non-union workers classified as "essential" employees working for supermarkets, big box retailers, and "gig" companies such as Instacart orchestrated a "general strike" demanding, among other things, better health and safety equipment to protected themselves from covid-19 infection. News reporters had been showing that these workers were, in fact, getting infected with the virus at higher rates than other workers. Assuming that these workers were all employees covered by the NLRA, would their walkout be protected by Washington Aluminum. What about by Section 502 and the OSHA Act?

8. Unionized Employees and Section 502: In Chapter 6 you will learn that labor unions may agree to "no strike" clauses with management, and include those agreements in their collective bargaining agreements. In essence, unions pledge not to attempt to resolve workplace disputes with management through strikes but, instead, through an internal grievance and arbitration process. But what if unionized employees encounter an abnormally dangerous condition at work which could not be effectively remedied through the grievance and arbitration process. Can workers refuse to work in that situation and still be protected by Section 502 of the LMRA? See Gateway Coal v. United Mine Workers, 414 U.S. 368 (1974).

B. CONCERTED ACTIVITY FOR MUTUAL AID AND PROTECTION

On page 134, add the following to the end of note 3, but before the paragraph about the Somali workers:

In *Alstate Maintenance*, 367 NLRB No. 68 (Jan. 11, 2019), the NLRB reined in its definition of "concerted activity" under the NLRA, limiting the application of "concerted activity" involving an individual. In *Alstate*, an airport skycap, after being informed by a supervisor that a customer request had been made for skycaps to assist with a soccer team's equipment, remarked that, "[w]e did a similar job a year prior and we did not receive a tip for it." The skycap was terminated for his indifference to a customer request and, apparently, for making the remark in front of other skycaps. The NLRB found the skycap's remarks were not concerted activity. According to the NLRB, this decision "overrule[s] conflicting precedent that erroneously shields individual action and thereby undermines congressional intent to limit the protection afforded under the Act to concerted activity for the purpose of mutual aid and protection." (slip op. at 1) The opinion states that "individual griping will not qualify as concerted activity solely because it is carried out in the presence of employees and a supervisor and includes the use of the first-person plural pronoun." (slip op. at 7) "Rather, to be concerted activity, an individual employee's statement to a supervisor or manager must either bring a truly group complaint regarding a workplace issue to management's attention, or the totality of the circumstances must support a reasonable inference that in making the statement, the employee was seeking to initiate, induce or prepare for group action." Id. (emphasis added) Moreover, the Board stated there are other cases conflicting with the older, narrower approach to the definition of concerted activity. In particular, the Board indicated in a footnote that it would be interested in a future appropriate case to reconsider whether discussions about certain subjects like wages, work schedules, and job security are "inherently concerted." Id. at 1 n.2.

On page 134, add the following note after note 5 (note 6 will become note 7):

6. *"Inherently concerned activity":* As an example of useful advice memoranda see Memorandum GC 21-03 of March 31, 2021, issued by Peter Sung Ohr, Acting General Counsel, who served in the interim between Peter Robb's dismissal and the start of Jennifer Abruzzo, the current General Counsel. In the memorandum, Ohr expresses that despite's *Alstate's* narrow interpretation of the phrase "concerted activity for mutual aid and protected" the opinion left untouched some employee activities that are "inherently concerted." These actions are so clearly protected that they do not even require workers to contemplate group action. As the memorandum states:

> While contemplation of group action may be indicative of concerted activity, it is not a required element. Employee discussions of certain "vital elements of employment" often raise concerns that are pivotal to their collective interests, which, in some circumstances, may spur organizational considerations. Concern about these crucial, common issues may render group discussions **inherently concerted,** "even if group action is nascent or not yet contemplated. No "magic words" are required for concert to attach, and a finding of concerted activity is not dependent on the extent to which other employees agree with the complaint or join in the protest. The Board has adopted this "settled doctrine" of inherent concert for decades, noting that unit employees' right to protect their fundamental, collective

> interest in these central issues, "could be rendered meaningless if employers were free to retaliate against employees on the ground that the retaliatory action was directed only at a discussion." Although the Board in recent years, most prominently in *Alstate*, has narrowed the circumstances under which individual complaints are considered concerted activity, the doctrine of inherent concert retains its vigor (emphasis added)(internalcitations omitted).

Office of the General Counsel, Memorandum GC 21-03 (March 31, 2021)

The memorandum went on to list some examples of possible inherently concerted activities, including sharing "information … about wages or wage differentials … insofar as,"[i]t is obvious that higher wages are a frequent objective of organizational activity." Others include discussion of changes in work schedules, because these "implicate[] vital elements of employment such as hours and working conditions, and thus '"are as likely to spawn collective action as the discussion of wages."' Additionally, job security is a "'vital term and condition of employment, which involves 'the very existence of an employment relationship,' e.g., whether an employee may be laid off or discharged." Health and safety and racial discrimination may also be inherently concerted. *Id.*

However, given qualifiers given for every possible inherently concerted action, can anyone say with full confidence that employee discussion of any one subject is per se protected, concerted activity?***On page 143, before the last sentence in note 1 add the following:***

"On January 20, 2021, in one of his first acts as President, Joe Biden fired NLRB General Counsel Peter Robb after he refused to resign. President Biden's dismissal of Robb was controversial because the NLRA does not expressly say that the General Counsel serves at the pleasure of the President and precedent is mixed on the President's power to remove the appointed and confirmed officers of independent agencies. On February 1, 2021, NLRB Acting General Counsel Peter Sung Ohr rescinded a slew of General Counsel Memos issued by his predecessor, Peter Robb. Ohr rescinded the memos indicating that he believed they were no longer necessary and were not consistent with the purpose of the NLRA to foster collective bargaining. Acting General Counsel Ohr indicated that new directives would be forthcoming. On July 22, 2021, Jennifer A. Abruzzo was sworn in as President Biden's appointment as General Counsel for the NLRB. Ms. Abruzzo had previously worked for the Board for over two decades, serving in a variety of positions from Field Attorney to Acting General Counsel. Immediately prior to her appointment as General Counsel, Ms. Abruzzo served as Special Counsel for Strategic Initiatives for the Communications Workers of America. On July 28, 2021, the U.S. Senate confirmed President Biden appointees, Gwynne Wilcox and David Prouty, to seats on the National Labor Relations Board, paving the way for a Democratic majority on the board for the first time since 2017. The Senate voted 52-47 to approve the nomination of Wilcox, a partner at Levy Ratner in New York, and 53-46 to confirm Prouty, the general counsel of New York City service worker union SEIU 32BJ. This change in the Board majority may threaten many of the recent changes in precedent by the Trump Board."

On page 157, at the end of note 1 add:

Of course NLRB General Counsel Robb has since been dismissed by President Biden and replaced with Jennifer A. Abruzzo. Ms. Abruzzo had previously worked for the Board for over two decades, including as Acting General Counsel. Immediately prior to her appointment as General Counsel, Ms. Abruzzo served as Special Counsel for Strategic Initiatives for the Communications Workers of America."

On page 158, replace NLRB v. Pier Sixty, LLC with the following case:

GENERAL MOTORS LLC AND CHARLES ROBINSON
369 NLRB No. 127 (2020)

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

The National Labor Relations Board has been repeatedly asked to determine whether employers have unlawfully discharged or otherwise disciplined employees who had engaged in abusive conduct in connection with activity protected by Section 7 of the National Labor Relations Act. By way of example, recent scenarios presented to the Board include employers discharging employees who had (1) unleashed a barrage of profane ad hominem attacks against the owner of an employer during a meeting in which the employee also raised concerted complaints about compensation,[1] (2) posted on social media a profane ad hominem attack against a manager, where the posting also promoted voting for union representation,[2]or (3) shouted racial slurs while picketing.[3] In deciding these cases, the Board has assumed that the abusive conduct and the Section 7 activity are analytically inseparable. In other words, the Board has presumed a causal connection between the Section 7 activity and the discipline at issue, rendering the *Wright Line*[4]standard--typically used to determine whether discipline was an unlawful response to protected conduct or lawfully based on reasons unrelated to protected conduct--inapplicable.[5]As a result, the Board has not taken into account employers' arguments that the discipline at issue was motivated solely by

[1] Plaza Auto Center, Inc., 360 NLRB 972, 977-980 (2014) (finding the employer violated Sec. 8(a)(1) for discharging an employee after the employee called the owner a "fucking mother fucking," a "fucking crook," an "asshole," and "stupid"; told him nobody liked him and everyone talked about him behind his back; and threatened that the owner would regret firing him, if he did).

[2] Pier Sixty, LLC, 362 NLRB 505, 506-508 (2015) (finding the employer violated Sec. 8(a)(3) and (1) for discharging an employee following a Facebook post stating that a certain manager "is such a NASTY MOTHER FUCKER don't know how to talk to people!!!!!! Fuck his mother and his entire fucking family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!"), enfd. 855 F.3d 115 (2d Cir. 2017).

[3] Cooper Tire & Rubber Co., 363 NLRB No. 194, slip op. at 7-10 (2016) (finding the employer violated Sec. 8(a)(3) and (1) for discharging a white employee after, while picketing, he shouted to black replacement workers: "Hey, did you bring enough KFC for everyone," and "Hey, anybody smell that? I smell fried chicken and watermelon."), enfd. 866 F.3d 885 (8th Cir. 2017).

[4] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in NLRB v. Transportation Management Corp., 462 U.S. 393 (1983).

[5] See, e.g., Roemer Industries, Inc., 362 NLRB 828, 834 fn. 15 (2015) ("Where an employer defends disciplinary action based on employee conduct that is part of the res gestae of the employee's protected activity, Wright Line is inapplicable. This is because the causal connection between the protected activity and the discipline is not in dispute."), enfd. 688 Fed. Appx. 340 (6th Cir. 2017), quoted in part in Entergy Nuclear Operations, Inc., 367 NLRB No. 135, slip op. at 1 fn. 1 (2019).

the abusive form or manner of the Section 7 activity or that the employer would have issued the same discipline for the abusive conduct even in the absence of Section 7 activity.

Instead, the Board has presumed that discipline based on abusive conduct in the course of Section 7 activity violates Section 8(a)(3) and (1) (or, when no union activity is involved, just Section 8(a)(1)) unless the Board determines, under one of its setting-specific standards, that the abusive conduct lost the employee the protection of the Act. For outbursts to management in the workplace, the Board has applied the four-factor *Atlantic Steel* test, under which it considers "(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice."[6]For social-media posts and most cases involving conversations among employees in the workplace, the Board has examined the totality of the circumstances.[7]And for picket-line conduct, the Board applies the *Clear Pine Mouldings* standard, which asks whether, under all of the circumstances, nonstrikers reasonably would have been coerced or intimidated by the abusive conduct.[8]

These setting-specific standards aimed at deciding whether an employee has or has not lost the Act's protection, however, have failed to yield predictable, equitable results. In some instances, violations found under these standards have conflicted alarmingly with employers' obligations under federal, state, and local antidiscrimination laws. We believe that, by using these standards to penalize employers for declining to tolerate abusive and potentially illegal conduct in the workplace, the Board has strayed from its statutory mission.

Accordingly, we hold that, going forward, these cases shall be analyzed under the Board's familiar *Wright Line* standard. In our view, abusive conduct that occurs in the context of Section 7 activity is not analytically inseparable from the Section 7 activity itself. If the General Counsel alleges discipline was motivated by Section 7 activity and the employer contends it was motivated by abusive conduct, causation is at issue. As in any *Wright Line* case, the General Counsel must make an initial showing that (1) the employee engaged in Section 7 activity, (2) the employer knew of that activity, and (3) the employer had animus against the Section 7 activity, which must be proven with evidence sufficient to establish a causal relationship between the discipline and the Section 7 activity. If the General Counsel has made his initial case, the burden of persuasion shifts to the employer to prove it would have taken the same action even in the absence of the Section 7 activity. We overrule all pertinent cases to the extent they are inconsistent with this holding.

I. BACKGROUND

Charging Party Charles Robinson works as a union committeeperson at the Respondent's automotive assembly facility in Kansas City, Kansas. Robinson is employed by the Respondent, but he has represented bargaining unit members as his full-time job since 2012. In 2017, the

[6] Atlantic Steel Co., 245 NLRB 814, 816 (1979).
[7] See Desert Springs Hospital Medical Center, 363 NLRB No. 185, slip op. at 1 fn. 3 (2016); Pier Sixty, LLC, 362 NLRB 505, 506 (2015).
[8] Clear Pine Mouldings, Inc., 268 NLRB 1044, 1046 (1984), enfd. mem. 765 F.2d 148 (9th Cir. 1985). In practice, the Clear Pine Mouldings standard has excused most speech that does not threaten violence. See, e.g., Cooper Tire, 363 NLRB No. 194, slip op. at 7-10.

Respondent suspended Robinson three times following three separate incidents in which he engaged in profane or racially offensive conduct towards management or at bargaining meetings in the course of union activity.

On April 11, 2017, Robinson had a heated exchange with manager Nicholas Nikolaenko near management offices about overtime coverage for employees away on cross-training. Robinson yelled at Nikolaenko that he did not "give a fuck about your cross-training," that "we're not going to do any fuckin' cross-training if you're going to be acting that way," and that Nikolaenko could "shove it up [his] fuckin' ass." The Respondent suspended him for 3 days.

On April 25, 2017, Robinson attended a meeting on subcontracting paint-shop work with two other union committeepersons and a dozen managers. Robinson became very loud and pointed his finger while speaking. When Manager Anthony Stevens told Robinson he was speaking too loudly, Robinson lowered his voice and mockingly acted a caricature of a slave. Referring to Stevens, Robinson said, "Yes, Master, Your Master Anthony," "Yes, sir, Master Anthony," "Is that what you want me to do, Master Anthony?," and also stated that Stevens wanted him "to be a good Black man." The Respondent suspended him for 2 weeks.

On October 6, 2017, Robinson attended a manpower meeting with another union committeeperson and four managers, including Stevens. At the meeting, Robinson kept repeating the same questions. When Stevens said they were going to move on, Robinson said he would "mess [Stevens] up." Stevens asked if that was a threat, and Robinson replied Stevens could take it how he wanted. Later in the meeting, Robinson began playing loud music from his phone that contained profane, racially charged, and sexually offensive lyrics. The music went on for 10 to 30 minutes. When Stevens left the room once or twice, Robinson turned off the music, only to turn it back on when Stevens returned. The Respondent suspended him for 30 days.

On September 18, 2018, Administrative Law Judge Donna N. Dawson issued [a] decision. The judge applied the four-factor *Atlantic Steel* standard to analyze whether Robinson's abusive conduct while engaged in union activity lost him the Act's protection. The judge concluded that Robinson's conduct retained the protection of the Act on April 11, 2017, notwithstanding his profanity-laced outburst to manager Nikolaenko regarding cross-training, but that his conduct lost him the protection of the Act during the course of the April 25 and October 6, 2017 meetings. Accordingly, the judge concluded that the Respondent violated Section 8(a)(3) and (1) of the Act only by suspending Robinson for his April 11 conduct.

The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. In addition, the General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

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II. DISCUSSION

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B. The Existing Setting-Specific Standards for Determining When Abusive Conduct Loses the Protection of the Act

Under the precedent before today's decision, the Board has found that an employer violates the Act by disciplining an employee based on abusive conduct "that is part of the res gestae" of Section 7 activity, unless evidence shows that the abusive conduct was severe enough to lose the employee the Act's protection. *Stanford Hotel*, 344 NLRB 558, 558 (2005). This precedent was based on the view that "employees are permitted some leeway for impulsive behavior when engaged in concerted activity," and the accommodation of such behavior is "balanced against an employer's right to maintain order and respect." *DaimlerChrysler Corp.*, 344 NLRB 1324, 1329 (2005) (quoting *Piper Realty Co.*, 313 NLRB 1289, 1290 (1994)). Whether specific abusive conduct is severe enough to lose protection has been determined by applying different standards specific to the context of the Section 7 activity at issue. In ascending order of leeway, the Board purports to grant employees, it has applied different standards to workplace discussions with management, social media posts and other conversations among employees, and picketing.

1. *Atlantic Steel*--Workplace discussions with management

To determine whether abusive conduct in the course of otherwise-protected workplace conversations with management was severe enough to lose the Act's protection, the Board has applied the four-factor standard set forth in *Atlantic Steel Co.*, 245 NLRB 814 (1979): "(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice." Id. at 816. The Board has not assigned specific weight to any of the factors generally, and it has chosen in specific cases to give certain factors more or less weight without adequately explaining why. As a result, as demonstrated in just a few examples below, the Board's application of the *Atlantic Steel* factors has produced inconsistent outcomes.

For example, in *Tampa Tribune*, 351 NLRB 1324 (2007), where applying the four *Atlantic Steel* factors yielded a two-two tie, the Board found that an employee's reference to a vice president as a "stupid fucking moron" retained protection by subtly grading the weight of factors on either side: "We find that the location and subject matter of [the employee's] statements, which weigh moderately to strongly in favor of his retaining the Act's protection, more than offset the nature of his outburst and the lack of provocation by unfair labor practices of the Respondent, which weigh slightly to moderately against protection." Id. at 1326-1327. By contrast, in *Trus Joist Macmillan*, 341 NLRB 369 (2004), the Board found that the fact that the ""nature of the outburst" factor weighed against protection was alone enough for the conduct to lose the protection of the Act where an employee had called a manager a "liar," "lying bastard," and "prostitute" and had grabbed his own crotch. Id. at 369-372. The final example we will cite is *Plaza Auto Center, Inc.*, 360 NLRB 972 (2014). There, the United States Court of Appeals for the Ninth Circuit had remanded the case back to the Board to reweigh the factors in light of the court's finding that the Board had improperly concluded that the nature of the outburst (profane personal attacks on the owner) did not disfavor protection. On remand, the Board concluded again that the employee retained the Act's protection by adding an additional counterweight to other factors that favored protection--newly describing them as "heavily" weighing in favor of protection. Id. at 978. In other words, as Member Johnson noted in his dissent, "[the majority] rebalance[s] the original Board

majority's weighting of those factors by stating that the place-of-discussion and provocation factors now weigh 'heavily' in favor of protection. . . . [T]he majority's approach in now reweighing 'heavily' both factors one and four is essentially anachronistic, implicitly assuming that the same events frozen in the past and by the law of the case can now illogically grow more significant and persuasive through reimagination." Id. at 985.

Beyond the pliability of *Atlantic Steel*'s four-factor test, another problem with that test is that the second factor--the subject matter of the discussion--*always* tilts the scale in favor of employees retaining protection for abusive conduct because *Atlantic Steel* only applies when the subject matter of the discussion is related to Section 7 activity. A standard predisposed to favoring protection in each case hardly is a meaningful or fair analytical tool.

Further, it is clear that *Atlantic Steel* has failed to produce reliably consistent results that provide clear guidance for when an employer will violate federal labor law by disciplining an employee who has engaged in abusive conduct in the course of otherwise-protected activity. On one hand, for example, the Board found the employees lost protection for their abusive conduct, and the employers' discipline was thus lawful, in *Verizon Wireless*, 349 NLRB 640 (2007), and *DaimlerChrysler Corp.*, 344 NLRB 1324 (2005). In *Verizon Wireless*, involving an employee who engaged in abusive conduct while soliciting coworkers in an open work area, the employer gave the employee written warnings for referring to a supervisor as "that bitch" and telling one coworker to show an email about the union to her "fucking supervisors." 349 NLRB at 641-643. In *DaimlerChrysler*, the employer gave a union steward a written warning for a verbal exchange with a supervisor in an open work area regarding when to schedule a grievance meeting where the union steward said "bullshit, I want the meeting now," "fuck this shit," and he didn't "have to put up with this bullshit," and he called the supervisor an "asshole." 344 NLRB at 1328-1330.

On the other hand, when seemingly presented with more seriously abusive conduct, the Board found that employees retained the Act's protection, and the employers' discipline was thus unlawful, in *Postal Service*, 364 NLRB No. 62 (2016), and *Plaza Auto*, above. In *Postal Service*, the employer gave a warning letter to a union steward who, in a one-on-one grievance meeting with a supervisor in a breakroom, called the supervisor "an ass," unleashed a stream of profanity, forcefully stood up, stepped toward the supervisor, shook her finger within striking distance, and continuously screamed, "I can say anything I want," "I can swear if I want," and "I can do anything I want." 364 NLRB No. 62, slip op. at 2-4. In *Plaza Auto*, during a meeting with the owner and two managers in one of their offices, an employee became enraged while discussing concerted complaints about compensation. 360 NLRB at 973. The employee called the owner a "fucking mother fucking," a "fucking crook," an ""asshole," and "stupid"; told the owner nobody liked him and everyone talked about him behind his back; stood up, pushing the chair aside; and threatened that the owner would regret firing him, if he did. Id. The owner discharged him on the spot. Id.

Finally, cases such as *Postal Service* and *Plaza Auto* also raise serious concerns that the Board is giving little, if any, consideration to employers' right to maintain order and respect. Cf. *NLRB v. Starbucks Coffee Co.*, 679 F.3d 70, 73-74, 79-80 (2d Cir. 2012) (concluding the Board's application of *Atlantic Steel* to find protected an employee's outburst--"you can go fuck yourself, if you want to fuck me up, go ahead, I'm here"--to an off-duty manager in front of customers "improperly disregarded the entirely legitimate concern of an employer not to tolerate employee

outbursts containing obscenities in the presence of customers"), denying enf. 355 NLRB 636 (2010); *Tampa Tribune v. NLRB*, 560 F.3d 181, 184-189 (4th Cir. 2009) (concluding the Board misapplied *Atlantic Steel* in finding an employee retained the Act's protection despite referring to a vice president as a ""fucking idiot," reasoning that "[t]he Act's protections are not limitless, . . . and where they do not reach, employers cannot be compelled to tolerate language or behavior that undermines workplace discipline"), denying enf. 351 NLRB 1324 (2007).

Atlantic Steel has failed to be an effective legal standard. Multifactor tests "lead to predictability and intelligibility only to the extent the Board explains, in applying the test to varied fact situations, which factors are significant and which less so, and why." *LeMoyne-Owen College v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004). The Board has been unable to provide the necessary clarity. Such "totality of the circumstances" analyses can become "simply a cloak for agency whim." Id. As shown above, we believe that *Atlantic Steel* has been used as just such a cloak.

2. Totality of the circumstances--Social-media posts and coworker discussions

The Board has held that *Atlantic Steel* does not apply to abusive conduct on social media or in workplace discussions among coworkers. See *Desert Springs Hospital Medical Center*, 363 NLRB No. 185, slip op. at 1 fn. 3 (2016); *Pier Sixty, LLC*, 362 NLRB 505, 506 (2015), enfd. 855 F.3d 115 (2d Cir. 2017). Instead, the Board has applied a totality of the circumstances approach unmoored from any specific factors. Based on the few cases decided under this approach, it appears that the Board's flexibility in considering a wider of range of facts in each specific circumstance promises to create the same, if not more, inconsistency and unpredictability as has been found in cases applying *Atlantic Steel*. Cf. *NLRB v. Pier Sixty, LLC*, 855 F.3d 115, 123-124 (2d Cir. 2017) ("While we are not convinced the amorphous 'totality of the circumstances' test adequately balances an employer's interests, Pier Sixty did not object to the ALJ's use of the test in evaluating Perez's statements before the Board. For that reason, we need not, and do not, address the validity of that test in this opinion."). Indeed, in *Pier Sixty*, the Board applied this amorphous standard to find that the respondent violated Section 8(a)(3) and (1) by discharging an employee for posting on Facebook the following attack on a manager and his family: "Bob is such a NASTY MOTHER FUCKER don't know how to talk to people!!!!!! Fuck his mother and his entire fucking family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!" 362 NLRB at 506-508.

3. *Clear Pine Mouldings*--The picket line

With regard to abusive conduct taking place on the picket line, the Board has applied *Clear Pine Mouldings, Inc.*, 268 NLRB 1044, 1046 (1984), which provides that abusive conduct loses the Act's protection, and the employer accordingly may lawfully refuse to reinstate or otherwise discharge an employee, where "'the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act."' *Clear Pine Mouldings, Inc.*, 268 NLRB at 1046 (quoting *NLRB v. W. C. McQuaide, Inc.*, 552 F.2d 519, 527 (3d Cir. 1977)), enfd. mem. 765 F.2d 148 (9th Cir. 1985). Cases applying *Clear Pine Mouldings* have found picket-line misconduct to lose the protection of the Act only where it involves an overt or implied threat or where there is a reasonable likelihood of an imminent physical confrontation. See, e.g., *Catalytic, Inc.*, 275 NLRB 97, 98 (1985). As a result, the Board has found appallingly abusive picket-line misconduct to retain protection, including

racially and sexually offensive language. See, e.g., *Cooper Tire & Rubber Co.*, 363 NLRB No. 194, slip op. at 7-10 (2016) (finding protected a white picketer saying to black replacement workers, "Hey, did you bring enough KFC for everyone?" and "Hey, anybody smell that? I smell fried chicken and watermelon."), enfd. 866 F.3d 885 (8th Cir. 2017); *Airo Die Casting, Inc.*, 347 NLRB 810, 812 (2006) (finding protected a striker shouting "fuck you nigger" to a black security guard); *Nickell Moulding*, 317 NLRB 826, 828-829 (1995) (finding protected a striker carrying a sign targeted at one particular nonstriker that read: "Who is Rhonda F [with an X through the F] Sucking Today?"), enf. denied sub nom. *NMC Finishing v. NLRB*, 101 F.3d 528 (8th Cir. 1996); *Calliope Designs, Inc.*, 297 NLRB 510, 521 (1989) (finding protected repeatedly calling nonstrikers "whores" and telling one she could make more money by selling her nonstriker daughter at the flea market).

4. The setting-specific standards are in tension with antidiscrimination laws

Federal, state, and local antidiscrimination laws impose on employers a legal duty to protect employees from discrimination in the workplace on the basis of protected characteristics such as race, color, religion, sex, national origin, age, and disability. The amicus brief filed by the EEOC, the principal federal agency tasked with administering and enforcing federal laws prohibiting employment discrimination, helpfully outlines employers' duties under laws within its purview. Under EEO law, when an employee creates a hostile work environment--by engaging in objectively and subjectively severe or pervasive harassment based on a protected characteristic--the employer is liable so long as it knew or should have known about the offending conduct and failed to take prompt and appropriate corrective action. The EEOC stresses that it is critical that employers are able to take corrective action as soon as they have notice of harassing conduct--even if the harassing conduct has not yet risen to the level of a hostile work environment. . . . This is because if the employer *fails* to take corrective action, and the harassment continues and rises to the level of an actionable hostile work environment, then the employer may face liability. The "primary objective" of Title VII is "not to provide redress but to avoid harm."

EEO laws, unlike the Board's current setting-specific standards, do not forgive abusive conduct because, for instance, it arises from heated feelings about working conditions or because crude language is common in the workplace. Further, the EEOC notes that "[e]employers may also be liable under Title VII for conduct occurring outside of work when that conduct impacts the employee's working environment . . . . Employees subjected on the picket line--or through social media--to racist or sexist comments or conduct outside the workplace may thus be impacted by that conduct, including when they return to work after picketing and must work alongside their harasser." …

The Board's current standards for analyzing abusive conduct, however, have been wholly indifferent to employers' legal obligations to prevent hostile work environments on the basis of protected traits. See *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942) ("[T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.") This indifference has not

escaped the notice of reviewing courts. Notably, the United States Court of Appeals for the District of Columbia Circuit recently denied enforcement of a Board decision finding an employee who had written "whore board" on the top of overtime signup sheets on a bulletin board retained the Act's protection under *Atlantic Steel*. *Constellium Rolled Products Ravenswood, LLC v. NLRB*, 945 F.3d 546 (D.C. Cir. 2019), denying enf. 366 NLRB No. 131 (2018). The court found that the Board had failed to grapple with the employer's argument that its duty to comply with antidiscrimination laws, which might require taking prompt action against the offending employee, seemed to be in conflict with its duties under the Act. Id. at 551-552.

C. Wright Line Is the Proper Standard

For all the reasons discussed above, we believe that the Board must consider a different standard for deciding cases where employees engage in abusive conduct in connection with Section 7 activity, and the employer asserts it issued discipline because of the abusive conduct. In cases such as *Postal Service*, above, we believe it entirely plausible that the employer's decision to give the long-time union steward a warning letter was based entirely on her abusive conduct--calling the supervisor "an ass," unleashing a stream of profanity, forcefully standing up, stepping toward the supervisor, shaking her finger within striking distance, and continuously screaming, "I can say anything I want," "I can swear if I want," and "I can do anything I want"-- rather than her union activity. See 364 NLRB No. 62, slip op. at 2-4. Likewise, it seems plausible in *Pier Sixty*, above, that the employer discharged an employee for the profane and vituperative attack on the manager in the Facebook post, which would make it difficult for the two to work together again, and not because the post also happened to conclude with a pro-union message. 362 NLRB at 506-508. Just as it seems plausible in *Cooper Tire*, above, that when it discharged a striker, the employer took the prompt and appropriate corrective action anticipated by antidiscrimination laws for his racist bullying--"[h]ey, did you bring enough KFC for everyone" and "[h]ey, anybody smell that? I smell fried chicken and watermelon"--and was not motivated by his protected picketing activity. 363 NLRB No. 194, slip op. at 7-10. Absent evidence of discrimination against Section 7 activity, we fail to see the merit of finding violations of federal labor law against employers that act in good faith to maintain civil, inclusive, and healthy workplaces for their employees. These results simply do not advance the Board's mission of promoting labor peace or any of the other principles animating the Act.

