Investigative Exhibits – Notice of Redaction

A number of Investigative Exhibits have been redacted to protect the disclosure of pre-decisional deliberative information, as well as the privacy of certain individuals. Redactions made to protect the disclosure of deliberative information are so marked.

With regard to the draft decisions included in IE 2, 6, 8, 11, and 15, portions of those draft decisions that were published unchanged in a final Board decision or were otherwise included in a public document have been left unchanged to the extent possible without disclosing deliberative information. Note, however, that although portions of the statement of position included in IE 22 were likewise published in the dissent in *J. Picini Flooring*, 356 NLRB No. 9 (2010), the substance of that statement of position has been redacted in full. We conclude that the statement of position in IE 22 is a wholly deliberative document and the portions of this document that ultimately were included in *J. Picini Flooring* are not segregable from the remainder of the material.

Berry, David P.

From: Flynn, Terence F.
Sent: Friday, October 01, 2010 9:45 AM
To: 'Peter Schaumber'
Subject: RE: Hello

Sure. Lafe has just issued a memo on 10j procedures that dovetails with the revamp on the Board side, all aimed at speeding the process up. Bill has essentially taken the Solicitor's Office out of the equation. It's in the DLR, but I'll e-mail a copy.

From: Peter Schaumber [mailto:peter@schaumber.com]
Sent: Friday, October 01, 2010 8:51 AM
To: Flynn, Terence F.
Subject: Hello

Can you keep me posted on what Board decisions I should be reading?

IE1

Berry, David P.

From: Flynn, Terence F.
Sent: Friday, October 01, 2010 9:47 AM
To: 'peterschaumber@aol.com'
Subject: FW: COPY-Richies BEH dissent.doc
Attachments: COPY-Richies BEH dissent.doc

One of the follow-on cases in Eliason.

From: [redacted]
Sent: Thursday, September 30, 2010 5:24 PM
To: [redacted] Flynn, Terence F.; [redacted]
Subject: COPY-Richies BEH dissent.doc

A BEH dissent.

IE2

RICHIE'S INSTALLATIONS, INC
21-CC-3337 et al

MEMBER HAYES, dissenting:

The bannering activity at issue in this case is essentially the same as in *Eliason & Knuth*, 355 NLRB No. 159 (2010). For the reasons fully set forth in the joint dissent in that case, I would find a violation here. The bannering involves the placement of union agents holding large banners proximate to the premises of neutral employers who have done or are doing business with employers who are the primary targets in a labor dispute with the Respondents. The predominate element of such bannering is confrontational conduct, rather than persuasive speech, designed to promote a total boycott of the neutral employers' businesses, and thereby to further an objective of forcing those employers to cease doing business with the primary employers in the labor dispute. Like picketing, this bannering activity is the precise evil that Congress intended to outlaw through Section 8(b)(4)(ii)(B), and the proscription of this conduct raises no Constitutional concerns. I therefore dissent from my colleagues' failure to enforce the Act as intended.

Dated, Washington, DC

Brian E. Hayes, Member

Investigative Summary

According to entries in the Board's Judicial Case Management System (JCMS), Member Hayes' dissent in *Richie's Installations, Inc.* was circulated on September 30, 2010. The final panel Board Member vote was recorded on that same day.

Southwest Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America *and* Richie's Installations, Inc. Case 21–CC–3337

Carpenters Local No. 803, United Brotherhood of Carpenters and Joiners of America and Dearden's *and* LGC Builders, Inc., Fullmer, KCB Builders, and GMA, Parties in Interest. Case 21–CC–3343

Carpenters Local No. 1506, United Brotherhood of Carpenters and Joiners of America *and* Catholic Healthcare West d/b/a San Gabriel Valley Medical Center and Pacific Building Group, Party in Interest. Case 21–CC–3345

Carpenters Local No. 1506 United Brotherhood of Carpenters and Joiners of America; Southwest Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America (Brady Company of San Diego) *and* Guident Corporation. Case 21–CC–3348

October 7, 2010

DECISION AND ORDER

BY MEMBERS BECKER, PEARCE, AND HAYES

This case concerns whether the Respondents Unions violated Section 8(b)(4)(ii)(B) of the Act by displaying large banners proclaiming a "labor dispute" at locations associated with several secondary Employers.[1] The judge found that these banner displays did not violate Section 8(b)(4)(ii)(B) of the Act because they were not picketing and did not otherwise constitute threats, coercion, or restraint within the meaning of that section. He therefore dismissed the complaint.

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,[2] and conclusions, and to adopt his recommended Order dismissing the complaint.

We find that the Union's conduct in this case was, for all relevant purposes, the same as the conduct found lawful in our recent decisions in *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.)* (*Eliason*), 355 NLRB No. 159 (2010); *Carpenters Local 506 (Marriott Warner Center Woodland Hills)*, 355 NLRB No. 219 (2010); and *Carpenters Local 1506* (*AGC San Diego Chapter)*, 355 NLRB No. 191 (2010) (AGC).

In both *Eliason* and *AGC*, the parties stipulated that union agents held the banners stationary; the Board concluded in both cases that the display of stationary banners did not constitute picketing or other "threatening, coercing or restraining" conduct proscribed by Section 8(b)(4)(ii)(B). In this case, the General Counsel argues in his exceptions that the banner displays constituted picketing because the banners were moved in several instances. The judge, however, correctly found that the movement was de minimis. The parties stipulated that the individuals holding the banners "did not engage in . . . marching, or similar conduct." Moreover, as the judge found, the movement was not continuous or even sustained. Rather, the movement was simply to carry a banner to the place where it was then displayed, to move a banner from one place to another to avoid alleged trespass or other alleged obstruction, and to keep those holding the banner out of the sun. Given that the General Counsel does not argue that the movement was not so limited, we agree with the judge's conclusion that these momentary movements of the banners were de minimis, do not constitute the type of patrolling that is an element

[1] On August 22, 2005, Administrative Law Judge John J. McCarrick issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondents Unions filed a joint answering brief.

We correct an inadvertent error by the judge, who stated that the banner at the premises of secondary employer Guidant Corporation read "Shame on Argent." The record shows that the banner, consistent with the handbill, read "Shame on Guidant."

[2] We find merit in the exception of the General Counsel that the judge erred in dismissing the complaint allegation in Case 21–CC–3348 that the Respondent Unions violated Sec.8(b)(4)(i)(B). In Case 21–CC–3348, the General Counsel alleged that certain conduct of the Unions at the premises of Charging Party Guidant Corporation served to induce and encourage employees to cease performing work. On June 13, 2005, the judge granted the General Counsel's motion to sever the relevant complaint paragraphs and remand the matter to the Regional Director for approval of an informal settlement agreement between the parties. Accordingly, we do not adopt the judge's dismissal of this allegation because it was no longer before him for his decision.

The General Counsel in his exceptions argues that at one location "the banner was a continuation of Respondents' earlier picketing, which various witnesses testified had occurred at this site." The General Counsel does not, however, point to any specific testimony or any other evidence in the record. The judge made no finding of prior picketing and the General Counsel did not except to that failure (despite specifically excepting to the judge's failure to find other facts). The limited testimony about prior picketing does not specify the dates of the picketing, the precise location of the picketing, or the nature of the picketing. Without an exception to the failure to find prior picketing, specifying what the judge should have found concerning prior picketing (for example, when it occurred, precisely where it occurred, and what type of picketing it was), and pointing to testimony or other evidence in the record supporting such findings, we cannot reach the General Counsel's legal argument.

of picketing, and do not distinguish this case from either *Eliason* or *AGC*.

Accordingly, for the reasons stated in that decision, we find that Section 8(b)(4)(ii)(B) does not prohibit the banner displays in this case.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. October 7, 2010

Craig Becker, Member

Mark Gaston Pearce, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting.

The bannering activity at issue in this case is essentially the same as in *Eliason & Knuth*, 355 NLRB No. 159 (2010). For the reasons fully set forth in the joint dissent in that case, I would find a violation here. The bannering involves the placement of union agents holding large banners proximate to the premises of neutral employers who have done or are doing business with employers who are the primary targets in a labor dispute with the Respondents. The predominate element of such bannering is confrontational conduct, rather than persuasive speech, designed to promote a total boycott of the neutral employers' businesses, and thereby to further an objective of forcing those employers to cease doing business with the primary employers in the labor dispute. Like picketing, this bannering activity is the precise evil that Congress intended to outlaw through Section 8(b)(4)(ii)(B), and the proscription of this conduct raises no Constitutional concerns. I therefore dissent from my colleagues' failure to enforce the Act as intended.

Dated, Washington, D.C. October 7, 2010

Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD

Ami Silverman, Esq., for the General Counsel.

Daniel Shanley, Esq. (DeCarlo & Connor), of Los Angeles, California, on behalf of Respondents, Southwest Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America; Carpenters Local 803, United Brotherhood of Carpenters and Joiners of America; Carpenters Local 1506, United Brotherhood of Carpenters and Joiners of America.

Ronald Klepetar, Esq. (Jenkins & Gilcrest), of Los Angeles, California, on behalf of Charging Party Richie's Installations, Inc.

John D. Collins, Esq. (Sheppard, Mullin, Richter, & Hampton), of San Diego, California, on behalf of Charging Party Dearden's.

Stephen Lueke, Esq. (Ballard, Rosenberg, Golper & Savitt) of Universal City, California, on behalf of Charging Party Catholic Healthcare West.

Scott J. Witlin, Esq. (Ogletree, Deakins, Nash, Smoak & Stewart), of Los Angeles, California, on behalf of Charging Party Guidant.

DECISION

JOHN J. MCCARRICK, Administrative Law Judge. This case was tried in Los Angeles, California, on June 13–14, 2005 based upon separate complaints consolidated on December 7, 2004 by the Regional Director for Region 21. The complaint in 21–CC–3337 issued on January 30, 2004, based upon an unfair labor practice charge filed on November 4, 2003 by Richie's Installations, Inc. (Richie's). The complaint in 21–CC–3343 issued on May 5, 2004 based upon an unfair labor practice filed on March 10, 2004 by Dearden's. The complaint in 21-CC-3345 issued on June 8, 2004, based upon an unfair labor practice filed on April 13, 2004 by Catholic Healthcare West d/b/a San Gabriel Valley Medical Center (CHW). The complaint[1] in 21-CC-3348 issued on November 30, 2004, based upon an unfair labor practice filed by Guidant Corporation (Guidant) on October 7, 2004 and amended on November 22, 2004. Generally, the complaints allege that Respondents' bannering activities violated Section 8(b)(4)(i) and (ii)(B) of the Act. Respondents filed timely answers to the complaints denying any wrongdoing and contend that their activity is protected by the first amendment of the United States Constitution.

Upon the entire record herein, including the stipulation, and the briefs from the General Counsel, Respondents and Charging Parties, I make the following

FINDINGS OF FACT[2]

I. JURISDICTION[3]

Charging Party Richie's, a California corporation, is engaged in the installation and assembly of furniture and has annually provided services valued in excess of $50,000 directly to employers engaged in commerce.

Charging Party Dearden's, a California Corporation with offices located at 700 South Main Street, Los Angeles, California and 117 North Broadway, Santa Ana, California, has been engaged in the retail sale of furniture, electronics, appliances and

[1] I granted General Counsel's motion to sever complaint pars. 8(a)–(d) and remanded them to the Regional Director for approval of an informal Board settlement

[2] The parties entered into a stipulation of facts that sets forth the nondisputed facts in this case. Witnesses were called regarding the sole disputed facts concerning the location of banners at Dearden's downtown Los Angeles facility and the location of the banner at Guidant's Temecula facility.

[3] Jurisdictional facts were part of the stipulation noted above and all parties stipulated to facts reflecting Board jurisdiction.

jewelry. In the course of its business Dearden's has annually had gross revenues in excess of $500,000 and has purchased and received goods in excess of $50,000 directly from points located outside the State of California.

Charging Party CHW, a California nonprofit corporation with a facility located at 438 West Las Tunas Drive, San Gabriel, California, and a Regional Office located in Pasadena, California, has been engaged in the operation of an acute care hospital. In the course of its business at the San Gabriel facility, CHW has annually had gross revenues in excess of $250,000 and has purchased goods valued in excess of $50,000 directly from points located outside the State of California.

Based upon the above, as well as the parties' stipulation, there is no dispute that each of the Charging Parties are and have been at all times material, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATIONS

Based upon the parties' stipulation, I find that Respondents and each of them is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The facts in this case are not in significant dispute. General Counsel has presented testimony dealing with the location of banners to establish the ambulatory nature of the bannering.

A. Common Facts

There are certain facts that are common to each of the sites where Respondents conducted bannering activities. The bannering took place at the Argent, Dearden's, CHW, and Guidant facilities. Argent, Dearden's, CHW, and Guidant contracted with general contractors or suppliers who in turn subcontracted work to subcontractors with whom Respondents had primary labor disputes: LGC Builders, Inc., Fullmer, KCB Builders, GMA, Pacific Building Group, Brady Company of San Diego (Brady's), and Richie's. At the Argent, Dearden's, CHW, and Guidant facilities Respondents caused stationary white banners to be placed which were about three to four feet high and 20 feet long. The banners which faced out toward public streets had large black lettering at either end together with larger red letters in the center which read:

LABOR DISPUTE	SHAME ON (NAME OF) THE NEUTRAL)	LABOR DISPUTE

The banners were held in place by at least two of Respondents' representatives and no more individuals than was necessary to physically hold the banners. The banners were generally maintained in a stationary position. There was no chanting, marching, yelling or similar conduct while the banners were displayed. Handbills were distributed by Respondents' representatives at the Dearden's, and Guidant facilities to passersby who asked about the banners. It was stipulated that Respondents' bannering and handbilling activity pertained to the persons with whom they had a primary dispute performing work at the Argent, Dearden's, CHW, and Guidant worksites.

To facilitate the organization of this decision, the facts concerning each site where the banners were displayed will be discussed separately.

B. The Argent Site

Argent is a mortgage lender with an office in Orange, California. Argent procured office furniture from Herman Miller, Inc., (Miller) a manufacturer of office furniture. Miller engaged Charging Party Richie's to install its furniture at the Argent facility. Respondents are not recognized or certified as the collective-bargaining representative of any employees employed by Argent or Miller. Respondents' primary labor dispute is with Richie's. Beginning about October 14, 2003, Respondent Southwest Regional Council of Carpenters (Regional Council) established and maintained a banner in front of Argent's Orange, California facility. The white banner was about 20-feet long and 3-feet high. In the center of the banner in red capital letters about 18-inches high were the words "SHAME ON ARGENT MORTGAGE." At each end of the banner in black capital letter about 6 inches high were the words "LABOR DISPUTE." The banner was displayed daily from about 9:30 a.m. to about 12 noon and was held in place by two to four of Respondents' representatives. The banner was located on the sidewalk in front of the jobsite, Argent's Orange, California facility. The sidewalk leads from the parking structure used by tenants and customers of the Orange County building where Argent is located.

C. The Dearden's Sites

Charging Party Dearden's is a retailer of furniture, electronics, appliances and jewelry at its offices in Los Angeles and Santa Ana, California. Dearden Properties and Rancho Amigos Investors, Inc., (Rancho) lessors of commercial real property, agreed to construct a warehouse for Dearden's. On October 14, 2003 Dearden Properties' and Rancho contracted with general contractor Arco National Construction Company (Arco) to build the warehouse. Arco in turn considered for hire or hired subcontractors LGC Builders, Fullmer, KCB Builders and GMA to work on Dearden's warehouse. Respondents are not recognized or certified as the collective-bargaining representative of any employees employed by Dearden's, Dearden Properties, Rancho, or Arco. Respondents' primary labor dispute is with LGC Builders, Fullmer, KCB Builders, and GMA. From on or about March 9, 2004, to about April 14, 2004 Respondent Local 803 displayed a white banner about 20 feet long and 4 feet high. The center of the banner contained two foot high red capital letters which stated, "DEARDENS FURNITURE PROFITS FROM IMMIGRANT LABOR ABUSE." At each end of the banner in smaller black capital letters were the words "LABOR DISPUTE."

Local 803 representatives also had handbills that were given to pedestrians who asked about the banner. The banner was distributed in both the English and Spanish languages. The handbill states:

DEARDEN'S FURNITURE
OPENS OUR COMMUNITY TO MORE
IMMIGRANT LABOR ABUSE

(A cartoon appears below the caption depicting a standing figure in front of three prostrate individuals)

IT'S NOT RIGHT FOR HARD WORKING SOUTHERN

CALIFORNIANS TO HAVE TO PAY THE BILLS FOR CONTRACTORS WHO ARE RIPPING OFF OUR COMMUNITY AND CONTRIBUTING TO THE EROSION OF AREA STANDARDS FOR SOUTHERN CALIFORNIA CARPENTERS CRAFT WORKERS. **GMA CONSTRUCTION** IS SUBCONTRACTING WORK FOR **ARCO CONSTRUCTION**, (AN OUT OF STATE COMPANY), ON THE DEARDENS FURNITURE DISTRIBUTION WAREHOUSE. **GMA CONSTRUCTION** DOES NOT MEET AREA LABOR STANDARDS, INCLUDING PROVIDING FOR FAMILY HEALTH CARE AND PENSION FOR ALL OF ITS EMPLOYEES.

CARPENTERS LOCAL 803 OBJECTS TO SUB-STANDARD CONTRACTORS LIKE GMA CONSTRUCTION WORKING IN THE COMMUNITY. IN OUR OPINION, THE COMMUNITY ENDS UP PAYING THE TAB FOR EMPLOYEE HEALTH CARE AND THE LOW WAGES THEY PAY TEND TO LOWER GENERAL COMMUNITY STANDARDS, THEREBY ENCOURAGING CRIME AND OTHERSOCIAL ILLS.

CARPENTERS LOCAL 803 BELIEVES THAT **DEARDEN'S FURNITURE** HAS AN OBLIGATION TO THE COMMUNITY TO SEE THAT AREA LABOR STANDARDS ARE MET FOR CONSTRUCTION WORK ON BUILDINGS THEY WILL OCCUPY. THEY SHOULD NOT BE ABLE TO INSULATE THEMSELVES BEHIND "INDEPENDENT CONTRACTORS. FOR THIS REASON LOCAL 803 HAS A LABOR DISPUTE WITH ALL THESE COMPANIES.

PLEASE CALL **RONNIE BENSIMON** AT DEARDEN'S FURNITURE 213-362-9600 AND TELL HIM THAT WANT THEM [sic] TO DO ALL THEY CAN TO CHANGE THIS SITUATION AND SEE THAT AREA LABOR STANDARDS ARE MET FOR THEIR CONSTRUCTION PROJECT.

THE MEMBERS AND FAMILIES OF CARPENTERS LOCAL 803 THANK YOU FOR YOUR SUPPORT. FOR MORE INFORMATION CALL (714) 978-6232.

We are not urging any workers to refuse to work nor are we urging any suppliers to refuse to deliver any goods.

The banner was initially displayed at the corner of Main and 7th Streets near Dearden's 7th Street entrance in Los Angeles on March 9, 2004 at about 9:30 a.m. The banner was located near the curb of the public sidewalk at a truck loading zone. Because they were in a loading zone, the banner was moved between Dearden's entrances on Main street. In order to keep the banner and its holders in the shade, the banner was moved back to the 7th Street location later on March 9, 2004.[4] Later on March 9, representatives of the Southwest Council directed the sign holders to keep the banner at the Main street location after complaints from Dearden's that the banner was being moved between the location on Main Street and the site on 7th Street.[5]

From April 14, 2004, to an unknown date Respondent Local 803 displayed the same banner at Dearden's Santa Ana, California facility. The banner was held by at least two of Respondents' representatives in front of the Santa Ana facilities' public parking lot, about 30 to 40 feet from the store's public entrance.

D. The CHW Site

CHW is affiliated with Pacific Medical Buildings, a developer of a medical building in San Gabriel, California. CHW has at least a 30 percent equity interest in the San Gabriel medical building. Pacific Building Group is the general contractor for the San Gabriel medical building. Respondent Local 1506 had a primary dispute with Pacific Building Group. Local 1506 has not been recognized or certified as the representative of CHW or Pacific Medical Building employees. On or about March 11, and March 17 to 19, 2004 Respondent Local 1506 established a banner on the sidewalk in front of CHW's regional office in Pasadena, California. The banner was similar in size and color to the banners at Argent and Dearden's. It bore the same labor dispute language and in large red letters said "SHAME ON CATHOLIC HEALTHCARE WEST."[6] The sign was held in place by two representatives of Local 1506.

E. The Guidant Site

Guidant is a manufacturer of medical devices and has facility in Temecula, California. Guidant retained Xnergy as general contractor to construct a lab/medical clean room at its Temecula facility. Xnergy in turn hired Brady to perform work on the lab/medical clean room project. Respondents Local 1506 and Southwest Council have a primary dispute with Brady. Respondents have not been recognized or certified as the representative of Guidant or Xnergy employees.

On or about October 4, 2004 about mid-January 2005 Respondents established a banner near the sidewalk of Guidant's Temecula facility.[7] The banner was similar in size, color and language to the banners described above. The banner stated that there was a "LABOR DISPUTE" and in larger red letter in the center of the banner said "SHAME ON ARGENT." The banner was held in place by two individuals from about 10 a.m. to 2 p.m. In addition Respondent's representatives had handbills[8] to pass out to pedestrians who asked about the banner. The handbills stated:

SHAME ON
GUIDANT
For desecration of the American

[4] See GC Exh. 1 and Jt. Exh. 7.

[5] It appears from the testimony of Ronny Ben-Simon, president of Dearden's, that from March 9 to 18, 2004 the banner holders kept the sign in the shade at the Main Street site from about 10 a.m. to 1:30 p.m. until it came into full sun then moved to the shade on 7th Street site from about 1:30 p.m. until 4 p.m. While Southwest Regional Council Business Representative Gilbert Badillo testified that the sign remained at the Main Street site from sometime after March 9, 2004 onward, he was not present at the Dearden's Los Angeles store every day. Since Ben-Simon was present each day, I credit his testimony.

[6] See Jt. Exhs. 9 and 10.

[7] See Jt. Exhs. 11 and 12.

[8] See Jt. Exh. 13.

Way of Life

(There was a cartoon of a rat eating an American flag.)

A rat is a contractor that does not pay all of its employees prevailing wages, including either providing or making payments for family health care and pension benefits.

Shame on Guidant for contributing to erosion of area standards for local carpenter craft workers. Carpenters Local 1506 has a labor dispute with **E F Brady-San Diego** that is a subcontractor for Xnergy. **E F Brady-San Diego** does not meet area labor standards, including providing or fully paying for family health care and pension for all of its carpenter craft employees.

Carpenters Local 1506 objects to substandard wage employers like **E F Brady-San Diego** working in the community. In our opinion the community ends up paying the tab for employee health care and the low wages paid tend to lower general community standards, thereby encouraging crime and other social ills.

Carpenters Local 1506 believes that **Guidant** has an obligation to the community to do all it can to see that area labor standards are met for construction of their buildings.

PLEASE TELL GUIDANT THAT YOU WANT THEM TO DO ALL THEY CAN TO CHANGE THIS SITUATION AND SEE THAT AREA LABOR STANDARDS ARE MET FOR CONSTRUCTION OF THEIR BUILDINGS.

The members and families of Carpenters Local 1506 thank you for your support
Call (858) 621–2670 for further information.

WE ARE NOT URGING ANY WORKER TO REFUSE TO WORK NOR ARE WE URGING ANY SUPPLIER TO REFUSE TO DELIVER GOODS.

On or about October 4, 2004 Respondent's representatives held the above-described banner on the sidewalk facing the street in front of Guidant's Temecula facility. Initially, the sign was put together on the Guidant lawn adjacent to the sidewalk at the site where it was displayed. On October 4 and 5, the banner holders were told by both Guidant representatives and the police that they were trespassing on Guidant property by standing on the grass. Accordingly, on October 5, the sign was thereafter assembled off Guidant property about 100 feet from where it was displayed and walked down to the display location where it remained stationary.

Analysis and Conclusions

While General Counsel's complaints allege that Respondents have violated Section 8(b)(4)(i) and (ii)(B), in the joint stipulation General Counsel argues that Respondents' bannering activity violated only Section 8(b)(4)(ii)(B) of the Act by enmeshing neutral employers. There is no argument and indeed no evidence that Respondents' conduct sought as its object to induce or encourage any employees to cease performing work. Accordingly, I shall dismiss complaint allegations alleging a violation of Section 8(b)(4)(i)(B) of the Act.

In regulating labor union's picketing, handbilling and other activities involving both speech and action, Congress balanced the interests of a union's right to freedom of speech under the first amendment to the United States Constitution and the interests in protecting neutral employers from being enmeshed in primary disputes in which they had no interest. That balancing is reflected in the language of the pertinent portions of Section 8(b)(4) of the Act:

> Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents . . . .
>
> (4)(ii) To threaten, coerce, or restrain any person engaged in commerce or in a business affecting commerce where . . . an object thereof is . . . .
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the product of any other producer, processor, or manufacturer, or to cease doing business with any other person. . . . Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing. . . .
>
> Provided further, that for the purpose of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that product or products are produced by an employer with whom the labor organization has a primary dispute. . . .

In order to establish a violation of Section 8(b)(4)(ii)(B) of the Act, General Counsel must establish that a labor organization has engaged in conduct that threatens, coerces or restrains. Traditional picketing has been found coercive. Next it must be established that the conduct is secondary rather than primary picketing. Finally the object of the conduct must be to force any person to cease doing business with another person. Last truthfully advising the public, other than by picketing, of a primary dispute may not be enjoined.

Section 2(9) of the Act defines a labor dispute as:

> [A]ny controversy concerning terms , tenure, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

A. The Issues

General Counsel and the Charging Parties contend that the bannering described above violated Section 8(b)(4)(ii)(B) of the Act. They argue that the bannering activity is essentially picketing or "signal picketing" designed to restrain or coerce Argent, Dearden's, CHW, Guidant, and other neutral employers with an object of requiring them to cease doing business with Richies' installation, Brady and other persons. General Counsel argues that the bannering was not truthful and is not protected by the provisos of Section 8(b)(4) of the Act or the United States Constitution.

Respondents counter that the bannering is neither picketing nor coercive but rather activity protected under both the provisos to Section 8(b)(4) of the Act and the first amendment to the

United States Constitution and cite the Supreme Court's decision in *Edward J. DeBartolo v. Florida Gulf Coast Building and Construction Trades Council (DeBartolo II)*, 485 U.S. 568 (1988) in support of this proposition.

B. The Case Law

This is not a case of first impression. The bannering activity undertaken by various Carpenters' locals has been the subject of seven unfair labor practice decisions before administrative law judges, three actions for 10(l) injunctive relief before the United States District Courts and one appeal of a District Court denial of 10(l) relief to the United States Court of Appeals for the Ninth Circuit.

In five unfair labor practice decisions, the administrative law judges found that the bannering did not constitute coercive picketing: Judge Kennedy in *Southwest Regional Council of Carpenters*, et al., *(Carignan Construction Co.)* JD(SF)-14-04, Judge Meyerson in *Southwest Region Council of Carpenters*, et. al. *(New Star General Contractors, Inc.)* JD(SF)-76-04, Judge Rose in *Carpenters Locals 184 and 1498 (Grayhawk Development, Inc.* JD(SF)-02-05 and Judge Anderson in *Carpenters Local Union 1506*, et. al. *(Sunstone Hotel Investors*, LLC.), JD(SF) 01-05 and *Southwest Regional Council of Carpenters, et. al. (Held Properties, Inc.)* JD(SF)-29-05. In two unfair labor practice decisions, Judge Parke in *Local 1827, Carpenters (United Parcel Service)*, JD(SF)-30-03 and Judge Litvack in *Southwest Regional Council of Carpenters (Held Properties)*, JD(SF)-24-04 concluded bannering was coercive conduct akin to traditional picketing not protected by the proviso. These decisions are not binding upon me. Respondents on brief also cite memoranda of the General Counsel's Division of Advice which are only positions of the General Counsel. These memoranda likewise do not bind me.

In each of three petitions for 10(l) injunctive relief, *Kohn v. Southwest Regional Council of Carpenters*, 289 F. Supp. 2d 1155 (C.D. CA 2003), *Benson v. Carpenters, Locals 184 & 1498*, (337 F. Supp. 2d 1275 (D. Utah, 2004), and *Overstreet v. Carpenters Local 1506*, 2003 U.S. Dist. LEXIS 19854 (S.D. CA 2003) the District Courts found there was not reasonable cause to believe that Section 8(b)(4) of the Act had been violated since the bannering was not like traditional picketing but protected under *DeBartolo II*. Likewise, in the appeal to the United States Court of Appeals for the Ninth Circuit in *Overstreet v. Carpenters Local . 1506*, 409 F.3d 1199 (9th Cir. 2005), the Court found no reasonable cause to believe that Section 8(b)(4) of the Act had been violated. While neither the United States District Courts' nor the United States Court of Appeals for the Ninth Circuit decisions in the context of 10(l) proceedings are not binding precedent on an administrative law judge in an unfair labor practice proceeding, they provide reasoned and experienced guidance on constitutional issues.

The threshold issue for resolution is whether the bannering activity of Respondents at the various worksites constitutes picketing or its functional equivalent such that it constituted prohibited coercive conduct not protected under a *Debartolo II* analysis.

In *Debartolo II*, the Supreme Court found that a union's handbilling neutral retailers without picketing did not threaten, coerce, or restrain any person engaged in commerce as prohibited by Section 8(b)(4)(ii) of the Act. The Court characterized the handbilling without coercive conduct as "mere persuasion"[9] and narrowly construed the Act, limiting a broad restriction on handbilling to avoid conflict with the first amendment's prohibition on limitations of free speech.[10]

Since *DeBartolo II*, the Board and Federal courts have held that secondary handbilling, when not accompanied by picketing or other coercive conduct is not prohibited by Section 8(b)(4)(ii)(B). However, the Board has yet to rule on the question of whether secondary bannering, unaccompanied by other coercive conduct, violates Section 8(b)(4)(ii)(B).

General Counsel and Charging Party CHW cite several Board cases for the proposition that patrolling is not an essential element of picketing and that stationary sign holders may be signal pickets. *Lumber & Sawmill Workers Local 2797 (Stoltze Land & Lumber Co.)*, 156 NLRB 388, 394 (1965); *Lawrence Typographical Union No. 570*, 169 NLRB 279, 283 (1968); *Mine Workers District 12 (Traux-Traer Coal Co.)*, 177 NLRB 213, 218 (1969); *Electrical Workers Local 98 (Telephone Man)*, 327 NLRB 593 (1999); , *Painters District Council 9 (We're Associates)*, 329 NLRB 140, 142 (1999); *Mine Workers, District 2 (Jeddo Coal Co.)*, 334 NLRB 677 (2001). In each of these cases there had been previous traditional picketing that involved patrolling with typical picket signs (*Stoltze Land & Lumber Co.*; *Lawrence Typographical Union No. 570*; *Jeddo Coal Co., Telephone Man; We're Associates*, supra), or some other form of coercion, including threatening to use up to 200 men to shut a jobsite down (*Traux-Traer Coal Co.*, supra). Also in *K-Mart Corp.*, 313 NLRB 50 (1993), a case involving banners, the Board affirmed the decision of the administrative law judge who found that the placement of three-foot by six-foot and three-foot by twelve-foot banners together with handbilling of consumers by 12 to 28 union supporters at the entrance to a K-Mart store violated Section 8(b)(4)(ii)(B) of the Act. The administrative law judge found the union's conduct went beyond peaceful persuasion and was accompanied by other coercive conduct including a demonstration by up to 50 union supporters in the K-Mart parking lot, parading, chanting with a bullhorn, blocking access to shopping carts, and lying in front of oncoming vehicles in the parking lot.

In *Overstreet v. Carpenters Local 1506*, 409 F. 3d 1199 (9th Cir. 2005), the Court, citing *DeBartolo II*, 485 U.S. at 587, found that the Legislative History of Section 8(b)(4)(ii)(B) of the Act clearly proscribes only "ambulatory picketing" of secondary businesses. This is not inconsistent with the above cited Board cases since each case contained some elements of traditional picketing or other coercion. The Court in *Overstreet* emphasizes that traditional picketing includes "walking in a line, and, in so doing create a symbolic barrier." Slip opinion page 10. The Court rejected General Counsel's contention that the Union's bannering constituted coercive picketing.

[9] *DeBartolo II*, supra at 580.

[10] Contrary to counsel for Charging Party CHW's assertion, I find nothing in *DeBartolo II* to suggest that handbilling or its functional equivalent has been characterized as "commercial speech" not entitled to the full protection of the first amendment's free speech guarantee.

The Court in *Overstreet* also rejected the argument that the banners amounted to "signal picketing" finding that "signal picketing" involves some prearranged sign to employees of a neutral, including union members, to cease performing work. The Board's decisions are in accord. See *Electrical Workers Local 98 (Telephone Man)*, supra, where a union agent on the pretext of being a neutral gate observer, regularly flashed what amounted to a picket sign to employees of neutrals entering the gate.

C. Discussion

I reject General Counsel's argument that the Respondent' bannering herein constituted picketing or signal picketing. I find that the bannering is more akin to use of billboards, newspaper ads, or handbills than traditional picketing, whether ambulatory or a substitute for patrolling pickets. Other than de minimis movements of the banners at the Guidant and Dearden's locations occasioned by orders of the police or in order to stay out of the heat of the midday, there was no record evidence of patrolling traditionally associated with picketing, nor was there any other evidence of blocking access to entrances, confrontation with employees, chanting, marching or other coercive conduct in conjunction with the bannering. Contrary to the assertion of Counsel for Charging Party Guidant, I find no evidence of prior traditional picketing or other coercive conduct by the Unions at the Guidant facility.

Further, I find that the Respondents' bannering had no element of a prearranged signal to employees of neutrals to cease engaging in work. As the Court in *Overstreet* noted,

> To broaden the definition of "signal picketing" to include "signals" to any passerby would turn the specialized concept of "signal picketing" into a category synonymous with any communication requesting support in a labor dispute. If "signal picketing" were defined so broadly, then the handbilling in DeBartolo would have been deemed signal picketing. *Overstreet*, supra at slip opinion page 12.

Having found that Respondents bannering does not constitute picketing or its functional equivalent, I conclude that it is not a threat, coercion or restraint within the meaning of Section 8(b)(4)(ii)(B) of the Act.

Next General Counsel argues that the banners contain information that is fraudulent and not protected by the proviso to Section 8(b)(4) or the first amendment. General Counsel contends that the banners are misleading to the extent that they imply that a primary labor dispute exits between Respondents and the neutral employers named thereon without identifying the primary employers with whom the Respondents have a labor dispute.

Respondents contend that the Act makes clear that a labor dispute may exist with a neutral or secondary employer. Section 2(9) of the Act defines a labor dispute more broadly than a primary dispute and may encompass secondary employers. All of the lower federal courts who considered the 10(l) petitions in the bannering cases as well as the 9th Circuit Court of Appeals in *Overstreet* agreed. The *Overstreet* Court found that since the Unions had a "labor dispute" with the secondary retailers within the meaning of Section 2(9) of the Act, the use of the term "labor dispute" was not fraudulent. *Overstreet*, supra, slip opinion at page 14.

I am baffled by General Counsel's characterization of the banners as fraudulent. I concur with the Respondents position as supported by the decisions of the above Courts that General Counsel's contention is in conflict with the Act's definition of "labor dispute". The signs' language referring to a "labor dispute" with the named neutral employers are true statements consistent with the Act's 2(9) definition of a labor dispute protected by both the first amendment to the United States Constitution and the proviso to Section 8(b)(4) of the Act.

Having reached these conclusions, I find that the bannering engaged in by the Respondents herein did not violate Section 8(b)(4)(ii)(B) of the Act. Accordingly, the complaints shall be dismissed.

CONCLUSIONS OF LAW

On the basis of the above findings of fact and the record as a whole and Section 10(c) of the Act, I make the following conclusions of law.

1. Each of the named Charging Parties and employers are persons engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondents are labor organizations within the meaning of Section 2(5) of the Act.

3. The Respondents have not engaged in unfair labor practices within the meaning of Section 8(b)(4)(i),(ii)(B) of the Act.

Based on these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11].

ORDER

The complaints are hereby dismissed in their entirety.

Dated, San Francisco, California, August 22, 2005.

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[11] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the finding, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections shall be waived for all purposes.

United Brotherhood of Carpenters and Joiners of America, Local Union No. 1506 *and* Eliason & Knuth of Arizona, Inc.

United Brotherhood of Carpenters and Joiners of America, Local Union No. 1506 *and* Northwest Medical Center

United Brotherhood of Carpenters and Joiners of America, Local Union No. 1506 *and* Ra Tempe Corporation. Cases 28–CC–955, 28–CC–956, and 28–CC–957

August 27, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS SCHAUMBER, BECKER, PEARCE, AND HAYES

Introduction

This case presents an issue of first impression for the Board: does a union violate Section 8(b)(4)(ii)(B) of the National Labor Relations Act when, at a secondary employer's business, its agents display a large stationary banner announcing a "labor dispute" and seeking to elicit "shame on" the employer or persuade customers not to patronize the employer. Here, the Union peaceably displayed banners bearing a message directed to the public. The banners were held stationary on a public sidewalk or right-of-way, no one patrolled or carried picket signs, and no one interfered with persons seeking to enter or exit from any workplace or business. On those undisputed facts, we find that the Union's conduct did not violate the Act.

The language of the Act and its legislative history do not suggest that Congress intended Section 8(b)(4)(ii)(B) to prohibit the peaceful stationary display of a banner. Furthermore, a review of Board and court precedent demonstrates that the nonconfrontational display of stationary banners at issue here is not comparable to the types of conduct found to "threaten, coerce, or restrain" a neutral employer under Section 8(b)(4)(ii)(B) – picketing and disruptive or otherwise coercive nonpicketing conduct.

Our conclusion about the reach of the prohibition contained in Section 8(b)(4)(ii)(B) is strongly supported, if not compelled, by our obligation to seek to avoid construing the Act in a manner that would create a serious constitutional question.[1] Governmental regulation of nonviolent speech—such as the display of stationary banners—implicates the core protections of the First Amendment. The crucial question here, therefore, is whether the display of a stationary banner *must* be held to violate Section 8(b)(4)(ii)(B) or, instead, "whether there is another interpretation, not raising these serious constitutional concerns, that may fairly be ascribed to" the statutory provision. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 577 (1988).

As we indicated above, the answer to the question posed by the Supreme Court in *DeBartolo* is clear in this case. Nothing in the language of the Act or its legislative history requires the Board to find a violation and thus present for judicial review the constitutionality of Section 8(b)(4)(ii)(B) as applied to the peaceful display of a stationary banner. Rather, the display of a stationary banner, like handbilling and even certain types of picketing,[2] is noncoercive conduct falling outside the proscription in Section 8(b)(4)(ii)(B).[3]

For both of those reasons, we dismiss the allegations.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION[4]

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[1] See, e.g., *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575, 577 (1988); NLRB v Catholic Bishop of Chicago, 440 U.S. 490, 500 (1979).

[2] See *NLRB v. Fruit & Vegetable Packers, Local 760*, 377 U.S. 58 (1964) (*Tree Fruits*) (applying canon of constitutional avoidance to hold that Sec. 8(b)(4)(ii)(B) does not bar all forms of peaceful consumer picketing); *NLRB v Drivers Local Union No. 639*, 362 U S. 274 (1960) (*Curtis Bros.*) (applying canon to hold that peaceful picketing for recognition by minority union did not violate the pre-Landrum-Griffin Sec. 8(b)(1)(A)). In both *Tree Fruits* and *Curtis Bros.*, as well as in *DeBartolo*, supra, the Supreme Court rejected the Board's view that unions had committed unfair labor practices.

[3] The General Counsel has sought injunctive relief in federal district court under Sec. 10(l) of the Act in four cases involving display of banners. Despite the deferential standard applied to applications for such relief, the district court in each of those cases rejected the contention that display of banners violated the Act. In the one case where the decision was tested on appeal, the United States Court of Appeals for the Ninth Circuit affirmed the district court's decision. See *Overstreet v. Carpenters Local 1506*, 409 F 3d 1199 (9th Cir. 2005), affirming *Overstreet v. Carpenters Local 1506*, 2003 WL 23845186, U S. Dist. Lexis 19854 (S.D. Cal. 2003); *Gold v. Mid-Atlantic Regional Council of Carpenters*, 407 F.Supp.2d 719 (D. Md. 2005); *Benson v. Carpenters Locals 184 & 1498*, 337 F.Supp.2d 1275 (D. Utah 2004); *Kohn v. Southwest Regional Council of Carpenters*, 289 F.Supp.2d 1155 (C.D. Cal. 2003).

[4] On November 12, 2003, Eliason & Knuth of Arizona, Inc. filed a charge in Case 28-CC-955. On December 3, 2003, Northwest Hospital, LLC filed a charge in Case 28–CC–956. On December 17, 2003, RA Tempe Corporation filed a charge in Case 28–CC–957. Pursuant to these charges, the General Counsel of the National Labor Relations

The parties have stipulated to the status of all relevant companies as persons and/or employers engaged in commerce and in industries affecting commerce within the meaning of Section 2(1), (2), (6) and (7) and 8(b)(4) of the Act.[5] The parties also stipulated that the Union is a labor organization within the meaning of Section 2(5) of the Act. Based on these stipulations, we find that the Board possesses jurisdiction over this matter.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts

At all material times, the Union has been involved in primary labor disputes with four employers engaged in construction: Eliason & Knuth (E&K), Delta/United Specialties (Delta), Enterprise Interiors, Inc. (Enterprise), and Hardrock Concrete Placement Co. Inc. (Hardrock). The Union asserts that those companies (the primary employers or "primaries") do not pay their employees wages and benefits that accord with area standards.

In furtherance of its labor disputes with the primary employers, the Union engaged in peaceful protest activities at three locations: the Thunderbird Medical Center in Phoenix, Arizona; the Northwest Medical Center in Tucson, Arizona; and the RA Tempe restaurant in Tempe, Arizona. The stipulation does not indicate whether the Union also had labor disputes with Banner Medical, Northwest Hospital, or RA Tempe (the companies operating at the sites of the union activities and to which the primaries were providing services) regarding the treatment of their employees or with Bovis Lend Lease, Layton Construction Company of Arizona, or R.D Olsen Construction (the general contractors who directly retained the primaries to perform work for the secondaries). For purposes of this opinion, therefore, we assume that no such disputes existed.[6] These companies (the secondary employers or "secondaries") had no collective-bargaining relationship with the Union, and the Union was not seeking to organize their employees. As described in Appendix B, one location of the protest activities was the facility of a secondary employer where a primary was performing construction work (Banner Medical). Another location was the facility of secondary employer Northwest Medical Center. The primary employer was not present when the banner was displayed there, but was performing work at a facility owned by Northwest's parent company. The third location was a restaurant operated by secondary employer RA Tempe. As at Northwest, the primary employer was not present when the banner was displayed, but was performing work at a facility owned by RA Tempe's parent company.

At each of those locations, as described in detail in Appendix B, the Union placed and maintained a banner on a public sidewalk or public right-of-way outside of the secondary Employer's facility, facing away from the facility such that the banner's message could be seen by passing motorists. The banners were held parallel to the sidewalk at the edge of the street so they in no way blocked the sidewalks. The banners were 3 or 4 feet high and from 15 to 20 feet long and, at the Thunderbird and Northwest Medical Centers, read: "SHAME ON [secondary employer]" in large letters, flanked on either side by "Labor Dispute" in smaller letters. At RA Tempe, the middle section of the banner read, "DON'T EAT 'RA' SUSHI." The banners were placed between 15 and 1,050 feet from the nearest entrance to the secondaries' establishments.[7] At each location, several union representatives (normally two or three) held the banner in place. The parties stipulated that the number of union representatives accompanying the banner (a maximum of four) was limited to the number needed to hold it up with

Board issued an order consolidating cases, a consolidated complaint, and a notice of hearing on January 23, 2004. The consolidated complaint alleges that the Respondent-Union, the United Brotherhood of Carpenters and Joiners of America, Local Union No. 1506 ("the Union"), engaged in and was engaging in unfair labor practices in violation of Sec. 8(b)(4)(ii)(B) of the Act. Copies of the charges, the consolidated complaint and notice of hearing were served on the Union. Thereafter, the Union filed a timely answer denying the commission of any unfair labor practices.

On March 1, 2004, the parties filed with the Board a joint motion to transfer the proceeding to the Board and for approval of the parties' stipulation of facts. The joint motion stated in relevant part that the parties agreed that the unfair labor practice charge, the complaint and consolidated complaint, the answer, the statement of issues presented, the stipulation of facts, and the parties' position statements constituted the entire record in the case. The parties further stipulated that they waived a hearing before an administrative law judge and the issuance of findings of fact, conclusions of law, and order by an administrative law judge and that they desired to submit the case for findings of fact, conclusions of law, and Order by the Board. On June 30, 2004, the Board approved the stipulation and transferred the proceeding to the Board for issuance of a decision and order. Thereafter, the General Counsel, the Union, and Charging Parties Eliason & Knuth and RA Tempe Corporation filed briefs. (Charging Party Northwest Hospital, LLC did not file a brief, but stated in the stipulation of facts that it adopts the position taken by the General Counsel).

[5] Appendix A provides the relevant locations and incorporations of the companies at issue.

[6] The relationships between the facilities' owners and their general contractors are set out in Appendix A.

[7] At the Thunderbird Medical Center, the banner was 80 feet from an entrance to a parking lot and 510 feet from an entrance to the facility. At Northwest Medical Center, the banners were 1,550 and 450 feet from roads entering the facility. At Northwest, the banners were 1,550 and 450 feet from roads entering the facility. In light of these stipulated facts, it is misleading for the dissent to state that the banners were "in close proximity to main entrances" to these facilities and "at the entrance to the neutral premises." Finally, at RA Tempe restaurant, the banner was 15 feet from the door of the restaurant.

staggered breaks. The parties also stipulated that at all material times the banners were held stationary.

In addition to displaying the banners at those locations, the union representatives offered flyers to interested members of the public. The handbills explained the nature of the labor dispute referred to on the banners. Specifically, the handbills explained that the Union's underlying complaint was with (depending upon the location) E&K, Delta, Hardrock, or Enterprise, and that the Union believed that, by using the services of one of those contractors, Banner Medical, Northwest Hospital, or RA Tempe was contributing to the undermining of area labor standards.[8]

The parties stipulated that the union representatives did not chant, yell, march, or engage in any "similar conduct." The parties stipulated that the representatives did not block persons seeking to enter or exit any of the secondaries' facilities. The parties stipulated that the representatives "did no more than hold up the banner and give flyers to any interested member of the public" and, apart from the unresolved question of whether the display of a banner is confrontational, "did not engage in any other activity that is considered confrontational within the context of this matter."[9]

B. Contentions of the Parties

The General Counsel and Charging Parties argue that the Union's banner displays violated Section 8(b)(4)(ii)(B) because they constituted coercive conduct that had an object of forcing the neutral employers to cease doing business with the primary employers. They contend, first, that posting individuals at or near the entrances of the secondaries' facilities to hold banners declaring a labor dispute constituted picketing, and was therefore coercive. Second, the General Counsel and Charging Parties contend that the banners were coercive because they contained "fraudulent" wording that misled the public into believing that the Union had a primary labor dispute with the secondaries regarding the treatment of their employees and that the secondaries should be boycotted. This alleged deception purportedly constituted "economic retaliation" against the secondaries, which the General Counsel asks us to deem coercive and proscribed.

The Union argues that the secondary boycott provisions of Section 8(b)(4) are not intended to reach the display of a stationary banner. Relying on the Supreme Court's decision in *DeBartolo*, the Union argues that the Court has instructed the Board to avoid, if possible, construing 8(b)(4)'s statutory language, "threaten, coerce, or restrain," in a manner that would raise serious questions under the First Amendment. The Union argues that although picketing has been found to constitute unlawful coercive conduct under Section 8(b)(4), the banner displays here did not constitute picketing, because there was no patrolling or confrontational conduct. To the contrary, the Union argues that the banner displays were peaceful at all times and should be considered a form of pure "speech" similar to handbilling, which the Court in *DeBartolo* found lawful. Accordingly, the Union argues that the complaint should be dismissed.

Discussion

Absent any binding precedent directly on point, analysis of whether Section 8(b)(4)(ii)(B) prohibits the activity involved here must begin with the text of the statute and must consider its legislative history, the policies underlying the prohibition, and cases involving other types of secondary protest activity, i.e., picketing, handbilling, and similar expressive activity. As explained below, none of the foregoing authority leads to the conclusion that the holding of a stationary banner "threaten[s], coerce[s], or restrain[s]" and that conclusion is reinforced by our duty to avoid creating serious constitutional questions.

A. Application of Section 8(b)(4)(ii)(B) to the Present Case

Section 8(b)(4)(ii)(B) of the Act states, in pertinent part, that it shall be an unfair labor practice for a labor organization or its agents:

> (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is --
>
> (B) forcing or requiring any person to . . . cease doing business with any other person . . . .

Congress adopted this provision and the other provisions of Section 8(b)(4) with the objective of "shielding unoffending employers" from improper pressure intended to induce them to stop doing business with another employer with which a union has a dispute. *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 692 (1951). Congress did not, however, intend to prohibit all conduct of labor organizations that might influence or persuade such "unoffending employers" to support the unions' cause. The Supreme Court explained:

[8] The text of the handbill distributed by the Union's representatives at the RA Tempe restaurant is attached as Appendix C. The handbills distributed at the facilities of other secondaries named other primary and secondary employers, but otherwise varied only minimally in their wording.

[9] The dissent asserts facts not in the record when it states that the activity at issue was part of the Union's "long-running campaign to enmesh property owners in its labor dispute."

> Whatever may have been said in Congress preceding the passage of the Taft-Hartley Act concerning the evil of all forms of 'secondary boycotts' and the desirability of outlawing them, it is clear that no such sweeping prohibition was in fact enacted in § 8 (b)(4)(A). The section does not speak generally of secondary boycotts. It describes and condemns specific union conduct directed to specific objectives.

Carpenters Local 1976 v. NLRB (Sand Door), 357 U.S. 93, 98 (1958).[10] Thus, the Court made clear that "a union is free to approach an employer to persuade him to engage in a boycott, so long as it refrains from the specifically prohibited means of coercion" specified in Section 8(b)(4). Id. at 99. Congress did not go so far as to "protect these other persons or the general public by any wholesale condemnation of secondary boycotts," the Court continued, "since if the secondary employer agrees to the boycott, or it is brought about by means other than those proscribed in § 8 (b)(4)(A), there is no unfair labor practice." Id.

Since the recodification of Section 8(b)(4) and the addition of Subsection 8(b)(4)(ii) in 1959, the Supreme Court has continued to construe the scope of the expanded statutory prohibition in a manner consistent with its approach in *Sand Door*.[11] Most importantly for our purposes here, the Supreme Court has held that Congress did not intend to bar all forms of union protest activity directed at a secondary employer even when the object of the activity is to induce the secondary to cease doing business with a primary employer. In *DeBartolo*, the Supreme Court held that "more than mere persuasion is necessary to prove a violation of § 8 (b)(4)(ii)." *DeBartolo*, supra, at 578. Specifically, the Supreme Court held that distribution of handbills urging consumers not to patronize a secondary employer with the object of inducing the secondary to cease doing business with a primary employer is not unlawful. "The loss of customers because they read a handbill urging them not to patronize a business, and not because they are intimidated by a line of picketers, is the result of mere persuasion, and the neutral who reacts is doing no more than what its customers honestly want it to do." Id. at 579. Thus, the Supreme Court's construction of Section 8(b)(4) generally, and Section 8(b)(4)(ii)(B) in particular, leaves us to determine whether the display of stationary banners on public sidewalks or rights of way is intimidation or persuasion.

1. The text of the Act and its legislative history establish that Congress did not intend to bar display of stationary banners

In answering the question before us, we turn first to the text of the Act. In order for conduct to violate Section 8(b)(4)(ii)(B), the conduct must "threaten, coerce, or restrain."[12] There is no contention that the Respondent threatened the secondary employers or anyone else. Nor is there any contention that the Respondent coerced or restrained the secondaries as those words are ordinarily understood, i.e., through violence, intimidation, blocking ingress and egress, or similar direct disruption of the secondaries' business. A reading of the statutory words "coerce" or "restrain" to require "more than mere persuasion" of consumers is compelled by the Supreme Court's holding in *DeBartolo*. 485 U.S. at 578. Here, however, there is nothing more.

Turning to the legislative history, we find no indication that Congress intended to give the words of the Act anything but their ordinary meaning. Nothing in the legislative history suggests that Congress intended to prohibit the peaceful, stationary display of a banner on a public sidewalk. Had Congress intended the prohibition to apply so broadly—"to bar any and all nonpicketing ap-

[10] The Court's opinion refers to Sec. 8(b)(4)(A), not 8(b)(4)(B), because in 1958 the former paragraph was the location of the statutory language addressed by the Court. The language was moved, with modifications immaterial to this discussion, to Sec. 8(b)(4)(B) as part of the Landrum-Griffin amendments of 1959. Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, § 704(a), 73 Stat. 519, 543 (hereinafter cited as LMRDA), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1, 24–25.

[11] Thus, while the dissent is correct that Congress overturned the precise holding in *Sand Door* in the Landrum-Griffin amendments by making the execution of "hot cargo" agreements (agreements between a union and an employer not to handle nonunion goods) unlawful, Congress did not in any way reject the Court's logic. Congress outlawed the specific practice found lawful in *Sand Door*, but it did not adopt a sweeping prohibition of all secondary boycotts in 1959 any more than it had in 1947. If that is what Congress had intended, as the dissent suggests, Congress would have so provided in either 1947 or 1959, but it did not do so. In subsequent cases, therefore, the Supreme Court continues to follow the logic of *Sand Door* by holding that Sec. 8(b)(4) does not bar actions that fall outside its precise prohibitions even if they aim to induce a secondary employer to cease doing business with a primary employer. See, e.g., *Bhd. of R R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 385-390 (1969);*Tree Fruits*, supra, 377 U.S. at 62-63, 71-73; *NLRB v. Servette, Inc.*, 377 U.S. 46, 55-57 (1964).

[12] An 8(b)(4)(ii)(B) violation has two elements. First, a labor organization must "threaten, coerce, or restrain" a person engaged in commerce. Second, the labor organization must do so with "an object" of "forcing or requiring any person to . . . cease doing business with any other person." *NLRB v. Retail Store Employees*, 447 U S. 607, 611 (1980) (*Safeco*). Both elements must be proven to establish a violation. For the reasons discussed below, we find that the peaceful display of a stationary banner does not threaten, coerce, or restrain a secondary employer within the meaning of Sec. 8(b)(4)(ii), and therefore does not violate that section of the Act. Accordingly, we need not decide whether the Union's banner displays had an unlawful object.

peals, through newspapers, radio, television, handbills, or otherwise," the Supreme Court reasoned in *DeBartolo*—"the debates and discussions would surely have reflected this intention." Id. at 584. Yet not only do the debates not reflect such an intention, the indications of congressional intent that exist in the legislative history suggest the opposite. The Supreme Court found no "clear indication . . . that Congress intended . . . to proscribe peaceful handbilling, unaccompanied by picketing, urging a consumer boycott of a neutral employer." Id. at 583–584. The focus of Congress was picketing, not "peaceful persuasion of customers by means other than picketing," the Court found. Id. at 584. The Court cited the explanation of the cosponsor of the House bill, Representative Griffin, "that the bill covered boycotts carried out by picketing [the premises of] neutrals but would not interfere with the constitutional right of free speech. 105 Cong. Rec. 15673, 2 Leg. Hist. 1615." Id. Indeed, in 1959, as part of the Landrum-Griffin amendments to the Act, Congress adopted the so-called publicity proviso to Section 8(b)(4), which (as explained by Senator John Kennedy, the chairman of the conference committee) authorized unions to "carry on all publicity short of having ambulatory picketing in front of a secondary site." Id. at 587, quoting 105 Cong. Rec. 17898–17899 (Sept. 3, 1959) (reprinted in II *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959* 1432 (1959) (hereinafter Leg. Hist.)).[13] The *DeBartolo* Court specifically cited Senator Kennedy's remark as an important indication of the meaning of Section 8(b)(4)(ii)(B). Id. at 587. Equally important is an analysis of the language in the conference bill presented to the House by Representative Griffin and in the Senate by Senator Goldwater which explained that the conference had adopted the House version of the provision at issue "prohibiting secondary consumer picketing . . . 'with clarification that other forms of publicity are not prohibited.'" Id. at 586.[14]

The terms of the Act and its legislative history thus make clear that Congress did not generally intend to bar display of a stationary banner. We could reach a different conclusion in this case only if we were to determine that the banner displays here were picketing of the form Congress intended to bar through Section 8(b)(4)(ii)(B) or were otherwise directly disruptive of the secondary employers' operations in a manner that should be classified as coercion. As discussed below, the display of stationary banners was neither proscribed picketing nor was it otherwise coercive.[15]

2. Holding a stationary banner is not proscribed picketing

The General Counsel argues that the display of the stationary banners is equivalent to conduct that the Board has found to constitute unlawful picketing. We disagree.

