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Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery, *and* FPR-II, LLC, d/b/a Leadpoint Business Services, *and* Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters, Petitioner. Case 32–RC–109684

August 27, 2015

DECISION ON REVIEW AND DIRECTION

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA, HIROZAWA, JOHNSON, AND MCFERRAN

In this case, we consider whether the Board should adhere to its current standard for assessing joint-employer status under the National Labor Relations Act or whether that standard should be revised to better effectuate the purposes of the Act, in the current economic landscape.

The issue in this case is whether BFI Newby Island Recyclery (BFI), and Leadpoint Business Services (Leadpoint) are joint employers of the sorters, screen cleaners, and housekeepers whom the Union petitioned to represent. The Regional Director issued a Decision and Direction of Election finding that Leadpoint is the sole employer of the petitioned-for employees.[1] The Union filed a timely request for review of that decision, contending that (a) the Regional Director ignored significant evidence and reached the incorrect conclusion under current Board precedent; and (b) in the alternative, the Board should reconsider its standard for evaluating joint-employer relationships.

In granting the Union's request for review, we invited the parties and interested amici to file briefs addressing the following questions:

> 1. Under the Board's current joint-employer standard, as articulated in *TLI, Inc.*, 271 NLRB 798 (1984), enfd. mem. 772 F.2d 894 (3d Cir. 1985), and *Laerco Transportation*, 269 NLRB 324 (1984), is Leadpoint Business Services the sole employer of the petitioned-for employees?
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> 2. Should the Board adhere to its existing joint-employer standard or adopt a new standard? What considerations should influence the Board's decision in this regard?
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> 3. If the Board adopts a new standard for determining joint-employer status, what should that standard be? If it involves the application of a multifactor test, what factors should be examined? What should be the basis or rationale for such a standard?

In response, the General Counsel, a group of labor and employment law professors, and several labor organizations, as well as other amici, have urged the Board to adopt a new standard. Employer groups, in contrast, argue that the Board should adhere to its current standard.

The current standard, as reflected in Board decisions such as *TLI* and *Laerco*, supra, is ostensibly based on a decision of the United States Court of Appeals for the Third Circuit, *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117 (3d Cir. 1982), enfg. 259 NLRB 148 (1981), which endorsed the Board's then-longstanding standard. But, as we will explain, the Board, without explanation, has since imposed additional requirements for finding joint-employer status, which have no clear basis in the Third Circuit's decision, in the common law, or in the text or policies of the Act. The Board has never articulated how these additional requirements are compelled by the Act or by the common-law definition of the employment relationship. They appear inconsistent with prior caselaw that has not been expressly overruled.

Moreover, these additional requirements—which serve to significantly and unjustifiably narrow the circumstances where a joint-employment relationship can be found—leave the Board's joint-employment jurisprudence increasingly out of step with changing economic circumstances, particularly the recent dramatic growth in contingent employment relationships. This disconnect potentially undermines the core protections of the Act for the employees impacted by these economic changes.

In the Supreme Court's words, federal regulatory agencies "are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy."[2] Having carefully considered the record and the briefs,[3] we have decided to revisit and to revise

[1] An election was conducted on April 25, 2014, after which the ballots were impounded.

[2] *American Trucking Assns. v. Atchison, T. & S.F. Ry. Co*., 387 U.S. 397, 416 (1967). See, e.g., *UGL-UNICCO Service Co.*, 357 NLRB No. 76, slip op. at 1 (2011) (quoting *American Trucking Assns.*, supra, and revising Board's successor-bar doctrine).

[3] The Union, BFI and Leadpoint each filed an initial brief and a brief in response to amici's briefs. Amicus briefs were filed by the American Federation of Labor and Congress of Industrial Organizations; the American Staffing Association; a group of entities consisting of the Coalition for a Democratic Workplace and 15 other amici; the Council on Labor Law Equality; the Driver Employer Council of America; the Equal Opportunity Employment Commission; the General Counsel; the International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada; the International Franchise Association; a group of labor and employment law professors; the Labor Relations and Research Center at the University of Massachusetts, Amherst;

the Board's joint-employer standard. Our aim today is to put the Board's joint-employer standard on a clearer and stronger analytical foundation, and, within the limits set out by the Act, to best serve the Federal policy of "encouraging the practice and procedure of collective bargaining."[4]

Today, we restate the Board's joint-employer standard to reaffirm the standard articulated by the Third Circuit in *Browning-Ferris* decision. Under this standard, the Board may find that two or more statutory employers are joint employers of the same statutory employees if they "share or codetermine those matters governing the essential terms and conditions of employment."[5] In determining whether a putative joint employer meets this standard, the initial inquiry is whether there is a common-law employment relationship with the employees in question. If this common-law employment relationship exists, the inquiry then turns to whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining.

Central to both of these inquiries is the existence, extent, and object of the putative joint employer's control. Consistent with earlier Board decisions, as well as the common law, we will examine how control is manifested in a particular employment relationship. We reject those limiting requirements that the Board has imposed—without foundation in the statute or common law—after *Browning-Ferris*. We will no longer require that a joint employer not only *possess* the authority to control employees' terms and conditions of employment, but also *exercise* that authority. Reserved authority to control terms and conditions of employment, even if not exercised, is clearly relevant to the joint-employment inquiry.[6] As the Supreme Court has observed, the question is whether one statutory employer "possesse[s] sufficient control over the work of the employees to qualify as a joint employer with" another employer.[7] Nor will we require that, to be relevant to the joint-employer inquiry, a statutory employer's control must be exercised directly and immediately. If otherwise sufficient, control exercised indirectly—such as through an intermediary—may establish joint-employer status.[8]

The Board's established presumption in representation cases like this one is to apply a new rule retroactively.[9] Applying the restated joint-employer standard here, we reverse the Regional Director and find that the Union established that BFI and Leadpoint are joint employers of the employees in the petitioned-for unit.

I. FACTS

A. Overview

BFI owns and operates the Newby Island recycling facility, which receives approximately 1,200 tons per day of mixed materials, mixed waste, and mixed recyclables. The essential part of its operation is the sorting of these materials into separate commodities that are sold to other businesses at the end of the recycling process. BFI solely employs approximately 60 employees, including loader operators, equipment operators, forklift operators, and spotters. Most of these BFI employees work outside the facility, where they move materials and prepare them to be sorted inside the facility. These BFI employees are part of an existing separate bargaining unit that is represented by the Union.

The interior of the facility houses four conveyor belts, called material streams. Each stream carries a different category of materials into the facility: residential mixed recyclables, commercial mixed recyclables, dry waste process, and wet waste process. Workers provided to BFI by Leadpoint stand on platforms beside the streams and sort through the material as it passes; depending on where they are stationed, workers remove from the stream either recyclable materials or prohibited materials. Other material is automatically sorted when it passes through screens that are positioned near the conveyor belts.

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a group of entities consisting of the National Association of Manufacturers and two other amici; a group of entities consisting of the National Council for Occupational Health and Safety and nine other amici; a group of entities consisting of the National Employment Law Project and nine other amici; the Retail Litigation Center; the Service Employees International Union; and the United States Chamber of Commerce.

[4] 29 U.S.C. §151.

[5] *Browning-Ferris Industries of Pennsylvania, Inc.*, supra, 691 F.2d at 1123. As explained below, we will adhere to the Board's inclusive approach in defining the "essential terms and conditions of employment." The Board's current joint-employer standard, articulated in *TLI*, supra, refers to "matters relating to the employment relationship *such as* hiring, firing, discipline, supervision, and direction," a nonexhaustive list of bargaining subjects. *TLI*, supra, 271 NLRB at 798 (emphasis added).

[6] See, e.g., *Restatement (Second) of Agency* §2(1) ("A master is a principal who employs an agent to perform service in his affairs and who controls *or has the right to control* the physical conduct of the other in the performance of the service.") (emphasis added); id., §220(1) ("A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control *or right to control*.") (emphasis added).

[7] *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964). To be sure, a joint employer will be required to bargain only with respect to those terms and conditions over which it possesses sufficient control for bargaining to be meaningful.

[8] See, e.g., *Restatement (Second) of Agency* §220, comment d ("[T]he control or right to control needed to establish the relation of master and servant may be very attenuated.").

[9] See, e.g., *UGL-UNICCO*, 357 NLRB No. 76, slip op. at 8 & fn. 28 (2011).

As indicated, BFI, the user firm, contracts with Leadpoint, the supplier firm, to provide the workers who manually sort the material on the streams (sorters), clean the screens on the sorting equipment and clear jams (screen cleaners), and clean the facility (housekeepers).[10] The Union seeks to represent approximately 240 full-time, part-time, and on-call sorters, screen cleaners, and housekeepers who work at the facility.[11]

The relationship between BFI and Leadpoint is governed by a temporary labor services agreement (Agreement), which took effect in October 2009, and remains effective indefinitely. It can be terminated by either party at will with 30 days' notice. The Agreement states that Leadpoint is the sole employer of the personnel it supplies, and that nothing in the Agreement shall be construed as creating an employment relationship between BFI and the personnel that Leadpoint supplies.

B. Management Structure

BFI and Leadpoint employ separate supervisors and lead workers at the facility. BFI Operations Manager Paul Keck oversees the material recovery facility and supervises the BFI employees. BFI Division Manager Carl Mennie oversees the recycling and compost operations and reports to Keck. Shift Supervisors Augustine Ortiz and John Sutter supervise BFI employees at the site, including the control room operator. They also spend a percentage of each workday in the material stream areas, monitoring the operation and productivity of the streams. Ortiz testified that part of his job is to ensure the productivity of the streams.

Leadpoint employs Acting On-Site Manager Vincent Haas, three shift supervisors, and seven line leads who work with the Leadpoint sorters. Haas oversees Leadpoint operations at the facility and reports to the Leadpoint corporate office in Arizona. The shift supervisors, who report to Haas, create the sorters' schedules, oversee the material streams, and coach the line leads. The line leads work on the floor with the sorters and are Leadpoint's first-line supervisors.[12] Frank Ramirez, Leadpoint's CEO and President, visits the facility two or three times per quarter to evaluate whether Leadpoint is meeting BFI's expectations and goals; he also meets with BFI and Leadpoint managers, and addresses any problems.

BFI and Leadpoint maintain separate human resource departments. BFI does not have an HR manager onsite. Leadpoint has an onsite HR manager who operates in a trailer (marked with the Leadpoint logo) outside the facility. Leadpoint employees use the BFI break rooms, bathrooms, and parking lot.

C. Hiring

The Agreement between BFI and Leadpoint provides that Leadpoint will recruit, interview, test, select, and hire personnel to perform work for BFI. BFI Managers Keck and Mennie, and Shift Supervisors Ortiz and Sutter testified that they are not involved in Leadpoint's hiring procedure and have no input into Leadpoint's hiring decisions. However, as to hiring, the Agreement requires Leadpoint to ensure that its personnel "have the appropriate qualifications (including certification and training) consistent with all applicable laws and instructions from [BFI], to perform the general duties of the assigned position." BFI also has the right to request that personnel supplied by Leadpoint "meet or exceed [BFI's] own standard selection procedures and tests."

The Agreement also requires Leadpoint to make "reasonable efforts" not to refer workers who were previously employed by BFI and were deemed ineligible for rehire. Under the Agreement, Leadpoint must ask workers if they were previously employed by BFI and verify with BFI that all workers provided are eligible to work with BFI. If Leadpoint inadvertently refers an ineligible worker, it must immediately cease referring her, upon notification by BFI.

Before it refers a worker to BFI, Leadpoint is also required to ensure, in accordance with the Agreement, that she has passed, at minimum, a five-panel urinalysis drug screen, "or similar testing as agreed to in writing with [BFI's] safety, legal and commercial group." Leadpoint is not permitted to refer workers who do not successfully complete the drug screen, and BFI may request written certification of such completion. After Leadpoint has referred workers, it is responsible for ensuring that they remain free from the effects of alcohol and drug use and in condition to perform their job duties for BFI.

When an applicant arrives at the Newby Island facility, she reports to Leadpoint's HR department. Leadpoint tests and evaluates an applicant's ability to perform the required job tasks at BFI by giving her a try-out on the material stream and assessing whether she has adequate hand-eye coordination. If the applicant passes the test,

[10] Consistent with previous Board decisions, we refer to the company that supplies employees as a "supplier" firm and the company that uses those employees as a "user" firm.

[11] BFI solely employs one sorter who works alongside the Leadpoint employees and performs identical job duties. She is part of the Union's existing unit of BFI employees and makes approximately $5/hour more in wages than the Leadpoint employees. BFI asserts that she was given sorter duties years ago after her position was eliminated owing to the loss of a municipal contract; she is grandfathered into BFI's existing contract with the Union, which otherwise exempts sorters from that bargaining unit.

[12] The parties agreed that Leadpoint's line leads are statutory supervisors.

she returns to the Leadpoint HR department for drug testing and background checks.

D. Discipline and Termination

Although the Agreement provides that Leadpoint has sole responsibility to counsel, discipline, review, evaluate, and terminate personnel who are assigned to BFI, it also grants BFI the authority to "reject any Personnel, and . . . discontinue the use of any personnel for any or no reason."

BFI Managers Keck and Mennie, and Shift Supervisors Ortiz and Sutter testified that they have never been involved in any disciplinary decisions for Leadpoint employees. However, the record includes evidence of two incidents where discipline of Leadpoint employees was prompted by BFI action. In a June 2013 email from BFI Operations Manager Keck to Leadpoint CEO Ramirez, Keck stated that he observed two Leadpoint employees passing a pint of whiskey at the jobsite. Keck then contacted Leadpoint Manager Haas, who immediately sent the two employees for alcohol and drug screening. Ramirez testified that, in response to Keck's email "request[ing] [the employees'] immediate dismissal," Leadpoint investigated the complaint and terminated one employee and reassigned the other.

In the same email to Ramirez, Keck indicated that he had observed damage to BFI property, including a paperwork drop box that had been destroyed. Keck stated that a surveillance camera recorded a Leadpoint employee punching the box, and that he hoped Ramirez agreed that "this Leadpoint employee should be immediately dismissed." Haas testified that, pursuant to Keck's email, he reviewed the video, identified the employee, and Leadpoint terminated the employee after an investigation. Haas stated that BFI was not involved in the investigation of the employee and was not consulted in the decision to terminate him.

E. Wages and Benefits

The Agreement includes a rate schedule that requires BFI to compensate Leadpoint for each worker's wage plus a specified percentage mark-up; the mark-up varies based on whether the work is performed during regular hours or as overtime. Although the Agreement provides that Leadpoint "solely determines the pay rates paid to its Personnel," it may not, without BFI's approval, "pay a pay rate in excess of the pay rate for full-time employees of [BFI] who perform similar tasks." Mennie testified that Leadpoint has never made such a request. Leadpoint issues paychecks to employees and maintains their payroll records.

The record includes a Rate Schedule Addendum between BFI and Leadpoint executed in response to a minimum wage increase from $8.75 to $10 by the City of San Jose. Pursuant to the Addendum, the parties agreed that BFI would pay a higher hourly rate for the services of Leadpoint employees after the minimum wage increase took effect.

Leadpoint employees are required to sign a benefits waiver stating they are eligible only for benefits offered by Leadpoint and are not eligible to participate in any benefit plan offered by BFI. Leadpoint provides employees with paid time-off and three paid holidays after they have worked for 2,000 hours, and the option to purchase medical, life, and disability insurance.

F. Scheduling and Hours

BFI establishes the facility's schedule of working hours. It operates three set shifts on weekdays: 4 a.m.—1 p.m., 2 p.m.—11:30 p.m., and 10:30 p.m.—7 a.m. Leadpoint is responsible for providing employees to cover all three shifts. Although Leadpoint alone schedules which employees will work each shift,[13] Leadpoint has no input on shift schedules. Keck testified that any modification in shift times would require modifying the facility's hours of operation and the work schedules for all BFI employees.

BFI will keep a stream running into overtime if it determines that the material on a specific stream cannot be processed by the end of a shift. A BFI manager will normally convey this decision to a Leadpoint shift supervisor; Leadpoint, in turn, determines which employees will stay on the stream to complete the overtime work.

BFI also dictates when the streams stop running so that Leadpoint employees can take breaks. Keck has instructed Leadpoint employees to spend 5 minutes gathering the debris around their stations before breaking. Although Keck asserted that this assignment would not affect the length of breaks, sorter Andrew Mendez testified that, as a practical matter, the clean-up requirement has cut into employees' break time.

The Agreement requires that Leadpoint employees must, at the end of each week, submit to Leadpoint a summary of their "hours of services rendered." Employees must obtain the signature of an authorized BFI representative attesting to the accuracy of the hours on the form. BFI may refuse payment to Leadpoint for any time claimed for which a worker failed to obtain a signature.

G. Work Processes

BFI determines which material streams will run each day and provides Leadpoint with a target headcount of

[13] Leadpoint must also supply housekeepers to work a Saturday shift.

workers needed. BFI also dictates the number of Leadpoint laborers to be assigned to each material stream, but Leadpoint assigns specific Leadpoint employees to specific posts. The record includes an email from Keck to Haas directing Haas to reduce the number of sorters on a specific line by two per shift. The email detailed what positions sorters should occupy on the stream, what materials should be prioritized, and whether a right-handed or left-handed sorter was preferred.[14] The email concluded by stating "[t]his staffing change is effective Monday, August 5, 2013." Ramirez testified that the sorters occupy set work stations along each stream and that BFI dictates the location of these stations. During a shift, BFI might direct Leadpoint supervisors to move employees to another stream in response to processing demands.

Before each shift, BFI's Shift Supervisors Ortiz and Sutter hold meetings with Leadpoint supervisors—the onsite manager and leads—to present and coordinate the day's operating plan. During those meetings, BFI's managers dictate which streams will be operating and establish the work priorities for the shift. Ortiz testified that he uses the preshift meeting to advise Leadpoint supervisors of the specific tasks that need to be completed during the shift, i.e. maintenance, quality, and cleaning issues. Ortiz indicated that Leadpoint supervisors assign employees so as to accomplish these designated tasks.

BFI managers set productivity standards for the material streams. BFI Division Manager Mennie testified that BFI tracks the tons per hour processed on each stream, the proportion of running time to downtime on each stream, and various quality standards. BFI has sole authority to set the speed of the material streams based on its ongoing assessment of the optimal speed at which materials can be sorted most efficiently. If sorters are unable to keep up with the speed of the stream, BFI—but not Leadpoint—can make various adjustments, such as slowing the speed of the stream or changing the angle of the screens. The record indicates that the speed of the streams has been a source of contention between BFI and Leadpoint employees. For instance, former-sorter Clarence Harlin described an incident during which BFI Shift Supervisor Sutter stood across the stream from sorters and criticized them for failing to remove a sufficient amount of plastic. Harlin responded that it was not possible to pull that much material unless the stream was slowed down or stopped. Sutter responded by calling the entire line of sorters to the control room, where he directed them to work more efficiently and dismissed their requests to slow down or stop the line.

Leadpoint employees are able to stop the streams by hitting an emergency stop switch. Sutter testified that he has instructed Leadpoint supervisors on when it is appropriate for Leadpoint employees to use the switch. A BFI employee who works in the control room monitors the operating status of the streams and is required to restart a stream after it has been stopped. Sorter Travis Stevens testified that he has been instructed by BFI managers on multiple occasions not to overuse the emergency stop switch. He stated that BFI Operations Manager Keck and BFI Shift Supervisor Ortiz held a meeting with an entire line of Leadpoint employees to call attention to the frequency of their emergency stops and to direct Leadpoint employees to minimize the number of stops to reduce downtime.

BFI's managers testified that when, in the course of monitoring stream operation and productivity, they identify problems, including problems with the job performance of a Leadpoint employee, they communicate their concerns to a Leadpoint supervisor. The Leadpoint supervisor is expected to address those issues with the employees. According to the testimony of Leadpoint employees, BFI managers have, on occasion, addressed them directly regarding job tasks and quality issues. Leadpoint Housekeeper Clarence Harlin testified that he receives work directions from BFI managers and employees at least twice a week. Sorters Mendez and Stevens both testified that they have received specific assignments from BFI managers that took priority over the tasks assigned by their immediate Leadpoint supervisors. Sorter Marivel Mendoza testified that Sutter has directed him to remove more plastic from the stream, and has moved him to other streams where assistance was needed.

H. Training and Safety

When Leadpoint employees begin working at the facility, they receive an orientation and job training from Leadpoint supervisors. Periodically, they also receive substantive training and counseling from BFI managers. For instance, following customer complaints about the quality of BFI's end product, Keck held two or three educational meetings with Leadpoint employees and supervisors who worked on the wet waste stream. During the meetings, Keck highlighted the objectives of the operation to make sure that Leadpoint employees understood BFI's goals. He also explained the difference between organic and nonorganic materials and specified which materials should be removed from the line. Keck held a similar meeting with Leadpoint employees who worked on the commercial single stream because he was

[14] For instance, the email stated that "[t]wo of your employees should be positioned at the east end of the presorts focusing primarily on glass. Their secondary picks should be plastics into the Recycling Stream drop chute."

concerned that sorters were allowing too many materials to pass by on the stream without being sorted.[15] With regard to one line, Keck told the sorters that BFI would only be able to cover the labor expenses for the line if the processed material generated revenue for BFI. As noted above, BFI Shift Supervisor Sutter similarly called a meeting with a group of sorters to direct them to work more productively.

As to safety, the Agreement mandates that Leadpoint require its employees to comply with BFI's safety policies, procedures, and training requirements. For all employees working in positions deemed safety-sensitive by BFI, Leadpoint must obtain a written acknowledgement that they have read, understand, and agree to comply with BFI's safety policy. BFI also "reserves the right to enforce the Safety Policy provided to [Leadpoint] personnel."[16]

New Leadpoint employees attend a safety orientation that is presented by Leadpoint managers. The record shows that, on occasion, BFI also provides safety training to Leadpoint employees.

I. Other Terms

According to the terms of the Agreement, Leadpoint personnel shall not be assigned to BFI for more than 6 months. Ramirez testified that Leadpoint employees have been assigned to BFI for more than 6 months, and BFI has never invoked this provision. The Agreement also allows BFI to examine "[Leadpoint's] books and records pertaining to the Personnel, [Leadpoint's] obligations and duties under this Agreement, and all services rendered by [Leadpoint] or the Personnel under this Agreement, at any time for purposes of auditing compliance with this Agreement, or otherwise." Mennie testified that he has never asked to inspect Leadpoint's personnel files.

II. THE REGIONAL DIRECTOR'S FINDINGS

The Regional Director, applying *TLI*, supra, found that BFI is not a joint-employer of the Leadpoint employees because it does not "share or codetermine [with Leadpoint] those matters governing the essential terms and conditions of employment" of the sorters, screen cleaners, or housekeepers. First, the Regional Director found that Leadpoint sets employee pay and is the sole provider of benefits. He acknowledged that, under the Agreement, Leadpoint is prevented from paying employees more than BFI pays employees who perform similar work. But he found that this provision was not indicative of BFI's control over wages because it limits only employees' maximum wage rate; it would not prevent Leadpoint from lowering wages or offering more benefits. Moreover, he found that the provision only applies to Leadpoint sorters, since BFI does not employ any screen cleaners or housekeepers.

Next, the Regional Director found that Leadpoint has sole control over the recruitment, hiring, counseling, discipline, and termination of its employees. He noted that there was no evidence to suggest that BFI participates in any of these decisions. With regard to Keck's email reporting the misconduct of Leadpoint employees, the Regional Director found that Keck merely requested that the employees be terminated; he did not order or direct Leadpoint to terminate them. He thus concluded that BFI does not possess the authority to terminate Leadpoint employees.

Finally, the Regional Director found that BFI does not control or codetermine employees' daily work. He found that Leadpoint employees were supervised solely by the Leadpoint onsite manager and leads, and that nothing in the record supported the Union's argument that BFI controls employees' daily work functions. While acknowledging BFI's control over the speed of the material stream, the Regional Director found that BFI does not mandate how many employees work on the line, the speed at which the employees work, where they stand on the stream, or how they pick material off the stream.[17] The mere ability to control the speed of the stream, he stated, does not "create a level of control that is sufficiently direct or immediate" to warrant a finding of joint control.

The Regional Director also stated that if BFI has a problem with a Leadpoint employee, it complains to a Leadpoint supervisor who takes care of the matter using her own discretion. To the extent that BFI has directly instructed Leadpoint employees, he found "the instruction was merely routine in nature and insufficient to warrant a finding that BFI jointly controls Leadpoint employees' daily work." Although BFI sets the work hours and shifts of the facility's operation, the Regional Director observed that Leadpoint is solely in control of scheduling its own employees' shifts, scheduling employees for overtime, and administering requests for sick leave and vacation.

[15] Ortiz indicated that he also held educational sessions with Leadpoint employees after he became concerned that sorters were not removing a sufficient amount of contaminants from the stream.

[16] Leadpoint employees' personal protective equipment—a safety vest, a hardhat, safety glasses, ear plugs, and gloves—is provided by Leadpoint and differs from the gear that BFI employees use.

[17] Based on our review of the record, we disagree with the Regional Director's factual findings that BFI does not mandate how many employees work on the line, the speed at which they work, where they stand, or how they pick material.

III. POSITIONS OF THE PARTIES AND AMICI

A. The Union

The Union argues first that, under the Board's current joint-employer standard, BFI constitutes a joint employer of the Leadpoint employees because it shares or codetermines the following essential terms and conditions of employment: employment qualifications, work hours, breaks, productivity standards, staffing levels, work rules and performance, the speed of the lines, dismissal, and wages. BFI's direct control over employees is evinced by its regular oversight of the employees and its constant control of their work. BFI, it argues, demands compliance with "detailed specifications, including the number of employees on each line, where they stand, what they pick, and at what rate they sort." BFI also trains and instructs employees as to how to do their jobs, directing them on picking techniques, what to prioritize, how to clear jams, and when to use the emergency stop.

Alternatively, the Union contends that the Board should adopt a broader standard to better effectuate the purpose of the Act and respond to industrial realities. The Union states that the Board's current emphasis on whether an employer exercises direct and immediate control over employees conflicts with the language and purpose of the Act, which is focused on ensuring employees' bargaining rights to the fullest extent. Further, the Union argues that the Board must consider all indicia of control in its joint-employer analysis, rather than the narrow subset of criteria set forth in *TLI*, supra, 271 NLRB at 798 (hiring, firing, discipline, supervision, and direction). It observes that "a myriad of other essential terms that are mandatory subjects of bargaining may [] also be pertinent to the employees involved." Based on these concerns, the Union recommends that the Board find joint-employer status where an employer "possesses sufficient authority over the employees or their employer such that its participation is a requisite to meaningful collective bargaining. Such authority can be either direct or indirect."

Finally, the Union asserts that absent a change in the joint-employer standard, a putative employer, like BFI, that is a necessary party to meaningful collective bargaining will continue to insulate itself by the "calculated restructuring of employment and insertion of a contractor to insulate itself from the basic legal obligation to recognize and bargain with the employees' representative."

B. BFI and Leadpoint

BFI argues that, under the Board's current joint-employer test, the Regional Director correctly found that BFI is not a joint employer of Leadpoint's employees. To this end, BFI contends that the Regional Director properly concluded that Leadpoint has sole authority to hire, fire, discipline, supervise, direct, assign, train, and schedule its employees. It further contends that the Union points to only a handful of instances in which BFI managers gave routine instructions to Leadpoint employees, evidence that falls far short of establishing that BFI exerted any meaningful control over them. Although BFI's physical plant dictates where Leadpoint employees must work, BFI does not decide where particular employees work. Likewise, despite the fact that BFI managers meet with Leadpoint supervisors daily to discuss operations, Leadpoint supervisors are solely responsible for controlling and directing their employees. Finally, contrary to the Union, meaningful control cannot be established by a contractual right or its occasional exercise; instead the Board properly looks to the actual practice of the parties.

BFI also urges the Board not to modify its joint-employer standard. It contends that the Union has not presented any compelling reason to revisit Board policy. Any modification, it argues, would undermine the predictability of the law in this area, which the Board has applied uniformly for over 30 years. The Union's proposed standard, in its view, imposes "no meaningful limit on who could be deemed a joint employer of another's workers." Thus, a regional director "would be free to exercise her substantial discretion to determine that completely separate companies constituted a joint employer simply because she believes that bargaining would be more effective if both companies were at the table."

Leadpoint echoes the arguments presented by BFI: that Leadpoint is the sole employer of its employees, and that the Board should not modify its joint-employer standard. In support of the current standard, Leadpoint contends that it is a clear and understandable approach that has not proven overly onerous for parties seeking to establish a joint-employer relationship. Leadpoint argues that the "vague and ambiguous" standard proposed by the Union lacks clarity and provides minimal, if any, guidance as to what factors are significant for evaluating joint-employer status.

C. The General Counsel

The General Counsel urges the Board to abandon its existing joint-employer standard because it "undermines the fundamental policy of the Act to encourage stable and meaningful collective bargaining."[18] The Board, since *TLI*, supra, has significantly narrowed its approach by (a) requiring evidence of direct and immediate control over employees; (b) looking only to the actual practice of

[18] The General Counsel's brief takes no position on the merits of this representation proceeding.

the parties rather than their contract; and (c) requiring an employer's control to be substantial and not "limited and routine." He posits that this approach is not consistent with the Act, which broadly defines the term "employer." Moreover, the contingent work force has grown significantly over the past several decades. The General Counsel submits that in many contingent arrangements, the user firm only has limited and routine supervision over employees, and indirect or potential control over terms and conditions of employment. Nonetheless, the user firm can influence the supplier firm's bargaining posture by threatening to terminate its contract with the supplier if wages and benefits rise above a set cost threshold.

The General Counsel recommends that the Board find joint-employer status where an employer "wields sufficient influence over the working conditions of the other entity's employees such that meaningful bargaining could not occur in its absence." Such an approach would make no distinction between direct, indirect, and potential control, and would find joint-employer status where industrial realities make an entity essential for bargaining.

D. Other Amici

Amici in support of the Union uniformly urge the Board to adopt a more inclusive joint-employer standard that would give dispositive weight to more forms of employer control. Specifically, they urge the Board to abandon its recent focus on direct and immediate control and consider instead the totality of a putative employer's influence over employees' working conditions, including control that is exercised indirectly or reserved via contractual right. They also argue that the Board should evaluate a putative employer's control over a broad range of terms and conditions of employment rather than the limited set of factors enumerated in *TLI*, supra. In urging the Board to modify its approach, many amici note that that the number of contingent employment relationships has grown significantly in recent years, and that a sizeable proportion of the labor force now works for staffing agencies. They posit that the Board's current narrow focus on direct control absolves many user employers of bargaining responsibilities under the Act despite the fact that their participation is required for meaningful bargaining to occur.

Amici in support of BFI uniformly contend that BFI is not a joint-employer of Leadpoint's employees, and urge the Board not to modify its existing approach. They argue primarily that the Board's standard—which has been applied consistently for over 30 years—has provided employers with stability and predictability in entering into labor supply arrangements in response to fluctuating market needs. Any change, they contend, would destabilize these relationships and undermine the expectations of the contracting parties. A more inclusive standard, they argue, would also widen the scope of labor disputes and force firms to participate in bargaining even where they have no authority to set or control terms and conditions of employment. Some amici contend that a broader standard could potentially include—and consequently disrupt—any contractual relationship involving labor. Other amici argue that a broader standard would expose employers to unwarranted liability for unfair labor practices committed by the other firm. Some argue too that the common law of agency prohibits the Board from adopting an open-ended approach that considers all of the economic realities of the parties' relationship.

IV. THE EVOLUTION OF THE BOARD'S JOINT-EMPLOYER STANDARD

In analyzing the joint-employer issue, and evaluating the various arguments raised by the parties and amici, it is instructive to review the development of the Board's law in this area. Three aspects of that development seem clear. First, the Board's approach has been consistent with the common-law concept of control, within the framework of the National Labor Relations Act. Second, before the current joint-employer standard was adopted, the Board (with judicial approval) generally took a broader approach to the concept of control. Third, the Board has never offered a clear and comprehensive explanation for its joint-employer standard, either when it adopted the current restrictive test or in the decades before.

The core of the joint-employer standard, which we preserve today, can be traced at least as far back as the *Greyhound* case, a representation proceeding that involved a company operating a bus terminal and its cleaning contractor. There, the Board in 1965 found two statutory employers to be joint employers of certain workers because they "share[d], or codetermine[d], those matters governing essential terms and conditions of employment."[19] Significantly, at an earlier stage of that case, the Supreme Court explained the issue presented—whether Greyhound "possessed sufficient control over the work of the employees to qualify as a joint employer with" the cleaning contractor—was "essentially a factual issue" for the Board to determine.[20]

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[19] *Greyhound Corp.*, 153 NLRB 1488, 1495 (1965), enfd. 368 F.2d 778 (5th Cir. 1966). See also *Franklin Simon & Co., Inc*., 94 NLRB 576, 579 (1951) (finding joint-employer status where "a substantial right of control over matters fundamental to the employment relationship [was] retained and exercised" by both department store and company operating shoe department).

[20] *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964). The Supreme Court reversed a district court injunction against the Board pro-

During the period after *Greyhound* but before the Third Circuit's 1982 decision in *Browning-Ferris Industries of Pennsylvania*, supra, some (though certainly not all) of the Board's joint-employer decisions used the "share or co-determine" formulation.[21] But regardless of the wording used, the Board typically treated the *right* to control the work of employees and their terms of employment as probative of joint-employer status. The Board did not require that this right be exercised, or that it be exercised in any particular manner. Thus, the Board's joint-employer decisions found it probative that employers retained the contractual power to reject or terminate workers;[22] set wage rates;[23] set working hours;[24] approve overtime;[25] dictate the number of workers to be supplied;[26] determine "the manner and method of work performance";[27] "inspect and approve work,"[28] and terminate the contractual agreement itself at will.[29] The Board stressed that "the power to control is present by virtue of the operating agreement."[30] Reviewing courts expressly endorsed this approach.[31]

In addition to recognizing the right to control as probative, the Board gave weight to a putative joint employer's "indirect" exercise of control over workers' terms and conditions of employment.[32] In so doing, the Board emphasized that, in order to exercise significant control, a putative employer need not "hover over [workers], directing each turn of their screwdrivers and each connection that they made."[33] Instead, the Board assessed whether a putative employer exercised "ultimate control" over their employment.[34]

Consistent with this principle, the Board in certain cases found evidence of joint-employer status where a putative employer, although not responsible for directly supervising another firm's employees, inspected their work, issued work directives through the other firm's supervisors, and exercised its authority to open and close the plant based on production needs.[35] Likewise, the Board found significant indicia of control where a putative employer, although it "did not exercise direct supervisory authority over" the workers at issue, nonetheless held "day-to-day responsibility for the overall operations" of the worksite and determined the scope and nature of the contractors' work assignments.[36] Contractual arrangements under which the user employer reimbursed the supplier for workers' wages or imposed limits on wages were also viewed as tending to show joint-employer status.[37]

The Third Circuit's *Browning-Ferris* decision did not question, much less reject, any of these lines of Board precedent. That decision, rather, carefully untangled the

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ceeding, rejecting Greyhound's argument that the Board was acting in excess of its powers under the Act, given the exclusion of independent contractors from the statutory definition of "employee."

[21] See, e.g., *C.R. Adams Trucking, Inc.*, 262 NLRB 563, 566 (1982), enfd. 718 F.2d 869 (8th Cir. 1983); *Springfield Retirement Residence*, 235 NLRB 884, 891 (1978); *Greenhoot, Inc.*, 205 NLRB 250, 251 (1973).

[22] See *Ref-Chem Co.*, 169 NLRB 376, 379 (1968), enf. denied on other grounds 418 F.2d 127 (5th Cir. 1969); *Jewel Tea Co.*, 162 NLRB 508, 510 (1966).

[23] See *Ref-Chem*, supra, 169 NLRB at 379; *Harvey Aluminum*, 147 NLRB 1287, 1289 (1964).

[24] See *Jewel Tea*, supra, 162 NLRB at 510; *Mobil Oil Corp.*, 219 NLRB 511, 516 (1975), enf. denied on other grounds sub nom. *Alaska Roughnecks and Drillers Assn. v. NLRB*, 555 F.2d 732 (9th Cir. 1977), cert. denied 43 U.S. 1069 (1978).

[25] *Ref-Chem Co. v. NLRB*, 418 F.2d 127, 129 (5th Cir. 1969).

[26] See *Harvey Aluminum*, supra, 147 NLRB at 1289; *Mobil Oil*, supra, 219 NLRB at 516.

[27] *Value Village*, 161 NLRB 603, 607 (1966).

[28] *Ref-Chem Co. v. NLRB*, supra, 418 F.2d at 129.

[29] *Value Village*, supra, 161 NLRB at 607; *Mobil Oil*, supra, 219 NLRB at 516.