1. Abusive conduct is not protected by the Act and should be differentiated from conduct that is protected by the Act.

The Board's fundamental rationale in applying its setting-specific standards has been that employees need a certain amount of leeway in exercising Section 7 rights for those rights to be meaningful. As the Board wrote in *Consumer Power Co.*, 282 NLRB 130 (1986), "The Board has long held . . . that there are certain parameters within which employees may act when engaged in concerted activities. The protections Section 7 affords would be meaningless were we not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses." Id. at 132. We believe, however, that this rationale is overstated and has largely swallowed employers' concomitant right to maintain order, respect, and a workplace free from invidious discrimination. We read nothing in the Act as intending any protection for abusive conduct from

nondiscriminatory discipline, and, accordingly, we will not continue the misconception that abusive conduct must necessarily be tolerated for Section 7 rights to be meaningful.

Section 7 of the Act relevantly provides that "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities." American workers engage in these activities every day without resorting to abuse, and nothing in the text of Section 7 suggests that abusive conduct is an inherent part of the activities that Section 7 protects or that employees who choose to engage in abusive conduct in the course of such activities must be shielded from nondiscriminatory discipline.[9] Accord *Adtranz ABB Daimler-Benz Transp. v. NLRB*, 253 F.3d 19, 26 (D.C. Cir. 2001) (noting that it was "preposterous" and condescending to assume that employees were not capable of exercising their statutory rights "without resort to abusive or threatening language").

Moreover, there are any number of matters, such as individual gripes and interpersonal conflicts wholly unrelated to Section 7 activity, that would be just as likely to engender ill feelings and strong responses as concerted disputes over terms and conditions of employment. Employers draw boundaries in every workplace, based on specific conditions and circumstances, as to what amount of leeway is appropriate in navigating such emotionally charged matters. Much more often than not, employees comport themselves civilly when engaged in Section 7 activity, and no leeway is needed. That said, Section 7 rights can thrive in the same space afforded other challenging topics, and it is reasonable for employers to expect employees to engage all such topics with a modicum of civility. As eloquently written by former Member Johnson in his *Pier Sixty* dissent:

> We live and work in a civilized society, or at least that is our claimed aspiration. The challenge in the modern workplace is to bring people of diverse beliefs, backgrounds, and cultures together to work alongside each other to accomplish shared, productive goals. Civility becomes the one common bond that can hold us together in these circumstances. Reflecting this underlying truth, moreover, legal and ethical obligations make employers responsible for maintaining safe work environments that are free of unlawful harassment. Given all this, employers are entitled to expect that employees will coexist treating each other with some minimum level of common decency.

362 NLRB at 510.

[9] Again, Sec. 7 protects self-organization; forming, joining, or assisting labor organizations; bargaining collectively; and other concerted activities for the purpose of collective bargaining or other mutual aid or protection. Discipline motivated by a purpose to interfere with, restrain, or coerce employees in exercising their right to engage in any of these is unlawful. Nothing in our decision today disturbs this principle. We simply reject the assumption underlying the setting-specific standards--namely, that where an employer disciplines an employee who engaged in abusive conduct in the course of Sec. 7 activity, the Board either cannot or ought not separate the two analytically and determine whether the employee's Sec. 7 activity was a motivating factor in the employer's decision to discipline the employee and, if so, whether the employer has shown that it would have taken the same action even absent the employee's Sec. 7 activity.

We do not read the Act to empower the Board to referee what abusive conduct is severe enough for an employer to lawfully discipline. Our duty is to protect employees from interference in the exercise of their Section 7 rights. Abusive speech and conduct (e.g., profane ad hominem attack or racial slur) is not protected by the Act and is differentiable from speech or conduct that is protected by Section 7 (e.g., articulating a concerted grievance or patrolling a picket line). Accordingly, if the General Counsel fails to show that protected speech or conduct was a motivating factor in an employer's decision to impose discipline, or if the General Counsel makes that showing but the employer shows that it would have issued the same discipline for the unprotected, abusive speech or conduct even in the absence of the Section 7 activity, the employer appears to us to be well within its rights reserved by Congress.

As the Supreme Court wrote in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937):

> The act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion. The true purpose is the subject of investigation with full opportunity to show the facts.

Id. at 45-46. Indeed, Section 10(c) of the Act expressly prohibits the Board from ordering reinstatement or backpay for any employee "suspended or discharged for cause." The Board's analyses under the setting-specific standards, however, pay no attention to the real possibility that employers may have discharged employees for abusive conduct--a reason entirely apart from a purpose to intimidate or coerce employees in the exercise of their rights under the Act--and such conduct is "cause" by any conventional notion. By analogy, employers' acknowledged right to maintain discipline, short of discharge, should likewise not be infringed. Cf. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797-798 (1945).

That the Board's setting-specific standards have failed is further shown by the following. When an employer imposes discipline for abusive conduct in the course of union activity, and the Board (applying a setting-specific standard) finds no loss of protection, the Board has typically found that the employer violated Section 8(a)(3). Section 8(a)(3) declares it is unlawful "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization"; accordingly, an 8(a)(3) violation requires evidence of discrimination and an antiunion motivation. See *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 32-33 (1967). None of the setting-specific standards, however, actually require any showing of discrimination or antiunion motivation. Instead, the Board has mistakenly assumed discrimination and antiunion motivation by treating union activity as inseparable from related abusive conduct. Accordingly, if an employer admits the discipline was for the abusive conduct, then the employer also admits it was discriminating against the inseparable union activity. For example, in *Aztec Bus Lines, Inc.*, 289 NLRB 1021 (1988), the Board established that an employer can violate Section 8(a)(3) by refusing to reinstate strikers either when (1) it treated strikers and nonstrikers disparately even if the misconduct was severe enough to lose protection under *Clear Pine Mouldings*, or (2) it treated strikers and nonstrikers the same

but the misconduct was not severe enough to lose protection under *Clear Pine Mouldings*. Id. at 1026-1029.

The flawed principle that Section 7 activity is analytically inseparable from abusive conduct committed in the course of Section 7 activity is also the reason the Board has relied upon for not applying *Wright Line*, 251 NLRB 1083 (1980), to these cases. The Board has explained, "Where an employer defends disciplinary action based on employee conduct that is part of the res gestae of the employee's protected activity, *Wright Line* is inapplicable. This is because the causal connection between the protected activity and the discipline is not in dispute." *Roemer Industries, Inc.*, 362 NLRB at 834 fn. 15. Again, we fundamentally disagree that the Section 7 activity is inseparable from the abusive conduct, and by recognizing that they are severable, the causal connection between protected activity and discipline *is* properly in dispute.

2. The Board's longstanding *Wright Line* framework appropriately allows the Board to protect Section 7 activity without erroneously extending the Act's protection to abusive conduct.

For the reasons set forth above, we conclude that the *Wright Line* burden-shifting framework is the appropriate standard for cases where the General Counsel alleges that discipline was motivated by Section 7 activity, and the employer asserts that it was motivated by abusive conduct. We find that *Wright Line* applies in these cases regardless of the setting involved, whether it be a workplace, social media, or picket line.

Under *Wright Line*, the General Counsel must initially show that (1) the employee engaged in Section 7 activity, (2) the employer knew of that activity, and (3) the employer had animus against the Section 7 activity, which must be proven with evidence sufficient to establish a causal relationship between the discipline and the Section 7 activity. *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 6, 8 (2019); see also *Mondelez Global, LLC*, 369 NLRB No. 46, slip op. at 1-2 (2020). Our decision today does not alter this standard. We specifically note that the General Counsel is not required, as part of his initial burden, to disprove the existence of other, lawful motivating factors for the discipline. Consistent with the principles stated in this decision, however, evidence is probative of unlawful motivation only if it adds support to a reasonable inference that the employee's Section 7 activity was a motivating factor in the employer's decision to impose discipline.

Once the General Counsel makes his initial case, the employer will be found to have violated the Act unless it meets its defense burden to prove that it would have taken the same action even in the absence of the Section 7 activity. See *Hobson Bearing International, Inc.*, 365 NLRB No. 73, slip op. at 1 fn. 1 (2017). Consistent with established precedent, however, if the evidence as a whole "establishes that the reasons given for the [employer's] action are pretextual--that is, either false or not in fact relied upon--the [employer] fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis." *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003).

The application of *Wright Line* to these cases promises more reliable, less arbitrary, and more equitable treatment of abusive conduct than the Board's experience under *Atlantic Steel*, the

"totality of the circumstances" standard, and *Clear Pine Mouldings*. The Supreme Court has approved the *Wright Line* framework, and the Board has vast experience applying it. Under this approach, the Board will properly find an unfair labor practice for an employer's discipline following abusive conduct committed in the course of Section 7 activity when the General Counsel shows that the Section 7 activity was a motivating factor in the discipline, and the employer fails to show that it would have issued the same discipline even in the absence of the related Section 7 activity.[10]This realignment honors the employer's right to maintain order and respect. It will also avoid potential conflicts with antidiscrimination laws. The Board will no longer stand in the way of employers' legal obligation to take prompt and appropriate corrective action to avoid a hostile work environment on the basis of protected characteristics.[11]

Further, the application of *Wright Line* in this context will ensure that employees' Section 7 rights continue to be protected. Under *Wright Line*, it is unlawful for employers to target employees who engage in Section 7 activity and subject them to discipline that would not have occurred but for that protected activity. At the same time, employees who engage in abusive conduct in the course of Section 7 activity will not receive greater protection from discipline than other employees who engage in abusive conduct. This is consistent with the recognition in *Wright Line* that Section 7 rights are "'sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the"' Section 7 activity. *Wright Line*, 251 NLRB at 1086 (quoting *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 285-286 (1977)).

D. Retroactive Application of Wright Line

We find it appropriate to apply *Wright Line* retroactively to all pending cases in which the Board would have determined, under one of its setting-specific standards, whether abusive conduct in connection with Section 7 activity had lost an employee or employees the Act's protection. . . .

E. Remand for Application to this Case

In the case before us, the judge applied *Atlantic Steel* in deciding that the Respondent had violated Section 8(a)(3) and (1) by suspending Robinson following his abusive conduct in the April 11, 2017 discussion with manager Nikolaenko but had not committed a violation by suspending Robinson following his abusive conduct during the April 25 and October 6, 2017 bargaining meetings. The parties have not had an opportunity to address how *Wright Line* applies to this case.

[10] With this approach, we finally engage in the proper analysis. See NLRB v. Electrical Workers IBEW Local 1229 (Jefferson Standard), 346 U.S. 464, 475 (1953) ("The legal principle that insubordination, disobedience or disloyalty is adequate cause for discharge is plain enough. The difficulty arises in determining whether, in fact, the discharges are made because of such a separable cause or because of some other concerted activities engaged in for the purpose of collective bargaining or other mutual aid or protection which may not be adequate cause for discharge.").

[11] If an employer is unable to prove it would have taken the same action against, for instance, racist conduct in the absence of Sec. 7 activity, perhaps because of a history of tolerating such conduct, the Board would still find the violation under Wright Line. The Board's role is to protect employees from interference, restraint, or coercion--including unlawful discipline--in the exercise of their Sec. 7 rights. The Board's role is not to affirmatively sanction an employer for failing to take steps to prevent a hostile work environment or otherwise fight discrimination on the basis of protected classes. Under the standard we adopt today, however, we are confident that the Board will no longer interfere with an employer's good-faith efforts to fulfill its obligations under antidiscrimination laws and protect its employees.

Moreover, because different facts are relevant under *Wright Line* than were under *Atlantic Steel*, the record is missing facts necessary to decide this matter. The General Counsel has not offered evidence that the Respondent had animus against Robinson's Section 7 activity, and the Respondent was blocked by the General Counsel's relevance objection from presenting evidence now relevant to whether the Respondent would have suspended Robinson for his abusive conduct even in the absence of Section 7 activity. Accordingly, we will remand the allegations regarding the April 11 and 25 conduct (set forth in paragraphs 5(a) and (b) of the complaint) to the judge for further proceedings consistent with this decision, including reopening the record to allow the parties to introduce evidence relevant to analyzing the 8(a)(3) and (1) allegations under *Wright Line*.

ORDER

IT IS ORDERED that this proceeding is remanded to Administrative Law Judge Donna N. Dawson for the purpose of reopening the record and preparing a supplemental decision addressing the allegations in paragraphs 5(a) and (b) of the complaint under the new standard adopted above, setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order. Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

IT IS FURTHER ORDERED that the allegation in paragraph 5(c) of the complaint that Robinson was unlawfully suspended on October 17, 2017, is dismissed.

NOTES

1. *Breaking with many years of precedent to provide clarity and reconcile the NLRA with federal anti—discrimination law, or to give employers discretion in determining the contours of Section 7 rights?* Before *General Motors LLC and Robinson,* the Board refused to protect employees who engaged in section 7 activity in an abusive or opprobrious manner. The Board had discretion to determine whether the conduct was abusive or opprobrious. To do so, it crafted various tests: Workplace discussions with management were analyzed following the 4-prong *Atlantic Steel* factor test. Social media postings were analyzed based on a more diffuse "totality of the circumstances" standard. Picket line conduct was assessed under *Clear Pine Mouldings,* determined over 35 years ago, which provided that abusive picket line conduct loses the Act's protection, where such conduct "may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act."' In essence, if conduct that coerced or intimidated employees from not engaging in picketing or not entering the company gates during a strike, for example, would lose protection.

With *General Motors LLC and Robinson*, the Trump Board extended *Wright Line*, a 1980 case decided to resolve employer discrimination against union activity cases arising under section 8(a)(3), not 8(a)(1), to 8(a)(1) cases if employers alleged that they took disciplinary actions against employees for considerations independent of protected activity. As such, the Board overruled many years of 8(a)(1) precedent. Rather than determine, under its discretion, whether the conduct lost protection, the General Counsel must make an initial showing that "(1) the employee engaged in Section 7 activity, (2) the employer knew of that activity, and (3) the employer had animus against the Section 7 activity, which must be proven with evidence sufficient to establish a causal

relationship between the discipline and the Section 7 activity." Once the General Counsel has made its prima facie case, "the burden of persuasion shifts to the employer to prove it would have taken the same action even in the absence of the Section 7 activity."

The Trump Board argued that by applying *Wright Line* it would create a standard that would provide more consistent results than the ambiguous standards set by precedent. According to the Trump Board, the *Wright Line's* burden shifting test -called that way because they shift the burden from the General Counsel to the Employer once the General Council has made its prima facie case- have proven useful and consistent in the 8(a)(3) context, and should be similarly effective in the 8(a)(1) context. Moreover, it will help employers comply with anti-discrimination law more generally, given that at least some abusive employee behavior might involve racist and sexist language that is prohibited by federal and state anti-discrimination law. As General Motors reported, employees do, in fact, sometimes might engage in sexist and racist language that has no place in the workplace. And yet, sometimes that language has been protected by the Board.

Do you agree with the Trump Board's idea that the *Wright Line* test offers more consistent results than its prior 8(a)(1) tests? Does *Wright Line* give employers more or less discretion to comply with Section 7 of the NLRA? Put differently, which method, the prior Board tests where the Board could determine loss of protection, or the *Wright Line* burden shifting test gives employers more opportunities to define what protected activity should be in a particular case?

2. *Can Protected Activity be Decoupled from the Words and Actions Employees Choose to Speak and Do?* The main reason the Board used to apply two different standards for 8(a)(1) and 8(a)(3) cases hinged on the Board's idea that confronting management, posting messages on social media, and picketing -i.e., species of section 7 activity- are inseparable from the words employees use and the actions they engage in. Hence, by enabling employers to separate an employee confrontation with management (the protected activity) from the words the employee chooses (e.g., expletives of some sort), for example, the Board might, in essence enable the employers to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7, which is against the Act. For example, imagine a scenario where an employee, a garment worker, is trying to persuade his or her coworkers to engage in a strike to protest employer unfair labor practices. The employee, a relatively short, petite woman, stands on a worktable at the workplace with a sign that reads "Union" to agitate her coworkers to walkout. Assume that the workplace has a rule concerning disruptive behavior in the workplace that includes discipline for using company equipment and furniture for purposes unrelated to work. It also has a rule stating that any concerns or grievances about the workplace need to be taken to the shift supervisor during the supervisor's office hours. Assume that the employer has disciplined every employee who has ever stood up on a table and/or raised grievances in public, outside the supervisor's office hours. If the employer terminates the employee who stood up on the table with the sign, not for engaging in protected activities, but for having broken the anti-disruption and complaint rules, would the General Council prevail under *General Motors*? Would the General Council prevail under prior precedent?

Note, this action by an employee standing on a company table to instigate a strike with a sign is recognized as one of the most iconic examples of employee collective action in the Unites States, as it was shown in the award-wining Hollywood movie *Norma Rae*.

3. *How Does the Board Draw the Line? Does it Have to?* While the Trump Board voices concerns about employee use of racist and sexist language in the workplace, which might impose Title VII liabilities on employers, not all of the speech it disagreed with, as reported in General Motors, was racist or sexist. If General Motors thus covers a broad range of abusive and opprobrious behavior that need not be racist or sexist, where does the NLRB draw the line of such speech and conduct? Would a violation of company rules and arguably disruptive behavior be sufficient to show abusive and opprobrious behavior that the employer would have disciplined independently of the Section 7 activity? But, if so, isn't Section 7 activity generally disruptive? Aren't walkouts disruptive? Strikes? Pickets? Petitions? Wouldn't employer discretion to define abusive and opprobrious behavior necessarily violate Section 7 of the Act?

4. *Unprotected Conduct as a Matter of Federal Policy?* It's pretty clear that picketing employees who call non-picketing employees racist expletives, such as reported in General Motors, can contribute to a hostile work environment under federal anti-discrimination law. Wouldn't it be simpler, and perhaps more in tune with both Section 7, 8(a)(1) and federal anti-discrimination policy that such language is unprotected for being in violation of federal employment discrimination policy? Why then mandate parties to engage in what appears to be a complex litigation, such as is determined by the *Wright Line* framework?

5. *Pretext and Mixed Motives: A Tale of Two Frameworks:* After General Motors, it appears that there are two, not one, evidentiary frameworks to analyze Section 8(a)(1) violations: the "pretext" (single motivation) and the mixed motive (dual motivation) framework which have existed since *Wright Line*. As the Trump Board stated:

> Consistent with established precedent, however, if the evidence as a whole "establishes that the reasons given for the [employer's] action are pretextual--that is, either false or not in fact relied upon--the [employer] fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis.

By far the most commonly used standard today in 8(a)(3) cases is the mixed motives framework, probably because the General Counsel tends to proceed with complaints in the stronger cases and can meet the initial burden causing the full burden to shift to the employer. Hence, it might also be the case that the mixed motives framework will become the most typical in 8(a)(1) cases when the employer alleges reasons independent from the Section 7 activities justifying employee discipline.

In the typical pretext case, once the General Counsel has made out a prima facie case of employer discrimination against employee section 7 activities, -which the Board is now extending to 8(a)(1) cases- the employer then attempts to show that either the General Counsel's case is flawed by rebutting the General Counsel's evidence, or showing that the real reason for the employer's action is a legitimate one. In these cases, credibility is attacked as each side tries to show theirs is the true account of what happened.

By contrast, in the mixed motive case, based on the strength of the evidence against the employer that an unlawful motivation played a part in the action against the employee, the full burden shifts and the employer must then show, by a preponderance of the evidence, that the action would have been taken despite the unlawful motivation, for legitimate reasons. *See* Holo-Krome Co. v. NLRB, 954 F.2d 108, 110 (2d Cir. 1992).

6. *For Cause Termination?*: Section 10(c) of the NLRA states that (1) an employer may only be found have committed an unfair labor practice based upon "preponderance of the testimony taken," and (2) employers may always terminate an employee "for cause." These burden of proof and "for cause" requirements have been incorporated into the existing frameworks, pretext and mixed motive, for determining whether the employer has discriminated in violation of Section 8(a)(3). *General Motors* now incorporated them in the 8(a)(1) context. *See* NLRB v. Transportation Management Corp., 462 U.S. 393 (1983), *supra* at __.

7. *The Requirement of Intent:* Before *General Motors*, we understood that while Section 8(a)(1) and 8(a)(2) violations could be established without showing antiunion animus, Section 8(a)(3) violations carried the requirement of intentional action by the employer. Is this understanding still correct, or do 8(a)(1) violations now also require the added element of intent?

Of course, intent can be proved circumstantially, as is typically the case. The relevance of employer motives has been consistently recognized under both § 8(a)(3) and its predecessor. In the first case to reach the Court under the National Labor Relations Act, *NLRB v. Jones & Laughlin Steel Corp*., 301 U.S. 1 (1937), which upheld the constitutionality of the Act, and which was cited by the Trump Board in *General Motors*, the Court said with respect to limitations placed upon employers' right to discharge by that section that "the [employer's] true purpose is the subject of investigation with full opportunity to show the facts." In another case that the Supreme Court decided on that same day, the Court found the employer's "real motive" to be decisive and stated that "the act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees." Courts of Appeals have uniformly applied this criterion, and writers in the field of labor law emphasize the importance employer motives in Section 8(a)(3) cases. That Congress intended the employer's purpose in discriminating to be controlling is clear. The Senate Report on the Wagner Act said: "Of course nothing in the bill prevents an employer from discharging a man for incompetence; from advancing him for special aptitude; or from demoting him for failure to perform." Senator Wagner spoke of Section 8(3), the predecessor to § 8(a)(3), as reaching "those very cases where the employer is strong enough to impress his will without the aid of the law." But having not spoken of Section 8(1) in the same way, was the Trump Board justified to add an intent requirement for violations of Section 8(a)(1)?

We should further note that it has also been clear that specific evidence of intent to encourage or discourage union activity is not an indispensable element of proof of violation of Section 8(a)(3), and neither should it be for 8(a)(1). Both the Board and the courts have recognized that proof of certain types of discrimination satisfies the intent requirement. This recognition that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership is but an application of the common-law rule that a person is held to intend the foreseeable consequences of his or her conduct. Thus an employer's protestation that

it did not intend to encourage or discourage protected activity must be unavailing where a natural consequence of its action was such encouragement or discouragement. Concluding that encouragement or discouragement will result, it is presumed that such consequence was intended. In such circumstances intent to encourage is sufficiently established. *Radio Officers v. NLRB*, 347 U.S. 17, 43–45 (1954).

8. *The Prima Facie case*: As *Wright Line* and *General Motors suggest*, the mixed motive case is one where the General Counsel can show ab initio, through either direct or circumstantial evidence, that the interference with, restraining, or coercing employees in the exercise of the rights guaranteed in section 7 was a substantial or motivating for the employer's discipline in question. To do so, the General Counsel will attempt to marshal the following evidence: (1) employer knowledge of employee Section 7 activities, (2) suspect timing of employer action, (3) excellence of employee work record, (4) extremity of discipline, (5) circumstances of employer action tending to show antiunion animus, and (6) evidence of history of section 7 hostility. For a relatively recent NLRB discussion of this type of evidence in the 8(a)(3) context, see *Lucky Cab Co.*, 360 N.L.R.B. 271 (2014).

If the General Counsel succeeds in showing that interference with, restraining, or coercing employees in the exercise of the rights guaranteed in section 7 was a substantial or motivating factor in the employer's discipline, the burden of persuasion shifts to the employer to show that the employer action would have been taken regardless of antiunion animus, the equivalent of showing that the action was "for cause," by a preponderance of the testimony taken.

9. *Should Evidence of Pretext Be Sufficient to Shift Burden to Employer?:* Assume that an employer terminates an employee some months after the employee got in confrontations with her supervisors during a union organizing campaign. The employer argued that the reason for the termination was not related to Section 7 activities, but because the employee refused to follow her supervisor's instructions on the job, i.e., she was "insubordinate." Assume that, in fact, the employee was insubordinate. Assume also that General Counsel proves that the employer never terminated any employee because of insubordination. In other insubordination situations the employer issued mere warnings or minor suspensions. Has the General Counsel shown that the employer's motivating or substantial factor in terminating the employee was to interfere with, restrain, or coerce the employee in the exercise of the rights guaranteed in section 7, thereby shifting the burden to the employer? *See Electrolux Home Products, Inc. & J'vada Mason*, 368 N.L.R.B. No. 34 (2019) ("When an employer has offered a pretextual reason for discharging or disciplining an alleged discriminatee, the real reason might be animus against union or protected concerted activities, but then again it might not. It is possible that the true reason might be a characteristic protected under another statute (such as the employee's race, gender, religion, or disability), or it could be some which would be permissible basis for action under the at-will employment doctrine.") In light of Electrolux, how much evidence must the General Council provide to support its allegation that the employer's motivating or substantial factor in disciplining the employee was to interfere with, restrain, or coerce the employee in the exercise of the rights guaranteed in section 7? If so, why shift the burden to the employer? What role does the burden shifting test play?

On page 184, add the following text to the end of note 2:

In *Cordúa Restaurants, Inc. and Steven et al.*, 368 NLRB No. 43, decided on August 14, 2019, the Trump NLRB decided that an employer could, without violating Section 7, require employees to sign opt-in collective action waivers and arbitration agreements after the employees joined in an opt-in collective action to pursue claims under the FLSA. However, in reaching this decision, the Trump Board also declared that workers who joined together in a collective action to pursue an FLSA claim were protected by the NLRA. Did the Trump Board determine the protected nature of filing collective actions in accordance with Epic Systems? What do we make of Justice Gorsuch's argument that "… the term 'other concerted activities' should, like the terms that precede it, serve to protect things employees 'just do' for themselves in the course of exercising their right to free association in the workplace, rather than 'the highly regulated, courtroom-bound 'activities' of class and joint litigation.''? Assuming that the Trump Board is not in conflict with Epic Systems, does it then follow that employers may retaliate against Section 7 activity with otherwise legal employer actions? In other words, can an employer require employees to accept a reduction in hours (which is generally legal to request) in response to employee walkouts triggered by cold and unsafe working conditions that the employees want to remedy?

On page 195, add to note 1:

"On February 1, NLRB Acting General Counsel Peter Sung Ohr rescinded a slew of General Counsel Memos issued by his predecessor, Peter Robb, including General Counsel Memo 18-04 (Handbook Rules Post-Boeing). According to Ohr, this Memo is being rescinded because it is no longer necessary given the number of Board cases interpreting Boeing that have been decided since the case was issued."

On page 196, add new note 3:

3. Assume that an employer promulgates a rule prohibiting "statements either oral or in writing, which are intended to injure the reputation of the Company or its management personnel with customers or employees." Would this rule classify as a Category 1, 2, or 3 rule under *Boeing*? *See* Union Tank Co. and Int'l Assoc. of Sheet Metal, Air, Rail, & Transp. Workers, 369 NLRB No. 120 (2020).

4. Assume that an employer has a work rule that states: "Employees may not record telephone or other conversations they have with their co-workers, managers or third parties unless such recordings are approved in advance by the Legal Department, required by the needs of the business, and fully comply with the law and any applicable company policy." Then assume that an employee is disciplined by the employer. The employee asks a union shop steward, who is also an employee of the employer, to accompany him to a grievance meeting with the employer, at the employer's facility, regarding the discipline. Assume that the union steward agrees to attend the meeting. He records the meeting in his cellphone without prior leave from the employer. The employer learns of this recording, and disciplines the union delegate for violating the company rule banning recordings in the workplace.

Under which *Boein*g category would this work rule fall under? Is the rule legitimate under *Boeing*? Even if the work rule is legitimate under *Boeing*, should the employer be found liable for violating Section 8(a)(1), under the given facts? *See AT&T Mobility and Marcus Davis*, 370 NLRB No. 121 (N.L.R.B.).

D. STRIKES

***On page* 198: At the end of the paragraph on "Black Friday Strikes" add:** "We will turn to this question next, in section "b" (page 204), on "intermittent strikes."

***On page 208,* add new section "e":**

e. What is not a Strike?

Section 502 of the LMRA: As we previously learned in Part A of this Chapter, while most collective refusals to work are considered "strikes," individual and collective refusals to work because of abnormally dangerous conditions are not considered to be strikes by the Section 502 of the LMRA. *See* Part A of this Chapter. Cataloging such refusals to work as non-strikes protects employees from being permanently replaced by management, as you will learn management can do under *NLRB v. Mackay Radio & Telegraph Co*., 304 U.S. 333 (1938), *supra* at 773. Moreover, Section 502 protects individual refusals to work. *See* Part A of this Chapter. Additionally, remember that some individual and collective refusals to work might also be protected by the OSHA Act if the work threatens the employee with "serious injury or death arising from a hazardous condition at the workplace" and the employer did not remedy that dangerous condition after it being reported by the employee. *Id.*

***On page* 204-206. Replace all text under that section with this new text:**

Walmart Stores, Inc. and
The Organization United for Respect at Walmart (Our Walmart)
368 NLRB No. 24 (N.L.R.B.)
July 25, 2019

BY MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

On January 21, 2016, Administrative Law Judge Geoffrey Carter issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party each filed an answering brief, and the Respondent filed reply briefs. In addition, the General Counsel and the Charging Party each filed cross-exceptions and a supporting brief, the Respondent filed answering briefs, and the General Counsel and the Charging Party each filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent

consistent with this Decision and Order.

The central issue in this case is whether a May-June 2013 work stoppage, called the "Ride for Respect," was an intermittent strike unprotected by the National Labor Relations Act. If it was, the Respondent did not violate Section 8(a)(1) by disciplining and discharging employees who participated in the stoppage. The judge found that it was not an intermittent strike and accordingly held that the Respondent violated Section 8(a)(1). We find that the Ride for Respect was an intermittent strike and reverse the judge's finding.