The Act does not define "picketing,"[16] and the legislative history does not suggest that Congress understood the term to encompass the mere display of a stationary banner. Further, we must evaluate the sweep of the suggestion in the legislative history that Congress intended to bar picketing in light of both the express statutory terms that bar only actions that "threaten, coerce, or restrain"[17] and, as we discuss below, the protections of the First Amendment. Under our jurisprudence, categorizing peaceful, expressive activity at a purely secondary site as picketing renders it unlawful without any showing of actual threats, coercion or restraint, unless it falls into the narrow exception for consumer product picketing defined in *Tree Fruits*. Moreover, the consequences of categorizing peaceful expressive activity as proscribed picketing are severe. The activity is stripped of protection and employees participating in it can be fired. See, e.g., *Motor Freight Drivers Local 707 (Claremont Polychem. Corp.)*, 196 NLRB 613, 614 (1972) (strikers who picketed in violation of Sec. 8(b)(7)(B) not entitled to reinstatement); *Hardee's Food Systems, Inc.*, 294 NLRB

[13] The publicity proviso of Sec. 8(b)(4) states in relevant part that nothing contained in [Sec. 8(b)] shall be construed to prohibit *publicity, other than picketing*, for the purpose of truthfully advising the public . . . that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer . . . .

29 U.S.C. §158(b)(4) (emphasis added). In DeBartolo, following the principles set forth in earlier decisions, the Court explained that the proviso did not create an exception to the prohibition in Sec. 8(b)(4) that would otherwise have proscribed non-picketing forms of persuasion, but rather added an interpretive gloss to ensure that it was read as "not covering nonpicketing publicity." 485 U.S. at 582–583.

[14] In contrast to the authoritative constructions cited by the Supreme Court, the dissent cites selected comments on the floor, a form of legislative history that the Supreme Court has found to be a highly unreliable indicator of congressional intent. *Zuber v. Allen*, 396 U.S. 168, 186 (1969) ("Floor debates reflect at best the understanding of individual Congressmen.")

[15] Our finding that no picketing occurred makes it unnecessary to address Charging Party Eliason & Knuth's argument that the banner displays constituted unlawful secondary activity, even though it occurred on a common situs under the criteria set out by the Board in *Sailor's Union (Moore Dry Dock)*, 92 NLRB 547 (1950).

[16] Sec. 8(b)(4) does not use the term picket or picketing. As the Second Circuit observed in *NLRB v. United Furniture Workers of America*, 337 F.2d 936, 939 (2d Cir. 1964), "[t]he term 'to picket' made its first appearance in the national labor relations act in the 1959 amendments. Although Sec. 8(b)(7)(B) can be invoked only when 'picketing' is present, the legislative history indicates no awareness that the new section presents a threshold definitional problem."

[17] Indeed, in *Tree Fruits*, the Supreme Court made clear that "the prohibition of §8(b)(4) is keyed to the coercive nature of the conduct, whether it be picketing or otherwise." 377 U.S. at 68.

642, 646 (1989)("Actions that violate Section 8(b) are not protected by the Act even if those actions would otherwise be protected by Sections 7 and 8(a)."), review denied sub nom. *Laborers Local 204 v. NLRB*, 904 F.2d 715 (D.C. Cir. 1990). The activity becomes an unfair labor practice and the Board is required, upon a finding of "reasonable cause" to believe such activity has occurred, to go into federal district court and seek a prior restraint against the continuation of the activity. See 29 U.S.C. §10(l). And, finally, a labor organization engaged in such activity is subject to suit in Federal court where damages can be awarded. See 29 U.S.C. §187. For each of these reasons, we must take care not to define the category of proscribed picketing more broadly than clearly intended by Congress.[18]

The Supreme Court has made clear that "picketing is qualitatively 'different from other modes of communication.'" *Babbit v. Farm Workers*, 442 U.S. 289, 311 fn. 17 (1979) (quoting *Hughes v. Superior Court*, 339 U.S. 460, 465 (1950). Thus, expressive activity that bears some resemblance to picketing should not be classified as picketing unless it is qualitatively different from other nonproscribed means of expression and the qualitative differences suggest that the activity's impact owes more to intimidation than persuasion. Precisely for this reason, the term picketing has developed a core meaning in the labor context. The Board and courts have made clear that picketing generally involves persons carrying picket signs and patrolling back and forth before an entrance to a business or worksite. See, e.g., *Mine Workers District 2 (Jeddo Coal Co.)*, 334 NLRB 677, 686 (2001); *Service Employees Local 87 (Trinity Building Maintenance)*, 312 NLRB 715, 743 (1993), enfd. 103 F.3d 139 (9th Cir. 1996); see also *NLRB v. Retail Store Union, Local 1001*, 447 U.S. 607 (1980)("*Safeco*") (Justice Stevens, concurring) (picketing "involves patrol of a particular locality") (quoting *Bakery Drivers v. Wohl*, 315 U.S. 769, 776-777 (1942) (Justice Douglas, concurring)); *Overstreet v. Carpenters Local 1506*, 409 F.3d 1199, 1213 (9th Cir. 2005) ("Classically, picketers *walk* in a line and, in so doing, create a symbolic barrier.") (Emphasis supplied.)

The core conduct that renders picketing coercive under Section 8(b)(4)(ii)(B) is not simply the holding of signs (in contrast to the distribution of handbills), but the combination of carrying of picket signs and persistent patrolling of the picketers back and forth in front of an entrance to a work site, creating a physical or, at least, a symbolic confrontation between the picketers and those entering the worksite. This element of confrontation has long been central to our conception of picketing for purposes of the Act's prohibitions. In *NLRB v. Furniture Workers*, 337 F.2d 936 (2d Cir. 1964), the Board had found that the union had engaged in unlawful recognitional picketing by affixing picket signs to poles and trees in front of the plant, while designated union members sat in their cars nearby. The court remanded, finding it unclear whether the Board had "considered the extent of confrontation necessary to constitute picketing." Id. at 940. A year later, in *Alden Press, Inc.*, 151 NLRB 1666, 1668 (1965), the Board adopted the Second Circuit's view in *Furniture Workers* that "'[o]ne of the necessary conditions of 'picketing' is a confrontation in some form between union members and employees, customers, or suppliers who are trying to enter the employer's premises.'" (Quoting 337 F.2d at 940). See also *Sheet Metal Workers' Local 15 v. NLRB*, 491 F.3d 429, 438 (D.C. Cir. 2007) ("mock funeral" procession outside a hospital did not constitute picketing, because the participants did not "physically or verbally interfere with or confront Hospital patrons" or create a "symbolic barrier"). To fall within the prohibition of Section 8(b)(4)(ii)(B), picketing must entail an element of confrontation.

The banner displays here did not constitute such proscribed picketing because they did not create a confrontation. Banners are not picket signs. Furthermore, the union representatives held the banners stationary, without any form of patrolling. Nor did the union representatives hold the banner in front of any entrance to a secondary site in a manner such that anyone entering the site had to pass between the union representatives. The banners were located at a sufficient distance from the entrances so that anyone wishing to enter or exit the sites could to do so without confronting the banner holders in any way.[19] Nor can it be said that the Union "posted" the

[18] The dissent's suggestion that we are "motivated in part by the consequences of finding an 8(b)(4) violation, which [we] view as too 'severe,'" is a distortion of our reasoning. In construing ambiguous terms in a statute proscribing a category of activity, it is entirely appropriate for an administrative agency or court to consider the sanctions that Congress has attached to the proscribed conduct to be relevant to the breadth of the proscription intended by Congress. See, e.g., *U S. v. 221 Dana Avenue*, 261 F 3d 65, 74 (1st Cir. 2001) ("federal forfeiture statutes must be narrowly construed because of their potentially draconian effect"); *Martin's Herend Imports v. Diamond & Gem Trading USA*, 112 F.3d 1296 (5th Cir. 1997) ("Given the draconian nature of this ex parte remedy, . . . we believe that it should be narrowly construed.") We suggest no more above.

[19] The RA Tempe banner, while closer to the secondary's entrance than the other banners, was nevertheless placed on the sidewalk, facing the street, *i.e.*, parallel to the sidewalk rather than running across the sidewalk, and as close to the street as possible without being in it. The sidewalk remained completely clear for anyone wishing to enter the restaurant, which could be done without ever seeing the front of the

individuals holding the banners at the "approach" to a secondary's place of business in a manner that could have been perceived as threatening to those entering the sites. The message side of the banner was directed at passing vehicular traffic, rather than at persons entering or leaving the secondaries' premises, and the union representatives faced in the same direction. There is no evidence that the banner holders kept any form of lists of employees or others entering the site or even interacted with passersby, other than to offer a handbill—an undisputably noncoercive act. Thus, members of the public and employees wishing to enter the secondaries' sites did not confront any actual or symbolic barrier and, "[j]ust as members of the public [and employees] can 'avert [their] eyes' from billboards or movie screen visible from a public street, they could ignore the [union representatives] and the union's banners." *Overstreet*, 409 F.3d at 1214. Like the mock funeral at issue in *Sheet Metal Workers*, the display of stationary banners here "was not the functional equivalent of picketing as a means of persuasion because it had none of the coercive character of picketing." *Sheet Metal* Workers, supra at 438. In short, the holding of stationary banners lacked the confrontational aspect necessary to a finding of picketing proscribed as coercion or restraint within the meaning of Section 8(b)(4)(ii)(B).

In order to sweep the display of stationary banners into the prohibition contained in Section 8(b)(4)(ii)(B), the General Counsel proposes a broad definition of picketing that strips it of its unique character and is at odds with the Supreme Court's decision in *DeBartolo*. The General Counsel argues that "picketing exists where a union posts individuals at or near the entrance to a place of business for the purpose of influencing customers, suppliers, and employees to support the union's position in a labor dispute." The General Counsel adds, "the posting of individuals in this fashion is inherently confrontational within the meaning of the Act." Yet shortly after *DeBartolo* was decided, the Board explained that the decision held "that Section 8(b)(4)(ii)(B) of the Act does not proscribe peaceful handbilling and other nonpicketing publicity urging a total consumer boycott of neutral employers." *Service Employees (Delta Air Lines)*, 293 NLRB 6092, 602 (1989). The Board has thus already rejected the General Counsel's overbroad definition of picketing.

Accepting the General Counsel's broad definitions of picketing and confrontation, as not requiring either the use of traditional picket signs or any form of patrolling,[20] would bar distribution of handbills to consumers and would thus defy the holding in *DeBartolo*. In proposing this clearly overbroad definition of picketing, the General Counsel ignores the imperative, created by the words of the Act as well as the principle of constitutional avoidance, to distinguish between actions the impact of which rests on persuasion and actions whose influence depend on coercion. The General Counsel argues that the holding of stationary banners "amounts to a call to action on the part of the public against the neutral entities named on the banners, sufficient to trigger the type of response by the public that is typically elicited by traditional picket signs." But *DeBartolo* and the Board's decision in *Delta Air Lines* permit just such a call to action so long as it is not reinforced with intimidation. The stipulated facts in this case suggest no such intimidation.[21]

We acknowledge that prior Board decisions have used broader language to define picketing. In *Lumber & Sawmill Workers Local 2797 (Stoltze Land & Lumber Co.)*, 156 NLRB 388, 394 (1965), cited prominently by the dissent, the Trial Examiner, in a decision affirmed by the Board, stated, "The important feature of picketing appears to be the posting by a labor organization . . . of individuals at the approach to a place of business to accomplish a purpose which advances the cause of the un-

banner or confronting the union agents, who were facing the street and separated from the portion of the sidewalk that would be used to enter the restaurant by a bench, several trees, a street light, or newspaper dispensers (depending on the precise placement of the banner that day).

[20] The dissent incorrectly suggests that our holding is inconsistent with those in *Mine Workers District 2 (Jeddo Coal)*, 334 NLRB 677 (2001), and *Sheet Metal Workers Local 15 (Brandon Regional Medical Center)*, 346 NLRB 199 (2006), enf. denied 491 F.3d 429 (D.C. Cir. 2007), but concedes that the activity in the former case involved carrying traditional picket signs and in the latter, patrolling (although the D.C. Circuit disagreed with the latter finding). In response to the dissent's arguments about the Board's "recent unanimous holding" in *Brandon*, Chairman Liebman points out that she joined that decision in a separate concurrence, emphasizing that she found the mock funeral procession to be unlawful expressly because it involved ambulatory patrolling.

[21] Our rejection of the General Counsel's argument that the conduct at issue here constituted picketing makes it unnecessary for us to reach one of his two arguments concerning the truthfulness of the words "LABOR DISPUTE" on the banners. The General Counsel argues that those words, combined with the location of the banners at the secondary sites, misleadingly suggested to consumers that the Union had a primary labor dispute with the secondaries and thus called on consumers to boycott the secondaries entirely. But the General Counsel makes this argument only to demonstrate that the conduct did not fit within the product picketing exception to the prohibition of secondary picketing created by *Tree Fruits*. Because we hold that the conduct was not picketing, this argument is inapposite. Moreover, the General Counsel's citation of pre-*DeBartolo* cases to suggest that this alleged misrepresentation took the banner displays outside the safe haven created by the publicity proviso is beside the point after *DeBartolo*, which made clear that conduct falling outside the proviso is not therefore proscribed. Even assuming the phrase was misleading (incorrectly, for reasons explained below), the General Counsel presents no colorable argument that misleading speech is coercive.

ion, such as keeping employees away from work or keeping customers away from the employer's business." Despite that broad language, however, in *Stoltze Land*, the activity in question was immediately preceded at the same location by traditional, ambulatory picketing (which was lawful prior to the union being decertified);[22] union representatives continued the practice they had begun during the traditional picketing of taking down the license numbers of vehicles entering the premises even after the picketing ended and was replaced with distribution of handbills; and the union disciplined members who worked for Stoltze for "crossing a picket line" even after the traditional picketing had been ostensibly replaced by distribution of handbills. *See* id. at 389–392. Moreover, *Stoltze* preceded *DeBartolo* and, taken literally and out of context, its definition of picketing, as well as its holding that "handbilling . . . was . . . picketing" is flatly inconsistent with the Supreme Court's later holding. 156 NLRB at 393.[23]

We also acknowledge that there are prior Board decisions finding picketing during periods when there was no patrolling or other ambulation. However, each of the prior cases is distinguishable from the banner displays at issue here. In many of the prior cases, the display of stationary signs or distribution of handbills was preceded at the same location or accompanied at other locations by traditional, ambulatory picketing. See, e.g., *Woodward Motors*, 135 NLRB 851, 856 (1962) (an 8(b)(7) case where traditional picketing ended 2 weeks before stationary display of picket signs began); *Lawrence Typographical Union No. 570 (Kansas Color Press)*, 169 NLRB 279, 282 (1968) (an 8(b)(7) case where strikers ceased traditional picketing and immediately began distributing handbills bearing the same message as prior picket signs); *Construction & General Laborers Local 304 (Athejen Corp.)*, 260 NLRB 1311, (1982) (picketers would "drift" from gate to gate and sometimes place signs they had previously carried on cones, barricades or fence); *Tamaha Local. 1329, United Mine Workers of America (Alpine Const. Co.)*, 276 NLRB 415, 431 (1985) (Sec.ion 8(b)(7) case where, after traditional picketing ceased, union assigned "security guards" to picket shacks outside entrances to mines); *Iron Workers Pacific Northwest Council (Hoffman Construction)*, 292 NLRB 562 fn. 2 (1989), enfd. 913 F.2d 1470 (9th Cir. 1990) (group of union members "gathered around a [picket] sign" near a neutral gate while ambulatory picketing took place simultaneously at the primary gate); *United Mine Workers District 2 (Jeddo Coal)*, 334 NLRB 677, 679–681 (2001) (traditional picketing at other sites and picket signs referred to crossing "picket lines"); cf. *NLRB v. Furniture Workers*, 337 F.2d 936, 937 (2d Cir. 1964) (8(b)(7) case where fixed picket signs were preceded by traditional picketing). The Board pointed out the relevance of this distinguishing fact in *Kansas City Color Press*, supra, 169 NLRB at 284, observing: "[f]ollowing in the footsteps of the conventional picketing which had preceded it, this conduct was intended to have, and could reasonably be regarded as having had, substantially the same significance for persons entering the Company's premises."[24] In many of the prior cases, the display was of traditional picket signs of the same type used in ambulatory picketing. *Athejen*, supra at 1316, 1319; *Woodward*, supra at 851 fn. 1 & 856; *Jeddo*, supra at 679; *Hoffman*, supra at 571, 583 & fn. 18; *Calcon*, supra at 570–571. And in many of the prior cases, union representatives were stationed near the stationary picket signs conspicuously to observe and, in some cases, record who entered the facility. *Teamster Local 282 (General Contractors Assn. of New York)*, 262 NLRB 528, 530, 541 (1982); *Kansas Color Press*, supra at 282.[25] Finally, in many of the prior cases, there was evidence that the stationary signs or posted union representatives had the effect of inducing employees to refuse to make deliveries to the target site. See, e.g., *Woodward*, 135 NLRB at 857. The prior cases are thus distinguishable.[26]

[22] The case was decided under Sec. 8(b)(7)(B), which proscribes recognitional picketing by a union which has lost a valid election in the preceding 12 months. Contrary to the dissent's suggestion, we do not propose that a different definition of picketing be used under Sec. 8(b)(4) and (7). Rather, we point out that many of the cases cited in the dissent were decided under Sec. 8(b)(7) in order to explain how the activity at issue in those cases could have been preceded at the same location (as it was in many of them) by lawful primary picketing as we describe further below.

[23] Other Board decisions (many of which are relied on by the dissent) have cited the *Stoltze* "posting" definition. See, e.g., *Kansas Color Press*, 169 NLRB 279, 283 (1968); *Teamsters Local 282 (General Contractors Assn. of New York)*, 262 NLRB 528, 540 (1982); *Laborers (Calcon Constuction Co.)*, 287 NLRB 570, 573 (1987); *Mine Workers District 2 (Jeddo Coal)*, 334 NLRB 677, 686 (2001). Those decisions, however, either preceded *DeBartolo* or made no attempt to reconcile the "posting" definition with *DeBartolo*. Furthermore, the cases, like *Stoltze* itself, are factually distinguishable, as we explain above.

[24] Significantly, many of these cases, like *Stoltze*, were brought under Sec. 8(b)(7) rather than 8(b)(4) and thus the unions were attempting to continue the intended effects of their prior, lawful, primary picketing—inducing members working inside the subject establishment to cease work—by other means. Thus, these cases are properly understood as involving signal picketing, which we discuss below.

[25] Here, in contrast, the orientation of both the banners and the union representatives toward busy streets, rendered such observation highly impractical.

[26] In *Mine Workers (New Beckley Mining)*, 304 NLRB 71, 71*Teamster*72 (1991), enfd. 977 F.2d 1470 (D.C. Cir. 1992), the Board found that a mass early morning gathering of 50-140 people at a motel housing an agent retained to supply striker replacements and the replacements themselves , accompanied by shouting and name calling,

The General Counsel nevertheless contends that, even if the banners did not constitute proscribed picketing, they constituted "signal picketing," that is, "activity short of a true picket line, which acts as a signal that sympathetic action" should be taken by unionized employees of the secondary or its business partners. *Electrical Workers Local 98 (Telephone Man)*, 327 NLRB 593 fn. 3 (1999).

Signal picketing is activity short of picketing through which a union intentionally, if implicitly, directs members not to work at the targeted premises.[27] "It is the mutual understanding among union employees of the meaning of these signals and bonds, based on either affinity or the potential for retribution, that makes these signals" potentially unlawful. *Overstreet*, supra at 1215. Thus, "[t]he entire concept of signal picketing . . . depends on union employees talking to *each other*, not to the public." Id. (emphasis in the original); see also *Kohn v. Southwest Regional Council of Carpenters*, 289 F. Supp.2d 1155, 1165 fn. 5 (C.D. Cal. 2003) ("'signal picketing' generally refers to activity designed to induce employees to strike, not activity designed to inspire a consumer boycott").

Here, nothing about the banner displays themselves or any extrinsic evidence indicates any prearranged or generally understood signal by union representatives to employees of the secondary employers or any other employees to cease work. The only banner that was held within 75 feet of any form of entrance to a facility or to a facility parking lot bore a message clearly directed only to the public: "DON"T EAT 'RA' SUSHI." None of the banners called for or declared any form of job action (in contrast to typical picket signs declaring "on strike"). In addition, the handbills distributed by the union representatives holding the banners expressly stated, "WE ARE NOT URGING ANY WORKER TO REFUSE TO WORK NOR ARE WE URGING ANY SUPPLIER TO REFUSE TO DELIVER GOODS."

Signal picketing does not and cannot include all activity conveying a "do not patronize" message directed at the public simply because the message might reach, and send a signal to, unionized employees. Such a broad definition of the proscribed category of nonpicketing activity would be inconsistent with *DeBartolo*, *Tree Fruits*, and many other prior decisions. As the Ninth Circuit observed in *Overstreet*, "To broaden the definition of 'signal picketing' to include 'signals' to any passerby would turn the specialized concept of 'signal picketing' into a category synonymous with any communication requesting support in a labor dispute." *Oversteet*, supra at 1215.

Moreover, the notion that the banners operated not as ordinary speech, but rather as a signal automatically obeyed by union members must be subject to a dose of reality. The General Counsel asks us to simply and categorically assume, even in the absence of additional evidence of intent or effect, that when agents of a labor organization display the term "labor dispute" on a banner proximate to a workplace, it operates as such a signal. Our experience with labor relations in the early 21st century does not suggest such a categorical assumption is warranted. Here, moreover, the record is devoid even of evidence that any union members worked for any of the secondary employers or otherwise regularly entered the premises in the course of their employment. In these circumstances, we decline to place labor organizations' speech into such a special and disfavored category.

In the absence of evidence that the Union did anything other than seek to communicate the existence of its labor dispute to members of the general public[28]—which

constituted "a form of picketing" and therefore violated Sec. 8(b)(4)(ii)(B). We question whether that activity was properly characterized as "picketing." Regardless, as observed in Sec. A.3 below, the sheer number of participants, together with the confrontational nature of their conduct, rendered it coercive, and therefore unlawful, when coupled with a forbidden objective. *Service Employees Local 525 (General Maintenance Co.)*, 329 NLRB 638 (1999) enfd. 52 Fed.Appx. 357 (9th Cir. 2002) (unpub.), cited by the dissent, also involved a massed assembly of 40 to 50 individuals and is similarly inapposite.

[27] Consistent with the core danger of signal picketing, the typical signal picketing case includes an allegation that the union violated Sec. 8(b)(4)(i)(B), which prohibits a union from inducing or encouraging *employees* of a neutral employer to engage in a refusal to work. See, e.g., *Jeddo Coal*, *Telephone Man*, *Hoffman*, and *Calcon*, supra. There is no 8(b)(4)(i) allegation here.

[28] The Board's prior decisions finding signal picketing each involved such additional evidence of the union's effort to induce or encourage a work stoppage or refusal to handle goods or perform services. See, e.g., *Hoffman Construction*, supra at 562 fn. 2 (agents posted around a stationary sign near a neutral gate while ambulatory picketing occurred at the primary gate "constitute[d] a 'signal' to the employees of secondary and neutral employers;" at some locations, union representatives talked to employees approaching the gates, and employees turned around and left); *Teamsters Local 182 (Woodward Motors)*, 135 NLRB 851 fn. 1, 857 (1962), enfd. 314 F.2d 53 (2d Cir. 1963) (8(b)(7)(B) violation found where, following an extended period of ambulatory picketing, the union placed picket signs in a snow bank while union representatives sat in nearby cars; the representatives stopped approaching delivery trucks to speak to the drivers, after which the drivers left without making deliveries); *Teamsters Local 282 (General Contractors Assn., of New York)*, 262 NLRB 528, 530, 541 (1982) (union representatives stationed themselves at the delivery entrances to construction sites and approached trucks making deliveries and explained that union was engaged in a job action and trucks turned back); *Calcon Construction*, 287 NLRB 570, 572–574 (1987) (picket signs laid on the ground "at or near" jobsite entrances were designed "to induce employees of [secondary] subcontractors. . . to withhold their labor from the site," because the alleged "pickets" were present at the commencement of the workday); *Jeddo Coal*, supra at 686–687 (con-

could, of course, as in *DeBartolo* and *Tree Fruits*, include employees of the secondaries and of others doing business with them—we find that the expressive activity did not constitute proscribed signal picketing merely because it involved the use of banners.

3. The banner displays were not disruptive or otherwise coercive

The Board has found non-picketing conduct to be coercive only when the conduct directly caused, or could reasonably be expected to directly cause, disruption of the secondary's operations. Blocking ingress or egress is one obvious example of such coercive conduct. In a variety of other instances, the Board and the courts have recognized that disruptive, non-picketing activity directed against secondaries can constitute coercion. For example, a union that engaged in otherwise lawful area-standards publicity violated Section 8(b)(4)(ii)(B) by broadcasting its message at extremely high volume through loudspeakers facing a condominium building that had hired the primary employer as a subcontractor. *Carpenters (Society Hill Towers Owners' Assn.)*, 335 NLRB 814, 820–823 (2001), enfd 50 Fed.Appx. 88 (3d Cir. 2002) (unpub.).[29] The common link among all of these cases is that the union's conduct was or threatened to be the direct cause of disruption to the secondary's operations. There was no such disruption or threatened disruption here. The banner holders did not move, shout, impede access, or otherwise interfere with the secondary's operations.[30]

In sum, we find that the peaceful, stationary holding of banners announcing a "labor dispute" fell far short of "threatening, coercing, or restraining" the secondary employers.

4. The dissent's position is untenable

Our colleagues' position rests on three clearly erroneous foundations. First, the dissent suggests that all "secondary boycotts" are unlawful. But the plain text of Section 8(b)(4) says nothing of the kind and the Supreme Court as well as the Board have repeatedly held to the contrary.[31] Most clearly, in *DeBartolo*, the Court held that the Act did not bar the distribution of handbills urging a consumer boycott of a secondary employer. Had Congress intended the broad prohibition suggested in the dissent–"to bar any and all non-picketing appeals, through newspapers, radio, television, handbills, or otherwise," the Supreme Court reasoned in *DeBartolo*–"the debates and discussions would surely have reflected this intention." 485 U.S. at 584. Yet the Court found no "clear indication . . . that Congress intended . . . to proscribe peaceful handbilling, unaccompanied by picketing, urging a consumer boycott of a neutral employer," i.e., a secondary boycott. Id. at 583–584. See also *Delta Air Lines*, supra. Thus, as we explained above, a consumer boycott of a secondary employer is unlawful only if it is induced by picketing or coercion.

Second, the dissent asserts that the banner displays were coercive, but one searches the dissent in vain for any explanation of why American consumers would be coerced by this common form of expressive activity. The dissent asserts that the banners "sought to invoke 'convictions or emotions sympathetic to the union activity.'" But that is persuasion, not coercion. The dissent further asserts that the banner "sought to invoke . . . 'fear or retaliation if the picket is defied,'" but can point to no evidence whatsoever suggesting such a coercive intent or

duct was part of a multisite campaign that included ambulatory picketing and the use of traditional picket signs at other sites).

[29] See also *General Maintenance*, supra, 329 NLRB at 664–665, 680 (hurling filled trash bags into the building's lobby); *Service Employees Local 87 (Trinity Maintenance)*, 312 NLRB 715, 746–748 (1993), enfd. mem.103 F.3d 139 (9th Cir. 1996) (use of bullhorns directed at building's tenants); *Mine Workers (New Beckley Mining)*, 304 NLRB 71, 71–72 (1991), enfd. 977 F.2d 1470 (D.C. Cir. 1992) (mass early morning gathering of 50–140 people at motel housing agent providing striker replacements, with shouting and namecalling); *Service Employees Local 399 (William J. Burns Agency)*, 136 NLRB 431, 436–437 (1962) (mass gathering and marching without signs at entrance to exhibit hall impeded access and was therefore coercive, whether or not it constituted "picketing").

[30] Our colleagues knock down a straw man when they suggest that in cases not involving picketing we would require the General Counsel to prove that conduct "directly caused, or could reasonably be expected to cause, significant disruption of the secondary's operations" before we would find it coercive within the meaning of Sec. 8(b)(4)(ii)(B). Of course, the General Counsel need not wait for harm to be inflicted. The Act clearly proscribes forms of coercion other than picketing that threaten such harm. But the common thread running through the Board cases finding such coercion is that it is exerted directly against the secondary employer or its agents. In other words, if union agents block ingress or egress, they directly interfere with the employer's operations. Unless the direct interference is not significant, i.e., it is de minimis, the Board will find it coercive. Cf. *Metropolitan Regional Council of Carpenters (Society Hill Towers Owners' Assn.)*, 335 NLRB 814 fn. 1 (2001) (brief picketing at reserve gate not unlawful). Similarly, mass assemblies accompanied by shouting and name calling around the home or other lodging of employer agents that cause the agents to fear for their safety directly exert a coercive force against the employer. As Senator Dirksen, a member of the Conference Committee that approved the language in Sec. 8(b)(4)(ii)(B) explained the distinction, the amendment "makes it an unfair labor practice for a union to try to coerce or threaten an employer directly (but not to ask him) in order— . . . [t]o get him to stop doing business with another firm." 105 Cong. Rec. 19849 (Sept. 14, 1959), II Leg. Hist 1823 (quoted in *NLRB v. Servette, Inc.*, supra, 377 U.S. at 54 fn. 12). Our point above is merely that the peaceful, stationary holding of banners announcing a labor dispute, even if such conduct is intended to and does in fact cause consumers freely to choose not to patronize the secondary employer, does not constitute such direct, coercive interference with the employer's operations or a threat thereof.

[31] See sec. A, supra.

effect.[32] The dissent cites the size of the banners and the presence of union agents. Union agents, of course, are also present during what the Supreme Court has held to be the noncoercive distribution of handbills. Thus, the dissent's finding of coercion is based solely on the size of the message. But the banners were no larger than necessary to be seen by passing motorists and, in any event, there is no reason why a large banner would intimidate anyone passing by in a car or even on foot.

Display of banners is not a novel form of public expression. See cases cited below, sec. B. Anyone who walks down the sidewalks of our cities, opens a newspaper, watches the news, or surfs the web is likely to have encountered this form of public expression.[33] Indeed, banners are a commonplace at Fourth of July parades and ordinarily precede high school marching bands. The very ordinariness of banners in our open society undermines the dissent's contention that they are coercive.

Finally, unable to advance any reason why the peaceful display of stationary banners would coerce consumers, the dissent posits that holding a stationary banner is picketing, but does so only by expanding the category of picketing far beyond its ordinary meaning and existing precedent and in a manner sharply at odds with *DeBartolo*. While the dissent quotes bits and pieces from our prior precedents, often from dicta,[34] it does not establish that the Board has adopted a clear and consistent definition of picketing that encompasses the peaceful display of stationary banners and, certainly, not the definition proposed in his dissent today. We address and distinguish each of the prior precedents cited by the dissent above.

Resting on these erroneous foundations, the proposition advanced in the dissent could not be more stark or more in tension with the express terms and fundamental purposes of the Act, Supreme Court precedent, and the core protections of the First Amendment. In the dissent's view, it would be unlawful for a single union supporter to stand alone outside a store, restaurant, or other establishment that the union seeks to encourage to cease doing business with a business that the union believes is undermining labor standards and politely ask consumers, "Please don't shop here" The dissent posits that "the posting of union agents at the site of a neutral employer is coercive within the meaning of Section 8(b)(4)(ii)(B)." There is no basis for concluding that the United States Congress intended such a broad reading of Section 8(b)(4). Indeed, the dissent's position flies in the face of any reasonable understanding of the term "coercion," is at war with the Supreme Court's holdings in *DeBartolo*, and would cut to the heart of the First Amendment in a manner that we believe it is our constitutional duty as members of the Executive Branch to avoid, as we now explain.

B. Application of the "Constitutional Avoidance" Doctrine

Our conclusion that the holding of a stationary banner does not violate Section 8(b)(4)(ii)(B) is supported, if not mandated, by the constitutional concerns that animated the Supreme Court's decision in *DeBartolo* and its precursors. To prohibit the holding of a stationary banner would raise serious constitutional questions under the First Amendment, as the Federal courts (notably, the Ninth Circuit in *Overstreet*, supra) have concluded. Under the framework established in the series of decisions culminating in *DeBartolo*, supra, we cannot so hold unless it is unavoidable, which it clearly is not in this case.[35]

In *DeBartolo*, the primary labor dispute was between an alliance of construction unions and a builder engaged in the construction of a new store at an existing shopping

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[32] Indeed, the dissent here quotes language in *United Furniture Workers*, supra, 337 F.2d at 940, from a passage in which the court is not stating its holding, but rather describing a party's *contention* that *picketing* necessarily involves an element of confrontation.

[33] See,.e.g.,.http://www.unc.org/atf/cf/%7BDB6A45E4-C446-4248-82C8-E131B6424741%7Dunns_237_080516_468.jpg, retrieved 05-17-10; http://farm4.static.flickr.com/3572/3362798476_dffd19e0ae.jpg, retrieved05-17-10; http://www.electjarrod.com/sitebuildercontent/sitebuilderpictures/LeaPartyBanner_0026.jpg, retrieved 05-17-10.

[34] To support their overbroad construction, our colleagues repeatedly cite broad language, but from cases whose actual holdings applied only to picketing or forms of coercion not at issue here. See, e.g., infra at sec. I.B.1. (quoting *Soft Drink Workers Local 812 v. NLRB*, 657 F 2d 1252, 1267 fn. 27 (D.C. Cir. 1980) (picketing), and *Kentucky State District Council of Carpenters (Wehr Constructors, Inc.)*, 308 NLRB 1129, 1130 fn. 2 (1992) (disciplinary charges against union member); sec. I.B.2. (citing *Laborers Eastern Regional Organizing Fund (Ranches at Mt. Sinai)*, 346 NLRB 1251, 1253 fn. 5 (2006) (patrolling back and forth in front of entrances)); sec II.A. (citing *Mine Workers District 2 (Jeddo Coal Co.)*, 334 NLRB 667, 686 (2001) ("six individuals stood at the entrance to the . . . facility, three of them carrying picket signs"); secs. I.B.2, and II.A. (citing *Service Employees Local 87 (Trinity Maintenance)*, 312 NLRB 715, 746–753 (1993) (multiple instance of traditional picketing combined with large groups of people marching in circular motion at entrances, blocking doors, making excessive noise, and entering the secondaries' buildings).

[35] Member Schaumber suggests that as members of the Executive Branch, state actors bound to uphold and abide by the Constitution, it is not our duty to avoid trenching on the First Amendment by defining peaceful, expressive activity to be unlawful. We disagree and believe that the Board has the authority, indeed, that the Board has a duty, to construe the Act, if possible, so as not to violate the Constitution. However, inasmuch as both the majority and the dissent analyze the constitutional implications of our respective positions, as was also the case in *Handy Andy, Inc.*, 228 NLRB 447 (1977), (cited by Member Schaumber), we need not address the specifics of Member Schaumber's argument against application of the constitutional avoidance doctrine.

mall; the mall itself and the other mall stores were secondaries. The unions distributed handbills at each of the mall's entrances calling for a consumer boycott of the entire mall. The Board construed Section 8(b)(4)(ii)(B) to prohibit that conduct, holding that the unions' handbilling was coercion or restraint within the meaning of that provision.[36] The Supreme Court rejected that interpretation, applying the canon of constitutional avoidance, in which the Court will construe a statute in order to avoid constitutional questions arising from an otherwise acceptable construction of the statute, if an alternative interpretation is possible and not contrary to the intent of Congress.[37]

The Court began by explaining why the canon of constitutional avoidance came into play:

> [T]he Board's construction of the statute . . . poses serious questions of the validity of §8(b)(4) under the First Amendment. The handbills involved here truthfully revealed the existence of a labor dispute and urged potential customers of the mall to follow a wholly legal course of action, namely, not to patronize the retailers doing business in the mall. The handbilling was peaceful. No picketing or patrolling was involved. On its face, this was expressive activity . . . .

DeBartolo, supra, 485 U.S. at 575–576. The Court then went on to examine the language of Section 8(b)(4)(ii)(B), describing the key terms of the provision—"threaten, coerce, or restrain"—as "nonspecific, indeed vague" and observing that they "should be interpreted with 'caution' and not given a 'broad sweep.'" 485 U.S. at 578, quoting *Curtis Bros.*, supra, 362 U.S. at 290. The Court found no "necessity to construe such language to reach the handbills involved . . . ." Id. Because neither the language of Section 8(b)(4) nor its legislative history "foreclosed" an interpretation of the statute as *not* reaching the handbilling at issue, the *DeBartolo* Court rejected the Board's contrary construction and so avoided the "serious constitutional questions" it raised. 485 U.S. at 588.

Even in the application of the prohibition of Section 8(b)(4)(ii)(B) to picketing, the Court stated in its earlier *Tree Fruits* decision, it has "not ascribed to Congress a purpose to outlaw peaceful picketing unless 'there is the clearest indication in the legislative history' . . . that Congress intended to do so. . . ." *Tree Fruits*, supra at 63 (quoting *Curtis Bros.*, supra, 362 U.S. at 284). The Court explained that its "adherence to this principle of interpretation reflect[s] concern that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment." Id.[38]

1. Holding a banner is speech

The banners in this case conveyed the message that the named entities merited "shame" or should be shunned because of their connection to a labor dispute. Thus, the banners plainly constituted actual speech or, at the very least, symbolic or expressive conduct. The First Amendment protects both. See *Virginia v. Black*, 538 U.S. 343, 358 (2003) (holding that cross-burning was symbolic expression protected by the First Amendment).[39]

There is no basis for treating a banner display differently from the other forms of expressive activity that the Supreme Court has concluded implicate the First Amendment. In upholding the freedom of unions to engage in picketing asking consumers not to purchase a particular product from a secondary, the *Tree Fruits* Court, for example, observed that a "broad ban against peaceful picketing might collide with the guarantees of the First Amendment." 377 U.S. at 63. The Court expressly rejected the argument that no type of picketing could be permitted under Section 8(b)(4) "because, it is urged, all picketing automatically provokes the public to stay away from the picketed establishment" and mem-

[36] *Florida Building Trades Council*, 273 NLRB 1431 (1985), enf. denied 796 F.2d 1328 (11th Cir. 1986).

[37] See also *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (holding that Board lacked jurisdiction over lay faculty members at Catholic high school).

[38] In *Tree Fruits*, supra, the court reached the conclusion that Sec. 8(b)(4) did not reach "product picketing," i.e., picketing directed at consumers with the ultimate aim of persuading secondary merchants not to sell the product of an employer with whom the union has a primary dispute. In order to avoid the constitutional question presented by the Board's interpretation of Sec. 8(b)(4), the Court declined to read the publicity proviso to imply that, because it expressly protected "publicity[] other than picketing," Congress intended that *all* consumer picketing at a secondary site was unprotected. *Tree Fruits*, 377 U.S. at 71-72. The Court rejected the idea "that such picketing *necessarily* threatened, coerced or restrained the secondary employer." Id. at 71 (emphasis added); see also *Servette*, supra, 377 U.S. at 554 ("The publicity proviso was the outgrowth of a profound Senate concern that the unions' freedom to appeal to the public for support of their case be adequately safeguarded.").

[39] See also *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (holding that flag burning is protected by First Amendment, and observing that "conduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments'"); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) (students wearing black armbands to protest Vietnam War were engaged in protected symbolic speech). Although the Supreme Court has held that "[t]he government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word," it may not "proscribe particular conduct *because* it has expressive elements . . . . A law *directed at* the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires." *Texas v. Johnson*, supra, 491 U.S. at 406 (internal citation omitted, emphasis in the original).

bers of the public will not "read the [picket] signs and handbills." Id. at 71.[40]

It is beyond dispute that media such as signs and banners are forms of speech. See, e.g., *City of Ladue v. Gilleo*, 512 U.S. 43, 48 (1994) (striking down municipal ban on residential signs and observing that "signs are a form of expression protected by the Free Speech Clause" of the First Amendment); *Brown v. California Dep't of Transp*, 321 F.3d 1217, 1226 (9th Cir. 2003) (preliminary injunction granted on First Amendment grounds against policy prohibiting anti-war "expressive banners" on highway overpasses); *Stewart v. District of Columbia Armory Bd.*, 863 F.2d 1013, 1019 (D.C. Cir. 1988) (district court erred in dismissing First Amendment complaint alleging the removal of a 3-by-15 foot religious banner displayed by football patrons during a game). Here, therefore, neither the character nor size of the banners stripped them of their status as speech or expression.

Similarly, the spareness of the message conveyed by the banners in no way removed them from the First Amendment's protection. Although the banners in this case may have conveyed less information than a typical handbill, they clearly communicated ideas.[41] Here, moreover, union representatives also distributed handbills while displaying the banners.[42] In any event, as the Ninth Circuit pointed out in *Overstreet*, on essentially identical facts, the use of "catchy shorthand, not discursive speech does not remove the banners from the scope of First Amendment protections, as cases regarding well known short slogans demonstrate." 409 F.3d at 1211, citing *Cohen v. California*, 403 U.S. 15, 25–26 (1971) (applying ordinary First Amendment principles to the slogan "Fuck the draft" on a jacket), and *Cochran v. Veneman*, 359 F.3d 263 (3d Cir. 2004), vacated and remanded on other grounds sub nom. *Johanns v. Cochran*, 544 U.S. 1058 (2005) (applying same principles to billboard phrase "Got Milk?").[43]

In short, the Court has found that the First Amendment protects conduct or statements as repugnant as cross-burning and as crude as "Fuck the draft." Surely a union banner bearing the message "Shame on [ ]" or "Don't Eat" implicates similar constitutional concerns.

Yet our dissenting colleagues assert that prohibiting banner displays would raise no First Amendment concerns for two reasons. First, observing that the Supreme Court has upheld proscriptions on traditional secondary picketing, they assert that the differences between a banner display and traditional picketing are "legally insignificant." We disagree for the reason explained above—picketing involves conduct that creates a confrontation. The Supreme Court has recognized that that distinction between picketing and other forms of communication is indeed significant under the First Amendment:

> While picketing is a mode of communication it is inseparably something more and different. Industrial picketing "is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated."

Hughes v. Superior Ct. of Cal., 339 U.S. 460, 464-465 (1950) (quoting *Bakery & Pastry Drivers Local 802 v. Wohl*, 315 U.S. 769, 775, 776 (1943) (Douglas, J., concurring); see also *Food Employees Local 590 v. Logan Valley Plaza*, 391 U.S. 308, 326 (1968) (Douglas, J., concurring) ("Picketing is free speech plus, the plus being physical activity that may implicate traffic and related matters. Hence the latter aspects of picketing may be regulated."), overruled on other grounds, *Hudgens v. NLRB*, 424 U.S. 507 (1976). Like the distribution of handbills at issue in *DeBartolo*, therefore, the stationary display of a banner is different from picketing and its prohibition would raise serious constitutional questions.

Second, citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912 (1982), our colleagues contend that a substantial governmental interest in "economic regulation" justifies the "incidental" constraint on First Amendment freedoms that would result from reading Section 8(b)(4) to prohibit stationary banner displays. While overturning a state court verdict against the organizers of a consumer boycott involving picketing in *Clai-*

[40] In *Curtis Bros.*, similarly, the Court pointed to the "sensitive area of peaceful picketing" in which Congress carefully targeted "isolated evils." 362 U.S. at 284. Upholding the right of unions to engage in peaceful recognitional picketing, the Court recognized such picketing as a legitimate method of persuasion. Id. at 287 (legislative history of pre-Landrum-Griffin Sec. 8(b)(1)(A) "negat[es] an intention to restrict the use by unions of methods of peaceful persuasion, including peaceful picketing").

[41] See *City of Ladue*, supra at 55 ("They may not afford the same opportunities for conveying complex ideas as do other media, but residential signs have long been an important and distinct medium of expression."). In the present case, insofar as the banners were large enough to be read by persons not entering the employer facilities (passing drivers, for example), they functioned as billboards, obviously a form of protected speech. *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981).

[42] At very least, therefore, the banners served as a means of attracting attention to the handbillers and to their effort to communicate the Union's message in more detail.

[43] In *Cohen*, supra, the Supreme Court rejected the view that "the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for that emotive function which practically speaking, may often be the more important element of the overall message sought to be communicated." 403 U.S. at 26.

borne, the Court, in dictum, cited as an example of permitted constraints those on "[s]econdary boycotts and picketing by labor unions." As we have demonstrated, however, the banner displays here were not picketing. And read in isolation and too broadly, the reference to "[s]econdary boycotts" in the *Claiborne* dictum would remove the foundation from the Court's subsequent decision in *DeBartolo*. In any event, *Claiborne* also cautioned that "the incidental restriction on alleged First Amendment freedoms [must be] no greater than is essential to the furtherance" of the government's interest. Id. at 912 fn. 47 (quoting *United States v. O'Brien*, 391 U.S. 367 (1965)). Thus, the *Claiborne* dictum cannot be read to suggest that a prohibition of the peaceful display of stationary banners would not "pose[] . . . serious questions under the First Amendment" when Congress did not clearly state that it is "essential to the furtherance" of the purpose of Section 8(b)(4)(ii)(B) and we therefore follow the Court's approach in *DeBartolo*. Id., 485 U.S. at 575; *Claiborne*, 458 U.S. at 912 fn. 47.

2. Section 8(b)(4)(ii)(B) need not be read to prohibit banners

Because the Union's display of banners was expressive activity, the canon of constitutional avoidance applies here in interpreting Section 8(b)(4)(ii)(B). The question, then, is whether that section "is open to a construction that obviates deciding whether a congressional prohibition on [banners] on the facts of this case would violate the First Amendment." *DeBartolo*, supra, 485 U.S. at 578. Such a construction *is* possible, just as it was possible in *DeBartolo* to construe the Act as permitting handbilling and in *Tree Fruits* to construe it as permitting product picketing. Nothing in the crucial words of Section 8(b)(4)(ii)(B) --"threaten, coerce, or restrain"—*compels* the conclusion that they reach the display of a banner, either as picketing or as otherwise coercive conduct.

In the absence of textual support, Section 8(b)(4)(ii)(B) can be read as *necessarily* prohibiting the display of a stationary banner only if the legislative history indicates a clear intention by Congress to do so. But the legislative history indicates no such intention. As we have shown, the object of Congress' concern was confrontational, "ambulatory picketing"–in Senator Kennedy's phrase–not the stationary display of banners. The Ninth Circuit's decision in *Overstreet* explains the obvious difference:

> Classically, picketers *walk* in a line and, in so doing, create a symbolic barrier. . . . In contrast, bannering involves no walking, in line or otherwise, of union members.

409 F.3d at 1213 (emphasis in original).

The Federal courts have explained persuasively why it is reasonable to construe Section 8(b)(4)(ii)(B) as *not* reaching the display of a stationary banner. The Ninth Circuit in *Overstreet*, citing *DeBartolo* and emphasizing "the need to avoid creating a 'significant risk' to the First Amendment," considered whether the conduct involved any of the following: (1) the creation of "a symbolic barrier" through patrolling or other conduct in front of the entrances to the neutrals' premises; (2) the creation of a "physical barrier" blocking those entrances; or (3) other behavior that was threatening or coercive, such as taunting of passersby, the massing of a large group of people, or following patrons or would-be patrons away from a neutral's premises. 409 F.3d at 1209, 1211. Similarly, the court in *Kohn* noted that the individuals holding the banner did not "patrol, shout, block entrances, or otherwise act aggressively." 289 F. Supp.2d at 1168; see also *Benson*, 337 F. Supp.2d at 1278 fn. 16 (same). Each of the actions cited by the Ninth Circuit might well constitute coercion and thereby trigger the statutory prohibition, but none of them occurred here.[44]

In addition to the Ninth Circuit's decision in Overstreet, the decision of the United States Court of Appeals for the District of Columbia Circuit in *Sheet Metal Workers' Local 15 v. NLRB*, supra, strongly supports our construing Section 8(b)(4)(ii)(B) in order to avoid serious constitutional questions. In that case, the court—applying the doctrine of constitutional avoidance, pursuant to *DeBartolo*–held that a union's mock funeral procession did not violate Sec. 8(b)(4)(ii)(B). Citing the Ninth Circuit's *Overstreet* decision with approval, the court explained that the funeral was "not the functional equivalent of picketing . . . because it had none of the coercive character of picketing." 491 F.3d at 438. Union members "did not physically or verbally interfere with or confront . . . patrons coming and going," nor did they "'patrol' the area in the sense of creating a symbolic barrier." Id.[45]

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[44] Compare *Laborers Eastern Regional Organizing Fund (Ranches at Mt. Sinai)*, 346 NLRB 1251 (2006) (demonstrators walking back and forth in front of entrance were engaged in picketing).

[45] In reversing the Board's finding of a violation, the court noted that the mock funeral did not take place in front of hospital entrances or even "immediately adjacent" to them, but rather 100 feet away from the main entrance. Id.

To support their argument that the display of banners was coercive and outside the First Amendment's protection, our colleagues cite the 11th Circuit's "obvious disagreement" with the D.C. Circuit in *Kentov v. Sheet Metal Workers Local 15*, 418 F.3d 1259 (11th Cir. 2005), which affirmed a district court's Sec. 10(l) injunction against the same "mock funeral procession" involved in *Sheet Metal Workers, supra*. Contrary to the D.C. Circuit, the 11th Circuit found reasonable cause to believe that the mock funeral was "the functional equivalent of picket-

Finally, we find no merit in the General Counsel's and Member Schaumber's contention that the Union, by naming only the secondary Employers on the banners proclaiming a "labor dispute," fraudulently misrepresented to the public that it had a primary labor dispute with the neutral employers. By making this allegedly false claim, the General Counsel asserts, the Union forfeited any First Amendment protection and coerced the secondary employers in violation of Section 8(b)(4)(ii)(B).

We reject the predicate of the argument for two reasons. First, by using the phrase "labor dispute," the Union's banners (and its handbills) did not in any way specify the nature of the labor dispute at issue. The expansive definition of "labor dispute" contained in Section 2(9) of the Act easily encompasses both primary and secondary disputes.[46] Cf. *Burlington Northern R.R. Co. v. Brotherhood of Maint. of Way Employees*, 481 U.S. 429, 443 (1987) (the Norris-LaGuardia Act's nearly identical definition of "labor dispute" covers disputes with secondaries); *Jacksonville Bulk Terminals v. International Longshoremen's Assn.*, 457 U.S. 702, 712 (1982) (the Norris-LaGuardia Act's definition "must not be narrowly construed"). The banners did not state or imply that the "labor dispute" was a primary labor dispute. Thus, the Union banners correctly used a statutory term. Cf. *Marquez v. Screen Actors Guild*, 525 U.S. 33, 46–48 (1998) (union did not breach duty of fair representation by negotiating union-security clause that tracked statutory language). Moreover, as the Ninth Circuit pointed out in *Overstreet*, supra, 409 F.3d at 1217, members of the public viewing the banners were unlikely to be familiar with the technical distinction in labor law between a primary and secondary dispute – and would likely have read the term "labor dispute" as indicating, correctly, that the Union had a dispute with the entity named that related to labor. In other words, the banners did not communicate a false message whether read by a trained labor lawyer or an ordinary member of the public.

There is a second shortcoming in the argument. A false statement does not lose the protection of the First Amendment. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 67 fn. 26 (1976) ("The mere fact that an alleged defamatory statement is false does not, of course, place it completely beyond the protection of the First Amendment."); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) ("The First Amendment requires that we protect some falsehood in order to protect speech that matters."). Member Schaumber strains to characterize the banners as fraud. But fraud requires a subjective intent to deceive,[47] and here there is no evidence in the stipulated record that the union agents responsible for creating and displaying the banners had any such intent. For each of these reasons, a holding that the banner displays violated Section 8(b)(4)(ii)(B) because of their purported falsity would raise serious constitutional questions of its own.

Conclusion

The Union's display of stationary banners did not "threaten, coerce, or restrain" the secondary employers. Accordingly, we find that the Union did not violate Section 8(b)(4)(ii)(B) of the Act.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. August 27, 2010

Wilma B. Liebman,	Chairman
Craig Becker,	Member
Mark Gaston Pearce,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER and MEMBER HAYES, dissenting.

Introduction

The National Labor Relations Act protects the right of employees to invoke economic weaponry, including strikes and picketing, to bring pressure to bear on employers with whom they have a primary labor dispute.

ing." Id. at 1265 (reasonable cause being the less demanding standard applicable under Sec. 10(l)). The dissent's reliance on *Kentov* is misplaced. The court in *Kentov* found that the union "patrolled" for 2 hours accompanied by somber funeral music, and that the procession was a mixture of conduct and communication "like traditional secondary picketing." Id. The court specifically distinguished *Overstreet*, supra, on the basis that it involved stationary banners "*without any accompanying patrolling or picketing*." Id. at 1264 fn. 7 (emphasis added). The court similarly distinguished *DeBartolo*. Id. at 1264 (noting that *DeBartolo* involved "peaceful handbilling in the absence of any accompanying picketing or patrolling").

[46] Sec. 2(9) reads: "The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

[47] See, e.g., *Fleet Nat'l Bank v. Anchor Media Television*, 45 F.3d 546, 554 (1st Cir. 1995); *Brown v. Forest Oil Corp.*, 29 F 3d 966, 969 (5th Cir. 1994).

However, the Act also recognizes the significant disruption and economic harm that can follow when labor disputes embroil neutral parties. Congress addressed these competing interests by enacting and subsequently amending the provisions of Section 8(b)(4),[1] which prohibit a range of coercive secondary boycott activity.[2] The Board has hewed over the years to the legislative purpose underpinning Section 8(b)(4) by applying the statutory language flexibly and pragmatically to prevent often creative attempts to circumvent the scope of the Act's prohibitions.

The Respondent Union in this case, as part of its long-running campaign to enmesh property owners in its labor dispute with certain nonunion contractors, employed a creative variation on classic picketing: the display of large, stationary banners at the premises of the neutrals. These banners, held aloft by union agents, misleadingly accuse the neutral employer of having a labor dispute with the union. Whether labeled "stationary picketing," "bannering," or something else, the express terms of the statute and its legislative history, as well as decades of Board precedent, demonstrate that the conduct in this case is a form of secondary coercion that Congress intended to outlaw by its adoption of Section 8(b)(4)(ii).

Settled precedent plainly would prohibit the display by the Respondent of signs affixed to pickets bearing exactly the same message as the banners at the premises of the neutral employers. However, because the Respondent's agents remained stationary and held a banner rather than pickets, our colleagues conclude that the Respondent's conduct was lawful. In so holding, our colleagues rely on a strained definition of statutory language, and selective and ambiguous excerpts from the legislative history. They also unpersuasively attempt to distinguish a substantial body of Board and court precedent defining conduct proscribed by Section 8(b)(4)(ii) as including activity other than traditional ambulatory picketing. Our colleagues admit to being motivated in part by the consequences of finding an 8(b)(4) violation, which they view as too "severe." However, when Congress has determined that certain conduct in support of secondary boycotts should be constrained because it constitutes a threat to the economy and national interest, it is not our role to second guess the means Congress chose to implement that policy determination.