[30] *Value Village*, supra, 161 NLRB at 607. See also *Jewel Tea*, supra, 162 NLRB at 510 ("That the licensor has not exercised such power is not material, for an operative legal predicate for establishing a joint-employer relationship is a reserved right in the licensor to exercise such control"); *Lowery Trucking Co.*, 177 NLRB 13, 15 (1969), enfd. sub nom. *Ace-Alkire Freight Lines v. NLRB*, 431 F.2d 280 (8th Cir. 1970) (observing that "[w]hile [putative employer] never rejected a driver hired by [supplier], it had the right to do so").

[31] See *Ref-Chem Co. v. NLRB*, supra, 418 F.2d at 129 (affirming the Board's joint-employer finding where "[t]he terms of the agreements with these two companies gave [putative employer] the right to approve employees, control the number of employees, have an employee removed, inspect and approve work, pass on changes in pay and overtime allowed"). See also *Ace-Alkire Freight Lines, Inc. v. NLRB*, 431 F.2d 280, 282 (8th Cir. 1970) (same where putative employer "retained the right to reject drivers sent to them"); *Carrier Corp. v. NLRB*, 768 F.2d 778, 781 (6th Cir. 1985) (same where, under parties' agreement, putative employer "had the authority to reject any driver that did not meet its standards and it could also direct [supplier firm] to remove any driver").

[32] *Floyd Epperson*, 202 NLRB 23, 23 (1973), enfd. 491 F.2d 1390 (6th Cir. 1974).

[33] *Sun-Maid Growers of California*, 239 NLRB 346, 351 (1978), enfd. 618 F.2d 56 (9th Cir. 1980) (finding joint-employer status).

[34] *Int'l Trailer Co.*, 133 NLRB 1527, 1529 (1961), enfd. sub nom. *NLRB v. Gibraltar Industries*, 307 F.2d 428 (1962) (finding joint-employer status), cert. denied 372 U.S. 911 (1963).

[35] Id. See also *Hamburg Industries*, 193 NLRB 67, 67 (1971) (finding joint-employer status where putative employer's superintendents checked the performance of supplier's workers and the quality of their work, and communicated work directions via supplier's supervisors).

[36] *Clayton B. Metcalf*, 223 NLRB 642, 643 (1976).

[37] See *Hamburg Industries*, supra, 193 NLRB at 67–68 (assigning weight to putative employer's "indirect control over wages" via cost-plus arrangement); *Hoskins Ready-Mix*, 161 NLRB 1492, 1493 (1966) (same, noting that user employer would be the "ultimate source of any wage increases" for workers); *Ref-Chem Co.*, supra, 169 NLRB at 379 (supplier could not make any wage modification without securing approval of the user). See also *Industrial Personnel Corp. v. NLRB*, 657 F.2d 226, 229 (8th Cir. 1981) (relying on the Board's finding that user employer reimbursed supplier for employees' wages), cert. denied 454 U.S. 1148 (1982).

joint-employer doctrine from the distinct single-employer doctrine (which addresses integrated enterprises only nominally separate), endorsed the Board's "share or codetermine" formulation, and enforced the Board's order finding joint-employer status. The Third Circuit explained:

> The basis of the [joint employer] finding is simply that one employer while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer. . . .Thus, the "joint employer" concept recognizes that the business entities involved are in fact separate but that they *share or codetermine those matters governing the essential terms and conditions of employment.*

691 F.2d at 1123 (citations omitted; emphasis added).

The Board subsequently embraced the Third Circuit's decision, but simultaneously took Board law in a new and different direction. *Laerco* and *TLI*, both decided in 1984, marked the beginning of a 30-year period during which the Board—without any explanation or even acknowledgement and without overruling a single prior decision—imposed additional requirements that effectively narrowed the joint-employer standard. Most significantly, the Board's decisions have implicitly repudiated its earlier reliance on reserved control and indirect control as indicia of joint-employer status. The Board has foreclosed consideration of a putative employer's right to control workers, and has instead focused exclusively on its actual exercise of that control—and required its exercise to be direct, immediate, and not "limited and routine."[38]

The Board has thus refused to assign any significance to contractual language expressly giving a putative employer the power to dictate workers' terms and conditions of employment. In *TLI*, for instance, the parties' contract provided, among other things, that the user employer "at all times will solely and exclusively be responsible for maintaining operational control, direction and supervision over said drivers".[39] Although prior precedent found this type of contractual authority probative of joint employer status, the *TLI* Board found it irrelevant, absent evidence that the putative employer "affect[ed] the terms and conditions of employment to such a degree that it may be deemed a joint employer."[40] The Board later emphasized this narrowed approach in *AM Property Holding Corp.*, a 2007 decision, supra, where it stated that "[i]n assessing whether a joint employer relationship exists, the Board does not rely merely on the existence of such contractual provisions, but rather looks to the actual practice of the parties."[41]

In *Airborne Express*,[42] a 2002 decision, the Board held that "[t]he essential element in [the joint-employer] analysis is whether a putative joint employer's control over employment matters is direct and immediate."[43] This restrictive approach has resulted in findings that an entity is not a joint employer even where it indirectly exercised control that significantly affected employees' terms and conditions of employment. For example, the Board refused to find that a building management company that utilized employees supplied by a janitorial company was a joint employer notwithstanding evidence that the user dictated the number of workers to be employed, communicated specific work assignments and directives to the supplier's manager, and exercised ongoing oversight as to whether job tasks were performed properly.[44] Likewise, the Board has found, contrary to its earlier approach, that cost-plus arrangements between the employing parties are *not* probative of joint-employer status.[45]

Even where a putative joint employer has exercised direct control over employees, the Board has given no weight to various forms of supervision deemed "limited and routine." In *TLI*, for instance, the user employer instructed contract drivers as to which deliveries were to be made on a given day, filed incident reports with the supplier when drivers engaged in conduct adverse to its operation, received accident reports, and maintained driver logs and records.[46] Nonetheless, the Board concluded that "the supervision and direction exercised by [the us-

[38] *AM Property Holding Corp.*, 350 NLRB 998, 1001 (2007), enfd. in relevant part sub nom. *Service Employees Int'l Union, Local 32BJ v. NLRB*, 647 F.3d 435 (2d. Cir. 2011)

[39] *TLI*, supra, 271 NLRB at 803.

[40] Id. at 799.

[41] 350 NLRB at 1000. The *AM Property* Board refused to give weight to a contractual provision requiring that the supplier plan, organize, and coordinate its operations "in conjunction with the directions, requests and suggestions" of the user's management, and that all new hires were subject to the initial approval of the user. Id. at 1019.

[42] 338 NLRB 597, 597 fn. 1 (2002).

[43] The Board in *Airborne Express* added this element in a footnote without any explanation; it cited only *TLI* as support. But the *TLI* Board did not use the phrase "direct and immediate control," let alone identify that concept as the "essential element" in the Board's test. The *Airborne Express* majority also asserted that the Board in *TLI* "abandoned its previous test in this area, which had focused on a putative joint employer's indirect control over matters relating to the employment relationship." 338 NLRB at 597 fn. 1. But *TLI* did not, in fact, purport to overrule any precedent or alter the Board's approach.

[44] *Southern California Gas Co.*, 302 NLRB 456, 461–462 (1991).

[45] See *Goodyear Tire and Rubber Co.*, 312 NLRB 674, 677–678 (1993) (rejecting the argument that participation in a cost-plus contract represented a form of codetermination).

[46] 271 NLRB at 799.

er] on a day-to-day basis is both limited and routine."[47] The Board elaborated on this concept in *AM Property*, supra, where it stated that "[t]he Board has generally found supervision to be limited and routine where a supervisor's instructions consist primarily of telling employees what work to perform, or where and when to perform the work, but not how to perform the work."[48] There, the Board found that the user's oversight of a supplier's cleaning employees was "limited and routine" where the user distributed supplies to workers, prepared their timecards, ensured that their work was done properly, and occasionally assigned work.[49]

V. REVISITING THE JOINT-EMPLOYER STANDARD

As the Board's view of what constitutes joint employment under the Act has narrowed, the diversity of workplace arrangements in today's economy has significantly expanded. The procurement of employees through staffing and subcontracting arrangements, or contingent employment, has increased steadily since *TLI* was decided.[50] The most recent Bureau of Labor Statistics survey from 2005 indicated that contingent workers accounted for as much as 4.1 percent of all employment, or 5.7 million workers.[51] Employment in the temporary help services industry, a subset of contingent work, grew from 1.1 million to 2.3 million workers from 1990 to 2008.[52] As of August 2014, the number of workers employed through temporary agencies had climbed to a new high of 2.87 million, a 2 percent share of the nation's work force.[53] Over the same period, temporary employment also expanded into a much wider range of occupations.[54] A recent report projects that the number of jobs in the employment services industry, which includes employment placement agencies and temporary help services, will increase to almost 4 million by 2022, making it "one of the largest and fastest growing [industries] in terms of employment."[55]

This development is reason enough to revisit the Board's current joint-employer standard. "[T]he primary function and responsibility of the Board . . . is that 'of applying the general provisions of the Act to the complexities of industrial life.'"[56] If the current joint-employer standard is narrower than statutorily necessary, and if joint-employment arrangements are increasing, the risk is increased that the Board is failing in what the Supreme Court has described as the Board's "responsibility to adapt the Act to the changing patterns of industrial life."[57] As we have seen, however, the Board has never clearly and comprehensively explained its joint-employer doctrine or, in particular, the shift in approach reflected in the current standard.[58] Our decision today is intended to address this shortcoming. For the reasons that follow, we are persuaded that the current joint-employer standard is not mandated by the Act and that it does not best serve the Act's policies.

We begin with the obvious proposition that in order to find that a statutory employer (i.e., an employer subject to the National Labor Relations Act) has a duty to bargain with a union representing a particular group of statutory employees, the Act requires the existence of an employment relationship between the employer and the employees. Section 2(3) of the Act provides that the "term 'employee' . . . shall not be limited to the employees of a particular employer, *unless the Act explicitly states otherwise*."[59] Section 9(c) authorizes the Board to process a representation petition when it alleges that "employees . . . wish to be represented for collective bargaining . . . and *their* employer declines to recognize their representative."[60] Section 8(a)(5), in turn, makes it an unfair labor practice for an employer "to refuse to

[47] Id. The Board also discounted the user's role in influencing bargaining where user attended the supplier's collective bargaining negotiations and explained that the contract was in jeopardy if the supplier failed to achieve cost savings. 271 NLRB at 798–799.

[48] 350 NLRB at 1001. See also *Flagstaff Medical Center*, 357 NLRB No. 65 slip op. at 9 (2011), enfd. in part 715 F.3d 928 (D.C. Cir. 2013).

[49] 350 NLRB at 1001.

[50] The Board previously recognized the "ongoing changes in the American work force and workplace and the growth of joint employer arrangements, including the increased use of companies that specialize in supplying 'temporary' and 'contract workers' to augment the workforces of traditional employers." *M. B. Sturgis, Inc.*, 331 NLRB 1298, 1298 (2000).

[51] Bureau of Labor Statistics, U.S. Department of Labor, "Contingent and Alternative Employment Arrangements, February 2005," (July 27, 2005).

[52] See Tian Luo, et al., "The Expanding Role of Temporary Help Services from 1990 to 2008," Monthly Labor Review, Bureau of Labor Statistics, August 2010 at 12.

[53] Steven Greenhouse, "The Changing Face of Temporary Employment," NY Times website, August, N.Y. TIMES, Aug. 31, 2014, at http://www.nytimes.com/2014/09/01/upshot/the-changing-face-of-temporary-employment.html

[54] See Luo et al., supra at 5.

[55] Richard Henderson, "Industry Employment and Output Projections to 2022," Monthly Labor Review, Bureau of Labor Statistics, December 2013.

[56] *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979), quoting *NLRB v. Insurance Agents*, 361 U.S. 477, 499 (1960); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963); and *NLRB v. Steelworkers*, 357 U.S. 357, 362–363 (1958).

[57] See *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975).

[58] It is well established that even when an agency is creating policies to fill a gap in an ambiguous statute, the agency has a responsibility to explain its failure to follow established precedent. *Atchison, T. & S.F. Ry. v. Wichita Bd. of Trade,* 412 U.S. 800, 807–809 (1973).

[59] 29 U.S.C. §152(3) (emphasis added).

[60] 29 U.S.C. §159(c) (emphasis added).

bargain collectively with the representatives of *his* employees."[61]

In determining whether an employment relationship exists for purposes of the Act, the Board must follow the common-law agency test. The Supreme Court has made this clear in connection with Section 2(3) of the Act and its exclusion of "any individual having the status of an independent contractor" from the Act's otherwise broad definition of statutory employees.[62] In determining whether a common-law employment relationship exists in cases arising under Federal statutes like the Act, the Court has regularly looked to the *Restatement (Second) of Agency* (1958) for guidance.[63] Section 220(1) of the *Restatement (Second)* provides that a "servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control."

The Board's joint-employer doctrine is best understood as always having incorporated the common-law concept of control—as the Supreme Court's one decision involving the doctrine confirms. In the *Greyhound* case, as we have seen, the Court framed the issue presented as whether one statutory employer "possessed sufficient control over the work of the employees to qualify as a joint employer with" another statutory employer.[64] Thus, the Board properly considers the existence, extent, and object of the putative joint employer's control, in the context of examining the factors relevant to determining the existence of an employment relationship.[65] Accordingly, mere "service under an agreement to accomplish results or to use care and skill in accomplishing results" is not evidence of an employment, or joint-employment, relationship.[66]

Deciding the joint-employer issue under common-law principles is not always a simple task, just as distinguishing between employees and independent contractors in the common law can be challenging (as the Supreme Court has recognized).[67] In cases where the common law would *not* permit the Board to find joint-employer status, we do not believe the Board is free to do so. Even where the common law *does* permit the Board to find joint-employer status in a particular case, the Board must determine whether it would serve the purposes of the Act to do so, taking into account the Act's paramount policy to "encourage[] the practice and procedure of collective bargaining" (in the words of Section 1). In other words, the existence of a common-law employment relationship is necessary, but not sufficient, to find joint-employer status.[68] As the Supreme Court has explained, "[o]ne of

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[61] 29 U.S.C. §158(a)(5) (emphasis added).

[62] See *NLRB v. United Insurance Co. of America* 390 U.S. 254, 256–258 (1968). See also *FedEx Home Delivery*, 361 NLRB No. 55, slip op. at 1–2 (2014) (reviewing Supreme Court's application of common-law test in independent-contractor cases arising under Federal statutes). See also *NLRB v. Town & Country Electric, Inc., 516 U.S. 85, 92–95 (1995) (*where Congress has used the term "employee" in a statute without clearly defining it, the Court assumes that Congress "intended to describe the conventional master-servant relationship as understood by common-law agency doctrine"); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739–740 (1989) (same).

[63] See, e.g., *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 323–324 (1992) (interpreting Employee Retirement Income Security Act). See also *Restatement (Second) of Agency* §220, comment g ("Under the existing regulations and decisions involving the Federal Labor Relations Act, there is little, if any, distinction between employee and servant as here used.").

[64] *Boire v. Greyhound Corp.*, supra, 376 U.S. at 481.

[65] See generally *Vizcaino v. U.S. District Court of the Western District of Washington*, 173 F.3d 713, 723 (9th Cir. 1999) (describing *Restatement (Second)* Sec. 220 factors as "useful" in determining whether common-law employment relationship existed between worker and client firm of temporary employment agency for purposes of ERISA).

Section 220(2) of the *Restatement (Second)* provides that:

> In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
>
> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
>
> (b) whether or not the one employed is engaged in a distinct occupation or business;
>
> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
>
> (d) the skill required in the particular occupation;
>
> (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
>
> (f) the length of time for which the person is employed;
>
> (g) the method of payment, whether by the time or by the job;
>
> (h) whether or not the work is a part of the regular business of the employer;
>
> (i) whether or not the parties believe they are creating the relation of master and servant; and
>
> (j) whether the principal is or is not in business.

[66] *Restatement (Second) of Agency* §220, comment e (addressing distinction between employees and independent contractors).

[67] *United Insurance*, supra, 390 U.S. at 258 (noting the "innumerable situations which arise in the common law where it is difficult to say whether a particular individual is an employee or an independent contractor"). See also *Restatement (Second) of Agency* §220, comment c ("The relation of master and servant is one not capable of exact definition. . . . [I]t is for the triers of fact to determine whether or not there is a sufficient group of favorable factors to establish the relation.").

[68] The General Counsel urges the Board to find joint-employer status:

> where, under the totality of the circumstances, including the way the separate entities have structured their commercial relationship, the putative joint employer wields sufficient influence over the working conditions of the other entity's employees such that meaningful collective bargaining could not occur in its absence. Under this approach, the Board would return to its traditional standard and would make no

the primary purposes of the Act is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation."[69] To best promote this policy, our joint-employer standard—to the extent permitted by the common law—should encompass the full range of employment relationships wherein meaningful collective bargaining is, in fact, possible.[70]

The core of the Board's current joint-employer standard—with its focus on whether the putative joint employer "share(s) or codetermine(s) those matters governing the essential terms and conditions of employment"—is firmly grounded in the concept of control that is central to the common-law definition of an employment relationship. The Act surely permits the Board to adopt that formulation. No federal court has suggested otherwise, and the Third Circuit in *Browning-Ferris*, of course, has endorsed this aspect of the standard.

The Board's post-*Browning-Ferris* narrowing of the joint-employer standard, however, has a much weaker footing. The Board has never looked to the common law to justify the requirements that a putative joint employer's control be exercised and that the exercise be direct and immediate, not "limited and routine." This aspect of the current standard is not, in fact, compelled by the common law—and, indeed, seems inconsistent with common-law principles. Because the Board thus is not obligated to adhere to the current standard, we must ask whether there are compelling policy reasons for doing so. The Board's prior decisions failed to offer any policy rationale at all, and we are not persuaded that there is a sound one, given the clear goals of the Act.

Under common-law principles, the right to control is probative of an employment relationship—whether or not that right is exercised. Sections 2(2) and 220(1) of the *Restatement (Second) of Agency* make this plain, in referring to a master as someone who "controls or has the *right to control*" another and to a servant as "subject to the [employer's] control *or right to control*" (emphasis added). In setting forth the test for distinguishing between employees and independent contractors, *Restatement (Second)* Section 220(2), considers (among other factors) the "extent of control which, *by the agreement*, the master *may* exercise over the details of the work" (emphasis added). The Board's joint-employer decisions requiring the exercise of control impermissibly ignore this principle.

Nothing about the joint-employer context suggests that the principle should not apply in cases like this one. Indeed, the Supreme Court's decision in *Greyhound*, supra, was entirely consistent with the *Restatement (Second)* when it described the issue as whether one firm "*possessed* [not exercised] sufficient control over the work of the employees to qualify as a joint employer."[71] Where a user employer reserves a contractual right (emphasis added) to set a specific term or condition of employment for a supplier employer's workers, it retains the ultimate authority to ensure that the term in question is administered in accordance with its preferences. Even where it appears that the user, in practice, has ceded administration of a term to the supplier, the user can still compel the supplier to conform to its expectations. In such a case, a supplier's apparently independent control over hiring, discipline, and work direction is actually exer-

distinction between direct, indirect, and potential control over working conditions and would find joint employer status where "industrial realities" make an entity essential for meaningful bargaining.

Amicus Brief of the General Counsel at 17. We decline to adopt this test insofar as it might suggest that the applicable inquiry is based on "industrial realities" rather than the common law. To be sure, however, we agree with the General Counsel that "direct, indirect, and potential control over working conditions"—at least as we have explained those concepts here— are all relevant to the joint-employer inquiry.

We also agree with the General Counsel that the "way the separate entities have structured their commercial relationship" is relevant to the joint-employer inquiry. Its relevance depends on whether the entities' relationship tends to show that the putative joint employer controls, or has the right to control—in the common-law sense—employees' essential terms and conditions of employment. "Sufficient influence" is not enough, however, if it does not amount to control.

As explained, we will not find joint-employer status where a putative joint-employer—despite the existence of a common-law employment relationship—could not engage in meaningful collective bargaining. But we reject any suggestion that such status should be found *only* where meaningful collective bargaining over employees' terms and conditions could not occur *without* the participation of the putative joint employer. Where two entities "share or codetermine those matters governing the essential terms and conditions of employment," they are *both* joint employers—regardless of whether collective bargaining with one entity alone might still be regarded as meaningful, notwithstanding that certain terms and conditions controlled only by the *other* entity would be excluded from bargaining.

[69] *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 211 (1964).

[70] See *Management Training Corp.*, 317 NLRB 1355, 1357 (1995) (recognizing, with regard to employers with close ties to government entities, that an employer may engage in meaningful bargaining with employees even where it does not exercise control over the full range of economic issues).

Our dissenting colleagues cite *Management Training* for the proposition that the bargaining obligation should be limited to the employees' most proximate employer because "employees and their exclusive bargaining representatives can still engage in meaningful bargaining under the Act even with an employer who lacks control over a substantial number of essential terms of employment." But the Board approved of such limited bargaining in *Management Training* only because some terms of employment were controlled by a government entity that was outside of the Board's jurisdiction. No such obstacle to bargaining exists here. Moreover, the thrust of *Management Training* was that an employer subject to the Act is required to bargain over the significant terms of employment that it *does* control.

[71] *Boire v. Greyhound Corp.*, supra, 376 U.S. at 481.

cised subject to the user's control. If the supplier does not exercise its discretion in conformance with the user's requirements, the user may at any time exercise its contractual right and intervene. Where a user has reserved authority, we assume that it has rationally chosen to do so, in its own interest. There is no unfairness, then, in holding that legal consequences may follow from this choice.[72]

Just as the common law does not require that control must be exercised in order to establish an employment relationship, neither does it require that control (when it *is* exercised) must be exercised directly and immediately, and not in a limited and routine manner (as the Board's current joint-employer standard demands). Comment d ("Control or right to control") to Section 220(1) of the *Restatement (Second)* observes that "the control or right to control needed to establish the relation of master and servant may be very attenuated."[73] The common law, indeed, recognizes that control may be *indirect*. For example, the *Restatement of Agency (Second)* §220, comment l ("Control of the premises") observes that

> [i]f the work is done upon the premises of the employer with his machinery by workmen who agree to obey general rules for the regulation of the conduct of employees, the inference is strong that such workmen are the servants of the owner...

and illustrates this principle by citing the example of a coal mine owner employing miners who, in turn, supply their own helpers. Both the miners *and* their helpers are servants of the mine owner.[74] As the illustration demonstrates, the common law's "subservant" doctrine addresses situations in which one employer's control is or may be exercised indirectly, where a second employer directly controls the employee.[75] The Federal courts have applied the "subservant" doctrine in cases under Federal statutes that incorporate the common-law standard for determining an employment relationship[76]—including the National Labor Relations Act.[77] The most recent authoritative effort to restate the common law related to employment is consistent with traditional doctrine and similarly makes clear that direct and immediate control is *not* required.[78]

In this respect, too, nothing supports the view that common-law principles can or should be ignored in the Board's joint-employer doctrine. Board case law suggests that in many contingent arrangements, control over employees is bifurcated between employing firms with each exercising authority over a different facet of decision making. Where the user firm owns and controls the premises, dictates the essential nature of the job, and imposes the broad, operational contours of the work, and the supplier firm, pursuant to the user's guidance, makes specific personnel decisions and administers job performance on a day-to-day basis, employees' working conditions are a byproduct of two layers of control. The

[72] The dissent observes that the Board has assigned probative weight only to evidence of actual authority or control in its assessment of various statutory exclusions, including independent contractors and supervisors. But the guiding policy in those areas, as here, is to ensure that statutory coverage is fully effectuated. See *FedEx Home Delivery*, 361 NLRB No. 55, slip. op. at 9 (2014), quoting *Holly Farms Corp. v. NLRB,* 517 U.S. 392, 399 (1996), ("[A]dministrators and reviewing courts must take care to assure that exemptions from NLRA coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach."). To recognize the significance of the right to control in the joint employment context, in which two putative employers are involved, both serves that policy and is consistent with the common law.

[73] "[I]t is not so much the actual exercise of controls as possession of the right to control which is determinative. In other words, 'subject to the control of the master' does not mean that the master must stand over the servant and constantly give directions." *The Law of Agency and Partnership* Sec. 50 (2nd ed. 1990).

[74] See also *Restatement (Second) of Agency*, Sec. 5, comments e & f, & illustration 6 (discussing subservant relationship between mine owner and miner's helper).

[75] See *Restatement (Second) of Agency*, Sec. 5 ("Subagents and Subservants") (1958); Warren A. Seavey, *Subagents and Subservants*, 68 Harv. L. Rev. 658, 669 (1955) (in subservant situation, the "employing servant . . . is in the position of a master to those whom he employs but they are also in the position of servants to the master in charge of the entire enterprise"). The *Restatement (Second)* Sec. 5, comment e observes that:

> Illustrations of the subservant relation include that between the mine owner and the assistant of a miner who furnishes his own tools and assistants, the latter, however, being subject to the general mine discipline; the relation between the owner of a building and an employee of a janitor; the relation between the employees of a branch manager of a corporation where the branch manager is free to control and pay his assistants, but where all are subject to control by the corporation as to their conduct.

[76] See, e.g., *Schmidt v. Burlington Northern & Santa Fe Railway Co.*, 605 F. 3d 686, 689–690 (9th Cir. 2010) (applying Federal Employers' Liability Act and finding evidence sufficient to establish employment relationship between railroad line and employee of railroad-car maintenance and repair company). Cf. *Williamson v. Consolidated Rail Corp.,* 926 F.2d 1344, 1350 (3d. Cir. 1991) (observing that use of subservant doctrine is unnecessary where there is evidence of direct control). See generally *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 325 (1974) (recognizing subservant doctrine for purposes of Federal Employers' Liability Act).

[77] *Allbritton Communications Co. v. NLRB*, 766 F.2d. 812, 818–819 (3d Cir. 1985) (upholding Board's determination that newspaper was statutory employer of mailroom employees, although second employer operated mailroom).

[78] See *Restatement of Employment Law*, Section 1.04(b) (June 2015) ("An individual is an employee of two or more joint employers if (i) the individual renders services to at least one of the employers and (ii) that employer and the other joint employers each *control or* supervise such rendering of services as provided in § 1.01(a)(3).")(emphasis added). (In relevant part, Sec. 1.01(a)(3) defines an employee as an individual who renders service to an employer who "controls the manner and means by which the individual renders service.")

Board's current focus on only direct and immediate control acknowledges the most proximate level of authority, which is frequently exercised by the supplier firm, but gives no consideration to the substantial control over workers' terms and conditions of employment of the user.[79]

The common-law definition of an employment relationship establishes the outer limits of a permissible joint-employer standard under the Act. But the Board's current joint-employer standard is significantly narrower than the common law would permit. The result is that employees covered by the Act may be deprived of their statutory right to bargain effectively over wages, hours, and working conditions, solely because they work pursuant to an arrangement involving two or more employing firms, rather than one. Such an outcome seems clearly at odds with the policies of the Act.

VI. THE RESTATED JOINT-EMPLOYER STANDARD

Having fully considered the issue and all of the arguments presented, we have decided to restate the Board's legal standard for joint-employer determinations and make clear how that standard is to be applied going forward.

We return to the traditional test used by the Board (and endorsed by the Third Circuit in *Browning-Ferris*): The Board may find that two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment. In evaluating the allocation and exercise of control in the workplace, we will consider the various ways in which joint employers may "share" control over terms and conditions of employment or "codetermine" them, as the Board and the courts have done in the past.[80]

We adhere to the Board's inclusive approach in defining "essential terms and conditions of employment." The Board's current joint-employer standard refers to "matters relating to the employment relationship *such as* hiring, firing, discipline, supervision, and direction" a nonexhaustive list of bargaining subjects.[81] Essential terms indisputably include wages and hours, as reflected in the Act itself.[82] Other examples of control over mandatory terms and conditions of employment found probative by the Board include dictating the number of workers to be supplied;[83] controlling scheduling,[84] seniority, and overtime;[85] and assigning work and determining the manner and method of work performance.[86] This approach has generally been endorsed by the Federal courts of appeals.[87]

Also consistent with the Board's traditional approach, we reaffirm that the common-law concept of control informs the Board's joint-employer standard. But we will no longer require that a joint employer not only possess the authority to control employees' terms and conditions

[79] As noted in several briefs in support of the Union, the Board's longstanding legal formulation for joint-employer status, even post-*TLI*, nominally acknowledges this bifurcated dynamic by covering employers that "codetermine" employees' terms and conditions of employment. But the Board's restrictive application of the test, which precludes any holistic assessment of the way control is allocated between the contracting parties, undermines this aspect of the joint-employer standard.

[80] In some cases (or as to certain issues), employers may engage in genuinely shared decision-making, e.g., they confer or collaborate directly to set a term of employment. See *NLRB v. Checker Cab Co.*, 367 F.2d 692, 698 (6th Cir. 1966) (noting that employers "banded themselves together so as to set up joint machinery for hiring employees, for establishing working rules for employees, for giving operating instructions to employees, for disciplining employees for violation of rules, for disciplining employees for violation of safety regulations"). Alternatively, employers may exercise comprehensive authority over different terms and conditions of employment. For example, one employer sets wages and hours, while another assigns work and supervises employees. See *D & F Industries,* 339 NLRB 618, 640 (2003). Or employers may affect different components of the same term, e.g., one employer defines and assigns work tasks, while the other supervises how those tasks are carried out. See *Hamburg Industries*, supra, 193 NLRB at 67. Finally, one employer may retain the contractual right to set a term or condition of employment. See *Hoskins Ready-Mix Concrete*, supra, 161 NLRB at 1493.

[81] *TLI*, supra, 271 NLRB at 798 (emphasis added). After *TLI*, the Board has continued to take a broad, inclusive approach to determining the relevant object of a putative joint employer's control, i.e., which terms and conditions of employment matter to the joint-employer inquiry. See *Aldworth Co.*, 338 NLRB 137, 139 (2002) (the "relevant facts involved in [the joint-employer] determination extend to nearly every aspect of employees' terms and conditions of employment and must be given weight commensurate with their significance to employees' work life"), enfd. sub nom. *Dunkin' Donuts Mid-Atlantic Distribution Center v. NLRB*, 363 F.3d 437 (D.C. Cir. 2004).

[82] Sec. 8(d), defining an employer's duty to bargain, specifically refers to the obligation to "confer in good faith over *wages, hours*, and other terms and conditions of employment." 29 U.S.C. Sec. 158(d) (emphasis added).

[83] *Mobil Oil*, supra, 219 NLRB at 516.

[84] *Continental Winding Co.*, 305 NLRB 122, 123 fn. 4 (1991).

[85] *D&F Industries,* supra*,* 339 NLRB at 649 fn. 77.

[86] *DiMucci Const. Co. v. NLRB.*, 24 F.3d 949, 952 (7th Cir. 1994) ("Factors to consider in determining joint employer status are: (1) supervision of employees' day-to-day activities; (2) authority to hire or fire employees; (3) promulgation of work rules and conditions of employment; (4) issuance of work assignments; and (5) issuance of operating instructions").

[87] See, e.g., *Tanforan Park Food Purveyors Council v. NLRB*, 656 F.2d 1358, 1361 (9th Cir. 1981); *Sun-Maid Growers of California v. NLRB*, 618 F.2d 56, 59 (9th Cir. 1980) ("A joint employer relationship exists when an employer exercises authority over employment conditions which are within the area of mandatory collective bargaining."); *Cabot Corp.*, 223 NLRB 1388, 1389-1390 (1976), enfd. sub nom. *International Chemical Workers Union Local 483 v. NLRB*, 561 F.2d 253 (D.C. Cir. 1977) (labor relations policies of the contractor or impact over the wages, hours, and working conditions of the contractor's employees).

of employment, but must also exercise that authority, and do so directly, immediately, and not in a "limited and routine" manner. Accordingly, we overrule *Laerco*, *TLI*, *A&M Property*, and *Airborne Express*, supra, and other Board decisions, to the extent that they are inconsistent with our decision today. The right to control, in the common-law sense, is probative of joint-employer status, as is the actual exercise of control, whether direct or indirect.

The existence, extent, and object of a putative joint employer's control, of course, all may present material issues. For example, it is certainly possible that in a particular case, a putative joint employer's control might extend only to terms and conditions of employment too limited in scope or significance to permit meaningful collective bargaining. Moreover, as a rule, a joint employer will be required to bargain only with respect to such terms and conditions which it possesses the authority to control.

The dissent repeatedly criticizes our decision as articulating a test under which "there can be no certainty or predictability regarding the identity of the 'employer.'" But we do not and cannot attempt today to articulate every fact and circumstance that could define the contours of a joint employment relationship. Issues related to the nature and extent of a putative joint-employer's control over particular terms and conditions of employment will undoubtedly arise in future cases—just as they do under the current test—and those issues are best examined and resolved in the context of specific factual circumstances. In this area of labor law, as in others, the "'nature of the problem, as revealed by unfolding variant situations,' requires 'an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer.'"[88]

Further, while our dissenting colleagues concede that the common law must form the basis of the Board's joint-employer test, they seem unwilling to apply its mode of analysis. As the Supreme Court has acknowledged, multifactor common-law inquiries are inherently nuanced and indeterminate: "In such a situation as this there is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles."[89] Accordingly, the nuanced approach that the dissent decries is a longstanding necessity of our common-law mandate, and not a novel or discretionary feature that we introduce here.

Our dissenting colleagues also accuse us of articulating a test "with no limiting principle" that "removes all limitations on what kind or degree of control over essential terms and conditions of employment may be sufficient to warrant a joint-employer finding." This is simply not the case. The dissent ignores the limitations that are inherent to the common law, particularly those set forth in the Restatement provisions enumerated above. Instead, the dissent suggests that, under the revised joint-employer test, a homeowner who hires a plumber or a lender who sets the homeowner's financing terms may each be deemed a statutory employer. But by any common-law analysis, these parties will not exercise, or have the right to exercise, the requisite control over the details of employees' work to forge common-law employment relationships. It should therefore come as no surprise that the annals of Board precedent contain no cases that implicate the consumer services purchased by unsuspecting homeowners or lenders.

The dissent is particularly pointed in its criticism of our assignment of probative weight to a putative employer's indirect control over employees; it contends that "anyone contracting for services, master or not, inevitably will exert and/or reserve some measure of indirect control by defining the parameters of the result desired to ensure he or she gets the benefit of his or her bargain." We do not suggest today that a putative employer's bare rights to dictate the results of a contracted service or to control or protect its own property constitute probative indicia of employer status. Instead, we will evaluate the evidence to determine whether a user employer affects the means or manner of employees' work and terms of employment, either directly or through an intermediary. In this case, for instance, BFI communicated precise directives regarding employee work performance through Leadpoint's supervisors. We see no reason why this obvious control of employees by BFI should be discounted merely because it was exercised via the supplier rather than directly.

Finally, the dissent asserts that today's decision gives the Board license to find joint-employer status based on only the slightest, most tangential evidence of control and "any degree of indirect or reserved control over a single term . . . may suffice to establish joint-employer status." Today's decision, however, makes clear that "all of the incidents of the relationship must be assessed."[90] Here, for example, our conclusion that BFI is a joint employer is based on a full assessment of the facts (set forth

[88] *Eastex, Inc. v. NLRB,* 437 U.S. 556, 574–575 (1978), quoting *Electrical Workers v. NLRB,* 366 U.S. 667, 674 (1961).

[89] *United Insurance*, supra, 390 U.S. at 258.

[90] *United Insurance*, supra, 390 U.S. at 258.

below) that reveals multiple examples of reserved, direct, and indirect control over Leadpoint employees.

VII. RESPONSE TO DISSENT'S ARGUMENTS REGARDING THE COMMON LAW

Notwithstanding the strong basis in common law for the standard we adopt, our dissenting colleagues assert repeatedly that the Board is not applying common law but instead reverting to the "economic realities" test that was once applied by the Supreme Court in *NLRB v. Hearst Publications*, 322 U.S. 111 (1944). In *Hearst*, the Court interpreted the Act to include "employees (who) are at times brought into an economic relationship with employers who are not their employers"; to "reject conventional limitations" in defining an employee or employer; and to intend that those definitions be applied "broadly . . . by underlying economic facts."[91] Our dissenting colleagues also assert that while the *Hearst* standard would include indirect control over terms of employment within the definition of joint employer, common law does not.

Both of these assertions are incorrect. As we have already made clear, our revised standard considers—as does common law—only an entity's control over terms of employment, not the wider universe of all "underlying economic facts" that surround an employment relationship.[92] Moreover, courts applying the "economic realities" test for an employer under the Fair Labor Standards Act and the Agricultural Workers Protection Act (AWPA) have recognized that although that test is significantly more expansive than the common-law test, indirect control over terms of employment is clearly a factor in the common-law test.[93]

The dissent also insists that the "current test is fully consistent with the common law agency principles" and should not be revisited or altered. But it fails to dispute or even acknowledge the extensive legal authority we cite to establish the common-law foundation of our approach.[94]

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[91] Id. at 129.

[92] Citing Justice Stewart's concurrence in *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964), the dissent sets up a straw man suggesting that our test encroaches on an employer's decisions concerning the volume and kind of advertising expenditures, product design, the manner of financing, and sales. Here, we are dealing only with subjects that are indisputably bargainable.