I. FACTS

OUR Walmart is a group for Walmart employees that the United Food and Commercial Workers Union (UFCW) supported and helped form. OUR Walmart initially employed various tactics to publicize its broad message of improving Walmart employees' wages, hours, benefits, and other working conditions, but it ultimately turned to work stoppages. There were four sets of strikes in the record. First, in October 2012, more than 58 Walmart employees at certain locations in the Los Angeles area went on strike. Second, on Black Friday in November 2012, there was a nationwide strike involving about 100 employees. Third, the Ride for Respect in late May to early June 2013 involved 100 to 130 employees striking for 5 to 6 days so that strikers could travel to the Respondent's annual shareholders' meeting to demonstrate. Fourth, on Black Friday in November 2013, there was a nationwide strike involving an unspecified number of employees. At issue here, the Respondent disciplined or discharged 54 employees who participated in the May-June 2013 Ride for Respect for violating its attendance policy.

II. ANALYSIS

The Board has consistently held since the Supreme Court's decision in *Auto Workers Local 232 v. Wisconsin Employment Relations Board (Briggs & Stratton)*, 336 U.S. 245 (1949), that intermittent strikes are unprotected by the Act. In other words, intermittent strikes are not unlawful, but employers do not contravene the Act by disciplining participants in such strikes.

Simply put, an intermittent strike unprotected by the Act is a strike pursuant to "a plan to strike, return to work, and strike again." *Farley Candy Co.*, 300 NLRB 849, 849 (1990). In the rare case where there is direct evidence of a strategy to use a series of strikes in support of the same goal, it is a straightforward matter to find the work stoppages unprotected. See *Honolulu Rapid Transit Co.*, 110 NLRB 1806, 1807-1811 (1954) (unprotected where union admittedly designed scheme to strike only on weekends); *Pacific Telephone & Telegraph Co.*, 107 NLRB 1547, 1548-1550 (1954) (unprotected where "[CWA's] announced strategy consisted of a multiplicity of little 'hit and run' work stoppages deliberately calculated, in CWA's own words, to 'harass the company into a state of confusion"').

This is one of those rare straightforward cases. There is direct evidence of a plan to strike, return to work, and strike again, repeatedly. All of the strikes here were in support of the same goal of broadly improving Walmart employees' wages, hours, benefits, and other working conditions. The UFCW and OUR Walmart stipulated on the record in this case that "[t]he UFCW and OUR Walmart intend to continue planning and assisting Walmart workers in striking in a manner

consistent with the strikes that the UFCW and OUR Walmart helped plan and assist Walmart workers hold in October and November 2012, June 2013, and November 2013," effectively admitting a strategy to use a series of strikes in support of the same goal. The Ride for Respect, the third strike undertaken pursuant to this strategy, was thus an unprotected intermittent strike, and the Respondent's disciplining and discharging some of the participants pursuant to its attendance policy was lawful.

In finding the Ride for Respect was not an intermittent strike, the judge incorrectly employed a multifactor analysis. The judge failed to recognize that the ultimate inquiry in every Board case on the subject, either explicitly or implicitly, has been whether the work stoppage was pursuant to a strategy to use a series of strikes in support of the same goal. *In the absence of direct evidence*, the Board has examined the surrounding circumstances to determine whether work stoppages were pursuant to a plan to strike, return to work, and strike again. For example, work stoppages that are frequent and short in duration are more likely to be part of a strategy of intermittent stoppages. Compare, e.g., *Polytech, Inc.*, 195 NLRB 695, 696 (1972) ("[The] presumption that a single concerted refusal to work overtime is a protected strike activity . . . should be deemed rebutted when and only when the evidence demonstrates that the stoppage is part of a plan or pattern of intermittent action which is inconsistent with a genuine strike or genuine performance by employees of the work normally expected of them by the employer.") and *Robertson Industries*, 216 NLRB 361, 362 (1975) (two work stoppages, one in November and one in February, were not a pattern of intermittent stoppages),[5] with *Embossing Printers, Inc.*, 268 NLRB 710, 722-724 (1984) (employer lawfully locked out employees who walked out to attend the third union meeting in about a week). Also, work stoppages responding to distinct employer actions or issues, even if close in time, are simply not pursuant to a plan to strike intermittently for the same goal and are therefore protected. Compare, e.g., *WestPac Electric, Inc.*, 321 NLRB 1322, 1360 (1996) (three separate strikes within 2 weeks were protected because strikes were not "intentionally planned and coordinated"; "each strike had its distinct origins and motivating antecedent features"), *Chelsea Homes, Inc.*, 298 NLRB 813, 831 (1990) (protected where two stoppages were "unique to [their] facts and circumstances"), and *City Dodge Center, Inc.*, 289 NLRB 194, 194 fn. 2 (1988) (protected because actions were "a series of reactions to steps taken by the Respondent," not "a plan to strike, return to work, and strike again"),[8] with *Swope Ridge Geriatric Center*, 350 NLRB 64, 64 fn. 3 (2007) (two work stoppages a few weeks apart were unprotected where "the parties were unable to reach agreement on a wage increase . . . [and] the Union proffered no alternative reason for its conduct. Thus, we find that the strikes were part of the Union's bargaining strategy and, because the bargaining dispute continued with no evident changed purpose, there was a reasonable basis for finding that the pattern would continue"). The judge here misinterpreted the Board's examination of such facts to be introducing factors of independent significance. It did not. If, as here, there is direct evidence that a strike was pursuant to a strategy to use a series of strikes in support of the same goal, additional inquiry is simply unnecessary.

Our dissenting colleague wrongly accuses us of expanding the intermittent-strike doctrine with an unprecedented new standard. To the contrary, we apply exactly what has always animated our precedent, the principle that plans to strike, return to work, and strike again are not protected genuine strikes. Our discussion above illustrates this principle. We do not read any of the cases our colleague cites--largely the same cases we cite--to contradict our reading of precedent.

Our colleague claims that precedent requires more than just a strategy of repeated strikes to be unprotected. The strikes, she claims, must be intended to "harass the company into a state of confusion." We expect she means that plans of repeated strikes must be intended to reach some undefined threshold of disruption, but our precedent contains no such rule. The "state of confusion" phrase comes from *Pacific Telephone & Telegraph Co.*, 107 NLRB 1547 (1954), where the Board remarked that the union's own publication touted its strategy of "hit and run" strikes as promising to, quoting the publication, "harass the company into a state of confusion." Id. at 1548 & fn. 3. The *Pacific Telephone* Board was quoting the union's publication to show the plan of repeated strikes and not setting a threshold of disruption.

The Board repeated the "state of confusion" language in just one later case, *United States Service Industries, Inc.*, 315 NLRB 285 (1994). There, the Board parroted agreement with the judge's inartful *Pacific Telephone* formulation that "'hit and run' strikes engaged in as part of a planned strategy intended 'to harass the company into a state of confusion' are not protected activity" and concluded, "we also agree with the judge that in the instant case there is no evidence that any such strategy was in place, and that the mere fact that some employee may have struck more than once does not render their conduct intermittent striking." In *United States Service Industries*, there was no evidence that the strikes were part of *any* plan to strike more than once, so we do not view the Board there to be setting a heightened threshold of disruption before a plan of repeated strikes loses protection, and it would be dicta if it were. Here, unlike *United States Service Industries*, there is direct evidence of UFCW and Our Walmart admitting their plan to strike repeatedly--the critical fact to our disposition here that our colleague unpersuasively denies.

Contrary to what our colleague claims, a strategy to return to work from a strike only to strike again for the same purpose is inconsistent with a genuine strike and has no protection in the Act. See *Local 232 v. Wisconsin Employment Relations Board (Briggs & Stratton)*, 336 U.S. 245 (1949) ("Congress [has not] confer[red an] absolute right to engage in every kind of strike or other concerted activity" including "intermittent stoppages"). Our colleague takes a novel position in asserting for the first time in the Board's history that plans to strike, return to work, and strike again can be legitimate economic warfare, continuing indefinitely. Congress never contemplated such hit-and-run work stoppages in preserving the right to strike (and the concomitant lockout) as the engine for parties to resolve their differences and ultimately eliminate obstructions to commerce and promote overall labor peace. See *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 487-489 (1960) ("The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized."). In situations like we have here, employees are acting on a plan to strike at times that would most negatively impact the employer (such as Black Friday and the annual shareholders' meeting) and, fully intending to strike again, quickly return to work before they could realistically lose their jobs to permanent replacements. This random economic warfare deprives employers of their responsive defense of permanently replacing strikers. See *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-346 (1938). The nature of these stoppages also makes it extremely difficult to address any of the employees' specific demands to prevent future economic harm in future surprise strikes. We are far from a genuine strike.

Broadly stated, a genuine economic strike involves employees fully withholding their labor

in support of demands regarding their terms and conditions of employment until their demands are satisfied or they decide to abandon the strike. At the end, employees make an unconditional offer to return to work and generally must be reinstated unless they have been permanently replaced. See, e.g., *Supervalu, Inc.*, 347 NLRB 404, 404-406 (2006). Striking and then returning to work with the intention of striking again is simply not the same. Notably, employees are not making *unconditional* offers to return to work. See *Indiana Ready Mix Corp.*, 141 NLRB 651, 652 (1963) (offer to return to work that included a guarantee that employees would not strike again for 30 days was not unconditional). We are certainly not suggesting that employees who go on strike cannot go on strike again based on even the same demands as the first. Deciding later that circumstances warrant going on another strike is fundamentally different than planning a strategy to strike, return to work, and strike again for a more damaging effect with less risk.

MEMBER MCFERRAN, dissenting in part.

As the Supreme Court has explained, the National Labor Relations Act "protect [s] the right of workers to act together to better their working conditions,"-- often this means that unrepresented workers must "speak for themselves as best they" can. Breaking with long-established precedent, the majority today sharply cuts back on the right of American workers--including those who lack unions--to protest their job conditions by striking. To be sure, the National Labor Relations Board has long treated certain strike tactics that straddle the line between striking and working as outside the protection of the Act; the "inherent character" of that kind of economic warfare goes "entirely beyond the pale of proper strike activities." But this case does not involve such tactics. Today's decision, rather, takes a legitimate protest by unrepresented workers, dissatisfied with the working conditions dictated by a giant in the retail industry, and classifies it as an unprotected ""intermittent" strike--even though it was buffered by months of strike inactivity, a tiny percentage of the work force participated, and no serious difficulties for store operations resulted.

Because this protest is held unprotected, the majority finds that the employer was free to discipline and discharge the workers who participated. That includes 29 employees who only struck *once*, not intermittently. The majority's decision ensures that future protests at this retail giant will run the risk of being deemed unprotected under its newly-expanded view of the intermittent-strike doctrine. It will also hamstring other nonunion workers who might seek to use work stoppages to raise awareness about their wages and working conditions. But the majority's view has no basis in Board precedent. Worse, it undermines what the Supreme Court has called the "strong interest of federal policy in the legitimate use of the strike."

NOTES

1. In Walmart Stores, the Board majority construed the employees' conduct as one where employees had "a plan to strike, return to work, and strike again" in order to improve their "wages, hours, benefits, and other working conditions." Moreover, the employees did not intend to stop striking, returning to work, and striking again until they met those goals. Is such strike conduct "intermittent" or "insistent" and "protracted"?

2. Should it matter, as the dissent argues, whether or not employees attempt to create a

"state of confusion" when they engage in strike activity, in order to find their conduct unprotected?

3. If employees engage in strikes in order to improve their "wages, hours, benefits, and other working conditions," when would the union and the employees stop their striking conduct? Could the union and the employees ever be satisfied if the employer concedes to some or even all of the union demands? Does the NLRA protect workers who engage in permanent, insistent, and protracted strike events, even if it is with the goal of improving their terms and conditions of employment?

4. In future chapters you will learn that the NLRA provides rules for unions to seek certification by the NLRB, or for voluntary recognition by the employer, and a requirement for the employer to bargain in good faith with the union about terms and conditions of employment of the employees. Within those bounds, unions and employees may strike to support their bargaining demands, but the employer may permanently replace the striking workers. The Taft-Hartley Act also includes picketing rules, whereas unions and employees may only picket the employer for thirty days if the union is seeking recognition and the employer files a union election petition with the NLRB. Hence, Congress prescribed procedures for unions to legitimately bargain with employers over "wages, hours, benefits, and other working conditions" that the union might want to improve, as well as limits on union agitation, e.g., picketing, for such purposes. The Supreme Court also determined that employees can be permanently replaced if they strike. We might thus construe these NLRA and Taft-Hartley rules as balancing the overall purposes of the NLRA to provide employee freedom of association and for industrial peace. If so, wouldn't a protracted, insistent striking tactic with no aims to formally bargain with the employer but, rather, to exert pressure until the employer meets the union demands be inapposite to the NLRA's and Taft-Hartley's attempt to balance freedom of association and industrial peace?

5. The dissent in Walmart Stores argues that 29 of disciplined employees had only struck once. If so, should those 29 employees be disciplined for engaging in various strikes, when they, in fact, only participated in one strike that lasted for days? Wouldn't the appropriate discipline, if any, befall only on the union and/or individual employees who struck once and again in accordance to "a plan to strike, return to work, and strike again"?

6. In Chapter 8 you will read about "alt labor," or alternative forms of worker organization that fall out of the bounds of the NLRA model of organizing and collective bargaining. Worker centers, the Fight for $15, and Our Walmart are some of the groups that have formed outside those NLRA bounds. These groups have formed out of sheer necessity to create organizational forms that can help to represent unorganized workers, who are today the majority in the United States. In Walmart Stores, we learn that, indeed, alt-labor may attempt to sidestep traditional union representation and collective bargaining through strike events that attempt to harness consumer and shareholder pressures against employers in order to compel employers to change the working conditions of their employees. As such, did the NLRB in *Walmart Stores* effectively destroy some of these alt-labor strategies? If so, did the NLRB go overboard in satisfying industrial peace at the cost of employee freedom of association?

On page 215 add the following text at the beginning of bullet point "g" (Picket Line Misconduct), and alter the next paragraph as suggested below:

Earlier, we learned that the Trump Board established a new standard to determine whether or not employer discipline of employees engaging in picketing activities would be sanctioned or not by the Act. *See* General Motors, *supra* at __. Employees who use profanities and other abusive language in a picket line can be legally disciplined by employers if employers show that the employees would have disciplined the employees for such abusive language independently of the protected conduct.

Additionally, while § 7…

On page 217-217

Delete notes 3 and 4 as they have now been rendered obsolete by *General Motors*.

B. WHO IS AN "EMPLOYEE"?

1. Contingent workers

a. Independent contractors

On p. 231, in the paragraph beginning, "In 2018," delete the last sentence and substitute the following new text:

In early 2020, new California legislation, popularly known as AB 5, codified *Dynamex* and expanded application of the ABC test from wage claims to claims for family and medical leave, unemployment insurance, workers' compensation, and other benefits. *See* Cal. Assembly Bill No. 5 (eff. Jan. 1, 2020), codified at Cal. Lab. Code §§ 2750-2752, 3351(i) & Cal. Unemp. Ins. Code §§ 606.5(c), 621(b). Shortly thereafter, an AB 5 action prosecuted by the state's attorney general resulted in a preliminary injunction ordering Uber, Lyft, and other ride-hailing companies to convert their drivers from independent contractors to payroll employees, and denying any delay or stay of execution. The preliminary injunction was upheld on appeal. *See People v. Uber Technologies, Inc.*, 56 Cal. App. 5th 266 (2020).

In late 2020, however, California voters approved Proposition 22, which carved out an exception for Uber, Lyft, and similar companies by making it easier for them to reclassify app-based drivers and delivery service personnel as independent contractors. *See* Prop. 22 (eff. Dec. 2020), codified at Cal. Bus. & Prof. Code §§ 7448-7467; Cal. Rev. & Tax Code § 17037. So far, Proposition 22 has not been held to be either retroactive or applicable to non-app-based drivers. *See, e.g.*, Erin Mulvaney & Tiffany Steckler, California Gig Workers Can Still Sue for Wages After Prop 22, Daily Lab. Rep. (BBNA), Nov. 9, 2020, available at https://www.bloomberglaw.com/bloomberglawnews/exp/eyJjdHh0IjoiRExOVyIsImlkIjoiMDAwMDAxNzUtOWUzNS1kNjU4LWE1ZjUtZmViZjRiNDUwMDAxIiwic2lnIjoia3VIZm92UmFGZUtjaFFpcjczS1g5SjhIcmhFPSIsInRpbWUiOiIxNjA0OTUxMTQwIiwidXVpZCI6InZTTllLQnNHVzZQTXJzT2RNb2lLL1E9PW0yeC8xam0zSkNLZWpxYjNMazcvL3c9PSIsInYiOiIxIn0=?bwid=00000175-9e35-d658-a5f5-febf4b450001&cti=LSCH&emc=bdlnw_cn%3A1&et=CHANNEL_NOTIFICATION&isAlert=false&qid=7008414&uc=1320026152&udvType=Alert&usertype=External. But in August 2021, an Alameda County superior court judge declared Proposition 22 to be inconsistent with the California Constitution. *See* Castellanos v. State of California, Case No. RG21088725, slip op. (Alameda Sup. Ct. Aug. 21, 2021), available at Castellanos v. State of California - DocumentCloud. An appeal is pending before the Fourth District of the state's Court of Appeal.

On p. 237, in Note 1, insert the following new paragraph before the paragraph beginning, "Outside the context of the NLRA":

Eventually, as further proof that the saga never ends, the Obama Board was overruled altogether by the newly-reconstituted Trump Board in *SuperShuttle DFW, Inc.*, 367 N.L.R.B. No.

75 (2019), *overruling FedEx Home Delivery*, 361 N.L.R.B. 610 (2014). In finding airport shuttle van drivers to be independent contractors rather than employees, Chairman Ring and Member Emanuel agreed that the drivers' leasing or ownership of the vans, their method of compensation, and their control over their daily work schedules and working conditions provided them with significant entrepreneurial opportunity. These factors, together with the absence of supervision and the mutual understanding of the employer and the drivers that they were independent contractors, carried the day. Member McFerran dissented.

And yet the end is not in sight. In December 2021, the Biden Board, led by now-Chairman McFerran and Members Wilcox and Prouty, granted review of an acting regional director's decision and direction of election finding makeup artists and related workers to be employees rather than independent contractors. *See Atlanta Opera, Inc*., 371 N L R B No. 45 (Dec. 21, 2021). The majority invited interested parties and amici to file briefs addressing two questions: (1) should the Board adhere to the standard set forth in *SuperShuttle DFW*, and (2) if not, should the Board return to the standard announced in *FedEx Home Delivery*? Members Kaplan and Ring dissented.

On p. 239, in Note 4, replace the second paragraph with this new paragraph:

Can the intentional misclassification of such workers by itself constitute an unfair labor practice? In *Velox Express, Inc.*, 368 N.L.R.B No. 61 (2019), the Trump Board answered this question with a clear no. Among the several reasons offered by the majority, which included Chair Ring and Members Kaplan and Emanuel, two stood out. First, "it is a bridge too far" to assume that it is a coercive act erroneously to advise one's employees that they are being classified as independent contractors. *Id*., slip op. at 7. Second, "important legal and policy concerns" weigh against answering the question yes. Not the least of these concerns are the existence of Section 8(c), 29 U.S.C. § 158(c), which protects the employer's free expression of a legal opinion about workers' status, and the complicated nature of the task of applying the multifactor common law right-of-control test. *Id*., slip op. at 8. Member McFerran dissented. *Velox Express* rejected the position taken by the Obama Era General Counsel, who had issued an advice memo finding such conduct to violate Sections 8(a)(1) and (3). *See Pac 9 Transportation, Inc*., Case No. 21-CA-150875 (Dec. 15, 2015). A few months after *Velox Express*, the Board stuck to its guns in *Intermodal Bridge Transport*, 369 N.L.R.B. No. 37, (2020) (holding misclassification not to be stand-alone ULP, even though drivers who lease trucks from, and transport shipping containers for, drayage company serving ports of Los Angeles and Long Beach, Calif., are employees). It is noteworthy that in both *Velox Express* and *Intermodal Bridge* the Board was unanimous in concluding that the affected employees had been misclassified as independent contractors.

On p. 240, before the last paragraph of Note 5, insert this new text:

In 2019, the NLRB's Division of Advice agreed with the outcome in *Razak*. It found Uber drivers to be independent contractors who were not protected by the Act. *See Uber Technologies, Inc*., 13-CA-163062, 14-CA-158833 & 29-CA-177483 (Apr. 16, 2019). A number of Uber X and UberBLACK drivers had filed various unfair labor practice charges. Uber defended on the ground that its drivers were not employees. Siding with Uber, the Division directed that the charges be dismissed. Applying *SuperShuttle DFW, Inc*., 367 N.L.R.B. No. 75 (2019), discussed *supra*,

which modified the test for determining whether a worker is an employee or independent contractor, the Division leaned heavily on its finding that Uber drivers had "significant entrepreneurial opportunity" in that they controlled their own work schedules, were free to choose login locations, could work for competitors and other employers, and generally owned and controlled their own cars.

On p. 240, add a new Note 7 with the following text:

7. *Should the gig be up?* Under key provisions of the Coronavirus Aid, Relief, and Economic Security (CARES) Act, a federal program called Pandemic Unemployment Assistance (PUA), 15 U.S.C. §§ 9021-9032, provided an extra $600 per week to workers who lost their jobs due to the effects of the Covid-19 Pandemic. Unique among unemployment assistance schemes, PUA paid benefits to workers in the gig economy, whether they were considered employees or self-employed independent contractors. Tellingly, just two months into the lockdown of the economy, 36 percent of all PUA claims – affecting some 3.8 million workers – had been filed by gig workers. *See* Ben Penn, Jobless Claims for Gig Workers Soar to 36% of Overall Filings, Daily Lab. Rep. (BBNA), Jun. 5, 2020, available at https://www.bloomberglaw.com/exp/eyJjdHh0IjoiRExOVyIsImlkIjoiMDAwMDAxNzItODA0MC1kOGUyLWE1ZmUtZmQ0NzMzNjUwMDAxIiwic2lnIjoiVUdaR0huc2dheTV4K040bmIvRDh2RXBTR0xNPSIsInRpbWUiOiIxNTkxMzU0OTQ1IiwidXVpZCI6IkRwS3BnR2hTbzZKdjBXL29wZkZ3bkE9PWx0NE5lYjh6V1dDZ1lFaGFyU1h0WWc9PSIsInYiOiIxIn0=?usertype=External&bwid=00000172-8040-d8e2-a5fe-fd4733650001&qid=6919164&cti=LSCH&uc=1320026152&et=FIRST_MOVE&emc=bdlnw_bf%3A2&bna_news_filter=true

Do you think that gig workers deserved PUA assistance? Why or why not? How does your reasoning affect your views about whether gig workers should be entitled to claim other forms of labor protection, such as the right to self-organization under the NLRA, the minimum wage and other fair labor standards, workers' compensation, or the laws outlawing discrimination based on age, race, sex, and other membership in a protected class?

On p. 240, add a new Note 8 with the following text:

8. *America's Got Tassels?* Applying the principles of *Super Shuttle*, and citing *Intermodal Bridge*, the Trump Board found a stripper/dancer at a men's club to be an employee with rights under the NLRA, rather than an independent contractor. In *Nolan Enterprises, Inc.*, 370 N.L.R.B. No. 2 (2020), Chairman Ring, joined by Members Kaplan and Emanuel, reasoned that, unlike the employer in Super Shuttle, which allowed drivers "a high degree of autonomy," the club "exercises significant control over the dancers' day-to-day work (through extensive rules, expectations, supervision, fines, and penalties)." Id., slip op. at p. 1. This close governance, in turn, limits the dancers' entrepreneurial opportunities. In fact, the more the dancers earns in dance fees and drink commissions, the more the club profits.

On p. 240, add the following new Note 9:

9. *Meanwhile, at the Labor Department*. In May 2021, the U.S. Department of Labor withdrew a new rule proposed by the Trump Administration that would have made it easier for employers to classify workers as independent contractors rather than "employees" within the meaning of the Fair Labor Standards Act. *See* 85 Fed. Reg. 60,600 (Sep. 25, 2020), *as supplemented by* 86 Fed. Reg. 1,168 (Jan. 7, 2021), *to be codified at* 29 C.F.R. Parts 780, 788 & 795 (2021), *withdrawn*, 86 Fed. Reg. 24,303 (May 6, 2021), The move, which affects millions of workers in both the brick-and-mortar and gig economies, leaves intact prior expansive interpretations of employee status by the Department's Wage and Hour Division (WHD), which have influence on who is considered an employee under corresponding provisions of the NLRA. The move stood in contrast to narrower interpretations of employee status embraced by the Trump Board in cases such as *SuperShuttle* and *Velox Express*, discussed *supra*. The move also leaves the door open for more worker-friendly interpretations of employee status that new U.S. Labor Secretary Marty Walsh may pursue in pending litigation brought by his agency.

2. Union Organizers.

On p. 263, after Note 3, add the following new Note 3:

3. *Access by union organizers to farmworkers on private agricultural property*. In *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021) a California case with potentially far-reaching implications for the enforcement of all manner of government regulations of private homes and businesses, the U.S. Supreme Court held by a vote of 6 to 3 that a rule promulgated by the state's Agricultural Labor Relations Board (ALRB) – which grants union organizers limited rights to enter farms for the purpose of communicating with farmworkers – constitutes an unconstitutional taking of the grower's private property without just compensation. The one-of-a-kind rule, which was in effect for 46 years, limited organizers' access to one hour before and after the workday, plus the lunch hour, for no more than four 30-day periods in any calendar year. *See* 8 Cal. Code. Reg. § 20900. The rule was promulgated in order to increase the chances of having personal contact with farmworkers, most of whom are indigenous immigrants living in temporary housing provider by growers. (Agricultural workers are excluded from the definition of "employee" under Section 2(3) of the NLRA, but states like California are free to grant them similar protections.) According to the ALRB, union organizers had used the rule sparingly. During the fiscal years spanning 2015 to 2020, access was sought an average of 19 times per year; by contrast, more than 16,000 agricultural employers operate in California. But the high Court's conservative majority, speaking through Chief Justice Roberts, characterized the regulation as an unconstitutional *per se* physical taking of property without compensation rather than a mere regulation restricting an owner's use of property. Had the Court characterized the regulation as a mere restriction, an established balancing test would have applied to determine the permissibility of the regulation. In dissent, Justice Breyer would have followed precedents drawing a distinction between regulations authorizing permanent versus nonpermanent rights of access. He predicted that the majority's view would substitute "a new complex legal scheme for a comparatively simpler old one." *Cedar Point*, 141 S. Ct. at 2088 (Breyer, J. dissenting).

Does the reasoning of the *Cedar Point* majority change your views about whether the NLRA ought to modify the common law right of property owners to exclude whomever they please? Why or why not?

3. Apprentices: Graduate Students, Trainees, and House Staff

On p. 282, at the end of Note 1, add the following new paragraphs:

Although the Trump Board hadhadhad yet to decide a case squarely presenting the issue decided in *Columbia University*, Chairman Ring and Members Kaplan and Emanuel signaled their willingness to revisit the issue whether graduating teaching assistants qualify as employees. *See University of Chicago*, 367 N.L.R.B. No. 41, slip op. at 1 n.2 (2018). But the Trump Board never overruled *Columbia University*, and the Biden Board was not expected to do so, either.

From time to time, the Board considers adjusting the law in a contentious area by rulemaking rather than adjudication. But in March 2021, the NLRB withdrew a proposed new rule that would have declared students who perform any services for compensation in connection with their studies at a private college or university – including, but not limited to, teaching or research – not to be "employees" within the meaning of Section 2(3) of the Act. *See* 84 Fed. Reg. 49691 (Sep. 23, 2019), *corrected*, 84 Fed. Reg. 55,265 (Oct. 16, 2019), *to be codified at* 29 C.F.R. Part 103 (2021), *withdrawn*, 86 Fed. Reg. 14,297 (Mar. 15, 2021). The move, which affects an estimated 22,000 graduate and undergraduate teaching and research assistants and fellows,[12] leaves intact the Obama Board's ruling in *Columbia University*. From 2016 to 2019, on the strength of that ruling, student assistants and fellows voted in some 15 NLRB elections that resulted in at least five new collective bargaining agreements, including contracts at American, New York, and Tufts Universities. *See* Danielle Douglas-Gabriel, NLRB Reverses Course on Graduate Students' Right to Organize as Employees, Wash. Post, Sep. 20, 2019 (quoting National Center for Study of Collective Bargaining in Higher Education and the Professions at Hunter College), available at https://www.washingtonpost.com/education/2019/09/20/nlrb-reverses-course-graduate-students-right-organize-employees/.

On p. 284, at the end of Note 5, add the following new text:

This fear may be justified. In a footnote to a recent decision, Chairman Ring and Members Kaplan and Emanuel signaled their willingness to reconsider the issue whether graduating teaching assistants qualify as employees. *See University of Chicago*, 367 N.L.R.B. No. 41, slip op. at 1 n.2 (2018). But the Trump Board never overruled *Columbia University*, and the Biden Board was not expected to do so, either.

On p. 284, at the end of Note 6, add the following new text:

[12] *See* Daniel Boguslaw, Trump's NLRB Is Picking a Fight with Graduate Students, American Prospect, May 19, 2019, available at https://prospect.org/justice/trump-s-nlrb-picking-fight-graduate-students/.

In late 2021, new life was breathed into the argument that college athletes are "employees" when General Counsel Abruzzo issued a memorandum announcing her position that misclassifying players at certain academic institutions "as mere 'student-athletes,' and leading them to believe that they do not have statutory protections," violates Section 8(a)(1). Memorandum to All Regional Directors, Officers-in-Charge, and Resident Officers from Jennifer A. Abruzzo, General Counsel, Regarding Statutory Rights of Players at Academic Institutions (Student-Athletes) Under the National Labor Relations Act, GC No. 21-08 (Sep. 29 2021). Interestingly, the new GC Memo specifically eschewed use of the term "student-athlete" on the ground that, historically, the NCAA's president and lawyers had coined the term to deprive injured players of worker's compensation benefits. The GC Memo embraced the reasoning that both traditional NLRA and employment law principles would classify many athletes as employees. *See, e.g.*, César F. Rosado Marzán & Alex Tillett-Saks, *Work, Study, Organize! Why the Northwestern University Football Players Are Employees Under the National Labor Relations Act*, 32 Hof. Lab. & Emp. L.J. (2015).