The majority does not limit its holding to the facts of this case, which were submitted on a stipulated record. Instead, our colleagues capitalize on the opportunity to narrowly circumscribe the Board's historically expansive definition of "picketing." Further, in assessing whether any conduct that does not involve traditional picketing is proscribed by Section 8(b)(4)(ii), the majority will now require a showing that the union's conduct "directly caused, or could reasonably be expected to directly cause, disruption of the secondary's operations." This new standard substantially augments union power, upsets the balance Congress sought to achieve, and, at a time of enormous economic distress and uncertainty, invites a dramatic increase in secondary boycott activity.

To justify its new and narrow construction of Section 8 (b)(4), the majority also relies on the Supreme Court's admonition to avoid an interpretation that would raise serious constitutional questions under the First Amendment. However, even assuming arguendo that the Board, as an administrative agency, may engage in a constitutional analysis of the Act it administers, the prohibition of the coercive secondary conduct at issue here, like the prohibition against traditional secondary picketing, simply does not implicate constitutional concerns.

Therefore, we respectfully dissent.

Facts

Bannering can be, and frequently is, accompanied by other coercive "corporate campaign" activity away from or at the premises of the neutral employer. Since the parties did not stipulate to any such conduct in this case, we assume none occurred. Most of the undisputed facts are otherwise fully set forth in the majority decision. Briefly, the Respondent displayed large banners held by three or four union agents at the premises of neutrals Banner Medical, Northwest Hospital, and RA Tempe. These banners all proclaimed the existence of a "LABOR DISPUTE" and identified the neutral employer as the disputant in the following terms: "SHAME ON BANNER THUNDERBIRD MEDICAL CENTER," "SHAME ON NORTHWEST MEDICAL CENTER," and "DON'T EAT RA SUSHI."

In fact, the Respondent's dispute was with primary employers Eliason & Knuth, Delta, Enterprise, and Hardrock, nonunion construction contractors that the Respondent alleges do not pay their employees wages and benefits that accord with local standards. The only "dispute" between the Respondent and the neutral em-

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[1] Sec. 8(b)(4)(ii)(B) states, in pertinent part, that it shall be an unfair labor practice for a labor organization or its agents–

(ii)to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is–

(B)forcing or requiring any person to . . . cease doing business with any other person . . . .

[2] See *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 692 (1951) (Sec. 8(b)(4) was adopted to serve "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own.").

ployers was that the primary employers at times performed work at facilities owned by the neutrals, although no such work was ever performed at the Northwest Hospital or RA Tempe sites.

At Banner Medical Center, the Respondent's agents were stationed on the public sidewalk just off the hospital's lawn and about 80 feet, or 5 car lengths, from the driveway entrance into the Medical Center's main parking lot. They held a banner measuring 16-feet long by 4-feet high. It is clear from photographs in the record and aerial photographs on public internet map sites that the banner was positioned as close as possible to private property at a point where it would be seen by most people entering onto the hospital's premises.

At Northwest Hospital, union agents held up two banners measuring 20-feet long by 3-feet high on public rights of way immediately adjacent to the Hospital's premises. The banners faced vehicular traffic and were clearly visible to employees, patients and visitors to the hospital and to contractors working there. As with the banner at Banner Medical Center, many persons would confront the banners and posted union agents immediately prior to entering onto the Hospital's property.

At RA Tempe restaurant, the banner measured 15-feet long by 3-feet high and was held by two or more union agents posted at the sidewalk curb approximately 15 feet from the front door and large windowed facade of the restaurant. The banner faced the street. Individuals going to the restaurant would be confronted by the sign and posted agents from the sidewalk across the street and from their cars as they drove by just prior to parking. Individuals parking curbside adjacent to the banner would have to walk around or duck under the banner in order to enter the restaurant.

Analysis

I. Both the Text of the Act and Well-Established Board Precedent Prohibit Bannering as a Means of Promoting a Secondary Boycott.

An 8(b)(4)(ii)(B) violation consists of two elements. First, a labor organization must "threaten, coerce, or restrain" a person engaged in commerce. Second, the labor organization must do so with "an object" of "forcing or requiring any person to . . . cease doing business with any other person." *San Francisco Building Trades Council (Goold Electric)*, 297 NLRB 1050, 1055 (1991). Both elements are satisfied in this case.

A. The Respondent Engaged in the Bannering to Compel Neutral Employers to Cease Doing Business With the Primary Employers with Whom It Had a Labor Dispute

In reverse order of the statutory language, we first briefly address whether the Union's bannering had a secondary objective, an issue the majority does not reach. An unlawful "cease doing business" object is demonstrated by conduct that is intended to or is likely to disrupt or alter the business dealings between the primary employer and a neutral.[3] A union violates Section 8(b)(4)(B) if "any object of [its coercive activity] is to exert improper influence on secondary or neutral parties."[4]

Here, the Respondent does not seriously dispute that an object of its bannering was to force or require the neutral employers to cease doing business with the primary employers. In any event, there is overwhelming evidence of a cease doing business object in this case. First, letters sent by the Respondent to neutrals Banner Medical and Northwest Hospital prior to the bannering threatened protest activity at their facilities if the primary employers performed work for them. Second, the banners displayed at each of the neutral employers' locations broadly proclaimed a "labor dispute" without identifying the primary employers. Third, the bannering at times took place when the primary employers were not performing work at the site of the protest. Finally, the handbills distributed in conjunction with the bannering solicited the public to request the neutral employers to "change this situation" of substandard wages and benefits for the primary employers' employees. In order to "change this situation," the neutral employers would be required to sever their relationship with the primaries. In sum, the prebannering letters, the banners themselves, and the handbills all manifest the Respondent's objective of promoting a total customer boycott of the neutral employers in order to force them to "cease doing business" with the targeted primary employers[5]

B. The Bannering Threatened, Coerced, or Restrained the Neutral Employers Within The Meaning of The Act

1. The statutory language and legislative history demonstrate a congressional intent to shield neutral employers

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[3] *NLRB v. Operating Engineers Local 825*, 400 U.S. 297, 304–305 (1971); *Iron Workers Local 272 (Miller & Solomon)*, 195 NLRB 1063 (1972).

[4] *Electrical Workers IBEW Local 501 v. NLRB*, 756 F.2d 888, 892 (D.C. Cir. 1985); NLRB v. Denver Building Trades Council, 341 U.S. 675, 689 (1951).

[5] *NLRB v. Retail Store Employees, Local 1001*, 447 U S. 607, 614 fn. 9 (1980) (*Safeco*) (appeal for total boycott of a neutral employer is evidence of unlawful cease doing business object); see also *Longshoremen ILA Local 799 (Allied International)*, 257 NLRB 1075, 1084–1085 (1981), enfd. 702 F.2d 1205 (D.C. Cir. 1983) (unlawful object may be inferred from the necessary and foreseeable consequences of exclusively secondary activity).

from coercive secondary activity beyond traditional ambulatory picketing

The dispositive issue in this case is whether the Respondents' bannering activity threatened, coerced, or restrained persons within the meaning of Section 8(b)(4)(ii). In interpreting that statutory text, courts have made clear that the terms threaten, restrain or coerce "[do] not describe any sort of measurable physical conduct suggested by the ordinary meaning of those words, but [are] rather ... term[s] of legislative art designed to capture certain types of boycotts deemed harmful by Congress."[6] Accordingly, 8(b)(4)(ii)'s proscription "broadly includes nonjudicial acts of a compelling or restraining nature, applied by way of concerted self-help consisting of a strike, picketing, *or other economic retaliation or pressure in the background of a labor dispute.*"[7]

Moreover, the legislative history of Section 8(b)(4) demonstrates both that Congress intended the Section to be applied flexibly and sensibly, drawing upon the Board's unique expertise, to protect neutrals from a broad range of coercive secondary activity, and that the Section's prohibitions were not limited to secondary activity that involved violence, intimidation, blocking ingress and egress, or similar direct disruption of the secondaries' business.[8] As Senator Taft, the Senate sponsor of the Taft-Hartley amendments and Chairman of the Senate Committee on Labor and Public Welfare, explained:

> It has been set forth that there are good secondary boycotts and bad secondary boycotts. Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have so broadened the provision dealing with secondary boycotts as to make them an unfair labor practice.[9]

The resulting secondary boycott provision, former Section 8(b)(4)(A), was understood by both its proponents and its opponents to "prohibit[] peaceful picketing, persuasion, and encouragement, as well as non-peaceful economic action, in aid of the forbidden objective"[10] because "Congress thought that [secondary boycotts] were unmitigated evils and burdensome to commerce." *Wadsworth Building,* supra.[11]

Moreover, when unions found and exploited limitations in the coverage of former Section 8(b)(4)(A), Congress closed the loopholes through amendments broadening the scope of the secondary boycott prohibition.[12] These included the addition in 1959 of Section 8(b)(4)(ii)(B), proscribing "direct pressures" on neutral employers like those used in this case. The legislative history discloses that this amendment simply perfected "the intention of Congress as far back as 1947 to outlaw all forms of the secondary boycott . . ." and to protect "the rights of the innocent third parties who have no dispute with either the union or the primary employer, but who are subjected to coercion, threats, picketing and possible loss of jobs simply because the union bosses are permitted to use them as a lever in the quest for greater power. . . .[No organization] can be allowed to deprive other individuals of freedom from coercion, economic or

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[6] *Soft Drink Workers Union Local 812 v. NLRB*, 657 F 2d 1252, 1267 fn. 27 (D.C. Cir. 1980) (citing *NLRB v. Fruit & Vegetable Packers & Warehousemen Local 760 (Tree Fruits)*, 377 US 58, 71 (1964)).

[7] *Carpenters Kentucky District Council (Wehr Constructors)*, 308 NLRB 1129, 1130 fn. 2 (1992) (quoting *Sheet Metal Workers Local 48 v. Hardy Corp.*, 332 F.2d 682, 686 (5th Cir. 1964) (emphasis supplied)), cited with approval in *Kentov v. Sheet Metal Workers Local* 15, 418 F.3d 1259, 1264 fn. 6. (11th Cir. 2005); *Laborers Local 1140 (Gilmore Construction)*, 127 NLRB 541, 545 fn. 6 (1960), enf. as modified 285 F.2d 397 (8th Cir. 1960), cert. denied 366 U S. 903 (1961) (prohibition reaches not only picketing but also strikes and "other economic retaliation").

[8] See, e g., *Teamsters Local 25 v. NLRB*, 831 F 2d 1149, 1153 (1st Cir. 1987) (Sec. 8(b)(4)(ii)(B) is "broad and sweeping," and "pragmatic in its application, looking to the coercive nature of the conduct, not to the label which it bears."); accord: *Pye v. Teamsters Local 122*, 61 F.3d 1013, 1024 (1st Cir. 1995) ("Coercion under Section 8(b)(4)(ii)(B) is a broad concept, and the NLRB has not hesitated to include varied forms of economic pressure within the conceptual ambit.") (upholding Sec. 10(l) injunction against union mass shopping at neutral retail stores).

[9] 2 Leg. History Labor Management Relations Act of 1947 (LMRA) 1106 (93 Cong. Rec. 4323).

[10] *Carpenters (Wadsworth Building)*, 81 NLRB 802, 812 (1949), enfd. 184 F.2d 60 (10th Cir. 1950), cert. denied 341 U.S. 947 (1951) (cited with approval in *Electrical Workers v. NLRB*, 341 U.S. 694, 704 (1951)).

[11] The Supreme Court's decision in *Tree Fruits*, supra, is not to the contrary. The Court held in that case that Sec. 8(b)(4)(ii)(B) did not prohibit picketing at the site of a neutral employer against a struck product of the primary employer. Such picketing normally is "confined to [the union's] dispute with the primary employer, since the public is not asked to withhold its patronage from the secondary employer, but only to boycott the primary employer's goods." Id. at 63. But there is no claim that the Respondent's bannering was struck product picketing under *Tree Fruits*. Rather, the banners sought to cause a total consumer boycott of the neutrals, and "a union appeal to the public at the secondary site not to trade at all with the secondary employer goes beyond the goods of the primary employer, and seeks the public's assistance in forcing the secondary employer to cooperate with the union in its primary dispute." *Tree Fruits*, supra at 63–64. Such "appeals" are prohibited by Sec. 8(b)(4)(ii)(B). Id. Moreover, the *Tree Fruits* doctrine has limited application in cases, such as this, involving construction industry employers: "Unlike the products at a grocery store, the work of a subcontractor merges with the work of the general contractor and the developer. Consequently, publicity directed against a subcontractor embroils the general contractor and developer in the labor dispute." *Solien v. Carpenters District Council of Greater St. Louis*, supra, 623 F. Supp. at 601.

[12] 2 Leg. History Labor-Management Reporting and Disclosure Act of 1959 (LMRDA) 1079 (Cong. Rec. (Senate) April 21, 1959, remarks of Sen. Goldwater).

otherwise." [13] Accordingly, the legislative history supports finding that Congress intended various means of promoting secondary boycotts, including outwardly peaceful picketing akin to the bannering activity here, to be covered by the definition of proscribed activity. [14]

2. Consistent with the legislative history and statutory text, the Board and courts have developed a broad and flexible definition of proscribed secondary picketing

The Board has long held that the use of traditional picket signs and/or patrolling is not a prerequisite for finding that a union's conduct is the equivalent of traditional picketing. The coercion element is satisfied when a union posts its agents "at the approach to a place of business to accomplish a purpose which advances the cause of the union, such as keeping employees away from work or keeping customers away from the employer's business." [15] The posting of union agents at the site of a neutral employer is coercive within the meaning of Section 8(b)(4)(ii)(B) because it creates "a confrontation in some form between union members and the employees, customers, or suppliers who are trying to enter the employer's premises." [16]

Thus, traditional picketing, where union agents patrol in an elliptical pattern while carrying placards affixed to sticks, is but one example of the type of coercive union activity covered by Section 8(b)(4)(ii). [17] The prohibition against coercive secondary activity sweeps more broadly and has been held to encompass patrolling without signs,[18] placing picket signs in a snowbank and then watching them from a parked car, [19] visibly posting union agents near signs affixed to poles and trees in front of an employer's premises,[20] posting banners on a fence or stake in the back of a truck with union agents standing nearby[21] and, as mentioned above, simply posting agents without signs at the entrance to a neutral's facility.[22]

Further, "movement . . . [is] not a *sine qua non* of picketing," nor is the "carrying of placards" a necessary element.[23] Instead, the essential elements of picketing are: (1) the posting of union agents reasonably identifiable as such; and (2) placement of the union agents within the immediate vicinity of the employer's premises. Accord: *NLRB v. Teamsters Local 182,* supra, 314 F.2d at 57–58 (to "picket in the labor sense means to walk or stand in front of a place of employment as a picket" and a "picket" is "a person posted by a labor organization at an approach to the place of work.") (internal quotations omitted).

3. Bannering has the same coercive impact as traditional picketing

Here, the Respondent sought to bring about a consumer boycott of the neutrals through the posting of its agents, with massive banners, adjacent to the entrance of the neutrals' premises. This conduct was the confrontational equivalent of picketing, and thus proscribed by Section 8(b)(4)(ii) within the meaning of the statute, legislative history, and precedent discussed above. Customers about to enter the neutral premises encountered union agents, readily identifiable as such, posted by the Respondent and holding large signs, albeit ones stretched between two poles rather than affixed to a single picket, misleadingly claiming the existence of a "labor dispute" with the neutral employers. The banners sought to invoke "convictions or emotions sympathetic to the union activity" as well as "fear of retaliation if the picket is defied," *NLRB v. United Furniture Workers,* supra, 337 F.2d at 940 (internal quotation omitted). The display in

[13] 2 Leg. History LMRDA 1630 (Cong. Rec. (House) 14354 (Aug. 12, 1959, remarks of Rep. Riehlman).

[14] While the legislative history does not specifically mention bannering, this is hardly surprising given that unions' widespread use of bannering to promote secondary boycotts substantially postdates the passage and amendment of that statutory provision. For that same reason, the Supreme Court's interpretation of this legislative history in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council,* 485 U.S. 568 (1988) (*DeBartolo II*) to distinguish between proscribed picketing and permitted handbilling cannot be regarded as conclusive of whether bannering should be proscribed to the same extent as picketing.

[15] *Lumber & Sawmill Workers Local Union No. 2797* (Stoltze Land & Lumber), 156 NLRB 388, 394 (1965). See also *Laborers Eastern Regional Organizing Fund (Ranches at Mt. Sinai),* 346 NLRB 1251, 1253 fn. 5 (2006), and cases cited therein.

[16] *NLRB v. United Furniture Workers,* 337 F.2d 936, 940 (2d. Cir. 1964). .

[17] See generally *Service Employees Local 87 (Trinity Maintenance),* 312 NLRB 715, 743 (1993), enfd. mem. 103 F.3d 139 (9th Cir. 1996).

[18] *Service Employees Local 399 (Burns Detective Agency),* 136 NLRB 431, 436–437 (1962)..

[19] *NLRB v. Teamsters Local 182 (Woodward Motors),* 314 F.2d 53 (2d Cir. 1963), enfg. 135 NLRB 851 (1962).

[20] *NLRB v. United Furniture Workers,* supra. The court remanded the case to the Board to consider whether "the extent of confrontation necessary to constitute picketing" was present. Significantly, the court did not question the Board's determination that movement is not required to establish picketing and specifically agreed that "a picket may simply stand rather than walk." Id. at 939. Rather, the court was concerned that there was no indication that the union agents who sat in their cars after affixing the signs were visible to employees and customers entering the plant or clearly identifiable as union representatives. Those concerns are not present in this case.

[21] *Mine Workers Local 1329 (Alpine Construction),* 276 NLRB 415, 431 (1985), remanded on other grounds 812 F.2d 741 (D.C. Cir. 1987)

[22] . *Mine Workers District 2 (Jeddo Coal Co.),* 334 NLRB 677, 686 (2001).

[23] *Lawrence Typographical Union No. 570 (Kansas Color Press),* 169 NLRB 279, 283 (1968), enfd. 402 F.2d 452 (10th Cir. 1968). The Board there recognized that it would "exalt form over substance" to limit the definition of picketing to situations where the union patrols with placards—precisely the error the majority commits.

front of the neutral's premises called for the same "automatic response to a signal" that traditional labor picketing evokes, and as such it is proscribed by Section 8(b)(4).[24]

Admittedly, there are differences between picket signs and banners, but those differences do not suggest the latter are any less likely to threaten, restrain, or coerce. On the contrary, banners are much larger and contain less speech. They are held by union agents, just as picket signs often are, but their imposing mass and length obviate the need for any patrolling to create a physical or, at the very least, symbolic confrontational barrier to those seeking access to the neutral employer's premises. Those agents holding the banners are not, as the Ninth Circuit has suggested, "human signposts."[25] They are sentient, watchful supporters of the boycott campaign, whose presence will provoke a far different reaction from passersby than the stanchions on a billboard. Oddly, the Ninth Circuit itself admits to this reaction when rationalizing that members of the public can "avert [their] eyes" from the banner and agents.[26] Aversion and avoidance are characteristic behaviors of persons being threatened, restrained, or coerced. Indeed, it is clearly the intent of the agents engaged in bannering activity to have members of the public avoid them by avoiding the premises of the neutral employers, thus facilitating the secondary boycott objective.[27]

In sum, the size and placement of the banners, the stationing of union agents to hold them, and other direct similarities to picketing are all factors contributing to the confrontational impact of bannering, sharply distinguishing that conduct from handbilling's mere persuasion. The coercive impact was further heightened by the misleading message the banners conveyed. By naming only the neutral employers, the banners naturally and forseeably created the impression that the Respondent had a primary labor dispute with the neutral employers over the employment terms and conditions of the neutral's employees. In fact, however, the Respondent did not have a labor dispute with the neutral employers. See *San Antonio Community Hospital v. Southern California District Council of Carpenters*, 125 F.3d 1230, 1235 (9th Cir. 1997) (hospital did not have labor dispute with union where union's primary labor dispute was with subcontractor working on hospital expansion project).

Having been misled into believing that the neutrals were unfair to their employees, potential customers would be more likely to support the union's boycott than they would if the banners truthfully indicated that the neutrals "must be dealing with other companies that deal with yet other companies that don't treat their employees right." *Overstreet v. Carpenters Local 1506*, 409 F.3d 1199, 1220 (9th Cir. 2005) (dissenting opinion). The result, of course, would be to increase pressure on the neutral employers to cease doing business with the unidentified primary employer targets.[28]

II. THE MAJORITY ABANDONS PRECEDENT AND REWRITES SECTION 8(B)(4), OPENING THE DOOR TO A SUBSTANTIAL EXPANSION OF SECONDARY ACTIVITY THAT CONGRESS INTENDED TO LIMIT

Rather than apply the settled understanding of "threaten, coerce, or restrain" established by decades of Board and court precedent, much of which is discussed above, the majority either ignores that precedent or claims it has been invalidated by the Supreme Court's

[24] *Safeco*, supra, 447 U.S. at 619 (concurring opinion of Justice Stevens). Justice Stevens distinguished picketing—where the mere presence of the picketers sends an intimidating "signal" to those about to enter an establishment—from handbilling, which depends entirely on the persuasive force of the ideas expressed therein to produce a response. This concept is analytically distinct from the concept of signal picketing, where a union's conduct is directed at *employees* of a neutral employer urging them to strike, rather than at customers of the neutral urging a boycott. *Service Employees Local 254 (Women's & Infants Hospital)*, 324 NLRB 743 (1997). The General Counsel did not allege signal picketing directed at employees in this case.

[25] *Overstreet v. Carpenters Local 1506*, 409 F.3d 1199, 1214 (9th Cir. 2005).

[26] Id.

[27] The majority seems to suggest that the distance of the bannering activity from the building entrances for Banner Medical and Northwest Hospital has some relevance to the confrontational nature of this conduct. Of course, the union agents in those situations could get no closer to the buildings without trespassing on private property. They displayed their banners in close proximity to main entrances to the neutral Employer's premises, at which point they would confront many or most persons who would ultimately enter the buildings in question.

The majority asserts that it was "highly impractical" for these union agents to observe customers as they entered the neutral premises due to the placement of the banners. At least as to Banner Medical Center and RA Tempe, we respectfully disagree. Union agents at those locations were stationed 80 feet from the parking lot entrance road and 15 feet from the restaurant's front door, respectively. Even if those agents normally faced the street (an issue the stipulation does not explicitly address), they could easily observe persons entering and leaving the neutral premises simply by turning their heads. Indeed, their attempt to confront and deter persons from entering onto the premises was logically directed towards those about to enter the premises.

[28] Member Schaumber observes that Board law requires unions to clearly identify the dispute with the primary employer and the neutral employer's relationship to the primary. See *Solien v. Carpenters District Council of Greater St. Louis*, 623 F. Supp. 597, 603–604 (E.D. Mo. 1985) (union cannot benefit from "publicity proviso" to Sec. 8(b)(4) if it misleadingly identifies neutral as disputant); *Sailors' Union of the Pacific (Moore Dry Dock)*, 92 NLRB 547, 549 (1950) (common situs picketing unlawful unless picketing clearly discloses that dispute is with primary). The Respondent's failure to comply with these well-settled standards supports an inference that it intended to mislead readers of the banners by creating the false impression that it had a primary labor dispute with them.

decision in *DeBartolo II*, supra. Our colleagues are undeterred in their assertions by the fact that the Board has steadfastly adhered to its precedent after *DeBartolo II* and by the fact that nothing in the high court's decision negates the Board's historic definition of coercive picketing. The majority then fashions out of whole cloth a new definition of coercive picketing that effectively guts the protections afforded neutrals by Section 8(b)(4)(ii)(B). The standard they adopt today simply cannot be squared with the language or purpose of that statutory provision.

A. The Majority Ignores or Misapplies Precedent Governing Coercive Picketing

The majority begins its analysis by citing *Carpenters Local 1976 v. NLRB (Sand Door)*, 357 U.S. 93, 99 (1958), for the proposition that Section 8(b)(4) did not enact a "wholesale condemnation of secondary boycotts," but instead allows such boycotts if the employer agrees to it or if it is brought about by means other than those proscribed by" that provision of the Act. We readily accept the notion that Section 8(b)(4) did not outlaw all union activity with a secondary objective. However, the holding of *Sand Door*–that Section 8(b)(4) did not prohibit boycotts with the employer's agreement–was legislatively overruled only a year later by the enactment of Section 8(e) in the Landrum-Griffin Act of 1959. See *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612, 634 (1967). Thus, while the Court's observation that Section 8(b)(4) did not outlaw all secondary activity remains valid, the scope of the proscription intended by Congress was clearly broader than the Court in *Sand Door* foresaw.

The majority then asserts that the terms "threaten, coerce, or restrain" must be given their "ordinary meaning," which in their view requires proof of "violence, intimidation, blocking ingress or egress, or similar direct disruption of the secondaries' business." While as a matter of statutory construction, the plain and ordinary meaning of words generally controls in this context, we have been instructed that these terms do not "describe any sort of measurable physical conduct suggested by the ordinary meaning of those words," but are rather "legislative terms of art designed to capture certain types of boycotts deemed harmful by Congress." *Soft Drink Workers Local 812 v. NLRB*, supra. Further, as previously stated, it is beyond peradventure that *peaceful* picketing to promote a total secondary boycott is proscribed by Section 8(b)(4)(ii)(B).

Our precedent makes clear that the peaceful display of stationary signs by union agents posted at a neutral's premises, in support of a secondary object, is among the class of confrontational actions Congress condemned. Nevertheless, the majority now holds that both patrolling *and* the carrying of traditional picket signs are essential elements for a finding that coercive picketing occurred. That precise argument has been repeatedly and consistently rejected by the Board and reviewing courts. See, e.g., *Stolze*, supra (patrolling not essential); *Mine Workers (New Beckley Mining)*, 304 NLRB 71 (1991), enfd. 977 F.2d 1470 (D.C. Cir. 1992) (picket signs or placards not essential). While the majority makes an unpersuasive attempt to distinguish cases such as *Stolze*, *New Beckley, and Kansas Color Press*, supra, on their facts, our colleagues effectively concede that the Respondent's bannering would meet the definition of coercive picketing set forth in those cases. In each, the Board found that the posting of stationary union agents was coercive and violated Section 8(b)(4)(ii)(B). While it its true that the unions in those cases also engaged in other coercive conduct, the Board did not rely on that conduct in its determination that the posting was unlawful.[29]

Unable to distinguish away precedent, the majority attempts a different tack and argues, in effect, that the *Stolze* standard is no longer good law because it was overruled in *DeBartolo II*. Unfortunately for our colleagues, history demonstrates otherwise. The Board has adhered to the *Stolze* standard in decisions issued both before and after *DeBartolo II*.[30] In *Jeddo Coal*, for example, union agents holding picket signs stood at the entrance to a neutral facility. The respondent union defended its actions on the grounds that there could be no 8(b)(4)(ii)(B) violation because there was no evidence of patrolling–precisely the reasoning advanced by the majority. But the Board rejected that position in a unanimous opinion that specifically relied upon the fact that "neither patrolling nor patrolling combined with the carrying of placards are essential elements to a finding of

[29] For example, in *Woodward Motors*, supra, the majority claims that the fact that "traditional" picketing (i.e., patrolling with signs on sticks) ended 2 weeks before the stationary display of signs began somehow distinguishes that case from the bannering at issue here. But the ambulatory picketing played no part in the Board's analysis of whether the stationary display of signs also constituted picketing. Further, in enforcing the Board's Order, the Second Circuit rejected the union's contention that the stationary display of signs was not picketing, and found instead that movement was not a "requisite" of picketing. *NLRB v. Local 182*, supra, 314 F 2d at 58.

[30] See, e.g., *Service Employees Local 87 (Trinity Maintenance)*, supra, 312 NLRB at 743 (post-*DeBartolo II* case recognizing that posting is sufficient to find picketing and that patrolling or carrying signs not required); *Jeddo Coal)*, supra (same).

While *Stolze* involved unlawful recognitional picketing in violation of Sec. 8(b)(7), the Board has repeatedly relied upon its definition of picketing in deciding. 8(b)(4) cases. See, e.g., *Ranches at Mt. Sinai*, supra, and cases cited therein. Any suggestion by the majority that *Stolze* and its progeny should be confined to Sec. 8(b)(7) cases—or that the same conduct could be picketing in that context but not under Sec. 8(b)(4)—cannot be reconciled with existing precedent.

picketing; rather, the essential feature of picketing is the posting of individuals at entrances to a place of work." 334 NLRB at 686. It cannot be gainsaid: the majority's decision flatly contravenes post-*De Bartolo II* precedent.

Nor is the majority's decision consistent with the Board's recent unanimous holding in *Brandon Regional Medical Center*[31] that a union "mock funeral procession" at a neutral hospital to pressure the hospital to cease doing business with a nonunion contractor violated Section 8(b)(4)(ii)(B). The procession involved union agents walking back and forth on the public sidewalks in front of the hospital's main entrance while carrying a "faux casket and accompanied by a [union] member dressed as the Grim Reaper." The union agents also distributed leaflets that detailed several malpractice lawsuits that had been filed against the hospital. Although the marchers did not carry any picket signs, the Board held that the funeral procession was picketing all the same. The majority fails to explain why picket signs were not necessary to establish picketing in *Brandon*, but are necessary now. [32]

Our colleagues posit that these post-*De Bartolo II* Board decisions are entitled to no precedential deference because the Board in those cases "made no attempt to reconcile the 'posting' definition with *DeBartolo.*" With all due respect, there was no need for such reconciliation. The Board was well aware of *DeBartolo II* when it decided these cases in 1993, 2001, and 2006. The *DeBartolo II* Court held that peaceful handbilling, not accompanied by picketing, urging a consumer boycott of a neutral employer did not violate Section 8(b)(4)(ii)(B). The Court reasoned that such handbilling is not coercive because it depends entirely on the persuasive force of the idea, and is thus distinguishable from picketing, which depends on intimidation to achieve its purpose.

There is no suggestion that the handbilling that occurred in this case violated the Act. Rather, the question presented is whether Respondent's bannering was unlawful. Nothing in *DeBartolo II* even hints that the Supreme Court intended to change the Board's longstanding and flexible definition of picketing, or the well-established understanding that posting an individual at a neutral's premises is sufficient to establish 8(b)(4)(ii)(B) coercion. Indeed, the court specifically endorsed the view that Section 8(b)(4)(ii)(B) proscribed stationary as well as ambulatory activity by its emphasizing that "[n]o picketing **or** patrolling was involved" in that case (emphasis added). See 485 U.S. at 575–576.

Our position finds further support in the 11th Circuit's 2005 decision in *Kentov v. Sheet Metal Workers Local 15*, 418 F.3d 1259 (11th Cir. 2005) (*DeBartolo II* "dealt only with a union's peaceful handbilling in the absence of any accompanying patrolling **or** picketing") (emphasis added). In obvious disagreement with the subsequent decision of the D.C. Circuit in *Brandon*, the court of appeals affirmed a lower court's issuance of a Section 10(l) injunction against the union's mock funeral protest, finding reasonable cause to believe that this conduct violated Section 8(b)(4)(ii)(B). Specifically relying on *Jeddo Coal*, *Trinity Building*, and *Stoltze*, the court "readily" concluded that the mock funeral was "the functional equivalent of picketing, and therefore, the First Amendment concerns in *DeBartolo* are not present in this case." Id. at 1265.

Indeed, the Supreme Court has endorsed the Board's broader and flexible view of picketing in a line of cases dating back many decades. See *Tree Fruits*, supra, 377 U.S. at 76 (Black, J., concurring)(emphasis added) ("'Picketing,' in common parlance and in § 8(b)(4)(ii)(B)," includes the concept of "patrolling, that is, *standing* or marching back and forth or round and round on the streets, sidewalks, private property, or elsewhere, generally adjacent to someone else's premises[.]"); *Thornhill v. State of Alabama*, 310 U.S. 88, 101 fn. 18 (1940) (picketing includes merely observing workers or customers, persuading "employees or customers not to engage in relations with the employer. . . *through the use of banners* . . ." and may include threatening employees or customers . . . . by the mere presence of the picketer" which "may be a threat of, (i) physical violence, [or] (ii) social ostracism, being branded in the

[31] *Sheet Metal Workers Local 15 (Brandon Regional Medical Center)*, 346 NLRB 199 (2006), enf. denied 491 F.3d 429 (D.C. Cir. 2007).

[32] Far from reconciling their views on Sec. 8(b)(4) with *Brandon*, our colleagues rely only on the court of appeals decision denying enforcement. The court viewed the procession as a combination of noncoercive street theater and handbilling, in that the union members did not physically or verbally interfere with or confront hospital patrons and did not "creat[e] a symbolic barrier . . ." by patrolling. In so finding, the court reasoned that the mock funeral procession took place 100 feet away from the hospital entrance, and thus satisfied the time, place, and manner requirements for limits on the abortion protests upheld by the Supreme Court in *Hill v. Colorado*, 530 U.S. 703, 734 (2000), and *Masden v. Women's Health Center*, 512 U.S. 753 (1994). As such, the court concluded that the funeral procession was protected by the First Amendment from regulation under Sec. 8(b)(4)(ii)(B).

We respectfully disagree with the opinion of the *Brandon* court and with our colleagues' summary reliance upon it rather than longstanding extant Board precedent. First, the standards applicable in an abortion protest context are obviously different from those where the conduct in question constitutes secondary activity subject to regulation by the Board. Second, the mock funeral procession constituted coercive picketing because the participants patrolled on the public right of way immediately adjacent to the hospital's property, and crossed the driveways and sidewalks commonly used by customers to enter the premises. *Brandon*, 346 NLRB at 203. As with the bannering activity in the present case, while the procession took place at a distance from the hospital building entrance, it was conducted at the entrance to the neutral *premises*.

community as a 'scab'") (emphasis added). There is no indication that the *DeBartolo II* Court thought it was overturning these principles, and there is no justification for the majority to do so now.[33]

B. The Majority's New Standard Undercuts 8(b)(4) Protections

The majority requires proof that union agents patrol the neutral's premises with traditional picket signs before they will find that proscribed peaceful picketing has occurred. Absent such conduct, they will find a 8(b)(4)(ii)(B) violation *only if* the union engages in conduct that "directly caused, or could reasonably be expected to directly cause, disruption of the secondary's operations." This new standard lacks any support in, indeed, it is controverted by, the statutory text and Board precedent. The statutory text requires only that the union activity "restrain, coerce, or threaten;" no proof of actual or potential loss or damage is necessary to find that the means used to promote a secondary boycott is proscribed. And Board law, which, until today, encompassed a broad range of coercive activity beyond traditional picketing, was faithful to that statutory text. It required no specific, much less objectifiable, quantum of disruption to establish a violation.

Indeed, the Board has found violations of Section 8(b)(4)(ii)(B) where there was no evidence of picketing or proof of loss or damage to the neutral's operations whatsoever. For example, in *General Maintenance Co.*, supra, 329 NLRB at 664–665, 680, the Board held that the union violated Section 8(b)(4) by, among other things, a mass assembly of 40-60 union agents at the home of the owner of a neutral entity.[34] The owner was away, but his 9 year old son and housekeeper were present. The Board found that this conduct, which was not accompanied by any shouting or name calling, violated Section 8(b)(4)(ii)(B) because the union "reasonably could foresee that the visit would harass and embarrass [the owner] in front of his neighbors and, thus, would have a coercive effect." Id. at 682. There was no evidence of picketing and the employer's operations were entirely unaffected, but the Board found a violation all the same.[35]

Cases such as *General Maintenance Co.* demonstrate the folly of imposing a new requirement of proof of disruption of operations to establish an 8(b)(4) violation in the absence of traditional picketing, and of attempting to delimit coercive conduct to a narrow class of secondary activity. And, as discussed above, consistent with the statutory text, the Board has never required a showing of specific or likely damage for secondary boycott activity to be deemed unlawful. See, e.g., *New Beckley Mining*, supra, 304 NLRB 71 (mass gathering at motel of shouting strikers seeking to oust replacement employees was a form of coercive picketing; *sufficient that* crowd was gathered in furtherance of labor dispute and its shouted messages were directed to removal of replacements from motel); *Carpenters (Society Hill Towers Owner's Assn.)*, 335 NLRB 814, 820–823 (2001), enfd. 50 Fed. Appx. 88 (3d. Cir. 2002) (broadcasting union message at excessive volume at condominium unlawful; "the Board has found violations of Section 8(b)(4)(ii)(B) where unions' secondary activities, short of picketing, have *interfered with* the use of private facilities by patrons and tenants of neutrals) (emphasis added). The majority's newly fashioned standard cannot be reconciled with this precedent.

The primary justifications offered by our colleagues for refuting the Congressional imperatives underpinning Section 8(b)(4) and rejecting the Board's heretofore broad and flexible definition of coercive conduct are newly divined policy considerations at odds with our statutory mandate. Thus, our colleagues observe that the consequences of an 8(b)(4) violation are "severe," as the conduct "becomes" an unfair labor practice and is subject to injunctive relief and a suit for damages, while employees who participate are not protected by the Act from discipline or discharge.

These considerations have no place in the Board's decisionmaking unless the general language in the Act's Preamble "to promote collective bargaining" is to be construed so broadly as to swallow enforcement of the specific provisions of the Act. Congress struck the secondary boycott weapon from the hands of organized labor in 1947 because it determined that the cost to society

[33] *Service Employees Local 399 (Delta Airlines)*, 293 NLRB 602 (1989), a case on which the majority relies, is not to the contrary. There too, the disputed union conduct was limited to handbilling and nonpicketing publicity in the form of newspaper advertisements, both urging the public to boycott a neutral. "There was no violence, *picketing*, patrolling, or work stoppage." Id. at 603 (emphasis added). The Board's determination that this conduct was lawful, consistent with *DeBartolo II*, does not even question, much less overturn, the established principle that the posting of union agents at the premises of a neutral can constitute prohibited picketing under Sec. 8(b)(4)(ii)(B).

[34] The many other violations found by the Board in that case included hurling trash bags into the lobby of a neutral office building. The majority appears to concede that such tactics violate Sec. 8(b)(4)(ii)(B).

[35] The majority allows that a mass assembly of this type would "exert a coercive force against the employer" – but only if it was accompanied by shouting and name calling that caused "employer agents" to fear for their safety. The majority never explains how this conduct fits within their "disruption of operations" standard. Moreover, our colleagues apparently would allow such mass assemblies if unaccompanied by shouting and name calling, or if aimed not at an agent, but his or her family. There is no justification for restricting Sec. 8(b)(4) in this manner.

was too high. That decision was bitterly contested at the time, but it is settled law now. The fact that Congress imposed severe sanctions for violations of Section 8(b)(4) only reinforces the significance of the harm it perceived to flow from the untrammeled spread of labor disputes into interstate commerce. It is our duty to carry out that Congressional objective, not to second-guess the severity of the remedies Congress imposed. We have no authority to constrain the reach of Section 8(b)(4) to shield one of our stakeholders from the Act's proscriptions.

Our colleagues' new narrow definition of picketing and their new requirement for a showing of actual or threatened disruption before other secondary activity will be found unlawful unquestionably augments union power. Unless the General Counsel can prove that disruption could be expected to occur in the neutral's business directly as a result of the union's secondary boycott activity or that such a disruption has, in fact, occurred, the Board will no longer authorize the General Counsel to seek injunctive relief or subsequently find a violation. However, the majority fails to adequately explain the contours of their new standard, and their efforts to do so raise more questions than they answer. Is proof of disruption alone sufficient, or must the General Counsel also establish that actual "harm" to the neutral's operations was threatened or inflicted, as the majority appears to suggest at one point? Will disruption of other businesses owned by the neutral count? What form of proof will the majority require to establish the requisite likelihood of future harm? Our colleagues leave these and a host of other questions to another day, jeopardizing not just the existence of numerous vulnerable small businesses already battered by the economy, but also the livelihoods of their many employees

The standard adopted by the majority substantially increases the leverage of unions that may be tempted to exploit the threat of coercive secondary activity, and creates new incentives to utilize such tactics. Communications, such as the letters that were sent by the Respondent, routinely will be sent to neutral Employers warning of "vigorous" public protests unless the neutral ceases doing business with a primary employer. Neutral employers will be understandably reluctant, given the vague but heightened burden of proof imposed by my colleagues, to invoke the Board's processes, and will instead simply cease doing business with the primary employer before bannering commences.

In short, the majority's decision is inconsistent with the text of the statute, its legislative history, decades of precedent, and sound and well-established policy. There is simply no reasoned basis for their constrained reading of 8(b)(4), which will have a lasting and significant economic impact on scores of businesses across the country.

C. A Finding That Bannering To Promote A Secondary Boycott Violates Section 8(b)(4)(ii)(B) Does Not Raise Constitutional Concerns

The majority invokes the judicial doctrine of constitutional avoidance to conclude that the Board may not interpret Section 8(b)(4) to prohibit bannering. This arguably requires consideration of whether a finding that union bannering violates Section 8(b)(4)(ii)(B) would potentially conflict with the free speech clause of the First Amendment and, if so, "whether there is another interpretation, not raising these serious constitutional concerns, that may fairly be ascribed to" the statutory provision.[36] In *DeBartolo II,* the Court applied this rule of construction in holding that peaceful secondary handbilling is not coercive and therefore does not violate Section 8(b)(4)(ii)(B). In earlier cases, the Court found that no constitutional concerns were raised by holding that secondary picketing was violative of Section 8(b)(4).[37] *DeBartolo II* did not disturb these findings. Thus, even assuming arguendo that the Board, as an administrative agency, must engage in the same constitutional analysis used in *DeBartolo II* by the high court, no constitutional issue is raised by barring secondary bannering to the same extent as traditional secondary picketing because the differences between the two activities are legally insignificant, as we have explained.[38]

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[36] *DeBartolo II*, supra, 485 U.S. at 577. Member Schaumber notes that the Board has stated that reliance on constitutional avoidance principles improperly "arrogate[s] to this [agency] the power to determine the constitutionality of mandatory language in the Act we administer. . . . [A] power that the Supreme Court has indicated we do not have." *Handy Andy, Inc.*, 228 NLRB 447, 452 (1977); see also *Hudgens v. NLRB*, 424 U.S. 507 (1976) (in which the Supreme Court castigated the Board for venturing into a First Amendment analysis, rather than applying the terms of the Act). While the Board's statement in *Handy Andy* may be interpreted as too categorical, in Member Schaumber's view, the majority's analysis demonstrates all too clearly the danger of an administrative agency invoking constitutional avoidance principles. Rather than construe the text as written and impart the Board's expertise and experience in assessing the coercive impact of secondary activity, the majority is able, under the guise of constitutional avoidance principles, to effectively reverse decades of Board precedent and narrowly construe statutory text to permit coercive secondary conduct Congress sought to outlaw.

[37] *Safeco*, supra at 616 (1980); *Electrical Workers v. NLRB*, 341 U.S. 694, 705 (1951).

[38] Member Schaumber observes that the First Amendment does not shield the coercive bannering in this case for the further reason that it falsely and fraudulently claimed that the Respondent had a labor dispute with the neutral employers. By displaying the banners in a manner that would cause most, if not all, readers to be misled into believing that the Respondent had a primary labor dispute with the neutrals, the Respondent crossed the line separating protected hyperbole from fraudulent misrepresentation. *San Antonio Community Hospital v.*

Furthermore, we disagree with our colleagues' interpretation of the Supreme Court's rulings about the breadth of First Amendment protections involved here. For instance, while they correctly state that the Supreme Court struck down the particular cross-burning law at issue in *Virginia v. Black*, 538 U.S. 343 (2003), the Court also held that states could constitutionally ban cross-burning when done with the intent to intimidate. Section 8(b)(4)(ii)(B) is addressed to confrontational union conduct that "threatens, coerces, or restrains," i.e., obviously including conduct that intimidates. More importantly, none of the individual free speech cases cited by our colleagues involves economic regulation, in which the Court has recognized a substantial governmental interest justifying some constraints on First Amendment freedoms, particularly in the "special context of labor disputes."[39] In this respect,

> [g]overnmental regulation that has an incidental effect on First Amendment freedoms may be justified in certain narrowly defined instances. See *United States v. O'Brien*, 391 U.S. 367. A nonviolent and totally voluntary boycott may have a disruptive effect on local economic conditions. This Court has recognized the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association. See *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490; *NLRB v. Retail Store Employees*, 447 U.S. 607. . . . Secondary boycotts and picketing by labor unions may be prohibited, as part of "Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife." *NLRB v. Retail Store Employees*, supra, at 617-618 (BLACKMUN, J., concurring in part). See *Longshoremen v. Allied International, Inc.*, 456 U.S. 212, 222–223, and n. 20.[40]

Clearly, both bannering *and* picketing involve elements of speech. However, the expressive element represented by the brief, obtuse, and misleading written message on a union banner–such as "Don't Eat RA Sushi" in one of the cases before us–is less than the expressive element in picket signs, usually accompanied by vocal protests, and it is certainly less than in handbills. Even if the banner's message is entitled to some weight under the First Amendment's protections for free speech, it does not warrant *greater* weight than in traditional secondary picketing situations. Because the confrontational conduct element in secondary bannering predominates over the speech element, we may find it unlawful under Section 8(b)(4) without raising any serious concern for impairment of the freedom of speech.

Conclusion

Section 1 of the Act declares the national labor policy of eliminating obstructions to commerce caused by labor disputes. The Wagner Act sought to achieve that purpose without imposing any restraint on unions' use of economic pressure to achieve secondary objectives. This arrangement proved unworkable, and so Congress added the Taft-Hartley amendments in 1947. Those amendments, which were a response, in part, to abuses of union power, brought needed balance to American labor relations and needed protection to neutral employers, their employees, and customers.

Section 8(b)(4)(ii)(B) deprived unions of a substantial weapon. No longer could they further their cause in a dispute with a primary employer by picketing "'to persuade customers of a secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon the primary employer.' Such picketing spreads labor discord by coercing a neutral party to join the fray."[41]

Today, the majority puts that neutral party right back into the fray. Ignoring decades of precedent establishing that bannering is coercive, our colleagues hold that it is mere persuasion and thus lawful. In the process, the majority reaches out to narrow the protection established by Section 8(B)(4) through a new and narrow definition of picketing and a startling new standard that exempts other types of secondary activity from the Act's reach unless it causes or can be expected to cause some un-

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Southern California District Council of Carpenters, supra, 125 F.3d at 1236-1237. As such, the fraudulent nature of the banners' messages remove them from any First Amendment protection. Id.; see also *Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600, 612 (2003) ("the First Amendment does not shield fraud"); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980) ("fraudulent misrepresentations can be prohibited"). This is especially true in the labor context, where as noted above, Board law consistently requires unions to carefully distinguish between the primary employer and neutrals in their communications.

[39] *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 763 fn. 17 (1976).

[40] *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912 (1982). The majority characterizes the Court's description of the scope of constitutional protection for boycott activity in the labor context as "dictum" and demands that it be read narrowly. We believe the Court's discussion of its own precedent is entitled to greater weight than the majority acknowledges. And while our colleagues also note the Court's caution that governmental regulation that has an "incidental effect on First Amendment freedoms" must restrict those freedoms no more than is essential to the furtherance of the Government's interest in imposing such regulation, id. at 912 fn. 47, prohibiting secondary bannering plainly furthers the important governmental interest in protecting neutrals from "coerced participation in industrial strife." Id. at 912.

[41] *Safeco*, supra at 616 (internal citations omitted).

known quantum of "disruption of the secondary's operation." Their holding is not compelled by any construction of Section 8(b)(4) and its legislative history, nor by any valid concerns about a conflict with First Amendment protections. Our dissent *is* compelled by a serious concern that their standard will assuredly foster precisely the evil of secondary boycott activity and expanded industrial conflict that Congress intended to restrict by enacting 8(b)(4)(ii)(B). We will not be alone in finding this decision to be most troubling and ill-advised.

For all the foregoing reasons, we respectfully dissent.

Dated, Washington, D.C. August 27, 2010

Peter C. Schaumber, Member

Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX A

The following companies are persons and/or employers engaged in commerce and in industries affecting commerce within the meaning of the Act. They are grouped by the location of the relevant bannering.

BANNER THUNDERBIRD MEDICAL CENTER

—Banner Health System (Banner Health), an Arizona nonprofit corporation, with an office and place of business in Phoenix, Arizona, has been engaged in the hospital/health care business and owns and operates the Banner Thunderbird Medical Center in Glendale, Arizona.

—Eliason & Knuth (E&K), a Nebraska corporation, with an office and place of business in Phoenix, Arizona, has been engaged as a contractor installing drywall, metal studs and interior finishes in commercial and residential construction projects at various job sites located throughout Maricopa County, Arizona.

—Layton Construction Company of Arizona (Layton) is an Arizona corporation with an office and place of business in Phoenix. Banner Health engaged Layton to be the general contractor on the remodeling of a building at its Thunderbird Medical Center. Layton subcontracted with E&K to perform construction work on this building.

NORTHWEST HOSPITAL

—Triad Hospitals, Inc. (Triad), a Delaware limited liability corporation, owns and operates medical facilities in 17 states, including Northwest Hospital, LLC (Northwest Hospital) in Tucson, Arizona and the Oro Valley Hospital that was under construction in Oro Valley, Arizona.

—Delta/United Specialties (Delta), a Tennessee corporation, with an office and place of business in Memphis, Tennessee, has been engaged as a contractor performing interior finish work.

—Hardrock Concrete Placement Co. Inc. (Hardrock), an Arizona corporation, with an office and place of business in Phoenix, Arizona, has been engaged as a contractor performing concrete work.

—Bovis Lend Lease, Inc. (Bovis), a Florida corporation has an office and place of business in Charlotte, North Carolina. Triad engaged Bovis to be the general contractor for the constriction of its Oro Valley Hospital. Bovis subcontracted with Delta and Hardrock to perform construction work on this hospital.

RA TEMPE

—RA Sushi Holding Corporation (RA Sushi), a Delaware corporation, is a wholly owned subsidiary of Benihana National Corporation (Benihana), also a Delaware corporation. RA Sushi owns RA San Diego Corporation, a Delaware corporation, which is engaged in the restaurant business and was constructing the RA San Diego restaurant in San Diego, California. RA Sushi also owns RA Tempe Corporation (RA Tempe), a Delaware corporation, which operated a restaurant in Tempe, Arizona.

—Enterprise Interiors, Inc. (Enterprise), a California corporation, with an office and place of business in Orange, California, has been engaged as a contractor performing interior finish work.

—R.D. Olsen Construction (R.D. Olsen) is a California limited partnership with an office and place of business in Irvine, California. Benihana, the parent of RA Sushi Holding, engaged R.D. Olsen to be the general contractor for the construction of the RA San Diego restaurant. R.D. Olsen subcontracted with Enterprise to perform construction work on this restaurant.

APPENDIX B

The specific circumstances of the bannering at each location were as follows:

(1) Banner Medical

At the Thunderbird Medical Center, where primary employer E&K was engaged as a construction subcontractor in a building remodeling project, the Union displayed a banner measuring 16 feet by 3 feet with the inscription "SHAME ON BANNER THUNDERBIRD MEDICAL CENTER" in large letters in the center of the banner, flanked on the left and right sides with the words "LABOR DISPUTE" in smaller letters. Two to three union representatives held the banner and distributed handbills to pedestrians who asked about the banner. The banner was erected on a public sidewalk in front of Banner Medical's parking lot, approximately 80 feet from the entrance to the parking lot and 510 feet from the front door of the Thunderbird Medical Center, facing automobile traffic on a public street.

Banner Health owns and operates the Thunderbird Medical Center.

(2) Northwest Hospital

At the location of neutral Northwest Hospital, the Union displayed two banners with the inscription "SHAME ON NORTHWEST MEDICAL CENTER" in large letters in the center of the banner, flanked on the left and right sides with the words "LABOR DISPUTE" in smaller letters. Both banners measured 20 feet by 3 feet and were placed on public rights of way facing automobile traffic on public streets. Two to three union representatives held each banner and had handbills available to distribute to pedestrians who inquired about the banner. One of the banners was displayed 1,050 feet from a vehicle entrance to Northwest Hospital and the other banner was displayed 450 feet from a vehicle entrance to the facility and 300 feet from its front door entrance. The primary employers, Delta and Hardrock, were never present at Northwest Hospital during the bannering. They were working 11 miles away at the Oro Valley Hospital construction project, which was owned by Northwest Hospital's parent corporation, Triad.

(3) RA Tempe

The bannering in the third case took place at the RA Tempe restaurant in Tempe, Arizona. The banner displayed at this neutral site measured 15 feet by 3 feet. It was set up on the curb side of a public sidewalk - i.e., immediately adjacent to the street - 15 feet from the restaurant's front door entrance, facing away from the entrance and towards the street. Two to three union representatives held the banner and distributed handbills to interested passersby. Rather than declaring shame on this neutral employer, the banner stated "DON'T EAT RA SUSHI" with the "LABOR DISPUTE" wording on both sides. The primary employer, Enterprise, was never present while the bannering took place at RA Tempe. Rather, Enterprise was performing construction work at the RA San Diego restaurant, which was owned by RA Sushi, the entity that also owned RA Tempe.

APPENDIX C

The text of the handbills distributed at the RA Sushi restaurant:

SHAME ON R A SUSHI

FOR DESECRATION OF THE AMERICAN WAY OF LIFE

A rat is a contractor that does not pay all of its employees prevailing wages, including either providing or making payments for health care and pension benefits.

Shame on **R A Sushi** for contributing to erosion of area standards for San Diego carpenter craft workers. Carpenters Local 1506 has a labor dispute with *Enterprise* that is a subcontractor for **R D Olsen** on **R A Sushi's** newest restaurant. Enterprise does not meet area labor standards, including providing or paying for health care and pension to all its carpenter craft employees.

Carpenters Local 1506 objects to substandard wage employers like **Enterprise** working in the community. In our opinion the community ends up paying the tab for employee health care and because low wages tend to lower general community standards, thereby encouraging crime and other social ills.

Carpenters Local 1506 believes that the **R A Sushi** has an obligation to the community to see that area labor standards are met when doing their construction work. They should not be allowed to insulate themselves behind "independent" contractors.

PLEASE CALL R A SUSHI AT [phone number] AND TELL THEM THAT YOU WANT THEM TO DO ALL THEY CAN TO CHANGE THIS SITUATION AND SEE THAT AREA LABOR STANDARDS ARE MET FOR CONSTRUCTION WORK DONE AT THEIR FACILITIES.

The members and families of Carpenters Local 1506 thank you for your support. Call [phone number] for further information.

WE ARE NOT URGING ANY WORKER TO REFUSE TO WORK NOR ARE WE URGING ANY SUPPLIER TO REFUSE TO DELIVER GOODS.

Berry, David P.

From: Flynn, Terence F.
Sent: Wednesday, October 06, 2010 2:23 PM
To: 'peter@schaumber.com'
Subject: NYU grant of review dissent.doc

Attachments: NYU grant of review dissent.doc

NYU grant of review dissent.do...

IE6

New York University
Case 2-RC-23481

Member Hayes, dissenting:

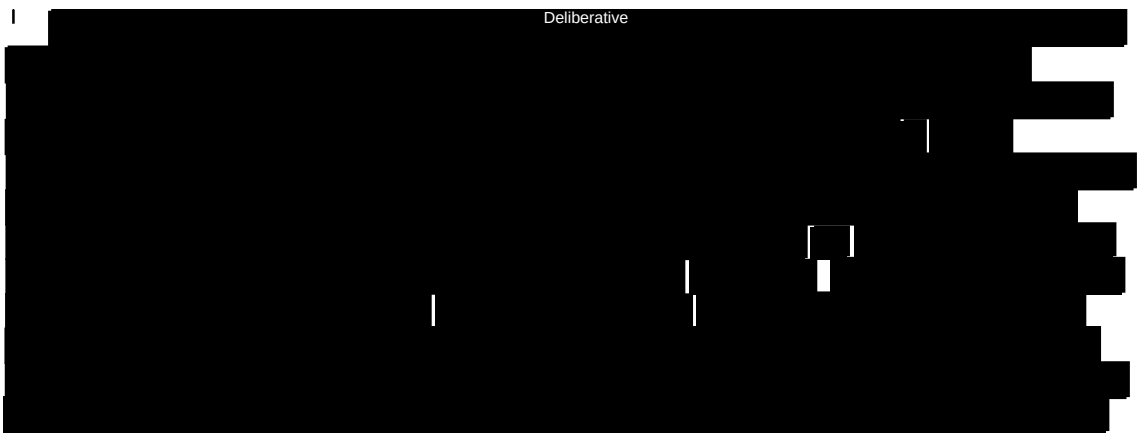
I would deny the Petitioner's Request for Review inasmuch as the Regional Director's dismissal of the instant petition is entirely consistent with existing Board precedent, and the Petitioner has set forth no compelling reasons for reconsideration of any Board rule or policy. Thus, the Request for Review fails to meet the most basic requirements for granting review under the Board's own Rules and Regulations. Additionally, I disagree with my colleagues that any of the papers before us creates a material issue of fact that would require a hearing in order to affirm the Regional Director's determination.