[93] "[The factor of] 'degree of supervision by the grower, *direct or indirect*, of the work' [regulation citation omitted] . . . like the growers' control over the workers, has more to do with common-law employment concepts of control than with economic dependence." *Antenor v. D & S Farms*, 88 F.3d 925, 934 (11th Cir. 1996) (applying AWPA, emphasis added). "[I]n considering a joint-employment relationship [under the AWPA] . . . our inquiry looks *not* to the common law definitions of employer and employee (for instance, to tests measuring *the amount of control an ostensible employer exercised over a putative employee*), but *rather* to the 'economic reality' of all the circumstances concerning whether the putative employee is economically dependent upon the alleged employer." Id. at 933, quoting *Aimable v. Long & Scott Farms*, 20 F.3d 434, 439 (11th Cir. 1994) (emphasis added). See also *Williamson v. Consolidated Rail Corp.,* supra, 926 F.2d at 1350 (in the common-law test for an employment relationship under FELA, "the factual issue before the jury included direct control, as well as indirect control through sub-agency.")

[94] Even where our dissenting colleagues cite case law, their efforts are wholly unpersuasive. In support of their contention (notwithstanding their acknowledgment to the contrary) that the common law requires proof of direct and immediate control to substantiate employer status, our colleagues rely on a number of early common-law decisions that merely confirm the traditional legal distinction between an employer's control over the final product and an employer's control over the work of employees, which we do not dispute. Our colleagues also cite various independent-contractor decisions to support their proposition that courts have "implicitly limited their analysis to looking for direct and immediate control." But none of these decisions hold, even implicitly, that the existence of indirect control would *not* be probative of employer status; they are merely garden-variety independent-contractor cases in which courts found that individuals were not employees based on the totality of the circumstances. The dissent's attempt to glean any kind of general principle disfavoring indirect control as a relevant factor from these decisions—without citing any specific facts—is tenuous at best. Likewise, the comments from Sec. 220 of the *Restatement (Second) of Agency* on which our colleagues rely do not state or suggest that the consideration of indirect control is proscribed under the common law.

As to the more recent circuit court decisions that our colleagues cite, the dissent's assertions regarding direct control depend largely on the quotation of key phrases taken out of context. In *Gulino v. N.Y. State Education Dept.*, 460 F.3d 361 (2d Cir. 2006), for instance, the court found that the Education Department was not a joint employer (subject to Title VII liability) because it did not hire, promote, or demote teachers, or determine their pay, tenure or benefits. Id. at 379. Although the court stated that it was looking for a "level of control [that] is direct, obvious, and concrete, not merely indirect or abstract", it did so only to emphasize that all of the evidence presented to support a joint-employer finding was attenuated and insubstantial. Id. In *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677 (9th Cir. 2009), the plaintiffs were overseas employees who alleged that Wal-Mart was their joint employer because it contracted with their local employers for production of goods. The court emphasized that Wal-Mart contracted with the factories only regarding prices, the quality of products, and the materials used. Id. at 683. As in *Gulino*, the court's statement that Wal-Mart did not have the right to exercise an "immediate level of day to day control" over employees was a reflection of Wal-Mart's total lack of control over working conditions rather than a specific holding on the probative value of indirect control evidence. Id. Indeed, neither of these cases were close, and the courts' decisions did not turn on any refusal to assign weight to indirect control; rather, in both decisions, there was little if any relevant evidence of control of any sort. In *Patterson v. Domino's Pizza, LLC*, 333 P.3d 723, 740 (Cal. 2014), while the Supreme Court of California stated that its employer standard required "a comprehensive and immediate level of day-to-day authority over matters such as hiring, firing, direction, supervision, and discipline of the employee" (internal quotations omitted), the court was expressly relying on precedent under the California Fair Employment and Housing Act. That decision also addressed the particularized features of franchisor/franchisee relationships, none of which are present here.

VIII. APPLICATION OF THE RESTATED TEST

With the above principles in mind, we evaluate here whether BFI constitutes a joint employer under the Act. As always, the burden of proving joint-employer status rests with the party asserting that relationship.[95] Having assessed all of the relevant record evidence, we conclude that the Union has met its burden of establishing that BFI is a statutory joint employer of the sorters, screen cleaners, and housekeepers at issue. BFI is an employer under common-law principles,[96] and the facts demonstrate that it shares or codetermines those matters governing the essential terms and conditions of employment for the Leadpoint employees. In many relevant respects, its right to control is indisputable. Moreover, it has exercised that control, both directly and indirectly. Finding joint-employer status here is consistent with common-law principles, and it serves the purposes of the National Labor Relations Act. We rely on the following factors in reaching this conclusion.

A. Hiring, Firing, and Discipline

BFI possesses significant control over who Leadpoint can hire to work at its facility. By virtue of the parties' Agreement, which is terminable at will,[97] BFI retains the right to require that Leadpoint "meet or exceed [BFI's] own standard selection procedures and tests,"[98] requires that all applicants undergo and pass drug tests, and proscribes the hiring of workers deemed by BFI to be ineligible for rehire.[99] Although BFI does not participate in Leadpoint's day-to-day hiring process, it codetermines the outcome of that process by imposing specific conditions on Leadpoint's ability to make hiring decisions. Moreover, even after Leadpoint has determined that an applicant has the requisite qualifications, BFI retains the right to reject any worker that Leadpoint refers to its facility "for any or no reason."[100]

Similarly, BFI possesses the same unqualified right to "discontinue the use of any personnel" that Leadpoint has assigned.[101] Although BFI managers testified that they have never discontinued use of a Leadpoint employee or been involved in disciplinary procedures, record evidence includes two specific instances where BFI Operations Manager Keck reported employees' misconduct to Leadpoint and "request[ed] their immediate dismissal." In response to Keck's directive, Leadpoint officials immediately removed the employees from their line duties and dismissed them from the BFI facility shortly thereafter. Though the evidence shows that Leadpoint conducted its own investigation of the alleged misconduct, it is also plain that the outcome was preordained by BFI's ultimate right under the terms of the Agreement to dictate who works at its facility.[102]

B. Supervision, Direction of Work, and Hours

In addition, BFI exercises control over the processes that shape the day-to-day work of the petitioned-for employees. Of particular importance is BFI's unilateral control over the speed of the streams and specific productivity standards for sorting.[103] BFI argues that, although it controls the pace of work, Leadpoint supervisors alone decide how employees will respond to BFI's adjustments. This characterization of the process, however, discounts the clear and direct connection between BFI's decisions and employee work performance. The evi-

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[95] See, e.g. *Flagstaff Medical Center*, supra, 357 NLRB No. 65 slip op. at 9.

[96] It is clear that Leadpoint employees are, in the words of *Restatement (Second) of Agency* §220(1) "employed to perform services in the affairs of" BFI and "with respect to the physical conduct in the performance of the services" are "subject to [BFI's] control or right to control." The record shows that BFI engages in "de facto close supervision" of the work of Leadpoint employees; that the work of Leadpoint employees "does not require the services of one highly educated or skilled;" that Leadpoint employees have "employment over a considerable period of time with regular hours;" and that the work of Leadpoint employees "is part of the regular business" of BFI. *Restatement (Second) of Agency* Sec. 220, comment h ("Factors indicating the relation of master and servant"). As a general matter, this case closely resembles the situation addressed in *Restatement (Second)* Sec. 220, comment l, which explains that where "work is done upon the premises of the employer with his machinery by workmen who agree to obey general rules for the regulation of the conduct of employees, the inference is strong that such workmen are the servants of the owner." Finally, the record here fairly permits categorizing the Leadpoint employees as subservants of BFI, as well as servants of Leadpoint.

[97] See *Value Village*, supra, 161 NLRB at 607; *Mobil Oil*, supra, 219 NLRB at 516 (relying on user's right to terminate contract at will as evidence of control).

[98] Applicants are tested on BFI's equipment and are required to meet specific productivity benchmarks in order to qualify for hire.

[99] See *K-Mart*, 159 NLRB 256, 258 (1966) (relying, in part, on contract language stating that contracting parties would not "hire an employee or former employee of the other without first checking" with the other party).

[100] See *Pacemaker Driver Service*, 269 NLRB 971, 975 (1984), enfd. 768 F.2d 778 (6th Cir. 1985) (relying on user's unilateral right to reject any driver referred by contractor); *Lowery Trucking*, supra, 177 NLRB at 15 (noting that "while [the user] never rejected a driver hired by [the supplier], it had the right to do so.").

[101] See *Ref-Chem Co.*, supra, 169 NLRB at 379 (emphasizing user's "virtually unqualified right to request the removal of an employee of the contractor."); *Hamburg Industries*, supra, 193 NLRB at 67 (relying on user's right to force supplier to remove employees from its plant).

[102] As Keck stated in his e-mail to Leadpoint on this matter, the misconduct Keck witnessed "is all I need to proceed." See *Grand Central Liquors*, 155 NLRB 295, 297 (1965) (noting that where the user requested the discharge of employees, the supplier complied).

[103] *Clayton B. Metcalf*, supra, 223 NLRB at 644 (emphasizing that putative employer had "day-to-day responsibility for the overall operation of the [facility] and all . . . operations were performed in accordance with [its] . . . plan" and that it "exercised considerable control over the manner and means by which [the subcontractor] performed its operations.")

dence reveals that the speed of the line and the resultant productivity issues have been a major source of strife between BFI and the workers. BFI managers have directly implored workers to work faster and smarter; likewise, they have repeatedly counseled workers, in the interest of productivity, against stopping the streams. Tellingly, there is no evidence that Leadpoint has had any say in these decisions. Indeed, given BFI's "ultimate control" over these matters, it is difficult to see how Leadpoint alone could bargain meaningfully about such fundamental working conditions as break times, safety, the speed of work, and the need for overtime imposed by BFI's productivity standards.[104]

BFI managers also assign the specific tasks that need to be completed, specify where Leadpoint workers are to be positioned, and exercise near-constant oversight of employees' work performance.[105] The fact that many of their directives are communicated through Leadpoint supervisors hardly disguises the fact that BFI alone is making these decisions.[106] Further, in numerous instances, BFI has dispensed with the middleman altogether. BFI managers have communicated detailed work directions to employees on the stream; held meetings with employees to address customer complaints and business objectives, and to disseminate preferred work practices; and assigned to employees tasks that take precedence over any work assigned by Leadpoint.[107] We find that all of these forms of control – both direct and indirect – are indicative of an employer-employee relationship.

In addition, BFI specifies the number of workers that it requires,[108] dictates the timing of employees' shifts,[109] and determines when overtime is necessary.[110] Although Leadpoint is responsible for selecting the specific employees who will work during a particular shift, it is BFI that makes the core staffing and operational decisions that define all employees' work days. In turn, Leadpoint employees are required to obtain the signature of an authorized *BFI* representative attesting to their "hours of services rendered" each week; failure to do so permits BFI to refuse payment to Leadpoint for time claimed by a Leadpoint worker.

C. Wages

We find too that BFI plays a significant role in determining employees' wages. Under the parties' contract, Leadpoint determines employees' pay rates, administers all payments, retains payroll records, and is solely responsible for providing and administering benefits. But BFI specifically prevents Leadpoint from paying employees more than BFI employees performing comparable work.[111] BFI's employment of its own sorter at $5 more an hour creates a de facto wage ceiling for Leadpoint workers. In addition, BFI and Leadpoint are parties to a cost-plus contract, under which BFI is required to reimburse Leadpoint for labor costs plus a specified percentage markup.[112] Although this arrangement, on its own, is not necessarily sufficient to create a joint-employer relationship,[113] it is coupled here with the apparent requirement of BFI approval over employee pay increases.[114] Thus, after new minimum wage legislation went into effect, BFI and Leadpoint entered into an agreement verifying that BFI would pay a higher rate for the services of Leadpoint employees.[115]

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[104] *Int'l Trailer*, supra, 133 NLRB at 1529. See also *Carrier Corp. v. NLRB*, supra, 768 F.2d at 781 (finding substantial evidence in support of the Board's joint-employer finding where putative employer "exercised substantial day-to-day control over the drivers' working conditions.").

[105] See *Hamburg Industries*, supra, 193 NLRB at 67 (finding indicia of control where putative employer instructed supplier on the work to be performed and "constantly check[ed] the performance of the workers and the quality of the work.")

[106] See *Int'l Trailer*, supra, 133 NLRB at 1529 (noting that, although putative employer did not directly supervise employees, it issued orders, through the other firm's supervisor, as to how employees should perform their duties).

[107] See *Sun-Maid Growers*, supra, 239 NLRB at 350 (finding indicia of control where putative employer's supervisors "occasionally provided specifications and instructions regarding the manner in which the work could be performed" and directly assigned work that took precedence over other assignments).

[108] See *Mobil Oil*, supra, 219 NLRB at 516 (relying on user's ability to dictate the size of the supplier's crew); *Hamburg Industries*, supra, 193 NLRB at 67 (same).

[109] BFI also affects the length of break periods by requiring employees to clean around their work stations before releasing them on break.

[110] *Sun-Maid Growers*, supra, 239 NLRB at 351 (finding indicia of control where the user dictated employees' "basic workweek" and number of overtime hours available based on its production schedule); *Floyd Epperson*, supra, 202 NLRB at 23 (user established work schedules).

[111] See *K-Mart*, 161 NLRB 1127, 1129 (1966) (relying on the fact that putative employer directed other firm to start full-time employees at no less than the rate that it paid to certain categories of its employees).

[112] See *CNN America*, 361 NLRB No. 47 slip op. at 6 (2014) (relying on parties' cost-plus arrangement as evidence of joint-employer status); *Hoskins Ready-Mix Concrete*, supra, 161 NLRB at 1493, and the cases cited in footnote 37.

[113] See *Pulitzer Publishing Co.*, 242 NLRB 35, 36 (1979), enf. denied 618 F.2d 1275 (8th Cir. 1980), cert. denied 499 U.S. 875 (1980) (assessing parties' cost-plus contract as one factor among many).

[114] See *Hoskins Ready-Mix Concrete*, supra, 161 NLRB at 1493 (relying on the fact that supplier was required to consult with user and obtain clearance before changing pay rates or hiring new employees at a rate above a specified level).

[115] In addition to the factors stated, we rely on the fact that BFI, by the terms of the Agreement, compels Leadpoint and its employees to comply with BFI's safety policy, and reserves the right to enforce its safety policy as to the workers. See *Hamburg Industries*, 193 NLRB at 67 (user requires all employees to follow its own safety rules); *Man-*

We find BFI's role in sharing and codetermining the terms and conditions of employment establishes that it is a joint employer with Leadpoint.[116] Accordingly, we reverse the Regional Director and find that BFI and Leadpoint are joint employers of the sorters, screen cleaners, and housekeepers at issue.[117]

VIII. THE IMPLICATIONS OF TODAY'S DECISION

Today's decision is grounded firmly in the common law, while advancing the policies of the National Labor Relations Act. In both respects, its approach is superior to prior law, which, as we have explained, imposed restrictions on the joint-employer standard that have no common-law basis and that foreclosed collective bargaining even in situations where it could be productive. Certainly, we have modified the legal landscape for employers with respect to one federal statute, the National Labor Relations Act.[118] But "reevaluating doctrines, refining legal rules, and sometimes reversing precedent are familiar parts of the Board's work—and rightly so."[119] As recognized by the Supreme Court:

> The use by an administrative agency of the evolutional approach is particularly fitting. To hold that the Board's earlier decisions froze the development . . . of the national labor law would misconceive the nature of administrative decisionmaking.

NLRB v. J. Weingarten, supra, 420 U.S. at 265–266.

Our colleagues' long and hyperbolic dissent persistently mischaracterizes the standard we adopt today and grossly exaggerates its consequences, but makes no real effort to address the difficult issue presented here: how best to "encourag[e] the practice and procedure of collective bargaining" (in the Act's words) when otherwise bargainable terms and conditions of employment are under the control of more than one statutory employer. Instead, the dissent puts the preservation of the current status quo far ahead of any cognizable statutory policy. Our colleagues never adequately explain why the Board should adhere to an approach that they essentially concede is not compelled by the common law and that demonstrably fails to fully advance the goals of the Act.[120]

As a practical matter, the criticisms that our colleagues level at our joint-employer standard could be made about the concept of joint employment generally—which has been recognized under the Act for many decades and which has long been a familiar feature of labor and employment law. The law-school-exam hypothetical of doomsday scenarios that they predict will result from today's decision is likewise based on an exaggeration of the challenges that can sometimes arise when multiple employers are required to engage in collective bargaining. The potential for these types of challenges to arise has existed for as long as the Board has recognized the joint-employer concept. Nonetheless, employers and unions have long managed to navigate these challenges, and the predicted disasters have not come to pass.[121]

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power, 164 NLRB 287, 287–288 (1967) (user gives employees safety instruction and conducts periodic safety meetings). We also note that BFI and Leadpoint have jointly determined, also by terms of the Agreement, that employees cannot work at BFI for more than 6 months. We find that these terms are further indicative of BFI's status as an employer of the employees at issue.

[116] See *Hamburg Industries*, supra, 193 NLRB at 67 (finding user to be joint-employer, in substantially similar factual scenario, where user had "considerable control over [supplier's] operations in such critical areas as work instructions, quality control and the right to reject finished work, work scheduling, and indirect control over wages").

[117] The dissent, in its brief discussion of the facts in this case, contends that "the majority's evidence amounts to a collection of general contract terms or business practices . . . plus a few extremely limited actions that had some routine impact on Leadpoint employees." In so doing, however, the dissent cannot avoid setting out a list of nine specific ways in which BFI has exercised or reserved control over Leadpoint employees. In our view, our colleagues' accounting of these factors makes a persuasive case for BFI's joint-employer status. Nonetheless, we note that the dissent's analysis excludes or downplays several additional critical factors, including BFI's control over the speed of the lines, productivity standards, and the use of the stop switches, as well as BFI's direct and ongoing instruction of Leadpoint employees in the details of job performance.

[118] The Board's joint-employer standard, of course, does not govern joint-employer determinations under the many other statutes, federal and state, that govern the workplace and that use a variety of different standards to determine whether a particular business entity has legal duties with respect to particular workers.

[119] *UGL-UNICCO Service Co.*, 357 NLRB No. 76, slip op. at 5 (2011).

[120] The dissent is simply wrong when it insists that today's decision "fundamentally alters the law" with regard to the employment relationships that may arise under various legal relationships between different entities: "lessor-lessee, parent-subsidiary, contractor-subcontractor, franchisor-franchisee, predecessor-successor, creditor-debtor, and contractor-consumer." None of those situations are before us today, and we decline the dissent's implicit invitation to address the facts in every hypothetical situation in which the Board might be called on to make a joint-employer determination. As we have made clear, the common-law test requires us to review, in each case, all of the relevant control factors that are present determining the terms of employment. In this case we are specifically concerned with only two employers: BFI and Leadpoint.

Likewise, we need not address the dissent's assertion that the decision somehow undermines other rules under the Act that are not at issue here, such as the prohibition on secondary boycott activity, other than to emphasize that our decision today does not modify any other legal doctrine, create "different tests" for "other circumstances," or change the way that the Board's joint-employer doctrine interacts with other rules or restrictions under the Act.

[121] For example, 20 years ago, the Board changed its approach in cases involving government contractors, rejecting the position that the Board should assert jurisdiction only where the contractor controlled economic terms and conditions of employment. *Management Training Corp.*, supra. The dissent insisted that the Board had "radically change[d] extant law," adopting a "doctrine that ha[d] virtually no

It is not the goal of joint-employer law to guarantee the freedom of employers to insulate themselves from their legal responsibility to workers, while maintaining control of the workplace. Such an approach has no basis in the Act or in federal labor policy.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 32 shall, within 14 days of this Decision on Review and Direction, open and count the impounded ballots cast by the employees in the petitioned-for unit, prepare and serve on the parties a tally of ballots, and thereafter issue the appropriate certification.

Dated, Washington, D.C. August 27, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBERS MISCIMARRA AND JOHNSON, dissenting.

The National Labor Relations Act (the Act) establishes a comprehensive set of rules for industrial relations in this country, and a primary function of the Board is to foster compliance with those rules by employees, unions, and employers. To comply with these rules, as they have grown and evolved over the last eight decades, substantial planning is required. This is especially true in regard to collective bargaining, a process that is central to the Act. The Act's bargaining obligations are formidable—as they should be—and violations can result in significant liability. When it comes to the duty to bargain, the resort to strikes or picketing, and even the basic question of "who is bound by this collective-bargaining agreement," there is no more important issue than correctly identifying the "employer." Changing the test for identifying the "employer," therefore, has dramatic implications for labor relations policy and its effect on the economy.

Today, in the most sweeping of recent major decisions, the Board majority rewrites the decades-old test for determining who the "employer" is. More specifically, the majority redefines and expands the test that makes two separate and independent entities a "joint employer" of certain employees. This change will subject countless entities to unprecedented new joint-bargaining obligations that most do not even know they have, to potential joint liability for unfair labor practices and breaches of collective-bargaining agreements, and to economic protest activity, including what have heretofore been unlawful secondary strikes, boycotts, and picketing.

Our colleagues are driven by a desire to ensure that the prospect of collective bargaining is not foreclosed by business relationships that allegedly deny employees' right to bargain with employers that share control over essential terms and conditions of their employment. However well intentioned they may be, there are five major problems with this objective.

First, no bargaining table is big enough to seat all of the entities that will be potential joint employers under the majority's new standards. In this regard, we believe the majority's new test impermissibly exceeds our statutory authority. From the majority's perspective, the change in the joint-employer analysis is an allegedly necessary adaptation of Board law to reflect changes in the national economy. In making this change, they purport to operate within the limits of traditional common-law principles by restoring and clarifying what they claim to be the law applied by the Board prior to 1984. In actuality, however, our colleagues incorporate theories of "economic realities" and "statutory purpose" that extend the definitions of "employee" and "employer" far beyond the common-law limits of agency principles that Congress and the Supreme Court have stated must apply.[1] Their decision represents a further expansion of revisions made in the majority decisions in *FedEx*,[2] which similarly revised the Board's longstanding definition of independent contractor status in a way that will predictably extend the Act's coverage to many individuals previously considered to be excluded as independent contractors, and in *CNN*,[3] which imposed after-the-fact joint-employer obligations contrary to the parties' 20-year-bargaining history, applicable collective-bargaining agreements (CBAs), relevant services contracts and the Board's own prior union certifications.

Second, the majority's rationale for overhauling the Act's "employer" definition—to protect bargaining from limitations resulting from third-party relationships that indirectly control employment issues—relies in substan-

limitation" and would "cause more problems than it solve[d]." 317 NLRB at 1360–1362. These dire predictions did not come to pass, and *Management Training* remains the law today.

[1] The common-law agency principles are also known as "master-servant" principles in the older cases and literature, and these terms are used interchangeably both in the doctrine and here.

[2] *FedEx Home Delivery*, 361 NLRB No. 55 (2014).

[3] *CNN America, Inc.*, 361 NLRB No. 47 (2014).

tial part on the notion that these relationships are unique in our modern economy and represent a radical departure from simpler times when labor negotiations were unaffected by the direct employer's commercial dealings with other entities. However, such an economy has not existed in this country for more than 200 years.[4] Many forms of subcontracting, outsourcing, and temporary or contingent employment date back to long before the 1935 passage of the Act. Congress was obviously aware of the existence of third-party intermediary business relationships in 1935, when it limited bargaining obligations to the "employer," in 1947, when it limited the definition of "employee" and "employer" to their common-law agency meaning, and in 1947 and 1959, when Congress strengthened secondary boycott protection afforded to third parties who, notwithstanding their dealings with the "employer," could not lawfully be subject to picketing and other forms of economic coercion based on their dealings with that "employer."[5] This is not mere conjecture; it is the inescapable conclusion that follows from Supreme Court precedent recognizing that the Act did not confer "employer" status on third parties merely because commercial relationships made them interdependent with an "employer" and its employees.[6]

Third, courts have afforded the Board deference in this context merely as to the Board's ability to make factual distinctions when applying the common-law agency standard.[7] However, our colleagues mistakenly interpret this as a *grant of authority to modify the agency standard itself*. This type of change is clearly within the province of Congress, not the Board. Thus, in *Yellow Taxi Co. of Minneapolis v. NLRB*,[8] in which the D.C. Circuit denounced the Board majority's "thinly veiled defiance" of controlling precedent regarding the "common law rules of agency," the court of appeals stated that "[n]o court can overlook an agency's defiant refusal to follow well established law," and it observed:

> The Board here is acting in an area where it is called upon to apply common law principles that have been established since 1800 and where the application of that law under the National Labor Relations Act has been declared by Congress and settled by the courts, including the Supreme Court, for some 36 years. In this area, there is no dispute as to the governing principles of law; what is involved is the application of law to facts. "[S]uch a determination of pure agency law involve[s] no special administrative expertise that a court does not possess." [*NLRB v. United Ins. Co. of America*, 390 U.S. 254, 260 (1968).]

To be specific, we understand the common-law standard as codified by the Act to put a premium on direct control before making an entity the joint employer of certain workers. Our fundamental disagreement with the majority's test is not just that they view indicia of indirect, and even potential, control to be probative of employer status, they hold such indicia can be *dispositive* without *any* evidence of direct control. Under the common law, in our view, evidence of indirect control is probative only to the extent that it supplements and reinforces evidence of direct control.

Fourth, the majority abandons a longstanding test that provided certainty and predictability, and replaces it with an ambiguous standard that will impose unprecedented bargaining obligations on multiple entities in a wide variety of business relationships, even if this is based solely on a never-exercised "right" to exercise "indirect" control over what a Board majority may later characterize as "essential" employment terms. This new test leaves employees, unions, and employers in a position where there can be no certainty or predictability regarding the identi-

[4] If our colleagues desired to return to a time when labor-management relations were insulated from third-party business relationships and competitive pressures, they would need to go back to our country's origins. The work of labor economists John R. Commons and Selig Perlman, who are perhaps the two most authoritative historians of the American labor movement, indicates that unions expanded and contracted for the first several centuries of economic development in the United States, and the transition to national markets, combined with unprecedented business competition, caused extensive labor-management instability. See 1 John R. Commons, *HISTORY OF LABOUR IN THE UNITED STATES* 25–30 (1918); Selig Perlman, A *HISTORY OF TRADE UNIONISM IN THE UNITED STATES* 36–41 (1922); see also Philip S. Foner, *THE HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES: FROM COLONIAL TIMES TO THE FOUNDING OF THE AMERICAN FEDERATION OF LABOR* 338–340 (1947).

[5] See, e.g., Sec. 8(b)(4) and (e).

[6] See, e.g., *NLRB v. Denver Building Trades Council*, 341 U.S. 675, 692 (1951) (holding that construction industry general contractors have no "employer" relationship with the employees of subcontractors, notwithstanding the general contractor's responsibility for the entire project). In *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964), an employer contracted out the maintenance work and "merely replaced existing employees with those of an independent contractor," and even though the subcontractor's employees continued "to do the same work under similar conditions of employment" and the "maintenance work still had to be performed in the plant," id. at 213, *Fibreboard ceased being the "employer."* Indeed, the premise of *Fibreboard* and comparable decisions is that the outsourcing of work may "quite clearly imperil job security, or indeed terminate employment entirely" for employees of the contracting employer. Id. at 223 (Stewart, J., concurring).

[7] The Supreme Court's decision in *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964), speaks directly only to the Board's ability to make factual distinctions under the common-law agency standard. The determination of whether two entities are joint employers "is essentially a factual issue." Id.

[8] 721 F.2d 366 (D.C. Cir. 1983). See also *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 94 (1995) ("In some cases, there may be a question about whether the Board's departure from the common law of agency with respect to particular questions and in a particular statutory context, renders its interpretation unreasonable.").

ty of the "employer." Just like the test of employee status rejected by the Supreme Court in *Nationwide Mutual Insurance Co. v. Darden*, 530 U.S. 318, 326 (1992), the majority's new joint-employer standard constitutes "an approach infected with circularity and unable to furnish predictable results." This confusion and disarray threatens to cause substantial instability in bargaining relationships, and will result in substantial burdens, expense, and liability for innumerable parties, including employees, employers, unions, and countless entities who are now cast into indeterminate legal limbo, with consequent delay, risk, and litigation expense. Nor can this type of fundamental uncertainty be positively regarded by the courts.[9]

Fifth, to the extent the majority seeks to correct a perceived inequality of bargaining leverage resulting from complex business relationships, where some entities are currently nonparticipants in bargaining, the "inequality" addressed by the majority is the wrong target, and collective bargaining is the wrong remedy. As noted above, the inequality targeted by the new "joint-employer" test is a fixture of our economy—business entities have diverse relationships with different interests and leverage that varies in their dealings with one another. There are contractually "more powerful" business entities and "less powerful" business entities, and all pursue their own interests. The Board needs a clear congressional command—and none exists here—before undertaking an attempt to reshape this aspect of economic reality. The Act does not redress imbalances of power between employers, even if those imbalances have some derivative effect on employees. As Justice Stewart observed 50 years ago:

> [I]t surely does not follow that every decision which may affect job security is a subject of compulsory collective bargaining. Many decisions made by management affect the job security of employees. *Decisions concerning the volume and kind of advertising expenditures, product design, the manner of financing, and sales, all may bear upon the security of the workers' jobs. Yet it is hardly conceivable that such decisions so involve "conditions of employment" that they must be negotiated with the employees' bargaining representative*.

Fibreboard Corp. v. NLRB, 379 U.S. 203 (1964) (Stewart, J., concurring) (emphasis added); see also *First National Maintenance Corp. v. NLRB*, 452 U.S. at 676 (In adopting the NLRA, Congress "had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed."). Requiring collective bargaining wherever there is some interdependence between or among employers is much more likely to thwart labor peace than advance it.

Indeed, on matters of economic power and relative inequality, the Board is not even vested with "general authority to define national labor policy by balancing the competing interests of labor and management." *American Ship Building Co. v. NLRB*, 380 U.S. 300, 316 (1965). "It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties." *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 107–108 (1970). Therefore, we are certainly not vested with general authority to define national economic policy by balancing the competing interests of different business enterprises.

The Act encourages collective bargaining, but only by an "employer" in direct relation to its employees. Our colleagues take this purpose way beyond what Congress intended, and the result unavoidably will be too much of a good thing. We believe the majority's test will actually foster substantial bargaining instability by requiring the nonconsensual presence of too many entities with diverse and conflicting interests on the "employer" side. Indeed, even the commencement of good-faith bargaining may be delayed by disputes over whether the correct "employer" parties are present. This predictable outcome is irreconcilable with the Act's overriding policy to "*eliminate* the causes of certain substantial obstructions to the free flow of commerce."[10]

In sum, today's majority holding does not represent a "return to the traditional test used by the Board," as our colleagues claim even while admitting that the Board has never before described or articulated the test they announce today. Contrary to their characterization, the new joint-employer test fundamentally alters the law applicable to user-supplier, lessor-lessee, parent-subsidiary, contractor-subcontractor, franchisor-franchisee, predecessor-successor, creditor-debtor, and contractor-consumer business relationships under the Act. In addition, because the commerce data applicable to joint employers is combined for jurisdictional purposes,[11] the Act's coverage will extend to small businesses whose separate operations and employees have until now not been subject to Board jurisdiction. As explained in detail below, we

[9] See, e.g., *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 678-679, 684–686 (1981), and other cases discussed in part V, subpart B of this opinion, emphasizing the need for certainty, predictability, and stability.

[10] Sec. 1 (emphasis added).

[11] *Valentine Properties*, 319 NLRB 8 (1995).

believe the majority impermissibly exceeds our statutory authority, misreads and departs from prior case law, and subverts traditional common-law agency principles. The result is a new test that confuses the definition of a joint employer and will predictably produce broad-based instability in bargaining relationships. It will do violence as well to other requirements imposed by the Act, notably including the secondary boycott protection that Congress afforded to neutral employers. For all of these reasons, we dissent.

I. THE CURRENT JOINT-EMPLOYER TEST

The Act does not expressly define who is an employer, whether joint or sole. In relevant part, Section 2(2) states only that "[t]he term 'employer' includes any person acting as an agent of an employer, directly or indirectly." In cases decided prior to 1984, both the Board and courts occasionally confused resolution of the issue whether two entities are joint employers by, among other things, blurring the distinction between the test for determining "single employer" and the test for determining "joint-employer" status.[12] In two cases decided in 1984—*Laerco Transportation*[13] and *TLI, Inc.*[14]—the Board clarified the law by expressly adopting the Third Circuit's joint-employer standard in *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117, 1124 (3d Cir. 1982): "The basis of the [joint-employer] finding is simply that one employer while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer. Thus, the 'joint employer' concept recognizes that the business entities involved are in fact separate but that they share or co-determine those matters governing the essential terms and conditions of employment." Applying this test as to "essential terms" in both *Laerco* and *TLI*, the Board stated it would focus on whether an alleged joint employer "meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction."[15]

Both *TLI* and *Laerco* were cases applying the joint-employer test to the relationship between a company supplying labor to a company using it, the same business relationship at issue in the present case. The Board found that evidence of the "user" employer's actual but "limited and routine" supervision and direction would not suffice to establish joint-employer status.[16] Subsequently, in *AM Property Holding Corp.*, 350 NLRB 998, 1001 (2007), the Board further explained that it has "generally found supervision to be limited and routine where a supervisor's instructions consist primarily of telling employees what work to perform, or where and when to perform the work, but not how to perform the work."

In *Airborne Express*, 338 NLRB 597, 597 fn. 1 (2002), the Board explained that under the existing joint-employer test, "[t]he essential element in [the joint-employer] analysis is whether a putative joint employer's control over employment matters is direct and immediate."[17] Consistent with this rationale, in *AM Property* the Board found that a contractual provision giving the user company (AM) the right to approve hires by the supplier company (PBS) to work at AM's office building was not, standing alone, sufficient to show AM's status as a joint employer. Instead, "[i]n assessing whether a joint employer relationship exists, the Board does not rely merely on the existence of such contractual provisions, but rather looks to the actual practice of the parties."[18]

The *AM Property* distinction between potential authority and the actual exercise of authority is a commonplace, well-established fixture in Board jurisprudence. For example, in the Board's single-employer test, we have repeatedly required proof that "one of the entities exercises actual or active control [as distinguished from potential control] over the day-to-day operations or labor relations of the other."[19] In other contexts where a party bears the burden of proving that an entity falls within a particular statutory definition, members of today's majority have endorsed this evidentiary distinction, giving weight only to the actual exercise of authority or control.[20]

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[12] See, e.g., *Parklane Hosiery Co.,* 203 NLRB 597, amended 207 NLRB 991 (1973).

[13] 269 NLRB 324 (1984).

[14] 271 NLRB 798 (1984), enfd. mem. 772 F.2d 894 (3d Cir. 1985).

[15] *Laerco*, 269 NLRB at 325; *TLI*, 271 NLRB at 798.

[16] *Laerco*, 269 NLRB at 326; *TLI*, 271 NLRB at 799. *Laerco* and *TLI* were decided by different 3-member panels of a Board then comprised of four sitting members. As such, they collectively represented the unanimous opinion of the full Board at that time.

[17] We note that, although concurring Member Liebman advocated revisiting the joint-employer standard represented by *TLI*, she expressly agreed with the majority that Board decisions applying this precedent "have required that the joint employer's control over these matters be direct and immediate." 338 NLRB 597, 597 fn. 1. The majority here is completely mistaken in asserting that the focus on "direct and immediate control" was a new addition to the *Browning-Ferris* joint-employer test in *Airborne*. Further, as we shall later explain, there is ample precedent in the common law for this requirement predating 1984.

[18] 350 NLRB at 1000.

[19] *Mercy Hospital of Buffalo*, 336 NLRB 1282, 1284 (2001). See also, e.g., *Dow Chemical Co.*, 326 NLRB 288 (1998); *Gerace Construction, Inc.*, 193 NLRB 645 (1971); *Los Angeles Newspaper Guild, Local 69*, 185 NLRB 303, 304 (1970).

[20] E.g., *FedEx Home Delivery*, 361 NLRB No. 165, slip op. at 14 (2014) ("The Board has been careful to distinguish between actual opportunities, which allow for the exercise of genuine entrepreneurial

As discussed in section III below, the current test is fully consistent with the common-law agency principles that the Board must apply in determining joint-employer status. Further, as an administrative law judge has accurately summarized, the test reflects a commonsense, practical understanding of the nature of contractual relationships in our modern economy. "An employer receiving contracted labor services will of necessity exercise sufficient control over the operations of the contractor at its facility so that it will be in a position to take action to prevent disruption of its own operations or to see that it is obtaining the services it contracted for. It follows that the existence of such control, is not in and of itself, sufficient justification for finding that the customer-employer is a joint employer of its contractor's employees."[21]

II. THE MAJORITY'S NEW JOINT-EMPLOYER TEST

The majority today expressly overrules *TLI*, *Laerco*, *Airborne Express*, *AM Property,* supra and related precedent, *and* purports to return to a joint-employer test that allegedly applied prior to this line of precedent. Their analysis begins in a manner that is consistent with the Board's modern precedent: "The Board may find that two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment." The "share or codetermine" language is the general statement of the joint-employer test in *Browning-Ferris* that was adopted and applied by the Board in both *TLI* and *Laerco*. Our colleagues go on to adopt *TLI* and *Laerco*'s description of essential terms and conditions of employment as "matters relating to the employment relationship *such as* hiring, firing, discipline, supervision, and direction." If this was the extent of the majority's holding, there would be no need to overrule precedent.