On p. 291, add a new note 3:

3. *Digging Deeper Into Section 10(c):* The remedial powers of the Board are broad. As Section 10(c) states, once the Board makes its factual determinations, it "shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action *including* reinstatement of employees with or without backpay, as will effectuate the policies of this Act" (emphasis added). Hence, posting a notice and seeking reinstatement and backpay are but some of the tools available to a General Counsel seeking to enforce the law. In the hands of experienced, creative, and strategically oriented General Counsels, such a capacious clause contains innumerable other tools. For example, in a recent GC Memorandum, General Counsel Jennifer Abruzzo announced that her office would seek a variety of new remedies for immigrant workers who have experienced unfair labor practices, even in light of *Hoffman Plastics*, including "payment into a remedial monetary fund in lieu of backpay," and immigration-based remedies, such as "sponsorship of work authorization (including all associated fees) where an employer's unfair labor practice has caused an employee's loss of such authorization," and certifying petitions for U and T visas, or visas available to immigrants who have been victims of abusive practices (including some that are labor related) or trafficking, and can help agencies prosecute the scofflaws and traffickers. Other remedies include mandatory training for employers, supervisors, and managers, posting notices much more broadly than the ordinary, requiring supervisors to personally read the notices to their workers, among many other creative possibilities.

C. WHO (OR WHAT) IS THE "EMPLOYER"?

On p. 302, insert the following text at the end of the paragraph discussing the San Manuel Indian Bingo & Casino case:

; *accord Casino Pauma*, 363 N.L.R.B. No. 60 (2015), *enf'd sub nom. Casino Pauma v. NLRB*, 888 F.3d 1066 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 2614 (2019).

On p. 302, insert the following text at the end of the paragraph discussing the Catholic Bishop of Chicago case:

Since *Catholic Bishop of Chicago*, the lower federal courts have expanded this interpretation to oust the Board of jurisdiction over religious institutions of higher education as well. *Duquesne University v. NLRB*, 947 F.3d 824 (D.C. Cir. 2020), *granting petition for review and vacating* 366 N.L.R.B. No. 27 (2018).

1. Supervisors

On p. 320, insert the following new text at the end of the paragraph beginning, "The list of 13 supervisorial actions . . ."

See also, e.g., *Westgate Gardens Care Center*, 365 N.L.R.B. No. 118 (2017) (no correlation between infractions reported by licensed vocational nurses and corrective action taken against employees), *enf'd sub nom. Thyme Holdings, LLC v. NLRB*, 2018 WL 3040701 (D.C. Cir. 2018); *Coral Harbor Rehabilitation & Nursing Center*, 366 N.L.R.B. No. 75 (2018) ("perfunctory" involvement of licensed practical nurses with issuing disciplinary notices to employees did not show authority effectively to recommend discipline or adjust grievances).

2. Managerial and confidential employees

On p. 330, add the following to the end of Note 3:

Outside the academic workplace, the Board and the courts must allow for the possibility that the nature of even well-established job classifications may morph from rank-and-file into managerial (and vice-versa). For example, in one long-running case, the Regional Director excluded from the bargaining unit four buyers in the employer's purchasing department because they were managerial employees. Sixteen years later, in response to a union petition seeking to represent the buyers, the Regional Director found they were no longer managerial employees. The Board agreed, and the Tenth Circuit enforced its order due to changed circumstances: the buyers, who once had exercised more discretion, were now operating "within the confines of detailed polices." *NLRB v. Wolf Creek Nuclear Operating Corp.*, 762 Fed. Appx. 461 (10th Cir. 2019), *enf'g* 366 N.L.R.B. No. 30 (2018).

On p. 330, add the following new Note 6:

6. *Be true to your shul? The academic workplace after Yeshiva*. In *Pacific Lutheran University*, 361 N.L.R.B. 1404 (2014), the Obama Board attempted to make sense of a range of cases purporting to articulate when faculty can be considered managerial and therefore outside the rights and protections of the Act after *Yeshiva*. With a focus on faculty decision-making authority at the committee level, *Pacific Lutheran* held that a faculty subgroup, such as nontenured faculty, must hold a majority of seats in order to exercise effective control through a committee and therefore be considered managerial. In *University of S. Calif.*, 365 N.L.R.B. No. 89 (2017), the Obama Board relied on the "subgroup majority status rule" articulated by *Pacific Lutheran* to take a step further: it ruled that nontenured full- and part-time faculty teaching in a private university's

design school were eligible for union representation because they filled only a minority of seats on almost every committee on which they served. Accordingly, it found that the university had committed ULPs by refusing to deal with the union representing nontenured faculty and ordered bargaining. The D.C. Circuit denied enforcement. *See University of S. Calif. v. NLRB*, 918 F.3d 126, 136, 137 (D.C. Cir. 2019). The subgroup majority status rule "rested on a fundamental misunderstanding of *Yeshiva*"; "the question the Board must ask is not whether a particular subgroup can force policies through based on crude headcounts, but rather whether that subgroup is structurally included within a college faculty body to which the university has delegated managerial authority." *Id*. at 136, 137. Because nontenured faculty were so included, they were considered managers, not ordinary employees. (Note: to the extent that *Pacific Lutheran* purported to exercise jurisdiction over religious institutions engaged in primary, secondary, or higher education, it has been abrogated too, at least in the District of Columbia Circuit. *See Duquesne University v. NLRB*, 947 F.3d 824 (D.C. Cir. 2020), *granting petition for review and vacating* 366 N.L.R.B. No. 27 (2018)).

Would it have been easier to adopt the bright-line rule adopted in *Pacific Lutheran*? Why did the D.C. Circuit decline to do so? Do you agree? Why or why not?

3. Public sector employers

On p. 341, add a new Note 3:

3. *Charting the charter school*. Typically, a charter school is a publicly funded educational institution that is operated by a private organization under a legislative contract, or charter, with a state, local, or other public authority. Between 2000 and 2016, enrollment in U.S. charter schools jumped from about 400,000 to 3 million, or from 1 percent to 6 percent of all public-school students. *See* National Center for Education Statistics, Public Charter School Enrollment (updated May 2019), available at https://nces.ed.gov/programs/coe/indicator_cgb.asp. Many of the staff teaching in charter schools are organized; in 2010, it was estimated that about 12 percent of all charter schools versus about 37 percent of regular public schools were unionized. *See* Charter Schools in Perspective, Section 4: Teachers and Teaching (updated 2015), available at http://www.in-perspective.org/pages/teachers-and-teaching-at-charter-schools#sub4.

The rise of the charter school has posed some thorny jurisdictional issues. As suggested by cases like *Pennsylvania Virtual Charter School* and *Chicago Mathematics & Science Academy Charter School Inc*., 359 N.L.R.B. No. 41 (2012), both decided by the Obama Board, a charter school may be subject to regulation by the NLRB when it is found to qualify for the "political subdivision" exemption codified in Section 2(2) – or by a state labor board when it does not qualify for the exemption. But the application of the exemption will vary with the circumstances, especially the institution's organizational structure and governance. The key test, according to the Fifth Circuit, is whether "ultimate authority over policymaking remains with the public." *Voices for Int'l Business & Education, Inc. v. NLRB*, 905 F.3d 770, 774 (5th Cir. 2018). For example, the Obama Board invoked the exemption and exercised jurisdiction over a charter school whose governing body was ***not*** found to be responsible to public officials, *see Hyde Leadership Charter School – Brooklyn*, 364 N.L.R.B. No. 88 (2016); the Trump Board refused the exemption and

declined to exercise jurisdiction over a charter school whose governing board ***was*** found to be responsible to public officials, *see Universal Academy*, 366 N.L.R.B. No. 38 (2018).

The discretion to invoke the exemption has some limits. For example, the doctrine of "judicial estoppel" bars a party from taking a position inconsistent with a winning position that it took in an earlier legal proceeding. Based on this doctrine, the D.C. Circuit called into question a Board decision and order exercising jurisdiction over ULP charges pursued against a university employer by a union that successfully had argued for state labor board jurisdiction over the same employer in a separate case. The decision and order were remanded to the NLRB to consider whether judicial estoppel should apply in an administrative agency proceeding. *See Temple Univ. Hospital Inc. v. NLRB*, 929 F.3d 729 (D.C. Cir. 2019). And in a footnote, then-Chairman Kaplan suggested that a fully constituted, five-member Board should reconsider its exercise of jurisdiction over charter school employers altogether, and decline to do so in the future. *See Excalibur Charter School, Inc*., 366 N.L.R.B. No. 49, slip op. at p. 2 n.6 (2018). The rest of the Board has yet to agree. Do you? If so, would your reasons be similar to or different from those offered by the Board when it declined to exercise jurisdiction over student-athletes who petitioned for a union representation in *Northwestern University*, 362 N.L.R.B. No. 167 (2015), discussed *infra* p. 284? How?

4. Multiple entities or single entity? The single employer and alter ego doctrines

a. The alter ego doctrine

On p. 356, add a new Note 4 as follows:

4. *A crying sham?* In *Island Architectural Woodwork, Inc. v. NLRB*, 892 F.3d 362 (D.C. Cir. 2018), the D.C. Circuit enforced a Board order finding a violation of the duty to bargain arising out of a classic alter ego scheme. A company called Island, which had a collective bargaining relationship with the union, manufactured office partitions for a certain buyer. The owner of Island set up a purportedly separate company called Verde, which had no such collective bargaining relationship, to manufacture a particular type of partition that once had been made exclusively by Island for the buyer. Verde sold this product to the same buyer. The owner assigned his two daughters a controlling interest in Verde. Writing for herself and Judge Srinivasan, Judge Pillard focused on three critical factors that exposed the sham nature of this transaction: (1) the identity of business purpose, operations, and equipment between Island and Verde, (2) substantial control of Verde by Island; and (3) anti-union motive. The majority agreed that the Board's finding was supported by substantial evidence on the record as a whole, which evidence was undisputed. But the dissent, authored by then-Judge (now Justice) Kavanaugh, all but ignored the sham. In what could be a preview of how Justice Kavanaugh would decide labor cases, he wrote: "Island and Verde did not have common ownership. They did not have common management. They did not share employees. They did not mingle funds. Neither company had a financial interest in the other. Each company supervised, hired, fired, and paid the salaries of its own employees." *Id*. at 377 (Kavanaugh, J., dissenting). Therefore, he concluded, they were not alter egos.

Do you agree with the majority or Judge Kavanaugh? In looking for evidence of a sham transaction, what weight, if any, should be placed on the fact that members of same family owned the two businesses?

5. Joint employers

***On p. 358, modify the last line at the end of the citation to Hy-Brand Industrial Contractors as follows*:**

, reconsideration denied, 366 N.L.R.B. No. 93 (2018). The ALJ's decision as to single-employer status was adopted without passing on the joint employer issue. *See* 366 N.L.R.B. No. 94 (2018). So *BFI II* remained the law – at least until the Trump Board engaged in rulemaking that restored the joint employer standard in place prior to *BFI II*. *See* Joint Employer Status Under the National Labor Relations Act, 85 Fed. Reg. 11,184 (Feb. 26, 2020).

Meanwhile, in 2018, the D.C. Circuit upheld the notion that common-law analysis of joint-employer status can factor into both an employer's authorized but unexercised forms of control, and an employer's indirect control over employees' terms and conditions of employment, but held that the Board's analysis in *BFI II* had failed to differentiate between the aspects of indirect control relevant to status as employer, and the "quotidian aspects" of common-law third-party contract relationships. *Brown-Ferris Industries of Calif., Inc. v. NLRB*, 911 F.3d 1195, 1220 (D.C2018). The case was remanded to the Board for further consideration. Writing for a 2 to 1 panel, Judge Millett was joined by Judge Wilkins; Judge Randolph dissented.

In 2020, on remand, the Trump Board held that it would be manifestly unjust restrictively to apply the Obama Board's test in *BFI II* to the parties, including Browning-Ferris itself. Instead, the Trump Board issued an order in which it announced a revised joint-employer test, held that Browning-Ferris is not a joint employer of Leadpoint's employees, and dismissed the General Counsel's ULP complaint. *See Browning-Ferris Industries of Calif., Inc*., 369 N.L.R.B. No. 139, at p. 6 (2020).

But in July 2022, the D.C. Circuit concluded that the Trump Board's retroactivity analysis had been "erroneous," because it failed to establish that *BFI II* "represented the kind of clear departure from longstanding and settled law that the agency said justified its retroactivity conclusion." *Sanitary Truck Drivers & Helpers Local 350 v. NLRB*, No. 21-1093, slip op. at p. 11 (D.C. Cir. Jul. 29, 2022). Again, the case was remanded to the Board for further consideration. Writing for a 2 to 0 panel, Judge Millett was joined this time by Judge Wilkins; Judge Jackson, who was appointed to the U.S. Supreme Court while the case was pending, did not participate. (Unhelpfully, the *Sanitary Truck Drivers* opinion labeled the 2015 Obama Board's decision in what we have called *BFI II* as "BFI I" and the 2020 Trump Board's decision as "BFI II.")

Thus the saga continues.

On p. 372, add the following new Note 0:

0. *It's not over 'til it's over.* Unsurprisingly, *BFI II* was not the final word on the subject of who can be considered a joint employer. In *BFI III*, the Trump Board, on remand from the D.C. Circuit, refused to give retroactive application to the *BFI II* joint employer standard on the ground that it would be "manifestly unjust" to do so. *Browning-Ferris. of Calif., Inc* (BFI III),369 N.L.R.B. No. 139, slip op. at 1 (2020). This decision followed three developments that effectively overruled *BFI II*. First, the court of appeals gave mixed reviews to the Board's revised standard. On petition for review and cross-application for enforcement of the Board's order, the D.C. Circuit expressed some skepticism about it. The court seemed to embrace the majority's reformulation of the standard to include consideration of two factors affecting the putative joint employer – its right to control employees' terms and conditions of employment, and its potential indirect control of the same – but remanded for further elaboration and application of the indirect control factor to the extent it failed to "distinguish evidence of indirect control that bears on workers' essential terms and conditions from evidence that simply documents the routine parameters of company-to-company contracting," *Browning-Ferris. of Calif., Inc. v. NLRB*, 911 F.3d 1195, 1216 (D.C. Cir. 2018), *granting review in part, denying cross-application, and remanding* 362 N.L.R.B. No. 186 (2015). Second, the ex-Chair Miscimarra and members Kaplan and Emanuel expressed their desire to overrule *BFI II*. *See Hy-Brand Industrial Contractors, Inc*., 365 N.L.R.B. No. 156 (2017), *vacated*, 396 N.L.R.B. No. 26, *reconsideration denied*, 366 N.L.R.B. No. 93 (2018). So the shelf-life of the new joint employer standard was destined to be short. Third, the Trump Board engaged in rulemaking that restored the joint employer standard in place prior to *BFI II*. *See* Joint Employer Status Under the National Labor Relations Act, 85 Fed. Reg. 11,184 (Feb. 26, 2020), *codified at* 29 C.F.R. Part 103 (effective Apr. 27, 2020). Technically, the final rule, which applies only prospectively, did not control the *BFI* litigation – but it might as well have.

The demise of the standard articulated by *BFI II*, however, has not killed off the joint employer doctrine altogether. Even before settling the controversial joint employer case brought by the Obama Era General Counsel against franchisor McDonald's, which was accused of discriminating against its franchisees' employees for participating in the nationwide living wage movement called "Fight for 15," *see McDonald's USA, LLC*, 368 N.L.R.B. No. 134 (2019), the Trump Board did find that individual employers who gave a purchasing consortium company the authority to negotiate a CBA and participated to some extent, via their management, in negotiations, are joint employers with company and equally bound to the CBA, *see Seven Seas Union Square, LLC* (*Key Foods*), 368 N.L.R.B. No. 92 (2019).

On p. 373, edit Note 4 by deleting all text in the paragraph after the words "since its issuance?"

C. REGULATION OF ACCESS

On page 432, strike the second full paragraph and insert the following:

Early in the history of the NLRA, the Supreme Court recognized that the Act's prohibitions on interference, restraint, or coercion of Section 7 rights modified this common law principle. In *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), the employer had a rule prohibiting all solicitation on its property. The employer enforced the rule across the board. Nevertheless, the Court held that termination of an employee for soliciting coworkers to join a union violated Section 8(a)(1). The Court upheld the Board's presumption that no-solicitation rules are illegal as applied to workers soliciting coworkers during nonworking time, such as during breaks and periods just before or after shifts. One way of thinking about the Court's reasoning is that while employees might want to encourage co-workers to support any number of causes, federal law protected just one: collective bargaining. Banning union solicitation, even in a manner that did not discriminate against unions, was an "unreasonable impediment to the exercise of the right to self-organization." At the same time, the Supreme Court allowed that the presumption should reverse during mandated worktimes, where management's productivity interests were much greater. "Working time," the Court famously stated, "is for work."

While the framework is old, fact-specific questions related to its application continue to arise. A significant one is what solicitation *is* exactly. The answer is critical, because if the employer allows workers to engage in casual conversation while working, it must also permit discussions that veer into union or Section 7 topics—but it can still bar "solicitation." The Board traditionally defined the term by analogizing to commercial or charitable contexts, where a solicitor might ask someone to drop some coins or "buy a product," perhaps even "exhibiting the product for [the consumer] from a book." *W.W. Grainger, Inc*., 229 N.L.R.B. 161, 167 (1977). Section 7 solicitation, in turn, meant "asking someone to join the union by signing [her] name to an authorization card." *Id.* Later cases specified that what makes "solicitation" different from "talk" is that solicitation "prompts an immediate response . . . and presents a greater potential for interference with employer productivity." *Wal-Mart Stores*, 340 N.L.R.B. 637, 639 (2003). The presentation of something to sign, which would presumably upend the task at hand, was therefore important. *Conagra Foods, Inc.*, 361 N.L.R.B. 944, 945 (2014). However, the Board has since eliminated that requirement, holding that solicitation "also encompasses the act of encouraging employees to vote for or against union representation . . . because the employee is selling or promoting the services of the union." *Wynn Las Vegas, LLC*, 369 N.L.R.B. No. 91 (May 29, 2020). This perhaps signals that the Board has moved away from the "interference" rationale, potentially broadening the definition of "solicitation" significantly.

Republic Aviation also upheld a presumption that bans on wearing union buttons or other insignia in the workplace are illegal. The employer could rebut the presumption by proving special circumstances, which over the years have included risks to employee safety, machinery, production standards, discipline, or the employer's public image. Questions of special circumstances frequently involve fine law drawing. The Board has held that a supermarket could prohibit a butcher from wearing a shirt with the phrase "Don't Cheat About The Meat" (because

customers might think they were being swindled, *Pathmark Stores*, 342 N.L.R.B. 378 (2004)), that a hotel could prohibit room service attendants from wearing a "Justice NOW! JUSTCIA AHORA! H.E.R.E. LOCAL 30" button (because the message detracted from the hotel's unique "'Wonderland'" experience "where guests can fulfill their 'fantasies and desires,'" *W. San Diego*, 348 N.L.R.B. 372 (2006)), and that a phone company could ban a sweatshirt reading, "Ma Bell is a Cheap Mother" (because it was vulgar and obscene, *Southwestern Bell Telephone Co.*, 200 N.L.R.B. 667 (1972)). Buttons with messages like "Cut the Crap! Not My Healthcare" and "WTF Where's The Fairness," worn by telephone technicians, *Pacific Bell Telephone Co.*, 362 N.L.R.B. 885 (2015), "Fight for 15" by fast food workers, *In-N-Out Burger, Inc.*, 365 N.L.R.B. No. 39 (2017), and "RNs Demand Safe Staffing" by nurses, *Washington State Nurses Ass'n v. NLRB*, 526 F.3d 577 (9th Cir. 2008)(reversing the Board to find that a hospital's concern for anxious patients and family members was speculative) have all been upheld.

The Board, though, has recently ruled that *Republic Aviation*'s analysis is limited to situations where employers ban buttons, shirts, and other insignia outright. Where management "maintains a facially neutral rule that limits the size and/or appearance of union buttons and insignia…but does not prohibit them," the *Boeing* framework used to determine the lawfulness of workplace rules applies, *supra* page 185. In practice, this asks the Board to weigh Section 7 interests against the employer's "legitimate justifications" for its insignia policy. In this context, "justifications other than the recognized special circumstances may suffice." *Wal-Mart Stores, Inc.*, 368 N.L.R.B. No. 146 (Dec. 16, 2019) (finding that enhancing the customer experience and preventing theft were legitimate justifications to prohibit a 3.5 inch "OUR Walmart" button in sales areas).

On page 432, strike the last full paragraph through page 446 and insert the following:

Republic Aviation involved a traditional industrial workplace where the employer owned the factory and employed the people who worked there. Modern, multi-use workplaces with interrelated employment and business relationships (think: entertainment centers, shopping malls, and office parks with retail) add complexity and increasingly raise the following issue: when and where must off-duty employees of an onsite contractor have access to the premises of the property owner to distribute handbills in support of their organizing efforts? The challenge in such instances is to strike the proper balance between the right to access sought by workers and the right to exclude sought by property owners. In a series of cases involving the New York New York hotel and casino in Las Vegas, the Board initially leaned toward characterizing the access sought by contracted employees as akin to that of employees of the property owner under *Republic Aviation* and, while off-duty, *Tri-County*, *see infra.*

In *New York New York Hotel* (*NYNY I*), 334 N.L.R.B. 762 (2001), the Board affirmed the right of off-duty employees of Ark, a contracted restaurant group, to distribute handbills to customers entering the casino through the "port cochere" just outside the main entrance. The Board stressed that working "regularly and exclusively" on the property distinguished them from "trespassers" or even "taxi and limousine drivers...who visit that facility intermittently." The D.C. Circuit denied enforcement and remanded the case, due largely to the NLRB's failure to answer a key question: "Does the fact that the Ark employees work on NYNY's premises give them

Republic Aviation rights throughout all of the nonwork areas of the hotel and casino?" *New York, New York LLC v. NLRB*, 313 F.3d 585, 590 (D.C. Cir. 2002).

Shortly thereafter, off-duty Ark employees once again distributed handbills, this time inside the casino but outside two Ark-owned restaurants, America and Gonzalez y Gonzalez; once again they were cited by police and escorted away; and once again the NLRB determined that the hotel had committed unfair labor practices. This time, in *NYNY II*, 334 N.L.R.B. 772 (2001), the hotel defended in part on the ground that the areas inside the casino, but outside the two restaurants, were work areas subject to regulation. A majority of the Board, speaking through Members Liebman and Truesdale, disagreed:

> [The hotel] is primarily in the business of providing people with hotel and gambling facilities. The areas in front of America and Gonzalez y Gonzalez are not gambling or lodging areas. They are passageways through which employees, guests of the facility, and the public pass from one area of the facility to another. As the judge found, cleaning and maintenance personnel work in those areas, but that is the same kind of work that the Board in *Santa Fe Hotel* found to be incidental to the facility's main function of providing gambling and lodging facilities. Numerous employees pass through those areas in the course of their work (for example, bellmen transporting guests' luggage from the entrances to their hotel rooms), but it would be a rare portion of such a facility which no employees used in that fashion. As the Board found in *Santa Fe Hotel*, to hold that such passageways constitute work areas would effectively deny employees the right to engage in protected distribution anywhere on the Respondent's property.

Chairman Hurtgen dissented. Although he agreed that the areas near the porte cochere and Gonzalez y Gonzalez were nonwork areas, he argued that America was different:

> The area outside the America restaurant was a work area. This is so because of the proximity of slot machines to the space in question. A row of slot machines was stationed approximately 27 feet directly across from the entrance to America, with additional slot machines immediately to the right of those slot machines. These additional slot machines surround a structure in the middle of the casino floor that houses a service bar and public restrooms. Employees involved in the hotel's gaming operations are among those who work in these areas in front of and adjacent to the entrance of America. These include change persons from the Respondent's Slot Operations department. These employees circulate throughout the area in carts resembling miniature New York taxi cabs, sell change to customers, convert cash into coins for customers to play the machines, and convert large bills into smaller denominations.
>
> Slot floor employees also refill slot machines, pay customers who win jackpots, and perform minor slot machine repairs. They also circulate around the area to ensure the orderly use of the machines and also to ensure that no minors are playing the machines in the area. Slot technicians perform major slot machine repairs. There are also other employees of the casino whose daily job responsibilities require them

> to work with or near the slot machines. I cannot agree with my colleagues' description of these areas as mere "passageways" for employees and guests when they pass from one area of the casino to another. Unlike the outdoor porte-cochere and the space outside the Gonzalez y Gonzalez restaurant in the same complex, they are, in a very real sense, employee work stations.

The D.C. Circuit granted the employer's petition for review and denied enforcement of the Board's orders in both *NYNY I* and *NYNY II*. *See* 313 F.3d 585 (D.C. Cir. 2002). On remand, the NLRB was directed squarely to address the question it had avoided below: whether the employees of a contractor working on property under another employer's control are "employees" possessing Section 7 rights within the meaning of the Act. The question was important, because the Supreme Court had never addressed it either. More than eight years later, in *NYNY III*, 356 N.L.R.B. 907 (2011), the Board finally answered "yes."

> Congress made clear in the text of the Act that the term "employee" does not refer to a relationship between individual workers and a single employer and, specifically, that the prohibition contained in Section 8(a)(1) of the Act extends to actions by employers affecting employees of other employers. As the Supreme Court explained:
>
> > This was not fortuitous phrasing. It had reference to the controversies engendered by constructions placed upon the Clayton Act and kindred state legislation in relation to the functions of workers' organizations and the desire not to repeat those controversies. . . . The broad definition of "employee," "unless the Act explicitly states otherwise," as well as the definition of "labor dispute" in § 2(9), expressed the conviction of Congress "that disputes may arise regardless of whether the disputants stand in the proximate relation of employer and employee." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 192 (1941).
>
> Based on these clear textual indications of Congress' intent, the Board as well as the courts have held in a wide variety of contexts that "an employer under Section 2(3) of the Act may violate Section 8(a) not only with respect to its own employees but also by actions affecting employees who do not stand in such an immediate employer/employee relationship." International Shipping Assn., 297 NLRB 1059, 1059 (1990).
>
> The Ark employees, then, are statutorily protected employees, and NYNY is a covered employer that can, under certain circumstances, be held to violate the Ark employees' statutory rights, even though the Ark employees are not employees of NYNY.

As for the balance of those rights with the hotel's right to exclude and otherwise prevent interference with its property, the Board viewed the Ark employees' intended audience—

customers milling about in front of the Ark-operated restaurants—as strengthening the workers' claim:

> At those locations, Ark employees were uniquely able to identify and communicate with the relevant subset of NYNY customers--those considering whether to patronize an Ark restaurant--with minimal difficulty and expense. For this reason, the location of the expressive activity here--the very threshold of the employees' own workplace--has been a central site of protected Section 7 activity since the passage of the Act. Wholly excluding the Ark handbillers from these uniquely effective locations would place a serious burden on the exercise of their Section 7 rights to communicate with the relevant members of the public.

Rejecting "both the view that these workers enjoy precisely the same access rights as the employees of the property owner (under the Supreme Court's *Republic Aviation* decision) and the view that the property owner may deny access to these workers except in the limited circumstances when even "nonemployee" union organizers must be permitted on the property (under the Supreme Court's *Lechmere* and *Babcock & Wilcox* decisions) the Board concluded that:

> [T]he property owner may lawfully exclude such employees only where the owner is able to demonstrate that their activity significantly interferes with his use of the property or where exclusion is justified by another legitimate business reason, including, but not limited to, the need to maintain production and discipline.

In the following case, a new Board majority wiped the slate clean.

BEXAR COUNTY PERFORMING ARTS CENTER FOUNDATION
(TOBIN CENTER FOR THE PERFORMING ARTS)
368 NLRB No. 46
August 23, 2019

BY CHAIRMAN RING AND MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

The issue in this case is whether and when a property owner must grant access to the off-duty employees of an onsite contractor to engage in Section 7 activity. Specifically, we address whether the Respondent, the Tobin Center for the Performing Arts, had the right to prohibit off-duty employees of one of its licensees, the San Antonio Symphony, from accessing a sidewalk located on Tobin Center private property to engage in informational leafleting to the general public. Contrary to the judge, we find the Respondent's conduct lawful, and we dismiss the complaint.

II. FACTS

The Respondent owns and operates the Tobin Center, which was built with public and private funding at the former site of the San Antonio Municipal Auditorium. The Tobin Center is set off from the street by the Valera Plaza, which includes eight gradually rising steps leading up

to the front entrance. At the edge of the Respondent's private property are sidewalks used by pedestrians to traverse the grounds of the Tobin Center. Upon opening the center in 2014, the City of San Antonio conveyed to the Respondent the deed to the Tobin Center property, including the surrounding sidewalks. The deed provides that the property is to be used "primarily for the [p]ublic [p]urpose." The Respondent maintains a general rule prohibiting all solicitation on its private property, including the sidewalks. On occasions where a local bar or club has sought to hand out flyers on the Center's private sidewalk, the Respondent has consistently removed those individuals from its property.