The Petitioner here has sought a unit composed of "all individuals enrolled in graduate-level programs .....who are employed to perform the functions of teaching assistants, research assistants and graduate assistants (regardless of job title)". The unit sought is not appropriate under the Board's decision in Brown University, 342 NLRB 483 (2004). This is a fact which the Petitioner freely concedes. Thus, it notes that: "It is undisputed that the Brown decision compels ..... [the dismissal of the petition]".

The Petitioner makes absolutely no assertion, proffer or claim that there are any facts at all that would distinguish any of the individuals sought by its petition from those found not to be statutory employees in Brown. Indeed, the Petitioner scrupulously notes that its Request for Review is based solely on Section 102.67 (c) (4) in urging that there are "compelling reasons for reconsideration of the Board's Brown decision." The Petitioner is completely candid about the objective of its Request for Review – it wants the Board to grant the request, overrule Brown, and reinstate the Board's prior holding in New York University, 332 NLRB 1205 (2000)("NYU"), that most of the individuals in the petitioned-for unit are statutory employees.

The Request for Review itself sets forth no proper, let alone "compelling" reasons for reconsideration.[1] The Request does not raise, allege, or reference a single fact,

[1] Deliberative



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circumstance, argument, legal precedent or claim that was not in existence and clearly before the Board when it rendered its decision in Brown. Thus, the Request for Review does nothing more than ask that a Board, with changed membership, view precisely the same evidence and argument considered by a prior Board, but reach an opposite result. This is not a proper basis for "reconsideration." To suggest that it is merely serves to reinforce the views of the Board's critics who charge that its view of the law is wholly partisan and thus changeable based on nothing more than changes in Board membership.[2]

The deficiencies in the Petitioner's Request for Review are patent, and my colleagues' effort to overcome them serves only to cast the problems in bolder relief. Rather than basing their grant of review and direction of a hearing on compelling reasons stated by the Petitioner, the party requesting review, my colleagues' take their basis for granting review *from the Employer's Opposition.* Thus, they note that the Employer asserts (1) it has included some graduate students in an adjunct faculty bargaining unit; and (2) some graduate students in the petitioned-for unit would not only be excludible under the Brown, but under the prior NYU decision as well.

Neither of these factual assertions presents a "compelling" reason to grant review of Brown's holding, nor do they require a hearing. As far as the graduate students in the adjunct faculty unit are concerned, if their circumstances are no different from the time of the prior NYU decision, then under Brown they are not statutory employees. The Employer may voluntarily engage in collective-bargaining for a unit including such individuals, but that does not make them statutory employees. On the other hand, if their circumstances have changed such that they *are* now statutory employees, then they are currently represented and the petition to include them in a separate unit is inappropriate.

As for the Employer's claim that certain individuals in the petitioned-for unit were also excluded as non-employees in NYU, the alleged necessity for a hearing to assess the "accuracy of [the Employer's] representations" exists only if Brown is overruled. It is otherwise immaterial. Granting review on this basis unavoidably suggests that overruling Brown is a preordained result.

The remainder of my colleagues' stated reasons for granting review unfortunately suffers from the same infirmity as the Petitioner's arguments. Thus, there is nothing referenced that was not, or could not have been duly considered by the Board when it reached its decision in Brown. The Board then was well aware of the "evidence of

[2] "[A]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987).

collective-bargaining in higher education", including, most notably the experience of the individuals and Employer that are the object of the instant petition.[3]

In sum, the Petitioner's Request for Review has failed to state any compelling reasons for reconsideration of Brown, and the majority unsuccessfully refer to statements in the Employer's Opposition as a basis for granting a hearing. I would instead deny review of the Regional Director's correct application of Brown to dismiss the petition.

BRIAN E. HAYES, MEMBER

Dated, Washington, D.C.,

---

[3] Amicus curiae briefs in Brown were filed, inter alia, by: the American Council on Education and the National Association of Independent Colleges and Universities; American Association of University Professors; American Federation of Labor-Congress of Industrial Organizations; Committee of Interns and Residents; Joint brief of Harvard University, Massachusetts Institute of Technology, Stanford University, George Washington University, Tufts University, University of Pennsylvania, University of Southern California, Washington University in St. Louis, and Yale University; and Trustees of Boston University. 342 NLRB at 483 fn. 1.

Berry, David P.

From: Peter Schaumber [peter@schaumber.com]
Sent: Wednesday, October 06, 2010 2:59 PM
To: Flynn, Terence F.
Subject: RE: NYU grant of review dissent.doc

Great dissent.

-----Original Message-----
From: Flynn, Terence F. [mailto:Terence.Flynn@nlrb.gov]
Sent: Wednesday, October 06, 2010 2:23 PM
To: 'peter@schaumber.com'
Subject: NYU grant of review dissent.doc

IE7

Berry, David P.

From: [redacted: Chief Counsel]
Sent: Wednesday, October 06, 2010 12:40 PM
To: [redacted: Board Staff Attorney] Hayes, Brian
Cc: Becker, Craig; Pearce, Mark G.; [redacted: Board Staff Attorneys and Managers] Flynn, Terence F.; [redacted: Board Staff Attorney]
Subject: RE: New York University, 2-RC-23481
Attachments: NYU grant of review dissent.doc

Member Hayes has approved the attached dissent.

From: [redacted: Board Staff Attorney]
Sent: Wednesday, September 08, 2010 11:33 AM
To: Hayes, Brian
Cc: Becker, Craig; Pearce, Mark G.; [redacted: Board Staff Attorneys and Managers]
Subject: New York University, 2-RC-23481

Member Hayes---Pursuant to the vote [redacted: Deliberative] considering P's request for review of the RD's Order Dismissing the petition in New York University, 2-RC-23481, I am circulating on behalf of Member Becker and Member Pearce the attached Order granting and remanding the case to the Regional Director. [redacted: Deliberative] Please let me know if you have any questions.

IE 8

New York University
Case 2-RC-23481

Member Hayes, dissenting:

I would deny the Petitioner's Request for Review inasmuch as the Regional Director's dismissal of the instant petition is entirely consistent with existing Board precedent, and the Petitioner has set forth no compelling reasons for reconsideration of any Board rule or policy. Thus, the Request for Review fails to meet the most basic requirements for granting review under the Board's own Rules and Regulations. Additionally, I disagree with my colleagues that any of the papers before us creates a material issue of fact that would require a hearing in order to affirm the Regional Director's determination.

The Petitioner here has sought a unit composed of "all individuals enrolled in graduate-level programs .....who are employed to perform the functions of teaching assistants, research assistants and graduate assistants (regardless of job title)". The unit sought is not appropriate under the Board's decision in Brown University, 342 NLRB 483 (2004). This is a fact which the Petitioner freely concedes. Thus, it notes that: "It is undisputed that the Brown decision compels ..... [the dismissal of the petition]".

The Petitioner makes absolutely no assertion, proffer or claim that there are any facts at all that would distinguish any of the individuals sought by its petition from those found not to be statutory employees in Brown. Indeed, the Petitioner scrupulously notes that its Request for Review is based solely on Section 102.67 (c) (4) in urging that there are "compelling reasons for reconsideration of the Board's Brown decision." The Petitioner is completely candid about the objective of its Request for Review – it wants the Board to grant the request, overrule Brown, and reinstate the Board's prior holding in New York University, 332 NLRB 1205 (2000)("NYU"), that most of the individuals in the petitioned-for unit are statutory employees.

The Request for Review itself sets forth no proper, let alone "compelling" reasons for reconsideration.[1] The Request does not raise, allege, or reference a single fact,

[redacted]

1 Deliberative [redacted]

circumstance, argument, legal precedent or claim that was not in existence and clearly before the Board when it rendered its decision in Brown. Thus, the Request for Review does nothing more than ask that a Board, with changed membership, view precisely the same evidence and argument considered by a prior Board, but reach an opposite result. This is not a proper basis for "reconsideration." To suggest that it is merely serves to reinforce the views of the Board's critics who charge that its view of the law is wholly partisan and thus changeable based on nothing more than changes in Board membership.[2]

The deficiencies in the Petitioner's Request for Review are patent, and my colleagues' effort to overcome them serves only to cast the problems in bolder relief. Rather than basing their grant of review and direction of a hearing on compelling reasons stated by the Petitioner, the party requesting review, my colleagues' take their basis for granting review *from the Employer's Opposition.* Thus, they note that the Employer asserts (1) it has included some graduate students in an adjunct faculty bargaining unit; and (2) some graduate students in the petitioned-for unit would not only be excludible under the Brown, but under the prior NYU decision as well.

Neither of these factual assertions presents a "compelling" reason to grant review of Brown's holding, nor do they require a hearing. As far as the graduate students in the adjunct faculty unit are concerned, if their circumstances are no different from the time of the prior NYU decision, then under Brown they are not statutory employees. The Employer may voluntarily engage in collective-bargaining for a unit including such individuals, but that does not make them statutory employees. On the other hand, if their circumstances have changed such that they *are* now statutory employees, then they are currently represented and the petition to include them in a separate unit is inappropriate.

As for the Employer's claim that certain individuals in the petitioned-for unit were also excluded as non-employees in NYU, the alleged necessity for a hearing to assess the "accuracy of [the Employer's] representations" exists only if Brown is overruled. It is otherwise immaterial. Granting review on this basis unavoidably suggests that overruling Brown is a preordained result.

The remainder of my colleagues' stated reasons for granting review unfortunately suffers from the same infirmity as the Petitioner's arguments. Thus, there is nothing referenced that was not, or could not have been duly considered by the Board when it reached its decision in Brown. The Board then was well aware of the "evidence of

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[redacted]
Deliberative
[redacted]

[2] "[A]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987).

collective-bargaining in higher education", including, most notably the experience of the individuals and Employer that are the object of the instant petition.[3]

In sum, the Petitioner's Request for Review has failed to state any compelling reasons for reconsideration of Brown, and the majority unsuccessfully refer to statements in the Employer's Opposition as a basis for granting a hearing. I would instead deny review of the Regional Director's correct application of Brown to dismiss the petition.

BRIAN E. HAYES, MEMBER

Dated, Washington, D.C.,

[3] Amicus curiae briefs in Brown were filed, inter alia, by: the American Council on Education and the National Association of Independent Colleges and Universities; American Association of University Professors; American Federation of Labor-Congress of Industrial Organizations; Committee of Interns and Residents; Joint brief of Harvard University, Massachusetts Institute of Technology, Stanford University, George Washington University, Tufts University, University of Pennsylvania, University of Southern California, Washington University in St. Louis, and Yale University; and Trustees of Boston University. 342 NLRB at 483 fn. 1.

Investigative Summary

According to entries in the Board's Judicial Case Management System (JCMS), the final panel Board Member vote in *New York University* was recorded on October 20, 2010.

New York University *and* GSOC/UAW. Case 2–RC–23481

October 25, 2010

ORDER

BY MEMBERS BECKER, PEARCE, AND HAYES

Petitioner's request for review of the Regional Director's order dismissing petition without a hearing is granted as it raises compelling reasons warranting review.

The Petitioner seeks to represent a unit of graduate students who, the Petitioner contends, are employed by the Employer, New York University, to provide teaching and research services. The Regional Director dismissed the petition without conducting a hearing, citing the Board's decision in *Brown University*, 342 NLRB 483 (2004), which held that graduate students performing such services at Brown University are not employees within the meaning of Section 2(3) of the Act.

The Employer's opposition to the Petitioner's request for review makes several significant factual representations, and contentions concerning unit placement. Because the Regional Director dismissed the petition without a hearing, we cannot assess the accuracy of these representations or determine the Petitioner's position on these factual questions or the unit placement issues that they appear to raise.

First, the Employer represents in its opposition that it has substantially altered both its relationship to graduate students who perform teaching duties and its legal position in regard to such individuals since the decisions in *New York University*, 332 NLRB 1205 (2000), and *Brown University*. The Employer represents that it has classified the overwhelming majority of its graduate students who perform teaching duties as adjunct faculty and now concedes that they are employees covered by the Act. The Employer concedes that, unlike the graduate students at issue in *Brown University*, the payments received by graduate students appointed as adjunct faculty are not the same as or similar to the amounts received by students on fellowships without teaching duties. However, the Employer contends that the graduate students appointed as adjunct faculty are properly included in an existing unit of adjunct faculty. The Employer does not make any specific representations concerning what percentage of the graduate students who are appointed as adjunct faculty satisfy the other criteria for inclusion in that unit, including provision "of forty contact hours of instruction in one or more courses in an academic year . . . or at least a total of 75 contact hours of individual instruction or tutoring during a semester." The Employer further represents that there are fewer than 15 graduate students performing teaching duties who have not been classified as adjunct faculty. Neither party presents any argument concerning the relevance of the classification of some graduate students performing teaching duties as adjunct faculty to the employee status of the remaining graduate student teachers who are not so classified. The Regional Director therefore did not consider this question.

Second, the Employer also represents in its opposition that some unspecified portion of its graduate students who provide research assistance are "funded by external grants" and, pursuant to the Board's decision in *New York University*, supra at 1209 fn. 10, they are not employees of the Employer regardless of the validity of the *Brown University* decision. Again, because the Regional Director dismissed the petition without a hearing, we cannot assess the accuracy of these representations and the Petitioner's position on the factual and legal questions they appear to raise.

Finally, we believe there are compelling reasons for reconsideration of the decision in *Brown University*. The Petitioner points out that *Brown University* overruled the decision in *New York University*, which had been issued just 4 years earlier. The Petitioner argues that the decision in *Brown University* is based on policy considerations extrinsic to the labor law we enforce and thus not properly considered in determining whether the graduate students are employees. The Petitioner also offered to present evidence of collective-bargaining experience in higher education as well as expert testimony demonstrating that, even giving weight to the considerations relied on by the Board in *Brown University*, the graduate students are appropriately classified as employees under the Act. Finally, the Petitioner argues that the decision in *Brown University* is inconsistent with the broad definition of employee contained in the Act and prior Board and Supreme Court precedent. The Employer, however, contends that *Brown University* was correctly decided.[1]

[1] Contrary to our dissenting colleague, we do not read Sec. 102.67(c) of our Rules to bar the Board from considering arguments and factual assertions contained in the responsive papers in determining whether "compelling reasons exist" for granting review. In addition, unlike our colleague, we are unwilling to find, in the absence of any evidence, that the graduate students who have been appointed as adjunct faculty "are currently represented" and that the instant petition is therefore inappropriate. Factual findings must be based on evidence; since no evidence was presented, a remand for a hearing is necessary.

We believe the factual representations, contentions, and arguments of the parties should be considered based on a full evidentiary record addressing the questions raised above as well as any others deemed relevant by the Regional Director. Accordingly, the Regional Director's dismissal of the petition is reversed, the petition is reinstated, and the case is remanded to the Regional Director for a hearing and the issuance of a decision.

Dated, Washington, D.C. October 25, 2010

Craig Becker, Member

Mark Gaston Pearce, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting.

I would deny the Petitioner's request for review inasmuch as the Regional Director's dismissal of the instant petition is entirely consistent with existing Board precedent, and the Petitioner has set forth no compelling reasons for reconsideration of any Board rule or policy. Thus, the request for review fails to meet the most basic requirements for granting review under the Board's own Rules and Regulations. Additionally, I disagree with my colleagues that any of the papers before us creates a material issue of fact that would require a hearing in order to affirm the Regional Director's determination.

The Petitioner here has sought a unit composed of "all individuals enrolled in graduate level programs . . . who are employed to perform the functions of teaching assistants, research assistants and graduate assistants (regardless of job title)." The unit sought is not appropriate under the Board's decision in *Brown University*, 342 NLRB 483 (2004). This is a fact which the Petitioner freely concedes. Thus, it notes that: "It is undisputed that the *Brown* decision compels . . . [the dismissal of the petition]."

The Petitioner makes absolutely no assertion, proffer, or claim that there are any facts at all that would distinguish any of the individuals sought by its petition from those found not to be statutory employees in *Brown*. Indeed, the Petitioner scrupulously notes that its request for review is based solely on Section 102.67 (c) (4) in urging that there are "compelling reasons for reconsideration of the Board's *Brown* decision." The Petitioner is completely candid about the objective of its request for review—it wants the Board to grant the request, overrule *Brown*, and reinstate the Board's prior holding in *New York University*, 332 NLRB 1205 (2000) (*NYU*), that most of the individuals in the petitioned-for unit are statutory employees.

The request for review itself sets forth no proper, let alone "compelling" reasons for reconsideration. The request does not raise, allege, or reference a single fact, circumstance, argument, legal precedent, or claim that was not in existence and clearly before the Board when it rendered its decision in *Brown*. Thus, the request for review does nothing more than ask that a Board, with changed membership, view precisely the same evidence and argument considered by a prior Board, but reach an opposite result. This is not a proper basis for "reconsideration." To suggest that it is merely serves to reinforce the views of the Board's critics who charge that its view of the law is wholly partisan and thus changeable based on nothing more than changes in Board membership.[1]

The deficiencies in the Petitioner's request for review are patent, and my colleagues' effort to overcome them serves only to cast the problems in bolder relief. Rather than basing their grant of review and direction of a hearing on compelling reasons stated by the Petitioner, the party requesting review, my colleagues' take their basis for granting review *from the Employer's opposition.* Thus, they note that the Employer asserts (1) it has included some graduate students in an adjunct faculty bargaining unit; and (2) some graduate students in the petitioned for unit would not only be excludible under the *Brown*, but under the prior *NYU* decision as well.

Neither of these factual assertions presents a "compelling" reason to grant review of *Brown*'s holding, nor do they require a hearing. As far as the graduate students in the adjunct faculty unit are concerned, if their circumstances are no different from the time of the prior *NYU* decision, then under *Brown* they are not statutory employees. The Employer may voluntarily engage in collective-bargaining for a unit including such individuals, but that does not make them statutory employees. On the other hand, if their circumstances have changed such that they *are* now statutory employees, then they are currently represented and the petition to include them in a separate unit is inappropriate.

As for the Employer's claim that certain individuals in the petitioned-for unit were also excluded as nonemployees in *NYU*, the alleged necessity for a hearing to assess the "accuracy of [the Employer's] representations" exists

[1] "[A]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 fn. 30 (1987) (citations and internal quotations omitted).

only if *Brown* is overruled. It is otherwise immaterial. Granting review on this basis unavoidably suggests that overruling *Brown* is a preordained result.

The remainder of my colleagues' stated reasons for granting review unfortunately suffers from the same infirmity as the Petitioner's arguments. Thus, there is nothing referenced that was not, or could not have been duly considered by the Board when it reached its decision in *Brown*. The Board then was well aware of the "evidence of collective-bargaining in higher education," including, most notably the experience of the individuals and Employer that are the object of the instant petition.[2]

In sum, the Petitioner's request for review has failed to state any compelling reasons for reconsideration of *Brown*, and the majority unsuccessfully refer to statements in the Employer's opposition as a basis for granting a hearing. I would instead deny review of the Regional Director's correct application of *Brown* to dismiss the petition.

Dated, Washington, D.C. October 25, 2010

Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD

[2] Amicus curiae briefs in *Brown* were filed, inter alia, by: the American Council on Education and the National Association of Independent Colleges and Universities; American Association of University Professors; American Federation of Labor-Congress of Industrial Organizations; Committee of Interns and Residents; Joint brief of Harvard University, Massachusetts Institute of Technology, Stanford University, George Washington University, Tufts University, University of Pennsylvania, University of Southern California, Washington University in St. Louis, and Yale University; and Trustees of Boston University. 342 NLRB 483 fn. 1.

Berry, David P.

From: Flynn, Terence F.
Sent: Thursday, January 20, 2011 7:49 AM
To: 'Peter Schaumber'
Subject: Mastec TV BEH dissent.doc
Attachments: Mastec TV BEH dissent.doc

Brian's third-party standard analysis.

MEMBER HAYES, dissenting:

I would sustain the Employer's Objection 5 and set aside the election based on third-party threats made during the critical pre-election period. I readily accept the proposition that the Board must apply a more stringent standard for setting aside an election based on the conduct of persons who are not subject to an employer or union's direct control. Notwithstanding this necessary distinction between party and non-party conduct, there are few phrases in the Board's lexicon that are more misleading than the statement in *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984), that the test for objections to third party threats in an election campaign is "whether the misconduct was so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." [redacted] Deliberative [redacted][1] but the scope of objectionable threats is not so limited. Indeed, third party threats directed at only one employee have required setting aside an election in certain circumstances.[2]

The *real* test of the objectionable nature of third party threats is the multi-factor standard set forth in *Westwood Horizons Hotel*:

> [W]hether a threat is serious and likely to intimidate prospective voters to cast their ballots in a particular manner depends on the threat's character and circumstances and not merely on the number of employees threatened. In determining the seriousness of a threat, the Board evaluates not only the nature of the threat itself, but also whether the threat encompassed the entire bargaining unit; whether reports of the threat were disseminated widely within the unit; whether the person making the threat was capable of carrying it out, and whether it is likely that the employees acted in fear of his capability

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[1] See *Diamond State Poultry Co.*, 107 NLRB 3, 6 (1953).

[2] See *Steak House Meat Co.*, 206 NLRB 28, 29 (1973), cited with approval in *Westwood Horizons*, 270 NLRB at 803 fn.8.

of carrying out the threat; and whether the threat was "rejuvenated" at or near the time of the election.

Unlike my colleagues, I find that the election here must be set aside under this third party test.[3]

The relevant facts are undisputed. One to two weeks before the election, eligible voter Matt Abel heard pro-union employee Chris Verbal tell a group of three or four unit employees that he would "bitch slap" someone or "whip their f---in' ass" if they "cost us the election." Abel testified that Verbal was referring to employees Dennis Sheil and Shawn Whippo. Then, about a week before the election, pro-union employee Anthony Hodges told Abel that he heard Sheil and Abel had changed their minds about supporting the Union. Hodges then told Abel that Hodges "could...whip [Sheil's] ass" and "find out jobs that [Sheil] had done [and] f--- them up to where they wouldn't pass the [quality control test]."[4]

Two days before the election, employee Louis Mays told Hodges and employee Mark Hopkins that he thought the election should be postponed for six months to give the Employer a chance to address employees' concerns. Subsequently, employee Scott Winter called Mays a "traitor," "backstabber," and a "f---ing snitch." Later that night, Mays received an anonymous phone call at his house. Repeating Winter's "backstabber" accusation from earlier that day, the caller told Mays "don't be a f---ing backstabber, if you backstab us, we will f---ing ...get even with you."

[redacted] Deliberative [redacted]

[redacted]

[redacted] Deliberative [redacted]

[redacted]

[4] Hodges had experience in quality control and likely would have been viewed as capable of carrying out such a threat.

[redacted]
Deliberative

One of the principal reasons for finding many third party threats unobjectionable is that the protagonists are not in a position to make good on the threat. That rationale is applicable to many types of threats to affect an employee's job or working conditions, but it hardly holds true for threats of a physical nature. Unless the Board is going to impose on an objecting party the burden to prove that an employee making a threat has greater pugilistic skills or physical prowess than the threatened employee, and it has not heretofore imposed such a burden, then it seems an acceptable general proposition that third parties making physical threats are capable of following through on them.

There remains the question whether the threats at issue may be objectively viewed as uttered with serious intent. I would so find. In this respect, the majority's contrary view is representative of an analytical approach reflexively dismissing almost any threat uttered by a pro-union employee as mere bravado, a colloquialism, or typical of language used in the workplace. This approach is unfortunately reminiscent of the Board's quondam attitude towards physical threats by strikers and picketers, holding that such misconduct did not deprive them of statutory protection unless accompanied by physical actions. That policy met its deserved demise[5] after the Supreme Court granted review of a case in which the Board originally held that

[5] See *Clear Pine Moldings, Inc.*, 268 NLRB 1044 (1984).

verbal threats by drunken strikers to a non-striker at his home and in the presence of his pregnant wife and young daughter did not remove the strikers' statutory protection.[6]

Clearly, the issue of whether to set aside an election based on third party threats involves consideration of *some* factors that are not at issue in striker misconduct cases. Deliberative

[redacted]

Deliberative

[redacted]

I would therefore set aside the election results and direct a new election.

Dated, Washington DC

Brian E. Hayes, Member

[6] *Georgia Kraft Co.*, 258 NLRB 908, 912-913 (1981), enfd. 696 F.2d 931 (11th Cir. 1983), cert. granted 464 U.S. 981 (1983), judgment vacated in part, 466 U.S. 901 (1984), reversed in relevant part on remand, 275 NLRB 63 (1985).

Berry, David P.

From: Peter Schaumber [peter@schaumber.com]
Sent: Thursday, January 20, 2011 8:57 AM
To: Flynn, Terence F.
Subject: RE: Mastec TV BEH dissent.doc

Thanks, only skimmed, but quite good. It would have been nice if he cited me ☺

From: Flynn, Terence F. [mailto:Terence.Flynn@nlrb.gov]
Sent: Thursday, January 20, 2011 7:49 AM
To: 'Peter Schaumber'
Subject: Mastec TV BEH dissent.doc

Brian's third-party standard analysis.

Investigative Summary

According to entries in the Board's Judicial Case Management System (JCMS), Member Hayes' dissent in *Mastec Direct TV* was originally circulated on January 5, 2011. The document name is "Mastec TV BEH dissent.doc." Mr. Flynn received an e-mail notification from the JCMS system when the document was circulated. The Deputy Chief Counsel on the former Member Schaumber staff emailed this version of the draft dissent to staff attorneys and Mr. Flynn on January 5 and again on January 19, 2011.

The majority subsequently amended its decision on February 14, 2011 and Member Hayes circulated a revised dissent on February 17, 2011. The document name for the revised dissent is "Mastec TV BEH revised dissent.doc." The Deputy Chief Counsel emailed this version of the dissent to staff attorneys and Mr. Flynn on February 18, 2011. The final panel Board Member vote was recorded on March 1, 2011.

Mastec North America, Inc., d/b/a Mastec Direct TV *and* Communications Workers of America, Local 3871. Case 10–RC–15707

March 11, 2011

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER AND HAYES

The National Labor Relations Board, by a three-member panel, has considered objections to an election held August 22, 2008, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The revised tally of ballots shows 14 for and 12 against the Petitioner, with no challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, has decided to adopt the hearing officer's findings and recommendations as further explained below, and finds that a certification of representative should be issued.[1]

I. OBJECTION 4: CONDUCT OF ALLEGED UNION AGENTS

We agree with the hearing officer's recommendation to overrule the Employer's Objection 4, which alleges that agents of the Union threatened and intimidated eligible voters during the campaign. Based on testimony regarding their membership in an in-plant "organizing committee," the Employer argues that employees Anthony Hodges and Scott Winter were union agents and that their conduct is therefore attributable to the Union. We find, in agreement with the hearing officer, that the evidence fails to establish agency.

At the hearing, union organizer Eddie Hicks testified about a document, not offered into evidence, that named Hodges and Winter as two of the four members of an "organizing committee."[2] Hicks identified the document as the union secretary's notes from a meeting Hicks did not attend. Regarding the role of the four individuals, Hicks testified that it was not a formal committee. Rather, he testified as follows: "What that's for, if we had to notify somebody, that was the four people we were going to get in touch with." He further stated: "If anybody had a question, I would answer back to these four people, not everybody in that group. I couldn't answer to everybody so these four people would get—the question would come to them, they would bring it to me, through my secretary, and I would put the information back to them." The four employees received no special training and attended no meetings other than those open to all employees.

The Employer argues that Hicks' testimony establishes that the four individuals were members of an organizing committee and that the organizing committee had both actual and apparent authority to speak for the Union. We disagree. "[E]mployee members of an in-plant organizing committee are not, simply by virtue of such membership, agents of the union." *Cornell Forge Co.*, 339 NLRB 733, 733 (2003); accord: *Advance Products Corp.*, 304 NLRB 436, 436 (1991). Moreover, the Board "will not lightly find an employee 'in-plant organizer' to be a general agent of the union." *S. Lichtenberg & Co.*, 296 NLRB 1302, 1314 (1989). The burden of proving agency is on the party asserting it. *Cornell Forge Co.*, supra at 733. The Employer has failed to meet that burden here in relation to either Hodges or Winter.[3]

First, the evidence fails to show that Hodges and Winter had actual authority to speak for the Union. Although Hicks testified that he would relay messages to the unit through the four employees, that establishes actual authority only to relay those specific messages, not to speak for the Union generally. See *United Builders Supply Co.*, 287 NLRB 1364, 1365 (1988) (employee had limited authority to collect cards and inform employees of meetings, but was not a general agent). There is no evidence that Hicks authorized the employees to make the alleged threats or was aware that they had done so.

Second, the evidence does not show apparent authority. Apparent authority "results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe the principal has authorized

[1] For the reasons stated in the hearing officer's report, we adopt her recommendations to overrule Objections 1, 2, 3, and 6.

The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

[2] According to the Employer's counsel, Matt Abel and Lou Mays were the other two employees identified on the document as members of the organizing committee. Neither Abel nor Mays was alleged to have committed any objectionable conduct.

[3] The Employer argues that another employee, Chris Verbal, was also a union agent because he testified that he belonged to the organizing committee. Verbal, however, was not identified by Hicks as one of the committee's four members. Furthermore, evidence of Verbal's organizing activities is limited to Hicks' testimony that Verbal "talked to us about a meeting and we set the meeting up. He brought everybody." That evidence is insufficient to establish agency under the principles discussed below.

the alleged agent to perform the acts in question." *Corner Furniture Discount Center, Inc.*, 339 NLRB 1122, 1122 (2003). "Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or the principal should realize that his conduct is likely to create such a belief." Id. Here, we find no such manifestation by Hicks to the unit employees.

As stated above, Hicks testified that he "would answer back" to one of the four employees "if anybody had a question." The record, however, does not disclose how often that actually occurred or what type of information, other than meeting times, was communicated through the four employees. Evidence of the four employees' specific activities is limited to general testimony from other witnesses that employee Hodges attended meetings, made people aware of the election date, and made some phone calls to employees. There is no evidence specifically addressing Winter's campaign activities.

There is also no evidence that the Union or the four employees ever told any employee that any of the four employees were acting as the Union's representatives, were members of any type of organizing committee, or were in any way associated with the Union beyond being union supporters. Furthermore, the evidence does not establish that the Union's admitted agents lacked a substantial role in the campaign—an important factor in analyzing the apparent authority of in-plant organizing committee members.[4] Hicks did not attend the first two campaign meetings, but representatives of the national union with which the petitioning Union was affiliated did. Hicks apparently attended later campaign meetings, because he testified: "I didn't even take notes on the last two or three meetings. I'd just sit there and I'd talk with the men." Hicks also testified that the Union's secretary communicated with employees on their cell phones. Thus, it would have been plain to employees that the Union had its own spokespersons separate and apart from the four employees. See *Corner Furniture*, supra at 1123; *Advance Products Corp.*, supra at 436; *United Builders Supply*, supra at 1365.[5] For all of the foregoing reasons, we overrule the Employer's Objection 4.

[4] See, e.g., *Corner Furniture*, supra at 1123; *Cornell Forge*, supra at 733; *S. Lichtenberg & Co.*, supra at 1302 fn. 4.

[5] The cases in which the Board has found employees to be union agents are distinguishable. In *Bristol Textile Co.*, 277 NLRB 1637 (1986), the Board found that, aside from a few meetings, the employee at issue was the union's only link to employees and had been identified by the union's vice president as the "spokesman" for employees. At the vice president's request, the employee made weekly reports to him. The employee testified that employees came to him to find out "what . . . was going on" and that employees recognized that he "represented the [u]nion" at the plant. Id. at 1637. Here, there is no evidence that the employees perceived the four employees as the Union's representatives or relied on them to find out what was going on, and those employees were not the Union's "only link" to the unit. In *Bio-Medical Applications of Puerto Rico*, 269 NLRB 827, 827–828 (1984), the employees introduced themselves as representatives of the union, spoke at meetings, made special appearances with union officials at campaign functions, and were taken by the union to campaign at a facility other than where they worked. None of those facts is present here.

[6] Sheil did not support the Union.

II. OBJECTION 5: THIRD-PARTY CONDUCT

We also agree with the hearing officer's recommendation to overrule Objection 5, which alleges that the conduct of certain prounion employees requires that the election be set aside, even if the employees were not acting as union agents. Specifically, the objections cite a statement by prounion employee Anthony Hodges to employee Matthew Abel that Hodges could "whip [employee Dennis Sheil's] ass" or sabotage his work;[6] an anonymous telephone threat to employee Lou Mays that the caller would "get even" with him if he "backstab[bed] us"; and statements by prounion employee Chris Verbal to a group of three or four employees that Verbal would "bitch slap" two other employees (who were not present at the time) or "whip their f—in' ass" if they "cost us the election," and that he would "whip [supervisor] Eddie's ass" if the Union lost. There is no evidence that any of the above statements were further disseminated.

A. The Third-Party Conduct Standard

It is settled that the Board will not set aside an election based on third-party threats unless the objecting party proves that the conduct was "so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984); see also *Lamar Advertising of Janesville*, 340 NLRB 979, 980 (2003); *Cal-West Periodicals*, 330 NLRB 599, 600 (2000). In assessing the seriousness of an alleged threat, the Board considers the following factors: (1) the nature of the threat itself; (2) whether it encompassed the entire unit; (3) the extent of dissemination; (4) whether the person making the threat was capable of carrying it out, and whether it is likely that employees acted in fear of that capability; and (5) whether the threat was made or revived at or near the time of the election. *Westwood*, supra at 803. For the reasons stated by the hearing officer, the Employer failed to satisfy the *Westwood* standard here.

The Employer concedes that proof of a general atmosphere of fear and reprisal is required in order to overturn the election. Nevertheless, our dissenting colleague contends that that standard should be modified to lower the burden imposed on a party seeking to overturn the results

of an election based on third-party conduct.[7] For the reasons stated below, we decline to follow our colleague's suggestion that we recast long-settled law.

To begin, we agree with our colleague that it is appropriate to apply the five -factor *Westwood* test in assessing the seriousness of alleged threats, and we consider those factors below. The fundamental question that consideration of the five factors is intended to illuminate, however, is whether the conduct created a general atmosphere of fear and reprisal rendering a free election impossible. *Westwood*, 270 NLRB at 803. That standard is grounded on principles of common sense, fairness, and efficiency and directly advances the goals of the Act. The courts have repeatedly endorsed it.[8]

We share the goal that animates the dissent: to insure that the election's results reflect the true and uncoerced choice of a majority of those voting. Since the Act's adoption, however, the Board has consistently concluded that that statutory goal is better served by requiring a more compelling showing to set aside an election when the source of the alleged coercion is the conduct of third parties rather than the conduct of the employer or union. For the reasons we now explain, we continue to believe our longstanding jurisprudence strikes the best balance between the competing objectives of preventing improper influence and respecting election results. The dissent's position, in our view, tips that balance too far in one direction by permitting a few employees (or even outside third parties), through the use of rough language, through overexuberance (which is most likely in a close election), or even through a deliberate effort to sabotage the election process, to frustrate what may have been the uncoerced choice of the majority.

First, we emphasize the extraordinary potential for disruption of the election process and frustration of employee choice that would result if third-party conduct were not subject to a heightened standard. "[W]ere the Board to give the same weight to conduct by third persons as to conduct attributable to the parties, the possibility of obtaining quick and conclusive election results would be substantially diminished." *Orleans Mfg. Co.*, 120 NLRB 630, 633–634 (1958); accord: *NLRB v. Griffith Oldsmobile*, 455 F.2d 867, 870 (8th Cir. 1972); *Owens-Corning Fiberglass Corp.*, 179 NLRB 219, 223 (1969). As the Board explained in *Orleans*:

> The employer and the union are deterred from election misconduct by the unfair labor practice provisions of the Act and by the trouble and expense which repeated elections impose upon them. The absence of similar deterrents against third persons who wish to forestall a conclusive election may make them more prone to engage in conduct calculated to prevent such a result.

120 NLRB at 633–634. This disruptive potential would be even greater if anonymous threats, such as the telephone call to employee Mays, were given significant weight. As stated by the District of Columbia Circuit, a union "may well have had no way to prevent such incidents from occurring; a rerun election would merely risk futility, because such incidents could easily recur despite the best efforts of the union and its supporters." *Clothing & Textile Workers v. NLRB*, 736 F.2d 1559, 1568 (D.C. Cir. 1984). The prospect of a rerun election might even encourage parties or individuals to manufacture anonymous threats and then attempt to use them to set aside the election. Id.

Second, because unions and employers cannot control nonagents, "there are equities that militate against taking away an election victory because of conduct by a nonagent." *Cal-West*, supra at 600; accord: *Lamar*, supra at 980. Simply put, it is unfair to saddle parties with the consequences of conduct over which they have no control. As the court stated in *NLRB v. Staub Cleaners, Inc.*, 418 F.2d 1086, 1088 (2d Cir. 1969): "[W]here one of the parties is directly at fault, the most effective deterrent to future misconduct is to deny that party what it sought to gain improperly. But, when . . . third parties are responsible for the improper comments, they have little concern with the expense and annoyance incurred by repeating the election, and the NLRB order in such a case carries with it no deterrent effect."

Third, the Board and the courts recognize that conduct by third parties is less likely to affect the outcome of the election than employer or union conduct. *Lamar*, supra at 980; *Cal-West*, supra at 600; *NLRB v. Eskimo Radiator*

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[7] The Board has consistently held that the third-party standard applies even where, as here, there was a narrow electoral margin. *Lamar*, supra at 980; *Cal-West*, supra at 600. Our colleague cites *Steak House Meat Co*, 206 NLRB 28, 29 (1973), for the proposition that third-party threats directed at only one employee have required setting an election aside in certain circumstances. We find the serious physical threats in *Steak House*—in which two male employees repeatedly threatened to kill a 16-year-old coworker, and one such threat was made while the speaker was holding a knife—easily distinguishable from the conduct here.

We also observe that the facts of *Westwood* itself, in which the Board ultimately set aside the election, are also far more extreme than those presented here. The third-party conduct at issue in *Westwood* included an employee's use of actual physical force to bring another employee to the voting line, conduct that was witnessed by 15 other employees.

[8] See, e g., *Precision Indoor Comfort, Inc. v. NLRB*, 456 F.3d 636, 639 (6th Cir. 2006); *Clothing & Textile Workers* v. NLRB, 736 F.2d 1559, 1568 (D.C. Cir. 1984); *Tuf-Lex Glass v. NLRB*, 715 F.2d 291, 296 (7th Cir. 1983); *Beaird-Poulan Division v. NLRB*, 649 F.2d 589, 594 (9th Cir. 1981).

Mfg. Co., 688 F.2d 1315, 1319 (9th Cir. 1982). "Employees reasonably have a greater concern about threats emanating from the union that may become their exclusive representative than they would have from threats uttered by a single nonagent individual." *Cal-West*, supra at 600 (overruling objection based on employees' statements that another employee should "wait and see" what happened to him if he did not vote yes and that they would "beat him up" if he crossed a picket line); *Orleans Mfg. Co.*, 120 NLRB 630, 633 (1958) ("[T]he conduct of third persons tends to have less effect upon the voters than similar conduct attributable to the employer who has, or the union which seeks, control over the employees' working conditions."). Employees will ordinarily reasonably discount the bravado of coworkers even when, as the dissent points out, the individual employees theoretically have the capacity to carry out the threat. See, e.g., *NLRB v. Bostik Division*, 517 F.2d 971, 975 (6th Cir. 1975); *Lamar*, supra at 981.

Our colleague contends that an employee has the same ability as an employer or union to effectuate a physical threat. Indeed, he would presume "that third parties making physical threats are capable of following through on them." As explained above, however, employee perception of the relative capability of a third party to effectuate a threat is only one of the reasons for the stricter third-party standard. The third-party conduct standard has routinely been applied to cases involving threats of physical harm or other repercussions that could, in theory, be carried out by an employee.[9]

Our colleague also condemns the Board's application of *Westwood* as "reflexively dismissing almost any threat uttered by a pro-union employee as mere bravado, a colloquialism, or typical of language used in the workplace." His concerns are misplaced for at least three reasons. First, we reject any implication that the *Westwood* standard governs only prounion conduct. The standard applies to all third-party threats, whether the individuals making them are prounion or antiunion. Second, our colleague denounces the *Westwood* "atmosphere of fear and reprisal" standard, yet he offers no reliable means of distinguishing bravado from objectionable threats. In the present case, as explained below, we rely on record evidence that similar statements were common in this workplace and among these employees. Third, and more generally, in declining to find that all language suggesting a physical threat must be deemed to have serious intent, we draw on our experience enforcing the Act. Loose talk is common, but acts of violence or other forms of retaliation perpetrated by employees rarely occur. Workplace violence may be on the rise, as our colleague asserts, but we see no evidence that talk of the kind involved here is leading to action prior to or after union representation elections.[10]

In short, in our view, requiring a general atmosphere of fear and reprisal in order to set aside an election based on third-party conduct appropriately balances the need to deter coercive conduct and preserve free choice against the interest in resolving representation issues promptly and with due regard for the expressed will of the majority. We therefore decline to abandon or recast the Board's longstanding test.

B. Application of the Standard

Applying the *Westwood* standard here, we find that the Employer has failed to show that the employees' conduct created a general atmosphere of fear and reprisal rendering a free election impossible. With regard to the physical threats in particular, the *Westwood* factors weigh against finding them sufficiently serious to be objectionable. The threats did not encompass the entire unit, nor were they disseminated beyond the employees present. In the context of this employer's workplace, the threats were comparable to everyday back and forth among employees and would not tend to suppress employee free choice. *Lamar*, supra at 981.

The record contains no evidence that Hodges and Verbal, the employees making the alleged threats, were capable of carrying them out. Nor is there evidence that Hodges or Verbal had a history of fighting or other violent behavior. Furthermore, it does not appear from the record evidence that the alleged threats—to "bitch slap" and "whip [another employee's] ass"—would have been taken seriously. Employee Matthew Abel, who heard Verbal's statements, described them as "just, you know, blowin' off steam," and testified that "a lot of technicians have probably said that once or twice, maybe not in regards to the Union." He further testified that he had probably said that he would "whip somebody's ass . . . more than once." Abel's testimony in this regard is consistent with the Board's general recognition that the threat

[9] See *Lamar*, supra at 980 (threat to "kick ass"); *Accubuilt, Inc.*, 340 NLRB 1337, 1338 (2003) (threat to damage employee's car or to "get him back" if he voted no); *Duralam, Inc.*, 284 NLRB 1419 (1987) (threat that an employee would be "dead meat" if the union lost by one vote and that an employee's bones would be broken if he crossed a picket line).

[10] Our colleague draws an analogy to picket-line misconduct cases, in which physical threats may be deemed unprotected even if they are not accompanied by physical action. As our colleague concedes, the analogy is flawed. In picket-line misconduct cases, only the individual committing the misconduct loses the protection of the Act. See, e.g., *Clear Pine Moldings*, 268 NLRB 1044, 1045–1046 (1984). Here, the Employer seeks to overturn the expressed will of the majority of employees based on the alleged threats of a few.

to "'kick [someone's] ass' . . . standing alone does not convey a threat of actual physical harm." *Leasco, Inc.*, 289 NLRB 549, 549 fn. 1 (1988). Because the language alleged as threatening here was not uncommon in the Employer's workplace and was unlikely to have led other employees to fear actual physical harm, it is unlikely that it would have affected the outcome of the election.[11]

The other evidence on which our colleague relies consists of a statement by employee Anthony Hodges, made about a week before the election, that he could sabotage employee Dennis Sheil's work, and an anonymous telephone threat received by employee Lou Mays 2 nights before the election, that some unknown persons would "get even" with Mays if he "backstab[bed]" them. Although both threats were close in time to the election, and Hodges (who had experience in quality control) may have had the ability to carry out the threat of work sabotage, the other *Westwood* factors weigh against sustaining the objection. Neither threat encompassed the entire unit. The threat of sabotage was not made to Sheil, but to Abel, who did not repeat it to Sheil or to anyone else. The telephone threat was anonymous and vague and was not disseminated to anyone.[12] As explained above, we agree with the District of Columbia Circuit that ordering a rerun election based on anonymous incidents could be both futile and "devastatingly unfair" to the majority. *Textile Workers*, supra, 736 F.2d at 1568.

We do not condone the sorts of statements made by the employees here. Nevertheless, the burden of proof on a party seeking to have a Board-supervised, secret-ballot election set aside is a heavy one. *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 806 (6th Cir. 1989) (citing *Harlan #4 Coal Co. v. NLRB*, 490 F.2d 117, 120 (6th Cir. 1974), cert. denied 416 U.S. 986 (1974)). As explained above, the Employer has failed to satisfy the standard for overturning an election based on third-party conduct, and, contrary to our colleague, we do not believe it would further the purposes of the Act to abandon that well-established, judicially-approved standard. Accordingly, we adopt the hearing officer's recommendation to overrule Objection 5.

[11] See *Bostik Division*, supra, 517 F.2d at 973 (holding that statement that an antiunion employee would "get [his] ass kicked" was "not the type that would be expected to have a coercive impact," because "[s]uch irresponsible threats are almost inevitable in the course of a heated election campaign and most employees doubtless expect such exchanges"); cf. *Ontario Knife Co. v NLRB*, 637 F 2d 840, 846 (2d Cir. 1980) (Friendly, J.) ("[T]he Board and the courts have recognized that the speech of the workplace is not that of the parlor").

[12] See *Accubuilt, Inc.*, supra (finding that coworkers' threat to "get [an employee] back" for voting no was not objectionable); *Nabisco, Inc v. NLRB*, 738 F.2d 955, 957 (8th Cir. 1984) (finding that two anonymous phone calls and rocks hurled at an employee's home, affecting a determinative number of voters, did not "add up to a pattern of improper conduct requiring an evidentiary hearing"; "A certain measure of bad feeling and even hostile behavior is probably inevitable in any hotly contested election.").

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Communication Workers of America, Local 3871, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time technicians, lead technicians and apprentice technicians employed by the Employer at its Kingsport, Tennessee facility, but excluding all other employees, technical employees, temporary employees, confidential employees, professional employees, guards and supervisors as defined in the Act.

Dated, Washington, D.C. March 11, 2011

Wilma B. Liebman, Chairman

Craig Becker, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting.

I would sustain the Employer's Objection 5 and set aside the election based on third-party threats made during the critical preelection period. I readily accept the proposition that the Board must apply a more stringent standard for setting aside an election based on the conduct of persons who are not subject to an employer or union's direct control. Notwithstanding this necessary distinction between party and nonparty conduct, there are few phrases in the Board's lexicon that are more misleading than the statement in *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984), that the test for objections to third party threats in an election campaign is "whether the misconduct was so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." The phrase, or at least the word "general," should be abandoned. It suggests a requirement of widespread and aggravated misconduct, and indeed it was born in cases concerning such conditions,[1] but the scope of objectionable threats is not so limited. Indeed, third

[1] See *Diamond State Poultry Co.*, 107 NLRB 3, 6 (1953).

party threats directed at only one employee have required setting aside an election in certain circumstances.[2]

The *real* test of the objectionable nature of third-party threats is the multifactor standard set forth in *Westwood Horizons Hotel*:

> [W]hether a threat is serious and likely to intimidate prospective voters to cast their ballots in a particular manner depends on the threat's character and circumstances and not merely on the number of employees threatened. In determining the seriousness of a threat, the Board evaluates not only the nature of the threat itself, but also whether the threat encompassed the entire bargaining unit; whether reports of the threat were disseminated widely within the unit; whether the person making the threat was capable of carrying it out, and whether it is likely that the employees acted in fear of his capability of carrying out the threat; and whether the threat was "rejuvenated" at or near the time of the election.

Unlike my colleagues, I find that the election here must be set aside under this third party test.[3]

The relevant facts are undisputed. One to two weeks before the election, eligible voter Matt Abel heard prounion employee Chris Verbal tell a group of three or four unit employees that he would "bitch slap" someone or "whip their f—in' ass" if they "cost us the election." Abel testified that Verbal was referring to employees Dennis Sheil and Shawn Whippo. Then, about a week before the election, prounion employee Anthony Hodges told Abel that he heard Sheil and Abel had changed their minds about supporting the Union. Hodges then told Abel that Hodges "could . . . whip [Sheil's] ass" and "find out jobs that [Sheil] had done [and] f— them up to where they wouldn't pass the [quality control test]."[4]

Two days before the election, employee Louis Mays told Hodges and employee Mark Hopkins that he thought the election should be postponed for 6 months to give the Employer a chance to address employees' concerns. Subsequently, employee Scott Winter called Mays a "traitor," "backstabber," and a "f—ing snitch." Later that night, Mays received an anonymous phone call at his house. Repeating Winter's "backstabber" accusation from earlier that day, the caller told Mays "don't be a f—ing backstabber, if you backstab us, we will f—ing . . . get even with you."

There is no indication that reports of the threats by Verbal and Hodges, Winter's diatribe, or the subsequent anonymous phone threat to Mays[5] were disseminated to employees other than those who first heard them. Still, at least 5 to 6 employees were exposed to threats of physical reprisal for opposing the Petitioner, repeated a final time only 2 days before an election which the Petitioner won by a slim 14 to 12 vote margin, meaning a change in even one vote could have resulted in a different outcome (in a tie vote, the petitioner loses).[6]

One of the principal reasons for finding many third party threats unobjectionable is that the protagonists are not in a position to make good on the threat. That rationale is applicable to many types of threats to affect an employee's job or working conditions, but it hardly holds true for threats of a physical nature. Unless the Board is going to impose on an objecting party the burden to prove that an employee making a threat has greater pugilistic skills or physical prowess than the threatened employee, and it has not heretofore imposed such a burden, then it seems an acceptable general proposition that third parties making physical threats are capable of following through on them.

There remains the question whether the threats at issue may be objectively viewed as uttered with serious intent. I would so find. In this respect, the majority's contrary view is representative of an analytical approach reflexively dismissing almost any threat uttered by an employee as mere bravado, a colloquialism, or typical of language used in the workplace. This approach is unfortunately reminiscent of the Board's quondam attitude towards physical threats by strikers and picketers, holding that such misconduct did not deprive them of statu-

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[2] See *Steak House Meat Co.*, 206 NLRB 28, 29 (1973), cited with approval in *Westwood Horizons*, 270 NLRB at 803 fn. 8.

[3] As stated above, I would abandon or revise the rote summary statement of the *Westwood* test, but not the multifactor test itself, which does not require that third party physical threats be pervasive in order to be objectionable. Although the third-party conduct at issue here is prounion, the test is, of course, applicable to antiunion conduct as well.

I join my colleagues in adopting the hearing officer's recommendation to overrule the Employer's Objections 1, 2, and 3. Inasmuch as I would find the Employer's Objection 5 sufficient to warrant setting aside the election, I find it unnecessary to pass on the Employer's Objections 4 and 6.

[4] Hodges had experience in quality control and likely would have been viewed as capable of carrying out such a threat.

[5] My colleagues place particular emphasis on the unreasonableness of setting aside an election based on anonymous threats. I do not find that the anonymous call to Mays, standing alone, would be objectionable under the *Westwood* test. It does, however, warrant consideration in conjunction with the proven threats by identified prounion employees, including Winters' tirade against Mays earlier that same day using language very similar to that used by the anonymous phone caller.

[6] The closeness of the election results is a consideration, albeit not determinative, in analyzing whether third party threats are objectionable. See *Robert Orr-Sysco Food Services*, 338 NLRB 614, 615 (2002) ("The Board has set aside elections where, as here, threats have been made or disseminated to voters whose ballots might have been determinative."), and cases cited there. In this case, threats were made to a determinative number of voters.

tory protection unless accompanied by physical actions. That policy met its deserved demise[7] after the Supreme Court granted review of a case in which the Board originally held that verbal threats by drunken strikers to a non-striker at his home and in the presence of his pregnant wife and young daughter did not remove the strikers' statutory protection.[8]

Clearly, the issue of whether to set aside an election based on third party threats involves consideration of *some* factors that are not at issue in striker misconduct cases. However, particularly at a time when workplace violence is on the rise nationally and employer efforts to restrain it trend towards zero tolerance, there should be a common concern as to whether the Board's assessment of preelection physical threats in the workplace furthers employee free choice and labor relations stability. In my view, the multifactor *Westwood Horizons* test for third party conduct, if correctly applied, requires finding that the objective collective impact of the threats in this case was serious and likely to intimidate prospective voters to cast their ballots in a particular manner.[9] I would therefore set aside the election results and direct a new election.

Dated, Washington, D.C., March 11, 2011

Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD

[7] See *Clear Pine Moldings, Inc.*, 268 NLRB 1044 (1984).

[8] *Georgia Kraft Co.*, 258 NLRB 908, 912–913 (1981), enfd. 696 F.2d 931 (11th Cir. 1983), cert. granted 464 U.S. 981 (1983), judgment vacated in part 466 U.S. 901 (1984), reversed in relevant part on remand 275 NLRB 63 (1985).

[9] My colleagues mischaracterize my position as conflating the party and third-party standards with respect to physical threats. I agree that a higher standard must be met before setting aside an election based on third-party conduct, but I would find that standard was met here.

Berry, David P.

From: Flynn, Terence F.
Sent: Tuesday, January 25, 2011 8:44 PM
To: peter@schaumber.com
Subject: FW: Albertson's Draft 1-24-11.doc
Attachments: Albertson's Draft 1-24-11.doc

Off the wall ....

From: [Deputy Chief Counsel]
Sent: Tuesday, January 25, 2011 5:11 PM
To: [Chief Counsel] Flynn, Terence F.
Cc: [2nd Deputy Chief]
Subject: Albertson's Draft 1-24-11.doc

FYI---Member Becker circulated this draft yesterday to his LBP panel. It came up in discussion on cases today with the deputies. Member Becker is proposing, in his words, [Deliberative] From a comment that [3rd Deputy Chief] made at the meeting, I'm surmising that Member Becker is offering that view for the panel's consideration, not that the panel voted for that statement.