However, the majority's decision makes clear that the new test expands joint-employer status far beyond anything that has existed under current precedent and, contrary to the majority's claim, under precedent predating *TLI* and *Laerco*. In a two-step progression, the first of which misleadingly depicts the limits of common law, the majority removes all limitations on what kind or degree of control over essential terms and conditions of employment may be sufficient to warrant a joint-employer finding:

> [W]e will no longer require that a joint employer not only possess the authority to control employees' terms and conditions of employment, but must also exercise that authority, and do so directly, immediately, and not in a "limited and routine" manner. . . . The right to control, in the common-law sense, is probative of joint-employer status, as is the actual exercise of control, whether direct or indirect.

Moreover, the new test will evaluate the exercise of control by construing "share or codetermine" broadly:

> In some cases (or as to certain issues) employers may engage in genuinely *shared decision-making*, e.g., they *confer or collaborate* to set a term of employment. . . . Alternatively, employers may exercise *comprehensive authority* over different terms and conditions of employment. For example, one employer sets wages and hours, while another assigns work and supervises employees. . . . Or employers *may affect different components of the same term*, e.g. one employer *defines and assigns work tasks*, while the other supervises *how those tasks are carried out*. . . . Finally, one employer may *retain the contractual right to set a term or condition of employment*. [Emphasis added.]

Our colleagues concede "it is certainly possible that in a particular case a putative joint employer's control might extend only to terms and conditions of employment too limited in scope or significance to permit meaningful collective bargaining." However, the majority fails to provide any guidance as to what control, under what circumstances, would be insufficient to establish joint-employer status.

What do the preceding passages and the overruling of cited precedent indicate? First, in any particular case, the majority may consider evidence about virtually any aspect of employment and may give dispositive weight to an employer's control over any essential term and condition of employment in finding a joint-employer relationship. Second, there will be no requirement that control over any essential term of employment be "direct and immediate" in order for it to be probative and potentially determinative. Indirect control, even a power reserved by contract but never exercised, will be considered and may suffice, *standing alone*, to find joint-employer sta-

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autonomy, and those that are circumscribed or effectively blocked by the employer."); *Pacific Lutheran University*, 361 NLRB No. 157, slip op. at 24 (2014) ("In order for decisions in a particular policy area to be attributed to the faculty, the party asserting managerial status must demonstrate that faculty actually exercise control or make effective recommendations."); and *Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 3 (2014) ("We reject, therefore, the judge's reliance on 'paper authority' set forth in the handbook, in light of the contrary evidence of the road supervisors' actual practice. *Schnurmacher Nursing Home v. NLRB*, 214 F.3d 260, 265 (2d Cir. 2000), enfg. in relevant part 327 NLRB 253 (1998) (no authority to discipline, despite statement in job description, where the alleged supervisors did not actually discipline or recommend discipline).").

[21] *Southern California Gas Co.*, 302 NLRB 456, 461 (1991).

tus. Finally, while the majority purports to base its standard on the common law and "sufficient control . . . to permit meaningful collective bargaining," it remains to be seen whether even the occasional limited and routine discussion or collaboration about a single essential term of employment may suffice to establish joint-employer status. The majority repeatedly states that almost every aspect of a business relationship may be *probative*, but it provides no significant guidance as to what may or should be *determinative*.

The majority's new test represents a major unexplained departure from precedent. This test promises to effect a sea change in labor relations and business relationships. Our colleagues presumably do not intend that every business relationship necessarily entails the joint employment of every entity's employees, but there is no limiting principle in their open-ended multifactor standard. It is an analytical grab bag from which any scrap of evidence regarding indirect control or incidental collaboration as to any aspect of work may suffice to prove that multiple entities—whether they number two or two dozen—"share or codetermine essential terms and conditions of employment."

III. THE MAJORITY'S NEW TEST IMPERMISSIBLY DEPARTS FROM THE COMMON-LAW AGENCY TEST AND RESURRECTS THE CONGRESSIONALLY-REJECTED ECONOMIC REALITY AND BARGAINING INEQUALITY THEORIES

A. The Majority's Implicit Reliance on Economic Reality and Statutory Purpose Theory Directly Contravenes Congressional Intent

The threshold insurmountable problem with the majority's reformulated joint-employer test is that it far exceeds the limits of our statutory authority.[22] In fact, this is the third case decided recently where Board majorities have tested or exceeded those limits when dramatically expanding "employer" and "employee" status.

In *FedEx Home Delivery*, 361 NLRB No. 55 (2014), the majority claimed to be applying the common law when it broadened the Act's definition of "employee," which (based on language added in 1947 as part of the Taft-Hartley amendments) explicitly excludes any "independent contractor."[23] In altering the analysis for distinguishing employees from independent contractors, the majority distorted the common-law test to emphasize the perceived economic dependency of the putative employee on the putative employer. Member Johnson's dissent explained that the majority's treatment of "employee" and "independent contractor" status in *FedEx* was contrary to the Act and its legislative history, and the majority's factual findings were contrary to the record.[24]

In *CNN America, Inc*., 361 NLRB No. 47 (2014), the majority concluded that a client (CNN) was a joint employer of technical employees supplied by a contractor (TVS), although CNN undisputedly had no direct role in hiring, firing, disciplining, discharging, promoting, or evaluating TVS' employees, and CNN's "employer" status was contrary to the TVS collective-bargaining agreements, the services agreement entered into between CNN and TVS, two decades of bargaining history and CBAs (all identifying the contractor as the only "employer"), and prior union certifications by the Board. The Board majority, though ostensibly applying the traditional joint-employer test, relied on factors similar to those emphasized by the majority here (e.g., finding that CNN's services agreement gave it "considerable authority" over "staffing levels"). Member Miscimarra's dissent explained that the Board and the courts had long dealt with situations where contractor employees worked at client locations, with substantial interaction between the client and contracting employer, without conferring "employer" status on the client. *CNN America, Inc*., slip op. at 28, 31–32 (citing *NLRB v. Denver Building Trades Council*, supra, 341 U.S. at 692; and *Fibreboard Corp. v. NLRB*, supra, 379 U.S. at 203 (other citations omitted)).[25]

In this case, our colleagues abandon extant joint-employer law, which had already been strained beyond its rational breaking point in *CNN*. Instead, similar to what was done in *FedEx* for the definition of a statutory employee, they have announced a new test of joint-employer status that, notwithstanding their adamant disclaimers, effectively resurrects and relies, at least in substantial part, on intertwined theories of "economic realities" and "statutory purpose" endorsed by the Supreme Court in *NLRB v. Hearst Publications*, 322 U.S. 111 (1944), which Congress expressly rejected in the Taft-Hartley Amendments of 1947. In *Hearst*, the Court ap-

[22] The majority cites the following passage from *American Trucking Assns. v. Atchison, T. & S.F. Ry. Co*., 387 U.S. 397, 416 (1967), purporting to justify the change in the joint-employer standard: "[Regulatory agencies] are supposed, *within the limits of the law and of fair and prudent administration*, to adapt their rules and practices to the Nation's needs in a volatile, changing economy." Id. (emphasis supplied). As hereafter discussed, the change in the joint-employer standard is neither within the limits of the law nor representative of fair and prudent administration.

[23] Sec. 2(3).

[24] Member Miscimarra did not participate in *FedEx*, but he agrees with Member Johnson's criticism of the economic realities test applied by the majority and the analysis of "employee" and "independent contractor" issues addressed in Member Johnson's dissent.

[25] Member Johnson did not participate in *CNN,* but he agrees with the criticism of the majority's joint-employer finding as expressed in Member Miscimarra's dissent.

plied the same rationale for the definitions of employee *and* employer under the original Wagner Act.

> To eliminate the causes of labor disputes and industrial strife, Congress thought it necessary to create a balance of forces in certain types of economic relationships. These do not embrace simply employment associations in which controversies could be limited to disputes over proper "physical conduct in the performance of the service." On the contrary, Congress recognized those economic relationships cannot be fitted neatly into the containers designated "employee" and "employer" which an earlier law had shaped for different purposes. Its Reports on the bill disclose clearly the understanding that "employers and employees not in proximate relationship may be drawn into common controversies by economic forces, and that the very disputes sought to be avoided might involve "employees (who) are at times brought into an economic relationship with employers who are not their employers." In this light, the broad language of the Act's definitions, which in terms reject conventional limitations on such conceptions as "employee," "employer," and "labor dispute," leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications.[26]

In reaction to *Hearst*, Congress expressly excluded "independent contractors" from the Act's definition of a statutory employee in the Taft-Hartley Amendments of 1947. The purpose of this revision was manifest in the legislative history of the Amendments and repeatedly acknowledged thereafter by the Supreme Court, which stated in one case that

> [in *Hearst*] the standard was one of economic and policy considerations within the labor field. Congressional reaction to this construction of the Act was adverse and Congress passed an amendment specifically excluding 'any individual having the status of an independent contractor' from the definition of 'employee' contained in s 2(3) of the Act. The obvious purpose of this amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act. . . . Thus there is no doubt that we should apply the common law agency test here in distinguishing an employee from an independent contractor.[27]

Our colleagues nevertheless cling to the notion that economic and policy considerations may determine the definition of employee and employer. Even assuming that may be true in some cases *not* dealing with the right to control under common law,[28] the Supreme Court squarely rejected reliance on these considerations in *Darden*, stating that

> *Hearst* and *Silk*, which interpreted "employee" for purposes of the National Labor Relations Act and Social Security Act, respectively, are feeble precedents for unmooring the term from the common law. In each case, the Court read "employee," which neither statute helpfully defined, to imply something broader than the common-law definition; after each opinion, Congress amended the statute so construed to demonstrate that the usual common-law principles were the keys to meaning. . . . To be sure, Congress did not, strictly speaking, "overrule" our interpretation of those statutes, since the Constitution invests the Judiciary, not the Legislature, with the final power to construe the law. But a principle of statutory construction can endure just so many legislative revisitations, and *Reid*'s presumption that Congress means an agency law definition for "employee" unless it clearly indicates otherwise signaled our abandonment of *Silk*'s emphasis on construing that term "'in the light of the mischief to be corrected and the end to be attained.'" [503 U.S. at 324–325 (footnote and citations omitted).]

Accordingly, the inescapable conclusion to be drawn from the Taft-Hartley legislation repudiating the *Hearst* opinion is that Congress must have intended that common-law agency principles, rather than the majority's much more expansive policy-based economic realities and statutory purpose approach, here govern the definition of employer as well as employee under the Act. Even if Congress had not been so clear, "it is . . . well established that '[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless a statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.'" *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989) (quoting *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981)).

[26] 322 U.S. at 128–129. See also *United States v. Silk*, 331 U.S. 704 (1947), applying the same economic realities and statutory purpose theories to the definition of employee under the Social Security Act.

[27] *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968). See also *Boire v. Greyhound*, supra, 376 U.S. at 481 fn. 10, and *Nationwide Mutual Insurance Co. v. Darden*, supra, 503 U.S. at 324.

[28] See, e.g., *Allied Chemical Workers Local Union 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 168 (1971).

Thus, the majority's new joint-employer test is invalid if it does not comport with the common-law agency principles.

Nevertheless, our colleagues now expand the definition of employer by redefining the joint-employer doctrine in unstated—but unmistakable—reliance on the rationale of *Hearst* that was repudiated by Congress.[29] Our colleagues are motivated by a policy concern that an imbalance of leverage reflected in commercial dealings between the undisputed employer and third-party entities prevents "meaningful bargaining" over each term and condition of employment and is therefore in conflict with the statutory policy of encouraging collective bargaining. This approach reflects a desire to ensure that third parties that have "deep pockets," compared to the immediate employer, become participants in existing or new bargaining relationships, and that they will also be directly exposed to strikes, boycotts and other economic weapons, based on the most limited and indirect signs of potential control.[30] Whether this is good or bad policy—and we think it is bad for numerous reasons discussed below—this fundamental balancing of interests has already been done by Congress. And the simple fact is that Congress has forbidden the Board from applying an economic realities or statutory purpose rationale in defining employer and joint-employer status under the Act.

B. The Majority's New Test does not Comport with Common-Law Agency Principles

Our colleagues do not acknowledge the Congressional rejection of *Hearst*'s economic realities theory for defining "employee" and "employer" under the Act. Neither do they acknowledge their implicit reliance on this theory in announcing a new joint-employer test. Instead, they attempt, as they must, to persuade that their test of joint-employer status is consistent with common-law agency's master-servant doctrine. The attempt fails.

The "touchstone" at common law is whether the putative employer sufficiently controls or has the right to control putative employees. See *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 448–449 (2003); Restatement (Second) of Agency §§ 2, 220 (1958). Without attribution, our colleagues state that the common law considers as potentially dispositive not only direct control, but also indirect control and even "reserved" control that has never been exercised. They would accordingly jettison the joint-employer test's requirement of evidence that the putative employer's control be "direct and immediate." As explained below, however, "control" under the common-law principles requires some direct-and-immediate control even where indirect control factors are deemed probative. The Act, and its incorporation of the common law, does not allow the Board to broaden the standard to include indirect control or an inchoate right to exercise control, *standing alone*, as a dispositive factor, which the majority does today.

Long before Congress anchored "employer" in the common law, courts applying those principles focused on discerning whether the putative master had control over the details of the work (master) or only the results to be achieved (not master). See, e.g., *Singer Mfg. Co. v. Rahn*, 132 U.S. 518, 522 (1889) ("[T]he relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, 'not only what shall be done, but how it shall be done.'" (quoting *New Orleans, M&CR Co. v. Hanning*, 82 U.S. 649, 657 (1872).) Further, the Supreme Court has for over a century adhered to the proposition that "under the common law loaned-servant doctrine immediate control and supervision is critical in determining for whom the servants are performing services."[31] Lower courts as well implicitly limited their

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[29] An unacknowledged antecedent for the joint-employer theory adopted here is the concurring opinion of then-Member Liebman in *Airborne Express*, supra, 338 NLRB at 597–599, who contended that "[g]iven business trends driven by accelerating competition, highlighted by this case, the Board's joint-employer doctrine may no longer fit economic realities." See also *AM Property Holding Co.*, supra, 350 NLRB at 1012 (Member Liebman, concurring in part and dissenting in part).

We note as well that the General Counsel relies on *Hearst* and economic reality theory in his amicus brief. The majority expressly rejects the General Counsel's argument, but implicitly relies on much of it. While we disagree with the General Counsel as to the need and basis for overruling the existing joint-employer test, we respect his efforts to address these important issues, which have broad ramifications that extend well beyond this particular case. We also commend his substantial public outreach efforts regarding these important proposed changes.

[30] See Michael Harper, *Defining the Economic Relationship Appropriate for Collective Bargaining*, 39 Boston College L. Rev. 329, 348 (1998) ("[I]f workers are to be assured the opportunity to utilize collective bargaining leverage to extract a greater share of the returns from their labor, they must be able to bargain with the firms that provide the capital."); see also Craig Becker, *Labor Law Outside the Employment Relation*, 74 Texas L. Rev. 1527 (1996) ("At bottom, my intent is to inquire how the principles of labor law might be freed from the limits of outmoded definitions of the employment relationship. That effort involves questioning the sanctity of the doctrine of privity of contract *as well as departing from the common-law paradigm of master-servant as foundations for rights and duties in the workplace.* Above all, it requires rethinking the nature of power at stake in labor relations so as to bring legal doctrine in line with contemporary economic realities.") (Emphasis added).

[31] *Shenker v. Baltimore & Ohio R. Co.*, 374 U.S. 1, 6 (1963), citing and applying the analysis in *Standard Oil Co. v. Anderson*, 212 U.S.

analysis to looking for direct-and-immediate control. See, e.g., *Dimmitt-Rickhoff-Bayer Real Estate Co. v. Finnegan*, 179 F.2d 882 (8th Cir. 1950) (not attaching any importance to indirect control in finding real estate agents were not employees), cert. denied 340 U.S. 823 (1950); *Glenn v. Standard Oil Co.*, 148 F.2d 51 (6th Cir. 1945) (not attaching any importance to indirect control in finding operators of Standard Oil's bulk distribution plants were not employees); *Spillson v. Smith*, 147 F.2d 727 (7th Cir. 1945) (not attaching any importance to indirect control in finding the musicians of an orchestra were the employees of its leader and not the restaurant where they played).

As courts undoubtedly realized, anyone contracting for services, master or not, inevitably will exert and/or reserve some measure of indirect control by defining the parameters of the result desired to ensure he or she gets the benefit of his or her bargain. For example, Judge Learned Hand wrote, in a case applying common-law principles to decide a production company was not the employer of the entertainers in vaudeville acts under the Social Security Act, that

> [i]n the case at bar the plaintiff did intervene to some degree; but so does a general building contractor intervene in the work of his subcontractors. He decides how the different parts of the work must be timed, and how they shall be fitted together; if he finds it desirable to cut out this or that from the specifications, he does so. Some such supervision is inherent in any joint undertaking, and does not make the contributing contractors employees. By far the greater part of [the putative employer's] intervention in the 'acts' was no more than this. It is true, as we have shown, that to a very limited extent he went further, but these interventions were trivial in amount and in character; certainly not enough to color the whole relation.

Radio City Music Hall Corp. v. United States, 135 F.2d 715, 717–718 (2d Cir. 1943).

The Supreme Court subsequently addressed the same point in construing the coverage of the Act's prohibition of coercive secondary activity against neutral construction employers by unions:

> We agree with the Board also in its conclusion that the fact that the contractor and subcontractor were engaged on the same construction project, and that the contractor had some supervision over the subcontractor's work, did not eliminate the status of each as an independent contractor *or make the employees of one the employees of the other*. The business relationship between independent contractors is too well established in the law to be overridden without clear language doing so.[32]

To aid in applying this well-established common law for employer-employee relationships, the Supreme Court largely adopted the Restatement (Second) of Agency § 220's nonexhaustive list of factors to be considered. *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751–752; see also *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. at 323–324. The *Reid* Court wrote:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Reid, 490 U.S. at 751–752. The inquiry remains the same. The factors provide useful indicia of the putative employer's direct-and-immediate control, or its right to such control.

The comments to Section 220 of the Restatement clarify that the listed factors are not looking to indirect control. Comment j, on the duration of the relationship, provides: "If the time of employment is short, the worker is less apt to subject himself to control as to details and the job is more likely to be considered his job than the job of the one employing him."[33] Comment k, on the source of the instrumentalities and tools, states it is understandable that the owner would regulate such instrumentalities because "if the worker is using his employer's tools or instrumentalities, especially if they are of substantial value, it is normally understood that he will follow the direction of the owner in their use." The same should hold true where one employer establishes rules for the use of its property. Comment *l*, on the location of work, informs

215 (1909). See also *Kelly v. Southern Pacific Co.*, 419 U.S. 318, 329–330 (1974), cited with approval in *Community for Creative Non-Violence v. Reid*, 490 U.S. at 739–740, and in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. at 323.

[32] *NLRB v. Denver Building Trades Council*, supra, 341 U.S. at 689–690 (emphasis added).

[33] We note here that Leadpoint is not supposed to keep its employees assigned long term to the BFI project.

that although the putative employer's controlling the location of work usually raises an inference of employer status, "[i]f, however, the rules are made only for the general policing of the premises, as where a number of separate groups of workmen are employed in erecting a building, mere conformity to such regulations does not indicate that the workmen are" employees.

Recently, courts applying the common law have continued to make it unmistakably clear that the employer standard requires sufficient proof of direct-and-immediate control. In finding that the New York State Education Department was not the employer of teachers under Title VII, the United States Court of Appeals for the Second Circuit wrote: "[The common-law standard] focuses largely on the extent to which the alleged master has 'control' over the day-to-day activities of the alleged 'servant.' The *Reid* factors countenance a relationship where the level of control is direct, obvious, and concrete, *not merely indirect or abstract*. . . . Plaintiffs in this case could not establish a master-servant relationship under the *Reid* test. [The State Education Department] does have some control over New York City school teachers—e.g., it controls basic curriculum and credentialing requirements—but SED does not exercise the workaday supervision necessary to an employment relationship." *Gulino v. N.Y. State Education Department*, 460 F.3d 361, 379 (2d Cir. 2006) (emphasis added), cert. denied 554 U.S. 917 (2008). Similarly, the United States Court of Appeals for the Ninth Circuit found, applying common-law principles, that Wal-Mart was not the joint employer of its suppliers' employees where Wal-Mart did not have the right to an "immediate level of 'day-to-day' control." *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 682–683 (9th Cir. 2009) (quoting *Vernon v. State*, 10 Cal. Rptr. 3d 121 (Cal. Ct. App. 2004)). A few years later, the Supreme Court of California used the same language in finding a franchisor not liable under the California Fair Employment and Housing Act for a franchisee supervisor's harassment of an employee: "[T]raditional common law principles of agency and respondeat superior supply the proper analytical framework . . . . This standard requires 'a comprehensive and immediate level of 'day-to-day' authority' over matters such as hiring, firing, direction, supervision, and discipline of the employee." *Patterson v. Domino's Pizza, LLC*, 333 P.3d 723, 740 (Cal. 2014) (quoting *Vernon*, supra).[34]

Contrary to our colleagues' characterization, the above-quoted language from *Gulino* and *Wal-Mart* cannot be dismissed as meaningless statements made "in cases where there was little if any relevant evidence of control of any sort." This begs the question why either court felt the need to specifically mention the absence of immediate control. As for *Patterson*, the majority states (as do we) that the case was decided under a California statute, but they fail to acknowledge that the court's opinion is founded on "traditional common law principles of agency and respondeat superior."[35] The salient point is that the cases we cite do indicate that evidence of direct and immediate control is essential to a finding of joint-employer status under the common law. By contrast, the majority does not and cannot cite a single judicial opinion that even implicitly affirms its concededly novel two-step version of an alternative common-law test or the proposition that a finding of a joint employer relationship under the common law can be based solely on indirect control.

In re *Enterprise Rent-A-Car Wage & Employment Practices Litigation*, 683 F.3d 462, 468–469 (3d Cir. 2012), provides a useful contrast between the common-law test of joint-employer status and the economic realities test that Congress expressly authorized by the unique language of the Fair Labor Standards Act (FLSA), but rejected in the Taft-Hartley Amendments of our Act.

[34] In *TLI*, supra, 271 NLRB at 798, the Board stated that "there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction." We read that passage to provide a nonexclusive list of direct-and-immediate control factors to consider, and hereafter we discuss cases decided after *TLI* that did examine factors other than those enumerated in that case. However, evidence of control over the specific factors referred to in *TLI* is usually most relevant to the joint-employer analysis. It is no coincidence that the Supreme Court of California used a similar list in *Patterson*, as did the Ninth Circuit in *EEOC v. Pacific Maritime Assn.*, 351 F.3d 1270 (9th Cir. 2003). Discussing the Supreme Court's *Clackamas* decision in this Title VII case, the Court stated:

> The Supreme Court seems to suggest that the sine qua non of determining whether one is an employer is that an "employer can hire and fire employees, can assign tasks to employees and supervise their performance." Logically, before a person or entity can be a joint employer, it must possess the attributes of an employer to some degree. Numerous courts have considered the key to joint employment to be the right to hire, supervise and fire employees.

Id. at 1277. The Board's task is to weigh all of the incidents of the relationship to determine the sufficiency of the control, and that analysis necessarily includes qualitative assessments of the general significance of specific factors. The new test discards this safeguard against overinclusion in favor of finding any sporadic evidence or tangential effect on working conditions to be potentially sufficient to prove joint-employer status.

[35] The majority also distinguishes *Patterson* on the ground that it involves "the particularized features of franchisor/franchisee relationships, none of which are applicable here." As we state elsewhere in this opinion, the Board has heretofore maintained a unitary joint-employer test for all types of employer relationships. The suggestion that the test will vary from one type of relationship to another is unprecedented, and certainly has no foundation in the common law.

With respect to the economic realities test, the Third Circuit stated:

> When determining whether someone is an employee under the FLSA, "economic reality rather than technical concepts is to be the test of employment." *Goldberg v. Whitaker House Co-op., Inc.,* 366 U.S. 28, 33, 81 S.Ct. 933, 6 L.Ed.2d 100 (1961) (internal quotation marks omitted). Under this theory, the FLSA defines employer "expansively," *Nationwide Mut. Ins. Co. v. Darden,* 503 U.S. 318, 326, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992), and with "striking breadth." *Rutherford Food Corp. v. McComb,* 331 U.S. 722, 730, 67 S.Ct. 1473, 91 L.Ed. 1772 (1947). The Supreme Court has even gone so far as to acknowledge that the FLSA's definition of an employer is "the broadest definition that has ever been included in any one act." *United States v. Rosenwasser,* 323 U.S. 360, 363 n. 3, 65 S.Ct. 295, 89 L.Ed. 301 (1945).[36]

The issue in *Enterprise* was whether the district court below erred in granting summary judgment against the plaintiff employees' claim that the parent company of their wholly owned rental car subsidiary was their joint employer with shared liability for alleged overtime wage violations. The district court had relied on a traditional common-law test developed under the ADEA and Title VII. However, the Third Circuit opined that

> [b]ecause of the uniqueness of the FLSA, a determination of joint employment "must be based on a consideration of the total employment situation and the economic realities of the work relationship." A simple application of the [district court's] test would only find joint employment where an employer had direct control over the employee, but the FLSA designates those entities with sufficient *indirect* control as well. We therefore conclude that while the factors outlined today in [that test] are instructive they cannot, without amplification, serve as the test for determining joint employment under the FLSA.[37]

It is readily apparent from the distinctions underscored by the *Enterprise* court that the new joint-employer test announced by our colleagues is rooted in economic reality and statutory purpose theory, not in the "technical concepts" of common-law agency. Indeed, their new definition of employer equals or exceeds the "striking breadth" of the FLSA standard, and it cannot stand in the face of express Congressional disapproval.

The majority's explication of its new joint-employer test erases any doubt that the test is the analytical stepchild of *Hearst*, rather than being founded in common law. Our colleagues posit that as a first step they must determine whether an employment relationship exists at all between the alleged joint employer and an employee. Here, the majority does no more than acknowledge the obvious: an entity with no control whatsoever over a person performing services in that entity's affairs cannot be that person's employer. But the majority incorrectly sets this "zero control" state as the *outer limit* of common law master-servant agency, that is, if there is *some* control over *any* aspect of the performance of services, then common law would allegedly permit finding an employment relationship. Of course, if that were true, it would obliterate the common-law concept of an independent contractor and erase the distinction at common law between servant and nonemployee agent. The majority seems vaguely to recognize this, but as far as deciding whether it should find that a separate business is a joint employer with an undisputed employer of an undisputed employee, the majority nevertheless looks to whether it would serve the purposes of the Act to expand the joint-employer definition to serve the Act's policy of "encouraging the practice and procedure of collective bargaining" (in the words of Sec. 1). In their view, it is necessary to do so because the current test's "requirements—which serve to significantly and unjustifiably narrow the circumstances where a joint employment relationship can be found—leave the Board's joint employment jurisprudence increasingly out of step with changing economic circumstances, particularly the recent dramatic growth in contingent employment relationships. This disconnect potentially undermines the core protections of the Act for the employees impacted by these economic changes."

Compare the majority's reasoning to the following passages from *Hearst* concerning the test for determining whether newsboys were employees or independent contractors under the Wagner Act:

> Congress had in mind a wider field than the narrow technical legal relation of "master and servant," as the common law had worked this out in all its variations, and at the same time a narrower one than the entire area of rendering service to others. The question comes down therefore to how much was included of the intermediate region between what is clearly and unequivocally 'employment,' by any appropriate test, and what is as clearly entrepreneurial enterprise and not em-

[36] Id. at 467–468.

[37] Id. at 469. The court nevertheless affirmed the grant of summary judgment, finding insufficient proof that the parent company was a joint employer even under the expansive FLSA standard. It is not clear whether the same evidence considered under the majority's test here would lead to the same result.

> ployment. . . . Myriad forms of service relationship, with infinite and subtle variations in the terms of employment, blanket the nation's economy. Some are within this Act, others beyond its coverage. Large numbers will fall clearly on one side or on the other, by whatever test may be applied. But intermediate there will be many, the incidents of whose employment partake in part of the one group, in part of the other, in varying proportions of weight, . . . Unless the common-law tests are to be imported and made exclusively controlling, without regard to the statute's purposes, it cannot be irrelevant that the particular workers in these cases are subject, as a matter of economic fact, to the evils the statute was designed to eradicate and that the remedies it affords are appropriate for preventing them or curing their harmful effects in the special situation.

322 U.S. 124–127 (fns. omitted). The only significant difference between the majority's reasoning here and the Court's reasoning in *Hearst* is that the Court at least candidly recognized the "intermediate region" into which it extended the Wagner Act's definition of covered employees was *beyond* the scope of common law, while the majority blandly and disingenuously assures that the intermediate region into which they extend the definition of joint employer stays well within the limits of that law. Clearly it does not. Contrary to our colleagues, we believe the Board's traditional joint-employer test accurately reflects common law, and we disagree with any suggestion that their new test constitutes an appropriate way under common law to advance the statutory goal of promoting collective bargaining. Indeed, as we discuss below in section V, we find their test is more likely to destabilize collective bargaining than to promote it.

IV. EVEN IF THE NEW TEST WERE PERMISSIBLE, THE MAJORITY FAILS TO IDENTIFY SUFFICIENT REASONS TO OVERRULE PRECEDENT AND ADOPT A NEW JOINT-EMPLOYER TEST

A. The Majority's Alleged Return to the Alleged "Traditional Standard" Relies on a Selective Misreading of Precedent Before and After TLI and Laerco

The majority states that the *TLI* and *Laerco* decisions "significantly and unjustifiably" narrowed the Board's "traditional" joint-employer standard. This standard allegedly encompassed far more factors, including those related to indirect control and reserved contractual control, and more comprehensively analyzed employment relationships to determine whether an entity was a joint employer. However, in selecting only the few cases allegedly supporting this view of traditional practice, the majority has neglected others where the Board found no joint-employer relationship, despite the presence of the "traditional" or "indirect control" factors that the majority claims justify a finding of such a relationship. Contrary to the majority, the Board's prior cases did not manifest an intention to apply a broad analytical framework in which indirect control played a determinative role in joint-employer cases. We agree with the majority that the Board has traditionally carried out a fact-intensive assessment of whether a putative employer exercised sufficient control over, or retained the right to control, the employees at issue. We disagree, however, with the notion that prior to *TLI* and *Laerco* the Board, as a rule, gave much probative weight to evidence of "indirect control," or that such evidence, standing alone, was routinely determinative. [38] We will now turn to a discussion of these factors of "indirect control."

This sentence is emblematic of the majority's attempt to prove too much by the citation of the older cases:

> Thus, the Board's joint-employer decisions found it probative that employers retained the contractual power to reject or terminate workers; set wage rates; set working hours; approve overtime; dictate the number of workers to be supplied; determine "the manner and method of work performance"; "inspect and approve work," and terminate the contractual agreement itself at will. [Footnotes omitted.]

The foregoing statement includes footnote citations to precedent that allegedly shows that "the Board typically treated the *right* to control the work of employees and their terms of employment as probative of joint-employer status. The Board did not require that this right be exercised, or that it be exercised in any particular manner." The majority fails to mention that in many of the cited cases there was evidence that the contractual rights *were exercised*, and there was other evidence of direct control over employees' work. The majority's statement also fails to account for all the Board cases that reach the contrary result with similar contractual provisions. Thus, we can paraphrase the majority's statement, with appropriate citations, that during the period preceding *TLI* and *Laerco*, the Board found *no* joint-employer status where putative "employers retained the contractual power to reject or terminate workers;[39] set wage rates;[40] set work-

[38] Apart from our disagreement with the majority's characterization of the joint-employer tests that existed prior to 1984, we note that in one major respect *TLI* and *Laerco* undisputedly broadened the circumstances in which a joint-employer relationship could be found. That is, by adopting the Third Circuit's *Browning-Ferris* joint-employer test, the Board made clear that the more restrictive single-employer test, requiring a showing of less than an arms-length relationship between employers, did not apply.

[39] *Cabot Corp.*, 223 NLRB 1388, 1390 fn. 10 (1976), affd. sub nom. *Chemical Workers Local 483 v. NLRB*, 561 F.2d 253 (D.C. Cir. 1977);

ing hours;[41] approve overtime;[42] determine 'the manner and method of work performance';[43] 'inspect and approve work,'[44] and terminate the contractual agreement itself at will."[45] Additionally, prior to *TLI* and *Laerco* the Board found that employers who conferred over the number of employees needed and the hours to be worked were not joint employers.[46]

The majority also states that prior to *TLI* and *Laerco* "the Board gave weight to a putative joint employer's 'indirect' exercise of control over workers' terms and conditions of employment," citing *Floyd Epperson*, 202 NLRB 23, 23 (1973), enfd. 491 F.2d 1390 (6th Cir. 1974). However, it is readily apparent that, while the Board noted anecdotal evidence of the employer's indirect control over wages and discipline in that case, its joint-employer finding was primarily based on evidence of direct and immediate supervision of the employees involved.[47] Accordingly, in *Fidelity Maintenance & Construction Co.*, supra, 173 NLRB at 1037, the Board emphasized *direct control*, saying that "the determinative factor in an owner contractor situation is whether the owner exercises or has the right to exercise sufficient *direct control* over the labor relations policies of the contractor, or over the wages, hours and working conditions" (emphasis added). Likewise, in *The John Breuner Co.*, supra, 248 NLRB at 989, the Board affirmed without comment the administrative law judge's observation that in prior truck delivery cases where the Board found joint-employer status, "there have always been supporting findings that the retailer or distributor by its supervisors, *directly supervised and controlled* the employees of his trucking contractor in the performance of their work" (emphasis added). Thus, contrary to the majority, *Epperson* and like precedent support the proposition that findings of joint-employer status in cases prior to *TLI* and *Laerco* that mention evidence of indirect control nevertheless turn on sufficient proof of direct control.

The majority also contends that "[c]ontractual arrangements under which the user employer reimbursed the supplier for workers' wages or imposed limits on wages were also viewed as tending to show joint-employer status," citing *Hamburg Industries*, 193 NLRB 67 (1971). *Hamburg* concerned a typical cost-plus contract where the user employer reimbursed the supplier employer for wages and then paid an additional fee. The Board has cited this factor in cases where the Board found joint-employer status. However, the Board has also found that this factor did not establish joint-employer status.[48] In any event, as explained in a subsequent case, the facts in *Hamburg* clearly demonstrated significant direct and immediate control of essential terms was exercised by the disputed employer. Specifically, "one employer, a manpower supplier, furnished another employer's entire work force, including first-level supervisors. That work force was subject to virtually complete control of the second employer. The second employer determined which tasks were to be performed and how they were to be performed. He also, in practice, set the wage rates."[49] Again, before *TLI* and *Laerco*, there was no established rule that cost-plus contracts should be given determinative weight in finding joint-employer status.

In sum, the precedent cited by the majority falls well short of showing that prior to *TLI* and *Laerco* there was a consistently applied "traditional joint-employer test" remotely equivalent to the one they announce today. The indirect control factors cited by the majority existed in many cases where the Board refused to find joint-employer status and thus were not frequently, much less routinely, determinative of joint-employer status. Evidence of direct and immediate control was far more often referenced as determinative in finding such status.[50] The interpretive key to different outcomes in this precedent is not due to a markedly different legal test; it is simply that

Hychem Constructors, Inc., 169 NLRB 274, 276 (1968); *Westinghouse Electric Corp.*, 163 NLRB 914 (1967); *Space Services International Corp.*, 156 NLRB 1227, 1232 (1966).

[40] *Cabot*, supra; *Hychem*, supra at fn. 4; *Fidelity Maintenance & Construction Co.*, 173 NLRB 1032, 1037 (1968).

[41] *S. G., Tilden, Inc.*, 172 NLRB 752 (1968).

[42] *Hychem,* supra at 276.

[43] *S. G., Tilden, Inc.*, supra.

[44] *Cabot*, supra at 1392; *Westinghouse*, supra at 915.

[45] *Space Services*, supra at fn. 23.

[46] *The John Breuner Co.*, 248 NLRB 983, 989 (1980); *Furniture Distribution Center*, 234 NLRB 751, 751–752 (1978).

[47] Id. ("United establishes the work schedule of the drivers, has the authority to make changes in the drivers' assignments, selects routes for the drivers, and generally supervises the drivers in the course of their employment.").