The Tobin Center houses three principal resident companies: the Symphony, Ballet San Antonio, and Opera San Antonio. Under the terms of use agreements, each of these companies has a licensor-licensee relationship with the Respondent. The Symphony's Use Agreement with the Respondent provides that it is entitled to use the Tobin Center for performances and rehearsals 22 weeks of the year. The Symphony is a party to a collective-bargaining agreement with the American Federation of Musicians Local 23 (Union). Under that agreement, the Symphony employees work 30 weeks within a 39-week performance season from September to June.[18] During the 2014-2015 season, 88 percent of Symphony employees' rehearsals and performances were at the Tobin Center. The percentage decreased to 83 percent for the 2015-2016 season and even further to 79 percent for the 2016-2017 season. During the 2016-2017 season, the Symphony employees also performed at the Majestic Theater and other venues throughout San Antonio, such as churches and high schools. During the performance season, the Symphony employees also used the Tobin Center's break room for breaks and union meetings. Some Symphony employees also stored large instruments there.

Although Ballet San Antonio occasionally uses live music performed by the Symphony at its ballets, it chose to use recorded music, as it had done on past occasions, for its February 17 through 19, 2017 production of Tchaikovsky's *Sleeping Beauty*. The use of recorded music denied the Symphony's employees the opportunity to perform the work. To raise awareness among Ballet San Antonio's patrons about the use of recorded music, the Union decided to leaflet before the four weekend performances of *Sleeping Beauty*. The leaflet stated, "You will not hear a live orchestra performing with the professional dancers of Ballet San Antonio. Instead, Ballet San Antonio will waste the world class acoustics of the Tobin Center by playing a recording of Tchaikovsky's score over loudspeakers. You've paid full price for half of the product. San Antonio deserves better! DEMAND LIVE MUSIC!"

The Respondent's president, Michael Fresher, learned of the Union's plan to leaflet beforehand. At a February 14 meeting, he instructed his staff not to permit anyone to hand out leaflets, promote, or solicit on the Respondent's property. On the evening of February 17, some Symphony employees, prior to performing at the Majestic Theater a few blocks away, and several sympathizers crossed the street onto the sidewalk in front of the Tobin Center's main entrance at the edge of the Valera Plaza to start passing out their leaflets. There were about 12 to 15 leafleteers in total. The Respondent's event staff and San Antonio police officers, at the Respondent's direction, immediately informed both the Symphony employees and the sympathizers that they could not pass out the leaflets anywhere on the Respondent's property, including the sidewalks, and had to relocate across the street off the Tobin Center grounds. The Symphony employees and

their sympathizers moved to public sidewalks across the street from the main entrance to the Tobin Center, where they distributed several hundred leaflets.

III. THE BOARD'S DECISIONS IN *NEW YORK NEW YORK* AND *SIMON DEBARTOLO*

In *New York New York*, off-duty employees of an onsite contractor who regularly and exclusively worked on the premises of the hotel and casino property owner sought access to distribute handbills, in support of their organizing effort, to members of the general public. The Board majority found that the contractor employees were neither employees of the property owner entitled to the full Section 7 access rights of the property owner's own employees nor nonemployees entitled to only the restrictive access rights for nonemployee union organizers under *Lechmere*. Yet the majority accorded the contractor employees access rights to the property that were virtually identical to those enjoyed by the hotel and casino's own employees, as described above. The majority concluded that it would be inappropriate to afford such employees diminished access rights merely because of the location of their workplace. The contractor's employees were neither "strangers" to nor "outsiders" on the property owner's property because that was their regular workplace. As to their protected activity, the majority found inconsequential that the contractor employees' intended audience was the general public, not their coworkers, because their effort to gain customer support in organizing rests at the core of what Congress sought to protect under Section 7. As a result, the majority found that the Section 7 interests of the contractor's employees were "much more closely aligned" with those of the property owner's own employees than with those of nonemployee union organizers, and thus their access rights should be similarly aligned.

Soon after issuing *New York New York*, the Board in *Simon DeBartolo* applied its *New York New York* holding to off-duty contractor employees who worked regularly but not exclusively on the property owner's property. The Board noted that under *New York New York*, the property owner could not prohibit off-duty contractor employees from engaging in protected conduct on its property that it could not lawfully restrict its own employees from engaging in unless it could show that the greater restrictions were justified by a heightened risk of disruption or interference with its use of its property. The Board determined that the contractor employees' regular workplace was the property owner's property, even though they may have worked at a different location on weekends, because their work at the property owner's property was "more likely than not" greater than "fleeting or occasional." Because the property owner failed to show a heightened risk of disruption to the use of its property by the off-duty contractor V.

V. POSITIONS OF THE PARTIES

On exception, the Respondent asserts that *New York New York* was wrongly decided. It claims that the decision failed to account for a property owner's right to protect its business interests when individuals attempt to involve the property owner's patrons and guests in a dispute with a separate entity. The Respondent hypothesizes that the Board's continued adherence to *New York New York* would prevent it and similarly situated employers from ever being able to exclude nonemployees from their private properties.

The General Counsel contends in its answering brief that there is no basis to overturn *New York New York* because it is not contrary to Supreme Court precedent. The General Counsel asserts that *Lechmere* concerned individuals with no relationship to the property owner, whereas *New York New York* concerned employees who seek to exercise their own Section 7 rights at their regular worksite, even if the property is not owned by their employer.

VI. DISCUSSION

A. The Critical Distinction "of Substance" Between Contractor Employees and a Property Owner's Own Employees

We begin our analysis by recognizing, as the Supreme Court has repeatedly done, the critical distinction "of substance" between employees and nonemployees in the context of Section 7 access rights to a property owner's property. It is self-evident that contractor employees are not employees of the property owner. When a property owner itself employs employees covered under the Act, the owner-employer relinquishes, to a certain degree, its control over its real property to accommodate its employees' right, under Section 7 of the Act, to engage in union or other protected concerted activity, subject to the owner-employer's managerial interests in maintaining production and discipline. The same is not true where contractor employees seek to engage in Section 7 activity on the property owner's property while off duty. The property owner has neither hired nor vetted the contractor employees. The owner may not have the same confidence in the integrity and self-discipline of contractor employees that it has in its own employees, and it may reasonably be concerned about the security of its property and the safety of persons rightfully thereon when contractor employees are off duty and not being supervised by the onsite contractor. Indeed, the property owner may have little, if any, idea who the contractor employees are. Although contractor employees, unlike nonemployees, are not complete strangers to the property, their diminished contact with the owner and its property should reasonably correspond to lesser rights of access to the property when off duty than the property owner's own employees enjoy.

B. Working Regularly and Exclusively on the Property Owner's Property

We agree with the holding of the Board's decisions prior to *New York New York* that only contractor employees who regularly and exclusively work for a contractor on a property owner's property have some Section 7 access rights. The removal of the exclusivity requirement in *New York New York* made off-duty access to the owner's property possible for a myriad of contractor employees, some of whom spend only a small fraction of their work-week on the property owner's property.

As to working regularly on the owner's property, it is axiomatic that contractor employees can only work regularly on the property if the contractor they work for regularly conducts business or performs services there. Where a contractor conducts business or performs services only occasionally, sporadically, or on an ad hoc basis, it is simply impossible to find that the contractor's employees work regularly on the property owner's property.

C. Reasonable Alternative Nontrespassory Means of Communication

Having determined which off-duty contractor employees have a sufficient connection to a property owner's property to have some access rights to engage in Section 7 activity there, the Board must still consider if those contractor employees have a reasonable alternative means of communicating their Section 7 message without causing any destruction to the property owner's property rights. In *Babcock & Wilcox*, the Supreme Court concluded that, as to nonemployees, Section 7 "does not require that the employer permit the use of its facilities for organization when other means are readily available.

In *Lechmere*, the Supreme Court ruled that infringement of a property owner's property rights is only permissible where nontrespassory means of communication would be unavailable because the target audience is "isolated from the ordinary flow of information that characterizes our society."

Applying that same analysis here, when off-duty contractor employees seek to access a property owner's property to communicate to the general public, the property owner may exclude the contractor employees if they can effectively communicate their message through nontrespassory means, which may include newspapers, radio, television, billboards, and other media through which is transmitted "the ordinary flow of information that characterizes our society." Here, off-duty contractor employees were able to reasonably communicate their message by leafleting on public property adjacent to the property owner's property. In certain instances, such alternative means could include social media, blogs, and websites, which are increasingly used by employees to spread information of interest within a community. On the other hand, where off-duty contractor employees would not have a reasonable alternative nontrespassory means for reaching their audience, the property owner must afford them only the least intrusive means of access to its property.

E. Application of the New Standard to the Symphony Employees

[W]e find that the Respondent lawfully denied access to the off-duty Symphony employees who sought access for the purpose of distributing leaflets to the public.

There is no question that the Symphony employees in this case are not employees of the Respondent. Their sole employer is one of the Respondent's licensees, a completely separate entity from the property owner. Therefore, our first inquiry is whether the Symphony employees worked on the Respondent's property regularly and exclusively. The record clearly shows they did not.

First, the Symphony employees did not work on the Respondent's property exclusively. They also performed at the Majestic Theater and other venues throughout San Antonio, such as churches and high schools. During the 2016-2017 performance season, only 79 percent of the Symphony employees' performances and rehearsals were held on the Respondent's property. In fact, the Symphony employees who sought to leaflet on the Respondent's property on February 17 had a performance that very night at the Majestic Theater.

In addition, the Symphony employees did not "regularly" work on the Respondent's property because the Symphony itself did not regularly conduct business or perform services there.

The Symphony's performance season lasted only 39 weeks of the year. The Symphony employees typically worked for 30 of those weeks--27 weeks in the 2016-2017 performance season because of a furlough. And the Symphony itself, which would include the Symphony employees, was entitled to use the Respondent's property for only 22 weeks of the year. For well over half the year, the Symphony is not present on the Respondent's property. Thus, there is no basis to find that the Symphony employees worked regularly on the Respondent's property. Moreover, the Symphony was not conducting business or performing services on the day when the Symphony employees sought to leaflet.

We could end the inquiry here, having determined that the Symphony employees did not work regularly and exclusively on the Respondent's property. But even assuming arguendo that they did, it is clear that they had other alternative nontrespassory channels of communication to reach the general public. The Symphony employees were able to leaflet on a public sidewalk across the street from the Respondent's property--and they did, distributing several hundred leaflets. Because they sought to communicate with the general public, the Symphony employees also had other channels they could have used to convey their message, including newspapers, radio, television, and social media, such as Facebook, Twitter, YouTube, blogs, and websites. The Symphony employees did not have to infringe on the Respondent's private property rights, including its fundamental right to exclude, for their message to be communicated.

Accordingly, because the Respondent lawfully informed the off-duty Symphony employees whom it did not employ that they could not engage in informational leafleting on its private property, we find that the Respondent did not violate Section 8(a)(1).

Dissent:

MEMBER MCFERRAN, dissenting.

1.

There is simply no rational, much less statutory, basis for limiting Section 7 access rights to only those employees who are employed exclusively on the property owner's property--and categorically denying access to all employees who also work somewhere else, even if they are regularly employed on the owner's property. So long as employees are regularly employed on the property (as *New York New York* held), their *workplace* is obviously a natural and uniquely appropriate site of Section 7 activity. The Supreme Court has recognized as much, observing that the workplace is the "one place where employees clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees." The unique nature of the workplace as the site of Section 7 activity is no less true where, as here, employees seek to communicate with patrons of their employer who are present at the workplace. *That* is precisely where employees and patrons intersect.

The position of the property owner, meanwhile, is no different with respect to employees who are employed regularly (but not exclusively) on his property, the employees who

can *always* be excluded under the majority's test. The owner's rights and interests--and his ability to protect those rights and interests--are the same, regardless of whether contractor employees also work somewhere else. The owner reasonably can expect that employees regularly employed on his property will seek to engage in Section 7 activity in areas open to the public and can provisions for that conduct. Because the employment is regular, in turn, the employer's contractual and operational relationship with the employees' employer--which necessarily encompasses day-to-day matters--provides a reasonable means to regulate employees' conduct, as may be necessary and appropriate. Employees regularly employed on site by a contractor are not strangers to the workplace whose appearance on the property poses some unusual threat to the owner's rights and interests. In accommodating the Section 7 rights of contractor employees and the property rights of employers, exclusive employment on the property is entirely irrelevant.

It should be clear, then, that the exclusivity requirement introduced by the majority serves no purpose other than to arbitrarily curtail who can exercise Section 7 rights. That a contractor employee may have *another* place of employment has no bearing at all on his Section 7 interests, so long as he is *also* regularly employed on the property to which he seeks access.

Under the majority's approach, a contractor employee who works only for the contractor, and who spends most of his work time on the site of the property owner, will have no access rights to that site, if he spends even a small amount of time at *another* of the contractor's service locations. Indeed, because they are exclusively employed *nowhere*, contractor employees who work at two service locations of the same contractor--on different sites belonging to others--will have *no* workplace where they can exercise their Section 7 rights to engage in leafleting or other off-duty activities, despite having only one employer. That result cannot be justified.

2.

The majority's threshold requirement of exclusive employment on the property is not the only arbitrary aspect of its new standard. Under that standard, even employees who are both regularly and exclusively employed on the property may be prevented from communicating with members of the public about Section 7 concerns, if the property owner can show that employees "can effectively communicate their message through . . . newspapers, radio, television, billboards, and other media," such as "social media, blogs, and websites" (in the majority's words). As this case illustrates, property owners will virtually always be able to make that nominal showing—and so contractor employees will virtually *never* be able to engage in Section 7 activity on the owner's property where their message is aimed at members of the public. The showing required of property owners, of course, does not require them to prove that the employees' Section 7 activity interfered with their use of the property in any way or that excluding the employees was justified by a legitimate business interest of any sort. To the majority, rather, the owner's mere objection to the employees' presence is enough to warrant their exclusion. In this crucial respect, the majority's new standard allows employees' rights under the Act to be trumped by the owner's bare property right to exclude unwanted persons. The majority offers no reasonable justification for this drastic outcome.

But even if it were appropriate to consider whether contractor employees had "reasonable alternative nontrespassory means of communication," the majority's approach would still be arbitrary in its failure adequately to consider the facts presented here and in other cases where employees seek to communicate not with the *general* public, but rather with a small, specific subset of the public: the patrons or customers of their employer, who might have special influence with the employer. The majority disregards a patently obvious fact: the far-and-away superior means to reach patrons of one's employer is by engaging in activity at the place of business. Advertising or social media is not a substitute. Even with the broadest outreach, bolstered with unlimited resources, attempting to reach the narrow band of the public who patronizes an establishment--a virtually unknowable subset of the population until they set foot in the employer's business--will be impossible. This case provides a clear example. It is difficult to discern a medium available to the Symphony's musicians that could target Ballet patrons effectively other than talking to people arriving for a Ballet performance. A random highway billboard advertisement or posting on a worker's social media pages is hardly an effective substitute--even leafleting on a sidewalk across the street, where Ballet patrons are less likely to traverse, is not really comparable.

Because the majority's holding falls far outside the Board's discretion in interpreting the National Labor Relations Act, I dissent.

On page 447-449, delete Notes 1-6 and insert the following:

1. *Direct versus Indirect*. Unlike *NYNY,* the *Bexar* majority characterized the property owner's right to exclude as akin to its powers in dealing with trespassers (classically, union organizers) whom the Supreme Court characterized in *Lechmere* (*infra,* p. 461) as having only an indirect or "derivative" Section 7 right to communicate messages. Here, the Symphony employees were involved in an active labor dispute with an employer at their workplace. Does that make their interest in Section 7 rights more direct than employees employed by a labor union and out on assignment?

2. *Strategic Leasing*? After *Bexar,* do you think employers needing to lease space will ask potential lessors about their views on the distribution of literature on their property? Might companies like Starbucks or Subway consider rotating employees across multiple locations to make sure the "exclusivity" requirement cannot be satisfied? *See* Jeff Hirsch, *NLRB Reverses Precedent on Employees' Off-Duty Access to Worksites,* Workplace Prof. Blog (Aug. 23, 2019).

3. *Property Protection by Contract.* In NYNY, the majority emphasized that the hotel "could have anticipated that Ark employees to seek access to its property" and "was free to negotiate contractual terms with Ark sufficient to protect its interests," including drug testing, an off-duty dress code, and regulations ensuring "the safety, care and cleanliness…of a first-class resort hotel facility." Why might the *Bexar* majority have found such protections insufficient?

4. *On-duty vs. off-duty*. The *NYNY* and *Bexar* litigations are but a complex variation on a standard tension raised by the NLRA: although the employer retains the general rights associated with owning or possessing private property, there are limits to its power to deny premises access to employees, including off-duty employees. Under established Board law, a rule restricting access by off-duty employees is valid only if it (1) limits access solely with respect to

the interior of the plant and other working areas, (2) is clearly disseminated to all employees, and (3) applies to off-duty employees seeking access to the plant for any purpose, not just union organizing activity. *See Tri-County Med. Ctr.*, 222 N.L.R.B. 1089 (1976). In practice this means that, absent a business necessity, off-duty employees are generally entitled to access the exterior gates, parking lots, and other nonworking areas of the employer's property. *See, e.g., St. Luke's Hospital*, 300 N.L.R.B. 836 (1990). In *J.W. Marriott Los Angeles at L.A. Live,* 359 N.L.R.B. 144 (2012), the Board found that a rule requiring that employees obtain the hotel's prior approval before entering or remaining in the "interior areas" of the "property" for more than 15 minutes before the start or after the end of the shift was invalid because the employer's "unlimited" discretion to deny access suggested the rule would not be applied uniformly. *Accord Sodexo America LLC,* 358 N.L.R.B. 668 (2012); *St. John's Health Center*, 357 N.L.R.B. 2078 (2011). While the Trump Board had signaled its intention to revisit this holding under the *Boeing Company* framework for analyzing workplace rules, 365 N.L.R.B. No. 154, ft. 54 (2017), the Board's new majority—which may be skeptical of *Boeing* itself—seems less likely to reverse course.

5. *"I'd like to report a trespass!"* Owners of multi-use facilities may assert their property rights by summoning the police to remove or arrest handbillers as trespassers. Such assertions are often met by the filing of unfair labor practice charges. Invoking the right to petition the government for redress of grievances—here, that handbillers are illegally on private property and should be removed or arrested by the authorities—may an employer defend against a ULP charge on First Amendment grounds? *See Venetian Casino Resort LLC,* 357 N.L.R.B. 1725 (2011), *order vacated Venetian Casino Resort, L.L.C. v. NLRB,* 793 F.3d 85 (D.C. Cir. 2015). Then-Judge Kavanaugh held that calling the police constituted a direct petition to government for redress of grievances and, unless a "sham petition," was protected from NLRA liability by virtue of the *Noerr-Pennington* doctrine.

On page 448, strike all text below the stars through page 458 and insert the following:

In the problem that opened the chapter, Enderby terminated Penny for sending an e-mail message urging her coworkers to support the Programmers' Union. Had she been terminated for urging such support in an off-duty, face-to-face discussion with coworkers, Enderby surely would have violated the NLRA. Should the same approach to face-to-face communication on the employer's premises apply to electronic communication over the employer's e-mail network? Should it matter that the employer tolerates employee use of the e-mail system for personal communications?

These issues were first considered by the Bush II Board in *Register Guard,* 351 N.L.R.B. 1110 (2007), which voted along party lines that an employer does not violate section 8(a)(1) by prohibiting the use of its e-mail system for all "non-job-related solicitations," although it left open the possibility that some forms of discriminatory enforcement of such a prohibition could run afoul of Section 8(a)(3).

In 2014, the Obama Board overturned *Register Guard* in *Purple Communications,* 361 N.L.R.B. 1050 (2014). Five years later, the Trump Board had its say.

CAESARS ENTERTAINMENT

(RIO ALL-SUITES HOTEL AND CASINO)

368 NLRB No. 143 (2019)

BY CHAIRMAN RING AND MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

The issue before us is whether the National Labor Relations Act requires the Respondent to permit employees to use its email and other information-technology (IT) resources for the purpose of engaging in activities protected by Section 7 of the Act.

I. BACKGROUND

The Respondent is a Las Vegas casino and hotel. The Respondent's employees all report to and work at the same facility, which contains an employee cafeteria, break rooms, and other nonwork areas where the Respondent permits its employees to engage in nonwork-related solicitation and distribution.

During the period of time covered by the complaint, the Respondent maintained an employee handbook, which it distributes to its workforce of approximately 3000 employees. As relevant to this decision, the Respondent maintained the following work rules in the portion of its handbook headed "Computer Usage":

> General Restrictions:
> Computer resources may not be used to:
> . . .
> • Share confidential information with the general public, including discussing the company, its financial results or prospects, or the performance or value of company stock by using an internet message board to post any message, in whole or in part, or by engaging in an internet or online chatroom
> • Convey or display anything fraudulent, pornographic, abusive, profane, offensive, libelous or slanderous
> • Send chain letters or other forms of non-business information
> . . .
> • Solicit for personal gain or advancement of personal views
> • Violate rules or policies of the Company

On May 3, 2016, [the] Administrative Law Judge[,] [a]pplying *Purple Communications*, found that the Respondent's rule against "[s]end[ing] chain letters or other forms of non-business information" was presumptively unlawful. [The Judge] also found that the Respondent failed to establish that its obligation to protect confidential guest information constituted special circumstances justifying this rule. Accordingly, [the] Judge concluded that the Respondent violated Section 8(a)(1) of the Act.

II. DISCUSSION

B. The Board's decision in Register Guard

[In *Register* Guard] the Board first considered whether employees have a Section 7 right to use employer-provided email for Section 7 communications in *Register Guard*. The Board there determined that employees do not have such a right, relying on a long line of Board decisions holding that there is no statutory right to use employer-provided equipment. [T]he Board rejected the argument that rules governing employees' use of workplace email should be analyzed under the balancing test articulated in *Republic Aviation Corp. v. NLRB*. The Board explained that *Republic Aviation* safeguards employees' right to face-to-face solicitation and distribution in the workplace, but it "does not require the most convenient or most effective means of conducting those communications, nor does it hold that employees have a statutory right to use an employer's equipment or devices for Section 7 communications." [T]he Board concluded that the outcome of the case should be determined by "applying the settled principle that, absent discrimination, employees have no statutory right to use an employer's equipment or media for Section 7 communications."

C. The Board's Decision in Purple Communications

In 2014, a Board majority overruled *Register Guard* in *Purple Communications.* The *Purple Communications* Board did not contend that its decision was necessitated by technological changes or that the rule announced in *Register Guard* had proven unworkable or given rise to unintended consequences. Rather, the majority believed that *Register Guard* "undervalued" employees' Section 7 rights and "failed to perceive the importance of email as a means" of employee communication. Rather than being equipment, the *Purple Communications* Board held that email was a "natural gathering place," akin to a breakroom or employee cafeteria, the use of which was governed by the *Republic Aviation* framework. Based on these premises, the *Purple Communications* Board held that if an employer provides an employee with access to its email system, it cannot prohibit the employee from-using the system for Section 7-protected communications on nonworking time absent a showing by the employer of special circumstances. The Board stated that such circumstances would be "rare," and in the years since *Purple Communications* was decided, the Board has never found special circumstances justifying a prohibition on nonwork-related email.

D. Purple Communications is Overruled

We believe the *Register Guard* Board and the *Purple Communications* dissenters were correct when they concluded that there is no statutory right for employees to use employer-provided email for nonwork, Section 7 purposes in the typical workplace.

As the Board observed in *Register Guard*, an employer's communication systems, including its email system, are its property. Accordingly, employers have a property right to control the use of those systems. Consistent with that principle, we reaffirm the long line of Board decisions holding that there is no Section 7 right to use employer-owned televisions, bulletin boards, copy machines, telephones, or public-address systems.

Contrary to the *Purple Communications* majority, the Supreme Court's decision in *Republic Aviation* does not require a different result. [W]e note that *Republic Aviation* dealt

exclusively with face-to-face Section 7 activity within a physical workplace, where the line separating working and nonworking areas is generally clear, and where solicitation takes place synchronously and it is easily determined whether all employees engaged therein are on working or nonworking time. The teaching of that decision regarding the times when and places where employers may restrict Section 7 activity has little relevance to an employer's email system, which creates a virtual space in which the distinction between working and nonworking areas is meaningless, and in which solicitation may and often would take place asynchronously--i.e., where Section 7-related communications may be composed, sent, and read at different times.

Properly understood, *Republic Aviation* stands for the twin propositions that employees must have "*adequate* avenues of communication" in order to meaningfully exercise their Section 7 rights and that employer property rights must yield to employees' Section 7 rights when necessary to avoid creating an "*unreasonable* impediment to the exercise of the right to self-organization." In the typical workplace, however, oral solicitation and face-to-face literature distribution provide more than "adequate avenues of communication." Indeed, the Board has long recognized that the "free time of employees on plant property [is] the very time and place uniquely appropriate for" oral solicitation. Likewise, the distribution of literature, in nonworking areas on nonworking time, is also an effective method of communication. There is no reason to believe that these methods of communication have ceased to be available in the typical workplace, and almost all employees continue to report to such workplaces on a regular basis. Moreover, in modern workplaces employees also have access to smartphones, personal email accounts, and social media, which provide additional avenues of communication, including for Section 7-related purposes. Accordingly, there is no basis for concluding that a prohibition on the use of an employer's email system for nonwork purposes in the typical workplace creates an "*unreasonable* impediment to the exercise of the right to self-organization."

Significantly, the *Purple Communications* Board did not contend that opportunities for face-to-face communication in the typical workplace were no longer adequate to permit employees to exercise their Section 7 rights. Rather, the Board argued that an employer's email system was a useful, convenient, and effective additional means for employees to engage in Section 7 discussions with their coworkers. But the Act "does not require the most convenient or most effective means of conducting those communications." Moreover, to hold that mere convenience is sufficient to negate employers' right to regulate the use of their IT systems would be to ignore the Supreme Court's directive to resolve the tension between employees' Section 7 rights and employers' property rights "with as little destruction of one as is consistent with the maintenance of the other."

We recognize that there may be some cases in which an employer's email system furnishes the only reasonable means for employees to communicate with one another. Consistent with the principles stated above, an employer's property rights may be required to yield in such circumstances to ensure that employees have adequate avenues of communication. Because, in the typical workplace, employees do have adequate avenues of communication that do not infringe on employer property rights in employer-provided equipment, we expect such cases to be rare. We shall not here attempt to define the scope of this exception but shall leave it to be fleshed out on a case-by-case basis.

Accordingly, for the foregoing reasons [w]e hold that an employer does not violate the Act by restricting the nonbusiness use of its IT resources absent proof that employees would otherwise be deprived of any reasonable means of communicating with each other, or proof of discrimination.

MEMBER McFERRAN, dissenting in part

In *Purple Communications*, the Board appropriately recognized [a] sea change in the nature of workplace communications and fulfilled its statutory responsibility to keep labor law current when it held that *if* an employer gives employees access to an e-mail system, then it must let them use the system (on nonworking time) to communicate with each other for statutorily-protected purposes, *unless* the employer can prove that the need to maintain production or discipline, or to preserve the efficiency of the system itself, justifies restricting or prohibiting use of the system.

That was then; this is now. Today, the majority overrules *Purple Communications* and, in its place, resurrects an approach that not only is out of touch with modern workplace realities, but that also contradicts basic labor-law principles.

1.

The majority is demonstrably wrong when it frames the issue here in terms of balancing employees' Section 7 rights and employers' *property* rights. There can be no dispute that employees who are at work and who have been granted access to an employer's e-mail system are rightfully on the employer's property. The proper balance, as Supreme Court precedent establishes, is thus between employees' Section 7 rights and employers' *management* interests. And this means that the employer's restriction on employees' exercise of their statutory rights will be lawful only when the employer can establish that it is necessary to maintain production or discipline.

Employees' Section 7 rights here are at their strongest. Promoting self-organization, of course, is a core purpose of the Act (as the text of Section 7 shows), and as the Supreme Court has observed the right of employees to self-organize "necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite." This is not a case where non-employees, such as union organizers, who are strangers to the employer's property seek to exercise *derivative* Section 7 rights to reach employees. The Board must recognize the "distinction between rules of law applicable to employees and those applicable to nonemployees," and must "distinguish between the organizing activities of employees and nonemployees," or run afoul of the Supreme Court.

2.

By contrast, the employer's property right (such as it is) is a relatively weak one. The Board is not dealing here with a property owner's right to exclude unwanted persons from his real property, but with his right to control the use of his *personal* property (the e-mail system) by persons who have already been granted access to it (employees). As the *Purple Communications* Board correctly pointed out, an employer's e-mail system is personal property, not real property, and thus (under well-established common-law principles) the employer's

property right in the system is not prejudiced unless actual harm to the system itself is proven. The majority does not address this point successfully; rather, it finds that employees have adequate alternative means of communication. [While] [t]his is a non sequitur[,] it should be clear that e-mail communication is sui generis: there is virtually no alternative means of communication that is even a rough equivalent in terms of ease of use and comprehensive reach. To reach a coworker by e-mail, an employee likely needs only to know her name. The employees need not work at the same time, in the same place, and they need never meet in order to communicate. No form of hypothetical face-to-face communication is comparable.

In contrast to e-mail, face-to-face communication— to occur even *once* — requires that employees be present at the same time, in the same place. This will not hold true for employees (1) who work different hours, perhaps on entirely separate shifts or on schedules that never overlap; and/or (2) who work in different places (even if in the same facility) where they do not ordinarily come in contact with each other, particularly in nonworking areas (the only places where, under current law, employers must permit the distribution of literature). Indeed, even for employees who work at the same time and in the same place (if not side-by-side), there may be no non-working-time, nonworking-place setting where they ordinarily would meet. There may be no break room and no employee cafeteria at all--or, in any case, no setting large enough to accommodate more than a fraction of the desired employer-wide bargaining unit. No such limitations apply to an e-mail system. And even if an employee has some face-to-face contact with some co-workers at some times, that contact may encompass only a small fraction of the potential unit. These are the undeniable realities of the modern workplace.