[redacted]

IE15

LBP
El Paso, TX

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

ALBERTSON'S LLC

and Cases 28-CA-22546

UNITED FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION, LOCAL 640
AFL-CIO, CLC

DECISION AND ORDER

On February 2, 2010, Administrative Law Judge William N. Cates issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering 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 [redacted] Deliberative [redacted]

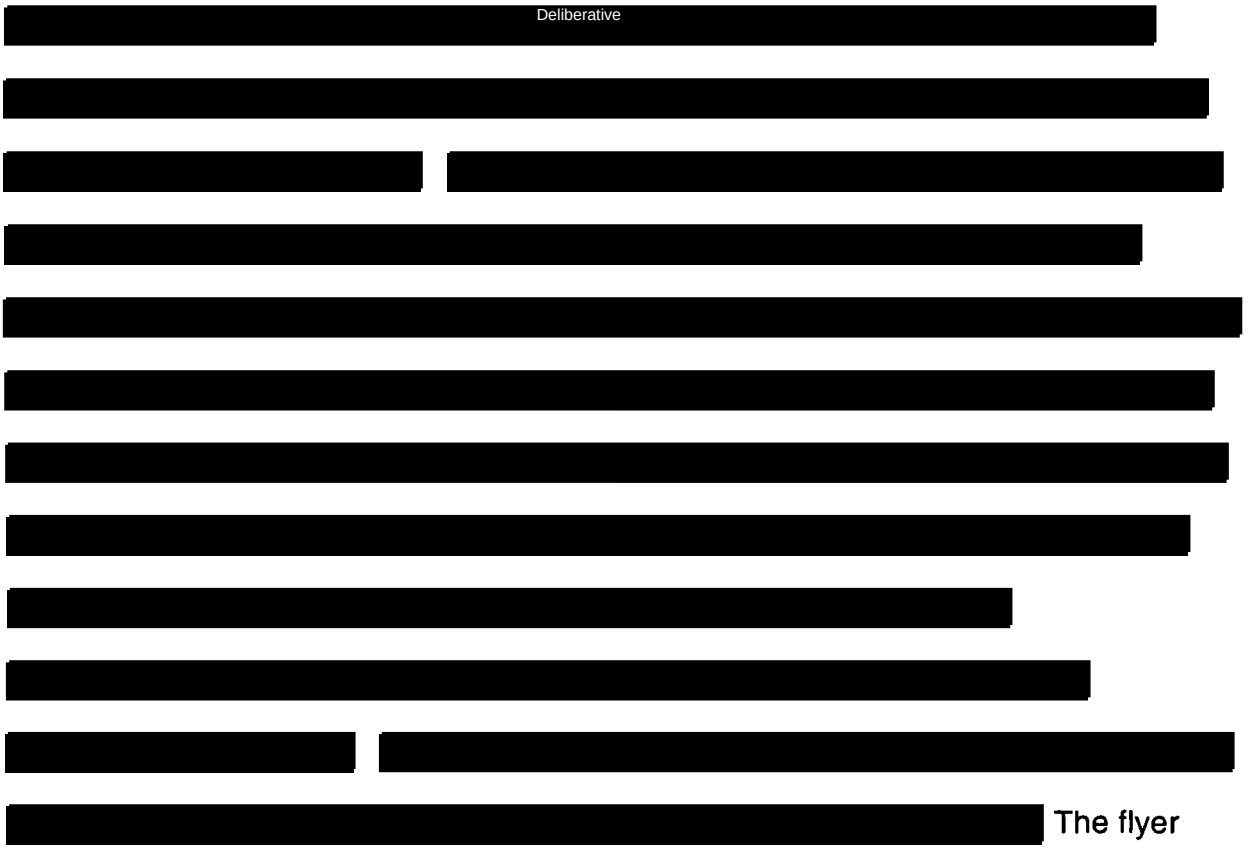
The Respondent owns and operates a chain of retail grocery stores throughout the southwestern United States, including eight stores in the El Paso, Texas area. At all relevant times, the Charging Party has represented, in a single bargaining unit, the meat department employees at three of the El Paso area stores. Employees at the other five

[redacted] Deliberative [redacted]

IE 15

El Paso area stores are unrepresented. The issue in this case is whether the Respondent was obligated to provide certain information regarding employees at the five nonrepresented stores, which was requested by the Charging Party during the parties' negotiations for a successor collective-bargaining agreement,.[2]

The parties' most recent collective-bargaining agreement expired in 2002. The



The flyer mentioned the wages, benefits, and working conditions of unrepresented employees in the El Paso area and asked the bargaining unit employees to compare their terms and

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[2] The Charging Party requested 37 items, all of which are listed in Sec. II of the judge's decision. The complaint does not allege that the Respondent unlawfully failed to provide items numbered 4, 5, 12, 19, and 20, and therefore we do not consider whether the failure to provide those items would have violated the Act.

[3] All dates are 2009 unless otherwise specified.

conditions of employment with those of their unrepresented colleagues. The flyer stated in relevant part:

> Albertsons has a long track record of treating our associates well. Look at it. Talk to associates in our union-free stores. Listen to them. We treat all of our associates fairly and with dignity and respect.
>
> . . . As to wages, Albertsons has never reduced wages when store associates have voted to go non-union. . . .If our objective is to reduce El Paso meat associates [sic] wages and the union is what is stopping us, why would we continue to raise the wages of the union free meat associates in El Paso to the point that the gap is as much as $1.80 an hour? The union free meat associates were already being paid a higher wage in 2001 than the union meat associates.
>
> . . . All other Albertsons associates in El Paso . . . are union-free. We believe they choose to be union free because they are treated fairly and enjoy good wages and benefits without a union. . ..

[redacted] Deliberative

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to provide the requested information. The judge found that the General Counsel established that the information was relevant or, alternatively, that the relevancy of the information should have been apparent to the Respondent.

The Respondent excepts to the judge's findings, [redacted] Deliberative

[redacted] Deliberative [redacted]

[redacted]

To begin, [redacted] Deliberative [redacted]

[redacted]

[redacted] Deliberative [redacted]

[redacted]

[redacted] Deliberative

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted] Deliberative [redacted]

[redacted]

We find, [redacted] Deliberative [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted] we find [redacted] Deliberative [redacted]

[redacted]

Accordingly, we [redacted] Deliberative [redacted]

[redacted]

[redacted]

[redacted]

[redacted] Deliberative [redacted]

[redacted]

[Remainder of document redacted.]

Investigative Summary

According to entries in the Board's Judicial Case Management System (JCMS), Member Becker's draft decision in *Albertson's LLC* was circulated on January 24, 2011. The other panel members on that decision were Chairman Wilma Liebman and Member Mark Pearce.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

WASHINGTON, D.C.

ALBERTSONS LLC,	)	
	)	
Respondent,	)	**Case No. 28-CA-22546**
	)	
v.	)	
	)	
UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 540, AFL-CIO, CLC,	)	
	)	
Charging Party.	)	

RESPONDENT ALBERTSONS LLC'S MOTION TO DISMISS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

NOW COMES Albertsons LLC, Respondent herein, and files its Motion to Dismiss Exceptions to the Decision of the Administrative Law Judge and in support thereof shows the following:

1. This is an Unfair Labor Practice case initiated by United Food and Commercial Workers Union, Local No. 540 ("Union") against Respondent wherein the Union, pursuant to a charge filed June 1, 2009, alleged that Respondent violated the Sections 8(a)(1) and (5) of the National Labor Relations Act (the "Act") by failing to provide the Union with requested information related to Respondent's non-bargaining employees.

2. Respondent's position in this case was that it did not violate the Act because, under long-standing Board precedent, information regarding an employer's employees outside the

bargaining unit is not presumptively relevant unless the union can establish relevancy based on the employer's statements made in the bargaining context. Because the Union failed to demonstrate the requisite relevancy, Respondent was under no obligation to produce the information requested.

3. On December 1, 2009, this matter was heard before Administrative Law Judge William Nelson Cates in El Paso, Texas. Following the submission of post-hearing briefs by the parties, Judge Cates issued his decision on February 2, 2010 finding that Respondent's refusal to provide the Union with the requested information relating to non-bargaining unit employees violated the Act.

4. On February 25, 2010, Respondent timely filed its Exceptions to the Decision of the Administrative Law Judge and its brief in support thereof. The Union, through General Counsel, filed its Answering Brief on March 16, 2010.

5. Against that procedural background, Respondent comes now and informs the Board that Respondent and the Union have mutually and amicably resolved all issues between them related to Case No. 28-CA-22546.

ACCORDINGLY, Respondent hereby moves to withdraw and dismiss its exceptions to Judge Cates' decision filed on February 25, 2010.

DATED this 11th day of February, 2011.

Respectfully submitted,

Charles C. High, Jr.
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of February, 2011, a true and correct copy of the foregoing Respondent Albertsons, LLC's Motion to Dismiss Exceptions to the Decision of the Administrative Law Judge was electronically filed using the E-Gov filing system, and that copies were sent via Federal Express and addressed as follows:

Eight (8) copies sent to:

Office of the Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

One (1) copy served on:

Liz Walker-McBride, Attorney
National Labor Relations Board,
Region 28
421 Gold Avenue, Suite 310
P.O. Box 567
Albuquerque, New Mexico 87103

G. William Baab, Esq.
Baab & Dennison, LLP
Stemmons Place
2777 North Stemmons Freeway, Suite 1100
Dallas, Texas 75207

By: _____
Charles C. High, Jr.
Of Attorneys for Respondent

El Paso, TX

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ALBERTSON'S LLC

and Case 28-CA-22546

UNITED FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION, LOCAL 640
AFL-CIO, CLC

ORDER

On February 2, 2010, Administrative Law Judge William N. Cates of the National Labor Relations Board issued his Decision in the above-entitled proceeding and, on the same date, the proceeding was transferred to and continued before the Board in Washington, D.C. The Administrative Law Judge found that the Respondent has engaged in certain unfair labor practices, and recommended that it take specific action to remedy such unfair labor practices.

The Respondent filed timely exceptions to the Judge's Decision, and thereafter Counsel for the General Counsel filed an answering brief. On February 10, 2011, the Respondent filed a Motion to Dismiss Exceptions. The Respondent's Motion to withdraw its Exceptions is hereby granted.

Accordingly, as there are no exceptions pending before the Board, and the time allowed for such filing having expired,

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, and Section 102.48 of the National Labor Relations Board's Rules and

Regulations, the Board adopts the findings and conclusions of the Administrative Law Judge as contained in his Decision, and orders that the Respondent, Albertson's LLC, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Order of the Administrative Law Judge.

Dated, Washington, D.C., February 25, 2011.

By direction of the Board:

Henry S. Breiteneicher

Associate Executive Secretary

Berry, David P.

From: Peter Schaumber [peter@schaumber.com]
Sent: Tuesday, August 31, 2010 4:40 PM
To: Flynn, Terence F.
Subject: Hello
Attachments: SuppBusPlan.doc

Can you take a look at this for me when you get a chance? Any Kramer suggested that this was not a 9 to 5 job so I took out "general work hours 9 to 5/6."

What do you think? Maybe I ought to say 4 days for first 6 months or so and then 3.

Thanks.

PETER C. SCHAUMBER

SUPPLEMENT TO BUSINESS PLAN

LAW FIRM RESPONSIBILITIES:

OVERALL: THE PRIMARY PURPOSE OF MY ASSOCIATION WITH THE FIRM IS TO ENHANCE THE REPUTATION AND STRENGTH OF THE FIRM IN TRADITIONAL LABOR LAW.

SPECIFIC DUTIES: PUBLIC SPEAKING; PARTICIPATE ON BEHALF OF THE FIRM WITH LARGE EMPLOYER GROUPS; PROVIDE ADVICE AND COUNSEL TO EXISTING CLIENTS BOTH UNIONIZED AND NON-UNIONIZED ON CURRENT BOARD DEVELOPMENTS; CLIENT DEVELOPMENT; AFTER A ONE-YEAR COOLING OFF PERIOD, APPEAR ON BEHALF OF FIRM CLIENTS IN BOARD PROCEEDINGS; ADVISE AND TRAIN YOUNGER LAWYERS IN TRADITIONAL LABOR LAW.

OTHER PROFESSIONAL ACTIVITIES: I ANTICIPATE BEING NAMED A TRUTEE BY PRESIDENT OBAMA TO A GOVERNMENT FOUNDATION AND BEING NAMED TO THE BOARD OF A LOCAL GRADUATE SCHOOL; PURSUING BOARD DIRECTORSHIPS AND A POSSIBLE THINK TANK FELLOWSHIP; OCASSIONAL LOBBYING

LENGTH OF EMPLOYMENT: 3 YEARS

START DATE: ON OR ABOUT NOVEMBER 15

WORKWEEK: 3 TO 4 DAYS A WEEK; PREFER 3 AFTER FIRST YEAR

COMPENSATION: NEGOTIABLE WITH PARTICIPATION IN NEW/ADDITIONAL BUSINESS FOR WHICH I WAS RESPONSIBLE

BILLABLE HOURS: NO BILLABLE HOUR EXPECTATIONS; WORK AT THE BUSINESS OF THE FIRM

TRAVEL: AS NECESSARY, BUT REDUCED AFTER INITIAL ROLL-OUT PERIOD

OFFICE NEEDS: DOWNTOWN WASHINGTON OFFICE; SHARED SECRETARY; PARALEGAL AND ASSOCIATE ASSISTANCE FOR RESEARCH AND WRITING.

Berry, David P.

From: Flynn, Terence F.
Sent: Friday, September 03, 2010 11:40 AM
To: 'peter@schaumber.com'
Subject: FW: Hello
Attachments: SuppBusPlan.doc

From: Peter Schaumber [mailto:peter@schaumber.com]
Sent: Tuesday, August 31, 2010 4:40 PM
To: Flynn, Terence F.
Subject: Hello

Can you take a look at this for me when you get a chance? Any Kramer suggested that this was not a 9 to 5 job so I took out "general work hours 9 to 5/6."

What do you think? Maybe I ought to say 4 days for first 6 months or so and then 3.

Thanks.

IE20

PETER C. SCHAUMBER

SUPPLEMENT TO BUSINESS PLAN

LAW FIRM RESPONSIBILITIES:

OVERALL: THE PRIMARY PURPOSE OF MY ASSOCIATION WITH THE FIRM IS TO ENHANCE THE REPUTATION AND STRENGTH OF THE FIRM IN TRADITIONAL LABOR LAW.

SPECIFIC DUTIES: PUBLIC SPEAKING; PARTICIPATE ON BEHALF OF THE FIRM WITH LARGE EMPLOYER GROUPS; PROVIDE ADVICE AND COUNSEL TO EXISTING CLIENTS BOTH UNIONIZED AND NON-UNIONIZED ON CURRENT BOARD DEVELOPMENTS; CLIENT DEVELOPMENT; AFTER A ONE-YEAR COOLING OFF PERIOD, APPEAR ON BEHALF OF FIRM CLIENTS IN BOARD PROCEEDINGS; ADVISE AND TRAIN YOUNGER LAWYERS IN TRADITIONAL LABOR LAW.

OTHER PROFESSIONAL ACTIVITIES: I ANTICIPATE BEING NAMED A TRUTEE BY PRESIDENT OBAMA TO A GOVERNMENT FOUNDATION AND BEING NAMED TO THE BOARD OF A LOCAL GRADUATE SCHOOL; PURSUING BOARD DIRECTORSHIPS AND A POSSIBLE THINK TANK FELLOWSHIP; OCASSIONAL LOBBYING

LENGTH OF EMPLOYMENT: 3 YEARS

START DATE: ON OR ABOUT NOVEMBER 15

WORKWEEK: 3 TO 4 DAYS A WEEK; PREFER 3 AFTER FIRST YEAR

COMPENSATION: NEGOTIABLE WITH PARTICIPATION IN NEW/ADDITIONAL BUSINESS FOR WHICH I WAS RESPONSIBLE

BILLABLE HOURS: NO BILLABLE HOUR EXPECTATIONS; WORK AT THE BUSINESS OF THE FIRM

TRAVEL: AS NECESSARY, BUT REDUCED AFTER INITIAL ROLL-OUT PERIOD

OFFICE NEEDS: DOWNTOWN WASHINGTON OFFICE; SHARED SECRETARY; PARALEGAL AND ASSOCIATE ASSISTANCE FOR RESEARCH AND WRITING.

Berry, David P.

From: Flynn, Terence F.
Sent: Friday, September 03, 2010 12:26 PM
To: 'peter@schaumber.com'
Subject: SCHAUMBER SuppBusPlan.doc
Attachments: SCHAUMBER SuppBusPlan.doc

Peter: This is a recreation of what I sent before. Please confirm receipt of this one.

IE21

PETER C. SCHAUMBER

SUPPLEMENT TO BUSINESS PLAN

LAW FIRM RESPONSIBILITIES:

OVERALL: THE PRIMARY PURPOSES OF MY ASSOCIATION WITH THE FIRM ARE: (1) TO ENHANCE THE VISIBILITY OF THE FIRM'S LABOR & EMPLOYMENT PRACTICE GROUP INTERNALLY AND TO MAXIMIZE CROSS SELLING OPPORTUNITIES WITH THE FIRM'S EXISTING CLIENT BASE, PARTICULARLY INTERNATIONAL AND CORPORATE CLIENTS; (2) TO MARKET AND ENHANCE THE REPUTATION AND STRENGTH OF THE FIRM IN LABOR & EMPLOYMENT MATTERS, INCLUDING TRADITIONAL LABOR LAW; (3) TO CAPITALIZE ON OPPORTUNITIES TO INCREASE THE FIRM'S EXPOSURE TO VARIOUS BUSINESS GROUPS; (4) TO SERVE AS A LIASON FOR THE FIRM ON MATTERS REQUIRING HIGH LEVEL INTERVENTION AT THE NATIONAL LABOR RELATIONS BOARD AND OTHER GOVERNMENT AGENCIES; (5) TO ASSIST IN GOVERNMENTAL AFFAIRS/LOBBYING INITIATIVES ON LABOR & EMPLOYMENT MATTERS.

SPECIFIC DUTIES: PUBLIC SPEAKING; ATTEND MARKETING/CLIENT DEVELOPMENT MEETINGS; ASSIST IN ORGANIZING AND PARTICIPATION IN FIRM CONFERENCES FOR POTENTIAL AND EXISTING CLIENTS; INTERNAL CROSS SELLING OF LABOR & EMPLOYMENT CAPABILITIES; LIASON WITH GOVERNMENT AGENCIES IN CONNECTION WITH INVESTIGATIONS/AGENCY ACTIONS. PROVIDE ADVICE AND COUNSEL TO EXISTING CLIENTS BOTH UNIONIZED AND NON-UNIONIZED ON CURRENT BOARD DEVELOPMENTS; COORDINATE AND PROVIDE COUNSEL, WITHIN LIMITATIONS OF ONE YEAR POST EMPLOYMENT RESTRICTIONS, ON BEHALF OF FIRM CLIENTS IN BOARD PROCEEDINGS; ADVISE AND TRAIN YOUNGER LAWYERS IN TRADITIONAL LABOR LAW.

OTHER PROFESSIONAL ACTIVITIES: I ANTICIPATE BEING NAMED A TRUTEE BY PRESIDENT OBAMA TO A GOVERNMENT FOUNDATION AND BEING NAMED TO THE BOARD OF A LOCAL GRADUATE SCHOOL; PURSUING BOARD DIRECTORSHIPS AND A POSSIBLE THINK TANK FELLOWSHIP; OCASSIONAL LOBBYING.

LENGTH OF EMPLOYMENT: FLEXIBLE, ANTICIPATE 3-5 YEARS WITH TAPER THEREAFTER.

START DATE: ON OR ABOUT NOVEMBER 15.

Deleted: IS

Deleted: PARTICIPATE ON BEHALF OF THE FIRM WITH

Deleted: LARGE EMPLOYER GROUPS

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IE 24

WORKWEEK: FLEXIBLE, ASSUME AGGRESSIVE INITIAL ROLL-OUT OF SPEAKING OPPORTUNITIES AND INTERNAL FIRM MEETINGS, WITH LIKELY TAPERING OF TIME COMMITMENT AT SOME POINT THEREAFTER.

COMPENSATION: NEGOTIABLE WITH PARTICIPATION IN NEW/ADDITIONAL BUSINESS FOR WHICH I WAS RESPONSIBLE.

BILLABLE HOURS: FLEXIBLE; PRIMARY DESIRED FOCUS IS BUSINESS DEVELOPMENT AND MARKETING OPPORTUNITIES AND COORDINATION ROLE IN INVESTIGATIONS AND OTHER LEGAL MATTERS.

TRAVEL: AS NECESSARY, BUT ANTICIPATE REDUCTION AFTER INITIAL ROLL-OUT PERIOD.

OFFICE NEEDS: DOWNTOWN WASHINGTON OFFICE; SHARED SECRETARY; PARALEGAL AND ASSOCIATE ASSISTANCE FOR RESEARCH AND WRITING.

Draft – 8/31/10 [2]

Deleted: 3 TO 4 DAYS A WEEK; PREFER 3 AFTER FIRST YEAR

Deleted: NO BILLABLE HOUR EXPECTATIONS. WORK AT THE BUSINESS OF THE FIRM

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Berry, David P.

From: Flynn, Terence F.
Sent: Friday, September 10, 2010 11:23 AM
To: 'Peter Schaumber'; 'peter@schaumber.com'
Subject: FW: Electronic Notice Posting
Attachments: BEH Memo Re GC Request For Electronic Posting Remedy.doc

Showing some backbone ...

From: [redacted] Chief Counsel
Sent: Friday, September 10, 2010 10:58 AM
To: Liebman, Wilma B.; Becker, Craig; Pearce, Mark G.
Cc: Hayes, Brian; Colwell, John F.; Winkler, Peter D.; Hirozawa, Kent; Flynn, Terence F.; HELTZER, LES (Hdqs); Cowen, William B.; Krafts, Andrew J.; Lennie, Rachel G.; Nixon, Kathleen; Martin, David P.; Kane, Robert F.; Shinners, Gary W.
Subject: Electronic Notice Posting

Please see the attached memo for a statement of Member Hayes' position on the electronic posting issue. Thanks.

IE22

Friday, September 10, 2010

Colleagues:

Deliberative

[redacted]

[redacted]

[redacted]

[redacted]

IE22

[redacted] Deliberative

[redacted] Deliberative

[redacted]

[redacted]

[redacted]

In sum, I would [redacted] Deliberative

I invite your comments.

B.E.H.

Berry, David P.

From: Flynn, Terence F.
Sent: Monday, September 20, 2010 3:35 PM
To: peterschaumber@aol.com
Subject: FW: 10j procedures -- agenda item for 9/22

From: HELTZER, LES (Hdqs)
Sent: Monday, September 20, 2010 3:28 PM
To: Liebman, Wilma B.; Becker, Craig; Pearce, Mark G.; Hayes, Brian; Cowen, William B.; Shinners, Gary W.; Colwell, John F.; Winkler, Peter D.; Hirozawa, Kent; Murphy, James R.; Flynn, Terence F.; Krafts, Andrew J.; Lennie, Rachel G.; Nixon, Kathleen; Martin, David P.; Kane, Robert F.
Subject: RE: 10j procedures -- agenda item for 9/22

All—

I would also like to add to the agenda a discussion on ([redacted] Deliberative [redacted]

LES HELTZER
EXECUTIVE SECRETARY
NATIONAL LABOR RELATIONS BOARD

From: Liebman, Wilma B.
Sent: Monday, September 20, 2010 1:32 PM
To: Becker, Craig; Pearce, Mark G.; Hayes, Brian; Cowen, William B.; HELTZER, LES (Hdqs); Shinners, Gary W.; Colwell, John F.; Winkler, Peter D.; Hirozawa, Kent; Murphy, James R.; Flynn, Terence F.; Krafts, Andrew J.; Lennie, Rachel G.; Nixon, Kathleen; Martin, David P.; Kane, Robert F.
Subject: 10j procedures -- agenda item for 9/22

I would like to add to Wednesday's meeting agenda a discussion and resolution of [redacted] Deliberative [redacted]

Here is my proposal, which I discussed today with the Solicitor and Acting GC:

[redacted] Deliberative [redacted]

On Wednesday we can discuss, among other matters, the AGC's original proposal to [redacted] Deliberative [redacted]

1E23

Berry, David P.

From: Peter Schaumber [peter@schaumber.com]
Sent: Tuesday, September 21, 2010 1:29 PM
To: Flynn, Terence F.
Subject: Here it is
Attachments: wsj ARTICLE.doc

Thanks.

IE24

THE EMERGING AGENDA OF THE OBAMA BOARD

The National Labor Relations Board Lurches to the Left

By Peter C. Schaumber, former Chairman and Board Member, National Labor Relations Board.

AND SO IT NOW BEGINS. THE NEARLY 100 DECISIONS SIGNED-OFF ON BY MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD ON AUGUST 27, 2010, REVEALS THE MAJORITY'S AGGRESSIVE ADGENDA TO AUGMENT UNION POWER, ENHANCE THE CARD-CHECK PROCESS LONG-FAVORED BY ORGANIZED LABOR, LIMIT THE ABILITY OF MANAGEMENT TO NON-COERCIVELY EXPRESS ITS OPPOSITION TO THE UNIONIZIATION OF ITS FACILITIES AND DEMINISH THE FREE CHOICE OF THE AMERICAN WORKER AND THEIR RIGHT UNDER THE LAW TO REFRAIN FROM SUPPORTING UNION POLITICAL AND SOCIAL ACTIVITIES WITH WHICH THEY DISAGREE.

THE FEAR OF MANY THAT THE BOARD WILL ADMINISTRATIVELY SEEK TO ADOPT THE EMPLOYEE FREE CHOICE ACT IS NO LONGER IDLE SPECULATION. WHILE THE BOARD CANNOT THROUGH RULE-MAKING OR DECISIONS ADOPT THE SPECIFIC PROVISIONS OF THE ACT, IT CAN RADICALLY ALTER AMERICAN LABOR LAW IN A WAY THAT ACCOMPLISHES SOME OF EFCA'S UNDERLYING OBJECTIVES.

IN ONE CASE, *UNITED BROTHERHOOD OF CARPENTERS & JOINERS V. ELIASON & KNUTH OF ARIZONA, INC)*, THE BOARD MAJORITY GAVE A GREEN LIGHT TO ORGANIZED LABOR TO ENGAGE IN INCREASED SECONDARY BOYCOTT ACTIVITY AGAINST NEUTRAL EMPLOYERS THREATENING TO SPREAD LABOR DISCORD BY FORCING NEUTRAL EMPLOYERS INTO THE LABOR DISPUTE. THIS STRENGTHENS UNIONS' ABILITY TO SECURE NEUTRALITY CARD-CHECK AGREEMENTS FROM EMPLOYERS OFTEN THE TARGET OF UNION CORPORATE ORGANIZING CAMPAIGNS. IN *ELIASON* THE BOARD'S DEMOCRAT MAJORTY RE-DEFINED PICKETING TOSSING ASIDE DECADES OF BOARD LAW, LONG AFFIRMED BY THE SUPREME COURT AND THE LOWER FEDERAL CIRCUIT COURTS. AND, IN THE FACE OF PLAIN LANGUAGE IN THE STATUTE TO THE CONTRARY, THE MAJORITY HELD THAT WHEN TRADITIONAL PICKETING IS NOT USED TO COERCE A NEUTAL EMPLOYER TO CEASE DOING BUSINESS WITH A PRIMARY EMPLOYER, THE NEUTRAL EMPLOYER MUST SHOW THAT THE COERCIVE ACTIVITY "DIRECTLY CAUSED OR COULD REASONABLY BE EXPECTED TO DIRECTLY CAUSE, DISRUPTION OF THE SECONDARY'S OPERATIONS." SUCH A VAGUE AND IMPRECISE STANDARD INVITES THE BROADENING OF LABOR DISPUTES AND DISRUPTIONS TO COMMERCE CONGRESS EXPRESSLY SOUGHT TO AVOID.

IN ANOTHER CASE, *INDEPENDENCE RESIDENCES*, THE BOARD'S DEMOCRAT MAJORITY IGNORED THE SUPREME COURT AND GAVE EFFECT TO AN OBVIOUSLY PRE-EMPTED NEW YORK STATE STATUTE THAT EFFECTIVLY REQUIRES EMPLOYERS UNDER STATE CONTRACTS TO REMAIN NEUTRAL DURING A UNION ORGANIZING CAMPAIGN. THE BOARD MAJORITY FOUND THAT DESPITE THE RESTRICTIONS PLACED ON THE EMPLOYER BY THE NEW YORK LAW, IN ITS VIEW THE EMPLOYER WAS NOT "SUFFICIENTLY" RESTRAINED IN ITS OPPOSITION TO THE UNION TO WARRANT SETTING THE ELECTION ASIDE. THE SAME BOARD MAJORITY, HOWEVER, WHEN CONFRONTED WITH AN EMPLOYER'S WORKPLACE RULE THAT COULD REASONABLY BE INTERPRETED TO RESTRAIN OR INTERFERE WITH ANY PRO-UNION ACTIVITY, WILL HAVE NO DIFFICULTY SETTING THE ELECTION ASIDE.

IN A THIRD CASE, *L-3 COMMUNICATIONS*, THE BOARD MAJORITY CONTINUED THE IMPEDIMENTS PLACED ON WORKERS' RIGHTS TO OBJECT TO PAYING FOR THE UNION'S POLITICAL AND SOCIAL ACTIVITIES WITH WHICH THEY DISAGREE. THE BOARD FOUND THAT IT WAS LAWFUL AND NON-DISCRIMINATORY FOR A UNION TO TREAT UNIT MEMBERS WHO PAY FULL UNION DUES DIFFERENTLY FROM UNIT EMPLOYEES WHO DO NOT, REQUIRING THE LATTER CATERGORY OF EMPLOYEE TO RENEW THEIR RIGHT NOT TO PAY FULL DUES DURING AN OFT-FORGOTTEN NARROW ANNUAL WINDOW PERIOD.

FOR SURE, THE NEW MAJORITY IS DELIVERING ON THE EXPECTATIONS ANNOUNCED THIS PAST SUMMER BY JUDITH SCOTT, GENERAL COUNSEL OF THE SERVICE EMPLOYEES INTENATIONAL UNION. AT A SEMINAR ON LABOR LAW HELD AT FLORIDA INTERNATIONAL UNIVERSITY SCHOOL OF LAW MS. SCOTT SAID THAT THE NEW MAJORITY "WILL DYNAMINCALLY INTERPRET" THE STATUTE. BY THAT SHE MEANS THE NEW BOARD WILL INVOKE BROAD GENERAL PRINCIPLES SET FORTH IN THE ACT -- SUCH AS THE PREAMBLE'S STATEMENT OF PURPOSE "TO PROMOTE COLLECTIVE BARGAINING" -- TO ACCOMPLISH DRAMATIC CHANGES IN BOARD LAW WITHOUT GIVING EFFECT TO THE SPECIFIC PROVISIONS OF ACT THAT DEFINE HOW THE PROMOTION OF COLLECTIVE BARGAINING IS TO BE ACHIEVED.

IN THEIR WELL-INTENTIONED BUT MISGUIDED ZEAL TO RESPOND TO ORGANIZED LABOR'S LOSS OF UNION DENSITY IN THE PRIVATE SECTOR, THE BOARD'S MAJORITY IS PAYING LIP SERVICE TO WORKERS' RIGHTS AND DISTORTING THE CAREFUL BALANCE CONGRESS SOUGHT TO ACHIEVE IN THE ACT BETWEEN THE RIGHTS OF MANAGEMENT AND THOSE OF UNIONS. THE NEW OBAMA BOARD MAJORITY IS LIKELY TO BE RESTRAINED ONLY BY A REPUBLICAN CONGRESS AND ULTIMATELY ONLY BY BALANCED LABOR LAW REFORM THAT PROTECTS EMPLOYEE RIGHTS

AND PREVENTS FUTURE BOARD'S FROM MISCONTRUING THE ACT TO SERVE THE NARROW INTERESTS OF ONE SIDE.

Berry, David P.

From: Flynn, Terence F.
Sent: Tuesday, September 21, 2010 4:26 PM
To: 'peterschaumber@aol.com'
Subject: sCHAUMBER wsj ARTICLE.doc
Attachments: sCHAUMBER wsj ARTICLE.doc

Peter: I have attached proposed mods, though I confess to having some misgivings; I'm not sure that having an angry glare focused on the Board (and you by Union-side people) advances the prospects of my nomination, even though it does not appear imminent.

IE 25

THE EMERGING AGENDA OF THE OBAMA BOARD

The National Labor Relations Board Lurches to the Left

By Peter C. Schaumber, former Chairman and Board Member, National Labor Relations Board.

AND SO IT BEGINS. THE NEARLY 100 DECISIONS ISSUED BY THE NATIONAL LABOR RELATIONS BOARD ON AUGUST 27, 2010 REVEAL THE NEW DEMOCRATIC MAJORITY'S AGGRESSIVE ADGENDA TO AUGMENT UNION POWER, ENHANCE THE CARD-CHECK PROCESS LONG-FAVORED BY ORGANIZED LABOR, LIMIT THE ABILITY OF MANAGEMENT TO NON-COERCIVELY EXPRESS OPPOSITION TO UNIONIZIATION, AND DIMINISH THE FREE CHOICE OF THE AMERICAN WORKER. IN PARTICULAR WORKERS' RIGHTS TO REFRAIN FROM SUPPORTING UNION POLITICAL AND SOCIAL ACTIVITIES WITH WHICH THEY DISAGREE.

THE FEAR OF MANY THAT THE BOARD WILL ADMINISTRATIVELY SEEK TO ADOPT THE SINGULARLY MISNAMED EMPLOYEE FREE CHOICE ACT (EFCA) IS NO LONGER IDLE SPECULATION. WHILE THE BOARD CANNOT THROUGH RULE-MAKING OR DECISIONS ADOPT THE SPECIFIC PROVISIONS OF THE ACT, IT CAN RADICALLY ALTER AMERICAN LABOR LAW IN A WAY THAT ACCOMPLISHES MANY OF EFCA'S UNDERLYING OBJECTIVES.

FOR EXAMPLE, IN *UNITED BROTHERHOOD OF CARPENTERS & JOINERS V. ELIASON & KNUTH OF ARIZONA, INC)*, THE BOARD MAJORITY GAVE A GREEN LIGHT TO ORGANIZED LABOR TO ENGAGE IN INCREASED SECONDARY BOYCOTT ACTIVITY AGAINST NEUTRAL COMPANIES IN ORDER TO PRESSURE THEM TO CEASE DOING BUSINESS WITH UNION TARGETED EMPLOYERS. THIS DECISION THREATENS TO SPREAD LABOR DISCORD AND DISRUPT COMMERCE BY ENMESHING NEUTRAL EMPLOYERS IN LABOR DISPUTES TO WHICH THEY ARE STRANGERS. THE DECISION ALSO STRENGTHENS THE ABILITY OF UNIONS TO STRONG ARM EMPLOYERS INTO SIGNING NEUTRALITY AND CARD-CHECK AGREEMENTS THROUGH CORPORATE CAMPAIGNS AND OTHER FORMS OF ECONOMIC COERCION. THE *ELIASON* DECISION JETTISONS DECADES OF BOARD LAW AND NARROWLY DEFINES THE SCOPE OF PROHIBITED SECONDARY PICKETING IN A MANNER PLAINLY CONTRARY TO CONGRESSIONAL INTENT.

IN ANOTHER CASE, *INDEPENDENCE RESIDENCES*, THE BOARD'S NEW MAJORITY GAVE EFFECT TO AN OBVIOUSLY PRE-EMPTED NEW YORK STATE STATUTE THAT ESSENTIALLY REQUIRES STATE GOVERNMENT CONTRACTORS TO REMAIN NEUTRAL DURING UNION ORGANIZING CAMPAIGNS. THE BOARD MAJORITY FOUND THAT DESPITE THE

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Deleted: THE BOARD'S DEMOCRAT MAJORTY RE-DEFINED PICKETING TOSSING ASIDE
Deleted: , LONG AFFIRMED BY THE SUPREME COURT AND THE LOWER FEDERAL CIRCUIT COURTS AND, IN THE FACE OF PLAIN LANGUAGE IN THE STATUTE TO THE CONTRARY, THE MAJORITY HELD THAT WHEN TRADITIONAL PICKETING IS NOT USED TO COERCE A NEUTAL EMPLOYER TO CEASE DOING BUSINESS WITH A PRIMARY EMPLOYER, THE NEUTRAL EMPLOYER MUST SHOW THAT THE COERCIVE ACTIVITY "DIRECTLY CAUSED OR COULD REASONABLY BE EXPECTED TO DIRECTLY ... [1]
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RESTRICTIONS THE NEW YORK LAW IMPOSED ON EMPLOYER CAMPAIGN ACTIVITY, THE EMPLOYER WAS NOT, IN THE MAJORITY'S VIEW, "SUFFICIENTLY" RESTRAINED IN ITS OPPOSITION TO THE UNION TO WARRANT SETTING THE ELECTION ASIDE. [THE SAME BOARD MAJORITY, HOWEVER, WHEN CONFRONTED WITH AN EMPLOYER'S WORKPLACE RULE THAT COULD REASONABLY BE INTERPRETED TO RESTRAIN OR INTERFERE WITH ANY PRO-UNION ACTIVITY, WILL HAVE NO DIFFICULTY SETTING THE ELECTION ASIDE.?]

IN A THIRD CASE, *L-3 COMMUNICATIONS*, THE DEMOCRATIC MAJORITY REINFORCED THE IMPEDIMENTS PLACED ON WORKERS' RIGHTS TO OBJECT TO SPENDING THEIR DUES MONEY ON NON-REPRESENTATIONAL ACTIVITIES, SUCH AS UNION POLITICAL CONTRIBUTIONS. THE BOARD FOUND THAT UNIONS COULD LAWFULLY TREAT EMPLOYEES WHO OPPOSE SUCH EXPENDITURES LESS FAVORABLY THAN THOSE WHO DO NOT. SPECIFICALLY, THE MAJORITY HELD THAT IT IS NOT DISCRIMINATORY FOR UNIONS TO REQUIRE OBJECTORS TO REASSERT THEIR OPPOSITION DURING NARROW ANNUAL WINDOW PERIODS, WHILE IMPOSING NO SIMILAR REQUIREMENTS ON NON-OBJECTING UNIT EMPLOYEES. AS A CONSEQUENCE, THOSE EMPLOYEES WHO EITHER FORGET TO RENEW THEIR OBJECTION OR FAIL TO COMPLY WITH THE COMPLEX RULES FOR REGISTERING THEIR DISSENT, MAY BE SADDLED WITH PAYING FULL DUES FOR THE YEAR TO SUPPORT POLITICIANS AND OTHER ACTIVITIES THEY ACTUALLY OPPOSE.

TO BE SURE, THE NEW MAJORITY APPEARS TO BE FULFILLING THE EXPECTATIONS ANNOUNCED THIS PAST SUMMER BY JUDITH SCOTT, GENERAL COUNSEL OF THE SERVICE EMPLOYEES INTENATIONAL UNION, AT A SEMINAR ON LABOR LAW HELD AT FLORIDA INTERNATIONAL UNIVERSITY SCHOOL OF LAW. MS. SCOTT PROMISED [PREDICTED] THAT THE NEW MAJORITY "WILL DYNAMINCALLY INTERPRET" THE STATUTE, MEANING THAT THE NEW BOARD WILL INVOKE BROAD GENERAL PRINCIPLES SET FORTH IN THE ACT -- SUCH AS THE PREAMBLE'S STATEMENT OF PURPOSE "TO PROMOTE COLLECTIVE BARGAINING" -- TO ACCOMPLISH DRAMATIC CHANGES IN BOARD LAW.

IN A MISGUIDED EFFORT TO RESPOND TO ORGANIZED LABOR'S LOSS OF UNION DENSITY IN THE PRIVATE SECTOR, THE NEW OBAMA BOARD'S RECENT DECISIONS REFLECT A DESIRE TO RECALIBRATE THE CAREFUL BALANCE CONGRESS SOUGHT TO ACHIEVE IN THE NATIONAL LABOR RELATIONS ACT AND TO ELEVATE THE INTERESTS OF UNIONS OVER THOSE OF EMPLOYERS AND INDIVIDUAL EMPLOYEES. WHILE IT REMAINS TO BE SEEN HOW FAR THE NEW MAJORITY WILL PUSH THE ENVELOPE, THEIR FIRST ROUND OF DECISIONS DEMONSTRATES A DISTURBING WILLINGNESS TO IGNORE OR REVERSE SETTLED PRECEDENT AND TO OVERTURN THE DECISIONS OF ADMINISTRATIVE LAW JUDGES

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Comment [t1]: Bracketed material needs additional explanation. Are you referring to a specific case? You might want to just delete this and add a closing sentence for the paragraph.

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FAVORABLE TO EMPLOYERS. FOR ENTITIES SUBJECT TO THE BOARD'S JURISDICTION, HANG ON. IT'S LIKELY TO BE A WILD RIDE.

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, LONG AFFIRMED BY THE SUPREME COURT AND THE LOWER FEDERAL CIRCUIT COURTS. AND, IN THE FACE OF PLAIN LANGUAGE IN THE STATUTE TO THE CONTRARY, THE MAJORITY HELD THAT WHEN TRADITIONAL PICKETING IS NOT USED TO COERCE A NEUTAL EMPLOYER TO CEASE DOING BUSINESS WITH A PRIMARY EMPLOYER, THE NEUTRAL EMPLOYER MUST SHOW THAT THE COERCIVE ACTIVITY "DIRECTLY CAUSED OR COULD REASONABLY BE EXPECTED TO DIRECTLY CAUSE, DISRUPTION OF THE SECONDARY'S OPERATIONS." SUCH A VAGUE AND IMPRECISE STANDARD INVITES THE BROADENING OF LABOR DISPUTES AND DISRUPTIONS TO COMMERCE CONGRESS EXPRESSLY SOUGHT TO AVOID

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IGNORED THE SUPREME COURT AND

Berry, David P.

From: Flynn, Terence F.
Sent: Wednesday, September 22, 2010 5:05 PM
To: 'peter@schaumber.com'
Subject: Re: Misc

Yes

From: Peter Schaumber <peter@schaumber.com>
To: Flynn, Terence F.
Sent: Wed Sep 22 16:58:52 2010
Subject: RE: Misc

What was the name of the fellow at AU that was used. Lubbers?

From: Flynn, Terence F. [mailto:Terence.Flynn@nlrb.gov]
Sent: Wednesday, September 22, 2010 4:42 PM
To: Peter Schaumber
Subject: RE: Misc

Good to hear that is his view. I'm not sure Dan knows anymore about what the WH is up to than us; even well connected D's have no clue. I'm sure the APA procedural requirements were discussed at the rulemaking presentations, but I have not seen any comprehensive summary floating around.

From: Peter Schaumber [peter@schaumber.com]
Sent: Wednesday, September 22, 2010 4:24 PM
To: Flynn, Terence F.
Subject: Misc

Spoke with Schneider today. He sees no problems with your nomination. It is being held up because they are not ready to nominate a GC. They are holding up other nominations pending yours, such as the head of the GPO. The unions want the Obama nominee for GPO to be confirmed.

He sees no problem with the wsj op ed for you – the WH is not looking for reasons to hold your nomination up -- but for me.

Has anyone done any research on what, if any requirements, the APA places on agency rule-making?

IE26

Berry, David P.

From: Flynn, Terence F.

Sent: Tuesday, October 12, 2010 10:24 AM

To: 'peter@schaumber.com'

Board will be voting Kroger this Friday (whether U must provide percentage of dues and fees for nonmember Beck objectors in the initial notice to employees). It seems likely there will be a majority to [redacted] Deliberative [redacted] We leave Friday for Galapagos/Machu Picchu. Looking forward to it, but a bit nervous about the political stability down there. Bagged my second deer of the season Saturday.

IE27

Investigative Summary

According to the Office of the Executive Secretary, on October 13, 2010, the Board met and discussed certain matters including *Kroger Limited Partnership*, 25-CB-08896.

The decision in *Kroger Limited Partnership* has not yet issued.

Berry, David P.

From: Flynn, Terence F.
Sent: Monday, November 01, 2010 2:25 PM
To: 'peter@schaumber.com'
Subject: cases of interest

Hi, Peter. Hope all is well. Any progress on the interview front? While I was away, the Board issued a few decisions worthy of your attention: the compound interest case (Kentucky River – Brian went along with daily compounding); the electronic notice posting case (Picini – Brian dissented), and the grant of review in NYU (the case Wilma [redacted] Deliberative [redacted]. All of the decisions are on the website. See you Saturday as I recall. Cheers, T.

IE29

Berry, David P.

From: peter@schaumber.com
Sent: Tuesday, November 30, 2010 3:11 PM
To: Flynn, Terence F.
Subject: Re: Misc

Thanks

Sent from my Verizon Wireless BlackBerry

From: "Flynn, Terence F." <Terence.Flynn@nlrb.gov>
Date: Tue, 30 Nov 2010 14:46:33 -0500
To: 'Peter Schaumber'<peter@schaumber.com>
Subject: RE: Misc

Not that I can think of.

From: Peter Schaumber [mailto:peter@schaumber.com]
Sent: Tuesday, November 30, 2010 2:39 PM
To: Flynn, Terence F.
Subject: Misc

Heard from Schneider (was e-mailing on other topics) that they are getting ready for a fight to get your nomination out or words to that effect.

Are there any recent interesting handbook or insignia wearing cases other than Stablius? Thanks.

IE30

Berry, David P.

From: Flynn, Terence F.
Sent: Thursday, January 06, 2011 11:52 AM
To: 'Peter Schaumber'
Subject: RE: President Obama Announces Another Key Administration Post, 1/5/11, . Terence F. Flynn, Member, National Labor Relations Board

Sage counsel.

From: Peter Schaumber [mailto:peter@schaumber.com]
Sent: Thursday, January 06, 2011 11:07 AM
To: Flynn, Terence F.
Subject: RE: President Obama Announces Another Key Administration Post, 1/5/11, . Terence F. Flynn, Member, National Labor Relations Board

I would get together with him; I am sure he will tell you what he knows.

I have not heard anyone say that Becker will be re-nominated. The White House must know that he will not be confirmed and I can't imagine him being recessed into another spot. The fact that so many on the outside did not know that the R's had selected someone months ago, gives you an idea of just how unreliable most rumors are.

But, now that you have been nominated, why does waiting until Wilma's term is up concern you, if that is what happens? Your nomination puts you in a better position at the Board; people, including Wilma, know that you will be a Board member. Unfortunately, waiting is part of the game with political appointments and, while you will have to continue to take a low profile, waiting has a good side, the pressure is less, you can take another good trip. So my advice would be to take it in stride as best you can.

From: Flynn, Terence F. [mailto:Terence.Flynn@nlrb.gov]
Sent: Thursday, January 06, 2011 10:28 AM
To: 'Peter Schaumber'
Subject: RE: President Obama Announces Another Key Administration Post, 1/5/11, . Terence F. Flynn, Member, National Labor Relations Board

Well, if he has shared anything with you about plans going forward, let me know. I need to meet with him for lunch, maybe next week. I do not like some of what I have heard – Becker being renominated, for example, and things not happening until WBL's term expires.

From: Peter Schaumber [mailto:peter@schaumber.com]
Sent: Thursday, January 06, 2011 10:00 AM
To: Flynn, Terence F.
Subject: RE: President Obama Announces Another Key Administration Post, 1/5/11, . Terence F. Flynn, Member, National Labor Relations Board

You're welcome. Schneider has been keeping me informed. He was surprised I wanted to remain engaged on these issues and told me this week that he hopes I knew that a renomination would have been mine for the asking. I told him that I knew that but that I had had eight great years, that you were available to take my spot and I wanted you to have the opportunity. So do a good job, as I am sure you will.

From: Flynn, Terence F. [mailto:Terence.Flynn@nlrb.gov]
Sent: Thursday, January 06, 2011 8:59 AM

To: peter@schaumber.com
Subject: FW: President Obama Announces Another Key Administration Post, 1/5/11, . Terence F. Flynn, Member, National Labor Relations Board

Thank you, my friend.

http://www.whitehouse.gov/the-press-office/2011/01/05/president-obama-announces-another-key-administration-post-1511

The White House
Office of the Press Secretary
For Immediate Release
January 05, 2011

President Obama Announces Another Key Administration Post, 1/5/11

WASHINGTON – Today, President Barack Obama announced his intent to nominate the following individual to a key Administration post:

- **Terence F. Flynn**, Member, National Labor Relations Board

President Obama announced his intent to nominate the following individual to a key Administration post:
Terence F. Flynn, Nominee for Member, National Labor Relations Board
Terence F. Flynn is currently detailed to serve as Chief Counsel to NLRB Board Member Brian Hayes. Mr. Flynn was previously Chief Counsel to former NLRB Board Member Peter Schaumber, where he oversaw a variety of legal and policy issues in cases arising under the National Labor Relations Act. From 1996 to 2003, Mr. Flynn was Counsel in the Labor and Employment Group of Crowell & Moring, LLP, where he handled a wide range of labor and employment issues, including collective bargaining negotiations, litigation of unfair labor practices, defense of ERISA claims, and wage and hour disputes, among other matters. From 1992 to 1995, he was a litigation associate at the law firm David, Hager, Kuney & Krupin, where he counseled clients on federal, state, and local employment and wage hour laws, NLRB arbitrations, and other labor relations disputes. Mr. Flynn started his law career at the firm Reid & Priest, handling labor and immigration matters from 1990 to 1992. He holds a B.A. degree from University of Maryland, College Park and a J.D. from Washington & Lee University School of Law.

Berry, David P.

From: Flynn, Terence F.
Sent: Thursday, February 03, 2011 8:05 AM
To: peter@schaumber.com
Subject: FW: wish list

From: Liebman, Wilma B.
Sent: Friday, January 14, 2011 3:04 PM
To: Becker, Craig; Pearce, Mark G.; Hayes, Brian; Colwell, John F.; Winkler, Peter D.; Hirozawa, Kent; Murphy, James R.
Cc: Cowen, William B.; HELTZER, LES (Hdqs); Shinners, Gary W.; Krafts, Andrew J.; Lennie, Rachel G.; Nixon, Kathleen; Martin, Andrew; Kane, Robert F.; Flynn, Terence F.
Subject: FW: wish list

These matters are my top priorities for final issuance by the end of my term. I appreciate your cooperation. Gary of course has a longer list of priorities.

* Deliberative [redacted]

* [redacted]

** Deliberative [redacted]

[redacted]

IE 32

[redacted]
Deliberative

[redacted]

IE32

Berry, David P.

From: Flynn, Terence F.
Sent: Wednesday, March 02, 2011 2:13 PM
To: 'Peter Schaumber'
Subject: RE: E-Mail from Chairman Liebman and Acting General Counsel Solomon

They are posted on the Agency website.

http://www.nlrb.gov/news/nlrb-chairman-acting-general-counsel-submit-letters-record-house-subcommittee-health-education-

Peter: Can you think of any ethical restraints on a Board member discussing a proposed change to election procedures that has not yet been made public -- raising concerns both about the substance of the proposal and the manner in which it is being moved through the Agency (i.e. without open and public discussion, etc.)? That seems different to me than discussing an actual case while it's pending.

From: Peter Schaumber [mailto:peter@schaumber.com]
Sent: Wednesday, March 02, 2011 12:47 PM
To: Flynn, Terence F.
Subject: Re: E-Mail from Chairman Liebman and Acting General Counsel Solomon

Can you e-mail? I don't get it.

Sent from my iPad

Peter Schaumber
3000 44th Street, NW
Washington, DC 20016

T 202 363 2900
C 202 669 9777
F 202 363 2047
Virginia Farm 540 364 6494

On Mar 1, 2011, at 12:11 PM, "Flynn, Terence F." <Terence.Flynn@nlrb.gov> wrote:

> See also the Liebman/Solomon statements in today's or yesterday's DLR re: rebuttal to hill hearing testimony.
>
> ---
>
> **From:** [redacted] Assistant to Bd Member
> **Sent:** Tuesday, March 01, 2011 5:09 PM
> **To:** ML-NLRB-Everyone (R)
> **Subject:** E-Mail from Chairman Liebman and Acting General Counsel Solomon
>
> "We wanted to update all employees on the NLRB's budget situation. This afternoon's vote in the House of Representatives approving a two-week Continuing Resolution (known as a "CR"), while not constituting final action, does make an imminent government shutdown seem unlikely. The resolution passed by the House continues funding for two weeks (until midnight on March 18) and does not include any cuts to our agency. News reports indicate that Senate and White House approval of this measure in the

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next few days are likely.

If the pending CR is signed into law, Congress would hope to complete work on a funding measure to cover the rest of the fiscal year during the next two weeks. Further short term CRs and threats of a government shutdown as deadlines approach remain possible. We will continue to monitor this situation closely and keep you apprised as much as possible of significant developments."

[redacted] Assistant to Bd Member
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
202-273-1700

IE 33

Berry, David P.

From: Peter Schaumber [peter@schaumber.com]
Sent: Wednesday, March 30, 2011 9:49 AM
To: Flynn, Terence F.
Subject: Op Ed
Attachments: NewSpecialtyHealthCareOpED.doc

Here it is. Thanks. I am having a friend (Chou's of speech writer) find an editor/journalist to help me out. She only just made the calls.

IE34

NLRB Flirts With A Sweeping Change In Board Law

By Peter C. Schaumber, former Chairman, National Labor Relations Board *

The National Labor Relations Board may be on the brink of making a major change in Board law, one that involves the formal arena for the collective bargaining process, namely, the composition and size of the group ("unit") of employees that can be represented by a union.

Determining the composition and size of a collective bargaining unit is one of the most important decisions a labor board can make. It has both strategic and practical consequences. Generally, smaller units are favored by unions because they are easier and less expensive to organize. It is easier to persuade 2 employees they should have union representation than it is 4 or 40. But a proliferation of small units fragments the workplace and has substantial negative consequences on the employer, the long-term interests of employees and the collective bargaining process.

A proliferation of small units does not enhance collective bargaining, it undermines it. It threatens increased work stoppages as the likelihood of disagreement increases with multiple small units of employees being represented by different unions with different goals. Multiple small units also substantially increase the employer's labor relations costs. There will be unending rounds of separate negotiations followed by bargaining with individual employees who have been left out of the assembly line of micro-units and who want similar or different terms and conditions of employment. If agreements are reached, this will be followed with the legal and administrative costs of applying different agreements to different small groups of employees around the workplace.

Since its inception the NLRB has sought to avoid the proliferation of bargaining units and considered factors beyond the scope of the unit sought which could warrant a larger more inclusive bargaining unit. It regularly combined employees doing different jobs but who had mutual interests; it considered factors such as employee interchange and the established patterns of bargaining in the particular industry. As a result, a unit could include all employees of the employer, be facility-wide or multi-facility.

However, the Board recently signaled a sharp change in direction. It invited briefs from interested partiers on whether it should approve units of two or more employees doing the "same job" in the "same location." Under such a new standard,

employees doing the same job could be separated from one another based on the room or floor they performed their work.

Apart from the sweeping nature of the change, the legal process the Board chose to consider it smacks of an effort to rush a new standard through without adequate public comment and deliberation. In 1977, when the Board was considering adopting a unit determination rule for a *single* industry, it chose to do so by rulemaking which is open, public and transparent and invites wide participation. . This new standard would be applicable to *all* industries and businesses over which the Board has jurisdiction but it is being considered in a single case before the Board and neither the union nor the employer raised the issue.

Board decisions must have a reasoned basis. It is not free to simply change its mind and ignore decades of its own precedent. If it is going to change its standard for unit determinations the Board will have to explain why units it considered appropriate in the past can now be split into various small groups and why factors it has long-considered significant for unit determinations no longer hold true. The only reason the Board has given for such a change is that unit determination issues have resulted in "unnecessary litigation and delay." But statistics the Board maintains do not support that assertion. Over 90% of union elections are conducted by agreement.

The Board's announcement triggered a four-page letter to the Board from Health, Education, Labor and Pension Committee Ranking Member Senator Michael Enzi and committee members Senators Orrin Hatch and Johnny Isakson. They said the change the Board was considering was inconsistent with the act that created it and threatened Congressional intervention if the Board proceeded with such a fundamental change in American labor law outside the public rule-making process.

Only time will tell whether the Board will accept or thumb its nose at this Congressional admonition.

Existing board law seeks to avoid a proliferation of units, the splintering of the employer's operation into narrow interest groups, with all of its attendant negative consequences: the increased threat of work stoppages as the likelihood of disagreement increases with multiple small units of employees being represented by different unions with different goals; the substantially increased costs to the employer to negotiate and apply numerous collective bargaining agreements; the potential inability

of the employer to achieve the economies of scale available to it with larger units in providing employee benefits, such as healthcare; the burden on employees who will bear the impact of a work stoppage for a dispute in which they have no interest and who may be thwarted in their desire to move from one job to another job as a result of multiple seniority districts throughout the employer's operation..

In its decision seeking briefing, the NLRB suggested that changing the board's standard for unit determinations may help prevent litigation over the scope of a unit that the parties have engaged in for tactical reasons. Their concern is belied by its own statistics which show few disputes between the parties over unit scope. In 2010, over 92% of elections were conducted by agreement between the union and the employer (1). This is not surprising as the board's decades-old law defining appropriate bargaining units has made outcomes before the board predictable making litigation less likely.

The sweeping change in board law the majority in *Specialty Healthcare* is considering, reflects the dissenting view of board member Craig Becker (whose nomination was filibustered by the Senate before he was recessed appointed) in a case issued by the board last August (2). Becker urged the establishment of a presumption that a unit of "all employees doing the same job and working in the same facility" should be approved absent "compelling evidence that such a unit is inappropriate" (3). Becker's motivation for this wholesale change in board law is not hard to find. Union's favor smaller units because they are easier to organize; with non-unionized employers they permit the union to more easily get its foot in the door. But smaller units do not promote collective bargaining. To the contrary, they undermine stable collective bargaining relationships, damage the employer and fail to serve the interests of the majority of employees.

The National Labor Relations Board's current Chairman Wilma Liebman, a veteran board member for nearly 14 years, disagreed with Becker joining in the majority that reaffirmed long-standing law. Only time will tell whether Liebman's considered view will remain unchanged or whether Congress – which has admonished the board in the past to "give due consideration to preventing the proliferation of units" – will have to step in and undue the damage of a short-sighted board decision.