[48] See *Hychem*, supra at 276 (referring to controls under a cost-plus contract as a "right to police reimbursable expenses under its cost-plus contract and do not warrant the conclusion that [user] has hereby forged an employment relationship"); *Westinghouse*, supra at 915 (cost-plus contract and no joint-employer finding); *Space Services*, supra at 1232 (cost-plus and no joint-employer finding); *Cabot*, supra at 1389 ("[C]ost plus contracts merely insured that Cabot obtain a satisfactory work product at cost and protected it against unnecessary charges being incurred."); *International House*, supra at 914 (cost-plus "purely arms length dealing"); *John Breuner*, supra at 988 (cost-plus insufficient to find joint employer).

[49] *Cabot*, supra, 223 NLRB at 1391 fn. 11.

[50] We recognize that dictum in *Airborne Freight* stated that "approximately 20 years ago, the Board, with court approval, abandoned its previous test in this area, which had focused on a putative joint employer's *indirect* control over matters relating to the employment relationship." 338 NLRB at 597 fn. 1. For the reasons just stated, we find this dictum to be a mistaken characterization of general precedent.

"minor differences in the underlying facts might justify different findings on the joint-employer issue." *North American Soccer League v. NLRB (NASL)*, 613 F.2d 1379, 1382 (5th Cir. 1980), cert. denied 449 U.S. 899 (1980); see also *Carrier Corp. v. NLRB*, 768 F.2d 778, 781 fn. 1 (6th Cir. 1985) (distinguishing *TLI* and *Laerco* by noting that a slight difference between two cases can tilt one toward a joint-employer finding, and the court was not deciding those other cases).

B. There Is No Judicial Precedent Adverse to the Board's Current Joint-Employer Standard or Supportive of the Majority's New Standard

It is reasonable to assume that if *TLI, Laerco*, and progeny departed abruptly from Board precedent without explanation, reviewing courts would by now have had the opportunity to criticize those decisions and would certainly have done so. After all, the Supreme Court and various appellate courts have warned the Board against such unexplained changes. See *Allentown Mack Sales & Services v. NLRB*, 522 U.S. 359, 375 (1998) ("The evil of a decision that applies a standard other than the one it enunciates spreads in both directions, preventing both consistent application . . . and effective review of the law by the courts."); *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 799 (1990) (Blackmun, J., dissenting) (finding the Board had departed from prior standard "without explanation"); *Bath Marine Draftsmen's Assn. v. NLRB*, 475 F.3d 14, 25 (1st Cir. 2007) (stating that when "the Board has not been consistent in its choice of standard, as explained above . . . . the Board is not entitled to the normal deference we owe it"); *LeMoyne-Owen College v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004) ("Requiring an adequate explanation of apparent departures from precedent thus not only serves the purpose of ensuring like treatment under like circumstances, but also facilitates judicial review of agency action in a manner that protects the agency's predominant role in applying the authority delegated to it by Congress."). As *LeMoyne* noted, courts are *duty-bound* to strike down Board decisions that lack explanation or are otherwise arbitrary and capricious in their exercise of statutory authority.

In this context, the Board's direct and immediate control standard has held up well over the last 30 years. While some courts may vary from the Board as to the particulars of a joint-employer test, others have expressly approved or applied the Board's test, and none have directly criticized that test or reversed a Board decision based on application of that test.

Significantly, two of the four Board decisions expressly overruled by the majority today were reviewed by a court of appeals, and both decisions were upheld. The decision in *TLI* was reviewed by a panel of the Third Circuit, the original *Browning-Ferris* circuit, and summarily affirmed in an unpublished decision.[51] Likewise, the decision in *AM Property* was reviewed and affirmed by a panel of the Second Circuit.[52] In accord with its own precedents, which date to before the issuance of *TLI* and *Laerco*, the court expressly endorsed the Board's standard requiring that "'an essential element' of any joint-employer determination is 'sufficient evidence of immediate control over the employees.'"[53] The court specifically supported the Board's finding that "limited and routine" supervision is insufficient to establish joint-employer status.

> The cases the Board relied on broadly support the proposition that 'limited and routine' supervision, *G. Wes Ltd.*, 309 NLRB at 226, consisting of 'directions of where to do a job rather than how to do the job and the manner in which to perform the work,' *Island Creek Coal*, 279 NLRB at 864, is typically insufficient to create a joint employer relationship. See also *Local 254, Serv. Emps. Intern. Union, AFL–CIO*, 324 N.L.R.B. 743, 746–49 (1997) (no joint employer relationship where employer regularly directed maintenance employees to perform specific tasks at particular times but did not instruct employees how to perform their work); *S. Cal. Gas Co.*, 302 N.L.R.B. 456, 461–62 (1991) (employer's direction of porters and janitors insufficient to establish joint employer relationship where employer did not, inter alia, affect wages or benefits, or hire or fire employees).

Id. at 443.

Thus, the Second Circuit has explicitly endorsed the Board's joint-employer standard. Further, as noted in an earlier case from the same circuit, other courts of appeals have varying standards for determining joint-employer status, but "[w]e see no need to select among these approaches or to devise an alternative test, because we find that an essential element under any determination of joint-employer status in a sub-contracting case is distinctly lacking in the instant case—*some evidence of immediate supervision or control of the employees.*"[54]

It is most noteworthy that, in addition to the absence of any circuit court precedent in conflict with the Board's current legal test of joint-employer status, there also is no circuit court precedent in support of the new two-step

[51] *Teamsters Local 326 v. NLRB*, 772 F.2d 894 (3d Cir. 1985).

[52] *Service Employees, Local 32BJ v. NLRB*, 647 F.3d 435 (2d Cir. 2011), aff. in relevant part, enf. in part and denying in part on other grounds 350 NLRB 998.

[53] Id. at 443 (quoting *Clinton's Ditch Co-op Co. v. NLRB,* 778 F.2d 132, 138 (2d Cir.1985)).

[54] *International House v. NLRB*, 676 F.2d 906, 913 (2d Cir. 1982) (emphasis added).

legal test articulated by our colleagues. That test, without any requirement that an alleged joint employer's control over those terms be significant or substantial, much less direct and immediate, most closely resembles a single Board decision's bizarre distortion of dictum from an Eighth Circuit opinion in *NLRB v. New Madrid Mfg. Co.*, 215 F.2d 908 (1954).

In *New Madrid*, the court denied enforcement of a Board order to the extent that it relied on finding that a company selling its business to an individual remained a coemployer with him. Finding no substantial evidence to support the Board's contrary finding, the court reasoned, inter alia, that provisions in the contract of sale did not demonstrate a retention of control over the successor's operations. In particular, the court stated that the contract did not "either expressly or by implication, purport to give New Madrid any voice whatsoever in the selecting or discharging of Jones' employees, in the fixing of wages for such employees, or in any other element of labor relations, conditions and policies in the plant purchaser's business." Id. at 913.

Thereafter, in *Hoskins Ready-Mix Concrete*, 161 NLRB 1492 (1966), a Board panel affirmed an administrative law judge's finding that a cement company and a company leasing trucks and drivers to it were joint employers. In doing so, the Board focused on the lessee's controls in the parties' lease and operating agreements. In a footnote citation to *New Madrid*, the Board converted the aforementioned dictum from negative to positive, incorrectly claiming that the court's test of co-ownership was whether a contract gave the disputed employer "any voice whatsoever" over terms and conditions of employment.[55] This was not then and is not now the joint-employer test of the Eighth Circuit[56] or any other court of appeals. It was not then the Board's joint-employer test, and has not thereafter been the test. Until now, that is.

Of course, the Board is free to go its own way and determine its own standards, but only within the statutory framework and with adequate explanation of the reasons for departing from long-established precedent. The majority claims that 30 years ago the Board departed without explanation from prior precedent by drastically restricting its test in a way that denies many workers their Section 7 rights. However, the absence of any judicial criticism of the legal test consistently applied since then undermines this claim. It is simply impossible that all the courts of appeals would have missed this train wreck. In any event, it remains the majority's burden to rationalize its new test.

V. THE MAJORITY'S NEW JOINT-EMPLOYER TEST IS IMPERMISSIBLY VAGUE AND OVERBROAD AND WILL HAVE SUBSTANTIAL ADVERSE CONSEQUENCES

A. The New Test Is Fatally Ambiguous, Providing No Guidance as to When and How Parties May Contract for the Performance of Work Without Being Viewed as Joint Employers

Multifactor tests, like the common-law agency standard that we must apply here, are vulnerable to an analysis that can be impermissibly unpredictable and results-oriented. As then-Judge Roberts remarked about the standard for determining whether college faculty are managerial employees under the Act:

> The need for an explanation is particularly acute when an agency is applying a multi-factor test through case-by-case adjudication. The open-ended rough-and-tumble of factors on which *Yeshiva* launched the Board and higher education can lead to predictability and intelligibility only to the extent the Board explains, in applying the test to varied fact situations, which factors are significant and which less so, and why. . . . In the absence of an explanation, the totality of the circumstances can become simply a cloak for agency whim—or worse.[57]

Our colleagues' new multifactor test, in which any degree of indirect or reserved control over a single term is probative and may suffice to establish joint-employer status, is woefully lacking the required explanation of "which factors are significant and which less so, and why." They provide no meaningful guidelines as to the test's future application. Further, they acknowledge no legitimate grounds for parties in a business relationship to insulate themselves from joint-employer status under the Act.

The new test stands in marked contrast to the current test's focus on evidence of direct-and-immediate control of essential terms of employment, thereby establishing a discernible and rational line between what does and does not constitute a joint-employer relationship under the Act. The current longstanding test thereby recognizes that "[s]ignificant limits . . . exist upon what actions by an employer count as control over the means and manner of performance. Most important, employer efforts to monitor, evaluate, and improve the results or ends of the worker's performances do not make the worker an em-

[55] Id. at 1493 fn. 2.

[56] The Eighth Circuit uses a four-factor test similar to a single-employer analysis. E.g., *Industrial Personnel Corp. v. NLRB*, 657 F.2d 226, 229 (8th Cir. 1981).

[57] *LeMoyne-Owen College v. NLRB*, supra, 357 F.3d at 61 (citations and quotations omitted).

ployee. Such global oversight, as opposed to control over the manner and means of performance (and especially the details of that performance), is fully compatible with the relationship between a company and an independent contractor."[58]

By comparison, our colleagues reference as probative all evidence of indirect control for such factors as the place of work, defining the work and how quickly it will need to be done, prescribing the hours when work will need to be performed, setting minimum qualifications for the individuals that the contractor provides and reserving the right to reject an individual (even though the contractor may assign its employee to a different job), inspecting the contractor's work, giving results-oriented feedback to the contractor that the contractor's supervisors use in their directions to the contractor's employees, agreeing to a price for the services that happens to be in the form of a cost-plus formula, and reserving the right to cancel the arrangement. *Under the majority's test, the homeowner hiring a plumbing company for bathroom renovations could well have all of that indirect control over a company employee!* By adopting such an overbroad, all-encompassing and highly variable test, our colleagues extend the Act's definition of "employer" well beyond its common-law meaning, and beyond its ordinary meaning as well. Cf. *Allied Chemical Workers Local 1 v. Pittsburgh Plate Glass Co.*, supra, 404 U.S. at 168 (1971) (admonishing the Board for extending "employee" in the Act beyond its ordinary meaning by attempting to include retired employees in its scope).

The expansive nature of the new test is demonstrated by the evidence relied upon by the majority to find joint-employer status in this case, which involves a "cost-plus" arrangement that is common in user-supplier contracts between separate employers.[59] The sum total of this evidence is (1) a few contract provisions that indirectly affect the otherwise unfettered right of Leadpoint (the supplier-employer) to hire its own employees; (2) reports made by BFI representatives to Leadpoint of two incidents—one where a Leadpoint employee was observed passing a "pint of whiskey" at the jobsite, and another where a Leadpoint employee "destroyed" a drop box—that understandably resulted in discipline; (3) one contractually-established pay rate ceiling restriction for Leadpoint employees (obviously stemming from the cost-plus nature of the contract); (4) BFI's control of its own facility's hours and production lines; (5) a record-keeping requirement for Leadpoint employee hours (again, obviously stemming from the cost-plus nature of the contract); (6) a sole preshift meeting to advise Leadpoint supervisors of what lines will be running and what tasks they are supposed to do on those lines; (7) monitoring of productivity; (8) establishment of one type of generally applicable production assignment scheme for Leadpoint; and (9) "on occasion," addressing Leadpoint employees about productivity directly. That is all there is, and the Regional Director correctly decided under extant law that it was not enough to show BFI was the joint employer of Leadpoint employees.[60]

The majority's evidence amounts to a collection of general contract terms or business practices that are common to most contracting employers (discussed below), plus a few extremely limited BFI actions that had some routine impact on Leadpoint employees. It would be hard to find any two entities engaged in an arm's-length contractual relationship involving work performed on the client's premises that lack this type of interaction. Again, we suppose that our colleagues do not intend that every business relationship necessarily entails joint-employer status, but the facts relied upon here demonstrate the expansive, near-limitless nature of the majority's new standard.

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[58] *North American Van Lines, Inc. v. NLRB*, 869 F.2d 596, 599 (D.C. Cir. 1989) (citations omitted).

[59] The Board and the courts have uniformly concluded that cost-plus arrangements do not automatically render the contracting client an "employer" of the vendor's employees. Therefore, our colleagues concede (as they must) that a cost-plus "arrangement, on its own, is not necessarily sufficient to create a joint-employer relationship." Indeed, the Board and the courts have uniformly concluded that nothing in cost-plus arrangements necessarily renders the contracting client an "employer" of the vendor's employees. In *Fibreboard*, for example, the contracting client (Fibreboard) arranged for employees of the contractor (Fluor) "to do the same [maintenance] work under similar conditions of employment," where Fibreboard was committed to pay the "costs of the operation plus a fixed fee." 379 U.S. at 206–207. As noted previously (see fn. 6, supra), Fibreboard was clearly treated as a distinct "employer" (having no employment relationship with the subcontractor's employees), even though the reasons underlying the subcontracting decision were almost *exclusively* based on employment-related considerations. Indeed, the Supreme Court noted that Fibreboard "was induced to contract out the work by assurances from independent contractors that *economies could be derived by reducing the work force, decreasing fringe benefits, and eliminating overtime payments*." Id. at 213 (emphasis added).

The majority nevertheless attempts to distinguish the instant case because there was an "apparent requirement of BFI approval over employee pay increases." In this respect, *the majority potentially confers "employer" status on every client/user company that enters into a cost-plus arrangement*, because few, if any, clients will give a blank check to supplier-employers regarding wages when the full cost will be charged to the client. This is but one illustration of the multitude of ways that our colleagues fail to appreciate the "complexities of industrial life," which is one of the Board's most important functions and responsibilities. *NLRB v. Insurance Agents*, 361 U.S. 477, 499 (1960).

[60] Although we might differ from the Regional Director as to the weight assigned to certain evidence, we find no need to do so where we agree with his ultimate finding. We note that the majority does not argue that the Regional Director erred in making this finding.

There is a further fundamental problem with the new joint-employer test. The majority states that its goal is to reach a large number of employees that they feel have been left unprotected by Section 7 because they work on a contingent or temporary basis. According to the majority, the number of workers so employed has dramatically risen since *TLI* and *Laerco* were decided and will predictably continue to rise. Further, the majority asserts that "[t]he Board's current focus on only direct and immediate control acknowledges the most proximate level of authority, which is frequently exercised by the supplier firm, but gives no consideration to the substantial control over workers' terms and conditions of employment of the user."

Thus, not only is the majority's *legal* justification for a new joint-employer test impermissibly based on economic reality theory, as previously discussed, but its *factual* justification is flawed as well. The majority focuses on facts limited to a particular type of business model—the user/supplier relationship involving the use of contingent employees—but they rely on these facts to justify a change in the statutory definition of employer, or joint employer, for all forms of business relationships between two or more entities.

The number of contractual relationships now potentially encompassed within the majority's new standard appears to be virtually unlimited:

- Insurance companies that require employers to take certain actions with employees in order to comply with policy requirements for safety, security, health, etc.;
- Franchisors (see below);
- Banks or other lenders whose financing terms may require certain performance measurements;
- Any company that negotiates specific quality or product requirements;
- Any company that grants access to its facilities for a contractor to perform services there, and then continuously regulates the contractor's access to the property for the duration of the contract;
- Any company that is concerned about the quality of the contracted services;
- Consumers or small businesses who dictate times, manner, and some methods of performance of contractors.

Our point is not that the majority intends to make all players in the economy, no matter how small, necessary parties at the bargaining table (although as discussed below, they may well become targets of economic protest in support of bargaining or other union causes), but that the majority's new standard foreshadows the extension of obligations under the Act to a substantial group of business entities without any reliable limitations.[61] This kind of overbroad and ambiguous government regulation is necessarily arbitrary and capricious. "In the absence of an explanation, the 'totality of the circumstances' can become simply a cloak for agency whim—or worse." *LeMoyne-Owen College v. NLRB*, supra, 357 F.3d at 61.

Our colleagues make this sweeping change in the law without any substantive discussion whatsoever of significant adverse consequences raised by BFI, Leadpoint, and amici. Indeed, they profess to limit themselves to the issue of joint bargaining obligations in the user-supplier context, with a disclaimer that their decision "does not modify any other legal doctrine or change the way that the Board's joint-employer doctrine interacts with other rules or restrictions under the Act." However, such a disclaimer cannot possibly be valid, because applying different tests in other circumstances would mark an unprecedented and unwarranted break from the unitary joint-employer test under our Act that has applied to *all* types of business relationships, each of which is affected by changing the basic joint-employer test. We therefore believe it is necessary to specifically address these consequences, and we do so below.

B. The New Test Will Cause Grave Instability in Bargaining Relationships, Contrary to One of the Board's Primary Responsibilities Under the Act

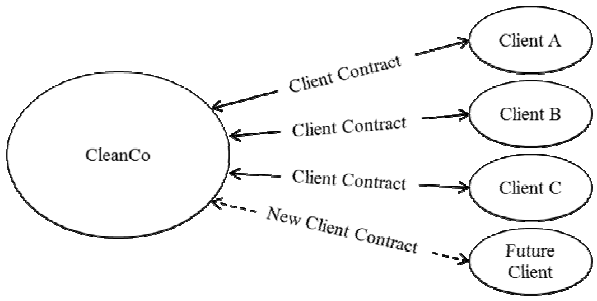
Our colleagues greatly expand the joint-employer test without grappling with its practical implications for real-world collective-bargaining relationships. They purport to be following the command in Section 1 of the Act to "encourag[e] the practice and procedure of collective bargaining." Congress did not mean, however, to blindly expand collective-bargaining obligations whether or not they are appropriate. The Act aims to "achiev[e] industrial peace by promoting *stable* collective-bargaining relationships." *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996) (emphasis added). Indeed, one of the Board's primary responsibilities under the Act is to foster labor relations stability. *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362–363 (1949) ("To achieve stability of labor relations was the primary objective of Congress in enacting the National Labor Relations Act."); *NLRB v. Appleton Electric Co.*, 296 F.2d 202, 206 (7th Cir. 1961) ("A basic policy of the Act [is] to achieve stability of labor relations."). And the Supreme Court has stressed the need to provide "certainty before-

[61] The majority correctly states that "the annals of Board precedent contain no cases that implicate the consumer services purchased by unsuspecting homeowners or lenders." We hope that continues to be the case, but there is no guarantee that what is past is prologue under their new and impermissibly expansive test.

hand" to employers and unions alike. Employers must have the ability to "reach decisions without fear of later evaluations labeling . . . conduct an unfair labor practice," and a union similarly must be able to discern "*the limits of its prerogatives, whether and when it could use its economic powers . . . , or whether, in doing so, it would trigger sanctions from the Board*." *First National Maintenance Corp. v. NLRB*, supra, 452 U.S. at 678–679, 684–686 (emphasis added).

Collective bargaining was intended by Congress to be a process that could conceivably produce agreements. One of the key analytical problems in widening the net of "who must bargain" is that, at some point, agreements predictably will *not* be achievable because different parties involuntarily thrown together as the "bargainers" under the majority's new test will predictably have widely divergent interests. Today's marked expansion of bargaining obligations to other business entities threatens to destabilize existing bargaining relationships and complicate new ones. Even if one takes an extremely simplistic user-supplier scenario, the new standard's conferral of joint-employer status—making many clients an "employer" of contractor employees, while making contractors an "employer" jointly with the clients—will produce bargaining relationships and problems unlike any that have existed in the Board's entire 80-year history, which clearly were never contemplated or intended by Congress.

Consider the following diagram, which depicts a single cleaning company named "CleanCo," which has cleaning contracts with three clients. CleanCo employees work at each client's facilities in circumstances similar to the instant case, and CleanCo periodically adds future clients.



Assuming circumstances like those presented here, the majority would find that CleanCo and Client A are a "joint employer" at the Client A location; CleanCo and Client B are a "joint employer" at the Client B location; and CleanCo and Client C are a "joint employer" at the Client C location. Such a situation—involving a single vendor and only three clients, each with only one location—creates all of the following problems under the majority's test:

1. **Union Organizing Directed at CleanCo.** If CleanCo employees are currently unrepresented and a union seeks to organize them, this gives rise to the following issues and problems:

- *What Bargaining Unit(s)?* Although CleanCo directly controls all traditional indicia of employer status, the new majority test establishes that three different entities—Clients A, B, and C—have distinct "employer" relationships with discrete and potentially overlapping groups of different CleanCo employees. It is unclear whether a single bargaining unit consisting of all CleanCo employees could be considered appropriate, given the distinct role that the new majority test requires each client to play in bargaining.
- *What "Employer" Participates in NLRB Election Proceedings?* If the union files a representation petition with the Board, the Act requires the Board to afford "due notice" and to conduct an "appropriate hearing" for the "employer." Sec. 9(c)(1). Currently, the Board has no means of identifying—much less providing "due notice" and affording the right of participation to—"employer" entities like Clients A, B, and C, even though they would inherit bargaining obligations if CleanCo employees select the union.
- *Who Does the Bargaining?* If the union wins an election involving all CleanCo employees, the majority test would require participation in bargaining by CleanCo *and* Clients A, B, and C. Here, the majority test provides that each party "will be required to bargain only with respect to *such terms and conditions which it possesses the authority to control*" (emphasis added). However, because the majority's standard is so broad—spanning "direct control," "indirect control" and the "right to control" (even if never exercised in fact)—nobody could ever reasonably know who is responsible for bargaining what.[62]
- *CleanCo-Client Bargaining Disagreements.* The majority standard throws into disarray the manner in which "employers" such as CleanCo and Clients A, B, and C can formulate coherent proposals and provide meaningful responses to union demands, when they will undoubtedly disagree among themselves regarding many, if not most, matters that are the subject of negotiation. Here, the majority disregards the fact that CleanCo's client contract will most often

[62] We discuss this aspect of the "authority problem" in more detail below.

have resulted from equally difficult negotiations with Clients A, B, and C. Therefore, the "joint" bargaining contemplated by the majority will involve significant disagreements between each of the employer entities (i.e., Clean Co and Clients A, B, and C) with no available process for resolving such disputes.[63]

- *CleanCo "Confidential" Information—Forced Disclosure to Clients.* The most contentious issue between CleanCo and Clients A, B, and C is likely to involve the amounts charged by CleanCo, which predictably could vary substantially between Clients A, B, and C, depending on their respective leverage, the need for CleanCo's services, the duration of their respective client contracts (i.e., whether short-term or long-term), and other factors. If a union successfully organizes all CleanCo employees, the resulting bargaining—since the majority test requires participation by Clients A, B, and C—will almost certainly require the disclosure of sensitive CleanCo financial information to Clients A, B, and C, which is likely to enmesh the parties in an array of disagreements with one another, separate from the bargaining between the union and the "employer" entities.
- We have already found, in many prior cases, that this information is sensitive and is not necessary to employees' exercise of rights under the Act. See, e.g., *Flex Frac Logistics*, 360 NLRB No. 120 (2014) (detailing disruption occurring when contractor, which "was particularly concerned to maintain the confidentiality of the rates it charges its clients," had rates disclosed to clients by employee). The majority's new standard basically guarantees such economic disruption for no legitimate purpose.
- *How Many Labor Contracts?* If a single union organizes all CleanCo employees, the above problems might be avoided if CleanCo engages in three separate sets of bargaining—each devoted to Client A, Client B, and Client C, respectively—resulting in three separate labor contracts. However, this would be inconsistent with the CleanCo bargaining unit if it encompassed all CleanCo employees, and CleanCo would violate the Act if it insisted on changing the scope of the bargaining unit, which under well-established Board law is a nonmandatory subject of bargaining.
- *What Contract Duration(s)?* If a union represented all CleanCo employees, and if the Board certified each client location as a separate bargaining unit, then there presumably would be separate negotiations—and separate resulting CBAs—covering the CleanCo employees assigned to Client A, Client B, and Client C, respectively. In this case, however, the duration of each CBA might vary, depending on each side's bargaining leverage, and a further complication would arise where CBA termination dates differ from the termination dates set forth in the various CleanCo client contracts.
- *Do Client Contracts Control CBAs, or Do CBAs Control Client Contracts?* Regardless of whether the CleanCo CBA(s) have termination dates that coincide with the expiration of the CleanCo client contracts, the majority's new test leaves unanswered whether CleanCo and Clients A, B, and C could renegotiate their client contracts, or whether the "joint" bargaining obligations—and the CBA(s)—would effectively trump any potential client contract renegotiations, even though this would be contrary to the Supreme Court's indication that Congress, in adopting the NLRA, "had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed." *First National Maintenance*, supra, 452 U.S. at 676. Likewise, similar to what the majority held in *CNN* (see discussion infra), the majority would impose its new joint-employer bargaining obligations on Clients A, B, and C, even where the client contracts explicitly identified CleanCo as the only "employer" and stated that CleanCo had sole and exclusive responsibility for collective bargaining.
- *New Clients (Possibly With Their Own Union Obligations).* If a union represented all CleanCo employees, and if (under the majority's new test) all CleanCo clients were deemed joint employers with CleanCo, what happens when Clean Co obtains new clients that previously had cleaning work performed by in-house employees or a predecessor contractor, and those in-house or contractor employees were unrepresented or represented by a different union? If, based on CleanCo's existing union commitments, CleanCo refused to consider hiring or retaining the employees who formerly did the new client's cleaning work, the refusal could constitute antiunion discrimination in violation of Sec. 8(a)(3). If CleanCo hired the new client's former employees (or the former employees of a predecessor contractor), then CleanCo could run afoul of its existing union obligations. See *Whitewood Maintenance Co.*, 292 NLRB

[63] We also discuss this aspect of the "authority problem" in more detail below.

1159, 1168–1169 (1989), enfd. 928 F.2d 1426 (5th Cir. 1991). Alternatively, this situation could require further Board proceedings for resolution.[64]

- *Non-Consensual Multiemployer Bargaining.* The Board has held that employees solely employed by a supplier employer combined with employees jointly employed by the supplier employer and a single user employer (e.g., CleanCo and either Clients A, B, or C) must be considered inappropriate as a matter of law, absent the consent of the parties. *Oakwood Care Center*, 343 NLRB 659, 661–663 (2004). A unit consisting of employees jointly employed by the supplier employer and multiple user employers (e.g., CleanCo and Clients A, B, and C) would likewise be inappropriate absent consent, unless the majority is overruling *(sub silentio)* the *Oakwood* consent requirement.
- *Potential Board Jurisdiction Over Some Entities and Not Others.* The Board does not have jurisdiction over governmental employers and employees, over railways or airlines that are subject to the Railway Labor Act, or—in a variety of circumstances—religiously-affiliated educational institutions or certain enterprises operated by Indian tribes. If CleanCo is subject to the NLRA, but Clients A, B, or C fall within one or more of the exempt categories identified above, the majority's new standard will create complex questions about whether the Board may lack jurisdiction over particular "joint" employer(s).

2. **Union Organizing Directed at Client(s).** If two different unions, rather than targeting CleanCo, engage in organizing directed at Client A and Client B, respectively, with Client C remaining nonunion, this gives rise to additional issues and problems:

- *All of the Above Issues/Problems.* If the CleanCo employees at Client A are organized by one union, and if the CleanCo employees at Client B are organized by a different union, then the majority test would make CleanCo and Client A the "joint employer" of the CleanCo/Client A employees, and CleanCo and Client B the "joint employer" of the CleanCo/Client B employees. In both cases, the "joint employer" status would give rise to *all* of the above problems and issues, in addition to those described below.
- *Employee Interchange and Multilocation Assignments.* If different unions represent the employees of CleanCo/Client A and CleanCo/Client B, and if CleanCo/Client C employees were nonunion, this would create substantial potential problems and potential conflicting liabilities regarding CleanCo employees assigned to work at all three client locations or transferred from one client's facility to another. This is a common situation, arising, for example, where one CleanCo client simply was unhappy with the productivity or attitude of the assigned employee.[65]
- *Strikes and Picketing—"Neutral" Secondary Boycott Protection Eliminated.* Sections 8(b)(4) and 8(e) of the Act protect neutral parties from being subjected to "secondary" picketing and other threats, coercion and restraint that have an object of forcing one employer to cease doing business with another. Therefore, if the CleanCo/Client A and CleanCo/Client B employees were involved in a labor dispute, under the Board's traditional joint-employer standard Clients A and B (as nonemployers) would be neutral parties protected from "secondary" union activity. Under the majority's standard, however, Clients A and B would be employers right along with CleanCo and thus subject to picketing.
- *Renegotiating or Terminating Client Contracts.* It is well established that "an employer does not discriminate against employees within the meaning of Section 8(a)(3) by ceasing to do business with another employer because of the union or nonunion activity of the latter's employees."[66] However, to the extent that CleanCo and Clients A, B, and C are joint employers, then any client's termination of CleanCo's

[64] Such a resolution might result, for example, from a unit clarification petition seeking to add the new employees to the bargaining unit without an election under the Board's accretion doctrine, or jurisdictional dispute proceedings pursuant to Sec. 10(k) of the Act.

[65] The potential problems caused by multilocation assignments or employee interchange between locations could arise, for example, from CBA provisions restricting such assignments or transfers, from union-security provisions in different CBAs requiring dues payments based on a person's employment without regard to where they were employed, or from conflicting wage rates and benefits applicable at each location. Although these issues might depend on what particular CBA or other policies were in effect, they would obviously cause significant burdens and potential confusion for the employees and each entity considered a joint employer under the majority's new standards.

[66] *Plumbers Local 447 (Malbaff Landscape Construction)*, 172 NLRB 128, 129 (1968). See also *Computer Associates International, Inc.*, 324 NLRB 285, 286 (1997) ("[F]inding a violation of Section 8(a)(3) on the basis of an employer's decision to substitute one independent contractor for another because of the union or nonunion status of the latter's employees is inconsistent with both the language of Section 8(a)(3) . . . and with legislative policies underlying Section 8(b) of the Act aimed at protecting the autonomy of employers in their selection of independent contractors with whom to do business.").

services based on potential union-related considerations would create a risk that the Board would find—as it did in *CNN*, supra—that the contract termination constituted antiunion discrimination in violation of Sec. 8(a)(3). *CNN*, supra, slip op. at 40–42 (Member Miscimarra, dissenting).

3. **Existing CleanCo-Union and/or Existing Client-Union Relationships.** Additional issues and problems result from the impact of the majority's new joint-employer test on existing union relationships and CBAs:

- *All of the Above Issues/Problems.* It is clear, under the majority's test, that existing collective-bargaining agreements and union relationships involving CleanCo, with no mention of Clients A or B, do not prevent Clients A and B from having joint-employer status with CleanCo, which would give rise to all of the issues and problems described above. Again, in *CNN*, discussed infra, the Board majority found that the client (CNN) was a joint employer, even though any bargaining between CNN and the unions representing employees of contractor TVS would have departed from applicable labor contracts, prior Board certifications, the services agreements between CNN and its vendor (TVS), and 20 years of bargaining history in which the employer-party was always TVS (or its predecessor contractors), and not CNN.
- *Existing CleanCo CBA: Prospective Four-Party Bargaining.* If CleanCo was party to an existing company-wide collective-bargaining agreement, in which CleanCo was identified as the only "employer," the majority's new test clearly imposes an obligation to engage in bargaining on *all* joint-employer entities—i.e., CleanCo and Clients A, B, and C—even though such bargaining would depart from explicit CBA language and the past practice of CleanCo and the union.
- *"Mandatory" Arbitration, Yet Never Agreed To?* If CleanCo had an existing company-wide CBA, the majority's imposition of "employer" status on Clients A, B, and C would not necessarily bind them to the terms of the existing CleanCo CBA. This would mean that, even though a particular grievance may pertain to essential employment terms that, in the majority's view, Clients A, B, and C have the right to "share or codetermine," the CBA's grievance arbitration procedure would not necessarily bind Clients A, B, and C, since they had never agreed to submit to the procedure.[67]
- *Benefit Fund Contributions and Liabilities—Who Pays?* Many existing collective-bargaining agreements contain extensive provisions regarding benefit fund contributions and benefit liabilities. If such provisions were contained in the CleanCo CBA, then Clients A, B, and C—when participating in the new four-way bargaining described above—would predictably be confronted with demands to assume liability for such provisions. Although the majority test suggests that Clients A, B, and C "will be required to bargain only with respect to such terms and conditions which it possesses the authority to control," it appears clear that they would face economic demands and potentially be subject to a strike based on a refusal to agree to such demands.
- *Joint Bargaining Versus "Add-On" CBAs.* If CleanCo employees assigned to Clients A, B, or C were organized for the first time by one or more unions, the majority clearly imposes a new mandatory bargaining obligation on all joint employer entities. Although an existing collective-bargaining agreement generally suspends a party's obligation to bargain for the agreement's term, the majority's new test, as noted above, imposes an independent duty to bargain on *every* joint employer "with respect to such terms and conditions which it possesses the authority to control," which may result in separate sets of negotiations and potential "add-on" CBAs that deviate from the existing union agreements.

The foregoing is only a selection of the complications that may arise. And the example is obviously simplistic because it relates only to *one* service company, which has only *three* clients—and in the real world, by comparison, (i) many businesses, large and small, rely on services provided by large numbers of separate vendors, and (ii) many service companies have dozens or hundreds of separate clients. Time will no doubt reveal more as employers and unions attempt to apply the limitless joint-employer standard to even more complicated settings than the above example. The only thing that is clear at present is that the new standard does not promote stable collective-bargaining relationships. There is no way that it could, and simple mathematics shows us why.

On its face, the majority's broad test can find up to 18 "joint" employers per work force. How? The majority

[67] *AT&T Technologies Inc. v. CWA*, 475 U.S. 643, 648 (1986); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. at 582; *Steelworkers v. American Mfg. Co.*, 363 U.S. at 570–571; *Gateway Coal Co. v. UMW*, 414 U.S. 368, 374 (1974).

finds that there are at least six essential terms and conditions of employment (wages, hours, hiring, firing, discipline, and direction of work). According to the majority, an "employer" is an entity that exercises—even on a limited and routine basis—any one of three forms of putative control (direct control, indirect control, or potential control) over any one of these terms. Six times 3 is 18, which leaves us with *a model where there could be up to 18 employers for a single workforce*. See Appendix A ("Why There Are At Least 18 Potential Employers"). In truth, the test can find *more than 18* employers because the majority has not limited itself to the specified 6 supposedly essential terms, and the majority has not unqualifiedly represented that there can be only one controller per category of control, e.g., there could be two "indirect controllers," for example. We do not know the exact limit to the multiplicity of putative employers arising from the majority's new joint-employer test. But it is surely common sense that placing 18 different cooks involuntarily in a single kitchen will lead to a terrible meal. That is the recipe for dyspeptic collective bargaining that the majority has cooked up.

The majority states that "a joint employer will be required to bargain only with respect to such terms and conditions which it possesses the authority to control." This does not temper the impact of the new standard; it only makes matters worse. The majority assumes these bargaining issues are severable, as if the resolution of one issue is not dependent on the resolution of another. This is not how contract negotiations work. And underscoring the irrationality of the majority's rule here, the Board has traditionally denounced this type of segmented issue-by-issue negotiating, when unilaterally undertaken by a party, as unlawful "fragmented bargaining."[68]

Moreover, how exactly are joint user and supplier employers to divvy up the bargaining responsibilities for a single term of employment that they will be deemed under the new standard to codetermine, one by direct control and the other by indirect control? How does one know who has authority at all over a term and condition of employment, under the majority's vague formulation? What if two putative employer entities get into a dispute over whether one has authority over a certain term or condition of employment? What if the putative employers are competitors? Taking the diagram above, what if Client A and Client B are competitors and have no real economic interest in the other client coming to a good-faith agreement with CleanCo on how much it pays employees working for that other client? Does it make sense for the law to attempt to create such an interest? What if there are too many entities to come to an agreement? How does bargaining work in this circumstance? Further, this purported division of bargaining responsibility creates conflicts between alleged violations of Section 8(a)(5), which *requires* employers to bargain in good faith with a certified or recognized union, and Section 8(a)(2), which makes such bargaining *unlawful* if the union lacks majority support among the entity's employees.[69] If multiple entities arguably constitute a "joint employer," and one entity is alleged to have unlawfully failed to bargain over particular terms of employment, the majority's standard effectively places the burden of proof on the respondent-employer to establish that it did not control those particular employment terms.[70] So questions exist as to (i) which entities are the "employer," (ii) which entities must (or must not) engage in bargaining over particular employment terms, and even (iii) what party—the respondent(s) versus the General Counsel—bears the burden of proof regarding this assortment of issues.