By contrast, the majority's invocation of a hypothetically "typical workplace," and its idealized description of alternative means of communication, has no empirical basis and simply ignores the realities of many American workplaces where employees do not have routine face-to-face contact with many (perhaps most) of their coworkers and have no idea how to contact them, even if they have access to smartphones, personal e-mail, or social media. In the end, it should be clear that what the majority means by "adequate avenues of communication" is *any* avenues of communication, no matter how limited or ineffective. This view does not accommodate employees' Section 7 rights with employer property rights, it eclipses them.

Accordingly, I dissent.

On pages 458-460, strike notes 1-5 and insert the following:

1. *So, what is email, exactly?* A key question in the email trilogy is whether the technology is better analogized to "equipment" cases that treat phones, bulletin boards, and copiers as the employer's personal property, or to cases implicating "real property," such as communications in a breakroom, hallway, or parking lot. The distinction is important, because the Board has traditionally upheld limits on the employee use of the employer's personal property for Section 7 purposes, so long as the restriction does not discriminate. Other situations implicate *Republic Aviation* and the standard balancing of management and Section 7 interests. The initial case, *Register Guard*, took a hard line in favor of the former approach, noting that the email system was the employer's personal "property and was purchased by the [employer] for use in operating its business." The majority also warned that opening up email to Section 7 communications raised "server space" and "virus" concerns. The dissent argued it was "absurd to find an e-mail system

analogous to a telephone, television set, a bulletin board, or a slip of scrap paper" and warned that the approach risked solidifying the NLRB as the "Rip Van Winkle of administrative agencies" by ignoring how profoundly email had transformed workplace communication. Reversing *Register Guard*, *Purple Communications* accepted email as personal property but stressed that—unlike copiers, bulletin boards, or sound systems—it is an "ongoing and interactive means of employee communications" that accordingly implicates *Republic Aviation* principles. *Caesars* re-adopts *Register Guard*, with a slight twist. Employer property interests in email entirely trump Section 7 rights, but employees can newly allege a lack of reasonable alternative means exception. As you will soon learn, this framework has been imported from the Supreme Court's treatment of union organizers in *Lechmere, Inc*, *infra* page 461, who, unlike employees in the email cases, do not actually work for the company.

2. *Exceptions versus Realities.* In what scenario would an employee *not* have access to "smartphones, personal e-mail, or social media?" Will the ubiquity of personal communication tools make the *Caesars'* exception effectively illusory? Then again, does the free and easy availability of apps like Gmail, Facebook, and Twitter blunt (or even moot) *Caesars*' practical impact anyway? Why does Member McFerran think the employer-based email is still relevant to Section 7?

3. *Typical?* Much of the majority's analysis hinges on the assumption that in "the typical workplace . . . oral solicitation and face-to-face literature distribution provide more than "adequate avenues of communication." The age of pandemic has seemingly turned what is "typical" at work on its head. As the New York Times reported, "what had seemed like a short-term inconvenience is now clearly becoming a permanent and tectonic shift in how and where people work." Matthew Haag, *Remote Work is Here to Stay. Manhattan May Never Be the* Same, N.Y.TIMES (Apr. 8, 2021). If so, should *Caesars'* holding be rethought? Or does the privacy that comes from working from home accentuate the alternative options presented by smartphones and apps to the extent that face-to-face communication is no longer all that necessary?

4. *Tic Tok You're Fired.* As noted, social media is an important forum in which workers can overcome their physical isolation and communicate in the modern work "place." It may also be monitored by employers and lead to discipline. In 2007, one pair of scholars argued that employees' off-duty blogging activity is the modern equivalent of meeting for a chat at the union hall and should be equally protected as concerted activity. A similar argument can be made about more modern forms of social media. The authors would not only reinterpret the NLRA to recognize these new developments, but also reinterpret state common law, as well as adopt new legislation, to protect on-line conduct as a form of off-duty activity beyond the reach of employer sanctions. As to the latter, they note that some states have passed laws protecting the private lives of off-duty employees to smoke, notwithstanding workplace policies against smoking. *See* Rafael Gely & Leonard Bierman, *Social Isolation and American Workers: Employee Blogging and Legal Reform*, 20 Harv. J.L. & Tech. 287 (2007)

5. *Discriminatory enforcement.* The reality is that employees with access to an employer provided email system do sometimes send and receive messages for personal, non-business use. (Come on, you know you've done it!) Acknowledging this, many employers look the other way or even adopt de minimus exceptions to their email policies. Both responses, though,

raise discrimination concerns once an employee is disciplined for using the employer's technology for Section 7 activity (and co-workers who emailed about the big game or invited friends to a party are not). The same issue arises where an employer adopts a strict, no-access, no-solicitation or distribution policy for outsiders at a physical location yet occasionally grants access to nonemployees raising money for a well-known charity like the Girl Scouts, the Salvation Army, or the United Way. Courts have long divided over whether such selective enforcement of no-solicitation or no non-business email policies actually qualifies as "discrimination." Compare, e.g., Four B Corp. v. NLRB, 163 F.3d 1177 (10th Cir. 1998) (finding discrimination in selective enforcement favoring Salvation Army and Cub Scouts) and Lucile Salter Packard Children's Hosp. v. NLRB, 97 F.3d 583 (D.C. Cir. 1996) (finding discrimination in selective enforcement allowing literature distribution by credit union, insurance company, social services provider, and medical textbook publishers, but not union) with, e.g., Salmon Run Shopping Center v. NLRB, 534 F.3d 108 (2d Cir. 2008) (finding no discrimination in selective enforcement allowing solicitation and distribution of messages deemed by shopping center to be beneficial to the mall, but not allowing distribution by union of literature protesting tenant's use of contractor paying below area standards) and Cleveland Real Estate Partners v. NLRB, 95 F.3d 457 (6th Cir. 1996) (finding no discrimination in selective enforcement allowing solicitations by Girl Scouts, Knights of Columbus, and children selling candy).

In the email context, *Register Guard* took a particularly narrow approach (unchanged in *Purple Communications*), stating that, to be actionable, "discrimination must be along Section 7 lines"—meaning the "unequal treatment of equals." For example, an employer would violate the Act "if it permitted employees to use e-mail to solicit for one union but not another, or if it permitted solicitation by antiunion employees but not by prounion employees." Under this logic, permitting emails selling Girl Scout cookies while prohibiting emails about a union meeting doesn't count as discrimination. In 2019, the Board solidified this view in physical locations stating:

"[T]o establish that a denial of access to nonemployee union agents violated the . . . discrimination exception, the General Counsel must prove that an employer denied access to nonemployee union agents while allowing access to other nonemployees for activities similar in nature to those in which the union agents sought to engage. Consistent with this standard, an employer may deny access to nonemployees seeking to engage in protest activities on its property while allowing nonemployee access for a wide range of charitable, civic, and commercial activities that are not similar in nature to protest activities. *Kroger Ltd. Partnership*, 368 N.L.R.B. No. 64 (2019).

While the current NLRB's General Counsel has encouraged the Board return to a broader standard, as of this writing it had not issued a decision doing so. Office of the General Counsel, Advice Memorandum, *LAZ Parking Mid Atlantic, LLC*, 05-CA-281089 (Jan. 4, 2022) ("The Region is therefore authorized to argue that *Kroger* be overruled and that the Board return to the definition of discrimination in *Sandusky*.").

Which definition of discrimination do you favor? Recall the case of Enderby, Inc. Would a company rule that granted representatives of the Red Cross or the Salvation Army to solicit donations, but not professional organizers from the Programmers Union, access to the lobby of the

company's building in High Tech Park, be discriminatory? If not, why not? Does it matter that national labor policy favors giving employees access to information about their Section 7 rights, but there is not such policy about giving them access to information about supporting well-known charities? If so, what should the remedy be?

On pages 466, replace Notes 3-5 with the following:

3. *Constitutionalizing Workplace Access. Babcock & Wilcox* and *Lechmere* are cases interpreting the NLRA, but when it comes to questions of workplace access constitutional principles increasingly loom larger than ever. In *Cedar Point Nursery v. Hassid*, 594 U.S. _, 141 S.2063 (2021), the Supreme Court held that a regulation under California's Agricultural Labor Relations Act (ALRA) allowing organizers access to private farms for up to an hour before work, after work, and during lunch for parts of the year constitutes a *per se* taking under the Fifth and Fourteenth Amendments. California enacted the ALRA, of course, to cover agricultural workers expressly excluded from the NLRA. But if the constitution requires that Cedar Point Nursery be compensated when the law allows organizers access to its property, should Exxon get paid when *Lechmere*'s access exception grants organizers entry to its oil rigs? Should Whole Foods receive a check when organizers successfully allege discriminatory treatment in the parking lot? *Cedar Point* did not consider those questions, but the majority did note that in *Babcock*'s crafting of a "highly contingent access right" the Court had not considered a takings claim. Even more directly, in concurrence Justice Kavanaugh stated that although the *Babcock* majority engaged in constitutional avoidance it nevertheless "recognized that employers have a basic Fifth Amendment right to exclude from their private property, subject to a 'necessity' exception similar to that noted by the Court today."

4. *Just Compensation*. In theory, how much might application of *Lechmere*'s access exception "cost?" What about if the government sought to enact something like a limited, but permanent, labor organizer easement on certain company properties? What factors might be involved in such a calculation? Note that after the Supreme Court decided *Loretto v. Teleprompter Manhattan CATV Corporation*, 458 U.S. 419 (1982), which deemed cable equipment installed on the outside of apartment buildings a *per se* taking of a landlord's property, a state commission set compensation at a dollar.

5 *The Relevance of State Law*. In *Cedar Point*, the Court acknowledged that as "a general matter" property rights are "creatures of state law." So, for example, in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), the Supreme Court affirmed the California Supreme Court's judgment that the state constitution did not allow shopping centers to categorically exclude non-commercial solicitors from its property. The Board has subsequently found a California shopping plaza that prohibited union organizers from soliciting on its property to have violated the NLRA. *See Bristol Farms, Inc.*, 311 N.L.R.B. 437 (1993). *Cedar Point* seemingly exposes a tension between that principle and what Justice Kavanaugh called the role of "the National Government via the Constitution [in] preserv[ing] property rights including the right to exclude." There the majority distinguished *Pruneyard* as a regulatory (or less serious) taking where ultimately no compensation was due because, unlike the farms, it "was open to the public, welcoming some 25,000 patrons a day." It remains to be seen how balances between state and constitutional property rights will tip in the future, particularly where a state chooses to modify

trespass rules to grant unions more generous property access than otherwise required. For background on the traditional intersections of state and constitutional property access law, see Nathan Newman, *The Legal Foundations for State Laws Granting Labor Unions Access to Employer Property*, 62 DRAKE L689 (2014).

6. *A Penny for your thoughts.* Recall Penny, the prounion programmer at Enderby, Inc. After being fired for violating the company's rule banning use of the e-mail system for personal messages, she and two professional union organizers tried to distribute leaflets urging employees to sign authorization cards. They stood alongside one of the 14 roads leading into and out of High Tech Part, the privately-owned, nine-acre, mixed-use suburban complex where Enderby maintains its offices. But most of the passersby were driving automobiles, and did not slow down to take the leaflets. Is it an unfair labor practice for the owners of High Tech Park (or Enderby itself) to bar the trio from access to the grounds of High Tech Park? From the parking lot where Enderby employees park their cars? From the lobby of the 10-story building in High Tech Park where Enderby maintains its office? From the fifth floor where Enderby is headquartered? Had Penny not been fired, would your answer be different as to her in any of these situations? Finally, what if it was later uncovered that, once organizing was apparent, High Tech Park (or Enderby) had lobbied local officials to remove or manipulate a traffic light at the intersection, eliminating the best opportunity workers and organizers had to make contact with drivers? *Cf.* William Thornton, *Jefferson County now says traffic lights were changed near Amazon*, al.com (17, 2021) ("[T]he county did in fact change traffic signals near Amazon's Bessemer fulfillment center at the company's request."), https://www.al.com/business/2021/02/jefferson-county-now-says-traffic-lights-were-changed-near-amazon.html.

7. *The lunch counter cases.* A retail store or a hospital has a cafeteria that is open to the public. A union organizer enters the cafeteria, purchases a meal, sits at a table, and speaks to employees on their lunch breaks about the benefits of union organization. May the employer bar the organizer from the cafeteria under *Lechmere*? Or is a cafeteria somehow different than a parking lot? So long as the space is open to the public and nonemployees act non-disruptively and in a manner consistent with its intended use, the Board has long allowed them access. *See Montgomery Ward*, 256 N.L.R.B. 800 (1981), *enf'd* 692 F.2d 1115 (7th Cir. 1982). In *UPMC*, 368 N.L.R.B. No. 2 (Jun. 14, 2019), the Board overruled this "public space" exception and held that "an employer may prohibit nonemployee union representatives from engaging in promotional activity, including solicitation or distribution, in its public cafeteria so long as it applies the practice in a non-discriminatory manner by prohibiting other nonemployees from engaging in a similar activity." In late early 2022, an NLRB Advice Memorandum signaled the General Counsel's intention to urge the Biden Board to revisit *UPMC* with the likely aim of overruling it. Office of the General Counsel, Advice Memorandum, *LAZ Parking Mid Atlantic, LLC*, 05-CA-281089 (Jan. 4, 2022).

D. REGULATION OF SPEECH

On page 479, replace Note 2 with the following and add the new Note 3:

2. *Funny Business.* Imagine a frustrated manager exclaims to factory workers that he could teach monkeys to do the welders' jobs, that the painters could be replaced in ten minutes,

that union people are stupid, and that union supporters are being used by union bosses who live it up on members' dues. The Board categorized these remarks as "intemperate" and "disparaging" but ultimately "flip" personal opinion protected by Section 8(c). *See Trailmobile Trailer, LLC*, 343 N.L.R.B. 95 (2004). Along these lines, what if an employer contends that challenged statements are satire, which employees would understand as made in jest? In *FDRLST Media, LLC and Joel Fleming*, 370 N.L.R.B. No. 49 (2020), an executive at the conservative online magazine The Federalist tweeted in response to a walkout by employees at an associated media company: "FYI @fdrlst first one of you tries to unionize I swear I'll send you back to the salt mine." The Federalist argued that the tweet was First Amendment protected satire—the company could not literally transfer its writers to a "salt mine"—and submitted affidavits from employees stating that "the tweet was funny and sarcastic" and not understood as a real threat. The Board disagreed, noting that the coercion analysis does not "turn on the employer's motive or on whether the coercion succeeded or failed." Idioms like "salt mine," moreover, carry "hidden meanings," and in this case a reasonable employee would have understood the term to refer to "tedious and laborious work." In refusing to enforce the decision, the Third Circuit called the tweet "as bizarre as it is comical" and urged the Board to rethink the broader context. FDRLST Media, LLC v. NLRB, 35 F.4th 108 (3d. Cir. 2022). Since the executive had never used Twitter to communicate with his six employees, the company had no history of labor strife, and *The Federalist*'s purpose to is to comment on controversial topics, "a reasonable [*Federalist*] employee who became privy to [the] tweet—posted the same day as the…walkout—would be far more likely to view the tweet as []commentary on a…contemporary newsworthy" topic "than as a threat." *Id.* at 123-24.
For marketing, branding, and basic communicative purposes, professionals and businesses must increasingly rely on social media, where snide, sarcastic, and even silly commentary is prized or even necessary. Does this merit treating the medium differently for 8(a)(1) purposes, as the Federalist's argument suggests?

While acknowledging that employer speech is properly analyzed from an objective employee perspective, the Third Circuit added that employees' subjective responses can nevertheless be useful evidence where an employer claims an alleged threat was actually a joke. Otherwise, a manager's quip to an employee to "break a leg" might always be a threat. *Id.* at 124. To what extent should employees' seemingly approving follow-ups, snickers, or smiles be used in analyzing employer speech?

3. Employer speech often amounts to commentary on labor law or collective bargaining itself. Determining whether the employer is lawfully opining on law or legal processes or unlawfully misstating employee or employer rights can be challenging. For example, is an employer's warning that the "option to strike" is countered by management's choice to lock workers out "as a pressure tactic to slap some sense into the Union" coercive or an accurate description of lawful economic weapons? *See Stern Produce Co.,* 368 N.L.R.B. No. 31 (2019) (deeming the statement truthful and protected). Is a company's claim that its practice is to set wages equal to or better than competitors and that management "will continue to" adhere to the policy, "union or no union," describing a future bargaining position or threatening to refuse to bargain with a union at all? *See Trane Co.,* 137 N.L.R.B. 1506 (1962) (ordering a re-run election). What if a manager says, "You should know that in collective bargaining you can lose what you have now"? *See Wild Oats Markets, Inc.,* 344 N.L.R.B. 717 (2005) ("[T]he statement was a factually accurate observation

regarding a possible negative outcome of collective bargaining, which is protected speech under Section 8(c).").

page 482, add the following as a new Note 5:

5. *Threats and the "Captive Audience" Speech: Could Form Trump Content?* It is estimated that in nearly 90% of representation campaigns, employers require employees to attend worktime meetings where managers or consultants advise against unionization. Such "captive meetings" have been lawful since 1948, so long as the content of the messages do not run afoul of 8(a)(1). *Babcock & Wilcox Co.*, 77 N.L.R.B. 577 (1948). Of course, what makes the meetings "captive" is that, explicitly or implicitly, employers threaten workers with firing if they refuse to attend. So, might the meetings, by their nature, violate 8(a)(1) as a threat of reprisal for exercising the explicit Section 7 right to *refrain* from listening to unionization-related speech? A brief filed by Region 28 in *Cemex Construction*, 28-CA-230115, argues just that, urging the Board to, in effect, make employer speech that attempts to dissuade workers from choosing unionization voluntary. Would such a change in law unfairly restrict employer speech rights protected by 9(c)? Would it deprive employees about important information regarding the consequences of unionization? Do employer assurances that an activity is "voluntary" make it, in practice, voluntary? Think back to a time at a job or internship where a superior asked you to do something and also added something like, "but up to you."

E. REGULATION OF OTHER TYPES OF COERCION

On page 485, add to the last sentence of Note 1 the following:

What if instead of better pay, health, pension, or time-off benefits the employer starts offering tasty free food? *See* ImageFIRST, 366 N.L.R.B. No. 182 (Aug. 27, 2018) (providing Creole, Hispanic, and restaurant food deliveries following the start of an organizing drive an unlawful grant of benefits).

page 492, add the following as a new "Note 3":

3. During an election at an Amazon warehouse in Bessemer, Alabama, the company engaged in a number of practices that the union later claimed added up to unlawful surveillance. Amazon stationed one of the mail ballot boxes, for instance, in the employee parking lot and in clear view of a number of pre-existing security cameras. The company also placed "Vote No" pins on a table outside of the room where mandatory anti-union meetings were held, and "human resource representatives…remained present as employees filed out past the…items." Which facts, do you think, are more or less likely to overturn the results of an election as violating laboratory conditions? How come? Amazon.com Services, LLC, Case 10-RC-269250 (Nov. 29, 2021) (finding both practices to constitute objectionable surveillance).

F. PROTECTION AGAINST DISCRIMINATION

On page 498, Note 4, add to the end of the second sentence, the following:

What if an employer's purported reason for its conduct is exposed as a lie? Absent other facts, the Board has said such evidence is entitled to very little weight: "It is possible that the true reason…could be some other factor unprotected by the Act or any other law, which would be a permissible basis for action under the at-will employment doctrine." *Electrolux Home Products, Inc*., 368 N.L.R.B. No. 34 (2019). For an in-depth discussion of motivating factor evidence, see *Lucky Cab Co.*, 360 N.L.R.B. 271 (2014).

If the General Counsel succeeds in showing that discrimination against Section 7 activities was a substantial or motivating factor in the employer action, the burden of persuasion shifts to the employer to show that the employer action would have been taken regardless of antiunion animus, the equivalent of showing that the action was "for cause," by a preponderance of the testimony taken.

On page 497, note that notes 1-5 have been moved to Chapter 2 in the Update after* General Motors*, in which the Trump Board in 2020 has now decided that certain Section 8(a)(1) claims will now follow a mixed-motive framework.

G. ROUTES TO UNION RECOGNITION

1. APPROPRIATE BARGAINING UNITS

On page 537, add the following at the end of Note 1:

The National Labor Relations Board held in *The Boeing Company* (10-RC-215878; 368 NLRB No. 67, Sept. 9, 2019) that a petitioned-for unit at Boeing's South Carolina plant that was limited to only two job classifications within an aircraft production line (a total of 178 mechanics out of 2,700 total workers) was not an appropriate unit for purposes of conducting a union election. In so doing, the Board applied and clarified the traditional community-of-interest standard it announced in *PCC Structurals.* In so doing, the Board noted its prior rejection of the "micro-unit" holding in *Specialty Healthcare*, 357 NLRB 934 (2011). In one of the first cases applying the traditional test since issuing *PCC Structurals*, the Board set forth a clarifying, three-step analysis for determining whether a petitioned-for unit is appropriate. Under that analysis, the Board will consider (1) whether the members of the petitioned-for unit share a community of interest with each other, (2) whether the employees excluded from the unit have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with unit members, and (3) guidelines the Board has established for appropriate unit configurations in specific industries. In reaching its decision, the Board found that the mechanics in the petitioned-for unit (flight-line readiness technicians and inspectors) did not share an internal community of interest and did not have sufficiently distinct interests from those employees excluded from the petitioned-for unit. The Board also concluded that there were no appropriate-unit guidelines specific to the employer's industry. In 2022, the House Education and Labor Committee filed a brief arguing the Board should return to the standard for determining the appropriateness of a bargaining unit articulated in *Specialty Healthcare and Rehabilitation Center*. The brief was filed in response to the NLRB's invitation for public input in *American Steel Construction*, 371 NLRB No. 41 (2021), where the

Board granted review of a Regional Director's decision finding a petitioned-for unit of only ironworkers in a larger plant inappropriate. *See also Nissan North America, Inc.*, 371 NLRB No. 43 (2021), where the Board granted a request for review of an Acting Regional Director decision finding that a unit of Tool and Die Maintenance Technicians did not constitute a separate craft unit, and that even if it did, the unit was inappropriate for collective bargaining. Members Kaplan and Ring dissented from the decisions in both *American Steel* and *Nissan*.

2. REPRESENTATION ELECTIONS

On page 541, after the paragraph on Blocking Charges, please add the following:

The N.L.R.B. issued a series of proposed amendments to representation election rules on August 12, 2019, that it then finalized on March 31, 2020. The Board published its final rules in the Federal Register on April 1, 2020, effective June 1, 2020. The amendments include:

- **Blocking Charge Policy**: The amendment replaces the current blocking charge policy with either a vote-and-count or a vote-and-impound procedure. Elections would no longer be blocked by pending unfair labor practice charges, but the ballots would be either counted or impounded—depending on the nature of the charges—until the charges are resolved. Regardless of the nature of the charge, the certification of results (including, where appropriate, a certification of representative) shall not issue until there is a final disposition of the charge and its effect, if any, on the election petition.
- **Voluntary Recognition Bar**: The amendment returns to the rule of *Dana Corp.*, 351 NLRB 434 (2007). For voluntary recognition under Section 9(a) of the Act to bar a subsequent representation petition—and for a post-recognition collective-bargaining agreement to have contract-bar effect—unit employees must receive notice that voluntary recognition has been granted and are given a 45-day open period within which to file an election petition. The amendment applies to a voluntary recognition on or after the effective date of the rule.
- **Section 9(a) Recognition in the Construction Industry**: The amendment states that in the construction industry, where bargaining relationships established under Section 8(f) cannot bar petitions for a Board election, proof of a Section 9(a) relationship will require positive evidence of majority employee support and cannot be based on contract language alone, overruling *Staunton Fuel*, 335 NLRB 717 (2001). The amendment applies to an employer's voluntary recognition extended on or after the effective date of the rule, and to any collective-bargaining agreement entered into on or after the effective date of voluntary recognition extended on or after the effective date of the rule.

See Representation-Case Procedures: Election Bars, Proof of Majority Support in Construction-Industry Collective Bargaining Relationships, 85 Federal Register 18366, April 1, 2020.

On page 546, add the following to the end of Section 2, just before Section 3(Bargaining Orders):

On December 13, 2019, the Board announced a set of modifications to its Rules and Regulations governing the processing of representation cases. This 2019 final rule amendments followed significant revisions of long-standing practices and procedures promulgated by the Board in 2014, which imposed a variety of new procedural requirements on the parties and significantly contracted the timeline between the filing of a petition and the election. Rather than rescinding the 2014 Rules in their entirety, the 2019 amendments incorporated targeted revisions.

On May 30, 2020, Judge Ketanji Brown Jackson of the United States District Court for the District of Columbia issued an order in *AFL-CIO v. NLRB*, Civ. No. 20-CV-0675, enjoining implementation of five aspects of the 2019 Amendments. Those sections, which cannot be implemented while the injunction is in place, include changes that (1) gave parties the right to litigate most voter eligibility and inclusion issues prior to the election (sec. 102.64(a)); (2) instructed that the Regional Director normally will not schedule an election before the 20th business day after the date of the direction of election (sec. 102.67(b)); (3) mandated 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 (sec. 102.67(l)); (4) limited a party's selection of election observers to individuals who are current members of the voting unit whenever possible (sec. 102.69(a)(5)); and, (5) instructed that the Regional Director will no longer 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 (sec. 102.69(b) and (c)). The General Counsel Memorandum therefore did not discuss implementation of these aspects of the 2019 Amendments. *See* Peter B. Robb, *Guidance Memorandum on Representation Case Procedure Changes (GC 20-07)(June 1, 2020)*.

The Board did, however, announce that it would immediately implement those amendments not enjoined by the judge. According to the Guidance Memorandum, the most significant changes 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 at noon three business days before the hearing. Currently, petitioners must respond to the Statement of Position on the record at a pre-election hearing, but not in writing.
- **Post-Hearing Briefs**: Parties are permitted once again 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 will be permitted for post-election 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.

- **Notice of Election**: The Board emphasized a Regional Director's discretion to issue a direction of election that may or may not contain a Notice of Election.
- **Requests for Review**:

o **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, ballots will be impounded and remain unopened pending a decision by the Board.

o **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.

o **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 time periods applicable to the election rule are calculated based on business days as opposed to calendar days. Under the 2014 Rules, there was a lack of consistency on the calculation of days. The 2019 Amendments 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.

4. VOLUNTARY RECOGNITION AND OTHER METHODS OUTSIDE THE NLRA'S PROCESSES

b. Lawful Voluntary Recognition

On page 588, after the excerpt on "Neutrality Agreements and Card Check," add the following:

Note that on November 20, 2019, General Counsel Robb issued an appeal opinion, remanding to the Regional Director for settlement or a hearing, finding that an employer arguably violated Sections 8(a)(1) and (a)(2) of the NLRA by entering into and maintaining a neutrality agreement with a union that "provides for more than 'ministerial aid' to the union during its organizing campaign." The GC also found that the union violated Section 8(b)(1)(a) by accepting this aid and support from the employer. The GC concluded that the employer unlawfully recognized, and the union accepted unlawful recognition, both in violation of the NLRA. *See Embassy Suites by Hilton, Seattle Downtown Pioneer Square* (Case 19-CB-227623) (Appeal by William Messenger, Natl. Right to Work Legal Defense Foundation).

On page 608 after the* Dana Corp*. case, add the following:

The N.L.R.B. issued a series of proposed amendments to representation election rules on August 12, 2019, that it then finalized on March 31, 2020. The Board published its final rules in the Federal Register on April 1, 2020, effective June 1, 2020. The amendments include:

- **Voluntary Recognition Bar**: The amendment returns to the rule of *Dana Corp.*, 351 NLRB 434 (2007). For voluntary recognition under Section 9(a) of the Act to bar a subsequent representation petition—and for a post-recognition collective-bargaining agreement to have contract-bar effect—unit employees must receive notice that voluntary recognition has been granted and are given a 45-day open period within which to file an election petition. The amendment applies to a voluntary recognition on or after the effective date of the rule [June 1, 2020].

See Representation-Case Procedures: Election Bars, Proof of Majority Support in Construction-Industry Collective Bargaining Relationships, 85 Federal Register 18366, April 1, 2020.

B. THE DUTY TO BARGAIN DURING THE TERM OF A CONTRACT

1. The National Labor Relations Act

On page 693, after note 5, insert the following:

6. What is the standard for determining whether the contract language gives the employer the right to make unilateral changes in a condition of employment during the life of the contract? For some 25 years, the Board has applied the "clear and unmistakable waiver" standard, holding that a union will be deemed to have given up the right to bargain over midterm changes on a subject only if the "bargaining partners . . . unequivocally and specifically 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." *Provena St. Joseph Medical Center*, 350 NLRB 808, at 811 (2007). Waiver could be based on express contractual language, bargaining history, the parties' past practice, or a combination of these factors. The Board explained that the narrowness of this standard "reflects [the Board's] policy choice, grounded in the Act, in favor of collective bargaining concerning changes in working conditions that might precipitate labor disputes." Id. However, in *M.V. Transportation, Inc.*, 368 NLRB No. 66 (September 10, 2019), the Board abandoned the clear and unmistakable waiver standard in favor of a "contract coverage" standard in which the Board will examine the plain language of the parties' collective-bargaining agreement to determine whether the change made by the employer was within the compass or scope of contractual language granting the employer the right to act unilaterally. If it was, the Board will honor the "plain terms" of the parties' agreement and the employer will not have violated the Act by making the change without bargaining. If the agreement does not cover the employer's disputed action, the employer will have violated the Act unless it demonstrates that the union waived its right to bargain over the change or that the employer was privileged to act unilaterally for some other reason. Id at ___. The Board adopted this change at the urging of some of the Courts of Appeal and because it believed it gave fuller expression to the intent of the statute and the intent of the parties. Id at ___.