(1) Office of the General Counsel, Summary of Operations (Fiscal Year 2010), Memorandum GC 11-03 (Jan. 10, 2011).
(2) Wheeling Island Gaming, 355 NLRB No. 127 (August 1910).
(3) *Wheeling Island Gaming*, 355 NLRB No. 127, slip 2.

* The author served on the Board for nearly 8 years, from December 2002 to August 2010.

Berry, David P.

From: Flynn, Terence F.
Sent: Wednesday, March 30, 2011 11:13 AM
To: 'Peter Schaumber'
Subject: RE: Op Ed

I've reviewed this and am happy to suggest revisions, but they will be extensive and I can't guarantee I can get through them today. This week, for sure.

From: Peter Schaumber [mailto:peter@schaumber.com]
Sent: Wednesday, March 30, 2011 9:49 AM
To: Flynn, Terence F.
Subject: Op Ed

Here it is. Thanks. I am having a friend (Chou's of speech writer) find an editor/journalist to help me out. She only just made the calls.

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Berry, David P.

From: Peter Schaumber [peter@schaumber.com]
Sent: Wednesday, March 30, 2011 11:31 AM
To: Flynn, Terence F.
Subject: Issue paper
Attachments: SpecialityHeathcareBackgroundPaper2.doc

IE36

Draft: 3/29/11

NATIONAL LABOR RELATIONS BOARD CONSIDERS RADICALCHANGE TO BOARD LAW

INTRODUCTION

The National Labor Relations Board may be on the brink of making a major change in Board law, one that involves the formal arena for the collective bargaining process, namely, the scope, the composition and size, of the group ("unit") of employees that can be represented by a union.

Determining unit scope is one of the most important decisions a labor board can make. It has both strategic and practical consequences. The smaller the unit, the easier it is for a union to organize and win an election. It is easier and less expensive to persuade 2 employees they need union representation than it is 4 or 40. But a proliferation of small units fragments the workplace and has substantial negative consequences on the employer, the long-term interests of employees and the collective bargaining process. The wholesale changes the Board is considering will do that and more.

BACKGROUND

The Board's Authority. Congress recognized that the many forms of self-organization and the complexities of the modern industrial organization make it difficult to adopt inflexible rules. As a result, the National Labor Relations Act gives the Board broad discretion to determine the composition and size of bargaining units.

However, the Board's authority is not unlimited. Unit determinations must be made on a "case-by-case" basis and the unit must be "appropriate" for collective bargaining purposes. The Board must not give controlling weight to the extent of the union's organizing and the unit defined must assure employees the fullest freedom in exercising their rights under the Act which includes supporting or opposing unionization as well as refraining from doing either. Finally, the Board's determination must have a reasoned basis. It is not simply free to change its mind and ignore decades of its own precedent. If it is going to change its approach to unit determination the Board has to explain why a unit considered appropriate in the past can now be split into different pieces and why factors it has long-considered significant for unit determination no longer hold true.

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Determining the Appropriate Bargaining Unit. Under long-standing Board law the Board looks both for a community of interest among the employees to be represented (factors such as mutuality of interest in wages, benefits and working conditions, commonality of skills and supervision, frequency of contact with other employees, lack of interchange and functional integration, area practice and patterns of bargaining) *and* whether the unit sought is sufficiently distinct and separate from other employees to warrant separate representation. This law has led to established patterns of bargaining throughout American industry and avoided an undue proliferation of bargaining units. These known patterns of bargaining have given a degree of predictability to both employers and unions and reduced disputes enhancing the bargaining process.

Bargaining Units Historically. While it is impossible to generalize for all industries and businesses, but for single craft units the Board has historically included more than one job classification in a unit. For example, in manufacturing the Board routinely approves all production employees in a single unit without regard to the particular job they perform. The same is true of all service employees in the automobile service industry and all selling employees in retail industries. During the first few decades after the National Labor Relations Act was passed, the Board favored multi-facility units that were co-extensive with the employer's administrative or geographic divisions. The board began favoring single facility units in a number of industries in the 1960's and in 1995 Board issued a proposed rule pursuant to formal rulemaking that a single-plant unit would be presumptively appropriate. The proposed rule drew strong Congressional opposition and was withdrawn.

HISTORY

The Current Controversy. In a case known as *Specialty Healthcare*, the union filed a petition for a unit of certified nursing assistants (CNA) at one of the employer's 26 long-term nursing homes. The employer objected arguing that the only appropriate unit was a broader unit of all the employer's non-professionals including its CNA's.

At a hearing before a NLRB Regional Director, the employer relied on existing Board law and the Congressional admonition to the Board to avoid a multiplicity of units in the highly specialized healthcare industry. It introduced uncontested evidence that there are established patterns for bargaining units in the long-term healthcare industry and there are no known CNA-only units in the industry absent agreement, a factor the Board considers in determining the community of interest. Nevertheless, the Regional Director found for the union and the employer appealed to the Board.

Instead of ruling on the issue presented, the Board invited amicus briefs and suggested a sweeping change in Board law; that it was considering finding as presumptively appropriate for *all industries* a unit of two or more employees doing the *same job in the same location.* It suggested as an alternative, any "readily identifiable group of employees whose similarity of functions and skills create a community of interest."

The Board's proposals would create "micro-units" and goes well beyond the 1995 proposed rule that was withdrawn by the Board due to Congressional opposition. In one proposal, the composition of a unit would be pre-determined by job and the size of the unit would be determined by the "location" in which the job is performed, a vague term which could differentiate between floors or rooms in a single facility. The suggested alternative adopts a less certain standard but its language would permit even smaller units than the same, job same location standard.

THE BOARD IS PROCEEDING IN A MANNER INCONSISTENT WITH ITS GRANT OF AUTHORITY

The Act grants the Board the authority to make decisions by adjudication or by rulemaking. To satisfy fundamental principles of due process, a decision reached by adjudication is based on the issues litigated by the parties and the factual record developed by them during the Board proceeding. In *Specialty Healthcare* the unit determination issues raised by Board in its requests for briefing were not raised or litigated by the parties nor could they have been. The Board's proposals for the creation of micro-units would apply to all industries not just the long-term health care industry involved in *Specialty Healthcare.*

In these circumstances, the only prudent and lawful way for the Board to proceed is by rulemaking. Rulemaking is open and public and permits comments from all those who will be impacted by a Board decision. Amicus briefs filed by certain unions and organizations represented by lawyers who routinely practice before the Board hardly suffices for the extended comment period rulemaking provides and its procedures far less legalistic. As a result, the rulemaking process provides far broader input from individual citizens, union members and small businesses which better guides the administrative process.

The Board engaged in rulemaking when it adopted a rule governing unit determinations in the acute healthcare industry. There is no reason for the Board to seek to avoid rulemaking when it is considering adopting a unit determination rule for

all industries unless the Board's intent it to keep its deliberations less transparent and avoid a time-consuming process that may outlast the terms of some of the current Board members who may want to rush a decision without the kind of deliberative process such a decision requires.

The Board's decision triggered a letter to the Board from Health, Education, Labor and Pension Committee Ranking Member Senator Michael Enzi and committee members Senators Orrin Hatch and Johnny Isakson. The Senator's threatened Congressional intervention if the board proceeded outside the rulemaking process. They described the change the Board was considering as one that would "produce grave harm to the productivity of American workplaces in an ever more competitive economic environment."

The Board's micro-unit proposals are inconsistent with the statute's prohibition against using the union's extent of organizing as the controlling factor in unit determinations. When unions file a petition for an election, they naturally define the unit to the extent of their organizing effort to maximize the likelihood of their winning the election. To be faithful to its role under the statutory scheme that created it, the Board goes beyond the union's petition and considers, as mentioned, the community of interests factors and whether the employee group the union seeks to represent is sufficiently distinct to warrant separate representation. Factors such as the extent of the contact and inter-charge among employees, the functional integration of the proposed unit's work with the enterprise and industry bargaining patterns often call for a broader unit. The Board's micro-unit proposals will make the union's extent of organizing the controlling factor in the Board's unit determinations.

To the extent the Board's proposals will impact on unit determinations in the healthcare industry they are inconsistent with the expressed intent of Congress when it amended the statute and extended the Board's jurisdiction to cover healthcare institutions. Both committee reports admonished the Board to take due precautions against the undue proliferation of bargaining units in this high-specialized industry. Senator Taft, a prime sponsor of the bill specifically cited the administrative and labor relations problems and high-costs that would result by the "leapfrogging" and "whip-sawing" during bargaining if "each professional interest and job classification is permitted to form a separate bargaining unit." The same can be said today for industry in general.

THE CONSEQUENCES OF MICRO--UNITS

The decision the Board is considering would upset the established patterns of bargaining in industries throughout the country. For example, in the long-term healthcare industry instead of professional units and a unit of all non-professionals, there would be a unit for each non-professional job held by two or more persons. There would be separate units for the CNA's, the activity assistants, the dietary aides, the cooks, the social service assistants and so on. Similarly, in the grocery business, instead of a wall-to-wall unit or perhaps a separate meat department unit (historically recognized as separate) with a unit of all other employees, there would be a separate unit for the cashiers, the baggers, the stockers, the produce staff, the bakery staff, the deli-counter staff, the maintenance staff and so on. Such a fragmentation of the workforce would be repeated in industry after industry unless the union decides to seek a larger unit.

A Board decision creating micro-units will make organizing easier and less-costly for unions, but it will result in a proliferation of units and a fragmentation of the workplace that will detrimental to the economic and social interests of the country due to its negative impact on American business, the long-term interests of employees and the collective bargaining process.

- The greater the number of decision centers there are in the workplace, each represented by different unions with differing goals, increases the incidents of disputes and likelihood of work stoppages.

- A proliferation of bargaining units increases an employer's labor relations costs because the employer has to negotiate and apply multiple collective bargaining agreements. Monies that could be used to hire and expand the employer's business will be diverted to non-productive legal and administrative expenses.

- Small units limit the ability of the employer to achieve economies of scale and the options available to it in making provision for employee benefits, such as health insurance.

Small units are also inconsistent with long-term employee interests. As mentioned above, they limit the options in benefits that would be available to the employer with a larger group. They lock employees into a position restraining them from transferring to another job because of the multiple separate seniority districts created. And employers who want to encourage transfers from one position to the next to develop workplace cohesion and a work-force with broad knowledge and experience in the operations of the company will be unable to do so. Furthermore,

an increase in work stoppages will impact employees as a result of disputes in which they have no interest.

Finally, collective bargaining will not be enhanced. It will become a costly nightmare for employers with endless rounds of negotiations with a multiplicity of bargaining units and, thereafter, bargaining with individual employees who have been left out of the assembly line of micro-units and who may want similar or different terms and conditions of employment. The different bargaining times with multiple units will result in either wage and benefit concessions to keep the peace with one union leapfrogging over the other union's bargaining proposals and whip-sawing the employer or industrial strife and unrest.

CONCLUSION

The change the Board is considering in its unit determination standard will up-end decades of settled national labor relations policy and the Board has not articulated a reasoned basis for doing so. Instead of fulfilling the Act's goals of promoting the collective bargaining process and the friendly adjustment of labor disputes it will undermine them. At a time when the nation can lest afford it, it will increase business labor relations costs and promote discord instead of harmony in the workplace.

Berry, David P.

From: Peter Schaumber [peter@schaumber.com]
Sent: Thursday, March 31, 2011 8:47 AM
To: Flynn, Terence F.
Subject: Additional thoughts

On re-reading what I wrote its approach may be too narrow. What do you think of the approach below?

NLRB Flirts With A Sweeping Change In Board Law

By Peter C. Schaumber, former Chairman, National Labor Relations Board *

The National Labor Relations Board may be on the brink of making a major change in Board law, one that involves the formal arena for the collective bargaining process, namely, the composition and size of the group ("unit") of employees that can be represented by a union.

Determining the "appropriate unit" for collective bargaining is one of the most important decisions a labor board can make. It injects important and sometimes competing public policy considerations into the collective bargaining process.

The central thrust of the National Labor Relations Act is found in its guaranty to employees the right to make an uncoerced choice for or against union representation. The size and composition of the collective bargaining unit, the group eligible to vote in the election, will often determine whether the employees who support the union or those who oppose it are successful. When a union files a petition for an election, it describes the unit of employees that it seeks to represent and generally it has determined in advance that it is likely to achieve majority support from the group it has identified. As a result of the Taft-Hartley amendments to the Act, however, the Board is prohibited from making the union's extent of organization a controlling factor when determining whether the unit sought by the union is an appropriate unit for purposes of collective bargaining.

The above prohibition evidences Congress' intent to emphasize that the Board's role is not to make organizing easier for unions, nor for that matter more difficult, but that in determining the appropriate bargaining unit for collective bargaining purposes it take into consideration broader public policy imperatives such as: promoting the friendly adjustment of labor disputes, removing the sources of discord and strife in the workplace and enhancing the collective bargaining process once it has been chosen by the employees.

Berry, David P.

From: peter@schaumber.com
Sent: Thursday, March 31, 2011 10:25 AM
To: Flynn, Terence F.

Hi. I was thinking that we could go on from there and say the board has grappled with what is an app unit since the beginning. While its determinations have changed somewhat rom industry to industry (Before TH and up until the 1960's it favored employer wide units or units which were consistent with the administrative or geographic operating divisions of the employer but then began favoring single facility units as presumptively appropriate) it adopted early on the community of interest test as best to fulfill its statutory role. Etc

Thanks.
Sent from my Verizon Wireless BlackBerry

IE38

Berry, David P.

From: Flynn, Terence F.
Sent: Thursday, March 31, 2011 10:58 AM
To: 'Peter Schaumber'
Subject: NewSpecialtyHealthCareOpED.doc

Attachments: NewSpecialtyHealthCareOpED.doc

NewSpecialtyHealth CareOpED.doc...

IE39

NLRB Poised to Push Through Sweeping Changes to Facilitate Union Organizing While Skirting Formal Rulemaking Requirements

Deleted: Flirts With A Sweeping Change In Board Law

By Peter C. Schaumber, former Chairman, National Labor Relations Board *

The National Labor Relations Board (Board) may be on the brink of making a major change in national labor policy without resort to the basic strictures of the Administrative Procedures Act (APA), which requires federal agencies to adhere to certain standards when issuing new regulations, including conducting cost benefit assessments and providing the public notice and a full and fair opportunity to comment. Specifically, the Board has announced its intent to reconsider the standards that have governed for decades what constitutes an appropriate unit for purposes of union representation and collective bargaining. The Board, over a strident dissent by the lone Republican member, has done so in the context of adjudicating a single case, one in which no party requested such a sweeping review of existing law. The Board's actions are questionable both as a matter of substantive policy and administrative procedure, and smack of an effort to achieve through agency fiat radical statutory changes Congress has declined to enact.

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The case at issue, *Specialty Healthcare and Rehabilitation Center of Mobile*, arises in the health care industry. That industry was singled out by Congress and the Board for specialized treatment due to the unique needs and considerations applicable to medical facilities. In particular, Congress directed the Board to give due consideration to preventing the proliferation of bargaining units within such facilities, and the Board itself recognized during its healthcare rulemaking proceedings in the late 1980s that "large-scale splintering of the [healthcare] work-force" was inconsistent with sound public policy.[1] Though the Board's healthcare rule did not in its final form extend to nursing homes and other non-acute care facilities, the Board has, for more than 20 years, applied a unit determination standard to nursing homes that considers a number of factors, including those deemed relevant in the acute care rulemaking.[2] Indeed, in formulating the standard applicable to nursing homes, the Board specifically noted its earlier findings during the rulemaking process concerning the greater functional integration within nursing homes, suggesting that smaller, fragmented units of employees would be less likely to be found appropriate in such facilities. For more than two decades, the Board has adhered to that measured approach, generally declining to splinter sub-groups of nonprofessional nursing home employees into separate sub-units.

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[1] 53 Fed. Reg. 33900, 33905 (1988).
[2] See Park Manor Care Center, 305 NLRB 872 (1991).

Why is the determination of the appropriate unit significant? For a slew of different reasons, both strategic and practical. Generally, smaller units are favored by unions because they are easier and less expensive to organize; union agents can target small subsets of disgruntled employees within a broader workforce. Once a foothold is gained, union agents enjoy broader access rights and can seek to make incremental gains among other segments of employees, with the ultimate objective of securing representation of the entire facility, albeit in separate units. But a proliferation of small units fragments the workplace and has substantial negative consequences on the employer, the long-term interests of employees, and the collective bargaining process.

A proliferation of small units presents the specter of an unending series of union organizing campaigns, NLRB proceedings, and the attendant litigation costs and disruption to the employer's operations. Moreover, fragmentation of the workforce does not enhance collective bargaining, it undermines it. As the Board has recognized, it can give rise to conflicts of interest and dissatisfaction among constituent groups, impose the time and expense of continuous and repetitious bargaining, and lead to wage whipsawing, more frequent strikes, work stoppages and jurisdictional disputes.[3] Even if agreements can be reached, fragmented units can create lasting legal and administrative costs in applying different agreements and working conditions to a slew of small groups of employees scattered around the workplace. Unit fragmentation also undermines the perceived legitimacy and bargaining strength of unions by severely restricting the size of their constituency relative to the overall workforce. These deleterious affects obviously take on heightened significance in the context of medical facilities, where heightened costs of care and the disruption of operations pose serious risks to public health.

That is why the NLRB, since its inception, has sought to avoid the proliferation of bargaining units and it is why the National labor Relations Act specifically states that the extent to which the union has succeeded in organizing employees shall not be controlling in determining the appropriate unit.[4] However, the Board has now signaled a sharp change in direction, one which may impact unit determinations, not just in nursing homes and other non-acute care facilities, but in all industries. The Board in the *Specialty Healthcare* case recently invited briefs on whether it should abandon decades of precedent and adopt a new rule that would approve units of two or more employees doing the "same job" in the "same location," without regard to whether those employees comprise a distinct and homogenous group with interests separate from other employees. Under such a new standard, a unit consisting solely

[3] Id. at 876 (quoting the Board's healthcare rulemaking notice, 53 Fed Reg. 33904).
[4] NLRA, Sec. 9(c)(5).

Deleted: unitsand in the contextinvolves the narrow question of whether in a nursing home a bargaining unit consisting solely of one sub-set of the non-professional employees working at the facility (certified nursing assistants or "CNAs") is appropriate. Under existing law, the Board would look to a number of factors in making that determination, including its prior experience in rulemaking for acute care facilities in the late 1980s, and whether the interests of

Deleted: the CNAs are actually sufficiently distinct from the many other non-professional employees, such as receptionists to warrant the establishment of a separate unit. without regard to whetheror the Board shoulda the appropriateDetermining the composition and size of a collective bargaining unit is one of the most important decisions a labor board can make. It has both strategic and practical consequences

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of maintenance employees working on the second floor of a nursing home or nursing assistants but not other care givers presumably would be appropriate. As would a unit consisting solely of the trumpet players in an orchestra or wide receivers on a football team, regardless of the sentiments of the other workers with whom they share common interests.

Apart from the sweeping nature of the change, the legal process the Board chose to try to implement it is reminiscent of a similar power play at the National Mediation Board (NMB), where the Democratic appointees jettisoned decades of precedent, without meaningful public comment and deliberation -- or even involvement of the lone Republican member -- to do away with the fundamental requirement that a majority of eligible voters in a unit cast ballots in favor of union in order to be certified as the bargaining representative. In this case, rather than undertake the same open rulemaking process it followed when implementing new unit determination rules applicable to a single industry, the Board simply issued a short deadline for submitting briefs in the *Specialty Healthcare* case. Fortunately, that action did not go unnoticed, and triggered a four-page letter to the Board from Health, Education, Labor and Pension Committee Ranking Member Senator Michael Enzi and committee members Senators Orrin Hatch and Johnny Isakson, who criticized the proposal as inconsistent with the NLRA and threatened Congressional intervention if the Board rushed through such a fundamental change in American labor law outside the public rule-making process.

It remains to be seen whether the unelected Democratic appointees at the NLRB will, like their colleagues at the NMB, skirt the rulemaking process in order to undermine foundational principles of workplace democracy requiring majority support of a workforce in order to impose union representation.

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Deleted: . In 1977, when the Board was considering adopting a unit determination rule for a *single* industry, it chose to do so by rulemaking which is open, public and transparent and invites wide participation. . This new standard would be applicable to *all* industries and businesses over which the Board has jurisdiction but it is being considered in a single case before the Board and neither the union nor the employer raised the issue. ¶
¶
Board decisions must have a reasoned basis. It is not free to simply change its mind and ignore decades of its own precedent. If it is going to change its standard for unit determinations the Board will have to explain why units it considered appropriate in the past can now be split into various small groups and why factors it has long-considered significant for unit determinations no longer hold true. The only reason the Board has given for such a change is that unit determination issues have resulted in "unnecessary litigation and delay." But statistics the Board maintains do not support that assertion. Over 90% of union elections are conducted by agreement. ¶
¶
The Board's announcement triggered a four-page letter to the Board from Health, Education, Labor and Pension Committee Ranking Member Senator Michael Enzi and committee members Senators Orrin Hatch and Johnny Isakson. They said the change the Board was considering was inconsistent with the act that created it and threatened Congressional intervention if the Board proceeded with such a fundamental change in American labor law outside the public rule-making process.¶
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Only time will tell whether the Board will accept or thumb its nose at this Congressional admonition.

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Existing board law seeks to avoid a proliferation of units, the splintering of the employer's operation into narrow interest groups, with all of its attendant negative consequences: the increased threat of work stoppages as the likelihood of disagreement increases with multiple small units of ... [2]

Page 2: [1] Deleted Author

considered factors beyond the scope of the unit sought which could warrant a larger more inclusive bargaining unit. It regularly combined employees doing different jobs but who had mutual interests; it considered factors such as employee interchange and the established patterns of bargaining in the particular industry. As a result, a unit could include all employees of the employer, be facility-wide or multi-facility.

Page 3: [2] Deleted Author

Existing board law seeks to avoid a proliferation of units, the splintering of the employer's operation into narrow interest groups, with all of its attendant negative consequences: the increased threat of work stoppages as the likelihood of disagreement increases with multiple small units of employees being represented by different unions with different goals; the substantially increased costs to the employer to negotiate and apply numerous collective bargaining agreements; the potential inability of the employer to achieve the economies of scale available to it with larger units in providing employee benefits, such as healthcare; the burden on employees who will bear the impact of a work stoppage for a dispute in which they have no interest and who may be thwarted in their desire to move from one job to another job as a result of multiple seniority districts throughout the employer's operation..

In its decision seeking briefing, the NLRB suggested that changing the board's standard for unit determinations may help prevent litigation over the scope of a unit that the parties have engaged in for tactical reasons. Their concern is belied by its own statistics which show few disputes between the parties over unit scope. In 2010, over 92% of elections were conducted by agreement between the union and the employer (1). This is not surprising as the board's decades-old law defining appropriate bargaining units has made outcomes before the board predictable making litigation less likely.

The sweeping change in board law the majority in *Specialty Healthcare* is considering, reflects the dissenting view of board member Craig Becker (whose nomination was filibustered by the Senate before he was recessed appointed) in a case issued by the board last August (2). Becker urged the establishment of a presumption that a unit of "all employees doing the same job and working in the same facility" should be approved absent "compelling evidence that such a unit is inappropriate" (3). Becker's motivation for this wholesale change in board law is not hard to find. Union's favor smaller units because they are easier to organize; with non-unionized employers they permit the union to more easily get its foot in the door. But smaller units do not promote collective bargaining. To the contrary, they undermine stable collective bargaining relationships, damage the employer and fail to serve the interests of the majority of employees.

The National Labor Relations Board's current Chairman Wilma Liebman, a veteran board member for nearly 14 years, disagreed with Becker joining in the majority that reaffirmed long-standing law. Only time will tell whether Liebman's considered view will remain unchanged or whether Congress – which has admonished the board in the past to "give due consideration to preventing

the proliferation of units" – will have to step in and undue the damage of a short-sighted board decision.

(1) Office of the General Counsel, Summary of Operations (Fiscal Year 2010), Memorandum GC 11-03 (Jan. 10, 2011).
(2) Wheeling Island Gaming, 355 NLRB No. 127 (August 1910).
(3) *Wheeling Island Gaming*, 355 NLRB No. 127, slip 2.

* The author served on the Board for nearly 8 years, from December 2002 to August 2010.

Berry, David P.

From: Flynn, Terence F.
Sent: Friday, April 01, 2011 11:25 AM
To: 'Peter Schaumber'
Subject: NewSpecialtyHealthCareOpED.doc
Attachments: NewSpecialtyHealthCareOpED.doc

Noticed two typos.

IE40

NLRB Poised to Push Through Sweeping Changes to Facilitate Union Organizing While Skirting Formal Rulemaking Requirements.

By Peter C. Schaumber, former Chairman, National Labor Relations Board *

The National Labor Relations Board (Board) may be on the brink of making a major change in national labor policy without resort to the basic strictures of the Administrative Procedures Act (APA), which requires federal agencies to adhere to certain standards when issuing new regulations, including conducting cost benefit assessments and providing the public notice and a full and fair opportunity to comment. Specifically, the Board has announced its intent to reconsider the standards that have governed for decades what constitutes an appropriate unit for purposes of union representation and collective bargaining. The Board, over a strident dissent by the lone Republican member, has done so in the context of adjudicating a single case, one in which no party requested such a sweeping review of existing law. The Board's actions are questionable both as a matter of substantive policy and administrative procedure, and smack of an effort to achieve through agency fiat radical statutory changes Congress has declined to enact.

The case at issue, *Specialty Healthcare and Rehabilitation Center of Mobile*, arises in the health care industry. That industry was singled out by Congress and the Board for specialized treatment due to the unique needs and considerations applicable to medical facilities. In particular, Congress directed the Board to give due consideration to preventing the proliferation of bargaining units within such facilities, and the Board itself recognized during its healthcare rulemaking proceedings in the late 1980s that "large-scale splintering of the [healthcare] work-force" was inconsistent with sound public policy.[1] Though the Board's healthcare rule did not in its final form extend to nursing homes and other non-acute care facilities, the Board has, for more than 20 years, applied a unit determination standard to nursing homes that considers a number of factors, including those deemed relevant in the acute care rulemaking.[2] Indeed, in formulating the standard applicable to nursing homes, the Board specifically noted its earlier findings during the rulemaking process concerning the greater functional integration within nursing homes, suggesting that smaller, fragmented units of employees would be less likely to be found appropriate in such facilities. For more than two decades, the Board has adhered to that measured approach, generally declining to splinter sub-groups of nonprofessional nursing home employees into separate sub-units.

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[1] 53 Fed. Reg. 33900, 33905 (1988).
[2] See Park Manor Care Center, 305 NLRB 872 (1991).

Why is the determination of the appropriate unit significant? For a slew of different reasons, both strategic and practical. Generally, smaller units are favored by unions because they are easier and less expensive to organize; union agents can target small subsets of disgruntled employees within a broader workforce. Once a foothold is gained, union agents enjoy broader access rights and can seek to make incremental gains among other segments of employees, with the ultimate objective of securing representation of the entire facility, albeit in separate units. But a proliferation of small units fragments the workplace and has substantial negative consequences on the employer, the long-term interests of employees, and the collective bargaining process.

A proliferation of small units presents the specter of an unending series of union organizing campaigns, NLRB proceedings, and the attendant litigation costs and disruption to the employer's operations. Moreover, fragmentation of the workforce does not enhance collective bargaining, it undermines it. As the Board has recognized, it can give rise to conflicts of interest and dissatisfaction among constituent groups, impose the time and expense of continuous and repetitious bargaining, and lead to wage whipsawing, more frequent strikes, work stoppages and jurisdictional disputes.[3] Even if agreements can be reached, fragmented units can create lasting legal and administrative costs in applying different agreements and working conditions to a slew of small groups of employees scattered around the workplace. Unit fragmentation also undermines the perceived legitimacy and bargaining strength of unions by severely restricting the size of their constituency relative to the overall workforce. These deleterious affects obviously take on heightened significance in the context of medical facilities, where heightened costs of care and the disruption of operations pose serious risks to public health.

That is why the NLRB, since its inception, has sought to avoid the proliferation of bargaining units and it is why the National Labor Relations Act specifically states that the extent to which the union has succeeded in organizing employees shall not be controlling in determining the appropriate unit.[4] However, the Board has now signaled a sharp change in direction, one which may impact unit determinations, not just in nursing homes and other non-acute care facilities, but in all industries. The Board in the *Specialty Healthcare* case recently invited briefs on whether it should abandon decades of precedent and adopt a new rule that would approve units of two or more employees doing the "same job" in the "same location," without regard to whether those employees comprise a distinct and homogenous group with interests separate from other employees. Under such a new standard, a unit consisting solely

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[3] Id. at 876 (quoting the Board's healthcare rulemaking notice, 53 Fed.Reg. 33904).
[4] NLRA, Sec. 9(c)(5).

of maintenance employees working on the second floor of a nursing home or nursing assistants but not other care givers presumably would be appropriate. As would a unit consisting solely of the trumpet players in an orchestra or wide receivers on a football team, regardless of the sentiments of the other workers with whom they share common interests.

Apart from the sweeping nature of the change, the legal process the Board chose to try to implement it is reminiscent of a similar power play at the National Mediation Board (NMB), where the Democratic appointees jettisoned decades of precedent, without meaningful public comment and deliberation -- or even involvement of the lone Republican member -- to do away with the fundamental requirement that a majority of eligible voters in a unit cast ballots in favor of a union in order to be certified as the bargaining representative. In this case, rather than undertake the same open rulemaking process it followed when implementing new unit determination rules applicable to a single industry, the Board simply issued a short deadline for submitting briefs in the *Specialty Healthcare* case. Fortunately, that action did not go unnoticed, and triggered a four-page letter to the Board from Health, Education, Labor and Pension Committee Ranking Member Senator Michael Enzi and committee members Senators Orrin Hatch and Johnny Isakson, who criticized the proposal as inconsistent with the NLRA and threatened Congressional intervention if the Board rushed through such a fundamental change in American labor law outside the public rule-making process.

It remains to be seen whether the unelected Democratic appointees at the NLRB will, like their colleagues at the NMB, skirt the rulemaking process in order to undermine foundational principles of workplace democracy requiring majority support of a workforce in order to impose union representation.

Berry, David P.

From: Flynn, Terence F.
Sent: Monday, April 18, 2011 11:30 AM
To: 'Peter Schaumber'
Subject: RE: Former NLRB Chairman's Op Ed

Maybe it will be picked up by others.

From: Peter Schaumber [mailto:peter@schaumber.com]
Sent: Monday, April 18, 2011 11:19 AM
To: Flynn, Terence F.
Subject: FW: Former NLRB Chairman's Op Ed

This was the easiest. Needed to get out there.

From: Emily Cahn [mailto:hillresearch1@thehill.com]
Sent: Monday, April 18, 2011 10:32 AM
To: Peter Schaumber
Subject: Re: Former NLRB Chairman's Op Ed

Hi Peter,

Here's a link to the op-ed. http://thehill.com/blogs/congress-blog/labor/156577-nlrb-skirts-formal-rulemaking-requirements

Sorry about any confusion!

On Mon, Apr 18, 2011 at 9:35 AM, Peter Schaumber <peter@schaumber.com> wrote:
Emily,

Attached is the op-ed. If you have any questions, please e-mail me or call to 202 363 2900. Thanks in advance.

Peter

--
Emily Cahn
The Hill
ecahn@thehill.com

1E41

THE HILL'S Congress Blog
Where lawmakers come to blog

NLRB skirts formal rulemaking requirements

By Peter C. Schaumber - 04/18/11 10:28 AM ET

The National Labor Relations Board (NLRB) may be on the brink of making a major change in national labor policy without resorting to the basic strictures of the Administrative Procedures Act (APA), which requires federal agencies to adhere to certain standards when issuing new regulations, including conducting cost benefit assessments and providing the public notice and a full and fair opportunity to comment.

Specifically, the Board has announced its intent to reconsider the standards that have governed for decades what constitutes an appropriate unit for purposes of union representation and collective bargaining. The Board, over a strident dissent by the lone Republican member, has done so in the context of adjudicating a single case, one in which no party requested such a sweeping review of existing law. The Board's actions are questionable both as a matter of substantive policy and administrative procedure, and smack of an effort to achieve through agency fiat radical statutory changes Congress has declined to enact.

The case at issue, Specialty Healthcare and Rehabilitation Center of Mobile, arises in the health care industry. That industry was singled out by Congress and the Board for specialized treatment due to the unique needs and considerations applicable to medical facilities. In particular, Congress directed the Board to give due consideration to preventing the proliferation of bargaining units within such facilities, and the Board itself recognized during its healthcare rulemaking proceedings in the late 1980s that "large-scale splintering of the [healthcare] work-force" was inconsistent with sound public policy. Though the Board's healthcare rule did not in its final form extend to nursing homes and other non-acute care facilities, the Board has, for more than 20 years, applied a unit determination standard to nursing homes that considers a number of factors, including those deemed relevant in the acute care rulemaking.

IE42

Brent Budowsky
Lanny Davis
John Del Cecato
Ben Goddard
David Hill
Cheri Jacobus
David Keene
Mark Mellman
Dick Morris
Markos Moulitsas (Kos)
Robin Bronk
Editorials
Letters
Op-Eds
Juan Williams
Judd Gregg
Christian Heinze
Karen Finney
John Feehery
CAPITAL LIVING
Gossip: In the Know
Cover Stories
Food & Drink
Announcements
New Member of the Week
All Capital Living
SOCIAL
Washington Scene
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iPad
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Indeed, in formulating the standard applicable to nursing homes, the Board specifically noted its earlier findings during the rulemaking process concerning the greater functional integration within nursing homes, suggesting that smaller, fragmented units of employees would be less likely to be found appropriate in such facilities. For more than two decades, the Board has adhered to that measured approach, generally declining to splinter sub-groups of nonprofessional nursing home employees into separate sub-units.

Why is the determination of the appropriate unit significant? Generally, smaller units are favored by unions because they are easier and less expensive to organize; union agents can target small subsets of disgruntled employees within a broader workforce. Once a foothold is gained, union agents enjoy broader access rights and can seek to make incremental gains among other segments of employees, with the ultimate objective of securing representation of the entire facility, albeit in separate units. But a proliferation of small units fragments the workplace and has substantial negative consequences on the employer, the long-term interests of employees, and the collective bargaining process.

A proliferation of small units presents the specter of an unending series of union organizing campaigns, NLRB proceedings, and the attendant litigation costs and disruption to the employer's operations. Moreover, fragmentation of the workforce does not enhance collective bargaining, it undermines it. As the Board has recognized, it can give rise to conflicts of interest and dissatisfaction among constituent groups, impose the time and expense of continuous and repetitious bargaining, and lead to wage whipsawing, more frequent strikes, work stoppages and jurisdictional disputes. Even if agreements can be reached, fragmented units can create lasting legal and administrative costs in applying different agreements and working conditions to a slew of small groups of employees scattered around the workplace. Unit fragmentation also undermines the perceived legitimacy and bargaining strength of unions by severely restricting the size of their constituency relative to the overall workforce. These deleterious affects obviously take on heightened significance in the context of medical facilities, where heightened costs of care and the disruption of operations pose serious risks to public health.

That is why the NLRB, since its inception, has sought to avoid the proliferation of bargaining units and it is why the National Labor Relations Act specifically states that the extent to which the union has succeeded in organizing employees shall not be controlling in determining the appropriate unit. However, the Board has now signaled a sharp change in direction, one which may impact unit determinations, not just in nursing homes and other non-acute care facilities, but in all industries. The Board in the Specialty Healthcare case recently invited briefs on whether it should abandon decades of precedent and adopt a new rule that would approve units of two or more employees doing the "same job" in the "same location," without regard to whether those employees comprise a distinct and homogenous group with interests separate from other employees. Under such a new standard, a unit consisting solely of maintenance employees working on the second floor of a nursing home or nursing assistants but not other care givers presumably would be appropriate. As would a unit consisting solely of the trumpet players in an orchestra or wide receivers on a football team, regardless of the sentiments of the other workers with whom they share common interests.

Apart from the sweeping nature of the change, the legal process the Board chose to try to implement it is reminiscent of a similar power play at the National

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THE HILL BLOGS

BRIEFING ROOM

- Carney: Republicans 'have to have a brick in your head' not to act on student loans
- Montana governor: Romney's father 'born on a polygamy commune in Mexico'
- Jobless rate falls in Ohio, Florida, where Obama is opening lead in polls

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- Addressing violence against all women
- The widening "justice gap" and why we must close it
- Thune's "ambush elections" based on right-wing myths

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PUNDITS BLOG

Mediation Board (NMB), where the Democratic appointees jettisoned decades of precedent, without meaningful public comment and deliberation -- or even involvement of the lone Republican member -- to do away with the fundamental requirement that a majority of eligible voters in a unit cast ballots in favor of a union in order to be certified as the bargaining representative. In this case, rather than undertake the same open rulemaking process it followed when implementing new unit determination rules applicable to a single industry, the Board simply issued a short deadline for submitting briefs in the Specialty Healthcare case. Fortunately, that action did not go unnoticed, and triggered a four-page letter to the Board from Health, Education, Labor and Pension Committee Ranking Member Senator Michael Enzi and committee members Senators Orrin Hatch and Johnny Isakson, who criticized the proposal as inconsistent with the NLRA and threatened Congressional intervention if the Board rushed through such a fundamental change in American labor law outside the public rule-making process.

It remains to be seen whether the unelected Democratic appointees at the NLRB will, like their colleagues at the NMB, skirt the rulemaking process in order to undermine foundational principles of workplace democracy requiring majority support of a workforce in order to impose union representation.

Peter C. Schaumber is the former chairman of the National Labor Relations Board.

4 Comments

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Real-time updating is **paused**. (Resume)

Jogy Nolan 7 months ago

http://fash55.com/c/skirts

Nearly all of the things you point out happens to be astonishingly precise and it makes me ponder the reason why I had not looked at this in this light before. This piece really did turn the light on for me as far as this particular topic goes. But there is one particular factor I am not necessarily too cozy with and while I attempt to reconcile that with the actual main theme of your

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E²-WIRE (ENERGY)

- Nuke chief: 'Allegations that I target women are categorically untrue'
- Sen. Kerry: 'Powerful interests' standing in the way of progress on energy
- Interior: Rules for subsea oil-well blowout preventers en route

More E²-Wire (Energy) »

BALLOT BOX

- Cleveland paper: Kucinich should resign before running for election elsewhere
- Obama raises $35M in March, has more than $100M stored away
- House Dems fundraising off Giffords's seat

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ON THE MONEY

- Senate Ag leaders come together on farm bill
- IMF announces $430 billion in new bailout funds
- Senate to vote on overturning NLRB's union election rule

More On The Money »

HEALTHWATCH

- Postal bill could bring hike in health premiums for federal workers
- Ways and Means wades into controversial Medicare proposals
- Analysis says Ryan plan would have cost states $500 billion over past decade

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FLOOR ACTION

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- Senate hearings: MF Global, tax reform
- Senate Dems, GOP differ on saving USPS

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issue, allow me observe just what the rest of the subscribers have to say,Very well done.

Like | Reply

hillwilliam 10 months ago

I can't wait until the NLRB tells Fiat they have to stay in Detroit.Fiat will tell them where to go.

Like | Reply

Gilbert Gray 1 year ago

More power grabs designed by our Dictator-In-Chief, BHO. He and his thugs work 24/7 at their subversive activities to bring down "We the People", and our once-great nation.

Like | Reply

Edwin Loftus 1 year ago

What did you expect? The proliferation of the bureaucracy was always intended to place legislative power in the hands of the executive branch. If it's any reassurance, the legislative branch won't be eliminated until it disagrees with the executive at some point in the future. Until then, a shadow government is established and refined through tests like this one. This plan/model has existed for 200 years and is derived from the monarchies of Western Europe. This is part of the process of eliminating disagreement with all real power focussed in the executive. It's what the Progressives have been working toward all along.

Like | Reply

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- White House: Keystone amendment 'noxious' to highway bill
- Group launches mobile phone app for reporting TSA profiling

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- Local groups demand review of US troops in Philippines
- Al Qaeda threatens new wave of attacks if terror suspect deported from UK

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COLUMNISTS

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Dems should pitch budget

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Romney's gender gap

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Berry, David P.

From: Flynn, Terence F.
Sent: Monday, April 18, 2011 2:20 PM
To: 'Peter Schaumber'
Subject: FW: Blog

From: Flynn, Terence F.
Sent: Monday, April 18, 2011 2:15 PM
To: Liebman, Wilma B.
Subject: RE: Blog

I'm not familiar with that blog, but thank you.

From: Liebman, Wilma B.
Sent: Monday, April 18, 2011 12:43 PM
To: Flynn, Terence F.
Subject: Blog

Trust you saw this. http://thehill.com/blogs/congress-blog/labor/156577-nlrb-skirts-formal-rulemaking-requirements

Perhaps even wrote it.

IE 43

Berry, David P.

From: Flynn, Terence F.
Sent: Tuesday, April 19, 2011 1:46 PM
To: 'Peter Schaumber'
Subject: RE: HELLO

Not really.

From: Peter Schaumber [mailto:peter@schaumber.com]
Sent: Tuesday, April 19, 2011 10:50 AM
To: Flynn, Terence F.
Subject: HELLO

Did a radio talk show this morning and have 3 more. Doing a video this afternoon. Here are my talking points. See any dangers?

HELLO, NAME

I AM HERE TO TELL YOU ABOUT THE IMPORTANT WORK OF THIS LITTTLE KNOWN AGENCY OF THE FEDERAL GOVERNMENT AND A PROBLEM WHICH UNDERMINES THE AGENCY'S CREDIBILTY, AND HAS THE POTENTIAL TO DAMAGE THE LONG TERM INTERESTS OF EMPLOYEES AND THE ECONOMY AS A WHOLE.

NLRB HAS BEEN EXTREMELY SUCCESSFUL IN FULFILLING ITS STATUTORY MISSION:

- GUARANTEES EMPLOYEES THE **RIGHT TO FREELY CHOOSE** WHETHER THEY WANT A COLLECTIVE BARGAINING REPRESENTATIVE – THE REP CAN BE AN EMPLOYEE UNION OR AN OUTSIDE UNION.
- IT ALSO GUARANTEES TO EES THE RIGHT TO OPPOSE UNIONIZATION OR NOT TO GET INVOLVED IN THE ISSUE AT ALL.
- IT CONDUCTS ELECTIONS TO DETERMINE WHETHER THE UNION MAJORITY SUPPORT AND PROTECTS THE CHOICE ONCE MADE
- PREVENTS AND REMEDIES ULP

THE **BOARD WAS ESTABLISHED IN 1935 – A LOT HAS HAPPENED** – IN 1935 CONGRESS **REJECTED HAVING PARTISAN BOARD** MEMBERS FOR A BOARD OF "IMPARTIAL GOVERNMENT EMPLOYEES."

CURRENTLY, ONE MEMBER COMES DIRECTLY FROM TWO OF THE NATION'S LARGEST LABOR UNIONS.

AND THE BOARD MAJORITY VIEWS ITS PRINICPAL ROLE AS TO **PROMOTE UNIONIZATION**.

BUT THE **ACT, AS AMENDED IN 1947, CONTEMPLATES** A BOARD THAT WOULD

PROTECT EE RIGHTS UNDER THE ACT WHILE IMPARTIALLY BALANCE **THE LEGITIMATE INTERESTS OF UNIONS AND MANAGEMENT. IN SHORT, THE BOARD WAS NOT TO TAKE SIDES**

MOST RECENTLY, THE BOARD ANNOUNCED IT WAS CONSIDERING MAKING A **RADICAL CHANGE, THE REASON FOR WHICH IS TO PROMOTE UNIONIZATION.**

- A UNION REPRESENTS A GROUP OF EMPLOYEES
- THE UNIT CAN BE ALL THE EMPLOYEES OF THE EMPLOYER OR SOMETHING LESS.
- THE BOARD LOOKS TO THE GROUP HAVING A COMMUNITY OF INTEREST AND BEING SUFFICIENTLY DISTINCT TO WARRANT SEPARATE REPRESENTATION.

NEW STANDARD - THE BOARD RECENTLY ANNOUNCED THAT IT WAS CONSIDERING FAVORING UNITS OF **ANY 2 OR MORE EES PERFORMING** THE SAME JOB IN THE SAME LOCATION.

LET ME TELL YOU WHY THIS IS SO IMPORTANT.

EXAMPLE: SYMPHONY ORCH.

CONSEQUENCES:

CAN HAVE SUBST. NEG CONSEQUENCES FOR EES, ERS AND THE COLLECTIVE BARG PROCESS

- EES ARE DENIED THE LEVERAGE FOR BARGAINING THE ACT INTENDED.

AND IT HAS THE POTENTIAL TO LEAD TO A PROLIFERATION OF TINY UNITS AND A FRAMENTATION OF THE WORKPLACE . PROLIFERATION

- THREARTENS TO INCREASE STRIKES AND WORKPLACE DISPUTES (FOR A VARIETY OF REASONS)
- EES WILL BE DRAWN INTO DISPUTES IN WHICH THEY HAVE NO INTEREST.
- DRAMATICALLY INCREASE AN ER'S LABOR RELATIONS COSTS
- EES WILL BE RESTRAINED FROM MOVING FROM ONE JOB TO ANOTHER BECAUSE EACH OF THESE UNITS WILL BE THERE OWN SENIORITY DISTRICT.

- EMPLOYEES WILL HAVE A MORE VULNRABLE, LESS COMPETITIVE AND FINANCIALLY STABLE EMPLOYER

EVEN WITHOUT THE POTENTIAL FOR PROLIFERATION - A UNION CAN USE THE THREAT OF ORG A TINY UNIT TO POSSIBLY DISTABILIZE THE EMPLOYER WITH WORKPLACE DISPUTES TO EXTRACT CONCESSIONS. UNFORTUNATELY THIS HAPPENS.

WHY THE CHANGE: EASIER AND LESS EXPENSIVE TO ORG 2 OR 4 THAN 10 OR 40 AND IT AUGMENTS UNON POWER AS DESCRIBED ABOVE.

NO RULE-MAKING:
BOARD IS CONSIDERING ADOPTING THIS SPECIFIC STANDARD FOR ALL INDUSTRIES IN A SINGLE CASE BEFORE THE BOARD IN WHICH NEITHER PARTY RAISED THE ISSUE.
IT IS AVOIDING PUBLIC RULE-MAKING AVAILABLE TO IT IN WHICH YOU AND I WOULD HAVE AN OPPORTUNITY TO COMMENT AND THE AGENCY WOULD HAVE TO RESPOND TO EACH OF OUR COMMENTS.

WHAT YOU CAN DO:

IF YOU ARE AN EMPLOYEE OR AN EMPLOYER, WRITE OR E-MAIL THE NLRB YOUR SENATORS AND MEMBERS OF CONGRESS AND TELL THEM THAT YOU DEMAND THAT THE NLRB GIVE YOU AND OTHERS AN OPPORTUNITY TO COMMENT ON THIS ISSUE THOUGH PUBLIC RULE-MAKING.

Berry, David P.

From: Flynn, Terence F.
Sent: Wednesday, April 27, 2011 9:05 PM
To: Schneider, Daniel (McConnell)
Subject: RE: 2 questions

The interview was pretty pro forma. [Not Relevant] [HELP Staffer] was [Not Relevant] and understood when I deferred on grounds that the issue could come before me as a Board Member. [Not Relevant] [Not Relevant]

[redacted]

[Not Relevant / Personal]

[redacted]

Cheers,

Terry

From: Schneider, Daniel (McConnell) [Daniel_Schneider@mcconnell.senate.gov]
Sent: Wednesday, April 27, 2011 4:48 PM
To: Flynn, Terence F.
Subject: 2 questions

1. How did your interview go?

2. [Not Relevant / Personal] [redacted]

IE 45

Berry, David P.

From: Flynn, Terence F.
Sent: Thursday, October 13, 2011 3:49 PM
To: 'peter@schaumber.com'
Subject: RE: Hi

T. Flynn's Personal E-mail Address I rarely check it, so do notice me via e-mail if you send something to that account.

-----Original Message-----
From: peter@schaumber.com [mailto:peter@schaumber.com]
Sent: Thursday, October 13, 2011 3:19 PM
To: Flynn, Terence F.
Subject: Hi

What is your personal e-mail address?
Sent from my Verizon Wireless BlackBerry

IE46

Berry, David P.

From: peter@schaumber.com
Sent: Thursday, October 13, 2011 4:05 PM
To: Flynn, Terence F.
Subject: Hi

Just e-mailed that address. Thanks.
Sent from my Verizon Wireless BlackBerry

IE46

On April 18, 2012, Member Brian Hayes provided the following information to David Berry, Inspector General.

Member Hayes acknowledged that Terence Flynn was the Chief Counsel of the Member Schaumber staff that was assigned to him after Member Schaumber's term ended.

Member Hayes was provided the opportunity to review copies of the three e-mail messages sent by Mr. Flynn to former Member Schaumber that had draft dissents by Member Hayes included as an attachment. After reviewing the e-mail messages and the attached dissents, Member Hayes was asked if he authorized the release of the draft dissents to former Member Schaumber. Member Hayes responded that he had no memory of ever authorizing the issuance of a draft document.

Investigative Summary

As of the date of the report, former Member Schaumber had not responded to the request for an interview.

Berry, David P.

From: Berry, David P.

Sent: Tuesday, April 10, 2012 9:58 AM

To: 'peter@schaumber.com'

Subject: OIG Interview

Peter,

As you probably know, we issued a report involving, among other things, the release of deliberative information to you. After the report issued, we became aware that four draft Board decisions, or portions there of, were provided to you – two in October 2010 and two in January 2011. We would like to discuss this matter with you. Can you please call me at 202 Direct line to arrange an interview?

Thanks
Dave Berry
IG, NLRB

I, [Name] Deputy Chief Counsel, provide the following information to David Berry, Inspector General.

[redacted] Currently I am the Deputy Chief Counsel to Board Member [redacted]. I have held a Deputy Chief Counsel position since [Not Relevant/Personal] [redacted]

[redacted] It is my practice to send the staff electronic copies of draft dissents that contain a substantive analysis once the draft dissent has been put in JCMS for circulation to the panel that is considering the case. I believe I began this practice once the staff was assigned to Member [redacted]. I thought this was one way to bring the staff up to speed with Member [redacted]' positions. I do not wait for the decision to be issued because it is important to let the staff know the Board Member's position once the position has been formalized in a draft dissent. I believe that the staff understands that the case remains under the Board's consideration and the decision has not been issued. I also believe that there may have been distributions by me of draft dissents to the staff in which I did not include Mr. Flynn when he was the Chief Counsel because I thought he knew Member [redacted] position in the case so there was no need to include him [redacted]

[redacted] Sometimes I refer to a panel by the initials of the Members' last name or sometimes I list the panel members by full name in e-mail messages. If I used initials identifying a panel in an e-mail message to Member Flynn now or when he was a Chief Counsel, I think he would know what it means. [redacted]

[redacted] Prior to signing this statement I read it and had the opportunity to make changes. I swear that the statement is true to the best of my memory and belief. [redacted]

[Signature] [redacted]

[Name] [redacted]

4/26/12
Date

David Berry
Inspector General
Authorized to administer oaths

4/26/12
Date

IE45

Berry, David P.

From: Berry, David P.
Sent: Thursday, April 26, 2012 8:52 PM
To: [redacted]
Subject: Re: Addendum to meeting with [redacted] on April 26, 2012

Thanks we will include this with your statement.

Dave Berry
Please excuse the brief message.
Sent from a mobile device.

On Apr 26, 2012, at 8:35 PM, [redacted] <[redacted]@nlrb.gov> wrote:

> Dave, [redacted] I came back to work because I wanted to mention the following which I've given a lot of thought. I think the far greater number of emails to the staff which pointed out to them dissents that Member [redacted] did were emails sent after and around the time he circulated those dissents in JCMS. In my position as Deputy Chief, I would get notice of those circulations in JCMS; look at them; and if I thought the staff would benefit from knowing about them (for example, I might **not** send out a discharge case that only raised factual issues), I would email them out. I hesitated at the meeting today on whether I ever sent out any emails to the staff, upon the issuance of cases to the public, that included a [redacted] dissent. I now think that I did do that but the number of those cases would not be large. The greater number of dissents that I sent to the staff via email is what I discussed today—they would be those that were circulated (not issued) and about which I got notice in JCMS. I just wanted you to know that.
>
> Thanks,
> [redacted]

WBC I, William Cowen, Solicitor for the National Labor Relations Board, provide the following statement to David Berry, Inspector General. WBC

WBC I served as a Board Member from January to November 2002. In March 2003, I was appointed to be Executive Assistant to Chairman Robert Battista. I was later appointed by the Board to be the Solicitor. WBC

WBC The circulation of draft majority opinions, concurring opinions, and dissents is part of the deliberative process of the Board. In my experience, I have observed that a dissent once circulated can cause the majority to make substantive changes in the draft majority opinion. A change in the draft majority opinion may then result in a change in the draft dissent. I have also observed that this back and forth may continue for a period of time with the dissenting and majority Members making additional changes to their respective draft opinions in response to their colleague's arguments. As a result of this deliberative process, there have situations where a dissenting view became the majority opinion, and other situations where a majority opinion has changed sufficiently for the dissenting Member to join the majority. WBC

WBC Another element of the Board's deliberative process is what we refer to as "noting off." Most decisions are issued by a panel of three Members, rather by than the full Board. When that occurs, the non-participating Board Members must "note off" on the decision before it is issued. A Member may decline to "note off" and elect to participate in the deliberations in any particular decision. When that occurs, the decision approved by the previous panel will not issue, and the deliberative process will resume with the new Member participating. This "noting off" process is not required in a small subset of cases that are considered by the "Panel of the Month." WBC

WBC A Board decision is not "final" until it is issued. Now that the Board has moved to electronic issuance of decisions, the Board considers a decision to be "issued" when it is posted on the NLRB Web site. Until a decision is issued, any Board Member may withdraw his or her vote and cause the deliberations to resume. WBC

WBC Prior to signing this statement, I read it and had the opportunity to make changes. I swear that this statement is true to the best of my memory and belief. WBC

William Cowen	4-27-2012 Date	David Berry Inspector General Authorized to administer oaths	4/27/12 Date

IE 50

NLRB-5517 (9-11)
Chief Counsel/Deputy Chief Cousel

NATIONAL LABOR RELATIONS BOARD

SENIOR EXECUTIVE PERFORMANCE APPRAISAL PLAN

PART I - IDENTIFYING INFORMATION

EMPLOYEE'S NAME	TITLE	ORGANIZATION

APPRAISING OFFICIAL (Type or Print Name and Position Title)	APPRAISAL PERIOD	
	FROM	TO

I acknowledge that this performance plan was developed with my input and involvement and that I understand the performance expectations for my position.

SIGNATURE OF SENIOR EXECUTIVE _____ DATE _____

PART II - MID-YEAR REVIEW

MID-YEAR REVIEW COMPLETED	
SIGNATURE OF SENIOR EXECUTIVE DATE:	SIGNATURE OF APPRAISING OFFICIAL DATE:

PART III - CRITICAL ELEMENT RATING

RATING (Per the Performance Standards - narrative statement attached)

CRITICAL ELEMENT I:

☐ OUTSTANDING ☐ COMMENDABLE ☐ FULLY SUCCESSFUL ☐ MINIMALLY SATISFACTORY ☐ UNSATISFACTORY

CRITICAL ELEMENT II:

☐ OUTSTANDING ☐ COMMENDABLE ☐ FULLY SUCCESSFUL ☐ MINIMALLY SATISFACTORY ☐ UNSATISFACTORY

CRITICAL ELEMENT III:

☐ OUTSTANDING ☐ COMMENDABLE ☐ FULLY SUCCESSFUL ☐ MINIMALLY SATISFACTORY ☐ UNSATISFACTORY

APPRAISING OFFICIAL SUMMARY RATING (In Accordance with the Summary Rating Conversion Chart)

☐ OUTSTANDING ☐ COMMENDABLE ☐ FULLY SUCCESSFUL ☐ MINIMALLY SATISFACTORY ☐ UNSATISFACTORY

SIGNATURE OF APPRAISING OFFICIAL _____ DATE _____

PART IV - HIGHER LEVEL REVIEW

OPTIONAL HIGHER LEVEL REVIEW

REVIEWING OFFICIAL (Name and Position Title)	DUE DATE FOR SENIOR EXECUTIVE (HLR) SUBMISSION

REVIEWING OFFICIAL SUMMARY RATING (If Requested)

☐ OUTSTANDING ☐ COMMENDABLE ☐ FULLY SUCCESSFUL ☐ MINIMALLY SATISFACTORY ☐ UNSATISFACTORY

SIGNATURE OF REVIEWING OFFICIAL _____ DATE _____

PART V - PERFORMANCE REVIEW BOARD RECOMMENDATION

PERFORMANCE REVIEW BOARD RECOMMENDED SUMMARY RATING

☐ OUTSTANDING ☐ COMMENDABLE ☐ FULLY SUCCESSFUL ☐ MINIMALLY SATISFACTORY ☐ UNSATISFACTORY

If the summary rating recommended by the PRB will vary from the initial Appraising Official's rating, the reason(s) for the variance should be recorded and attached to the appraisal.