[68] See, e.g., *E.I. Dupont de Nemours & Co.*, 304 NLRB 792, 792 fn. 1 (1991) ("What we find unlawful in the Respondent's conduct was its adamant insistence throughout the entire course of negotiations that its site service operator and technical assistant proposals were not part of the overall contract negotiations, and, therefore, had to be bargained about totally separately not only from each other but from all the other collective bargaining agreement proposals. We find this evinced fragmented bargaining in contravention of the Respondents duty to bargain in good faith."); see also *NLRB v. Patent Trader*, 415 F.2d 190, 198 (2d Cir. 1969), modified on other grounds 426 F.2d 791 (2d Cir. 1970) (When a party "removes from the area of bargaining . . . [the] most fundamental terms and conditions of employment (wages, hours of work, overtime, severance pay, reporting pay, holidays, vacations, sick leave, welfare and pensions, etc.)," it has "reduced the flexibility of collective bargaining, [and] narrowed the range of possible compromises with the result of rigidly and unreasonably fragmenting the negotiations.").

[69] The conflict between Sec. 8(a)(5) and Sec. 8(a)(2) results from the Hobson's Choice that confronts multiple entities that control different aspects of employment for one or more different employee groups. Potential joint-employer entities risk violating Sec. 8(a)(5) if they fail or refuse to bargain over certain matters because Sec. 8(a)(5) obligations apply generally to "wages, hours, and other terms and conditions of employment." See Sec. 8(d) (defining the phrase "to bargain collectively," which is required under Sec. 8(a)(5)). Conversely, potential joint-employer entities risk violating Sec. 8(a)(2), which makes it unlawful for an employer to bargain with a union that does not validly represent its employees, if the Board determines that the entities engaged in bargaining when, in fact, they were not an "employer" as to employment terms not within their control. In other words, not only does the majority's standard promise to create confusion about who is an "employer," but the majority's patchwork allocation making different entities responsible for different issues creates confusion about which "employer" entity may or must bargain over what particular employment terms. As with other aspects of the majority's new standard, definitive answers will be available only after years of Board and court litigation.

[70] See, e.g., *Hobbs & Oberg Mining Co.*, 297 NLRB 575, 586 (1990) (General Counsel's burden to prove joint-employer status), enfd. 940 F.2d 1538 (10th Cir. 1991), cert. denied 503 U.S. 959 (1992).

This scenario is made all the worse by the need for years of Board litigation before third parties will actually learn whether (i) they unlawfully failed to participate in bargaining between another employer and its union(s), or (ii) the third parties unlawfully injected themselves into such bargaining when their commercial relationship was insufficient to make them a joint employer. Nor is the Board permitted to engage in the economic analysis needed to sort out the plethora of arm's-length company-to-company relationships affected by the majority's new joint-employer test. The Board's Division of Economic Research was abolished 75 years ago, and Section 4(a) of the Act—adopted by Congress in 1947—prohibits the Board from having any agency personnel engage in "economic analysis."[71] Additionally, we note that the Board lacks the authority to impose labor contract terms on parties,[72] and nothing in the Act authorizes the Board to impose requirements on companies regarding how they must arrange or rearrange themselves.

The majority even acknowledges some turmoil will result from its decision, but largely dismisses it as being outweighed by the need to protect contingent workers' Section 7 rights.

> Certainly any doctrinal change in this area will modify the legal landscape for employers with respect to the National Labor Relations Act. However, given the centrality of collective bargaining under the Act, we must ensure that the prospect of collective bargaining is not foreclosed by business relationships that effectively deny employees' right to bargain with employers that share control over essential terms and conditions of their employment. [(Footnote omitted.)]

Contrary to our colleagues' assertion, we are not slavish defenders of the status quo. We would support revisiting any Board doctrine that systemically fails to protect Section 7 rights, but we would not do so without evidence of that failure. The majority cites no evidence, and none has been presented, showing that employees in contingent or any comparable employment situations have been unable to bargain with their undisputed employer. The majority uses the phrase "meaningful bargaining" numerous times, but the majority's premise is that bargaining fails to be "meaningful" whenever the employer's business relationships influence the matters under negotiation. Our colleagues on this front simply cite the large number of employees whose terms and conditions of employment might be affected in some way by a user employer and Board cases finding no duty to bargain with these user employers, and assert that rights have been denied. How do we know that employees have been unable to engage in "meaningful bargaining" with the supplier employer? Under the majority's test, it is possible to find that "meaningful bargaining" cannot take place with a supplier employer alone if it lacks meaningful control over even a single "essential" facet of employment. Such a definition of meaningful bargaining has never been the law, and it cannot be reconciled with business practices that have been in existence since before the Act.

It is difficult, if not impossible, to reconcile this reasoning with the Board's rationale in *Management Training*, 317 NLRB 1355 (1995), addressing whether to assert discretionary jurisdiction over a private employer contracting for business with an exempt governmental entity. The Board there modified prior caselaw and held that it would no longer decline to assert jurisdiction in circumstances where the private employer lacked control of what had been deemed essential terms of employment. It reasoned that "[b]ecause of commercial relationships with other parties, an inability to pay due to financial constraints, and competitive considerations which circumscribe the ability of the employer to grant particular demands, the fact is that employers are frequently confronted with demands concerning matters *which they cannot control as a practical matter or because they have made a contractual relationship with private parties* or public entities." Id. at 1359 (emphasis added). Quite obviously, under *Management Training*, the Board believes that employees and their exclusive bargaining representative can still engage in meaningful bargaining under the Act even with an employer who lacks control over a substantial number of essential terms of employment.

C. The New Test Will Dramatically Change Labor Law Sales and Successorship Principles, and Will Discourage Efforts to Rescue Failing Companies and Preserve Employment

Expanding the definition of employer will also alter the landscape of successorship law under the Act. It is well established that successor employers,[73] although

[71] Sec. 4(a) states in part: "Nothing in this Act shall be construed to authorize the Board to appoint individuals . . . for economic analysis." This language was added to the NLRA as part of the Labor Management Relations Act (LMRA), 61 Stat. 136, Sec. 101 (amending NLRA Sec. 4(a)) (1947). The enactment of Sec. 4(a) occurred after the Board abolished its Division of Economic Research in 1940. See 93 Cong. Rec. 6661, reprinted in 2 LMRA Hist. 1577 (June 6, 1947) (analysis of H.R. 3020). See generally John E. Higgins, Jr., *Labor Czars–Commissars–Keeping Women in the Kitchen–The Purpose and Effects of the Administrative Changes Made by Taft-Hartley*, 47 CATH. U. L. REV. 941, 951–952 (1998).

[72] Sec. 8(d); *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).

[73] An employer is a successor of its predecessor under the Act when there is a "substantial continuity between the enterprises," the successor hired a majority of its predecessor's employees, and the unit is still

they must recognize and bargain with the union representing the predecessor's employees in certain circumstances, are not obligated to adopt the preexisting collective-bargaining agreement and have the right to unilaterally set different initial terms and conditions of employment.[74] *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 287–288, 294–295 (1972). This rule "careful[ly] safeguards the rightful prerogative of owners independently to rearrange their businesses." *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 40 (1987) (internal quotations omitted). But the policy concerns behind the rule are even deeper than that:

> [H]olding either the union or the new employer bound to the substantive terms of an old collective-bargaining contract may result in serious inequities. A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital. On the other hand, a union may have made concessions to a small or failing employer that it would be unwilling to make to a large or economically successful firm. The congressional policy manifest in the Act is to enable the parties to negotiate for any protection either deems appropriate, but to allow the balance of bargaining advantage to be set by economic power realities. Strife is bound to occur if the concessions that must be honored do not correspond to the relative economic strength of the parties.

Burns, 406 U.S. at 287–288.

Under the majority's expansive joint-employer standard, many user employers will now be considered joint employers of their supplier employers' employees. Rebidding contracts has been a common feature of the user—and supplier—employer market. Going forward, it may be less common because deeming the user employer to be a joint employer will make terminating or rebidding the contract with the supplier employer much more difficult. The user employer will often have a duty to bargain the decision to lay off the employees or to subcontract those jobs to another supplier employer. See *Fibreboard Corp. v. NLRB*, supra, 379 U.S. at 215 (1964); *CNN,* supra, 361 NLRB No. 47, slip op at 17. Assuming the user employer does contract with a new supplier employer that would otherwise be a *Burns* successor able to set its own terms, the user employer, under the broadened standard, will likely be deemed a joint employer with the new supplier employer as well. That user employer's ongoing bargaining obligation spanning the two supplier employers prevents the new supplier employer from setting different terms and conditions of employment than its predecessor had. See *Whitewood Maintenance Co.*, supra, 292 NLRB at 1168–1169 (contractor that substituted one subcontractor for another jointly employed both the old and new subcontractors' employees, so the new subcontractor could not set its own initial terms), enfd. 928 F.2d 1426 (5th Cir. 1991).

Similarly, when a predecessor's union-represented employees apply for employment with a successor, the successor cannot lawfully extend recognition unless and until it has hired a "substantial and representative complement" of employees and has received a demand for recognition from the predecessor union(s).[75] In *CNN*, supra, two unions already represented employees of CNN's contractor, TVS, as part of a 20-year history in which unionized contractors supplied technical employees to CNN, where only the contractor—and not CNN—was considered the "employer." When CNN decided to terminate its use of contractor employees and directly hire its own technical workforce, CNN as a successor would have violated the Act if it engaged in bargaining with the TVS unions before it hired a "substantial and representative complement" of its own employees. However, the majority's expansive joint-employer finding converted CNN into an "employer" before it hired *any* of its own technical employees. And, based on its expansive joint-employer finding, the Board majority determined that CNN—even before it decided to terminate the TVS relationship (and before it notified TVS)—was required to notify the TVS *unions* and engage in bargaining with them over *whether* CNN might terminate the TVS relationship and hire its own work force.

Member Miscimarra stated, in his *CNN* dissent, that employer status "does not arise as the result of spontaneous combustion," and he explained that the expansive joint-employer finding—applied to CNN before it hired its own workforce—was irreconcilable with the parties' understandings and existing agreements:

appropriate. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43–52 (1987).

[74] There is a limited exception to this general rule when "'it is perfectly clear that the new employer plans to retain all of the employees in the unit,'" unless the successor "clearly announce[s] its intent to establish a new set of conditions prior to inviting former employees to accept employment." *Spruce Up Corp.*, 209 NLRB 194, 195 (1974) (quoting *Burns*, 406 U.S. at 294–295), enfd. 529 F.2d 516 (4th Cir. 1975). However, a so-called "perfectly clear" successor employer is still not bound by the predecessor contract itself. It must only adhere to terms established by the contract while negotiating new terms with the incumbent union.

[75] *Fall River Dyeing Corp. v. NLRB*, 482 U.S. at 47–48.

> Nothing in such a scenario would promote stable bargaining relationships. Rather, CNN's actions—taken as an "employer" of the TVS technical personnel—would have directly contradicted the then-existing TVS-NABET collective-bargaining agreements (which identified TVS, not CNN, as the employer). CNN's actions would have violated the CNN-TVS Agreements, which stated . . . that TVS employees "are not employees of [CNN], and shall not be so treated at any time". . . . Finally, CNN's actions would have exhibited a total disregard for the elaborate body of law regarding "successorship" and related business changes that has been the subject of nearly a dozen Supreme Court cases and innumerable Board decisions.[76]

The inability of user employers to freely terminate or rebid client contracts and of new supplier employers to set different initial terms will inhibit our economy and lead to labor strife. The new standard sends a message to user employers to *never contract with unionized firms in the first place* to avoid being trapped in "permanent" client contracts that cannot be terminated without bargaining to agreement or impasse. On the other side, the supplier-employer market will become uncompetitive as potential bidders for contracts where the incumbent supplier employer is unionized will be unable to compete with the incumbent employer on labor costs, as the new supplier employer will likely be beholden to the same terms. The Act is being applied in a manner Congress could not conceivably have intended.

D. The New Test Threatens Existing Franchising Arrangements in Contravention of Board Precedent and Trademark Law Requirements

Of the thousands of business entities with different contracting arrangements that may suddenly find themselves to be joint employers, franchisors stand out. According to amicus International Franchise Association (IFA), "in 2012 there were 750,000 franchise establishments in the United States employing 8.1 million workers, generating a direct economic output of $769 billion. These businesses account for approximately 3.4 percent of America's gross domestic product."[77]

For many years, the Board has generally not held franchisors to be joint employers with franchisees, regardless of the degree of indirect control retained.[78] The majority does not mention, much less discuss, the potential impact of its new standard on franchising relations, but it will almost certainly be momentous and hugely disruptive. Indeed, absent any discussion, we are left to ponder whether the majority even agrees with the statement of the General Counsel in his amicus brief that "[t]he Board should continue to exempt franchisors from joint employer status to the extent that their indirect control over employee working conditions is related to their legitimate interest in protecting the quality of their product or brand. *See, e.g., Love's Barbeque Rest.*, 245 NLRB 78, 120 (1978) (no joint-employer finding where franchisees were required to prepare and cook food a certain way because, *inter alia*, the franchisor established the requirements to 'keep the quality and good will of [the franchisor's] name from being eroded' (internal quotations and citations omitted), *enforced in rel. part*, 640 F.2d 1094 (9th Cir. 1981)." (Amicus Br. at 15–16 fn. 32). Given the breadth of the majority's test and rationale, we are concerned that the majority effectively finds that a franchisor even with this type of indirect control would be deemed a joint employer.

The majority's new test appears to require specific analysis of whether the franchisor shares or codetermines "the manner and method of performing the work." However, in many if not most instances, franchisor operational control has nothing to do with labor policy but rather compliance with federal statutory requirements to maintain trademark protections. "It is required that the owner of the mark should set up the standards or conditions which must be met before another is permitted to use the certification mark and the owner should permit the use of the mark by others only when they meet those standards or conditions." *State of Fla. v. Real Juices, Inc.*, 330 F. Supp. 428, 432 (M.D. Fla. 1971). As one court explained:

> Without the requirement of control, the right of a trademark owner to license his mark separately from the business in connection with which it has been used would create the danger that products bearing the same trademark might be of diverse qualities. If the licensor is not compelled to take some reasonable steps to prevent misuses of his trademark in the hands of others the public will be deprived of its most effective protection against misleading uses of a trademark. The public is hardly in a position to uncover deceptive uses of a trademark before they occur and will be at best slow to detect them after they happen. Thus, unless the licen-

[76] *CNN*, supra, slip op. at 38–39 (Member Miscimarra, dissenting) (footnote and emphasis omitted).

[77] Br. of IFA at 1.

[78] See, e.g., *Speedee 7-Eleven*, 170 NLRB 1332 (1968) (franchisor not a joint employer despite a policy manual that described "in meticulous detail virtually every action to be taken by the franchisee in the conduct of his store"), and *Tilden, S. G., Inc.*, 172 NLRB 752 (1968) (franchisor not a joint employer, even though the franchise agreement dictated "many elements of the business relationship," because the franchisor did not "exercise direct control over the labor relations of [the franchisee]").

> sor exercises supervision and control over the operations of its licensees the risk that the public will be unwittingly deceived will be increased and this is precisely what the Act is in part designed to prevent. Clearly the only effective way to protect the public where a trademark is used by licensees is to place on the licensor the affirmative duty of policing in a reasonable manner the activities of his licensees.

Stanfield v. Osborne Indus., Inc., 839 F. Supp. 1499, 1504 (D. Kan. 1993), affd. 52 F.3d 867 (10th Cir. 1995), abrogated on other grounds by *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377 (2014). If a franchisor fails to maintain sufficient control over its marks, it is considered to have engaged in "naked franchising" and thereby abandoned the mark.[79] "The critical question in determining whether a licensing program is controlled sufficiently by the licensor to protect his mark is whether the licensees' operations are policed adequately to guarantee the quality of the products sold under the mark." *General Motors Corp. v. Gibson Chem. & Oil Corp.*, 786 F.2d 105, 110 (2d Cir. 1986). The necessity of the franchisor to police the "manner and method" of the franchisee is paramount. "'The purpose of the Lanham Act . . . is to ensure the integrity of registered trademarks, not to create a federal law of agency.' The scope of a licensor's duty of supervision of a licensee who has been granted use of a trademark must be commensurate with this limited goal." *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1018 (9th Cir. 1985) (quoting *Oberlin v. Marlin American Corp.,* 596 F.2d 1322, 1327 (7th Cir. 1979)).

These cases demonstrate that one important aspect of the franchising relationship is the franchisee's ability to reap the benefits of manifesting to the customer the appearance of a seamless enterprise through the use and maintenance of the franchisor's trademark. Federal franchise law recognizes this benefit and requires that the franchisor maintain the mark by maintaining enough control over the franchisee to protect consumers. However, even while franchise law requires some degree of oversight and interaction, it was never the intent of Congress, by that interaction, to make a franchisee the agent of its franchisor for any purpose. Thus, the new joint-employer standard portends unintended consequences for a franchisor's compliance with the requirements of another Federal act that are totally unrelated to labor relations. The Board has been repeatedly reminded that it "has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that [we] may wholly ignore other and equally important Congressional objectives." *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942). Rather than providing a "careful accommodation of one statutory scheme to another," the majority's new standard places "excessive emphasis upon [the Board's] immediate task." Id.

E. The New Test Undermines the Parent-Subsidiary Relationship in Contravention of Board Precedent

In most areas of the law, it is widely recognized that parent and subsidiary corporations are indeed separate entities. The Board, which has developed whole legal doctrines devoted to detecting ostensibly separate companies that are in truth either created to evade obligations under the Act (the alter ego doctrine) or so integrated that they function as one (the single employer doctrine), has recognized this principle repeatedly. For example, in *Dow Chemical*, 326 NLRB 288 (1998), a bipartisan Board majority reaffirmed the longstanding rule under the single employer doctrine that typical parents and subsidiaries are not considered a sole "employer" for bargaining purposes. See also, e.g., *Western Union*, 224 NLRB 274 (1976), affd. sub nom. *United Telegraph Workers v. NLRB*, 571 F.2d 665 (D.C. Cir. 1978), cert. denied 439 U.S. 827 (1978). Indeed, the presumption of separateness for purposes of the Act is so strong that it extends also to unincorporated divisions that are operated independently from the company as a whole. See, e.g., *Los Angeles Newspaper Guild, Local 69 (Hearst Corp.)*, 185 NLRB 303, 304 (1970), enfd. 443 F.2d 1173 (9th Cir. 1971). And here, the Board's honoring of corporate separateness occurs even as the Board simultaneously recognizes that a subsidiary is, of course, under the potential control of its parent. In other words, potential control is not enough to find that a parent is the same employer with its subsidiary for purposes of labor law:

> Common ownership by itself indicates only *potential* control over the subsidiary by the parent entity; a single-employer relationship will be found only if one of the companies exercises *actual* or *active* control over the day-to-day operations or labor relations of the other.

[79] Id.; see 15 U.S.C. § 1064(5)(A). See also *Barcamerica International USA Trust v. Tyfiled Importers, Inc.*, 289 F.3d 589, 596 (9th Cir. 2002) ("It is well-established that '[a] trademark owner may grant a license and remain protected provided quality control of the goods and services sold under the trademark by the licensee is maintained.' *Moore Bus. Forms, Inc. v. Ryu,* 960 F.2d 486, 489 (5th Cir.1992). But '[u]ncontrolled or "naked" licensing may result in the trademark ceasing to function as a symbol of quality and controlled source.' *McCarthy on Trademarks and Unfair Competition* § 18:48, at 18–79 (4th ed. 2001). Consequently, where the licensor fails to exercise adequate quality control over the licensee, 'a court may find that the trademark owner has abandoned the trademark, in which case the owner would be estopped from asserting rights to the trademark.' *Moore,* 960 F.2d at 489.").

Dow, 326 NLRB at 288 (emphasis in original). The majority now turns this principle on its head, and its wholesale adoption of the "potential control" standard would treat parents and subsidiaries as joint-employing entities for purposes of labor law. To our reckoning, no Board has ever taken this leap before. Indeed, the majority's new test—which applies to admittedly separate and independent companies—applies a more onerous "control" standard than the one that the Board uses to find control where a company is *actually integrated* with another. This makes no sense.

Whatever the contradiction in the majority's logic, the result is serious. The upshot is that the majority's new test threatens to automatically sweep every parent or affiliate company in America into being the "employer" of a subsidiary's employees, with the concomitant bargaining obligations, the loss of secondary-employer protection from union strikes discussed below, and all the other deleterious results mentioned above. If this is the outcome intended, upending decades of precedent of labor law and probably centuries of precedent in corporate law, we need a mandate from Congress before we purport to "find" it in our decisional case law. The majority here identifies no such mandate, and its test should be invalidated on this basis alone. If Congress had wanted us to turn the world of corporate identity upside down, it would have expressly told us so.

VI. THE NEW TEST CONFLICTS WITH CONGRESSIONAL INTENT TO INSULATE NEUTRAL EMPLOYERS FROM SECONDARY ECONOMIC COERCION

Not only does the majority's new test impermissibly expand and confuse bargaining obligations under Sections 8(a)(5) and 8(d), it also does violence to other provisions of the Act that depend on the "employer" definition. Chief among them is the Section 8(b)(4)(ii)(B) prohibition on secondary economic protest activity such as strikes, boycotts, and picketing. That section "prohibits labor organizations from threatening, coercing, or restraining a neutral employer with the object of forcing a cessation of business between the neutral employer and the employer with whom a union has a dispute," but it does not prohibit striking or picketing the primary employer, i.e., the employer with whom the union has the dispute. *Teamsters Local 560 (County Concrete)*, 360 NLRB No. 125, slip op. at 1 (2014). Congress intended to "preserv[e] the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and . . . [to] shield[] unoffending employers and others from pressures in controversies not their own." *NLRB v. Denver Building Trades Council*, supra, 341 U.S. at 692.

An entity that is a joint employer with the employer subject to a labor dispute is equally subject to economic protest. See *Teamsters Local 688 (Fair Mercantile)*, 211 NLRB 496, 496–497 (1974) (union's picketing of a retailer did not violate Section 8(b)(4)(ii)(B) because it was the joint employer of a delivery contractor's employees). To put this in a practical terms, before today's decision at least, a union in a labor dispute with a supplier employer typically could not picket a user employer urging clients to cease doing business with that user employer—the object there being that the user employer would in turn cease doing business with the supplier employer.[80] Likewise, a union with a labor dispute with one franchisee typically could not picket the franchisor and all of its other franchisees.

Today's expansion of the joint-employer doctrine will sweep many more entities into primary-employer status as to labor disputes that are not directly their own. Unions will be able to freely picket or apply other coercive pressure to either or both of the joint employers as they choose. This limits the Act's secondary-boycott prohibitions in a manner Congress did not intend. The targeted joint employer may not have direct control or even any control over the particular terms or conditions of employment that are the genesis of the labor dispute. Here, the economic consequences are far reaching. For example, a union could picket all of the user employer's facilities even though the supplier employer only provides services at one. Further, assuming that a franchisor exerts similar indirect control over each franchisee, as the majority here may often find to be the case, a union could picket the franchisor and all franchisees even though its dispute only involves the employees of one.[81]

It does not end there. As previously stated, numerous provisions relied upon by the majority are typically included in a residential renovation contract— i.e., the contractor's employees cannot start work before a certain hour, they must finish work by a certain hour, they cannot use the bathrooms in the house, they have to park their vehicles in certain locations. Suppose that the annual revenues of the company with whom the homeowners contract meet the Board's discretionary standard for asserting jurisdiction, not an unlikely possibility. Then

[80] Of course, the user- and supplier-employer scenario often raises common situs issues as addressed in *Sailors Union (Moore Dry Dock)*, 92 NLRB 547 (1950), and its progeny, but explicitly targeting the secondary employer is blatantly unlawful.

[81] Going back to the CleanCo diagram above for an example, Client A likely has no control over what goes on upon the premises of Client C. More importantly, there is no underlying economic relationship between the two that could supply even a remotely rational foundation for the Act to allow economic weapons like strikes, picketing, etc. at Client A to convince it to use its obviously nonexistent "power" over Client C in a labor dispute involving CleanCo employees posted at Client C.

suppose that a union initiates an area standards wage protest against this contractor. One day, the homeowners open their front door to discover pickets patrolling the sidewalk in front of their house. In the new joint-employer world, they are a lawful target for this protest activity. Unions may not have any interest in bringing them into any bargaining process, but they may be more than eager to maximize economic injury to the primary employer by expanding the cease-doing-business pressure to as many clients as possible. Congress did not intend that every entity with some degree of economic relationship with the employer-disputant be thrown into its labor dispute. The Act is supposed to encourage labor peace, and to this end Congress enacted Sections 8(b)(4) and 8(e), demonstrating its intent to avoid limitless economic warfare based on dealings between employers and other persons.

The majority's expansive definition of joint-employer status poses particular questions about its applicability to common situs work in the construction industry. As previously stated, the Supreme Court has expressly held that the fact "the contractor and subcontractor were engaged on the same construction project, and that the contractor had some supervision over the subcontractor's work, did not eliminate the status of each as an independent contractor or make the employees of one the employees of the other."[82] We presume that our colleagues do not intend to act in direct contravention of an express holding of the Supreme Court, but the breadth of their test and their emphasis on contractual control as probative of joint-employer status seems to pose a dilemma: either they must articulate an exception to a statutory definition that seems to require uniform treatment of employers in all industries, or they must place limits on their test they obviously wish to avoid.[83]

VII. CONCLUSION

The Board is not Congress. It can only exercise the authority Congress has given it. In this instance, our colleagues have announced a new test of joint-employer status based on policy and economic interests that Congress has expressly prohibited the Board from considering. That alone is reason enough why the new test should not stand. Even more troubling from an institutional perspective, however, is the nature of the new test. The negative consequences flowing from the majority's new test are substantial. It creates uncertainty where certainty is needed. It provides no real standard for determining in advance when entities in a business relationship will be viewed as independent and when they will be viewed as joint employers.

Moreover, as noted previously, the resulting confusion will cause damage both ways: (i) too many parties will discover after the fact, following years of litigation, they were unlawfully absent from negotiations in which they were legally required to be participants; and (ii) countless other parties will discover they unlawfully injected themselves into collective bargaining involving another entity and its union(s), based on a relationship that was insufficient, after all, to result in joint-employer status. The majority essentially says that the Board will look at every aspect of a relationship on a case-by-case basis, in litigation, and then decide the limited issue presented. We owe a greater duty to the public than to launch some massive ship of new design into unsettled waters and tell the nervous passengers only that "we'll see how it floats."

Accordingly, we here defend a standard that serves labor law and collective bargaining well, a standard that is understandable and rooted in the real world. It recognizes joint-employer status in circumstances that make sense and would foster stable bargaining relationships. Indeed, in the Board's history of applying this traditional joint-employer test, there have been many cases where two or more employers were found to exercise sufficient control over a common group of employees to warrant joint bargaining obligations and shared liability for unfair labor practices.[84] Our quarrel with the majority stems not

[82] *Denver Building Trades*, 341 U.S. at 692.

[83] There is a further question. *Denver Building Trades* involved a situation in which a subcontractor was the primary employer target of protest, and the general contractor was the neutral employer. In *Markwell & Hartz*, the Board applied the same principles of separateness and neutrality when the general contractor was the primary employer in a labor dispute, thereby finding all subcontractors at the common situs to be neutrals. *Building & Construction Trades Council (Markwell & Hartz)*, 155 NLRB 319 (1965), enfd. 387 F.2d 79 (5th Cir. 1967). The breadth of our colleagues' test raises a genuine concern that they might use it to undermine this decision.

[84] Our colleagues fault us for making "no real effort to address" the issues they have asserted. But today's legal framework for bargaining (which they dismissively refer to as "the current status quo") already supplies the answer. That is, economic interdependence and indirect influence *work both ways*. Current law offers unions great flexibility when dealing with employers that happen to be interdependent with another entity. As long as the union respects secondary boycott principles, leverage applied to the immediate "employer" is all the more likely to affect suppliers, vendors, and other parties having closely aligned economic interests, which predictably may lead to meaningful discussions and changes across the various entities. Such discussions are likely to occur even "without the intervention of the Board enforcing a statutory requirement to bargain," and there is an "important difference" between such discussions being "permitted" as opposed to making them "mandatory." *First National Maintenance v. NLRB*, 452 U.S. 666, 681 fn. 19, 683 (1981). Here, if the Union organizes Leadpoint, then, depending on its actual bargaining strength, it can engage in activities that lead to modifications in BFI's contract with Leadpoint to accommodate those Union demands. And the Board's successorship case law permits the Union to remain on the scene even

from any disagreement about the concept of joint employment status but rather from their imposition of a test that we firmly believe cannot be reconciled with the common-law agency standard the Board is compelled to apply, based on a statute the Board is duty-bound to enforce.

The Supreme Court has recently cautioned that a federal agency must explain itself when departing from interpretation of well-established rules that have governed business practices for long periods, *even when the rules are of the agency's own making*. In *Christopher v. SmithKline Beecham Corp.*, 132 S.Ct. 2156 (2012), the Court reviewed the Department of Labor's (DOL) new interpretation that pharmaceutical sales representatives would no longer be considered outside salesmen exempt from the FLSA's overtime provisions. The Court emphasized that its usual deference to such an agency action was not warranted because of the "potentially massive" economic implications of the new interpretation "for conduct that occurred well before that interpretation was announced,"[85] and because deference "would seriously undermine the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'"[86] The Court also noted that DOL's "longstanding practice" of exempting detailers went back to the beginning of the FLSA, and that there were currently 90,000 detailers working for pharmaceutical companies with the understanding that they were exempt outside sales reps.[87]

Because DOL's new interpretation would be so disruptive to the regulated industry, the Court could not simply defer to it:

> It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference. Accordingly, whatever the general merits of . . . deference, it is unwarranted here. We instead accord the Department's interpretation a measure of deference proportional to the "'thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.'" *United States v. Mead Corp.,* 533 U.S. 218, 228, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001) (quoting *Skidmore v. Swift & Co.,* 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944)).[88]

What the majority has done here is far broader in scope than DOL's invalidated interpretive change. Instead of overturning one discrete longstanding agency interpretation that affects a statutory exemption for a single category of employer, the Board has substantially altered its interpretation of joint-employer status across the spectrum of private business relationships subject to our jurisdiction. Despite the majority opinion's description, this case is not merely about whether the Board should overturn thirty years of precedent based on the *TLI* and *Laerco* decisions. That would be serious enough.

Our greater concern is the impact of the majority's reformulation on a much broader body of law, affecting multiple doctrines central to the Act that have been developed and refined through decades of work by bipartisan Boards, the courts, and Congress. As in *Christopher*, the majority here gives insufficient consideration to the "potentially massive" economic implications of its new joint-employer standard, and it requires innumerable parties to "divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding." We believe that the Board should adhere to the "joint-employer" test that has existed for 30 years without a single note of judicial criticism. In our view, the Regional Director correctly applied that test in concluding that Leadpoint was the sole employer of employees in the petitioned-for unit.

Accordingly, we respectfully dissent.

Dated, Washington, D.C. August 27, 2015

Philip A. Miscimarra, Member

Harry I. Johnson, III, Member

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if BFI attempts to switch contractors. The flaw with our colleagues' approach is that, regardless of the strength of the union, it gives that union an artificial place at the table where there is *any* interdependency between the employer and other entities. See *H. K. Porter Co.*, 397 U.S. at 107–108 ("It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties.")

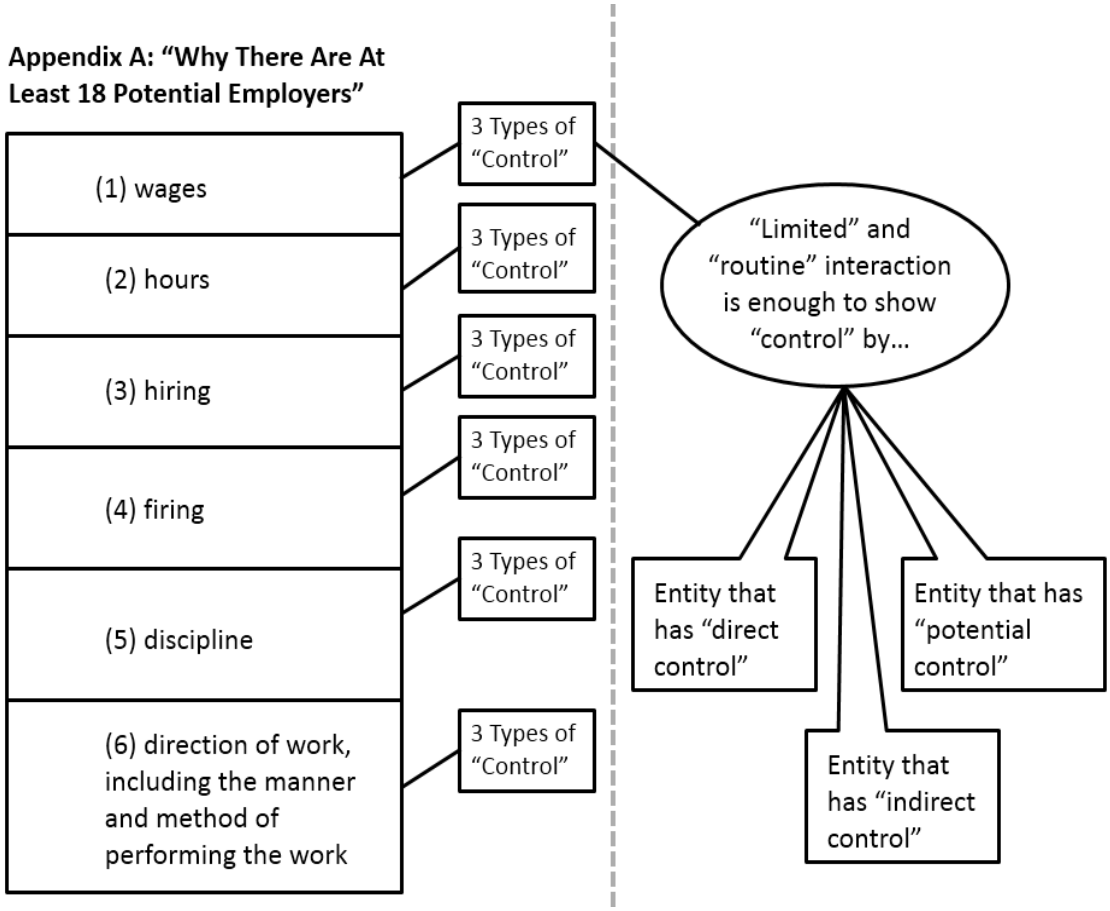
[85] Id. at 2167.

[86] Id. (quoting *Gates & Fox Co. v. Occupational Safety and Health Review Comm'n,* 790 F.2d 154, 156 (D.C. Cir. 1986)).

[87] Id. at 2167–2168.

[88] Id. at 2168–2169.

NATIONAL LABOR RELATIONS BOARD



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Miller & Anderson, Inc. and Tradesmen International *and* Sheet Metal Workers International Association, Local Union No. 19, AFL–CIO. Case 05–RC–079249

July 11, 2016

DECISION ON REVIEW AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA, HIROZAWA, AND MCFERRAN

I. INTRODUCTION

The fundamental issue raised by the Petitioner's request for review is whether under the National Labor Relations Act ("the Act") the employees who work for a user employer—both those employees the user alone employs and those employees it jointly employs (along with a supplier employer)—must obtain employer consent if they wish to be represented for purposes of collective bargaining in a single unit, even if both groups of employees share a community of interest with one another under the Board's traditional test for determining appropriate units.[1]

Anyone familiar with the Act's history might well wonder why employees must obtain the consent of their employers in order to bargain collectively. After all, Congress passed the Act to compel employers to recognize and bargain with the designated representatives of appropriate units of employees, even if the employers would prefer not to do so. But most recently in *Oakwood Care Center*, 343 NLRB 659 (2004) ("*Oakwood*"), the Board held that bargaining units that combine employees who are solely employed by a user employer and employees who are jointly employed by that same user employer and an employer supplying employees to the user employer constitute multi-employer units, which are appropriate only with the consent of the parties. Id. at 659. The *Oakwood* Board thereby overruled *M. B. Sturgis, Inc.*, 331 NLRB 1298 (2000) ("*Sturgis*"), which had held that the Act permits such units without the consent of the user and supplier employers, provided the employees share a community of interest. *Sturgis*, 331 NLRB at 1304–1308.