Which standard gives fuller effect to the language of the NLRA making it to obligation of the parties to bargain in good faith? What are the potential costs and benefits of a narrower or broader standard for finding that the union has waived it's right to bargain? Which standard better fulfills the purposes of the Act?

7. *Mid-term Bargaining During a Pandemic:* The Covid-19 pandemic has required a variety of changes in the terms and conditions of employment, both in response to state executive orders and federal laws prohibiting certain work or working conditions or requiring certain benefits and in response to employer and employee concerns about work safety and the equity of compensation received by "essential" workers asked to continue to do in-person work during the pandemic. Of course employers are required to comply with executive orders and federal laws in conducting their business, but what is the obligation to bargain over other decisions that are made in response to the virus and the effects of changes that are made? Does the emergency nature of the pandemic impact the employer's obligation to bargain over these changes in working

conditions? Although the scale and exact nature of the employment problems caused by the pandemic are unprecedented since the passage of the NLRA, the Board does have prior cases dealing with the duty to bargain in an "emergency" and recently the General Counsel of the Board released a memo outlining many of those prior cases to "educate" employers on their duty to bargain regarding the effects of the pandemic. Office of the General Counsel, Memorandum GC 20-04 "Case Summaries Pertaining to the Duty to Bargain in Emergency Situations" (March 27, 2020).

The General Counsel's memo cites cases involving layoffs and/or facility closures due to a flu prevention policy, weather emergencies, materials shortages, discontinuance of a line of credit, and a sudden reduction in the employer's business. The decisions establish that, in order to be free of an obligation to bargain, the employer must demonstrate that "economic exigencies compel[led] prompt action." *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991). The exception is limited to "extraordinary events which are an unforeseen occurrence, having a major economic effect requiring the company to take immediate action" *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995). Even in cases where the Board has found no obligation to bargain over the change in working conditions, it has sometimes found an obligation on the employer to bargain over the effects of the decision.

How should we apply these cases to the problems caused by the pandemic? Do all of the issues posed by the pandemic evince *economic* exigency? Should it matter? The pandemic has gone on for over half a year, how quickly must an employer have to resolve and employment issue in order for the problem to be "exigent"? Even if the employer has to make an initial determination quickly to continue production, should the employer be obligated to bargain about the decision as the pandemic wears on? How long does an exigency last?

G. SUBJECTS OF BARGAININGBARGAINING

3. The NLRA

On page 714, to the end of note 2, add the following:

See also, Rigid Pak Corp., 366 NLRB No. 137 (July 25, 2018)(employer obligated to bargain over decision to subcontract it's injection molding work, but not to bargain over decision to close blow-mold division because "Historically, the [employer] utilized separate equipment and processes to manufacture different types of products in each division [and] continues to be involved in the manufacture of injection-molded products; [but] it has . . . abandoned blow-molding manufacturing").

CHAPTER 6: ECONOMIC WEAPONS

A.INTRODUCTION

On page 733, replace the sentence starting on line 17 in the second paragraph with the following2021, the annual total number of major work stoppages—which includes strikes and lockouts—was 16, about average over the past two decades, and a far cry from the 470 recorded in 1952. News Release, U.S. Bureau of Labor Statistics, Major Work Stoppages in 2021 (2022).

Nevertheless, last year a number of big and lengthy strikes at companies like Deere, Kellogg, and Nabisco helped fuel media claims of "Strike-tober" and "Strike-vember." Union workers, steeled by sacrifices made during the pandemic that many felt had not been adequately recognized, often chose to remain on strike even as companies' contract proposals offered progressively more pay and benefits. Members at Deere voted down two draft agreements until finally accepting a third that provided an immediate 10% pay increase and 5% raises in future years. Noam Scheiber, *Striking Deere workers approve a new contract on the third try.*, N.Y. Times (Nov. 17, 2021).

Non-union workers, also fed up with pandemic working conditions, also sometimes stopped working in a phenomenon often dubbed "The Great Resignation" or "The Big Quit." More workers left their jobs in October 2021than in any other month recorded by the Department of Labor. *See* Ben Casselman, *More Quit Jobs Than Ever, But Most Turnover Is in Low-Wage Work*, N.Y.Times (Jan. 4, 2022). Later research would suggest that these moves were less decisions to stop working for good than choices to move to jobs with better pay and benefits that were increasingly plentiful in an especially tight labor market. *See* Derek Thompson, *Three Myths of the Great Resignation*, The Atlantic (Dec. 8, 2021).

On page 735, add the following to the end of the first paragraph:

Most recently, short strikes have been linked to the pandemic's harrowing impacts on workplace safety, where workers had been deemed "essential" and even "heroes"—without pay or benefits to match. One website tracked 900 separate stoppages from the start of COVID's lockdown in March 2020 through July. http://www.paydayreport.com/900-strikes-since-march-1st-rubber-bullet-wokers-make-only-10-an-hour-new-strike-boardgame-launced/. At companies like Amazon, Whole Foods, Instacart, Taco Bell, Fed Ex, and hundreds of others, workers demanded—and won—basic protections like masks, gloves, sanitizer, and mandatory social distancing. Concrete benefits like paid sick leave and hazard pay were also frequently implemented after strikes, at least temporarily. Moreover, workers have continued to strike as COVID and its sub-variants (even *sub*-sub-variants) have persisted. In 2021, 140,000 workers struck for almost 3.3 million cumulative days, often fueled by pandemic-related work frustrations. *See* ILR Worker Institute, Labor Action Tracker – Annual Report 2021 (Feb. 21, 2022).

B. CONSTITUTIONAL PROTECTIONS FOR STRIKES AND PROEST

On page 747-748, replace Note 3 with:

3. *First Amendment protection for labor picketing.* Under modern First Amendment jurisprudence, although some laws limiting picketing would be upheld as reasonable time, place, and manner restrictions, provisions that prohibit labor picketing would run afoul of many rules: they are content-based and often discriminate based on viewpoint (by proscribing speech that seeks to deter people from dealing with certain businesses but not speech that encourages it). In *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), the Supreme Court struck down a city ordinance that limited the use of outdoor signs advertising temporary events. The unanimous Court stressed that the ordinance was unconstitutional because it discriminated among signs based on their content and was not narrowly tailored to serve a compelling government interest. Can the NLRA's restrictions on picketing in sections 8(b)(4) and 8(b)(7) (covered in detail later in this chapter) be upheld in light of *Reed*? *See* Catherine L. Fisk, *A Progressive Labor Vision of the First Amendment*, 118 Columbia L. Rev. 2057 (2018) (arguing that, under recent Supreme Court precedent, labor picketing and secondary boycotts are speech protected by the First Amendment and that labor law prohibitions on them are not narrowly tailored to serve a compelling government interest); *but see* NLRB v. Int'l Ass'n of Bridge, Structural, Ornamental, & Reinforcing Iron Workers, Local 229, 941 F.3d 902 (9th Cir. 2019) (holding that recent cases do not undermine earlier Supreme Court authority upholding the constitutionality of section 8(b)(4)), *cert denied* 2021 U.S. Lexis 2690.

On page 749, replace subsection c with the following:

c. **The Rat.** The colloquial term "rat" among unionized construction workers refers to a nonunion employer or nonunion workers. In labor disputes all over the country, particularly those involving the construction trades, labor activists have begun using pictures of rats, people dressed up in rat costumes, inflatable balloons in the shape of rats, and other references to rats. Courts reached conflicting results on which uses of rat language, costumes, and images were permissible, but most recently the Board had concluded that rat displays are not picketing or coercive and therefore do not violate the NLRA. *Sheet Metal Workers Int'l Ass'n, Local Union 15*, 356 N.L.R.B. No. 162 (2011). *See also Tucker v. Fairfield*, 398 F.3d 457 (6th Cir. 2005) (finding a 12-foot rat balloon to be protected speech that could not be enjoined under a city ordinance that prohibits establishing a "structure" on a public right of way); *San Antonio Comm. Hosp. v. S. Calif. Dist. Of Carpenters*, 125 F.3d 1230 (9th Cir. 1997) (displaying a sign at a hospital saying "This building is full of rats" and explaining in smaller letters the colloquial meaning of "rat" was defamatory and therefore not protected speech). In late-2018 and 2019, the NLRB's General Counsel and Advice Division pressed for a course correction by seeking to enjoin and solicit Regional complaints against rat and other pest-related balloons displayed in front of neutral employers. *See King v. Construction & General Building Laborers' Local 79 et al*., 1:19-cv-03496 (E.D.N.Y. July 1, 2019); NLRB Advice Memorandum, *Int'l Brotherhood of Electrical Workers*, 13-CC-225655 (20, 2018). Then, in late-2020, the Board invited amici to comment on the issue, also signaling the possibility of a policy reversal. However, early in his term the Acting General Counsel moved to withdraw all pending litigation and the Board, in a 3-1 decision, definitively held that displaying "an inflatable rat near the entrance of a neutral employer, without more, does not 'threaten, coerce, or restrain' the neutral." *See Lippert Components, Inc.*, 25-CC-228342 N.L.R.B. (Jul. 21, 2021). Do you agree with such a broad statement of the rule? Should it matter whether the rat display is directed toward a construction site or a hospital? Should it matter whether

the rat appears menacing or humorous? What if there is evidence that the display caused a consumer or employee to turn back or fear some sort of confrontation?

On page 797, strike the law review citation and replace it with the following:

Douglas E. Ray & Christopher David Ruiz Cameron, *Revisiting the Offensive Bargaining Lockout on the Fiftieth Anniversary of American Ship Building Company v. NLRB*, 31 ABA J. Lab. & Emp. L. 325 (2016).

C. STATUTORY PROTECTIONS FOR EMPLOYEE PROTEST

On page 762, add the following paragraph at the end of bullet point "c" (The Effect of the no Strike Clause)

Additionally, and if you recall from Chapter 2, the Supreme Court has held that a union remains bound to a valid no strike clause despite the special protections afforded by Section 502 of the LMRA to employees who refuse to work because "abnormally dangerous condition for work." Gateway Coal v. United Mine Workers, 414 US 368 (1974). The union will be in breach of the no strike clause, unless the union can present "ascertainable, objective evidence supporting its conclusion that an abnormally dangerous condition for work exists." Good faith, which is generally sufficient to protect workers under Section 502, is not sufficient for workers who want to engage in 502 refusals to work if they are covered by a no strike clause.

E. STATUTORY PROTECTIONS FOR EMPLOYERS: SECONDARY ACTIVITY

On page 827, add the following as a new Note 5:

5. *Mixed Objects*? Labor organizations, like anyone, can have mixed motives. Should a union be able to escape a secondary activity charge if the pressure it exerts rests on dual objectives—a legal primary motive together with an illegal secondary motive? Courts say "no." *See Tri-Gen Inc. v. Int'l Union of Operating Engineers, Local 150,* 433 F.3d 1024, 1034 (7th Cir. 2016) ("[I]t is not necessary to find that the sole object of the strike was secondary so long as one of the union's objectives was to influence the secondary employer to bring pressure to bear on the primary.").

On page 853, strike the final partial sentence and replace it with the following:

The Board's current rule is that banners and rats are not coercive and, therefore, not unlawful. While the Trump Administration's General Counsel had pressed the agency to reverse that interpretation—and the Board solicited amicus briefs on the issue—the new acting head of the agency has committed to preserving existing law. In July 2021 the Board itself reaffirmed the legality of rats and banners under Section 8(b)(4). *See Lippert Components, Inc.*, 25-CC-228342 N.L.R.B. (Jul. 21, 2021).

On page 859, in the paragraph below "NOTE," replace the sentence in the parenthetical with the following:

(Note the similarity between the analysis used to identify what is "coercive" within the meaning of § 8(b)(4) and the analysis, see note 5 on p. 748 above, used to determine what is "picketing" that receives lesser First Amendment protection.)

On page 860, add example (f):

(f) UNITE HERE members leave voicemails for representatives of professional organizations, research and use their otherwise private email addresses, and "tag" them in a voluminous number of public tweets describing (with some evidence) mold, asbestos, rodent, and lead issues at a Hilton Hotel to pressure the groups to cancel conferences scheduled at the hotel. Coercive? *See* CP Anchorage Hotel 2 LLC v. UNITE HERE Local 878, 2021 WL 4558370 (D. Alaska Sept. 3, 2021) ("[S]ocial media messages 'pose very little risk of harming an unwilling or captive listener; after all, anyone can unsubscribe from Twitter.'").

B. WORKPLACE SELF GOVERNANCE UNDER THE COLLECTIVE BARGAINING AGREEMENT

1. Enforcing the Agreement to Arbitrate

On page 886, at the end of Note 4

AT&T Technologies, 475 U.S. 643, provides that issues of substantive arbitrability are for courts to decide "unless the parties clearly and unmistakably provide otherwise." Id. at 649. What does "clearly and unmistakably" mean?

In *Culinary Workers Union Local 226 v. Mirage Casino-Hotel, Inc.*, 911 F.3d 588 (9th Cir. 2018), the employer claimed that the union had agreed to submit the issue of arbitrability to the arbitrator, and thus that the union's challenge to the arbitrator's decision that the particular grievance was not arbitrable should have been dismissed. At the arbitration hearing, and in response to the employer attorney's claim that the grievance was not subject to arbitration (both because of a timeliness issue and a question about the employer's identity), the union's attorney responded indicating that the employer's identity argument sounded more "on the merits than it is on procedural arbitrability." During the hearing, the Union did not offer argument or evidence regarding what it deemed a substantive arbitrability issue. Following the hearing, the parties agreed to submit briefs regarding the arbitrability issue. The employer address both the timeliness and substantive arbitrability issue, while the union only addressed the timeliness issue, noting that it considered the issue regarding the employer's identity to go to the merits of the case, and thus an issue that would be addressed when the parties submitted their briefs to the arbitrator on the merits of the case.

The arbitrator found in favor of the employer on the grounds that the employer's identity issue made the grievance non-arbitrable. The Court of Appeals reversed the district court's decision upholding the arbitrator's ruling. According to the Court of Appeals, *AT&T Technologies*, and later Supreme Court cases like *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), made it clear that "silence and ambiguity cannot commit the question of arbitrability to an arbitrator." Thus, were the union did not present any argument on substantive arbitrability to the arbitrator because it believed that the employer's arbitrability argument was directed to the merits, the parties had not clearly and unmistakably agreed to let the arbitrator decide the substantive arbitrability issue.

On page 887, add to Note 6

In *Pittsburgh Mailers Union Loc. 22 v. PG Publishing Co.*, 30 F.4th 184 (2022), the U.S. Court of Appeals for the Third Circuit considered whether the arbitration clause itself survives the expiration of the collective bargaining agreement. In 1994, the Third Circuit had held that arbitration clauses might survive the expiration of a collective bargaining as part of a new implied-in-fact agreement, unless both parties intended the term not to survive or unless either party objectively manifested to the other a particularized intent to disavow the arbitration clause.

Luden's Inc. v. Loc. Union No. 6 of the Bakery, Confectionery & tobacco Workers Int'l Union, 28 F.3d 347 (3d Cir. 1994). Relying on the U.S. Supreme Court's decision in *M&G Polymers USA LLC. V. Tackett* 574 U.S. 427 (2015) (discussed below in Section D.2), in which the Court applied "ordinary principles of contract law" to the question of deciding which provisions survived the expiration of a collective bargaining agreement, the Third Circuit noted that arbitration provisions are matters of consent, and as such, unlike terms like wages, hours and terms and conditions of employment, are not required by the NLRA to continue in effect during the negotiation of a new agreement. Thus, under ordinary principles of contract law, if the arbitration provision does not have its own durational clause, the general duration clause of the collective bargaining agreement applies. In the instant case, the arbitration provision did not provide a durational limit of its own and thus, they expired when the agreement expired.

On page 887, add as new Note 8

8. Thus, questions of substantive arbitrability are decided by the court, while questions of procedural arbitrability are decided by the arbitrator.

Who decides whether the arbitrator was validly appointed to serve as the arbitrator? *Liberty Maritime Corp.*, ---F.3d---, 2021 WL 2096367 (D.C. Cir. 2021) involves the appointment of a panel of arbitrators under the procedures in the collective bargaining agreement. These provisions called for the formation of a "Licensed Personnel Board" charged with resolving any grievances. The Board was to be comprised of four representatives evenly chosen by the parties. An arbitrator, appointed by mutual agreement was to serve as the chair of the Board. For years, the parties mutually ignored these provisions, instead appointing arbitrators by mutual agreement on an adhoc basis. When in 2019 the employer decided to invoke the provisions of the collective bargaining agreement, the union objected. Despite the objections of the union, the employer-appointed members of the board selected an arbitrator. The union brought action in district court challenging the arbitrator's appointment. The district court referred the parties to arbitration finding that the dispute over the validity of the arbitrator's appointment should be resolved by the arbitrator. The U.S. District Court for the District of Columbia Circuit reversed. While the court recognized the traditional procedural/substantive arbitrability divide, the court appeared to single out a subgroup of procedural arbitrability issues. The court recognized that questions regarding the selection of the arbitrator might be consider procedural issues like questions of waiver, timeliness, notice and estoppel. However, the court noted that the "pivotal question" was not whether the issue was a procedural issue but whether the issue was one that the partied would likely expect to be resolved by the court and thus, was presumptively for the court to resolve. The court found that questions regarding the arbitrator's selection process was one which the parties would have expected to be resolved by the court, particularly where there was no clear and unmistakable evidence that in this case the parties intended to give authority to the arbitrator to decide that issue.

A similar vexing question was raised in *MZM Construction Co. v. New Jersey Building Laborers Statewide Benefit Funds*, 974 F.3d 386 (3d Cir. 2020). The case involved what the Third Circuit Court of Appeals described as the "mind bending" question of "Who decides—a court or an arbitrator—whether an agreement exists, when the putative agreement includes an arbitration provision empowering an arbitrator to decide whether an agreement exists?" The case arose from a dispute over contributions to a union's statewide benefit funds by an employer who just had

signed a one-page short-form agreement which referred to two other collective bargaining agreements. The employer never signed other documents. The two referenced collective bargaining agreements required the employer to make contributions to statewide funds and also included an arbitration provision. When the dispute regarding contributions arose, the representatives of the funds sought arbitration. The employer filed a complaint seeking to enjoin the arbitration, claiming among other things that the fund had committee a fraud in the execution of the short-form agreement. In deciding whether the employer's contract defense (that it never intended to execute the short-form agreement incorporating the two collective bargaining agreements), should be decided by the arbitrator of the court, the Third Circuit consider two lines of precedent, both developed under the Federal Arbitration Act (FAA): cases holding that absent a specific challenge to an arbitration clause, a court must refer any challenges to the arbitrator; and, cases holding that the FAA requires courts to decide questions about the formation of a valid arbitration agreement. The court found that even though the employer was not challenging the arbitration clause itself, and thus under the severability doctrine the dispute should have been referred to arbitration, disputes as to whether the parties have agreed to arbitrate at all (i.e., whether there was a contract) must be resolved by the court. "Otherwise" noted the court, "arbitrators would be allowed 'to determine their own jurisdiction, something that is not permitted in the federal jurisprudence of arbitration.'" (Id. at 398).

On page 887, add as new Note 9

9.No federal statute of limitations expressly applies to Section 301 actions, including actions by the parties seeking to compel arbitration. In such cases, parties have proposed using the state's breach of contract claims which usually run for several years, or alternatively, the six-month period for the filing of unfair labor practices provided in Section 10(b) of the NLRA. Most circuits have held in favor of using the six-month period. See, *United Government Security Officers of America Int'l Union v. American Eagle Protective Service Corp.*, 956 F.3d 1242 (10th Cir. 2020).

A Note on Arbitration in Non-Union Settings

On p. 889, at the end of paragraph that starts "As discussed in Chapter 2 …"

Following the Supreme Court's holding in *Epic Systems*, the Board has provided additional guidance regarding the validity of arbitration provisions limiting the ability of employees to arbitrate their claims collectively. For instance, and relying on the U.S. Supreme Court guidance in other FAA cases that the mandate that arbitration agreements are to be enforced as written pursuant to the FAA and may be overridden only by contrary congressional command (*Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987)), the Board held that such a contrary congressional command with respect to arbitration agreements that interfere with the right of employees to file charges with the Board, is found under Section 10(a) of the NLRA. Where the arbitration provision explicitly prevents employees from filing charges with the NLRB, or could reasonably be interpreted that way, the Board has found a violation of the Act. See *Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10 (2019); *Beena Beauty Holding, Inc.*, 368 NLRB No. 91 (2019); *E.A. Renfro & Co.*, 368 NLRB No. 147 (2019). Similarly, an arbitration agreement providing that "This agreement applies to all disputes involving legally-protected rights

(e.g., local, state and federal statutory, contractual or common law right(s) regardless of whether the statute was enacted or common la doctrine was recognized at the time this agreement was signed" was found to violate the Act, even though the arbitration provision also stated that "This agreement does not limit an employee's ability to complete any external administrative remedy (such as with the EEOC) …" *Brinker Int'l Payroll Co.*, 370 NLRB No. 137 (2021). On the other hand, arbitration provisions containing language that makes it clear to employees that they are not prohibited from filing claims with the NLRB (the so-called "saving clause"), have been found to be in compliance the Act. See *Briad Wenco*, 368 NLRB No. 72 (2019).

In a similar vein, in *Lamps Plus., Inc. v. Varela*, 139 S.Ct. 1407 (2019), the Supreme Court reversed a lower court ruling which had allowed a group of employees to pursue a class-wide arbitration on the grounds that their employment contract contained a provision that could have been interpreted to allow for class arbitration. The Supreme Court found that a clear statement authorizing class-based arbitration was required under the FAA before those actions were allowed to proceed.

On p. 889, add at the end of paragraph that starts, "There is considerable evidence …"

An interesting development which might diminish the enthusiasm with which employers have adopted arbitration provisions involves efforts by employees to file mass-individual claims, and then require the employer to pay the filing fees required to initiate the arbitration process (which are common in employment arbitration provisions, and which could amount to as much as $2,000 in some cases.) Unsurprisingly, employers have been reluctant to pay those fees. See, *Abernathy, v. DoorDash*, 438 F. Supp.3d 1062 (N.D. Cal. 2020).

California Bill 707, effective January 1, 2020, imposes monetary sanctions for failing to pay arbitration fees and costs within 30 days of the due date in employment and consumer arbitrations, further reducing the desirability of these arbitration provisions. In *Postmates Inc., v. 10,356 Individuals*, 2:20-cv-02-2783 (Jan. 19, 2021), a federal district court held that the California law is not preempted by the FAA because it does not invalidate arbitration agreements.

2. Enforcing the Arbitration Award

On p. 894, add at the end of Note 4

Similarly, the U.S. Court of Appeals for the Third Circuit refused to enforce an arbitration award in a case involving the interpretation of a vacation scheduling provision. The collective bargaining agreement contained a provision providing that "[v]acation will, **so far as possible**, be granted at times most desired by employees; **but** the **final** right to allow vacation periods, and the right to change vacation periods[,] is **exclusively** reserved to the **Hospital**." (Emphases added by the court.) The Union filed a grievance on behalf of an employee who was denied the vacation leave of her choice. The arbitrator found in favor of the Union on the grounds that the "so far as possible" language controlled over the more specific "final right" language that gave the hospital the right to determine vacation schedules. Accordingly, the arbitrator held that notwithstanding the employer's reservation of an exclusive right to determine vacation schedules, the agreement prevented it from denying senior employees in the bargaining unit their desired vacation when

there was no "operating need." While recognizing the "heavy degree of deference" given to arbitrators, the court declined to enforce the award. The court found that the award ignored the contract's plain language. The court noted, "'[s]o far as possible' cannot hold hostage what follows…" Further, the court chastised the arbitrator for creating a right for senior employees to obtain their desired vacation unless there was a showing of "operational need," a term that was not found anywhere in the collective bargaining agreement. *Monongahela Valley Hospital Inc. v. United Steel Paper and Forestry Rubber Manufacturing Allied Industrial and Service Workers Int'l Union*, 946 F.3d 195 (3rd Cir. 2019).

On p. 900, add at the end of Note 4

The *functus officio* doctrine also provides grounds for courts to refuse to enforce arbitral awards when the arbitrator, after issuing a decision, attempts to revise that decision without the parties' consent. In *Verizon Pennsylvania LLC v. Comm. Workers of America Local 13000,* 13 F.4th 300 (4th Cir. 2021), the Board of Arbitration (the arbitral panel provided in the collective bargaining agreement) held that the employer had violated the terms of the collective bargaining agreement when it allowed for customers a self-installation option for one of the service the employer provided, instead of having unit employees complete the installation. In its award, the Board of Arbitration referred the issue of money damages back to the parties and retained jurisdiction in case the parties could not reach an agreement. The parties failed to reach an agreement and submitted the remedy issue back to the arbitration board. In deciding the remedy issue, the Board of Arbitration went further by expanding the scope of the violation identified in the initial award. The Court of Appeals for the Fourth Circuit affirmed the District Court's Order vacating the remedy award noting that such revisions were precisely what the *functus officio* doctrine was designed to prevent.

D. THE INDIVIDUAL AND THE COLLECTIVE PROCESS

1. The Union's Duty of Fair Representation

a. Origins of the Duty of Fair Representation

On p. 941, add as new Note 5

As noted earlier, the political makeup of the Board and the General Counsel has clearly influenced the approaches the Board has taken to various enforcement issues. Add to that list the decision to prosecute duty of fair representation cases under Section 8(b)(1)(A). On October 2018, General Counsel Peter Robb issued a memorandum indicating that:

> "In cases where a union asserts a mere negligence defense based on its having lost track, misplaced or otherwise forgotten about a grievance, whether or not it had committed to pursue it, the union should be required to show the existence of established, reasonable procedures or systems in place to track grievance, without which, the defense should ordinarily fail."

> Similarly, a union's failure to communicate decisions related to a grievance or to respond to inquiries for information or documents by the charging party … constitutes more than mere negligence and, instead, rises to the level of arbitrary conduct unless there is a reasonable excuse of meaningful explanation."

Office of the General Counsel, Memorandum GC 19-01 (Oct. 24, 2018).

The U.S. Court of Appeals for the Sixth Circuit, however seems to be pushing back against the type of expansion suggested by General Counsel Robb. In *UAW v. NLRB*, 956 F.3d 345 (6th Cir. 2020), the court found that a union violated its duty of fair representation where it failed to process an employee's request to resign his union membership, resulting in the employee having to pay dues for three months. The court adopted the Board's findings that the explanation given by the union's financial secretary for the delay was "vague and less than credible," and that the union had demonstrated ill will and intent towards the employee by "responding reproachfully" and "excoriating" the employee throughout the process. The court, thus characterized the union's conduct as falling under the "bad faith" category described in *Vaca v. Sipes*. Importantly, the court noted that "mere negligence" does not establish a claim for breach of the duty of fair representation, declining to enforce also a different part of the Board's order finding that the union violated Section 8(b)(1)(A). The court disagreed with the Board's contention that "intent is not a required element of an 8(b)(1)(A) violation."

On January 20, 2021, in one of his first acts as President, Joe Biden fired NLRB General Counsel Peter Robb after he refused to resign. President Biden's dismissal of Robb was controversial because the NLRA does not expressly say that the General Counsel serves at the pleasure of the President and precedent is mixed on the President's power to remove the appointed and confirmed officers of independent agencies. Robb's removal was subject to judicial challenge. In Exela Enterprise Solutions, Inc. v. NLRB, 32 F.4th 436 (5th Cir. 2022), the U.S. Court of Appeals for the Fifth Circuit upheld President Biden's decision to remove Robb. The court held that the "President's power to remove is essential to the performance of his Article II responsibilities" and that because the "NLRA does not provide tenure protections to the General Counsel of the Board," the President lawfully removed the General Counsel without cause. Id. at 445.

On February 1, 2021, NLRB Acting General Counsel Peter Sung Ohr rescinded a slew of General Counsel Memos issued by his predecessor, Peter Robb, including Memorandum GC 19-01. Ohr rescinded the memos indicating that he believed they were no longer necessary and were not consistent with the purpose of the NLRA to foster collective bargaining. Acting General Counsel Ohr indicated that new directives would be forthcoming. On July 22, 2021, Jennifer A. Abruzzo was sworn in as President Biden's appointment as General Counsel for the NLRB. Ms. Abruzzo had previously worked for the Board for over two decades, including as Field Attorney, Supervisory Field Attorney, Deputy Regional Attorney, Deputy Assistant General Counsel, Deputy General Counsel, and Acting General Counsel. Immediately prior to her appointment as General Counsel, Ms. Abruzzo served as Special Counsel for Strategic Initiatives for the Communications Workers of America.

b. The Duty of Fair Representation: substantive Standards of Conduct

On p. 949, add as new note 5.

5. A group of flight instructors, who were represented by the same union which represented line pilots, brought a DFR claim under the RLA. The claim arose from the decision regarding how to allocate a sum of money obtained by the union (ALPA) as retroactive pay for the period in which the parties were negotiating the contract. The union delegated the task of devising a formula to allocate the retroactive pay to a committee. The committee adopted a formula that was much more favorable to line pilots than to flight instructors. In upholding a summary judgment order in favor of the union, the U.S. Court of Appeals for the Seventh Circuit addressed the "arbitrary, discriminatory, or made in bad faith" standard of *O'Neill*. The court defined arbitrary as involving a decision "so far outside" the range of reasonableness that it becomes "wholly irrational." Discriminatory was defined as showing that the union "acted (or failed to act) due to an improper motive. "Bad faith" was defined as involving a situation where the union made decisions "'solely for the benefit of a stronger, more politically favored group over a minority group.'" *Bishop v. Air Line Pilots Association International*, 2021 WL 2980705 (7th Cir. 2021).

c. Duty of Fair Representation: Enforcement Procedures and Remedies

On p. 950, at the end of the section

"No collusion, no collusion" – In the context of the RLA, plaintiffs have contended that even where the employer has not breached its own obligation under a collective bargaining agreement, the employer might be liable if it colluded with the union's breach of its duty of fair representation. In *Beckington v. American Airlines*, 926 F.3d 595 (9th Cir. 2019), the plaintiffs, a group of pilots challenging the union's decision regarding a merging of seniority lists, brought action against their employer for colluding with the union by participating in a series of "mostly attorneys-only meetings" and failing to evaluate the union's proposal in a manner that was protective of the plaintiffs' interests. The Court of Appeals for the Ninth Circuit declined to extent the duty of fair representation to impose liability on an employer solely for "colluding" in a union's breach of the duty. The court found no support in the text of the RLA, and also found the plaintiff's theory inconsistent with the RLA's collective bargaining framework. According to the court, nothing in the text of the RLA or the framework provided by the statute "imposes on employers an additional duty to bargain with the interests of particular employees in mind or to ensure that the union does so." The court distinguished the plaintiffs' theory from the hybrid cases, noting that while in hybrid cases the plaintiffs may allege collusion as a basis for jurisdiction, "collusion is not the basis for liability."