The PRB recommends ☐ a performance award (bonus), ☐ an increase in base pay; ☐ a decrease in base pay, or ☐ none. (Check one or more)

PRB MEMBERS SIGNATURES AND DATES

1. _____ 2. _____ 3. _____

4. _____ 5. _____ 6. _____

PART VI - FINAL RATING

CHAIRMAN/BOARD MEMBER/GENERAL COUNSEL FINAL RATING

☐ OUTSTANDING ☐ COMMENDABLE ☐ FULLY SUCCESSFUL ☐ MINIMALLY SATISFACTORY ☐ UNSATISFACTORY

I certify that this rating is a result of an appraisal process that makes meaningful distinctions based on relative performance, takes into account, as appropriate, the Agency's assessment of its performance against program performance measures, as well as other relevant considerations; and demonstrates a direct linkage between the Agency's performance and the executive's performance. I further certify that pay adjustments, cash awards, and base pay decisions based on the results of the appraisal process accurately reflect and recognize the executive's performance and/or contribution to the Agency's performance, and that final ratings, particularly, outstanding ratings are not distributed on a rotational basis.

SIGNATURE OF CHAIRMAN/BOARD MEMBER DATE SIGNATURE OF GENERAL COUNSEL DATE

IES1

NATIONAL LABOR RELATIONS BOARD

PERFORMANCE MEASURES

GOAL: #1: Resolve all questions concerning representation, impartially and promptly.

MEASURE #1: The percentage of representation cases resolved within 100 days of filing the election petition.

Baseline:	78.0%	
Long-term target:	FY 2012	85.2%
Annual targets:	FY 2007	79.0%
	FY 2008	80.0%
	FY 2009	81.0%
	FY 2010	85.0%
	FY 2011	85.0%
	FY 2012	85.2%

Definitions:

Resolve -- When a case has been finally processed with no further rights of appeal or administrative action required. The question as to whether or not the labor organization will represent the employees has been finally resolved. Representation cases are resolved in a number of ways:

- Cases may be dismissed before an election is scheduled or conducted. Dismissals at an early stage in the processing may be based on a variety of reasons, for example, the employer not meeting our jurisdictional standards, the petitioner's failure to provide an adequate showing of interest to support the petition and/ or the petition being filed in an untimely manner.

- Cases may also be withdrawn by the petitioner for a variety of reasons including lack of support among the bargaining unit and/or failure to provide an adequate showing of interest.

- The majority of cases are resolved upon either a certification of representative (the union prevails in the election) or a certification of results (the union loses the election).

- In a small percentage of cases there are post-election challenges or objections to the election. The cases are not considered resolved until the challenges and/or objections have been investigated either administratively or by a hearing and a report that has been adopted by the Board.

Counting of Days -- The Agency starts counting the 100 days on the date that the petition is formally docketed.

NATIONAL LABOR RELATIONS BOARD

SENIOR EXECUTIVE PERFORMANCE APPRAISAL PLAN

PART III - CRITICAL ELEMENT RATING

Critical Element 1:

Accomplishes results in Unfair Labor Practice Cases and Representation Cases by achieving timeliness, quality, and efficiency in casehandling. Achieves timeliness by complying with processing goals established for Stage 1, Stage 2, and Stage 3 cases. Achieves quality by ensuring that drafts presented to the Board Member are concise and well-organized, accurately convey the Board Member's positions, reflect thorough research of applicable case law, accurately identify and appropriately treat all key legal and factual issues, and contain logical and sound legal analysis, appropriate style and tone, cogent presentation, effective use of authority, and proper attention to detail. Achieves efficiency by ensuring that the Board Member is effectively advised on legal and administrative issues, that cases are appropriately and promptly assigned or reassigned, as necessary, and that case issuance is facilitated.

PERFORMANCE WEIGHT: 60%

Alignment: National Labor Relations Board Strategic Plan (FY 2007 - 2012) - Check all appropriate goals and measures.

☐ NLRB Strategic Goal 1: Promptly resolve questions concerning representation.

- ☐ Measure #1: In FY 2012, resolve questions concerning representation in at least 85.2% of representation cases within 100 days of the filing of the election petition.

☐ NLRB Strategic Goal 2: Promptly investigate, prosecute and remedy cases of unfair labor practices by employers or unions.

- ☐ Measure #2: In FY 2012, resolve at least 72% of all charges of unfair labor practices by withdrawal, by dismissal, or by closing upon compliance with a settlement or Board order or Court judgment within 120 days of the filing of the charge.
- ☐ Measure #3: In FY 2012, close 80.3% of meritorious (prosecutable) unfair labor practice cases on compliance within 365 days of the filing of the unfair labor practice charge.

Organizational Measures for Critical Element 1 (All are applicable) (Each measure assists in achieving the Agency's three overarching performance measures):

1. In at least 75 percent of the cases that the Board has determined are ripe for disposition, process cases for presentation to the Board Members within a median of 6 weeks.
2. In at least 75 percent of the cases in which participating Members' votes enable the preparation of a draft decision, process a draft Board decision within a median of 5 weeks from receipt of the votes from all participating Members.
3. In at least 75 percent of the cases in which draft decisions have circulated internally, process to the Board Member proposed action (e. g., approval, approval with edits, approval with modifications, separate opinion) in response to drafts and/or memos circulated by another Board Member and ripe for the executive's Member's action within a median of 4 weeks.
4. Reduce the median age of cases awaiting decision by the Board Members by 10% per year.
5. Consistently provide accurate and high-quality legal advice to the Board Members based on a thorough understanding of the relevant facts, law, and policy considerations and the Board's goals and priorities.
6. Prepare memoranda to the Board that set forth viable options and recommendations and ensure that drafts effectively and persuasively reflect the views of the participating Board Members.

RATING

☐ OUTSTANDING ☐ COMMENDABLE ☐ FULLY SUCCESSFUL ☐ MINIMALLY SATISFACTORY ☐ UNSATISFACTORY

NATIONAL LABOR RELATIONS BOARD

PERFORMANCE MEASURES

GOAL: #2: Investigate, prosecute, and remedy cases of unfair labor practices by employers or unions, or both, impartially and promptly.

MEASURE #2: The percentage of unfair labor practice (ULP) charges resolved by withdrawal, by dismissal, or by closing upon compliance with a settlement or Board order or Court judgment within 120 days of the filing of the charge.

Baseline:	66.7%	
Long-term target:	FY 2012	72.0%
Annual targets:	FY 2007	67.5%
	FY 2008	68.0%
	FY 2009	68.5%
	FY 2010	71.2%
	FY 2011	71.2%
	FY 2012	72.0%

Definitions:

Resolve -- The ULP case has been finally processed. The issues raised by the charging party's charge have been answered and where appropriate, remedied. There is no further Agency action to be taken.

Counting of Days -- The 120 days is calculated from the date that the charge is docketed.

Measure #3: The percentage of meritorious (prosecutable) ULP cases closed on compliance within 365 days of the filing of the ULP charge.

Baseline:	73.6%	
Long-term target:	FY 2012	80.3%
Annual targets:	FY 2007	74.0%
	FY 2008	75.0%
	FY 2009	75.5%
	FY 2010	80.0%
	FY 2011	80.2%
	FY 2012	80.3%

Definitions:

Resolve -- Cases are closed on compliance when the remedial actions ordered by the Board or agreed to by the party charged with the violation are complete.

Counting of Days -- The 365 days is calculated from the date that the charge is docketed.

NATIONAL LABOR RELATIONS BOARD

NARRATIVE APPRAISAL FOR CRITICAL ELEMENT 1.

NATIONAL LABOR RELATIONS BOARD

SENIOR EXECUTIVE PERFORMANCE APPRAISAL PLAN

PART III - PERFORMANCE ELEMENTS AND MEASURES

Critical Element 2: Demonstrate business acumen, and collaborate with stakeholders. Listen to and engage stakeholders (colleagues, labor organizations and professional associations, customers and other federal agencies) to identify needs and expectations. Develop processes for two way communications that build strong alliances, involve stakeholders in making decisions and gain cooperation to achieve mutually satisfying solutions. Represent the Agency in a professional and competent manner. Develop and execute plans to achieve organizational goals, leveraging resources (human, financial, technology, etc.) to maximize efficiency and produce high quality results.

PERFORMANCE WEIGHT: 20%

Alignment: National Labor Relations Board Strategic Plan (FY 2007 - 2012) - Check all applicable goals and measures.

☐ **NLRB Strategic Goal 1**: Promptly resolve questions concerning representation.

☐ **Measure #1:** In FY 2012, resolve questions concerning representation in at least 85.2% of representation cases within 100 days of the filing of the election petition.

☐ **NLRB Strategic Goal 2:** Promptly investigate, prosecute and remedy cases of unfair labor practices by employers or unions.

☐ **Measure #2**: In FY 2012, resolve at least 72% of all charges of unfair labor practices by withdrawal, by dismissal, or by closing upon compliance with a settlement or Board order or Court judgment with 120 days of the filing of the charge.

☐ **Measure #3:** In FY 2012, close 80.3% of meritorious (prosecutable) unfair labor practice cases on compliance within 365 days of the filing of the unfair labor practice charge.

Organizational Measures for Critical Element 2 (All are applicable): (Each measure assists in achieving the Agency's three overarching performance measures.)

1. Engage in effective outreach with customers and stakeholders as appropriate; communicate the Agency's interest, policies, and programs with parties, the labor-management bar, oversight agencies, the public, and other stakeholders, as appropriate. In so doing, listen to and consider stakeholders' interests developing processes for two-way communications to identify needs and expectations.

2. Monitor and evaluate programs and work practices to optimize efficiencies and prevent mismanagement and instill pubic trust.

3. Timely and professionally establish and mobilize collaborative relationships within the Agency to achieve organizational goals and Agency's casehandling initiatives; provide effective liaison in Agency-wide and other cross-organization projects and issues; in the event of workload imbalances, ensure that staff skills are made available to other organizational units.

4. Use information technology effectively to accomplish the Agency's mission; effectively support the President's Management Agenda on technological innovation.

5. Ensure conformance with government-wide and Agency administrative regulations and policies. Effectively manage fiscal and other resources of the organization; adequately plan for funds needed for the organization, manage within the organization's budgetary allowance, maintain appropriate records regarding finances, space and equipment. Ensure conformance with procurement and case record regulations.

6. Adhere to high standards of integrity in executing responsibilities.

RATING

☐ OUTSTANDING ☐ COMMENDABLE ☐ FULLY SUCCESSFUL ☐ MINIMALLY SATISFACTORY ☐ UNSATISFACTORY

NATIONAL LABOR RELATIONS BOARD

NARRATIVE APPRAISAL FOR CRITICAL ELEMENT 2.

NATIONAL LABOR RELATIONS BOARD

SENIOR EXECUTIVE PERFORMANCE APPRAISAL PLAN

PART III - PERFORMANCE ELEMENTS AND MEASURES

Critical Element 3: Effectively lead and manage human capital resources. Successfully lead organizational change and motivate others to achieve high performance through open and honest communication. Create and sustain a positive workplace that inspires others to support the organization's mission and goals. Develop and recognize employees so that they realize their full potential. Analyze and prioritize the critical workforce skill needs of the Agency and address the needs through training and effective recruitment in order to achieve Agency goals.

PERFORMANCE WEIGHT: 20%

Alignment: National Labor Relations Board Strategic Plan (FY 2007 - 2012) - Check all applicable goals and measures.

☐ **NLRB Strategic Goal 1**: Promptly resolve questions concerning representation.

☐ **Measure #1:** In FY 2012, resolve questions concerning representation in at least 85.2% of representation cases within 100 days of the filing of the election petition.

☐ **NLRB Strategic Goal 2:** Promptly investigate, prosecute and remedy cases of unfair labor practices by employers or unions, or both, impartially and promptly.

☐ **Measure #2**: In FY 2012, resolve at least 72% of all charges of unfair labor practices by withdrawal, by dismissal, or by closing upon compliance with a settlement or Board order or Court judgment within 120 days of the filing of the charge.

☐ **Measure #3:** In FY 2012, close 80.3% of meritorious (prosecutable) unfair labor practice cases on compliance within 365 days of the filing of the unfair labor practice charge.

Organizational Measures for Critical Element 3 (All are applicable): (Each measure assists in achieving the Agency's three overarching performance measures.)

1. Foster a motivated workforce through leadership, effective communication with staff and local union representatives, candid exchange of ideas taking into account employee perspective, listening to and challenging subordinates in a manner that fosters creativity, innovation and high quality individual and organizational performance.

2. Timely appraise employees, supervisors and managers using appropriate judgment in assessing their performance and providing them with constructive feedback. Make meaningful distinctions in performance rating and through the Agency's award program consistent with individual and group performance. Ensure that subordinate performance plans and appraisals are aligned with Agency goals. Deal with problems in an effective and timely manner.

3. Take positive actions to enhance workforce diversity and demonstrate commitment to diversity and equal employment opportunity policies and programs. Apply merit principles in recruiting, selecting, developing, and managing a high quality workforce with an appropriate skill mix to accomplish current workload and to effectively plan for future workforce needs. When filling positions, managers and supervisors with responsibility for hiring are held accountable for meeting established deadlines in recruiting and hiring well qualified employees and supporting their successful transition into NLRB service.

4. Administer collective bargaining agreements and labor relations policy in an effective, appropriate and timely manner, including handling grievances and disputes in a manner consistent with Agency policy. Apply appropriate judgment in attempting to resolve disputes before grievances are filed.

5. Fully utilize employees' skills in carrying out the mission of the Agency; provide developmental opportunities for employees at all levels which maximize employees' capabilities and contributies to the achievement of organizational goals.

RATING

☐ OUTSTANDING ☐ COMMENDABLE ☐ FULLY SUCCESSFUL ☐ MINIMALLY SATISFACTORY ☐ UNSATISFACTORY

NATIONAL LABOR RELATIONS BOARD

NARRATIVE APPRAISAL FOR CRITICAL ELEMENT 3.

NATIONAL LABOR RELATIONS BOARD

SENIOR EXECUTIVE PERFORMANCE APPRAISAL

CRITICAL ELEMENT RATING DEFINITIONS

OUTSTANDING
Performance not only exceeds the agreed-upon objectives, commitments and/or desired results required at the fully successful level, but results surpass expectations in quantity, quality or timeliness to such an extent as to result in exceptionally positive impact on the achievement of organizational goals; or executive overcame significant obstacles beyond the executive's control, such as insufficient resources, in achieving or exceeding desired results.

COMMENDABLE
Performance is between the levels described for Outstanding and Fully Successful.

FULLY SUCCESSFUL
Performance demonstrates substantial achievement of, or substantial progress toward, agreed upon objectives and commitments and/or desired results. Performance has a positive impact on the achievement of organizational goals.

MINIMALLY SATISFACTORY
Performance is between the levels described for Fully Successful and Unsatisfactory.

UNSATISFACTORY
Performance fails to demonstrate achievement of, or progress toward, agreed-upon objectives and commitments and/or desired results to such an extent that results in demonstrable, negative consequences for the organization.

LINKAGE FOR SUMMARY RATINGS

OUTSTANDING	OUTSTANDING in Critical Element 1 and one of the other critical elements; at least COMMENDABLE in the remaining element.
COMMENDABLE	At least COMMENDABLE in Critical Element 1 and one of the other critical elements and at least FULLY SUCCESSFUL in the remaining critical element.
FULLY SUCCESSFUL	At least FULLY SUCCESSFUL in Critical Element 1 and no less than FULLY SUCCESSFUL in Critical Elements 2 and 3; except that no more than one MINIMALLY SATISFACTORY in Critical Element 2 or 3 and at least one rating above FULLY SUCCESSFUL will receive a FULLY SUCCESSFUL summary rating.
MINIMALLY SATISFACTORY	MINIMALLY SATISFACTORY in Critical Element 1, or MINIMALLY SATISFACTORY in Critical Elements 2 and 3, UNSATISFACTORY in none; or MINIMALLY SATISFACTORY in Critical Element 1, or MINIMALLY SATISFACTORY in Critical Element 2 or 3 with no rating above FULLY SATISFACTORY in remaining Critical Elements and UNSATISFACTORY in none.
UNSATISFACTORY	UNSATISFACTORY in any Critical Element.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NEW YORK UNIVERSITY,	:	
Employer,	:	
-and-	:	
		Case No. 2-RC-23481
GSOC/UAW,	:	
Petitioner.	:	
	:	

MOTION FOR RECUSAL

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New York University ("NYU") respectfully submits this motion requesting that Chairman Liebman recuse herself from participation in the Board's consideration of this case. Petitioner has submitted a study through an expert witness, Dr. Paula Voos, as a key piece of evidence in support of its Request for Review, which asks the Board to reconsider and reverse its decision in *Brown University,* 342 NLRB 483 (2004). Dr. Voos testified that Chairman Liebman suggested the idea for the study to her as something that would be useful to bolster Chairman Liebman's dissent in *Brown.* Under these circumstances, Chairman Liebman's "impartiality might reasonably be questioned" and recusal is therefore required under the standards set forth in 28 U.S.C. § 455(a).

1. Background

The petition in this case seeks to represent graduate students at NYU who are appointed to teaching, research and other positions. On June 7, 2010, the Regional Director dismissed the petition, concluding "that it seeks an election among graduate assistants that are clearly not employees under *Brown.*" (BX 1, June 7, 2010 Order at 4). Petitioner filed a Request for Review of the Order dismissing the petition on June 21, 2010, and on October 25, 2010, the Board granted the Petitioner's Request for Review, by a 2-1 vote, stating its belief that there were "compelling reasons for reconsideration of the decision in *Brown University,*" 356 NLRB No. 7 at 2 (Oct. 25, 2010). In reaching this conclusion, the Board noted that Petitioner had offered to present "expert testimony demonstrating that, even giving weight to the considerations relied on by the Board in *Brown University*, the students are appropriately classified as employees under the Act." *Id.* at 1. Accordingly, the Board

majority reinstated the Petition and remanded the case to the Regional Director for a hearing and issuance of a decision.

The hearing ordered by the Board was held from November 18, 2010 to March 31, 2011, and the Regional Director issued a decision on June 7, 2011, finding *Brown* applicable and dismissing the Petition. On June 30, 2011, Petitioner submitted its Request for Review of this dismissal. In support of its argument that *Brown* should be reconsidered and reversed, Petitioner relies significantly on Dr. Voos's testimony concerning a study evaluating the effects of graduate student unionization on student-university relationships conducted by Dr. Voos and Dr. Adrienne Eaton of Rutgers University. (*See* Pet. Request for Review at 4-7, 9-11) The study is offered by Petitioner as evidence that "directly contradicts [the *Brown* majority's] assumptions about the negative effects of collective bargaining by graduate student employees." (Pet. Request For Review at 30) As of July 14, 2011, Petitioner's Request for Review and all related submissions are before the Board for consideration. [1]

2. Dr. Voos's Testimony Regarding Her Conversation With Chairman Liebman

In the course of her testimony, Dr. Voos acknowledged that she had discussions with Chairman Liebman concerning *Brown* and Chaiman Liebman's view that academic research on the effect of graduate student unionization would be useful to the Board. Specifically, Dr. Voos testified that she "believed that Brown was [decided] on the wrong basis" and that she discussed the *Brown* decision with Chairman Liebman, in a general way. (Tr. 75, 103)[2] She further testified that a couple of years ago during a cocktail reception or similar event at a

[1] On June 30, 2011, NYU submitted a Conditional Request for Review taking issue with certain of the Acting Regional Director's findings should the Board grant Petitioner's Request for Review.

[2] The complete transcript of Dr. Voos's testimony is attached as Exhibit A.

meeting of the Labor and Employment Relations Association (LERA), Chairman Liebman suggested that she conduct research on the impact of unionization on faculty/student relationships or academic freedom in order to bolster then-Member Liebman's dissent in *Brown*. (Tr. 103-05) Dr. Voos described the conversations with Chairman Liebman in her testimony:

> Q: And have you ever discussed the issue of graduate student unionization or the NYU or Brown decisions with any current or former member of the National Labor Relations Board?....
>
> * * *
>
> Q: And so you might have casually discussed this issue with--
>
> A: Yes, yes, yes. I talk to people, sure.
>
> Q: With Wilma Liebman at some point in the past?
>
> A: Yeah, sure. Sure. In a general way.
>
> Q: Well, when you say in a general way, did you for example discuss her dissent in the Brown case?
>
> A: Not in detail. I think I knew about her dissent and said something to her about it in passing.
>
> Q: ***Did you and she ever discuss the idea of doing some academic research to bolster her dissent?***
>
> A: She has given presentations about academic research and how that could help Board decisions, and she has mentioned some things, ***yes***.
>
> Q: And what did she mention to you?
>
> A: She has mentioned this as an area that academics needs to do research in among other areas.

(Tr. 102-03) (Emphasis added) Dr. Voos went on to explain:

> Q: And other than hearing the number of suggestions from her, was there any more specific discussion with her directly with you or in a small group about researching this particular issue

of the impact of unionization on faculty/student relationships or academic freedom?

A: This was definitely one of the things that she felt would be a good matter for research.

(Tr. 105)[3] Dr. Voos testified that she and Dr. Eaton then discussed Chairman Liebman's suggestion and decided that they would commence the suggested research. (Tr. 105)

Dr. Voos's testimony also indicates a connection between Chairman Liebman's suggestion that she perform this research and Dr. Eaton contacting the UAW to let the union know of this research because they "thought that it would be of use to the NLRB."[4] (Tr. 72) She testified:

Q: At some point several years ago Wilma Liebman suggested to you and some group that research in this area would be useful to the Board.

A: Um-hum.

Q: That you and Professor Eaton understood to do this research. And then you communicated with the UAW to let them know that you had done this research and that they might be interested in it for purposes of this proceeding?

A: That is correct except I did not communicate with the UAW. Adrienne Eaton, at some conference, heard about this hearing and then communicated with the UAW about our study which had already been completed, data had been collected but not analyzed very much, so that they knew it was available. Because we thought that our results might be of use in this hearing.

(Tr. 107)

[3] Dr. Voos also testified that the she spoke with Chairman Liebman shortly before her testimony in this matter for about a half-hour when Chairman Liebman was at Rutgers University regarding another matter, but stated that she did not discuss her testimony relating to this case. (Tr. 101)

[4] Dr. Voos testified that she was not aware of what communications, if any, Chairman Liebman have had with Dr. Eaton regarding the proposed study.

3. Chairman Liebman Should Recuse Herself Pursuant to 28 U.S.C. § 455

Based on Dr. Voos's testimony, Member Liebman should recuse herself from any consideration of this case pursuant to the standards set forth in 28 U.S.C. § 455(a), as that section requires that "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." This provision "governs circumstances that constitute an appearance of partiality, even though actual partiality has not been shown." *Chase Manhattan Bank v. Affiliated FM Ins. Co.*, 343 F.3d 120, 127 (2d Cir. 2004). This is an objective standard -- that is whether a reasonable, objective observer who knows and understands all the facts would question the judge's impartiality. *See SEC v. Loving Spirit Found. Inc.*, 392 F.3d 486, 494 (D.C. Cir. 2004). A relationship with an expert witness, and especially a connection to evidence presented by that witness, would cause such an appearance of a lack of impartiality. *See Day v. United States of America, Veterans Administration Medical Center*, 1997 U.S. Dist. LEXIS 11777, 94-CV-46 (Aug. 5, 1997) (District court judge found recusal to be appropriate where she had an acquaintance with plaintiff's expert witness despite finding that she could preside over the case impartially.).

While this statute applies on its face only to federal judges, Chairman Liebman has acknowledged that these same standards apply to members of the Board. *Overnite Transp.* 329 NLRB 990, 999 (1999). Similarly, the same rationale of promoting confidence in the impartiality of the courts applies to the Board. As the Supreme Court has stated, "The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864-65 (1988).

Dr. Voos's testimony makes clear that the study at issue in this matter resulted from a suggestion that Chairman Liebman *made directly to her*, either individually or in a small group, regarding the kind of evidence needed to support her dissent in *Brown*.[5] (Tr. 104, 107) Dr. Voos's testimony that she and Dr. Eaton performed the study as a direct result of the suggestion made by Chairman Liebman creates, at a minimum, an appearance that Chairman Liebman may not be able to evaluate that study and its relevance to this case in an impartial manner. A reasonable person with knowledge of these facts would almost certainly question whether Chairman Liebman could fairly consider, in the course of deciding this case, the significance of a study that she solicited from an academic who she knew agreed with her position that *Brown* was wrongly decided.[6]

[5] To the extent it makes any difference in evaluating the necessity for recusal, any suggestion by Petitioner that Chairman Liebman's discussion of research on graduate student unionization simply was part of a formal presentation is belied by the plain meaning of Dr. Voos's testimony. Furthermore, any uncertainty in Dr. Voos's testimony about the precise circumstances or context of her conversations with Chairman Liebman is a result of Petitioner's objection to continued questioning by counsel for NYU about these conversations and Petitioner's failure to clarify the testimony of its own witness on re-direct examination. (Tr. 106-07)

[6] NYU communicated its concerns to Chairman Liebman in a letter dated July 20, 2011, and requested that she disclose any relevant communications she had with Dr. Voos, Dr. Eaton or other individuals directly or indirectly associated with the Voos/Eaton study, as well as any other information which she believed would be relevant in assessing whether her participation in the Board's consideration of this matter would be appropriate. (A copy of the letter, without the attached transcript, is attached as Exhibit B). To date, however, Chairman Liebman has not responded to NYU's request.

Conclusion

The testimony by Dr. Voos as to her communications with Chairman Liebman about the study relied on by Petitioner creates at least an appearance of partiality requiring Chairman Liebman to recuse herself from any consideration of this matter.

New York, New York
August 11, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that copies of the within Motion for Recusal in Case No. 2-RC-23481 has been served by electronic mail on this date on:

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Dated: August 11, 2011
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/s/Brian Rauch
Brian S. Rauch

J & R Flooring, Inc. d/b/a J. Picini Flooring[1] ***and*** **Freeman's Carpet Service, Inc. and FCS Flooring, Inc.**

Flooring Solutions of Nevada, Inc., d/b/a FSI *and* International Union of Painters and Allied Trades, District Council 15. Cases 28-CA-21229, 28-CA-21230, 28-CA-21231, and 28-CA-21233

October 22, 2010

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER, PEARCE, AND HAYES

I. INTRODUCTION

Section 10(c) of the National Labor Relations Act authorizes the Board to issue an order requiring a party who has engaged in an unfair labor practice to "take such affirmative action . . . as will effectuate the policies of th[e] Act." The remedial power vested in the Board by this provision is a "broad, discretionary one," *NLRB v. J. H. Rutter-Rex Mfg.*, 396 U.S. 258, 262–263 (1969) (internal quotation mark and citation omitted), and has long been understood to include the authority to order respondents to post notices to employees concerning the violations found by the Board, the remedies ordered, and the underlying rights of the employees. See *NLRB v. Express Publishing Co.*, 312 U.S. 426, 438 (1941). In exercising its discretion, the Board, like all administrative agencies, has a duty to adapt its rules and policies to the demands of changing circumstances. See, e.g., *NLRB v. J. Weingarten*, 420 U.S. 251, 266 (1975) ("The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board").

In this case, we consider whether employers and unions that are found to have violated the Act should be required to distribute remedial notices electronically, such as by email and/or posting on an intranet or the internet, in addition to the traditional posting of a paper notice on a bulletin board. We find that given the increasing prevalence of electronic communications at and away from the workplace, respondents in Board cases should be required to distribute remedial notices electronically when that is a customary means of communicating with employees or members. We modify the Board's current notice-posting language, which requires posting in all places where notices to employees or members are customarily posted, to expressly encompass electronic communication formats.

II. BACKGROUND

On May 14, 2010, the Board issued a notice and invitation to file briefs to the parties and interested amici in this and two other cases, *Stevens Creek Chrysler Jeep Dodge, Inc.*, Case 20–CA–33367 et al., and *Arkema, Inc.*, Case 16–RD–1583. The notice requested that the parties address whether Board ordered remedial notices should be posted electronically and, if so, what legal standard should apply and at what stage of the proceeding any necessary factual showing should be required.[2] Briefs in response to the Board's invitation were filed by the General Counsel; Respondent FSI, Inc.; Respondent Arkema, Inc.; the Charging Parties in *Stevens Creek Chrysler Jeep Dodge* (Machinists District Lodge 190, Machinists Automotive Local 1101, and International Association of Machinists and Aerospace Workers, AFL–CIO) together with the Charging Party in the instant case, International Union of Painters and Allied Trades, District Council 15; and amici AFL–CIO, Service Employees International Union (SEIU), National Right to Work Foundation, Chamber of Commerce of the United States (joined by Respondent J & R Flooring, Inc.), Bodman LLP, and Texas Association of Business.[3]

III. POSITION OF THE PARTIES AND AMICI

The General Counsel, the Charging Parties, and amici AFL–CIO and SEIU make the following arguments. In light of the increasing reliance on electronic communication in the workplace, the Board should amend its standard notice posting provision, which requires posting of remedial notices in all places where notices to employees

[1] On January 4, 2008, the Board granted the Charging Party Union's motion to sever Case 28–CA–21226, involving Respondent *Custom Floors, Inc.*, from this proceeding and to remand it to the Regional Director to dismiss the complaint in that case pursuant to a non-Board settlement. The caption has been modified accordingly.

[2] On September 5, 2007, Administrative Law Judge Lana H. Parke issued her decision in the above entitled proceeding. The Charging Party filed exceptions and a supporting brief, and the Respondents filed answering briefs. The Charging Party excepted to, inter alia, the judge's failure to order electronic posting of a remedial notice to employees. On August 26, 2010, the Board issued a decision and order affirming in part and reversing in part the judge's findings, and severing the electronic notice posting issue for decision at a later date. 355 NLRB No. 123 (2010).

[3] By order dated June 17, 2010, the Board invited responsive briefing from the parties. Respondent Arkema and Charging Parties Machinists District Lodge 190, Machinists Automotive Local 1101, International Association of Machinists and Aerospace Workers, AFL–CIO, and International Union of Painters and Allied Trades, District Council 15, filed responsive briefs.

Amicus Texas Business Association has requested oral argument. The request is denied as the record and briefs adequately present the issues and the positions of the parties and amici.

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or members are customarily posted, to make clear that it encompasses posting through email and other electronic formats, where the respondent customarily communicates with employees or members by those means. Any issues as to whether electronic notice and which type of electronic notice is appropriate in a particular case should be resolved in compliance proceedings, in the same manner that issues regarding the number or location of paper postings are currently resolved. Further, in determining whether electronic posting is appropriate, the relevant inquiry should be whether the respondent customarily disseminates information to employees or members through electronic means.[4]

Respondent FSI, Respondent Arkema, and amici Chamber of Commerce (joined by Respondent J & R Flooring), Texas Business Association, and Bodman LLP, argue that electronic posting of remedial notices is an extraordinary remedy that should be compelled only in cases involving egregious unfair labor practices or recidivist violators of the Act. They further argue that the General Counsel should bear the burden of establishing that electronic posting is warranted, and that any necessary factual showing should be made during the unfair labor practice hearing. The Respondents and supporting amici also contend that any change in the Board's standard notice posting remedy should be applied equally to respondent unions and respondent employers.[5]

IV. ANALYSIS

A.

The requirement that respondents post a notice informing employees of their rights under the Act, the violations found by the Board, the respondent's undertaking to cease and desist from such unlawful conduct in the future, and the affirmative action to be taken by the respondent to redress the violations has been an essential element of the Board's remedies for unfair labor practices since the earliest cases under the Act. See, e.g., *Pennsylvania Greyhound Lines, Inc*, 1 NLRB 1, 52 (1935), enf. denied in relevant part 91 F.2d 178 (3d Cir. 1937), revd., 303 U.S. 261 (1938). Remedial notices serve a number of important functions in advancing the Board's mission of enforcing employee rights and preventing unfair labor practices. They help to counteract the effect of unfair labor practices on employees by informing them of their rights under the Act and the Board's role in protecting the free exercise of those rights. They inform employees of steps to be taken by the respondent to remedy its violations of the Act and provide assurances that future violations will not occur. See generally *Teamsters Local 115 v. NLRB*, 640 F.2d 392, 399–401 (D.C. Cir. 1981). See also *NLRB v. Falk Corp.*, 308 U.S. 453, 462 (1940) (purpose of remedial notice is to convey to employees information about their rights and the employer's obligation not to interfere with those rights); *Chet Monez Ford*, 241 NLRB 349, 351 (1979), enfd. mem. 624 F.2d 193 (9th Cir. 1980) (notices are "a means of dispelling and dissipating the unwholesome effects of a respondent's unfair labor practices"). They also serve to deter future violations. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 152 (2002) (the requirement to "conspicuously post a notice to employees setting forth their rights under the NLRA and detailing its prior unfair practices" is a "significant sanction"). In order to achieve these remedial goals, notices must be adequately communicated to the employees or members affected by the unfair labor practices found. The Board's standard notice posting provision therefore requires respondents to post a remedial notice for a period of 60 days "in conspicuous places including all places where notices to employees [members] are customarily posted."[6] This provision has traditionally been applied to require posting of paper copies at fixed locations, usually on bulletin boards as well as at time clocks, department entrances, meeting hall entrances, and dues payment windows. See NLRB Casehandling Manual, Part III (Compliance Proceedings), Section 10518.2.

The ubiquity of paper notices and wall mounted bulletin boards, however, has gone the way of the telephone message pad and the interoffice envelope. While these traditional means of communication remain in use, email, postings on internal and external websites, and other electronic communication tools are overtaking, if

[4] Amicus AFL–CIO argues that the Board should go further and require that notices routinely be distributed to individual employees, read aloud, and translated into languages other than English at the request of a charging party or the General Counsel. These matters are beyond the scope of the issues on which briefing was invited. Accordingly, we do not address them in this case.

[5] Respondent J & R Flooring also argues that the Board should disregard the Union's request for electronic posting in this case because (1) the Union presented no argument in support of its exception, and (2) the Union waived its request for electronic posting by raising it for the first time in its exceptions to the Board. We find no merit in these arguments. It is well settled that the Board has the authority to consider remedial issues sua sponte. *Sacramento Recycling & Transfer Station*, 345 NLRB 564, 564 fn. 3 (2005) (citing *Indian Hills Care Center*, 321 NLRB 144, 144 fn. 3 (1996)).

Amicus National Right to Work Foundation takes no position on whether the Board should require electronic posting. However, it agrees with the Respondents and supporting amici that any change in the Board's policy concerning the posting of remedial notices should apply equally to respondent unions and employers.

[6] Where the respondent is a union, the Board requires posting "where notices to employees *and members* are customarily posted." See *Operating Engineers Local 150*, 352 NLRB 360, 361 (2008) (emphasis added).

they have not already overtaken, bulletin boards as the primary means of communicating a uniform message to employees and union members. Electronic communications are now the norm in many workplaces,[7] and it is reasonable to expect that the number of employers communicating with their employees through electronic methods will continue to increase.[8] Indeed, the Board and most other government agencies routinely and sometimes exclusively rely on electronic posting or email to communicate information to their employees. In short, "[t]oday's workplace is becoming increasingly electronic."[9]

Given the increasing reliance on electronic communication and the attendant decrease in the prominence of paper notices and physical bulletin boards, the continuing efficacy of the Board's remedial notice is in jeopardy. Notices posted on traditional bulletin boards may be inadequate to reach employees and members who are accustomed to receiving important information from their employer or union electronically and are not accustomed to looking for such information on a traditional bulletin board. Furthermore, the growth of telecommuting and the decentralization of workspaces permitted by new technologies mean that an increasing number of employees will never see a paper notice posted at an employer's facility.[10] As a matter of general policy, it follows that, in addition to physical posting, notices should be posted electronically, on a respondent's intranet or internet site, if the respondent customarily uses such electronic posting to communicate with its employees or members. Similarly, notices should be distributed by email if the respondent customarily uses email to communicate with its employees or members, and by any other electronic means of communication so used by the respondent.[11]

Requiring electronic posting in these circumstances will improve the administration of the Act by ensuring that remedial notices are adequately communicated to the employees or members affected by the unfair labor practices. The fact that a respondent customarily uses electronic means of communication with its employees or members reflects a judgment concerning the relative efficacy of the available alternatives to communicate with the relevant audience. The Board's remedial notices are sufficiently important to be communicated in the manner deemed appropriate by the respondent for its own communications. A respondent's customary use of an electronic means of communication also demonstrates that use of the same means for communication of the Board's notice does not entail an unreasonable burden for the respondent.

We believe that the Board's current notice posting language, which requires posting in "conspicuous" places, including *all* places where notices to employees or members are customarily posted, is sufficiently broad to encompass new communication formats, including electronic distribution of remedial notices by email and/or posting on an intranet or the internet if a respondent customarily communicates with its employees or members by any of those means.[12] Nevertheless, to obviate any possible uncertainty about the meaning of that language, we shall modify the provision in pertinent part to add the following after the sentence ending "in all places where notices to employees are customarily posted."

> In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent customarily communicates with its employees [members] by such means.

We agree with the General Counsel, the Charging Parties, and supporting amici, that questions as to whether a particular type of electronic notice is appropriate should be resolved at the compliance stage. In determining, at the compliance stage, whether some form of electronic

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[7] For example, in a recent survey of nearly 900 employers in a wide variety of industries, email (83 percent of respondents) and intranet (75 percent) were the most frequently used communication methods for engaging employees and fostering productivity By contrast, only 28 percent of the survey respondents frequently used posters or flyers for these purposes *IABC Research Foundation & Buck Consultants, Employee Engagement Survey Results* (June 2010) (available at www *iabc* com/ *researchfoundation*/pdf/*IABCEmployeeEngagement*Report*2010*Final pdf) Similarly, a recent survey of professional employer organizations, which communicate on behalf of their clients with the clients' employees, showed that 75 4 percent of the respondents used either entirely electronic distribution of human resources and benefits information or electronic distribution at least half of the time Aon Consulting, *2010 PEO Survey Communicating with Worksite Employees*, at 4 (available at www.*aon* com/attachments/*2010_PEO_Survey*_Final pdf)

[8] See *Human Resources: Most Employers Use Intranets to Deliver HR Services, Watson Wyatt Study Finds*, Daily Labor Report No 42, at A-5 (March 2, 2000) The Aon Consulting survey of professional employer organizations reported that 63 8 percent of the respondents planned to eliminate paper based communications at some time within the next five years. *2010 PEO Survey*, supra at 6

[9] Martin H Malin & Henry H Perritt, Jr , *The National Labor Relations Act in Cyberspace: Union Organizing in Electronic Workplaces*, 49 U Kan L Rev 1, 3 (2000)

[10] See id at 3 & fn 13 ("A growing number of employees telecommute or otherwise report electronically, instead of reporting physically to a fixed location ")

[11] We agree with Respondents, supporting amici, and amicus National Right to Work Foundation that a policy concerning communication of remedial notices should apply equally to union and employer respondents The policy we announce today, by its terms, applies to all respondents, employer and union, without differentiation

[12] Cf *Bryant & Stratton Business Institute*, 327 NLRB 1135, 1135 fn 3 (1999) (finding electronic records to be encompassed by the Board's traditional records preservation language), *Ferguson Electric Co*, 335 NLRB 142, 142 fn 3 (2001) (same)

posting is warranted, the relevant inquiry shall be whether the respondent employer customarily disseminates information to its employees via email and/or electronic posting. If the respondent is a union, the inquiry shall be whether the respondent customarily disseminates information to its members by email and/or electronic posting.

Addressing at the compliance stage whether a respondent customarily communicates with its employees or members electronically will permit respondents to present evidence about any peculiarities in their email, intranet, internet, or other electronic communication systems that would affect their ability to post remedial notices by those means. It is also consistent with the Board's current practice of resolving at the compliance stage issues regarding the location and number of paper postings. See NLRB Casehandling Manual, Part III (Compliance Proceedings), Section 10518.2. Accordingly, we hold that questions concerning whether a respondent customarily uses a particular electronic method in communicating with employees or members, whether electronic notice would be unduly burdensome, and other matters bearing on whether electronic notice is appropriate in a particular case, may be resolved at the compliance stage.[13] *International Business Machines Corp.*, 339 NLRB 966 (2003), and *Nordstrom, Inc.*, 347 NLRB 294 (2006), are overruled to the extent they are inconsistent with this decision.

We adopt this approach today because we believe it is vital to preserving the efficacy of the Board's remedial notices as the use of electronic communications technology in the workplace and elsewhere proliferates. This approach constitutes an appropriate balancing of the parties' legitimate interests in light of technological change, and enables the Board to continue to protect and effectively enforce employees' rights under the Act. For the Board to ignore the revolution in communications technology that has reshaped our economy and society would be to abdicate our responsibility to "adapt the Act to changing patterns of industrial life."

B.

In reaching our decision, we have given careful consideration to the arguments of the parties and amici curiae. The Respondents and supporting amici—joined by our dissenting colleague—argue that electronic posting is an extraordinary remedy that should be compelled only in cases involving egregious unfair labor practices or recidivist violators of the Act. We find no merit in these arguments. Under our decision today, only respondents that customarily communicate with employees or members by electronic means will be required to post remedial notices electronically. Accordingly, our decision does not impose extraordinary or onerous burdens on respondents. Indeed, respondents who customarily communicate with employees or members electronically have chosen to do so because it is the most efficient and cost effective way to disseminate important information.[14]

Cases cited by the Respondents and supporting amici are not to the contrary. They hold that direct distribution of notices to individual employees by traditional mail and companywide distribution are extraordinary remedies.[15] We are not persuaded, however, that electronic distribution is equivalent to traditional mail, companywide distribution, or other extraordinary notice remedies. By definition, in a company or union for which some form of electronic communication is customary, communication of a notice by that electronic means would be customary, not extraordinary. Moreover, distributing a notice electronically more closely resembles posting a notice on a paper bulletin board than traditional mail or companywide distribution. Most electronic communication systems will permit respondents to post or upload a single file containing the notice, similar to posting a single hard copy on a bulletin board, and most intranet and internet systems used for internal organizational communication will accommodate access limitations for user groups defined by the organization. Similarly, most email systems will permit respondents to send a single message to the employees or members affected by the unfair labor practices found, and to limit the scope of distribution to that group of individuals. We emphasize that it is not our intention to broaden the scope of the standard notice posting remedy. Rather, electronic no-

[13] See *Endicott Interconnect Technologies, Inc.*, 345 NLRB 448, 448 fn 2 (2005), enf denied 453 F 3d 532 (D C Cir 2006) Parties may also resolve the issue at the merits stage

[14] The Respondents and supporting amici also argue that it should remain the General Counsel's burden of proof to establish the propriety of such a remedy in each case As explained above, the burden of establishing whether electronic notice of any particular type should or should not be required appropriately rests with the respondent because of its knowledge of its own communication practices and systems and its possession of the evidence concerning those facts

[15] See, e g , *First Legal Support Services, LLC*, 342 NLRB 350, 350 fn 6 (2002) (special notice remedies, such as reading or mailing the notice to employees, are appropriate only in extraordinary circumstances where traditional posting is insufficient to dissipate the effects of the unfair labor practices found), *Carbonex Coal*, 262 NLRB 1306, 1306 (1982) (same), *Control Services, Inc* , 314 NLRB 421, 421–422 (1994) (companywide notice posting is warranted in extraordinary circumstances, such as where the unfair labor practices were committed on a companywide basis), *Beverly Health & Rehabilitation Services*, 339 NLRB 1243, 1234–1244 (2003) (same), *Fieldcrest Cannon, Inc* , 318 NLRB 470, 473 (1995) (same), enfd in relevant part 97 F 3d 65 (4th Cir 1996)

tices will have the same scope as notices posted by traditional means; that is, distribution will be limited, to the extent practicable, to the location(s) where the unfair labor practices occurred.

Respondent Arkema and amicus Texas Association of Business contend that, as a practical matter, it will be impossible to limit the scope of electronic notices to the affected facilities or locations, because of the ease with which such notices can be forwarded and disseminated. They further contend that such notices can be tampered with and altered as a tool to disrupt or defame respondents. Along the same lines, our dissenting colleague points out that respondents are required to sign remedial notices, and he cautions that respondents will "lose[] dominion" over such notices (and their signature) if they are posted electronically.

In reality, however, respondents have never had dominion over Board-ordered remedial notices. Remedial notices in Board proceedings are matters of public record. Hard copies, albeit unsigned, have long been available through the Board's bound volumes. Electronic copies, also unsigned, have been available to the public since the inception of the internet through legal search engines and more recently the Board's website. Signed copies, moreover, are routinely provided to charging parties upon request. See NLRB Casehandling Manual, Part III (Compliance Proceedings), Section 10518.4. Notices bearing the respondent's signature could easily be scanned, altered, forwarded, or distributed by charging parties. Yet, despite the fact that remedial notices have long been in the public domain, respondents and supporting amici have cited no examples of improper use or dissemination. We see no reason to speculate that such improper use or dissemination will increase as a result of electronic posting. We will not, however, require a facsimile signature for notices posted or distributed by electronic means; an indication that the notice has been duly signed, such as "s/" and the name of the signing individual, will suffice for this purpose.

The Charging Parties contend that the Board should require respondent employers to allow employees to read electronic notices on paid work time. They also urge the Board to expressly forbid respondents from monitoring which employees open and read electronic notices and from taking adverse action against employees who forward, print, or download notices. The Charging Parties additionally urge the Board to require posting via email at least once per month during the posting period and to require posting for a period equal to the number of days that have elapsed from the first violation to the date of notice posting. We decline to adopt such rules at this time. With respect to concerns that employers may prohibit employees from reading a remedial notice on paid work time, monitor which employees open and read notices, and/or take adverse action against employees who forward, print, or download notices, we caution that such conduct may violate Section 8(a)(1) (or Section 8(b)(1)(A) if the respondent is a union) if it tends to interfere with the exercise of Section 7 rights.

C.

The Board's practice is to apply new policies and standards retroactively "to all pending cases in whatever stage," *SNE Enterprises, Inc.*, 344 NLRB 673, 673 (2005) (quoting *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006–1007 (1958)), unless application in a particular case would work a "manifest injustice." Id. In determining whether retroactive application of the remedial policy we announce today would be unjust, we consider "the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application." Id. Because this case involves a remedial policy, and not a substantive rule of conduct, reliance on preexisting law is not an issue. Indeed, it is difficult to conceive of anything that any party might have done differently if this policy had been in effect prior to the events that gave rise to this case. To the extent that any injustice might be viewed as arising from application of the policy in this case, it is far outweighed by the need for the policy in order to maintain the efficacy of the Board's notice remedy.

We will modify the Board's original order in this case in conformity with this decision.

ORDER

The Board's Order, reported at 355 NLRB No. 123 (2010), is modified as set forth below, and the Respondent, Flooring Solutions of Nevada, Inc., d/b/a FSI, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall take the actions specified in the Order as modified.

Substitute the following for paragraph 2(b).

"(b) Within 14 days after service by the Region, post at its Las Vegas, Nevada facility, copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 30, 2007."

Dated, Washington, D.C. October 22, 2010

Wilma B. Liebman,	Chairman
Craig Becker,	Member
Mark Gaston Pearce,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting.

I dissent from my colleagues' decision to expand the Board's traditional notice posting remedy to include electronic posting. By their decision today, my colleagues transform what has heretofore been an extraordinary remedy into a routine remedy. Further, they have done so without considering practical implementation problems presented by the tremendous variation in the types of electronic media involved. Electronic posting is not a direct analog of physical posting. There are significant practical differences between the two, only a few of which are described below.

Initially, I readily acknowledge that the use of electronic media to communicate with employees in the modern workplace is common. I also note that many Federal agencies require or permit employers to use electronic media when giving employees periodic notice of statutory rights. On the other hand, I note that neither the General Counsel nor the majority refers to any Federal agency or court that regularly require the use of electronic communications *as a remedial matter.*

At present, once a respondent posts remedial notices in the appropriate physical locations its posting compliance obligation is complete. Electronic posting, however, envisions a respondent being required to do more than this to effectuate compliance. Thus, a respondent would not only be required to "post" the notice on its intranet site, it presumably would face the additional obligation of communicating individually with employees via email to advise them of the posting on the intranet, or, in the alternative, of adding the posting as an attachment to an email. Aside from the merits of such individualized notifications and "invitations," such a requirement is clearly beyond the current physical posting requirement; and, shares much in common with what are now considered to be "special" or "enhanced" notice mailing remedies. Thus, electronic posting would arguably require routinely imposing what has been heretofore considered to be a special remedy.[1]

In addition, as a practical matter, a physical posting is designed to be viewed principally by employees at the location(s) where the unfair labor practices occurred. Thus, for example, a respondent that operates multiple sites is not typically required to post at sites other than where unfair practices took place. Indeed, this kind of posting is a "special" remedy, and reserved for use only in the instance of more egregious and pervasive unfair labor practices. Unless a respondent's intranet is capable of limiting informational access and notification to select sites (a capability unclear as a general proposition) electronic posting would entail a posting obligation far broader than current practice and much more in line with current special remedies. Limiting intranet access to the notice by way of a link sent to certain individuals and/or locations (if possible) creates an additional burden on a respondent's information technology personnel that goes far beyond what is required by the simple posting of a hard copy notice

Moreover, under current procedures, a respondent retains physical control over the posting which it has executed. That is simply not true once an executed copy of the document is electronically "posted." As a practical matter, the respondent loses dominion over such document which bears its signature. Once in cyberspace, the official Board notice is at much greater risk of being anonymously altered and broadly distributed to nonemployees, customers, stockholders, or competitors, or, in the case of union respondents to rival unions, and poten-

[1] The majority opinion equates the traditional notion of "where notices are customarily posted," with the notion of "how employers customarily communicate with employees." Those two things are not the same—if they were, reading the notice would be required in every case because the *most* customary means of communication is oral. However, under Board precedent a remedial notice reading requirement has been and continues to be a special remedy reserved for egregious unfair labor practices

tial members, perverting the remedial purposes of the Act, and, become punitive.

It is unclear whether electronic posting requirements would include posting on internet or social networking sites for respondents who routinely use such means of communication. If so, and that is what some amici have requested, that would be the equivalent of requiring a respondent to publish a notice in a newspaper, heretofore an extraordinary and extremely rare remedy.

Furthermore, electronic posting imposes these additional obligations and sanctions only on respondents that happen to use compliant electronic media to communicate with employees about work matters. A respondent employer without such systems would avoid these enhanced posting remedies simply by happenstance. In an extreme example, one respondent could remedy a single 8(a)(1) interrogation finding by posting a notice at its time clock, while another respondent would have to remedy the same violation by additionally posting the notice on a nationwide intranet, with accompanying email. Further, while we lack factual information on the point, it seems quite possible that fewer respondent unions than respondent employers use electronic means of communicating with their members and employees affected by union unfair labor practices. There may be instances where the ability to communicate electronically is relevant to remedial action, but such ability should not, as a general proposition, be a basis for the arbitrary imposition of more onerous posting obligations on one set of respondents as opposed to others.

Finally, in my view, the details of electronic posting should not be deferred to the compliance process for determination on a case-by-case basis. Doing so invites more litigation and will serve to widen the temporal gap between a merit determination and the commencement of remediation. Moreover, by failing to specify how the new remedial posting requirement will be implemented for any of the myriad and varied methods of electronic communication with employees, the majority unnecessarily complicates the relative tasks of the General Counsel and administrative law judges in defining what a particular respondent's remedial obligations should be.

In sum, for all the reasons discussed above, I would not broaden the Board's traditional notice posting remedy to include routine electronic posting. I note that I would not oppose amending the traditional hard copy notice to include a link to the Board's official website where employees could read not only the notice, but the decision itself, from any location.

Dated, Washington, D.C. October 22, 2010

Briane E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD

The Federal Register

The Daily Journal of the United States Government

Notice

Sunshine Act Meetings

A Notice by the **National Labor Relations Board** on 08/06/2010

Table of Contents

- TIME AND DATES:
- PLACE:
- STATUS:
- MATTERS TO BE CONSIDERED:
- CONTACT PERSON FOR MORE INFORMATION:

TIME AND DATES:

All meetings are held at 2:30 p.m.

Tuesday, August 3;

Thursday, August 12;

Wednesday, August 18;

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Wednesday, August 25;

Thursday, August 26;

Friday, August 27, 2010.

PLACE:

Board Agenda Room, No. 11820,1099 14th St., NW., Washington, DC 20570.

STATUS:

Closed.

MATTERS TO BE CONSIDERED:

Pursuant to § 102.139(a) of the Board's Rules and Regulations, the Board or a panel thereof will consider "the issuance of a subpoena, the Board's participation in a civil action or proceeding or an arbitration, or the initiation, conduct, or disposition * * * of particular representation or unfair labor practice proceedings under section 8, 9, or 10 of the [National Labor Relations] Act, or any court proceedings collateral or ancillary thereto."See also 5 U.S.C. 552b(c)(10).

CONTACT PERSON FOR MORE INFORMATION:

Lester A. Heltzer, Executive Secretary, (202) 273-1067.

Dated: August 4, 2010.

Lester A. Heltzer,

Executive Secretary.

[FR Doc. 2010-19538 Filed 8-4-10; 11:15 am]

BILLING CODE 7545-01-P

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Notice

Sunshine Act Meetings

A Notice by the **National Labor Relations Board** on **09/09/2010**

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- Time and Dates:
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- STATUS:
- MATTERS TO BE CONSIDERED:

Time and Dates:

All meetings are held at 2:30 p.m.

Wednesday, September 1; Thursday, September 2; Tuesday, September 7; Wednesday, September 8; Thursday, September 9; Tuesday, September 14; Wednesday, September 15; Thursday, September 16; Tuesday, September 21; Wednesday, September 22; Thursday, September 23; Tuesday, September 28; Wednesday, September 29; Thursday, September 30, 2010.

PLACE:

Board Agenda Room, No. 11820,1099 14th St., NW., Washington, DC 20570.

STATUS:

Closed.

MATTERS TO BE CONSIDERED:

Pursuant to § 102.139(a) of the Board's Rules and Regulations, the Board or a panel thereof will consider "the issuance of a subpoena, the Board's participation in a civil action or proceeding or an arbitration, or the initiation, conduct, or disposition * * * of particular representation or unfair labor practice proceedings under section 8, 9, or 10 of the [National Labor Relations] Act, or any court proceedings collateral or ancillary thereto."See also **5 U.S.C. 552**b(c)(10).

Dated: September 3, 2010.

Lester A. Heltzer,

Executive Secretary.

[FR Doc. 2010-22605 Filed 9-7-10; 11:15 am]

BILLING CODE 7545-01-P

The Federal Register

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Sunshine Act Meetings

A Notice by the **National Labor Relations Board** on **10/07/2010**

Table of Contents

- Time and Dates:
- Place:
- Status:
- Matters to be Considered:
- Contact Person for More Information:

Time and Dates:

All meetings are held at 2:30 p.m.

Tuesday, October 5;

Wednesday, October 6;

Thursday, October 7;

Tuesday, October 12;

Wednesday, October 13;

Thursday, October 14;

Tuesday, October 19;

Wednesday, October 20;

Thursday, October 21;

Tuesday, October 26;

Wednesday, October 27;

Thursday, October 28.