The Petitioner requests that the Board overturn *Oakwood* and return to the rule of *Sturgis* in its request for review of the Regional Director's administrative dismissal of its petition seeking to represent a unit of all sheet metal workers employed by Miller & Anderson, Inc. and/or Tradesmen International as either single employers or joint employers on all job sites in Franklin County, Pennsylvania.[2]

We granted review to consider the important issue raised by the Petitioner. Following our grant of review, we issued a Notice and Invitation to File Briefs ("NIFB"). The NIFB invited the parties and interested amici to address one or more of the following questions:

> 1. How, if at all, have the Section 7 rights of employees in alternative work arrangements, including temporary employees, part-time employees and other contingent workers, been affected by the Board's decision in *Oakwood Care Center*, 343 NLRB 659 (2004), overruling *M.B. Sturgis*, 331 NLRB 1298 (2000)?
>
> 2. Should the Board continue to adhere to the holding of *Oakwood Care Center*, which disallows inclusion of solely employed employees and jointly employed employees in the same unit absent the consent of the employers?
>
> 3. If the Board decides not to adhere to *Oakwood Care Center*, should the Board return to the holding of *Sturgis*, which permits units including both solely employed employees and jointly employed employees without the consent of the employers? Alternatively, what principles, apart from those set forth in *Oakwood* and *Sturgis*, should govern this area?

The briefs filed in response to the NIFB largely mirror the reasoning of the dueling majority and dissenting opinions in *Oakwood* and *Sturgis*. In short, the briefs that favor adhering to *Oakwood* largely argue that its holding is compelled by the Act and that returning to *Sturgis* would be unwise as a policy matter in any event.[3] On the other hand, the briefs that favor returning to *Sturgis* argue that the Act does not preclude the Board from returning to *Sturgis*, and that the Board should do so to

[1] Consistent with previous Board decisions, this decision refers to the company that supplies employees as a "supplier" employer and the company that uses those employees as a "user" employer.

[2] The Regional Director's letter administratively dismissing the petition noted that both Miller & Anderson and Tradesmen International declined to consent to a combined unit.

[3] Tradesmen International, the American Hospital Association and the Federation of American Hospitals, the American Staffing Association, Associated Builders and Contractors, Inc., the Chamber of Commerce of the United States of America, the Coalition for a Democratic Workplace and the National Association of Manufacturers, the Council on Labor Law Equality, and the National Right to Work Legal Defense Foundation, Inc. have filed briefs urging the Board to adhere to *Oakwood*. Although the briefs also argue that the Board should not return to *Sturgis* even if the Board decides to overturn *Oakwood*, they do not explain precisely what the Board should do in that event.

effectuate the Act's fundamental policies that are plainly frustrated by *Oakwood*.[4]

After carefully considering the briefs of the parties and amici and the views of our dissenting colleague, we conclude that *Sturgis* is more consistent with our statutory charge. Accordingly, we overrule *Oakwood* and return to the holding of *Sturgi*s. Employer consent is not necessary for units that combine jointly employed and solely employed employees of a single user employer. Instead, we will apply the traditional community of interest factors to decide if such units are appropriate. *Sturgis*, 331 NLRB at 1308. We also agree with the *Sturgis* Board's clarification that there is no statutory impediment to processing petitions that seek units composed only of the employees supplied to a single user, or that seek units of all the employees of a supplier employer and name only the supplier employer. Ibid. We remand the case to the Regional Director for further proceedings consistent with this Decision.

II. OVERVIEW OF PRECEDENT

A. Board Precedent Prior to Sturgis

A review of Board precedent demonstrates that units combining employees solely employed by a user employer and employees jointly employed by that same user employer and a supplier employer are not novel. In the early years of the Act's administration and continuing for 4 decades, the Board routinely found units of the employees of a single employer appropriate, regardless of whether some of those employees were jointly employed by other employers. The Board used its traditional community of interest test to decide whether such units were appropriate. Significantly, the Board identified no statutory impediment to such units, and the issue of employer consent was neither raised nor discussed.

Thus, in the 1940's, the Board included employees who worked for concessionaires in a unit of the employees of the retail department store where the concessions were located. Some of these employees were referred to as "employees" of the concessionaire or as being "retained" by the concessionaire to work in the store. See *Louis Pizitz Dry Goods Co.*, 71 NLRB 579 (1946); *Taylor's Oak Ridge Corp.*, 74 NLRB 930 (1947); *Denver Dry Goods Co.*, 74 NLRB 1167 (1947). Although these concessionaires operated whole departments, the Board included the employees in these departments in the unit with the solely employed department store employees where the evidence demonstrated that the department store possessed sufficient control over the former to be deemed their employer, and where those employees shared a community of interest with the store's solely employed employees. On the other hand, the Board excluded employees in the departments operated by the concessionaires pursuant to lease or similarly-styled arrangements if they were solely employed by the concessionaires. In these cases, the Board noted that they did not share "sufficient interests" with the employees in the other departments to be joined for collective bargaining. See *J. M. High Co.,* 78 NLRB 876, 878 (1948); and *Block & Kuhl Department Store*, 83 NLRB 418, 419–420 (1949). In the 1950s, the Board continued to include the employees in the leased departments in units with the store's employees. See, e.g., *Stack & Co.*, 97 NLRB 1492, 1493–1494 (1952).

In the 1960s, the Board recognized that control over employees in leased departments may be shared between user and supplier employers and, hence, the employees may be jointly employed. See *Frostco Super Save Stores, Inc.*, 138 NLRB 125 (1962);[5] *Spartan Department Stores*, 140 NLRB 608, 610–611 fn. 8 (1963). With this shared employment relationship, the Board continued to sanction units combining solely employed department store employees with jointly employed employees working in the leased departments, applying the community of interest test to decide whether jointly employed employees should be included in the unit. See *Frostco*, 138 NLRB at 129; *Thriftown, Inc.*, 161 NLRB 603 (1966); and *Jewel Tea Co.*, 162 NLRB 508 (1966). In *Thriftown*, the Board majority included jointly employed employees of those leased departments in the same bargaining unit with the solely employed department store employees. Although Chairman McCulloch

[4] The Petitioner, the General Counsel, the American Federation of Labor and Congress of Industrial Organizations and North America's Building Trades Unions, Construction and Master Laborers' Local Union 11, affiliated with the Laborers' International Union of North America, the Service Employees International Union, and the University of Wisconsin-Extension, Labor Education Department, the School for Workers have filed briefs urging the Board to overturn *Oakwood* and to return to *Sturgis*.

[5] The circumstances in *Frostco* illustrate (1) that the Board found no impediment to combining employees of solely employed/jointly employed employees; and (2) that the Board utilized a community of interest analysis in determining appropriate units in such instances. In *Frostco*, the Retail Clerks sought an overall store unit of all employees of the Sav-Mart store. The Meat Cutters sought a unit of the employees in the grocery and meat department operated by Frostco. The Culinary Workers sought employees operating popcorn concessions, who were also employed by yet another company. The Board found that Sav-Mart was a joint employer with each licensee. Yet the Board found a storewide unit, including the jointly employed employees, was appropriate. In addition, the Board permitted the Frostco employees to decide whether they wished to be represented in the overall unit or separately "[i]n view of all the indicia of separateness" such employees enjoyed. The Board found, however, that the jointly employed employees sought by the Culinary Workers "do not comprise a group with sufficiently disparate employment interests" and the Board dismissed the petition for a separate unit of these employees. 138 NLRB at 129.

and Member Fanning, in dissent, objected to the joint employer finding, they expressed no concern over the inclusion of the jointly employed employees in the unit with the solely employed store employees. 161 NLRB at 608. Compare *United Stores of America*, 138 NLRB 383, 385 (1962), in which a separate unit of jointly employed grocery and meat department employees was found appropriate because of the "indicia of separateness" from solely employed storewide employees.

In 1969, the United States Court of Appeals for the Sixth Circuit rejected an employer's challenge to a storewide unit that included jointly employed employees supplied by several employers in a unit with Kresge's employees. *S. S. Kresge Co. v. NLRB*, 416 F.2d 1225 (6th Cir. 1969), enfg. in relevant part, *S. S. Kresge Co.*, 169 NLRB 442 (1968). The employer contended that "to compel unwilling employers to bargain as joint employers will disrupt the collective bargaining process because each licensee may have independent ideas about appropriate labor policy." 416 F.2d at 1231. The court specifically rejected this contention, relying on a similar case from the U.S. Court of Appeals for the Ninth Circuit which rejected an employer's contention that a userwide (storewide) unit would have a "highly disruptive effect upon the store's operation, [and] will prejudice the licensees and not produce sound and stable collective bargaining relationships." See *Gallenkamp Stores Co. v. NLRB*, 402 F.2d 525, 531 (9th Cir. 1968). The *Gallenkamp* court also had rejected the employer's contention that the jointly employed employees of one the licensees "lack[ed] a sufficient community of interest" with the store employees to be included in the unit. Id.

In short, as of the end of the 1960s, no Board or court decision had barred, absent employer consent, units combining solely employed employees and jointly employed employees. To the contrary, the Board and the courts perceived no statutory impediments to units combining solely employed employees and jointly employed employees. Inclusion of the jointly employed employees was subject only to the Board's traditional community of interest standards.[6]

During the next 2 decades, the Board continued to find appropriate collective bargaining units that combined employees solely employed by a single user employer and employees jointly employed by that same user employer and a supplier employer, provided the employees shared a community of interest under the Board's traditional test for determining unit appropriateness. For example, in *Globe Discount City*, 209 NLRB 213 (1974), the Board found that the Regional Director erred in excluding jointly employed employees from a unit of Globe's employees (and other jointly employed employees). The Board found that the jointly employed employees shared "a substantial community of interest" with the solely employed and other jointly employed store employees and that a unit combining them was an appropriate unit.[7]

Similarly, the U.S. Court of Appeals for the Seventh Circuit found no impediment to bargaining in units of these mixed groups of employees absent employer consent. Thus, in *NLRB v. Western Temporary Services, Inc.*, 821 F.2d 1258, 1265 (7th Cir. 1987), the court found that a user employer, Classic, was not prejudiced by the inclusion—in a unit with Classic's solely employed employees—of the part-time employees supplied to it by Western Temporary Services ("Western") whom Classic jointly employed (along with Western).

However, the Board's treatment of units combining jointly employed and solely employed user employees abruptly changed in *Lee Hospital*, 300 NLRB 947 (1990), without any explanation or even so much as an acknowledgement from the Board that it was breaking with precedent. The issue arose there in a convoluted manner. The petitioner sought a unit limited to certified registered nurse anesthetists (CRNAs) who worked in a department operated by Anesthesiology Associates, Inc. (AAI) for the hospital.[8] The Regional Director found that CRNAs did not constitute an appropriate unit separate from other hospital professionals, because under the then applicable "disparity of interest" test applied to health care institutions, the CRNAs possessed no sharper than usual differences from the other professionals employed by the hospital. Accordingly, the Regional Director dismissed the petition. The petitioner sought review of this decision arguing, among other things, that the CRNAs were jointly employed by Lee Hospital and AAI, and that this joint employer relationship further evidenced a disparity of interest between the CRNAs and

[6] In 1970, the United States Court of Appeals for the Fifth Circuit pointed out that the Board "often" had found appropriate units of the user's employees and licensees' employees, especially when the user employer exercised substantial control over the employment practices of the licensees and "was in practical effect a joint-employer." *NLRB v. Zayre Corp.*, 424 F.2d 1159, 1165 (5th Cir. 1970).

[7] In several unfair labor practice cases, the Board also imposed a bargaining obligation on the joint employers of employees in contractual units that included employees employed by only one of the joint employers. See, e.g., *Sun-Maid Growers of California*, 239 NLRB 346, 352–353 (1978), enfd. 618 F.2d 56, 59–60 (9th Cir. 1980); and *U.S. Pipe & Foundry Co.*, 247 NLRB 139, 142 (1980). The Board found that "no policy of the Act" was offended by imposing a bargaining obligation "for that portion of the overall unit." *Sun-Maid Growers*, 239 NLRB at 353.

[8] The Hospital had contracted with AAI for the operation of the anesthesiology department and recovery room.

the other hospital professionals who were not jointly employed.

On review, the Board, unlike the Regional Director, concluded that the joint employer issue had to be resolved to determine whether a separate CRNA unit was appropriate. This was so because, according to the Board, "as a general rule, the Board does not include employees in the same unit if they do not have the same employer, absent employer consent[.] Thus, if AAI is a joint employer, the CRNAs could be included in the unit with other professionals employed by Lee Hospital only with the hospital's consent[,] and [i]t is clear that Lee Hospital does not consent to such an arrangement." Id. at 948 (footnote omitted).[9]

In announcing this "general rule," however, *Lee Hospital* entirely ignored the Board's routine practice of finding appropriate units that combined employees solely employed by a user employer and employees jointly employed by that same user employer and a supplier employer. *Lee Hospital* also failed to offer any rationale in support of its supposed general rule. Instead, it simply cited in a footnote (300 NLRB at 948 fn. 12) a single case—*Greenhoot, Inc.*, 205 NLRB 250 (1973)—in support of the supposed general rule.

The Board's decision in *Greenhoot*, however, had left undisturbed—indeed it had said nothing about—the Board's long-standing practice of finding appropriate units that combined employees solely employed by a user employer and employees jointly employed by that same user employer and a supplier employer absent employer consent.[10] Instead, *Greenhoot* addressed the entirely different situation where a union seeks to represent a unit of employees who perform work for, and who are employed by, different user employers.[11]

Subsequently, the Board applied the "rule" of *Lee Hospital* to prohibit any unit that would combine jointly employed employees with solely employed employees of one of the joint employers, absent consent of both employers. See, e.g., *International Transfer of Florida, Inc.*, 305 NLRB 150 (1991); and *Hexacomb Corp.*, 313 NLRB 983 (1994). These cases applying *Lee Hospital* did not discuss, explain, or rationalize the "rule."

B. Sturgis

A decade later, the Board reexamined *Lee Hospital* in *Sturgis*. The Regional Director for Region 14 had issued a Decision and Direction of Election in *M. B. Sturgis, Inc.*, Case 14–RC–11572, in which he found appropriate a petitioned-for unit consisting of all employees employed by M. B. Sturgis, with the exception of 10–15 "temporary" employees used by Sturgis and supplied by Interim, Inc. The Regional Director found that the temporary employees were jointly employed by Sturgis and Interim, but that under *Lee Hospital*, they could not be included in the same unit with employees employed solely by Sturgis absent the consent of both Sturgis and Interim. *Sturgis*, 331 NLRB at 1298–1299.[12]

On review, the Board concluded that *Lee Hospital* had improperly extended the multi-employer analysis in *Greenhoot* to situations where a single user employer obtains employees from a supplier employer and a union is seeking to represent both those jointly employed employees and the user's solely employed employees in a single unit. The Board rejected the "faulty logic" of *Lee Hospital* that a user employer and a supplier employer—both of which employ employees who perform work on behalf of the same user employer pursuant to the user's arrangement with the supplier—are equivalent to the completely independent user employers in multi-employer bargaining units. Id. at 1298, 1305. The Board

[9] The Board ultimately did not apply this rule in *Lee Hospital* because it concluded that Lee Hospital and AAI were not joint employers of the CRNAs at issue.

[10] Following *Greenhoot*, the Board, with court approval, continued to find appropriate units that combined employees solely employed by a user employer and employees jointly employed by that same user employer and a supplier employer, without suggesting that they implicated the consent requirement of multi-employer bargaining. See, e.g., *NLRB v. Western Temporary Services, Inc.*, supra, 821 F.2d at 1265 (finding no impediment to bargaining in units of these mixed groups of employees absent employer consent) (enfg. 278 NLRB 469 (1986)).

[11] The issue presented there involved a multi-employer bargaining unit where the petitioner sought a unit consisting of the engineers and maintenance employees at 14 separately owned office buildings. The Board found that "Greenhoot and each of the Building owners are joint employers at each of the respective buildings." *Greenhoot, Inc.*, 205 NLRB at 251. The Board further found that the petitioned-for unit composed of employees working at, and employed by, each of the separately owned buildings constituted a multi-employer unit. As there was no consent as required for a multi-employer unit, the Board found "separate units [of the engineers and maintenance men] at each location" to be appropriate, rather than the combined unit sought by the petitioner. Id. *Greenhoot* therefore stands for the proposition that where two or more otherwise separate user employers obtain employees from the same supplier employer, and a union is seeking to represent the employees in a single unit for the purposes of collective bargaining with all the user employers, the unit sought is a multi-employer unit.

[12] In the meantime, the Acting Regional Director for Region 9 had issued a Decision and Order in *Jeffboat Division*, Case 9–UC–406, in which he dismissed a unit clarification petition by which the petitioning union had sought to clarify the bargaining unit of Jeffboat employees covered by its existing collective-bargaining agreement with Jeffboat to include employees supplied by T.T. & O. Enterprises (TT&O) for use by Jeffboat. The Acting Regional Director found that Jeffboat and TT&O were joint employers of the TT&O-supplied employees but that *Greenhoot* and *Lee Hospital* precluded the inclusion of the jointly employed employees in the existing unit, because Jeffboat and TT&O would not consent to joint bargaining. See *Sturgis*, 331 NLRB at 1299. The Board granted review in both *Sturgis* and *Jeffboat*.

found that employer consent is not required for a unit combining the employees solely employed by a user employer and the employees jointly employed by that same user employer and a supplier employer, because such a unit is an "employer unit" given that all the employees in such a unit perform work for the user employer and all are employed by the user employer. Id. at 1304–1305. The Board held that it would apply traditional community of interest factors to decide if such units are appropriate. Id. at 1308. Accordingly, the Board remanded the cases to the Regional Directors to decide the unit questions without regard to the restriction imposed by *Lee Hospital.* Ibid.[13]

C. Oakwood

Four years later, however, the Board changed course. In *Oakwood*, the Regional Director for Region 29 had issued a Decision and Direction of Election, in which he found appropriate a petitioned-for unit of nonprofessional employees at Oakwood's residential care facility. 343 NLRB at 659. The petitioned-for unit included both the employees who were solely employed by Oakwood and the employees who were jointly employed by Oakwood and its supplier employer, a personnel staffing agency. The parties stipulated that under *Sturgis*, the petitioned-for unit of the employees solely employed by Oakwood and the jointly employed supplier employees (who wore identification tags that were issued by Oakwood and that identified them as employees of Oakwood's facility) was appropriate. However, Oakwood urged the Board to reverse *Sturgis*, contending that it was wrongly decided. Ibid.

After granting review, the Board concluded that *Sturgis* was misguided both as a matter of statutory interpretation and sound national labor policy. Id. at 662. The Board concluded that Congress had not authorized the Board to direct elections in units encompassing the employees of more than one employer, and that the bargaining structure contemplated by *Sturgis* gives rise to significant conflicts among the various employers and groups of employees participating in the process. Id. at 661–663.

III. DISCUSSION

With the foregoing review of the Board's and the courts' historical treatment of combined units of jointly employed and solely employed employees in mind, we turn to our own analysis of the issue. We begin, as we must, with the statute itself. Section 1 of the Act sets forth the Congressional findings that the denial by some employers of the right of employees to organize and bargain collectively and the inequality of bargaining power between employers and employees, who do not possess full freedom of association, lead to industrial strife that adversely affects commerce. Congress therefore declared it to be the policy of the United States to mitigate or eliminate those adverse effects by "encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. § 151. In short, the central purpose of the Act is "to protect and facilitate employees' opportunity to organize unions to represent them in collective bargaining negotiations." *American Hospital Assn. v. NLRB*, 499 U.S. 606, 609 (1991). Thus, Section 7 of the Act grants employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]" 29 U.S.C. §157.

Section 9 of the Act, in turn, speaks to the implementation of employees' right to bargain collectively through representatives of their own choosing. Section 9(a) thus provides that representatives "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment[.]" 29 U.S.C. §159(a). And Section 9(b) relevantly provides that "[t]he Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof[.]" 29 U.S.C. § 159(b). But neither Section, nor any other portion of Section 9[14] or the Act itself, explicitly addresses whether the Board may find appropriate a unit that combines employees solely employed by a user employer and

[13] *Sturgis* also clarified that employer consent is not required when a petition seeks a unit only of the employees supplied to a single user, or seeks a unit of all the employees of a supplier employer and names only the supplier employer. Id. at 1308. The *Sturgis* Board, however, reaffirmed the decision in *Greenhoot* insofar as it requires employer consent for the creation of true multi-employer units involving employees who do not share a user employer in common and where the union seeks to bargain with those separate user employers. Id. at 1298.

[14] Notably, Sec. 9 expressly deems certain other units not appropriate for purposes of collective bargaining. See, e.g., Sec. 9(b)(3) (expressly barring the Board from finding appropriate a unit including guards and nonguards).

employees jointly employed by that same user employer and a supplier employer.[15]

That circumstance establishes two important foundations for our consideration of the employer-consent issue. First, the Act does not compel *Oakwood's* holding that bargaining units combining solely employed and jointly employed employees are appropriate only with the consent of the user and supplier employers. Second, precisely because the Act does not dictate a particular rule, we may find that another rule is not only a permissible interpretation of the statute, but also that it better serves the purposes of the Act. For the reasons explained below, we find that the *Sturgis* rule, not requiring employer consent to units combining jointly employed and solely employed employees of a single user employer, meets both of those criteria.

A. Sturgis Is Consistent With Section 9(b)

The "exact limits of the Board's powers" under Section 9 and "the precise meaning" of the term "employer unit" are not defined by the statute. *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 165 (1941). Notably, however, the statutory definition of the terms "employer" and "employee" in Sections 2(2) and 2(3) of the Act are very broad,[16] and, as described, Congress's "statutory command" to the Board, in deciding whether a particular bargaining unit is appropriate, is "to assure to employees the fullest freedom in exercising the rights guaranteed by th[e] Act[.]" *Gallenkamp Stores Co. v. NLRB*, supra, 402 F.2d at 532 (quoting Section 9(b)). In that context, we are persuaded that a unit combining employees solely employed by a user employer and employees jointly employed by that same user employer and a supplier employer logically falls within the ambit of a 9(b) employer unit. All the employees in such a unit are performing work for the user employer and are employed within the meaning of the common law by the user employer. Thus, the user employer and the supplier employer are joint employers of the employees referred by the supplier to the user for the latter's use.[17] The employees solely employed by the user employer likewise plainly perform work for the user employer and are employed by the user within the meaning of the common law. In sum, a *Sturgis* unit comprises employees who, working side by side, are part of a common enterprise.

As *Sturgis* explained,

> That a unit of all of the user's employees, both those solely employed by the user and those jointly employed by the user and the supplier, is an "employer unit" within the meaning of Section 9(b), is logical and consistent with precedent. The scope of a bargaining unit is delineated by the work being performed for a particular employer. In a unit combining the user employer's solely employed employees with those jointly employed by it and a supplier employer, all of the work is being performed for the user employer. Further, all of the employees in the unit are employed, either solely or jointly, by the user employer. Thus, it follows that a unit of employees performing work for one user employer is an "employer unit" for purposes of Section 9(b).

331 NLRB at 1304–1305.

The restrictive view that the *Oakwood* Board and our dissenting colleague place on Section 9(b) is based on the erroneous conception that bargaining in a *Sturgis* unit constitutes multi-employer bargaining, which requires the consent of all parties. However, in the traditional multi-employer bargaining situation, the employers are entirely independent businesses, with nothing in common except that they operate in the same industry. They are often in competition for work with each other, operate at separate locations on different work projects, and hire their own employees.[18] Multi-employer bargaining units are created without regard for any preexisting community of interest among the employees of the various separate employers. In fact, the Board developed the consent requirement in such cases precisely because the employers at issue were physically and economically separate

[15] See *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–843 (1984).

[16] Sec. 2(2) of the Act (29 U.S.C. §152(2)) states that "[t]he term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act . . ., or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization" (and Sec. 2(1) of the Act (29 U.S.C. §152(1)) defines the term "person" to include "one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, . . . or receivers"). Sec. 2(3) of the Act (29 U.S.C. §152(3)) states that "[t]he term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise[.]"

[17] Under Board precedent, an entity may not be found to be a joint employer unless, among other things, it *is* an employer within the meaning of the common law of the employees in question. See *BFI Newby Island Recyclery*, 362 NLRB No. 186, slip op. at 2 (2015) ("*BFI*").

[18] In a *Sturgis* unit, the user and supplier employers are not competitors. As Associated Builders and Contractors, Inc. acknowledges in its brief, the supplier and user employers "almost always serve different business purposes. For example, a typical staffing agency's primary purpose is to provide labor for its customers to utilize. The user's primary purpose is to satisfy its own business objectives, such as sell[ing] goods or services to a different set of customers."

from each other, their operations were not intermingled, and their employees were not jointly controlled.[19]

In multi-employer bargaining, the unrelated employers on their own initiative decide to join an employer association and bargain through a mutually selected agent to match union strength and to avoid the competitive disadvantages resulting from nonuniform contractual terms. As an agency relationship cannot be compelled, multi-employer bargaining is voluntary in nature; unions may not coerce employers into joining associations which negotiate labor contracts on behalf of their members. See generally *NLRB v. Truck Drivers Local Union No. 449, IBT*, 353 U.S. 87, 94–96 (1957); *Florida Power & Light Co. v. NLRB*, 417 U.S. 790, 798, 803 & n.14 (1974); *NLRB v. Amax Coal Co*., 453 U.S. 322, 335 (1981); *Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404, 412 (1982). Indeed, by conceding that employer consent is not required when a petition names two employers and seeks a unit composed of the employees jointly employed by the two employers, *Oakwood* itself recognized that a bargaining unit involving more than one employer is not ipso facto a "multi-employer bargaining unit."

There plainly is a distinction of substance between a *Sturgis* unit and a multi-employer bargaining unit. Put simply, as shown, in a *Sturgis* unit, all of the employees are employed by the user employer. *Sturgis*, 331 NLRB at 1305. After all, the employees who are solely employed by the user employer share an employer (the user employer) with the contingent employees who are jointly employed by that same user employer and a supplier employer.[20] Thus, a *Sturgis* unit fits comfortably within 9(b)'s sanctioning of an "employer unit." By contrast, although a multi-employer bargaining unit also involves more than one employer, there is no common user employer for all the employees in such a unit.

The legislative history relied on in *Oakwood*, 343 NLRB at 661, which indicates that "Congress included the phrase 'or subdivision thereof' [in Section 9(b)] to authorize other units 'not as broad as 'employer unit,' yet not necessarily coincident with the phrases 'craft unit' or 'plant unit,'" does not persuade us that a single user employer unit is inappropriate. That Congress sought to authorize the Board to find appropriate employer subunits hardly establishes that Congress sought to disallow units of employees of a user employer combined with employees who the user jointly employs with a supplier. Indeed, our dissenting colleague, like the *Oakwood* majority, cites no legislative history expressing disapproval of such units. The only concern expressed by either the Wagner Act Congress or the Taft-Hartley Congress with respect to bargaining units that included more than one employer was focused on industrywide or anti-competitive bargaining units and on multiple-worksite situations.[21]

Tradesmen, several amici, and our dissenting colleague nevertheless contend that the Board is precluded from returning to *Sturgis*, relying on the following single phrase from Section 9(b) of the Act to support their argument:

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, *the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof*[.]

29 U.S.C. §159(b) (emphasis added). Citing *Oakwood*, they reason that because the broadest permissible unit category listed in Section 9(b) is the "employer unit," with each of the other delineated types of appropriate units representing subgroups of the work force of an employer, "the text of the Act reflects that Congress has not authorized the Board to direct elections in units encompassing the employees of more than one employer." *Oakwood*, 343 NLRB at 661.

[19] See, e.g., *Chapman Dehydrator Co.*, 51 NLRB 664, 666–667 (1943) (multi-employer unit not appropriate absent consent, where there was no evidence of "any managerial interrelationship between members of the Association," and employers "operate … as separate and distinct business organizations with no interchange of employees"); *Sagamore Mfg.*, 39 NLRB 909, 915–916 (1942) (same result where employers were "independent and competing" with each other); *F. E. Booth & Co.*, 10 NLRB 1491, 1496 (1939) (same result where interchange of employees between employers was "not effectuated by any plan of [the union] or through any common agency of the companies" and "each of the companies hires its own employees as the conditions of its business require"); *Alaska Packers Assn.*, 7 NLRB 141, 148 (1938) (same result even though "the three companies constitute an economic [regional industry] aggregate," because they are "separate and distinct business organizations"). See also *Bull-Insular Line Co.*, 56 NLRB 189, 193–194 (1944) (Puerto Rico-wide employer unit not appropriate absent consent, but unit of two employers appropriate where they were "interlocking corporate organizations" and their employees "together are engaged in various tasks incidental to the loading or unloading of cargo vessels at the [two] companies' piers in the Harbor of San Juan"). Cf. *Rayonier, Inc.*, 52 NLRB 1269, 1274 (1943) (multi-employer unit appropriate in view of implied consent through collective-bargaining history, in contrast to cases where employers are merely "competing companies not otherwise related except through membership in an [e]mployer [a]ssociation").

[20] We take this opportunity to reiterate that we will not find any entity to be a joint employer unless, among other things, it *is* an employer within the meaning of the common law. See *BFI*, 362 NLRB No. 186, slip op. at 2.

[21] 1 Leg. Hist. 1300 (NLRA 1935) (1985 reprint), 2 Leg. Hist. 3219–3221, 3253–3256, 3264–3269 (NLRA 1935) (1985 reprint); 1 Leg. Hist. 58–61, 117, 299–300, 535–536, 550–551, 584, 612, 636, 643–644, 663, 672–674 (LMRA 1947) (1985 reprint).

However, the proponents of this argument put more weight on those few words than they can reasonably carry. As we have explained, given the broad definition of "employer" and "employee" in Sections 2(2) and 2(3) of the Act, along with our statutory charge to afford employees "the fullest freedom" in exercising their right to bargain collectively, a combined unit of employees solely employed by a user employer and employees jointly employed by that same user employer and a supplier employer does not fall outside the ambit of a Section 9(b) "employer unit," because all work is performed for the user employer and all employees are employed, either solely, or jointly, by the user employer. And, as we explain below, finding such a unit to be appropriate is responsive to Section 9(b)'s statutory command and effectuates fundamental policies of the Act. Accordingly, we conclude that the Act does not preclude us from returning to *Sturgis*.[22]

B. Sturgis Effectuates Fundamental Policies of the Act that Oakwood Frustrates

Sturgis is manifestly more responsive than *Oakwood* to Section 9(b)'s "statutory command" to the Board, in deciding whether a petitioned-for bargaining unit is appropriate, "'to assure to employees the fullest freedom in exercising the rights guaranteed' by th[e] Act[.]" *Gallenkamp Stores Co. v. NLRB*, supra, 402 F.2d at 532 (quoting Section 9(b)). The Board has recognized that "[a] key aspect of the right to 'self-organization' is the right to draw the boundaries of that organization—to choose whom to include and whom to exclude." *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934, 941 fn.18 (2011) ("*Specialty Healthcare*"), *affd sub. nom*, *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013). The *Sturgis* approach honors that principle because it does not require employees to obtain employer permission before they may organize in their desired unit. Nor does *Sturgis* mandate any particular bargaining unit for the contingent employees (who are jointly employed by a user employer and a supplier employer) and the employees solely employed by that same user employer. Rather, *Sturgis* leaves the employees free to choose the unit they wish to organize, provided their desired unit is appropriate under the Board's traditional test for determining unit appropriateness. Thus, *Sturgis* permits the jointly employed contingent employees to organize in bargaining units with their coworkers who are solely employed by the user employer if they share the requisite community of interest, while also leaving both groups free to organize separately if they would prefer to do so.

In contrast, *Oakwood* denies employees in an otherwise appropriate unit full freedom of association. Thus, even if the jointly employed employees and their coworkers who are solely employed by the user employer wish to be represented for purposes of collective bargaining in the same unit, and even if both groups share a community of interest with one another, *Oakwood* prevents them from so organizing unless the employers consent. Requiring employees to obtain employer permission to organize in such a unit is surely not what Congress envisioned when it instructed the Board, in deciding whether a particular bargaining unit is appropriate, "to assure to employees the fullest freedom in exercising the rights guaranteed by th[e] Act." 29 U.S.C. §159(b). In fact, by requiring employer consent to an otherwise appropriate bargaining unit desired by employees, *Oakwood* has upended the Section 9(b) mandate and allowed employers to shape their ideal bargaining unit, which is precisely the opposite of what Congress intended.

Oakwood also potentially limits the contingent employees' opportunity for workplace representation. Under *Oakwood*, the contingent employees cannot organize in the same unit as the employees solely employed by the user employer unless the user and supplier employers consent. Some amici argue that *Oakwood* does not deprive the contingent employees of their Section 7 rights to organize because a union does not need employer consent if it files a petition that names just the supplier employer and seeks a unit of just the supplier employees or if it files a petition that names both the user and supplier employers and seeks a unit limited to the jointly employed employees. However, *Oakwood* would appear to deny employees and unions the first option in cases where the supplier employer establishes that the petitioned-for employees are jointly employed by a user employer. See *Oakwood*, 343 NLRB at 663, 669. Moreover, many supplier employers do not just serve one client; rather they serve many clients simultaneously, and accordingly, the supplier employees may be scattered

[22] Equally unavailing is our dissenting colleague's reliance on Sec. 8(a)(5) of the Act, which makes it an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Sec. 9(a). The first sentence of Sec. 9(a), which sets forth the right of employees to have an exclusive bargaining representative, does not even refer to an "employer." Moreover, as discussed below, if a union is certified as the collective-bargaining representative of a *Sturgis* unit, each employer is obligated to bargain only over the employees with whom it has an employment relationship. Accordingly, the supplier employer cannot possibly be found to have violated Sec. 8(a)(5) by refusing to bargain over terms and conditions of employment of the employees solely employed by the user employer. Nor, for similar reasons, does Sec. 8(b)(3) advance the dissent's case. A union cannot be deemed to have violated Sec. 8(b)(3) by refusing to bargain with an employer regarding employees whom that employer does not employ.

among various locations. Given their isolation from one another, those employees may face near-insurmountable challenges in attempting to organize, and even if they do, it may prove extremely difficult for them to have their collective voice heard by their referring employer. As for the second option, there may be no union that wishes to name the user and supplier employers on a petition that seeks to represent a unit limited to the jointly employed contingent employees.

In any event, limiting the contingent employees to these options, by definition, deprives them of the full ability to associate for collective bargaining purposes with their coworkers who are solely employed by the user employer. It also deprives the solely employed employees of their full ability to associate with their contingent coworkers. And, as discussed below, it dilutes the bargaining power of both groups. In short, *Oakwood*'s interjection of a consent requirement in workplaces utilizing contingent workers creates an obstacle to workers' freedom to organize and bargain collectively as they see fit even when the contingent workers share a broad community of interest with the user's solely employed employees they work alongside.[23]

Sturgis is also more consistent with the premise upon which national labor policy is based, because it permits employees in an otherwise appropriate unit to pool their economic strength and act through a union freely chosen by the majority so that they can effectively bargain for improvements in their wages, hours and working conditions. See *NLRB v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 180 (1967) (our national labor policy "has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions."). Accord *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 735 (1981). On the other hand, by requiring the two groups of employees to engage in parallel organizing drives and then parallel bargaining relationships, despite their shared community of interest and desire to bargain in a single unit, the *Oakwood* approach diminishes the bargaining power of both the employees solely employed by the user employer and the employees jointly employed by that same user employer and a supplier employer.

These deleterious effects of the *Oakwood* rule requiring employer consent are all the more troubling because of changes in the American economy over the last several decades. In *BFI*, 362 NLRB No. 186, slip op. at 11 (footnotes renumbered), we recently characterized these changes as follows:

> [T]he diversity of workplace arrangements in today's economy has significantly expanded. The procurement of employees through staffing and subcontracting arrangements, or contingent employment, has increased[.][24] The most recent Bureau of Labor Statistics survey from 2005 indicated that contingent workers accounted for as much as 4.1 percent of all employment, or 5.7 million workers.[25] Employment in the temporary help services industry, a subset of contingent work, grew from 1.1 million to 2.3 million workers from 1990 to 2008.[26] As of August 2014, the number of workers employed through temporary agencies had climbed to a new high of 2.87 million, a 2 percent share of the nation's work force.[27] Over the same period, temporary employment also expanded into a much wider range of occupations.[28] A recent report projects that the number of jobs in the employment services industry, which includes employment placement agencies and temporary help services, will increase to almost 4 million by 2022, making it "one of the largest and fastest growing [industries] in terms of employment."[29]

The Petitioner notes that while the temporary help services industry is historically associated with clerical positions, by 2008 temporary workers in clerical positions

[23] The American Hospital Association and the Federation of American Hospitals contend that both before and after *Oakwood*, unions have sometimes sought to exclude contingent employees from bargaining units of solely employed user employees. However, that the two groups of employees may not wish to associate with one another for collective bargaining purposes in a particular case does not mean that employers should have veto power to prevent the employees from organizing together in a combined unit when the employees do desire to do so. Put simply, *Sturgis* does not mandate any particular bargaining unit; it simply respects the Sec. 7 rights of employees.

[24] The Board previously recognized the "ongoing changes in the American work force and workplace and the growth of joint employer arrangements, including the increased use of companies that specialize in supplying 'temporary' and 'contract workers' to augment the workforces of traditional employers." *M. B. Sturgis, Inc.*, 331 NLRB 1298, 1298 (2000).