2. Rights of Retirees

On p. 959, at the end of Note 1

Does the Supreme Court's approach in *Tackett* expose employees to potential abuse by employers? In her dissenting opinion in *Zino v. Whirlpool Corp.*, 763 Fed. Appx. 470 (6th, 2019),

Judge Jane Stranch, argues that it does. In a case challenging the employer's decision to reduce retirees "lifetime, unalterable healthcare benefits," she noted:

> "This case is not an aberration. Over and over again, companies promised their retirees lifetime healthcare benefits. But now, over and over again, we find that the contracts they negotiated unambiguously state the opposite. We thereby avoid the mountains of evidence that the parties intended exactly what they promised. I think that we have moved beyond the parameters articulated by the Supreme Court when we presume the necessity of a clear statement rule. And I find that requirement sadly ironic. In these cases, the contractual language was negotiated in a legal environment in which everyone understood it to constitute an ongoing promise, the employer publicly and repeatedly reiterated that promise in word (both spoken and written) and in deed, and working men and women relied on that promise."

3. Super-Seniority and Hiring Halls

On page 968, at the end of Note 1

The following two cases illustrate the type of conduct that has been held to violate a union's duty of fair representation in the context of the operation of hiring halls. In *International Alliance of Theatrical Stage Employees (IATSE) Local 8 v. NLRB*, 2022 WL 186039 (3d Cir. 2022), the Union operated an exclusive hiring hall in which the union could designate some employees as members of a "house crew" that had priority in obtaining work at a particular convention center. In 2018, an employee was removed from the house crew after receiving an email from the union's president admonishing him for complaining about the operation of the hiring hall. After further complaints, the employee was removed from the house crew. The employee filed an unfair labor practice charge challenging his removal. The Board affirmed the Administrative Law Judge decision finding that the union violated Section 8(b)(1)(A) of the NLRA by removing the employee for questioning work assignments and by bringing internal union charges against him. In affirming the Board's decision, the U.S. Court of Appeals for the Third Circuit noted that in the union hiring hall context, where a union causes a worker from being hired, "a rebuttable presumption arises that the interference is intended to encourage union membership" in violation of the Act. The court noted that the Board had discredited the union's contention that the employee had been removed from the house crew because there had been a reduction in force or because the employee had self-solicited work.

In another case involving a different local of the same union (IATSE), the Board affirmed the Administrative Law Judge's conclusion that the union had violated Section 8(b)(1)(A) by maintaining a policy (the "Worker Information Policy") that required users of the exclusive hiring hall to obtain a subpoena or have other compelling reasons to request another user's records. *IATSE Local 16 and David Jury*, 371 NLRB No. 100 (2022). The Board's adopted the ALJ's reasoning that the policy arbitrarily prohibited and placed unnecessary burdens on the ability of employees to obtain information to which they would be entitled in a fairly administered hiring hall. The union argued that it did not breach its duty of fair representation by adopting the Worker Information Policy because under existing law it was entitled to a "wide range of reasonableness

in implementing a work rule or policy. The ALJ rejected the union's argument noting that the reasonableness argument was inapplicable in the context of an exclusive hiring hall. The ALJ concluded that a rule prohibiting users of the hiring hall to get the contact information of other users, interfered with the ability of all users to verify that they were being referred fairly and thus violated the Act.

E. THE CONTRACTUAL GRIEVANCE PROCEDURE AND "EXTERNAL" PUBLIC LAW

1. The Grievance Procedure and the NLRB

On p. 971, before paragraph that starts, "The Board confronted the question of how …"

The *Babcock & Wilcox*'s approach was relatively short lived, as in 2019 the Board reverted to the post-arbitral deferral standards as defined in *Spielberg Mfg. Co.* and *Olin Corp.* Under the restored standard the Board will defer to the arbitrator's decision where (1) the arbitral proceedings were fair and regular, (2) all parties agreed to be bound, (3) the contractual issue was factually parallel to the unfair labor practice issue, (4) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice issue, and (5) the arbitrator's decision was not clearly repugnant to the purposes and policies of the Act. *United Parcel Services*, 369 NLRB No. 1 (2019).

The case involved an employee who was fired for violating the employer's package delivery procedures. Before his termination, the employee, who had been a union steward, opposed the ratification of prior collective bargaining agreements, and had unsuccessfully ran for local union office against a longtime business agent. The employee filed a grievance, which was ultimately reviewed by a joint-grievance panel consisting of equal representation from the union and the employer. The employee testified at the hearing and was represented by the business agent whom the employee had challenged in an election. The panel upheld the disciplinary action and the employee filed an unfair labor practice charge with the Board. Applying the Board's decision in *Babcock v. Wilcox*, the administrative law judge rejected the employer's argument that the Board should defer to the joint-panel's decision, and found that the employee's dismissal was unlawful. The Board reversed the administrative law judge's decision.

The Board justified its decision to return to the *Spielberg* and *Olin* standards on the grounds that the *Babcock & Wilcox* standard was based on the inaccurate and unproven presumption that there was an "excessive risk" that arbitrators would not be able to appropriately consider the statutory issues implicated in discharge and discipline cases. The Board pointed to the Federal Arbitration Act and "the overwhelming body of judicial precedent voicing confidence in, and strong preference for" resolution of disputes through the arbitration process.

In *Atkinson v. NLRB*, 2021 WL 2850565 (3d Cir. July 8, 2021), the U.S. Court of Appeals for the Third Circuit upheld the Board's decision to return to the *Olin Corp.* standard. The court agreed with the Board, that the *Olin Corp.* standard encouraged parties to rely on the arbitration process rather than trying to circumvent the proceeding by taking grievances to the Board and that it also was faithful to the Board's mandate to prevent unfair labor practices. The court, however,

remanded the case to the Board for further proceedings given that the Board had failed to explain why it found that the grievance process had been fair and regular (one of the prompts of the *Olin Corp.* standard.)

On p. 985, add to Note 5

As noted above, in *United Parcel Service*, the Board deferred to exactly that process, even in a situation in which the employee who initiated the grievance had experienced disagreements with the union, and where the business agent who represented the employee during the grievance process was the same person that the employee had challenged in a local union election. The Board quickly dismissed the argument that the panel members, or the business agent representing the employee were biased, as "mere speculation."

On p. 985, add as new Note 6

In addition to overruling *Babcock v. Wilcox*, in *United Parcel Service* the Board also restored the policies regarding pre-arbitral deferral established in *United Technologies Corp.*, and those regarding deferral to pre-arbitral settlement agreements as established in *Alpha Beta Co.*, 273 NLRB 1546 (1985).

On p. 985, add as new Note 7

Offensive Use of Deferral? On November 2019, the Board's General Counsel Office issued a memorandum titled "Deferral of Cases Arising Under *MV Transportation, Inc.*, 368 NLRB Bo. 66 (2019)." *MV Transportation* dealt with the issue of union challenges to situations where employers attempt to make unilateral changes to terms of employment. In there, the Board held that in deciding those challenges, it will focus on whether the unilateral change falls within the scope of the management's rights clause, and it will no longer require the employer to show that the union waived its right to bargain over the term in question. In the 2019 memorandum, the General Counsel Office states that in cases involving unilateral changes, and where the union has filed a grievance, the region should defer to arbitration under *Dubo Mfg. Corp.* Importantly, the memorandum also notes that where the union has not filed a grievance, "if an employer urges deferral and gives assurances not to raise timeliness or procedural objections to processing and arbitrating a grievance, the union may be required to pursue a grievance or have the charge dismissed."

2. Grievance Arbitration and Statutory Claims

On p. 997, following the first paragraph of note 5

The evolving nature of "clearly and unmistakably" - Employee brought a class action lawsuit against her employer alleging that the employer had violated the Fair Labor Standards Act and several state statutes (referred to as "Covered Statutes"), by failing to pay overtime and spread-of-hours pay. The collective bargaining agreement applicable to the employee provided that "all claims brought by either the Union or Employees, asserting violation of or arising under the Fair Labor Standards Act …, [and the Covered Statutes], in any manner, shall be subject exclusively,

to the grievance and arbitration procedures described below…" The arbitration procedure then provided that "In the event and Employee has requested, in writing, that the Union process a grievance alleging a violation of the Covered Statutes and the Union declines to process a grievance ..., an Employee solely on behalf of himself/herself, may submit their individual claim to mediation, or following the conclusion of mediation, to arbitration." The District Court found that the "may submit" language indicated that employees may choose whether to arbitrate or pursue their claims in court, and thus refused to mandate the plaintiff to arbitrate. The Court of Appeals for the Second Circuit reversed holding that the collective bargaining agreement's "all claims brought" language clearly and unmistakably required all statutory disputes related to wages and hours to be arbitrated. According to the court, the "may submit" provision, merely restated the obvious, that is, that in cases where the union decided not to pursue a grievance, the employee had the choice of continuing the process by submitting the claim to arbitration or stop the process by deciding not to go to arbitration. *Abdullayeva v. Attending Homecare Services LLC*, 928 F.3d 218 (2d Cir. 2019).

Another issue involves the degree of specificity required in the arbitration clause for it to satisfy the "clearly and unmistakably" language. Some courts have drawn bright-lines requiring the arbitration provision to explicitly mention the statutes which will fall under the arbitration provision, *Cavallaro v. UMass Mem'l Healthcare, Inc.*, 678 F.3d 1 (1st Cir. 2012), while other courts have required less specificity. For example, the U.S. Court of Appeals for the Third Circuit only requires that the "collective bargaining agreement, interpreted according to applicable contract-interpretation principles, clearly and unmistakably waives a judicial forum for statutory claims." *Darrington v. Milton Hershey School*, 958 F.3d 188 (3d Cir. 2020). Applying this standard, the court found that while an arbitration provision that read that the union and the employee waived "any right to institute or maintain any private lawsuit alleging employment discrimination in any state of federal court regarding the matters encompassed within the grievance procedure" was broad, it clearly and unmistakably included claims arising under Title VII of the Civil Rights Act and under the state's human rights act. Accordingly, the court order the plaintiffs to arbitrate those claims.

3. Arbitral Consideration of Public Law Claims

On p. 1007, following the first paragraph of note 1

What would the result have been if the collective bargaining agreement made a more general reference to applicable statutes? In *Ameren Illinois Co. v. International Brotherhood of Electrical Workers, Local Union 51*, 906 F.3d 612 (2018), the grievant was terminated for violating the employer's policy prohibiting "the possession of unauthorized weapons … on Company parking lots." The union filed a grievance contending that the employer did not have just cause to terminate the grievant. The arbitrator found for the grievant, noting that the grievant possessed a valid license to carry the weapon under state law, and that the state law expressly permitted individuals to store their firearms in their vehicles on private property unless the owner of the property posted signs indicating that firearms were prohibited. The employer had no posted such signs, and thus the arbitrator concluded that the state law "serve[d] to prohibit the Employer from enforcing its rule" against the Grievant. The district court vacated the arbitrator's award on the ground that the arbitrator improperly applied external law to contradict the terms of the

contract. The Seventh Circuit Court of Appeals affirmed the arbitrator's award even though it disagreed with the arbitrator's rationale. In particular, the court relied on a provision in the collective bargaining agreement, which both the arbitrator and the district court had overlooked, which provided:

> "Any provisions of this Agreement found by either party to be in conflict with State or Federal statutes shall be suspended when such conflict occurs and shall immediately thereafter be reopened for amendment to remove such conflict."

According to the court, this provision "firmly establishe[d] the intent of the parties to bring external law … within the scope of the bargain."

In the cases discussed in this section, the issue is whether the arbitration process is the correct forum for resolving disputes that involve interpretation of public law. A related issue which we treat in Chapter 10 as it raises preemption concerns, is whether the court is the correct forum to resolve cases that at the core involve the interpretation of the collective bargaining agreement. Section 301 of the LMRA completely preempts state law claims "founded directly on rights created by collective-bargaining agreements, and also claims substantially dependent on analysis of a collective-bargaining agreement." *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987). Applying this reasoning, the court in *Carmean v. Bozzuto Mgmt. Co.*, No. 20 C 5294, 2021 BL 223362, 2021 US Dist. Lexis 111842 (N.D. Ill. June 15, 2021) dismissed a putative biometric privacy class brought by a union-represented employee against his employer arguing that the employer violated a state privacy law in the handling of employee fingerprint data because the employee failed to exhaust the remedies available through a labor contract's grievance process. The court reasoned that resolution of the state law claim would require interpretation of the employee's rights under the collective bargaining agreement, and thus that the state law claim was preempted by Section 301 of the LMRA.

CHAPTER 8: UNIONS AND ACTIVISM: EXPANDING THE BOUNDARIES OF THE MODERN LABOR LAW PRACTICE

Page 1017, at the end of the first full paragraph finish the sentence with the following: "program services, and other external forms of funding." *See* Leslie Gates, Kati Griffith, Zane Mokhiber, and Joseph C. Blazer, *Sizing Up Worker Center Income (2008-2014): A Study of Revenue Size, Stability, and Streams*, in NO SIZE FITS ALL: WORKER ORGANIZATION, POLICY, AND MOVEMENT IN A NEW ECONOMIC AGE (Janice Fine, Linda Burnham, Kati Griffith, Minsun Ji, Victor Narro, and Steven Pitts, eds. 2018).

Page 1019, add the following new citation at the end of note 3: See also SCOTT CUMMINGS, AN EQUAL PLACE: LAWYERS IN THE STRUGGLE FOR LOS ANGELES (2021) (describing legal mobilization and the role of lawyers in various Los Angeles campaigns where worker centers participated).

Page 1030, add the following paragraph at the end of note 3: Recognizing the special vulnerabilities of immigrant workers, the General Counsel, Jennifer Abruzzo has announced the creation of special procedures to handle cases dealing with immigrant workers claiming unfair labor practices. Among its new procedures, the office will seek "immigration relief including deferred action, parole, continued presence, U or T status, a stay of removal, or other relief as available and appropriate, to protect these workers in the exercise of their statutory rights and allow for vigorous enforcement of the Act." In light of *Hoffman Plastics, supra* at Chapter 3, the General Counsel is also seeking that employers pay an amount to a "remedial monetary fund in lieu of backpay." NLRB Office of the General Counsel, Ensuring Rights and Remedies for Immigrant Workers Under the NLRA, Memorandum GC 22-01 (Nov. 8, 2021). The General Counsel is thus showing how the capacious wording of the NLRA's remedial powers, stated in Section 10(c), can provide effective tools in the hands of a strategic and proactive enforcer.

Page 1047, add new paragraph before Section 3: Cross-border…

In 2019, the United States, Canada, and Mexico unveiled their new free trade agreement. The new agreement improved the old NAFTA labor side agreement in a number of ways. *See* Agreement between the United States of America, the United Mexican States, and Canada, Chapter 23 (2019). First, it made the labor provisions integral to the trade agreement; it is no longer a side agreement. Second, as other labor clauses in trade agreements, it incorporated the ILO's core labor standards and explicitly states that the right to strike is contained in the general right to bargain collectively. *Id.* at note 6 ("For greater certainty, the right to strike is linked to the right to freedom of association, which cannot be realized without protecting the right to strike."). While the ILO has held on numerous times that the right to strike is part and parcel of the right to bargain collectively and, thus, of freedom of association, the employer representatives in the ILO have been challenging this notion since on or about 2012, when they objected the ILO hear any freedom of association matters pertaining to the right to strike. JEFFREY VOGT ET AL., THE RIGHT TO STRIKE IN INTERNATIONAL LABOR LAW 9 (2020). That the United States agreed to recognize the right to strike as integral to collective bargaining and freedom of association was thus an important recognition.

Additionally, Annex 23-A of the Labor Chapter makes specific demands on Mexico to better guarantee freedom of association and collective bargaining rights to its workers.

Finally, subject to important conditions, Article 23.17.12 of the new trade agreement subjects disputes arising under the labor chapter to the general dispute resolution process of the trade agreement (Article 31), an innovation whose impact remains to be tested.

CHAPTER 9: ENDING THE COLLECTIVE BARGAINING RELATIONSHIP

B. WITHDRAWAL OF RECOGNITION

On page 1141, insert the following at the end of note 4:

In *Johnson Controls*, 368 N.L.R.B. No. 20 (July 3, 2019), the NLRB partially abrogated its longstanding rule in *Levitz Furniture* and adopted the reasoning of the D.C. Circuit in *Scomas.* The *Johnson Controls* majority discussed the issue of dual signers – those union members who sign both deauthorization cards and petitions proclaiming their support of the union – by explaining that it was unfair to employers who count on those signers in withdrawing recognition only to find later that a union petition "reacquiring" union majority support may have been signed by some of the same workers who earlier indicated they no longer support the union. After *Johnson Controls*, "the Board will no longer consider, in a [ULP] case, whether a union has reacquired majority status as of the time recognition was actually withdrawn. Instead, if the union wishes to reestablish its majority status, it must file an election petition. The Board will process the petition without regard to whether the parties' contract is still in force at the time the petition is filed." 368 N.L.R.B. No. 20, slip op. at 9. The majority also explained that the union "must file an election petition within 45 days from the date the employer announces its anticipatory withdrawal." *Id*. The ruling effectively embraces the rule urged by Member Hurtgen's concurrence in *Levitz Furniture*. *Johnson Controls* purports to modify only the part of *Levitz Furniture* that allows the union to seek signatures in an attempt to "reacquire" majority status. The only avenue for reacquiring majority status after *Johnson Controls* is an election petition. In dissent, Member McFerran called out the majority for flipping two longstanding principles on their head: first, a recognized union is entitled to a continuing presumption of majority support, and second, that a Board-conducted election, not unilateral employer action, is the preferred way to determine whether an incumbent union continues to enjoy majority support.

Do workers' signatures on petitions seem unreliable, whether procured by the employer, the union, or employees? If so, does it make sense that best way to unseat a union that once enjoyed majority support is to hold an election?

D. SUCCESSORSHIP

On page 1167, insert the following after the first paragraph of Note 2:

In *Ridgewood Health Care Center, Inc.*, 367 N.L.R.B. No. 110 (2019), the NLRB clarified and narrowed the scope of the "perfectly clear" exception to *Burns.* In *Ridgewood*, the Board found that a new employer had engaged in discriminatory hiring in order to ensure that its initial cohort of employees would constitute less than half of former employer's unionized workforce. Accordingly, the Board found the new employer to be a successor with an obligation to bargain with the union. But the Board disagreed with an ALJ finding that it was also "perfectly clear" that the new employer would have hired all or substantially all of the former employer's employees requiring the new employer to bargain with the union before setting initial terms and conditions of employment. *Spruce-Up's* extension of the *Burns* exception requiring a successor to bargain with a union about initial terms could be applied when, but for a successor's unlawful discrimination,

it would have hired all or substantially all of the former employer's workforce. In fact, the Board so held in *Loves Barbeque*, 245 N.L.R.B. 78 (1979), *enf'd in part sub nom. Kallman v. NLRB*, 640 F.2d 1094 (9th Cir.1981). However, where, as in the case before it, the unlawful discrimination only involved four employees bringing the successor's hiring to a number barely more than half of former employees, *Burns'* "perfectly clear" language could not be extended. It is not in such a case "perfectly clear" that the successor would hire all or substantially all of the former employer's workforce. In so holding, the Board reversed its holding in *Galloway School Lines*, 321 N.L.R.B. 1422 (1996). According to the Board, "We find that *Galloway* and precedents applying its holding must be overruled. The majority there impermissibly tore the *Love's Barbeque* remedy from its doctrinal roots, and, in so doing, went far beyond the limits of the narrow "perfectly clear successor" exception contemplated by the Court in *Burns.*" In dissent, Member McFerran pointed to facts showing that the new employer promised a number of times that it intended to hire "99.9%" of the former employer's workforce. Moreover, according to McFerran, once there has been a finding that the new employer intentionally discriminated in hiring, "[t]he employer has not made a good faith mistake; but rather has intentionally engaged in an unlawful hiring scheme to get rid of the union." *Id*. at 17. According to McFerran, "resetting initial employment terms in these circumstances is necessary to effectuate the Act's purposes by establishing stability for the employees, restoring the status quo, and removing an incentive for employers to break the law." *Id*.

E. REJECTION OF COLLECTIVE BARGAINING AGREEMENTS IN BANKRUPTCY

On p. 1188, before the paragraph beginning, "In the Detroit municipal bankruptcy," insert the following new paragraph:

The San Bernardino case is a reminder of how contentious labor relations can become in the context of financial distress in the public sector, where the parties commonly play dual roles as both bargaining table adversaries and political actors who can mobilize important constituencies. The crisis in public sector finances occasioned by the ongoing Covid-19 Pandemic will no doubt produce more examples of this. For example, in 2019, a "labor revolt" led by public employee unions in Richmond, Calif. – which was facing a $7.6 million deficit and fears of Chapter 9 bankruptcy proceeding – caused the firing of the city manager, who had been on the job for only 10 months. "You can't put people in charge who don't understand public labor law," the president of the police union warned city council members before the ouster vote. Louis C. LaBrecque, Unions at Work: Labor Revolt Pushes Out California City Chief, Daily Lab. Rep. (Bloomberg BNA), Jul. 30, 2019 (remarks of Ben Therriault of Richmond Police Officers Association), available at https://www.bloomberglaw.com/document/XEIALG64000000?bwid=0000016c-1ef8-db14-abef-5ef913800001&email=0000016c-4323-db51-a17e-633fc70a0000&emc=bdlnw_hlt%3A14&et=CURATED_HIGHLIGHTS&link=eyJjdHh0IjoiRExOVyIsImlkIjoiMDAwMDAxNmMtMWVmOC1kYjE0LWFiZWYtNWVmOTEzODAwMDAxIiwic2lnIjoiRWtlamE4NjZ5dGt2VHBGYVF1RVZnbTlZcGpjPSIsInRpbWUiOiIxNTY0NTE4NzIyIiwidXVpZCI6IkNTWmc3cFRoNXlvRmhnWENNQ25OWVE9PStHbXlUNzVtZ0hZVEg1TWVlU2wweWc9PSIsInYiOiIxIn0%3D&qid=6762949.

F. ANTITRUST AND THE END OF THE COLLECTIVE BARGAINING RELATIONSHIP

On p. 1196, after the paragraph beginning, "In 2016, Seattle Ordinance . . . ," insert the following new paragraph:

In 2021, a bill granting ride-share and delivery drivers the right to unionize and collectively bargain without being classified as "employees," which was opposed by organized labor and workers' advocacy groups, stalled in the New York Legislature. The affected drivers would havehavehave been assigned a new classification: "network drivers." The bill was reported to be the product of negotiations between gig economy firms and some but not all of the state's unions. It was unclear whether such a bill enacted as state law would eliminate the exposure of network drivers to antitrust liability under federal law. *See* Noam Scheiber, Uber and Lyft Ramp Up Legislative Efforts to Shield Business Model, N.Y. Times, Jun. 9, 2021, updated Oct. 21, 2021, available at Uber and Lyft Ramp Up Efforts to Shield Business Model - The New York Times (nytimes.com).

B. GARMON PREEMPTION

On p. 1214, add the following new Note 9:

9. Suppose a state enacts legislation creating a private cause of action for any employee who is disciplined or discharged for refusing to attend a captive audience meeting at which the employer expresses its views about unionization. Traditionally, the regulation of employer speech is governed exclusively by Section 7 and 8 of the NLRA, and therefore, subject to *Garmon* preemption. Suppose further than the General Counsel, instead of waiting for an employee to be disciplined or discharged and exercise her rights under the legislation, brings a Section 10(j) action seeking a declaratory judgment that the legislation is preempted by *Garmon*. Should the General Counsel prevail? Why or why not? *See, e.g., NLRB v. Oregon,* slip op., Case No. 6:20-CV-00203-MK (D. Or. Oct. 9, 2020) (Kasubhai, Mag. J.) (dismissing such action for lack of standing).

On p. 1214, after new Note 9, insert an ellipsis followed by this new text:

* * *

The sweep of *Garmon* preemption is so broad that it can preclude NLRA protection of certain persons who ordinarily are left unprotected by the Act, but sometimes seek refuge under it anyway. Take the case of supervisors. Under Section 2(3), the protections of the NLRA do not extend to "any individual employed as a supervisor." 29 U.S.C. § 152(3). As explained in Chapter 3.C.1, *supra* pp. 301-03, this is because an employer is entitled to insist on the loyalty of supervisorial staff; they are deemed to be aligned with management and to act and speak on behalf of the employer. Therefore, a supervisor is not free to engage in activity that would be protected if engaged in by a rank-and-file employee; if she does so, then she will be precluded from pursuing a ULP charge or otherwise invoking the processes of the Board. *See Florida Power & Light v. Electrical Workers,* 417 U.S. 790, 806-09 (1974).

Nevertheless, at least three basic exceptions to this no-protection-for-supervisors rule have been recognized. *See Automobile Salesmen's' Union Local 1095 v. NLRB,* 711 F.2d 383, 386 (D.C. Cir. 1983). These exceptions include when a supervisor:

- Is disciplined for testifying before the NLRB or processing an employee's grievance, *see, e.g., King Radio Corp. v. NLRB,* 398 F.2d 14 (10th Cir. 1968); *Oil City Brass Works v. NLRB,* 357 F.2d 466 (5th Cir. 1966).

- Is disciplined for refusing to commit an unfair labor practice, *see, e.g., Gerry's Cash Markets, Inc. v. NLRB,* 602 F.2d 1021 (1st Cir. 1979); *Russell Stover Candies, Inc. v. NLRB,* 551 F.2d 204 (8th Cir. 1977).

- Hires his own crew of union adherents and then is discharged by the employer as a pretext for discharging that crew too, *see, e.g., NLRB v. Downslope Industries, Inc.,* 676 F.2d 1114 (6th Cir.1982); *Pioneer Drilling Co. v. NLRB,* 391 F.2d 961 (10th Cir. 1968).

For example, the supervisor of a hotel management organization was discharged for refusing to obey a directive to "discourage employees from engaging in efforts to unionize." The supervisor brought a state law wrongful termination claim asserting retaliation for refusing to perform an illegal act, which was actionable in New Jersey. The employer responded by filing a motion to dismiss based on *Garmon* preemption; it argued that the supervisor's sole remedy was to pursue a ULP charge for discriminatory discharge under Section 8(a)(3) instead, because that provision was what made the act of retaliation illegal. Citing Section 2(3), the supervisor replied that she was neither protected by the Act nor permitted to invoke the processes of the Board. The district court agreed with the employer and dismissed the claim. Although ordinarily the NLRA does not protect supervisors, an exception can be made when the supervisor's discharge "has a tendency to interfere with, restrain or coerce the protected employees in the exercise of their [S]ection 7 rights," which is what she alleged in her complaint asserting the state law wrongful termination claim. *Harvey v. TJM Atlantic City Mgmt., LLC* , 2019 WL 3459204 (D.N.J. July 31, 2019). Therefore, the supervisor should have filed a ULP charge with the NLRB instead of a wrongful termination claim in state court.

C. MACHINISTS PREEMPTION

On p. 1234, add the following new Note 7:

7. During the Covid-19 pandemic, a number of municipalities passed legislation requiring private businesses to compensate "essential" workers with a type of hazard pay. Suppose a city enacts an ordinance requiring grocery stores to pay their employees a premium of $4.00 per hour more than their regular hourly wage for at least 120 days. The ordinance declares that it does not prevent an employer from taking any action – such as reducing essential workers' regular pay – so long as such action is not a response to the ordinance. The ordinance applies to businesses operating grocery stores employing over 300 employees nationwide and more than 15 employees in the city. Its purpose is to compensate grocery workers for performing the essential function of keeping stores open, stocked, and sanitized, despite the perils of working frequently within six feet of the general public. Suppose further that, Invoking *Machinists* preemption, a trade association of grocery store operators challenges the ordinance on the ground that it unlawfully alters the mechanics of collective bargaining. The city responds that the ordinance merely sets minimum labor standards, an area traditionally held not to be preempted. Is the ordinance preempted? If so, should a preliminary injunction against its enforcement be issued? Why or why not? *See, e.g.*, *California Grocers Ass'n v. City of Long Beach*, 521 F. Supp. 3d 902 (C.D. Cal. 2021) (Wright, J.) (holding not preempted such ordinance and denying preliminary injunction).

D. SECTION 301 PREEMPTION

On p. 1240, add the following new bullet point:

- Claims alleging the employer's non-compliance with a state statute requiring informed written consent in order to collect, capture, and store an employee's biometric information (such as fingerprints, retina scans, and facial geometry)? *See, e.g., Miller v. Southwest Airlines, Inc.*, 926 F.3d 898 (7th Cir. 2019) (holding preempted such claims as asserted under Illinois Biometric Privacy Act, 740 ILCS §14/1).