Place:

Board Agenda Room, No. 11820,1099 14th St., NW.,Washington, DC 20570.

Status:

Closed.

Matters to be Considered:

Pursuant to § 102.139(a) of the Board's Rules and Regulations, the Board or a panel thereof will consider "the issuance of a subpoena, the Board's participation in a civil action or proceeding or an arbitration, or the initiation, conduct, or disposition * * * of particular representation or unfair labor practice proceedings under section 8, 9, or 10 of the [National Labor Relations] Act, or any court proceedings collateral or ancillary thereto."See also 5 U.S.C. 552b(c)(10).

Contact Person for More Information:

Lester A. Heltzer, Executive Secretary, (202) 273-1067.

Dated: October 4, 2010.

Lester A. Heltzer,

Executive Secretary.

[FR Doc. 2010-25389 Filed 10-5-10; 4:15 pm]

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Sunshine Act Meetings: November 2010

A Notice by the **National Labor Relations Board** on **11/04/2010**

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- Time and Dates
- PLACE:
- STATUS:
- MATTERS TO BE CONSIDERED:
- CONTACT PERSON FOR MORE INFORMATION:

Time and Dates

All meetings are held at 2:30 p.m.:

Monday, November 1;

Tuesday, November 9;

Wednesday, November 10;

Tuesday, November 16;

Wednesday, November 17;

Thursday, November 18;

Tuesday, November 23;

Tuesday, November 30.

PLACE:

Board Agenda Room, No. 11820, 1099 14th St., NW., Washington DC 20570.

STATUS:

Closed.

MATTERS TO BE CONSIDERED:

Pursuant to § 102.139(a) of the Board's Rules and Regulations, the Board or a panel thereof will consider "the issuance of a subpoena, the Board's participation in a civil action or proceeding or an arbitration, or the initiation, conduct, or disposition * * * of particular representation or unfair labor practice proceedings under section 8, 9, or 10 of the [National Labor Relations] Act, or any court proceedings collateral or ancillary thereto."See also 5 U.S.C. 552b(c)(10).

CONTACT PERSON FOR MORE INFORMATION:

Lester A. Heltzer, Executive Secretary, (202) 273-1067.

Dated: November 2, 2010.

Lester A. Heltzer,

Executive Secretary.

[FR Doc. 2010-28052 Filed 11-2-10; 4:15 pm]

BILLING CODE 7545-01-P

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Sunshine Act Meetings

A Notice by the **National Labor Relations Board** on **12/06/2010**

Table of Contents

- Time and Dates
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- Status:
- Matters To Be Considered:

Time and Dates

All meetings are held at 2:30 p.m.

Wednesday, December 1;

Thursday, December 2;

Tuesday, December 7;

Wednesday, December 8;

Thursday, December 9;

Tuesday, December 14;

Wednesday, December 15;

Thursday, December 16;

Tuesday, December 21;

Wednesday, December 22;

Thursday, December 23;

Tuesday, December 28;

Wednesday, December 29;

Thursday, December 30.

Place:

Board Agenda Room, No. 11820. 1099 14th St., NW., Washington DC 20570.

Status:

Closed.

Matters To Be Considered:

Pursuant to § 102.139(a) of the Board's Rules and Regulations, the Board or a panel thereof will consider "the issuance of a subpoena, the Board's participation in a civil action or proceeding or an arbitration, or the initiation, conduct, or disposition * * * of particular representation or unfair labor practice proceedings under section 8, 9, or 10 of the [National Labor Relations] Act, or any court proceedings collateral or ancillary thereto."See also 5 U.S.C. 552b(c)(10).

Dated: December 2, 2010.

Lester A. Heltzer,

Executive Secretary.

[FR Doc. 2010-30681 Filed 12-2-10; 4:15 pm]

BILLING CODE 7545-01-P

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Notice

Sunshine Act Meetings: January 2011

A Notice by the **National Labor Relations Board** on **01/07/2011**

Table of Contents

- TIME AND DATES:
- PLACE:
- STATUS:
- MATTERS TO BE CONSIDERED:
- CONTACT PERSON FOR MORE INFORMATION:

TIME AND DATES:

All meetings are held at 2:30 p.m.

Tuesday, January 4; Wednesday, January 5; Thursday, January 6; Friday, January 7; Tuesday, January 11; Wednesday, January 12; Thursday, January 13; Friday, January 14; Tuesday, January 18; Wednesday, January 19; Thursday, January 20; Friday, January 21; Tuesday, January 25; Wednesday, January 26; Thursday, January 27; Friday, January 28.

PLACE:

Board Agenda Room, No. 11820, 1099 14th St., NW., Washington DC 20570.

STATUS:

Closed.

MATTERS TO BE CONSIDERED:

Pursuant to § 102.139(a) of the Board's Rules and Regulations, the Board or a panel thereof will consider "the issuance of a subpoena, the Board's participation in a civil action or proceeding or an arbitration, or the initiation, conduct, or disposition * * * of particular representation or unfair labor practice proceedings under section 8, 9, or 10 of the [National Labor Relations] Act, or any court proceedings collateral or ancillary thereto." See also 5 U.S.C. 552b(c)(10).

CONTACT PERSON FOR MORE INFORMATION:

Lester A. Heltzer, Executive Secretary, (202) 273-1067.

Dated: January 5, 2011.

Lester A. Heltzer,

Executive Secretary.

[FR Doc. 2011-260 Filed 1-5-11; 4:15 pm]

BILLING CODE 7545-01-P

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Notice

Sunshine Act Meetings: February 2011

A Notice by the **National Labor Relations Board** on 02/15/2011

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- PLACE:
- STATUS:
- MATTERS TO BE CONSIDERED:
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TIME AND DATES:

All meetings are held at 2:30 p.m.

Tuesday, February 1;

Wednesday, February 2;

Thursday, February 3;

Tuesday, February 15;

Wednesday, February 16;

Thursday, February 17;

Tuesday, February 22;

Wednesday, February 23;

Thursday, February 24.

PLACE:

Board Agenda Room, No. 11820, 1099 14th St., NW., Washington, DC 20570.

STATUS:

Closed.

MATTERS TO BE CONSIDERED:

Pursuant to § 102.139(a) of the Board's Rules and Regulations, the Board or a panel thereof will consider "the issuance of a subpoena, the Board's participation in a civil action or proceeding or an arbitration, or the initiation, conduct, or disposition * * * of particular representation or unfair labor practice proceedings under section 8, 9, or 10 of the [National Labor Relations] Act, or any court proceedings collateral or ancillary thereto." See also 5 U.S.C. 552b(c)(10).

CONTACT PERSON FOR MORE INFORMATION:

Lester A. Heltzer, Executive Secretary, (202) 273-1067.

Dated: February 11, 2011.

Lester A. Heltzer,

Executive Secretary.

[FR Doc. 2011-3537 Filed 2-11-11; 4:15 pm]

BILLING CODE 7545-01-P

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Notice

Sunshine Act Meetings

A Notice by the **National Labor Relations Board** on 03/04/2011

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- TIME AND DATES:
- PLACE:
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TIME AND DATES:

All meetings are held at 2:30 p.m.

Tuesday, March 1;

Wednesday, March 2;

Thursday, March 3;

Tuesday, March 8;

Wednesday, March 9;

Thursday, March 10;

Tuesday, March 15;

Wednesday, March 16;

Thursday, March 17;

Tuesday, March 22;

Wednesday, March 23;

Thursday, March 24;

Tuesday, March 29;

Wednesday, March 30;

Thursday, March 31.

PLACE:

Board Agenda Room, No. 11820, 1099 14th St., NW., Washington, DC 20570.

Status: Closed.

Matters To Be Considered: Pursuant to § 102.139(a) of the Board's Rules and Regulations, the Board or a panel thereof will consider "the issuance of a subpoena, the Board's participation in a civil action or proceeding or an arbitration, or the initiation, conduct, or disposition * * * of particular representation or unfair labor practice proceedings under section 8, 9, or 10 of the [National Labor Relations] Act, or any court proceedings collateral or ancillary thereto."See also 5 U.S.C. 552b(c)(10).

CONTACT PERSON FOR MORE INFORMATION:

Henry S. Breiteneicher, Associate Executive Secretary, (202) 273-2917.

Dated: March 2, 2011.

Henry S. Breiteneicher,

Associate Executive Secretary.

[FR Doc. 2011-5083 Filed 3-2-11; 4:15 pm]

BILLING CODE 7545-01-P

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The Federal Register

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Notice

Sunshine Act Meetings: April 2011

A Notice by the **National Labor Relations Board** on 04/05/2011

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- TIME AND DATES:
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- MATTERS TO BE CONSIDERED:
- DATED:
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TIME AND DATES:

All meetings are held at 2:30 p.m.

Tuesday, April 5;

Wednesday, April 6;

Thursday, April 7;

Tuesday, April 12;

Wednesday, April 13;

Thursday, April 14;

Tuesday, April 19;

Wednesday, April 20;

Thursday, April 21;

Tuesday, April 26;

Wednesday, April 27;

Thursday, April 28;

PLACE:

Board Agenda Room, No. 11820, 1099 14th St., NW., Washington DC 20570.

STATUS:

Closed.

MATTERS TO BE CONSIDERED:

Pursuant to § 102.139(a) of the Board's Rules and Regulations, the Board or a panel thereof will consider "the issuance of a subpoena, the Board's participation in a civil action or proceeding or an arbitration, or the initiation, conduct, or disposition * * * of particular representation or unfair labor practice proceedings under section 8, 9, or 10 of the [National Labor Relations] Act, or any court proceedings collateral or ancillary thereto."See also 5 U.S.C. 552b(c)(10).

DATED:

April 1, 2011.

CONTACT PERSON FOR MORE INFORMATION:

Lester A. Heltzer, Executive Secretary, (202) 273-1067.

Lester A. Heltzer,

Executive Secretary.

[FR Doc. 2011-8221 Filed 4-1-11; 4:15 pm]

BILLING CODE 7545-01-P

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The Federal Register

The Daily Journal of the United States Government

Notice

Sunshine Act Meetings: May 2011

A Notice by the **National Labor Relations Board** on **05/04/2011**

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- TIME AND DATES:
- PLACE:
- STATUS:
- MATTERS TO BE CONSIDERED:
- CONTACT PERSON FOR MORE INFORMATION:

TIME AND DATES:

All meetings are held at 2:30 p.m.

Tuesday, May 3; Wednesday, May 4; Thursday, May 5; Tuesday, May 10; Wednesday, May 11;Thursday, May 12; Tuesday, May 17; Wednesday, May 18; Thursday, May 19; Tuesday, May 24; Wednesday, May 25; Thursday, May 26; Tuesday, May 31.

PLACE:

Board Agenda Room, No. 11820, 1099 14th St., NW., Washington DC 20570.

STATUS:

Closed.

MATTERS TO BE CONSIDERED:

Pursuant to § 102.139(a) of the Board's Rules and Regulations, the Board or a panel thereof will consider "the issuance of a subpoena, the Board's participation in a civil action or proceeding or an arbitration, or the initiation, conduct, or disposition * * * of particular representation or unfair labor practice proceedings under section 8, 9, or 10 of the [National Labor Relations] Act, or any court proceedings collateral or ancillary thereto." See also **5 U.S.C. 552**b(c)(10).

CONTACT PERSON FOR MORE INFORMATION:

Lester A. Heltzer, Executive Secretary, (202) 273-1067.

Dated: May 2, 2011.

Lester A. Heltzer,

Executive Secretary.

[FR Doc. 2011-10992 Filed 5-2-11; 4:15 pm]

BILLING CODE 7545-01-P

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

In the Matter of:	
TERENCE FLYNN	Case No. **OIG-I-468**

Investigative Interview of:

TERENCE FLYNN

was held at the **National Labor Relations Board, 1099 14th Street, N.W., 9th Floor, Washington, D.C.,** on **Thursday, April 26, 2012,** at **8:30 a.m.**

A P P E A R A N C E S

On behalf of the National Labor Relations Board:

DAVID P. BERRY, Inspector General
JENNIFER MATIS, Counsel to the Inspector General
National Labor Relations Board
1099 14th Street, N.W., Suite 9820
Washington, DC 20570

Email address .gov

On behalf of the Witness:

BARRY COBURN, Esq.
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Washington, DC 20036

Email address .com

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P R O C E E D I N G S

(Time Noted: 8:30 a.m.)

(Whereupon,

TERENCE FLYNN

was called as a witness and, having been duly sworn, was examined and testified on his oath.)

MR. BERRY: I am David Berry, the Inspector General for the National Labor Relations Board. Also present during this interview is Jennifer Matis, who is the Counsel to the Inspector General.

And, Mr. Coburn, do you want to introduce your law folk?

MR. COBURN: Oh, hey. Thank you so much. I am here with my colleague, Marc Eisenstein, who is a law clerk at our firm. If you need a spelling, just let me know.

MR. BERRY: And Barry Coburn, you are representing Terence Flynn?

MR. COBURN: Correct.

MR. BERRY: And you are Terence Flynn?

THE WITNESS: Yes.

MR. BERRY: Before we get started, I'd just like to go over a preliminary matter so there are no questions later. You are free to answer or not answer any of the questions I'm about to ask you. And to that extent, the statements you make will be voluntary, and they could be used against you in any future criminal proceeding or any disciplinary action or

both. So if you decide not to answer a question, I'd just ask that you state that you are not going to answer the question. And we will not make any adverse inferences from that decision.

Also, as I said, you are free to answer no questions. And if you decide to answer no questions, if you could just tell me, and I will stop asking questions. So are there any questions about that?

MR. COBURN: None whatsoever. Thank you so much.

MR. BERRY: Mr. Flynn, do you have any questions?

THE WITNESS: I do not.

MR. BERRY: Thank you. So do you desire to answer my questions at this time?

MR. COBURN: We're going to take it question by question. But for now --

MR. BERRY: No, but just as a general?

MR. COBURN: Yes.

MR. BERRY: Okay. Now, this is a second interview. And just very briefly what we have done is we have a number of exhibits. Now, I'm going to show you a number of them. I may not show you them in chronological order, but they will match up to the report later. So this allows us to not have duplicate exhibits creating a super huge report.

Also, I have taken the opportunity since we had some time to individually number them so there will less confusion

than last time.

EXAMINATION

Q. BY MR. BERRY: So do you recall when Peter Schaumber's term ended as a Board Member?

A. I believe it was August of 2010 or '11.

Q. And did you continue to have contact with him after his term ended?

A. I did.

Q. Okay. I'm going to show you what we've marked as Exhibit 1. Go ahead and take your time, look at it.

(Investigative Exhibit 1 marked for identification.)

MR. COBURN: So just for the record, this exhibit numbering system is going to be different from the one in the first session, right? You're going back to 1?

MR. BERRY: Yeah, we went back to 1. We did not start over. If it's easier for you, we can ask to differentiate between the two reports.

MR. COBURN: It's totally okay.

MR. BERRY: Okay.

Q. BY MR. BERRY: Okay, so there are actually two e-mails on that. I'd like to draw your attention to the one from October 1, 2010, at 8:51 a.m. That's from Mr. Schaumber to you. Do you see that e-mail?

A. I do.

Q. Do you recall receiving that e-mail?

A. I do not.
Q. Can you now having reviewed it, it says can you keep me posted on Board decisions I should be reading, do you know what Member Schaumber meant by that request?
A. I don't know exactly what was in Member Schaumber's mind, no.
Q. Okay. What did you take that request to mean?
A. I assumed that he would like to stay apprised of developments at the Board.
Q. Did you assume that that meant issued decisions or pending decisions or draft decisions?
A. I don't know what he meant.
Q. Well, what did you -- how did you interpret it?
A. I interpreted it that he continued to have a very strong interest in what was going on at the Board, and including Board decisions and which decisions he should be reading.
Q. I'll take that back.
(Investigative Exhibit 2 marked for identification.)
Q. BY MR. BERRY: I'm now showing you what we have marked as Exhibit 2. Please take a look at that.
A. Okay.
Q. Do you recall sending that e-mail to Mr. Schaumber?
A. I don't.
Q. And can you explain what that e-mail is?
MR. COBURN: Can we step out for a sec? We'll come

right back.

MR. BERRY: Okay.

(Off the record from 8:39 a.m. to 8:40 a.m.)

MR. BERRY: Just so you know, if you want to step outside, there is actually an unused office right next to here if you want to just shut the door and have a more private conversation than standing in the --

MR. COBURN: That is very much appreciated.

MR. BERRY: -- whatever you call that little space where everyone walks through.

MR. COBURN: Thanks a lot.

Q. BY MR. BERRY: Okay. So I believe my question is can you please explain what the e-mail is?

A. Well, it is the document that it appears to be, I guess. And it's an e-mail from Deputy Chief Counsel circulated to a number of different people including myself, attaching a BEH, which stands for Brian Hayes dissent, in a case called *Ritchie's*.

Q. And why did you send that to Mr. Schaumber?

A. Member Schaumber was --

Q. Actually, he wasn't a member at that time, correct?

A. Well, I mean I don't -- that appears to be accurate.

Q. Okay. Sorry.

A. Member Schaumber was involved, highly involved in the *Eliason* case, which involved this issue.

Q. But at that time he was not a member of the Board?

A. Well, I mean that's what the document appears to indicate.
Q. And you knew on September 30, 2010, that Member Schaumber was not a member of the Board?
MR. COBURN: So you're referring to what's underneath the October 1st e-mail?
MR. BERRY: Right.
Q. BY MR. BERRY: On September 30, 2010, did you know that Member Schaumber was not a member of the Board?
A. Yes.
Q. Okay. And this dissent, was this dissent an issued dissent or a pending dissent?
A. It looks to me like it was an issued dissent because Deputy Chief Counsel usually circulates these after they have gone out.
Q. Did you tell Member Hayes that you were sending the dissent to Mr. Schaumber?
A. Well, I mean I don't specifically recall this at all. So I don't recall talking to Brian about it, no. But I wouldn't necessarily tell Brian that I was sending Peter a copy of one of his dissents.
Q. Do you have access to the NexGen system or the JCMS system?
A. I don't work very often in that other to vote cases.
Q. I'm referring to back then, not what you do now.
A. Again, I didn't at that time, either, do much in JCMS

other than vote cases for Member Schaumber. And I have never voted a case for Member Hayes.

Q. Oh, so you're saying Member Schaumber would tell you what the vote was, and then you would enter his vote on his behalf or for him, sort of administratively?

A. Many of the Board Members don't work in JCMS because they just don't want to be -- they don't want to deal with the technology.

Q. I'm a little confused because this appears just to be a dissent. Why wouldn't you send Member Schaumber the actual case, the full case decision?

A. I suppose it is because that's what Deputy Chief sent me.

Q. Well, if it was an issued decision, wouldn't you also have access to the full decision?

A. I assume that I would.

MR. COBURN: If I can just note an objection here?

MR. BERRY: I would prefer you don't. You can note your objections at the end, but --

MR. COBURN: Yeah, but I think --

MR. BERRY: This really isn't a --

MR. COBURN: I think I've got to note it contemporaneously or it won't mean anything. You know I just, my objection is simply if there is an actual issued dissent that's been disseminated by an individual of the Board to somebody, there just can't be any impropriety

relating to that.

MR. BERRY: Okay. Well, we'll --

MR. COBURN: So I'm suggesting that it's not an appropriate subject for --

MR. BERRY: Well, I would suggest to you that it's not an issued dissent. It was a pending dissent.

MR. COBURN: Okay.

MR. BERRY: So actually the case was not issued until October 7, 2010, so it was a pending dissent.

Q. BY MR. BERRY: Do you have any authority to provide non-issued parts of Board decisions to outside parties or outside individuals?

MR. COBURN: You know that is question calling for a legal conclusion, and so I think we're not -- we're going to accept your invitation not to answer that question.

Q. BY MR. BERRY: Has anyone ever told you that you had permission to provide draft documents, draft decisions, portions of draft decisions to outside parties or individuals?

A. I've never had a discussion of that nature with anybody that I'm aware of.

Q. Are you aware of any other individuals at the Board who have released draft documents, draft decisions, or portions of draft decisions to outside individuals or parties?

A. I don't have any firsthand knowledge.

Q. Can you tell me what the purpose of circulating a dissent among the members is? Do you know?
A. I'm not sure I understand the question. There could be many purposes.
Q. Well, if a case is not issued yet and votes have not been taken, what is the primary purpose of circulating a draft dissent to the other Board Members?
A. There wouldn't be a dissent if the votes had not been taken.
Q. There would be a dissent in the sense that there would have been a preliminary sort of, I'm not sure what you guys call it, but during an agenda or some other meeting of the Board, there would be a discussion of the case. Board Members would sort of stay with -- they decide, the majority would draft a decision, and the non-majority member or members would draft a dissent. And then the various documents would be circulated. Am I basically summing that up correctly?
A. No.
Q. No? Okay, well, how would you sum it up?
A. Well, for one, the Board Members very often don't ever meet on a case to discuss it. Two, the votes are recorded well before any kind of dissent is or even a majority is drafted.
Q. Well, there's several votes, aren't there?

A. No, each member votes and usually votes only once.
Q. Well, aren't dissents circulated so that the dissenting member may be able to influence the majority decision or sort of frame the issues or, you know, isn't circulating the dissent part of the deliberative process?
A. There may be many reasons for preparing a dissent. I'm not sure what you're getting at.
Q. I guess what I'm getting at is sometimes a dissent is circulated and the majority members have a chance to read it. And that may affect how they, they frame their decision. And so the dissenting member has an opportunity to try to influence the majority decision by circulating the dissent.
A. Typically, a dissent is writing for a Court of Appeals.
Q. Don't dissents or decisions change after they have been circulated?
A. They may.
Q. So one member may be able to affect the decision by circulating their dissent and raising arguments that maybe the other members haven't considered, or they did consider but after they read the dissent they then alter the decision to meet certain concerns that are in the dissent.
MR. COBURN: Are you asking whether that could happen as a speculative matter?
Q. BY MR. BERRY: I'm not saying that it does. Has it happened?

A. I'm sure it has.
Q. So the circulation of the various drafts, the decisions and dissents, is part of the deliberative process?
MR. COBURN: That's a legal conclusion. And again we are going to accept your invitation not to answer that question. He just is not able to express a legal opinion about that.
MR. BERRY: Is that your answer, or is that your lawyer's answer? I'm a little confused.
MR. COBURN: Well, I mean I'm his counsel, so I'm just letting you know that, I mean when we commenced this interview, you kindly indicated that he had the option to answer or not answer questions.
MR. BERRY: He does.
MR. COBURN: So I'm just informing you he's not going to answer that one.
MR. BERRY: Okay. Typically, your right not to answer any questions is based upon the Fifth Amendment, on the grounds that you might incriminate yourself. But I assume that's not the grounds in this case.
MR. COBURN: It's not. We're just --
MR. BERRY: You're just declining to answer the question, but not on any particular grounds; is that right?
MR. COBURN: Well, we're just accepting the invitation you gave us at the beginning on the record. And so we're

just, since you were kind enough to say that he had a right not to answer a question, you know, he's just not going to answer that one.

MR. BERRY: Okay. Again, typically, that right is based on some privilege, spousal privilege or the privilege against self-incrimination, doctor-patient privilege. There are probably dozens of various privileges that one could assert.

Okay, I'm going to show you Investigative Exhibit 6.

(Investigative Exhibit 6 marked for identification.)

Q. BY MR. BERRY: Do you recall sending this e-mail to Mr. Schaumber?

A. I don't have a specific recollection of that, no.

Q. Can you explain what this e-mail is?

A. It appears to be an e-mail to Member Schaumber attaching a copy of Member Hayes' dissent in a case called *New York University*.

Q. And what is the case of *New York University*, if you recall?

A. I'm just reading the dissent that you have given me a copy of this morning. And it appears to be the case that involved a request for a Board review of a Regional Director's decision in connection with a petition, an election petition involving New York University.

Q. Okay. Now, was this an issued dissent or a pending dissent or a draft dissent?

A. I don't know.
Q. How would you -- do you know where this dissent came from, how you got a copy of it?
A. I do not.
Q. Was this circulated by -- I think you said Deputy Chief Counsel usually circulated them.
A. I don't know.
Q. Did you ask Member Hayes' permission to circulate this dissent to Mr. Schaumber?
A. I don't recall having that conversation with Member Hayes.
Q. Did Mr. Schaumber ask you for this dissent?
A. I don't recall that, either.
Q. Why would you have sent this to Mr. Schaumber?
MR. COBURN: Are you asking why did he or why --
Q. BY MR. BERRY: Why did you?
A. I don't, I don't have a specific recollection, as I said, of sending this to Member Schaumber. But I wouldn't, I wouldn't be shocked that I was keeping Member Schaumber informed of a Board decision.
Q. I'll take that back. Just so you know, this was not a Board decision. And what's the date that you circulated this to Member Schaumber or provided it to him?
A. Well, you're telling me that. I don't know that one way or the other.

Q. What's the date?
A. October 6, 2010.
Q. Okay. Would you like me to tell you the date that it was issued as a decision?
MR. COBURN: Yes. Thank you.
MR. BERRY: Oh, actually, I can show you something that I want to show you anyway. Actually, that doesn't have it. Just bear with me just for second.
MR. COBURN: Absolutely, no worries.
MR. BERRY: I know, but I was looking for something else. October 20, 2010.
MR. COBURN: Okay. Thank you.
(Investigative Exhibit 29 marked for identification.)
Q. BY MR. BERRY: I'm showing you Exhibit 29. Do you recall sending that e-mail?
MR. COBURN: Is there an exhibit number on this one, Dave?
MR. BERRY: 29. It's at the bottom.
MR. COBURN: Exhibit 29? Sorry. Thank you.
MR. BERRY: Sure.
THE WITNESS: I don't have a specific recollection again of this e-mail.
Q. BY MR. BERRY: And I'd just draw your attention to the third line from the bottom. It says a grant of review in NYU, the case Wilma [redacted] Deliberative

[redacted] Deliberative

[redacted]

A. You appear to have read that.

Q. Okay. Did you have a chance to read it?

A. Yes.

Q. So were you authorized to or did anyone tell you to tell Member Schaumber the position of Chairman Liebman at that time?

MR. COBURN: I object to that question because it assumes that he needed some sort of express authorization to do that.

MR. BERRY: I'm not assuming anything. I'm asking if he was authorized.

MR. COBURN: You mean authorized by a person or authorized by his general authority?

MR. BERRY: Authorized by a human being.

THE WITNESS: Member Liebman had been -- there was a motion, I believe there was a motion filed to recuse Member Liebman from this case because of her public comments at a speech at NYU which were widely publicized regarding her views on whether or not these individuals were graduate assistants. I think that was a matter of public record at the time. But --

Q. BY MR. BERRY: Well, I guess that's different from what's stated here, though. I mean it's stated --

A. Well, you're characterizing. You're characterizing what's stated there.
Q. Well, I mean I just read it as [redacted] Deliberative [redacted]
MR. COBURN: But what's the question, though?
Q. BY MR. BERRY: Did Chairman Liebman authorize you to state what her position was?
A. Well, that's my opinion of what her comments reflected.
Q. Okay.
A. Her public comments reflected, which was shared obviously by the people who filed the motion to recuse for among other reasons her invitation to a professor at NYU to write a brief in support of reversing that decision.
Q. And that brief was filed with the Board, the recusal?
A. I believe it was.
Q. Okay. Well, we'll find it. Got to be careful, the exhibits can get tricky. Okay, we're going to go back to pretty much being in chronological order now.
(Investigative Exhibit 11 marked for identification.)
Q. BY MR. BERRY: I'm showing you what we've marked as Exhibit 11.
A. Okay.
Q. Do you recall sending this e-mail to Mr. Schaumber?
A. Again, I don't have a specific recollection of sending this e-mail to Member Schaumber.

Q. And what does this e-mail do or what is the purpose of this e-mail?
A. Again, it appears to be an e-mail attaching a dissent by Member Hayes.
Q. And where did you get the copy of the dissent?
A. Again, I don't know. It may have been one that Deputy Chief circulated, as he did with others. I just don't know.
Q. Is there any indication on the e-mail that it was circulated to you?
MR. COBURN: On the e-mail that is Exhibit 11?
Q. BY MR. BERRY: Right.
A. No. I think the e-mail speaks for itself.
Q. Would that be no?
MR. COBURN: I think he is saying that you just can't tell because that, this e-mail is from him to Schaumber.
MR. BERRY: Right. There's nothing, okay.
Q. BY MR. BERRY: Can you take a look at that decision? What's the significance of that decision or actually that dissent?
MR. COBURN: Objection. I just think that question is too vague to be answered.
Q. BY MR. BERRY: Well, let me ask it this way. What did you mean by Brian's third party standard analysis?
A. I've just been given this this morning, and I'd have to read through the dissent to try and determine what I meant by

that.
Q. Do you want to take a minute?
A. Well, I don't know that a minute would be enough time, actually.
Q. Well, it's not very long.
A. Well, I mean I --
Q. Why don't you give it shot? And if you can't, you can't.
A. Well, the first sentence of the dissent says I would sustain the employer's objections and set aside the election based on third party threats made during the critical pre-election period. So apparently it refers to that.
Q. But the text says Brian's third party standard analysis, so is this --
MR. COBURN: You mean the text of the e-mail?
MR. BERRY: The text of the e-mail.
THE WITNESS: Yes, that's what it says.
Q. BY MR. BERRY: Okay. I guess there's a couple of ways to interpret that. Like this is a standard analysis that he will be using over and over again, or this is third party standard, and I'm just wondering whether this is a standard analysis that will be used in many cases or third party standard. I mean maybe you're not being clear enough, but I'm just wondering how the word standard --
MR. COBURN: You're asking him if he remembers what he

meant by that phrase?
Q. BY MR. BERRY: Right, yeah.
A. And I don't. But I mean reading the first sentence of the dissent that you've just given me this morning, it says that -- it says set aside the election based on third party threats. And there is a Board standard in election cases that deals with conduct of third parties, so it's an existing standard at the Board.
Q. Okay.
A. I don't know that that's what I meant necessarily, but that's what the first sentence says, and that's what I would infer from that first sentence.
Q. Okay. Well, you are the best one to infer something rather than me, if we're going to infer anything. Okay, did Member Schaumber or Mr. Schaumber ask for this dissent?
A. I don't recall.
Q. And did you ask Member Hayes' permission to send this dissent to Member Schaumber?
A. I don't recall having a conversation with Brian about that one way or the other.
Q. And just so you know, the e-mail, as you had a chance to look at it, is dated January 20th. I don't know if you noticed that. But again, just for your own information, the decision actually wasn't issued until March 1st.
Now, as the Chief Counsel, you keep up with what's going

on at the Board, right?

MR. COBURN: Kept up.

MR. BERRY: Correct?

MR. COBURN: It's a temporal objection, right, because he's not the Chief Counsel now.

Q. BY MR. BERRY: As a Chief Counsel, you kept up with what was going on at the Board?

A. I tried to.

Q. Okay. That was one of your jobs was to know where the cases were and what attorneys had cases.

A. Actually, that's typically the job of the Deputy Chief Counsel.

Q. Right. Well, what was your job if you're not keeping up with cases?

A. I was a political appointee. We served at the will of the Board Member as his chief political and legal advisor.

Q. Is that a confidential position?

MR. COBURN: Objection. That question is vague. You'd have to say confidential from whom.

Q. BY MR. BERRY: Is it typically considered a confidential position?

MR. COBURN: Same objection.

Q. BY MR. BERRY: Do you consider the information you get in that position to be confidential?

MR. COBURN: Here I have a question for you, if I may.

When you say confidential, are you talking about confidential in the sense of, you know, confidential with respect to not disseminating it to the general public, or are you using that term in the context of a lean professional responsibility or something like that?

MR. BERRY: Either, either is fine. And if you want to draw distinctions, you can, but I'm not doing it with -- I'm not using the term confidential in the term of national security information.

MR. COBURN: Are you able to say confidential from whom, because I'm just not sure how the term should be interpreted in the context of the question.

MR. BERRY: I'm just asking him what he considered the information.

MR. COBURN: Whether he thought it was confidential?

Q. BY MR. BERRY: Right. Who are you authorized to give information to outside of the Board?

A. What -- again, I don't understand the pending question, if you could repeat it.

Q. Well, the question is when you receive information, when you did receive information as a Chief Counsel, who were you authorized to release that information to?

A. Part of my, one of my responsibilities as Chief Counsel was to interact with, in our evaluations, to interact with the bar, with the public, with practitioners to keep them

apprised of the developments of the Board.
Q. Did the developments at the Board include what's in a pending decision?
MR. COBURN: I mean are you asking whether there is a rule that specifies that one way or the other.
MR. BERRY: Well, I think there is a rule. But I'm asking him what his understanding is.
THE WITNESS: Well, I don't know what rule you're referring to.
Q. BY MR. BERRY: It would be referring to the rule in the Staff Counsel Manual that says you're not allowed to --
A. I was -- let me just be clear about something. I was never a staff counsel.
Q. So those rules don't apply to you?
A. I was never --
MR. COBURN: That's it. That calls for a legal conclusion. And that's something I'm going to again accept your invitation that he not answer that question. It's simply the only ones I'm doing really so far are the ones that are calling for a legal conclusion. I mean that's just something, you know, lawyers can debate. But I don't think the witness should be asked to opine about it.
MR. BERRY: He's not a witness. He's a subject. That's different. Witnesses are witnesses. Subjects are subjects.
MR. COBURN: That would be even more so in the case of a

subject or somebody who might be considered --

MR. BERRY: Well, it is important to understand what his, what he believed at the time.

Q. BY MR. BERRY: Did you believe you were authorized to release draft documents?

MR. COBURN: Objection because the question presupposes --

MR. BERRY: You can just say objection, okay? You don't have to go into this. You are kind of interfering with my ability --

MR. COBURN: I don't mean to.

MR. BERRY: -- to ask questions. Well --

MR. COBURN: It just presupposes the notion that he needed some kind of specific authority.

Q. BY MR. BERRY: Did you believe you had the authority to release draft documents?

A. Mr. Berry, if your question relates to the Staff Counsel Manual, which you have referred to in various reports of yours, I was never given a copy of the staff counsel memorandum, and I don't recall ever having that been discussed with me at the time I started with the Board. I was never a staff counsel.

Q. I'm quite surprised by that answer because I recall being in your office and pointing to a copy of the Staff Counsel Manual that was right next to your desk, on the

shelf, in your Chief Counsel office.

MR. COBURN: But that's your testimony.

Q. BY MR. BERRY: Well, I'm just saying, I mean do you recall when I was in your office and --

A. I do not recall that. But that office was occupied by many Chief Counsels before me.

Q. So it could have been in your office, but you didn't know it was in your office?

A. That's entirely possible.

Q. So as a Chief Counsel, you're saying you are not bound by the rules in the Staff Counsel Manual?

MR. COBURN: That would be again a legal conclusion.

Q. BY MR. BERRY: Do you really believe you have the authority to release a draft document?

MR. COBURN: Objection. He answered that, Mr. Berry. And to ask him again about whether he really believes, that's just argumentative.

MR. BERRY: That's fine.

Q. BY MR. BERRY: Did you perform any counsel duties for Member Becker?

A. I was not on Member Becker's staff, no.

Q. Did you perform any counsel duties for Chairman Liebman?

A. I was not on Chairman Liebman's staff.

Q. Did you perform any counsel duties for Member Pearce?

A. I was not on Member Pearce's staff.

Q. Do you recall a case called *Albertsons Limited Liability Corporation*?
A. I do not specifically recall that.
Q. There was a draft decision by Member Becker that was circulated to a panel composed of Wilma Liebman and Member Pearce. What would be the purpose of you getting that draft decision if you're not on the panel, if your member is not on the panel?
MR. COBURN: That's speculation. That calls for speculation. I mean he would just have no way of knowing that.
Q. BY MR. BERRY: At times did you have access to draft decisions from panels that your member wasn't a panel of or wasn't a member of, I'm sorry?
A. Could you repeat the question?
Q. At times when you're in the Chief Counsel position, did you receive copies of draft decisions from panels that your member was not participating on?
A. That would not be the norm.
Q. My understanding, I'm not trying to trick you or anything, but my understanding is that once the decision is sort of completed and almost ready to issue, that the non-participating panel members can note off on it.
A. That's not a draft decision. That's a final decision.
Q. Well, it's draft in the sense it is not issued yet. I

mean I'm just, just to be clear, a non-issued decision is noted before the Board actually issues it.

A. Typically.

(Investigative Exhibit 15 marked for identification.)

Q. BY MR. BERRY: Okay. I'm going to show you Exhibit 15.

A. Okay.

Q. Okay. Can you look at the first e-mail? And there are two e-mails on the first page. I'd draw your attention to the one dated January 25, 2011, at 5:11. Give you an opportunity to read that.

A. I've read it.

Q. Okay. On the first line, it says circulated this draft, yesterday, to LBP panel. What does LBP mean?

A. Well, I don't know what Deputy Chief Counsel is specifically referring to, but it could be Liebman, Becker, and Pearce.

Q. What do you mean you don't know?

A. I mean I can't speak for what Deputy Chief Counsel intended in his e-mail.

Q. Well, what do you think it means?

MR. COBURN: That's calling for speculation, it seems to me.

MR. BERRY: Really?

MR. COBURN: Well --

MR. BERRY: In the general course of doing work at the NLRB, what would that mean to you?

MR. COBURN: I mean if there is some sort of a course of conduct or course of action that's responsive to that question, feel free to answer it.

THE WITNESS: It could be the Liebman, Becker, Pearce panel, as I said.

Q. BY MR. BERRY: Are panels usually referred to by the initials of the members?

A. They are sometimes referred to in that way.

Q. Now, is this an issued decision or a draft decision, the document that is attached to the e-mail?

A. I don't know.

Q. You don't know?

MR. COBURN: That's what he said.

MR. BERRY: You can answer the questions or you cannot answer the questions, but you must answer the questions truthfully if you are going to provide an answer.

MR. COBURN: Objection. That is argumentative. And that's just not fair, Mr. Berry. I mean you can accept his answer --

MR. BERRY: I'm telling you now that you can answer the questions or not answer the questions. But clearly this document indicates it is a draft.

MR. COBURN: But that doesn't -- I mean you're handing him an attachment that is attached to an e-mail. He's just telling you that he doesn't know looking at it.

Q. BY MR. BERRY: At the time that you looked -- at the time that you received the e-mail, did you understand that to be an issued document or a draft document?

MR. COBURN: He told you he doesn't know. He said I don't know. You have to -- you cannot, you know, shove another answer into his mouth.

MR. BERRY: I'm not trying to shove another answer.

MR. COBURN: You can disbelieve him. That's your right.

MR. BERRY: I'm giving him the opportunity to clarify, because I think, well --

MR. COBURN: But what was ambiguous about it? He said I don't know.

THE WITNESS: I don't recall the date the decision issued. You have been telling me the dates that these decisions issued if I don't recall.

Q. BY MR. BERRY: It doesn't matter what date the decision issued. The document, itself, states that it is a draft document and that the panel has not voted.

A. Well, I don't know that. I don't know that this is a document that was necessarily a draft or whether this as a document that was an issued decision. I mean you're just giving me this this morning.

MR. COBURN: The attachment does not state that. The e-mail states it.

THE WITNESS: It doesn't say one way or the other.

MR. BERRY: It says Becker circulated this draft yesterday.

MR. COBURN: That's what --

MR. BERRY: Because LBP panel, it came up in discussion on cases today with the deputies. Member Becker is proposing, in his words, to [redacted: Deliberative] [redacted: Deliberative] [redacted] I'm surmising that Member Becker is offering this view for the panel's consideration, not for the panel's vote or not that the panel voted on, voted for that statement. That would indicate that it is not issued, correct?

MR. COBURN: You're asking him to interpret the language of an e-mail that he didn't write.

Q. BY MR. BERRY: You sent this to Peter Schaumber almost four hours later after you received it.

A. Well --

MR. COBURN: So your question is, is that true?

Q. BY MR. BERRY: Is that true?

A. If I look at the document that you've given me, that appears to be -- was sent by [redacted: Deputy Chief Counsel] on 5:11 p.m., on Tuesday, January 25th. And then it appears that on Tuesday, January 25, 2011, at 8:44 p.m., it was sent to Member Schaumber.

Q. At that time, would you have understood this to be a

draft document or an issued decision?
A. I don't recall. I don't recall the exchange.
Q. Did Member Hayes have any involvement in that decision?
A. I don't recall.
Q. Did you have any involvement in that decision?
A. I don't recall that either.
Q. Please explain what role Peter Schaumber had in your nomination process.
A. I don't know.
Q. Did Member Schaumber contact any members of the Senate on your behalf?
A. I don't know.
Q. Did Member Schaumber talk to any staff of senators on your behalf?
A. I don't know.
Q. Do you think Member Schaumber was responsible for your nomination?
MR. COBURN: Objection. That calls for speculation.
MR. BERRY: Okay. Well, I'll show him something in a little bit, might help refresh his memory.
Q. BY MR. BERRY: But do you feel grateful to Member Schaumber for your nomination?
A. Member Schaumber and I worked together for seven years. And as a result of that, in my capacity as Chief Counsel to Member Schaumber, many people came to know and appreciate the

work that I did. And so I would say yes, indirectly, because Member Schaumber selected me for that position and frequently complimented my work, as did Chairman Liebman, that people came to know of my skills and abilities through that exposure. And so, yes, I would say that Member Schaumber played a significant role in my nomination.

Q. But only in the sense that he hired you and you worked for him, is that what you're saying?

A. Well, that's what I'm saying that I know happened. He frequently complimented my work in ABA meetings and other functions as, again, as I mentioned, as did Chairman Liebman and Les Heltzer and other individuals at the Board. And that, no doubt, raised my exposure in terms of other perception of my abilities.

(Investigative Exhibit 22 marked for identification.)

Q. BY MR. BERRY: I'm showing you what we've marked as Exhibit 22. Did Member Hayes give you authority to send this memorandum to Peter Schaumber?

MR. COBURN: Again, it presupposes that he would have needed some sort of express authority.

MR. BERRY: Okay. So you are not answering that question?

MR. COBURN: No, no, no, no. That's not the position we're taking on those questions. I'm not telling him not to answer. I'm just saying that I'm objecting because your

question presupposes something that he hasn't said.

MR. BERRY: It doesn't presuppose anything.

Q. BY MR. BERRY: But did you have permission from Member Hayes to send this memorandum out?

MR. COBURN: Same objection.

Q. BY MR. BERRY: Are you going to answer the question?

A. I can state that I don't recall having a conversation one way or the other with Member Hayes.

Q. I'll take it back.

A. I mean I will say this document appears on its face that it is from [redacted] Chief Counsel stating that Member Hayes has set forth his position on this issue.

Q. Is it a public document?

A. So far as I know.

Q. Where would I find this if it's publicly available? Where would that be?

A. I don't know. You'd have to check with the JCMS IT people.

Q. So do you think this would be something that would be in the system that the public would have access to?

A. All members' votes on issues are recorded and are required to be recorded consistent with FOIA.

(Investigative Exhibit 23 marked for identification.)

Q. BY MR. BERRY: I'm showing you what we've marked as Exhibit 23.

A. Okay.
Q. Why did you send that to Mr. Schaumber?
A. I don't recall specifically.
Q. Draw your attention to the second to the last paragraph.
A. Of which document, of which --
Q. The bottom.
MR. COBURN: You mean in Wilma Liebman's e-mail?
Q. BY MR. BERRY: Right, the second to last paragraph on the page.
A. Okay.
Q. Did Chairman Liebman ask you to send that information to Mr. Schaumber?
A. I don't believe so.
Q. Is that information that would be publicly available?
MR. COBURN: When you say that, do you mean --
Q. BY MR. BERRY: That, the information in that paragraph.
A. Well, the e-mail from Heltzer is setting this issue for agenda, for a Board agenda, and the Board puts *Federal Register* notices weekly of its agenda discussions. The balance of it, I guess, is calling for another legal conclusion, but --
Q. Okay. Now, do you recall when we first interviewed you that we talked about a *Wall Street Journal* article that had not been -- that we couldn't find being published anywhere? Do you recall that? It was an op-ed piece by Mr. Schaumber.

A. I recall you asking me questions about potential op-ed pieces Mr. Schaumber had asked me to look at.
Q. There was one that I asked if you knew had been published anywhere. I'm just trying to help you refresh your memory, but --
MR. COBURN: I mean I remember the questions you asked. If you could --
MR. BERRY: Okay.
MR. COBURN: This all just sounds kind of prefatory, so if you --
MR. BERRY: It is. I'm just --
MR. COBURN: Yeah, just go.
MR. BERRY: Just I'm going to show you some things that might help refresh your memory. And I am trying to be mindful of the time, so --
MR. COBURN: We appreciate that very much.
MR. BERRY: I want to show you exhibit -- actually, let me back up because there is something. I want to be mindful of the time but not skip something which we should give you the opportunity to see. Okay, I'm going to show you Exhibit 25.
(Investigative Exhibit 25 marked for identification.)
MR. BERRY: Okay. I don't really have any questions for you. I just want to give you the opportunity to look at it. Of course, if you want to state anything about it, you are

free to do so, but I don't have any particular questions.

MR. COBURN: He doesn't. Thank you very much.

MR. BERRY: So my questions will focus on this and that.

(Pause.)

MR. COBURN: We're going to accept your invitation just to step out for a sec, okay?

MR. BERRY: Okay.

MR. COBURN: We'll come right back.

(Off the record from 9:32 a.m. to 9:33 a.m.)

Q. BY MR. BERRY: Okay. Can you, looking at the bottom paragraph, can you tell me who is Schneider?

A. I cannot tell you with certainty who Peter was referring to, but it could be Dan Schneider based upon the second from the bottom e-mail.

Q. So looking at this today, you're not sure if that was Dan Schneider. Is there any --

A. Well, now I see, I see looking at the second e-mail, it says Dan, and I'm connecting that with the Schneider from the first e-mail, and I'm assuming it's a reference to Dan Schneider.

Q. Are there any other Schneiders who might have been involved in your nomination?

A. I don't know.

(Investigative Exhibit 27 marked for identification.)

Q. BY MR. BERRY: Okay, thank you. I'm showing you

Exhibit 27.
A. Okay.
Q. Do you recall sending this e-mail to Mr. Schaumber?
A. I don't have a specific recollection.
Q. When the Board is going to vote on something, is that generally public information?
A. Notices of the Board consideration of agenda items are put in the *Federal Register*, yes.
Q. So I should be able to find a *Federal Register* notice for that, you think?
MR. COBURN: We don't know that, but he did testify that was his understanding about it.
THE WITNESS: Well, I mean as I understand your question, yes.
(Investigative Exhibit 31 marked for identification.)
Q. BY MR. BERRY: I'm showing you Exhibit 31.
A. Okay.
Q. Do you recall this exchange of e-mails with Mr. Schaumber?
A. No, I don't specifically recall this exchange of e-mails with Member Schaumber.
Q. So the January 6, 2011, e-mail at 8:59 p.m., that's the first e-mail on that chain.
MR. COBURN: You mean the one at the bottom?
MR. BERRY: Well, it's two pages. It's kind of hard to

say bottom. But, yeah, the last e-mail in the chain.

MR. COBURN: Okay. So it's the bottom of Page 1, going onto Page 2.

MR. BERRY: Correct. It starts, on Page 1 it starts from Flynn, Terence, to and then sent.

MR. COBURN: And the question is whether he remembers it?

MR. BERRY: No.

Q. BY MR. BERRY: The question is it says "Thank you, my friend," and then below that appears the White House announcement of your nomination. What did you mean by "Thank you, my friend"?

A. Well, I'm sure I meant thank you to Peter for having allowed me to serve as his Chief Counsel, for having raised my profile in terms of public exposure to my work, and that I was grateful for his, his constant, you know, recommendations of my work to others.

Q. Okay, thank you.

MR. COBURN: I didn't mean to say anything.

MR. BERRY: It's okay.

Q. BY MR. BERRY: Do you recall the *Specialty Healthcare* decision by the Board?

A. Yes.

Q. Is that a significant decision?

A. I would say it is.

Q. Do you recall whether or not there was any congressional interest in that decision?
A. I believe there is widespread interest, including in Congress, about that decision.
Q. Now, as a Chief Counsel for Member Hayes, were you involved in any discussions about the *Specialty Healthcare* decision, the deliberations, or --
A. I believe I was involved in discussions concerning *Specialty Healthcare*.
Q. And would your participation in those decisions be just with Member Hayes, or would they have been with the subordinate counsel on your staff or his staff?
A. I don't believe that that case originated off our staff. I don't remember, but if it did not originate off of our staff, I probably would not have been involved in any discussion with subordinate counsel.
Q. Were you involved in discussions of the case with say your counterparts on Member Hayes' primary staff?
A. I don't specifically recall.
Q. Do you recall editing an article for Peter Schaumber involving *Specialty Healthcare*?
A. I don't. I just don't specifically recall that, no.
Q. Do you recall an article that Peter Schaumber drafted appearing in the *Hill* paper?
A. I don't know what article you are referring to.

Q. There was an article, a blog entry. I'm not sure what you would call it. I would call an editorial piece that Peter Schaumber had appear in the *Hill* paper or he submitted to the *Hill* and then the *Hill* paper posted it.
A. I don't recall any article being published in the *Hill* paper. But you said a blog.
Q. Right, a blog entry. Do you recall a blog entry?
A. I don't. But I believe that something you showed me the first interview, but I don't recall.
(Investigative Exhibit 34 marked for identification.)
Q. BY MR. BERRY: I'm showing you Exhibit 34.
A. Okay.
Q. So do you recall receiving that e-mail?
A. I'm sorry. I don't have a specific recollection of it.
Q. Does that e-mail help refresh your memory as to an article or editorial involving *Specialty Healthcare* by Peter Schaumber?
A. It doesn't refresh my recollection.
Q. Okay. I have more I can show you.
A. But I mean what it says, it is an e-mail from Member Schaumber to me that says that he is having a friend, Chows (ph.) of Speech Writer (ph.), find an editor journalist to help him out and that she made the calls. And then attached to that is what appears to be an article by or some kind of article or paper by Member Schaumber that's entitled

"NLRB Flirts With a Sweeping Change in Board Law."
Q. Do you recall editing that article?
A. I don't specifically recall, David. But, honestly, between -- I have edited so many thousands of documents for Member Schaumber over the years, I don't have a specific recollection one way or the other.
Q. Well, I have more things I can show you --
A. Okay.
Q. -- that might help refresh your recollection.
A. All right.
(Investigative Exhibit 35 marked for identification.)
Q. BY MR. BERRY: And I'm showing you Exhibit 35. Does that help refresh your recollection?
A. Well, it is an e-mail from me to Peter apparently in response to the earlier e-mail you just showed me in which I have suggested that I will respond to his -- I'll suggest some -- it says I've reviewed this, and I'm happy to suggest some revisions.
Q. Do you recall suggesting revisions?
A. I don't have a specific recollection of this one, but --
(Investigative Exhibit 36 marked for identification.)
Q. BY MR. BERRY: I'm showing you Exhibit 36. Do you recall receiving that e-mail?
A. I don't.
Q. Okay. I'm showing you Exhibit 38, I'm sorry, 37,

Exhibit 37.

A. Okay.

(Investigative Exhibit 37 marked for identification.)

Q. BY MR. BERRY: Do you recall receiving that e-mail?

A. Again, I do not. But it appears to be related to the same article.

(Investigative Exhibit 38 marked for identification.)

Q. BY MR. BERRY: Okay. I'm showing you Exhibit 38.

A. Okay.

Q. Do you recall receiving that e-mail?

A. I don't have a specific recollection.

(Investigative Exhibit 39 marked for identification.)

Q. BY MR. BERRY: Okay, that's fine. I'm showing you Exhibit 39.

A. Okay.

Q. Do you recall sending that e-mail to Mr. Schaumber?

A. I don't. But I can tell you I don't have a specific, I've sent thousands, as I said, thousands and thousands of e-mails to Member Schaumber over the years, and I'm not going to have a specific recollection of any individual one.

Q. I just thought you might recall sending this one because it appears to be the edited article.

A. Again, I edited thousands of documents for Member Schaumber over the years, and I just don't have specific recollections regarding each of them.

(Investigative Exhibit 41 marked for identification.)

Q. BY MR. BERRY: I'm showing you Exhibit 41.

A. Okay.

Q. Now, this e-mail he appears to be sending you a link to the article that appeared on the blog for the *Hill* paper.

A. That appears to be correct.

Q. Okay. And you responded to him at 11:30 a.m. on April 18th, correct?

A. That appears to be what the document says, yes.

Q. Okay. And your response indicates what?

A. The document says maybe it will be picked up by others.

Q. What did you mean by that?

A. I don't recall specifically what I meant by that.

Q. Okay.

A. And reading through, my guess is maybe it'll be picked up by other blogs.

Q. Yeah, maybe it will get wider circulation than just the *Hill*?

A. I don't know.

COURT REPORTER: Excuse me. I'm getting some pretty bad feedback from --

MR. COBURN: You are? Yeah, that's my little card. Thank you for letting me know. I'll shut it down.

MR. BERRY: Even I can hear it.

(Pause.)

MR. COBURN: Does that cure it?
COURT REPORTER: No.
MR. COBURN: No? Then it's not me because mine is off.
COURT REPORTER: It might have been shutting itself down. Now, it's gone.
MR. COBURN: Oh, okay. Good.
(Investigative Exhibit 43 marked for identification.)
Q. BY MR. BERRY: I'm now showing you Exhibit 43.
A. Okay.
Q. Do you recall receiving the e-mail from Chairman Liebman?
A. I don't.
Q. At the time you sent the reply to Chairman Liebman, were you, in fact, familiar with that blog?
A. I mean I don't know that I've never read that blog. I mean that was an e-mail that Member Schaumber sent to me. I don't read that blog.
Q. Okay. I'm showing you Exhibit 45. It's actually the last exhibit I'll be showing you.
(Investigative Exhibit 45 marked for identification.)
MR. COBURN: Let's go off the record.
THE WITNESS: Yeah.
(Off the record from 9:53 a.m. to 9:56 a.m.)
Q. BY MR. BERRY: I just want to draw your attention to one part of this e-mail. First of all, do you recall this

e-mail?
A. I don't recall this specific e-mail, but I recall having conversations with Mr. Schneider.
Q. Okay. And I don't really care about your conversations with Mr. Schneider. But more do you recall your interview or your meeting with the staffers for the help committee?
A. I do.
Q. Okay. So I want to draw your attention just to one very small point on this e-mail which begins on the second line and towards the end.
MR. COBURN: Deferred on grounds that the issue could come before me as a Board Member?
MR. BERRY: Correct.
Q. BY MR. BERRY: And my only real question is when you were interviewed by the help staff, did you decline to answer questions on the grounds that you did not want to pre-state or that the issues might come before you as a member?
MR. COBURN: Did he refuse to answer?
MR. BERRY: Not refuse, but just respectfully decline.
THE WITNESS: Well, I don't, I don't have a specific recollection of all of the details of that, but it wouldn't surprise me if there were specific questions that they asked me relating to a pending matter. I just don't remember.
Q. BY MR. BERRY: Okay. And why would you decline? I mean what's the sort of theory behind that?

A. That is the tradition for nominees.
Q. Okay. So I don't have any further questions for you.
A. Thank you.
MR. COBURN: Great. Well, good to see both of you. And I'll just --
MR. BERRY: That's very polite.
MR. COBURN: Well, sure. I try to be. You know, just a follow-up on the invitation to state any objections at the end, I just would like to note an objection.
MR. BERRY: Okay.
MR. COBURN: To the fact that these documents weren't provided for us to look at in advance. We requested them, and you indicated that the answer was no. And so I just wanted to very respectfully note an objection to that.
MR. BERRY: Okay.
(Whereupon, at 10:00 a.m., the interview in the above-entitled matter was concluded.)

CERTIFICATION

I, TIMOTHY J. ATKINSON, JR., a court reporter and Notary Public in and for the State of Maryland,

DO HEREBY CERTIFY that I was authorized to and did report the foregoing Interview of TERENCE FLYNN; that the foregoing pages constitute a true and accurate record thereof.

I FURTHER CERTIFY that I am neither an attorney or counsel for, nor related to or employed by any of the parties to the action in which this deposition is taken; and furthermore, that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in the action.

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TIMOTHY J. ATKINSON, JR.
Court Reporter

My Notary Expires: MD 12/12/12