[25] Bureau of Labor Statistics, U.S. Department of Labor, "Contingent and Alternative Employment Arrangements, February 2005," (July 27, 2005).

[26] See Tian Luo, et al., "The Expanding Role of Temporary Help Services from 1990 to 2008," Monthly Labor Review, Bureau of Labor Statistics, August 2010 at 12.

[27] Steven Greenhouse, "The Changing Face of Temporary Employment," NY Times website, August, N.Y. TIMES, Aug. 31, 2014, at http://www.nytimes.com/2014/09/01/upshot/the-changing-face-oftemporary-employment.html

[28] See Luo et al., supra at 5.

[29] Richard Henderson, "Industry Employment and Output Projections to 2022," Monthly Labor Review, Bureau of Labor Statistics, December 2013.

represented less than one quarter of employment in this industry and only 16 percent of the industry's revenue. See Luo, et al., supra at 5. Industrial and factory staffing is the single largest source of revenue for the employment services industry, which includes both temporary staffing agencies and more permanent employee leasing firms, further evidence of the massive changes it has undergone since 1990. Rebecca Smith & Claire McKenna, *Temped Out: How the Domestic Outsourcing of Blue-Collar Jobs Harms America's Workers* l, 4 (National Employment Law Project, Sept 2. 2014). The Petitioner further contends that industrial or "blue collar" workers account for the largest single occupational group of temporary and contingent workers, with recent estimates placing them at 37 percent of that workforce. American Staffing Association, *Fact Sheet* (last visited Nov. 24, 2015); see also GAO Report to the Ranking Member, Committee on Health, Education, Labor, and Pensions, U.S. Senate: *Contingent Workforce: Size, Characteristics, Earnings, and Benefits*, 9 GAO-15–168R 19 (April 2015). It also claims that over 10 percent of contingent workers are employed in the construction industry, and contingent workers are approximately twice as likely as other workers to be employed in construction and extraction occupations. Id. at 45, 49–50.

In *BFI*, we concluded that given our "responsibility to adapt the Act to the changing patterns of industrial life,"[30] this change in the nature of the workforce was reason enough to revisit the Board's then current joint-employer standard. 362 NLRB No. 186, slip op. at 11. Just as was the case with respect to that standard, *Oakwood* imposes additional requirements that are disconnected from the reality of today's workforce and are not compelled by the Act. We correspondingly conclude that to fully protect employee rights, the Board should return to the standard articulated in *Sturgis*.[31]

C. The Policy Arguments Advanced by Sturgis' Opponents Are Unpersuasive

Tradesmen, several amici, and our dissenting colleague also argue that returning to *Sturgis* would be unwise as a policy matter because it would hinder meaningful bargaining, threaten labor peace, and harm employee rights. They argue that this is so because *Sturgis* permits a bargaining structure that allegedly gives rise to significant conflicts both among the various employers and among the groups of employees participating in the process, thereby making agreement much less likely and increasing the chances for labor strife.[32]

However, the specter of conflicts posited by *Sturgis*' opponents did not materialize during the many decades before *Sturgis* that the Board had "routinely found units of the employees of a single employer appropriate, regardless of whether some of those employees were jointly employed by other employers." *Sturgis*, 331 NLRB at 1302–1307. And *Sturgis*' opponents do not demonstrate that those problems materialized in the years between *Sturgis* and *Oakwood*.

Moreover, the amici and our dissenting colleague fail to show that collective bargaining involving a *Sturgis* unit is significantly more complicated than if the jointly and solely employed employees were in separate bargaining units, as envisioned by *Oakwood*. Under *Oakwood*, a union does not need a user employer's consent if it wishes to organize a unit limited to the employees solely employed by the user employer. Nor does a union need the consent of the user employer and supplier employer if it wishes to organize a unit limited to the employees who are jointly employed by user and supplier employers. Accordingly, if a union were to successfully organize both units, then the user employer would have an obligation to bargain in good faith with both units of employees. Thus, in the unit composed of employees solely employed by the user employer, the user employer would have an obligation to bargain over all those employees' terms, and the supplier employer would have no bargaining obligation whatsoever vis-a-vis the solely employed employees (because it does not employ any of them). In the unit of the jointly employed contingent employees, the user employer, like the supplier employer, would have an obligation to bargain only as

[30] See *NLRB v. J. Weingarten*, *Inc*., 420 U.S. 251, 266 (1975).

[31] The American Staffing Association argues that there is no reason to return to *Sturgis* because the market for domestic temporary workers has consistently topped out at 2 percent of the total domestic nonfarm workforce in recent years. However, as the Board noted in *BFI*, as of August 2014, the number of workers employed through temporary agencies, a subset of contingent work, had grown to 2.87 million workers, a not insignificant number. 362 NLRB No. 186, slip op. at 11. Moreover, as shown, *Oakwood* also denies the Section 7 rights, and dilutes the bargaining power, of the many more solely employed employees in the workforce.

[32] For example, the Council on Labor Law Equality states in a passage typical of those favoring adhering to *Oakwood*:

> If the user employer and supplier employer are forced into such a bargaining relationship without their consent, there will likely be disputes on the employers' side of the table (over who has the responsibility to bargain, and ultimately pay for, certain terms and conditions of employment) as well as with the union. And there will likely be divisions on the union's side of the table if the terms and conditions of employment for the user employer's employees are different (*i.e.*, more or less favorable to the employees) than for the jointly employed employees. And there will be no agreement unless the parties can reach agreement on all terms and conditions of employment for both groups of employees (the user employer's employees and the jointly employed employees). The Board should not mandate bargaining relationships that are so fraught with the potential for failure.

to the terms and conditions it has the authority to control. See *NLRB v. Western Temporary Services, Inc.*, supra, 821 F.2d at 1265; *BFI*, supra, 362 NLRB No. 186, slip op. at 16.

The user and supplier employers would face the precisely the same obligations in a *Sturgis* unit. Our caselaw makes clear that each employer is obligated to bargain only over the employees with whom it has an employment relationship and only with respect to such terms and conditions that it possesses the authority to control.[33] Thus, in a *Sturgis* unit, the user employer has an obligation to bargain over all the terms of the employees it solely employs, and only has an obligation to bargain over its jointly employed employees' terms and conditions which it possesses the authority to control. Similarly, in a *Sturgis* unit, the supplier employer has no obligation to bargain regarding any of the terms of the employees who are solely employed by the user employer. Allowing jointly employed employees to be included in a bargaining unit with their solely employed coworkers imposes no additional burden on the supplier employer because its bargaining obligation extends only to the employees it jointly employs and only with respect to such terms and conditions which it possesses the authority to control. And the user employer has exactly the same size pocketbook regardless of whether it bargains in a *Sturgis* unit or whether it bargains in two parallel units (i.e., one limited to the employees solely employed by it and the other limited to the employees it jointly employs with the supplier employer). The supplier employer likewise has the same size pocketbook under both the *Oakwood* and *Sturgis* regimes.

Accordingly, the claim that *Sturgis* gives rise to an unworkable bargaining structure—because there may be disputes on the employer side of the table over who has the responsibility to bargain over or pay for certain items—is unconvincing, because the potential for such disputes could be said to exist in every case involving joint employer bargaining, which has long been sanctioned by the Board and the courts. After all, in every joint employer bargaining case, more than one employer must sit at a bargaining table and bargain with the union that represents the unit employees.

Not surprisingly, the appellate courts have also rejected claims that inclusion of jointly employed employees in a unit of solely employed employees over the objections of one or more of the joint employers is inimical to effective collective bargaining. For example, as noted, in *S.S. Kresge Co. v. NLRB*, the Sixth Circuit rejected the claim that "to compel unwilling employers to bargain as joint-employers will disrupt the collective bargaining process" because each of the joint employers may have independent ideas about appropriate labor policy. 416 F.2d at 1231–1232. The court explained (id. at 1231): "Whether [this] asserted practical difficult[y] will occur is speculative." The court also agreed with the Ninth Circuit that just as the different entities have managed to resolve any differences between them in agreeing to do business with one another, so too should they be able to resolve any differences between them when it comes to bargaining. See id. quoting *Gallenkamp Stores Co. v. NLRB*, supra, 402 F.2d at 531 ("'K-Mart and the licensees have worked out their diverse business problems to meet the needs of their joint enterprise, as is shown in their uniform license agreements. Like efforts should be as effective in their bargaining with the Union.'").[34]

As for employee interests, to the extent that the user and supplier employers are unable or unwilling to give both the solely employed and the jointly employed employees everything they want, tradeoffs may have to be made. But the same would be true regardless of whether the bargaining takes place in two parallel units or one *Sturgis* combined unit. And, as *Sturgis* noted, "Even in units composed only of solely employed employees, it is common for groups of employees to have differing, even competing, interests. Unions and employers are routinely called upon to handle such differences, and do so successfully." *Sturgis*, 331 NLRB at 1307. In *S.S. Kresge Co. v. NLRB*, the Sixth Circuit rejected a similar claim that the rights of the licensees' employees would be impaired if they were included in the same unit as the employees solely employed by Kresge because the solely employed employees would outnumber the others and

[33] *Sturgis* phrased the obligation as follows: "[E]ach employer is obligated to bargain only over the employees with whom it has an employment relationship *and only to the extent it controls or affects their terms and conditions of employment*." *Sturgis*, 331 NLRB at 1306 (emphasis added). In light of the Board's recent decision in *BFI*, we find it appropriate to slightly rephrase the obligation as follows: Each employer is obligated to bargain only over the employees with whom it has an employment relationship and "*only with respect to such terms and conditions which it possesses the authority to control*." *BFI*, 362 NLRB No. 186, slip op. at 2, 16 (emphasis added).

[34] Contrary to our dissenting colleague's claim, it is of no legal consequence that the supplier employer is not a joint employer of some of the employees in a *Sturgis* unit. To repeat, in a *Sturgis* unit, all the employees perform work for the user employer, and all are employed (either solely or jointly) by the user employer. And if a union prevails in an election involving a *Sturgis* unit, the Board does not require the supplier employer to engage in bargaining as to the entire bargaining unit; it must bargain only as to those unit members whom it employs. The same is true if the user employer contracts with multiple supplier employers. There too, all the employees perform work for the user employer; all the employees are employed (either solely or jointly) by the user employer; and no supplier employer is required to bargain as to the entire unit, but only as to its own employees.

therefore dominate union policy. 416 F.2d at 1231. The court explained (id. at 1232):

> There is the possibility that the employees in the departments operated by Kresge will dominate union policy. This, however, is a problem which is germane to all units encompassing different departments with divergent interests. Indeed, the same problem could arise if the appropriate unit consisted solely of Kresge employees, because employees in larger Kresge departments could impose their decisions on employees in smaller departments. Such a result does not mean that the unit is inappropriate, particularly when, as in the present case, there is a sufficient community of interest among the employees in the unit to suggest the problem will not be serious if it does occur.

Contrary to amici, *Sturgis* does not encourage a tyranny of the majority over minority interests. Under *Sturgis* (331 NLRB at 1305–1306, 1308), the Board will not find a combined unit appropriate for the purposes of collective bargaining unless the two groups share a community of interest; moreover, by virtue of the union's status as exclusive representative of the unit, the union has a duty to fairly and in good faith represent the interests of *all* the unit employees, including in collective bargaining. See generally *Emporium Capwell Co. v. NLRB*, 420 U.S. 50, 64 (1975); *Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

Nor are we persuaded by the other policy arguments opposing a return to *Sturgis*. For example, some amici argue that the Board would harm contingent workers and the economy as a whole if it were to return to *Sturgis*. They reason that if the Board were to overturn *Oakwood* and return to *Sturgis,* it would discourage employers from entering into, or maintaining, alternative staffing arrangements because user employers will wish to avoid the costs, uncertainty and inherent difficulties presented by the prospect of bargaining in *Sturgis* units. But this employer wish runs counter to the Act's stated policy of encouraging the practice of collective bargaining. In any event, *Sturgis* leaves employers free to enter into, or maintain, such arrangements. In other words, we have decided to return to *Sturgis*, not to prevent employers from entering into, or maintaining user-supplier arrangements, but rather to better effectuate the policies of the Act if the employees affected by such arrangements choose to exercise their Section 7 rights.

The Chamber of Commerce of the United States of America cautions that overturning *Oakwood* and returning to *Sturgis* would be bad for unions seeking to organize just the employees solely employed by the user employer, because "employers may use *Sturgis* as a weapon to dilute a union's support" and to preclude employees solely employed by a user employer "from being represented at all." The Chamber adds, "If the temporary [supplier] employees outnumber the employees solely employed by the user, this possibility may well become likely." In our view, rather than undermining the case for returning to *Sturgis*, the suggestion that employers might choose which positions to take regarding the inclusion of the supplier employees based solely on tactical considerations relating to the election, contradicts their claims that combined units hinder collective bargaining, foster labor strife, and undermine employee rights.[35]

Nor, contrary to the claims of some amici and our dissenting colleague, can it fairly be said that returning to *Sturgis* would undermine Section 8(b)'s prohibitions. For example, nothing in *Sturgis* permits a union in any way to restrain or coerce an employer in the selection of his collective bargaining representative or grievance adjustor. Nothing in *Sturgis* permits a union to strike or to threaten, coerce, or restrain an employer to join an employer organization. Nothing in *Sturgis* forces an employer to bargain with a labor organization before it has been certified. And nothing in *Sturgis* eliminates the prohibition on secondary boycott activity. See *Sturgis*, 331 NLRB at 1307 (rejecting dissent's secondary boycott concerns).[36]

D. Response to the Dissent

Our dissenting colleague offers both policy arguments and statutory arguments against a return to *Sturgis*, but, for reasons already suggested, we are not persuaded.

We have explained that our interpretation of the Act is consistent with its text and supportive of its policies. Our dissenting colleague does not argue, nor could he, that Congress has spoken directly to the issue in this case. Instead, the dissent repeatedly—but mistakenly—characterizes the bargaining that takes place in a *Sturgis* unit as "multi-employer/non-employer bargaining." As discussed above, it is not "multi-employer" bargaining because all the employees in a *Sturgis* unit perform work for the user employer and all the employees are em-

[35] In any event, as we recently reiterated, the fact that an employer's proposed alternative unit may be appropriate does not necessarily render the employees' proposed unit inappropriate. See *Specialty Healthcare*, 357 NLRB 934, 941–943.

[36] As for the National Right to Work Legal Defense Foundation, Inc.'s claim that employees' rights to decertify or deauthorize third-party representation would, in most cases, be difficult, if not impossible, given the disparate interests and the numerosity of a user employer's own employees, the same problem could be said to exist whenever a small group of employees is included in the same unit as a larger group of employees. And *Sturgis* requires that the two groups share a community of interest. See *Sturgis*, 331 NLRB at 1305–1306, 1308. Moreover, as the Chamber's argument implicitly concedes, it is by no means clear that the contingent workers will always be outnumbered by the employees who are solely employed by the user employer.

ployed (either solely or jointly) by the user employer. By contrast, there is no common user employer for all the employees in a multi-employer bargaining unit.

The dissent's contention that under *Sturgis*, an employer is required to bargain with respect to non-employees—in contravention of Section 8(a)(5)—is likewise mistaken. As explained above, in a *Sturgis* unit, each employer is obligated to bargain only over the employees with whom it has an employment relationship (and only with respect to such terms and conditions which it possesses the authority to control). *Sturgis*, 331 NLRB at 1306. Accordingly, no employer bargains regarding employees it does not employ, and so our colleague's use of the term "non-employer" bargaining is inaccurate. To the extent that multiple employers will be required, as a practical matter, to cooperate or coordinate in bargaining, that is a function of the freely chosen business relationship between user and supplier employers that defines all joint-employer situations.[37]

Contrary to our dissenting colleague's suggestion, we are not, by returning to *Sturgis*, abdicating our responsibility to carefully review and make an appropriate bargaining unit determination in each case. As the *Sturgis* Board explained, "By our decision today, we do not suggest that every unit sought by a petitioner, which combines jointly employed and solely employed employees of a single user employer, will necessarily be found appropriate. As in the Board's pre-*Greenhoot* cases, application of our community of interest test may not always result in jointly employed employees being included in units with solely employed employees." *Sturgis*, 331 NLRB at 1305–1306 (and cases cited therein). The Board continued to carefully examine the community of interest factors in determining the appropriateness of petitioned-for units while *Sturgis* was in effect. For example, as the Chamber of Commerce notes, in the *Sturgis*-governed case of *Outokumpu Copper Franklin, Inc.*, the Board rejected the unit sought by the petitioning union on community-of-interest grounds. 334 NLRB 263, 263–264 (2001). And, as our order in this case makes clear, no election can be conducted in the combined unit sought by the petitioner here unless, among other things, it is established that the employees supplied by Tradesmen to Miller & Anderson (who are allegedly jointly employed by both entities) share a community of interest with the employees solely employed by Miller & Anderson.

Our dissenting colleague is mistaken in asserting that the return to *Sturgis,* coupled with *BFI*'s restatement of the joint-employer standard, somehow creates an unprecedented situation. In *BFI*, the Board returned to its traditional test, endorsed by the Third Circuit. *BFI*, 362 NLRB No 186, slip op. at 15, 20. *BFI* merely represents a return to the Board's "earlier reliance on reserved control and indirect control as indicia of joint-employer status." See *BFI*, 362 NLRB No. 186, slip op. at 8–10, 13–16, 18–20. Indeed, *Sturgis* itself cited several cases that relied on such factors. 331 NLRB at 1302–1303.[38] Before the Board's restrictive joint-employer decisions of 1984 (overruled in *BFI*) and before 1990's *Lee Hospital* decision, the Board followed the same approach we endorse today: a broad definition of joint employment and a practice of including jointly-employed and solely-employed employees of a single user employer in the same bargaining unit, where they shared a community of interest. There is no evidence of destabilized collective bargaining during that long period. In any event, for the reasons explained here and in *BFI*, both rules are based on permissible constructions of the Act and effectuate the Act's policies.[39]

IV. CONCLUSION

We hold today that *Sturgis* is more consistent with our statutory charge than *Oakwood.* Accordingly, we overrule *Oakwood* and return to the holding of *Sturgis*. Em-

[37] Our dissenting colleague misunderstands the reference in Sec. 9(b) to "assur[ing] employees the fullest freedom in exercising the rights guaranteed by th[e] Act." The reference is plainly to the statutory rights granted to *employees*. No provision in the Act guarantees employers that they will be required to bargain only with respect to a unit to which they have consented.

[38] See, for example, *S.S. Kresge Co. v. NLRB*, supra, 416 F.2d at 1229–1231 (Board did not act arbitrarily in concluding that Kresge and its licensees are joint employers and that a storewide unit is appropriate based on its finding that Kresge retained the right to control substantially the labor relations of the various licensees); *Thriftown, Inc.*, supra, 161 NLRB at 607 (whether or not exercised, Thriftown's power to control is present by virtue of its operating agreement with licensee Astra); *Jewel Tea Co., Inc.*, supra, 162 NLRB at 510 (finding relevant that the license agreements expressly give Jewel Tea the power to control effectively essential terms and conditions of employment of the employees of certain licensees even if licensor has not actually exercised such power); *Taylor's Oak Ridge Corp.*, supra, 74 NLRB at 932 ("That the Employer's power of control [over the individuals working in the departments leased to concessionaires] may not in fact have been exercised is immaterial, since the right to control, rather than the actual exercise of that right, is the touchstone of the employer-employee relationship.").

[39] The Board will address jurisdictional issues the same way it did before, and, unlike the dissent, we do not anticipate any jurisdictional problems. For example, prior to *Sturgis*, the Board had held that the fact that some terms of employment are controlled by a government entity that is outside of the Board's jurisdiction does not mean that meaningful bargaining is not possible with the government contractor that is subject to the Act regarding the significant terms of employment that the latter employer controls. See *Management Training Corp.*, 317 NLRB 1355 (1995). See also *BFI*, 362 NLRB No. 186, slip op. at 13 fn.70, 20–21 fn. 121 (discussing *Management Training*).

ployer consent is not necessary for units that combine jointly employed and solely employed employees of a single user employer. Instead, we will apply the traditional community of interest factors to decide if such units are appropriate. *Sturgis*, 331 NLRB at 1308. We likewise agree with the *Sturgis* Board's sanctioning of units of the employees employed by a supplier employer, provided the units are otherwise appropriate. Ibid.

ORDER

The Regional Director's administrative dismissal of the petition is reversed, and the petition is reinstated. The petition is remanded to the Regional Director for further action consistent with this Decision.[40]

Dated, Washington, D.C. July 11, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

In *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015) (*Browning-Ferris*), the Board majority substantially expanded the circumstances when multiple entities would be deemed a joint employer of particular employees.[1] Under *Browning-Ferris*, if two businesses have sufficient control over employment terms and conditions within an appropriate bargaining unit, then (i) both entities are jointly deemed the "employer," and (ii) if the union prevailed in an election, both business entities would be required to jointly engage in collective bargaining, with each entity negotiating "such terms and conditions which it possesses the authority to control."[2] Former Member Johnson and I dissented in *Browning-Ferris*, based on our view that the expanded joint-employer standard was contrary to our statute and because it left employees, unions and employers "in a position where there can be no certainty or predictability regarding the identity of the 'employer.'"[3] We were especially critical of the multiple-entity bargaining obligation described in *Browning-Ferris*, where each entity would be responsible for bargaining over some subjects and not others.[4] In our view, this type of bargaining would "foster substantial bargaining instability by requiring the nonconsensual presence of too many entities with diverse and conflicting interests on the 'employer' side," and "even the commencement

[40] After the Board issued its NIFB on July 6, 2015, Tradesmen International moved to dismiss as moot the petition and the request for review on July 20, 2015. Tradesmen's motion claimed that the work described in the petition had ended and that neither Tradesman nor Miller & Anderson expected to perform sheet metal work in Franklin County, Pennsylvania in the foreseeable future. Petitioner opposed the motion, claiming, among other things, that if the Board reverses the Regional Director's decision to dismiss the petition for lack of employer consent, it would test Tradesman's factual claims at hearing. We find that Tradesmen's motion to dismiss raises material factual issues warranting a hearing. Accordingly, we remand the case to the Regional Director to determine whether Miller & Anderson, Inc. and Tradesmen have ceased performing sheet metal work in Franklin County, Pennsylvania with no plans to resume such work. If that is not the case, the Regional Director must determine the appropriate unit under the holding of *Sturgis*, which we return to today. See *BFI*, 362 NLRB No. 186, slip op. at 2 (noting that the Board's "established presumption in representation cases like this one is to apply a new rule retroactively."). In other words, in the event that Miller & Anderson, Inc. and Tradesmen have not permanently ceased performing sheet metal work in Franklin County, Pennsylvania, the Regional Director must determine whether Miller & Anderson and Tradesmen are joint employers of the employees supplied by Tradesmen to Miller & Anderson, and, if so, whether those employees share a community of interest with the employees solely employed by Miller & Anderson on its jobsites in Franklin County, Pennsylvania.

Our dissenting colleague complains that rather than deciding the applicability of *Oakwood*, the Board should have simply remanded this case for a hearing to resolve the factual dispute regarding the continued existence of the petitioned-for unit. However, we deem it more appropriate to address the thoughtful arguments raised by the parties and amici. Then, if the Regional Director determines on remand that the unit continues to exist, the Director can also promptly decide, based on record evidence, whether the petitioned-for unit is appropriate, rather than make the employees and parties wait still longer while the Director transfers the case back to the Board for resolution of the *Oakwood* issue, as our colleague recommends.

[1] See, e.g., *Browning-Ferris*, supra, slip op. at 2, where the Board majority stated: "We will no longer require that a joint employer not only possess the authority to control employees' terms and conditions of employment, but also exercise that authority. Reserved authority to control terms and conditions of employment, even if not exercised, is clearly relevant to the joint-employment inquiry. . . . Nor will we require that, to be relevant to the joint-employer inquiry, a statutory employer's control must be exercised directly and immediately. If otherwise sufficient, control exercised indirectly—such as through an intermediary—may establish joint-employer status" (citations and footnotes omitted).

[2] Id., slip op. at 16.

[3] Id., slip op. at 22–23 (Members Miscimarra and Johnson, dissenting).

[4] Id., slip op. at 22–24, 37–43, 48 (Members Miscimarra and Johnson, dissenting).

of good-faith bargaining may be delayed by disputes over whether the correct 'employer' parties are present."[5]

In today's decision, my colleagues substantially enlarge the expanded joint-employer platform created by *Browning-Ferris* and require a more attenuated type of multi-employer/non-employer bargaining[6] in a single unit when the multiple business entities do *not* even jointly employ all unit employees. Specifically, my colleagues hold that the Board may require two or more businesses to engage in multi-employer bargaining without their consent, even though one of the entities *has no employment relationship* with some of the unit employees, provided that *other* employees in the same unit are jointly employed by the employer entities. The latter determination (whether some individuals are jointly employed) will be governed by the expanded *Browning-Ferris* joint-employer standard.

My colleagues overrule *Oakwood Care Center*, 343 NLRB 659 (2004) (*Oakwood*), and adopt standards governing multi-employer bargaining that have never previously existed, except for a 4-year period after the Board decided *M. B. Sturgis, Inc.*, 331 NLRB 1298 (2000). However, I do not agree that my colleagues today "return to the holding of *Sturgis*." It is true that *Sturgis* permitted the certification of multi-employer bargaining units, without consent, where some unit employees were jointly employed, and where other unit employees were employed only by one employer entity. However, throughout the 4-year period governed by *Sturgis* (and for many years before and after *Sturgis* was decided), the joint-employer landscape was circumscribed by well-known limiting principles that were repudiated, with considerable fanfare, in *Browning-Ferris*.[7] Thus, my colleagues do not "return" to a legal regime that has ever existed. The Board and the courts have never previously applied the expansive joint-employer standards articulated in *Browning-Ferris* combined with the multi-employer/non-employer bargaining that will result from today's decision.[8]

For several reasons, I respectfully dissent from the majority's approval of multi-employer/non-employer bargaining in the circumstances presented here.

First, as noted above, the Board majority in *Browning-Ferris* already created a new type of multi-employer bargaining, in joint-employer situations, that will predictably result in confusion and instability, which is compounded by the multi-employer/non-employer bargaining approved by the Board majority here. Given that *Browning-Ferris* has already created an "analytical grab bag from which any scrap of evidence regarding indirect control or incidental collaboration" may result in joint-employer status,[9] the majority's expansion of *Browning-Ferris* here will only make it more difficult for parties to anticipate whether, when or where this new type of multi-employer/non-employer bargaining will be required by the Board, nor can anyone reasonably predict what it will mean in practice.

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[5] Id., slip op. at 23 (Members Miscimarra and Johnson, dissenting).

[6] The phrase "multi-employer bargaining" is misleading in the instant case because the type of bargaining contemplated by my colleagues involves two or more management entities, but only one has an employment relationship with all employees in the bargaining unit, and the other management entity or entities has or have no employment relationship whatsoever with some of the unit employees (i.e., with the employees who are solely employed by the first entity). To avoid confusion, I refer to this as "multi-employer/non-employer bargaining," which reflects the fact that one management entity employs everyone in the bargaining unit (either jointly or solely), and the other management entity lacks any employment relationship with some employees in the unit.

This type of bargaining differs from "joint-employer" status, which exists when two or more entities are found to have sufficient control over employment terms and conditions to warrant a finding that they *jointly* have an "employer" relationship with *all* employees in the bargaining unit—although, in *Browning-Ferris*, the Board majority indicated that each joint-employer entity would only be responsible for bargaining "with respect to such terms and conditions which it possesses the authority to control," id., slip op. at 16.

[7] *Browning-Ferris* overruled two longstanding joint-employer decisions—*Laerco Transportation*, 269 NLRB 324 (1984), and *TLI, Inc.*, 271 NLRB 798 (1984), enfd. mem. 772 F.2d 894 (3d Cir. 1985)—which the Board majority described as follows:

> *Laerco* and *TLI*, both decided in 1984, marked the beginning of a 30-year period during which the Board . . . effectively narrowed the joint-employer standard. Most significantly, the Board's decisions have implicitly repudiated its earlier reliance on reserved control and indirect control as indicia of joint-employer status. The Board has foreclosed consideration of a putative employer's right to control workers, and has instead focused exclusively on its *actual* exercise of that control—and required its exercise to be *direct*, *immediate*, and *not "limited and routine*."

362 NLRB No. 186, slip op. at 10 (emphasis added). In addition to overruling *Laerco* and *TLI*, the Board in *Browning-Ferris* abandoned all three of the limiting principles described above. Id., slip op at 15–16 ("[W]e will no longer require that a joint employer . . . exercise [its] authority . . . directly, immediately, and not in a 'limited and routine' manner.").

[8] My colleagues dispute this assertion and persist in characterizing *Browning-Ferris* as a return to the pre-1984 standard, before *Laerco* and *TLI*. However, as former Member Johnson and I explained in our *Browning-Ferris* dissent, the Board majority's decision there "expand[ed] joint-employer status far beyond anything that . . . existed . . . under precedent predating *TLI* and *Laerco*." 362 NLRB No. 186, slip op. at 25. Further, as explained below in footnote 29, the few cases cited by the majority today—to support their contention that the Board, early in its history, approved of units combining employees solely employed by a store with employees jointly employed by the store and its licensees—did not address the issue raised here: whether Sec. 9(b) precludes nonconsensual multi-employer bargaining units where one of the "employer" entities lacks *any* employment relationship with some or many employees in the unit.

[9] Id., slip op. at 26 (Members Miscimarra and Johnson, dissenting).

Second, I believe the Act's requirements and sound policy considerations prevent the Board from certifying multi-employer bargaining units without the consent of the parties.

Third, I also disagree with my colleagues' use of this case as the vehicle for overruling existing precedent. In a timely "Motion to Dismiss Petition and Request for Review as Moot" that was filed more than 11 months ago,[10] the Board was placed on notice that the petitioned-for unit in the instant case no longer exists and has not existed for several years. The Motion to Dismiss, supported by an affidavit, indicated that (i) nobody has been employed in the multi-employer unit for *more than 3 years*, (ii) there is no expectation that anyone will ever be employed in the unit, and (iii) the petitioned-for unit is defunct. Instead of ruling on the pending Motion to Dismiss on the basis that it pleads facts that would render this proceeding moot, my colleagues moved forward with the disposition of this case on the merits. The available evidence indicates no employees of the Employers will be affected by the Board's decision in this case, which means the Board is essentially issuing an advisory opinion that overrules existing precedent. I believe the Board should have fairly considered and resolved the Motion to Dismiss, especially considering it was filed so long ago, before expending the considerable resources required to decide the merits.

For these reasons, which are explained more fully below, I respectfully dissent.

DISCUSSION

The representation petition in this case, filed by the Sheet Metal Workers International Association, Local Union No. 19, AFL–CIO (Union), seeks to represent a bargaining unit consisting of two groups of employees: (i) sheet metal workers solely employed by Miller & Anderson at a construction project in Franklin County, Pennsylvania, and (ii) sheet metal workers directly employed by Tradesmen International (Tradesmen) who were assigned to perform services for Miller & Anderson at the Franklin County project. (Using the standard terminology, Tradesmen was the "supplier employer," and Miller & Anderson was the "user employer.") It is undisputed that Tradesmen and Miller & Anderson jointly employed the employees supplied by Tradesmen to Miller & Anderson. However, Tradesmen had no employment relationship with the sheet metal workers solely employed by Miller & Anderson. Nonetheless, the Union's petition sought a combined unit as to which the "employer" entities would include both Tradesmen and Miller & Anderson. Tradesmen and Miller & Anderson did not consent to the multi-employer/non-employer bargaining unit sought by the Union.

On April 26, 2012, the Regional Director dismissed the election petition, correctly finding that the petitioned-for unit was inappropriate under *Oakwood*. On May 18, 2015, the Board granted the Petitioner's request for review of the Regional Director's decision.[11] On July 20, 2015, as noted previously, one of the employer entities, Tradesmen, filed a "Motion to Dismiss Petition and Request for Review as Moot," with a supporting affidavit, indicating that nobody has been employed in the unit for *more than 3 years*, there is no expectation that anyone will ever be employed in the unit, and the petitioned-for unit is defunct. My colleagues, overruling *Oakwood*, hold that it is appropriate to conduct an election in a multi-employer/non-employer bargaining unit where the employer entities are a joint employer of some employees, and where no employment relationship of any kind exists between one or more employer participants and other employees. And if the union prevails in an election,[12] the Board will impose a statutory obligation on all of the employer entities, without the parties' consent, to engage in multi-employer bargaining. Contrary to my colleagues, I believe the Regional Director properly dismissed the petition, and by overruling *Oakwood*, the Board majority improperly expands the *Browning-Ferris* joint-employer standard by requiring multi-employer/non-employer bargaining that will be even more unworkable in a unit where one of the joint employers does not even have an "employer" relationship with everyone in the bargaining unit.

[10] See Tradesmen International's Motion to Dismiss Petition and Request for Review as Moot (filed July 20, 2015) (Motion to Dismiss). Attached to Tradesmen's Motion to Dismiss is the sworn affidavit of Scott Hilligoss, Tradesmen International's Mid-Atlantic Manager, who swears under penalty of perjury that the project that was the subject of the election petition was completed on or before July 6, 2012, that employees of Tradesmen International have not performed any work for Miller & Anderson for more than 3 years, that Tradesmen International itself has not employed any employees within the unit's geographic boundaries in the last 3 years, and that Tradesmen International has no expectation of performing unit work in the foreseeable future.

[11] On July 6, 2015, the Board issued a Notice and Invitation to File Briefs.

[12] As noted previously, it is highly likely that no election will be conducted in this case because the Motion to Dismiss filed by Tradesmen, with a supporting affidavit, indicates that the bargaining unit no longer exists, no employees have been employed in the unit for more than 3 years, and there is no reasonable expectation that any employees will ever be employed in the petitioned-for unit.

A. Multi-Employer/Non-Employer Bargaining Units, in Tandem with the Expanded Browning-Ferris Joint-Employer Standard, Will Produce Bargaining That Is Even More Unworkable, Contrary to the Board's Primary Duty to Foster Stable Labor Relations

One of the Board's primary roles is to foster stability in bargaining relationships when employees choose to be represented by a union. *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362–363 (1949) ("To achieve stability of labor relations was the primary objective of Congress in enacting the National Labor Relations Act."); *NLRB v. Appleton Electric Co.*, 296 F.2d 202, 206 (7th Cir. 1961) ("A basic policy of the Act [is] to achieve stability of labor relations."); *Northwestern University*, 362 NLRB No. 167, slip op. at 1 (2015) (declining to assert jurisdiction where the union sought to represent grant-in-aid scholarship football players because doing so "would not serve to promote stability in labor relations"). As I stated in *CNN America, Inc.*, "[n]othing is more fundamental when interpreting and applying the Act than correctly identifying the parties," which includes "establishing what parties and representatives may appropriately engage in bargaining." 361 NLRB No. 47, slip op. at 38 (2014) (Member Miscimarra, dissenting in part).

In *Browning-Ferris*, supra, Member Johnson and I dissented in large part because the Board majority's expanded joint-employer standards would require an unprecedented array of diverse business entities, with conflicting interests, to participate in collective bargaining. As we explained:

> Collective bargaining was intended by Congress to be a process that could conceivably produce agreements. One of the key analytical problems in widening the net of "who must bargain" is that, at some point, agreements predictably will not be achievable because *different parties involuntarily thrown together as the "bargainers" under the majority's new test will predictably have widely divergent interests*. Today's marked expansion of bargaining obligations to other business entities *threatens to destabilize existing bargaining relationships and complicate new ones*.[13]

Although the Board majority in *Browning-Ferris* stated that each joint-employer participant would only be responsible for bargaining over "such terms and conditions which it possesses the authority to control,"[14] former Member Johnson and I pointed out that our statute provides virtually no guidance (nor did the *Browning-Ferris* majority) regarding how such bargaining is supposed to work:

> [H]ow exactly are joint user and supplier employers to divvy up the bargaining responsibilities for a single term of employment that they will be deemed under the new standard to codetermine, one by direct control and the other by indirect control? How does one know who has authority at all over a term and condition of employment, under the majority's vague formulation? What if two putative employer entities get into a dispute over whether one has authority over a certain term or condition of employment? What if the putative employers are competitors? . . . What if there are too many entities to come to an agreement? How does bargaining work in this circumstance? . . . So questions exist as to (i) which entities are the "employer," (ii) which entities must (or must not) engage in bargaining over particular employment terms, and even (iii) what party—the respondent(s) versus the General Counsel—bears the burden of proof regarding this assortment of issues.[15]

The above questions (and more) arise where, under *Browning-Ferris*, the multiple business entities at least nominally have an employer relationship with *all* employees in the bargaining unit—specifically, a joint-employer relationship based on the substantially enlarged *Browning-Ferris* standard. As a result of today's decision, our statute is being stretched further to combine (i) all the challenges associated with joint-employer bargaining under the expansive *Browning-Ferris* standard, plus (ii) additional issues caused by mandating bargaining where one or more business entities do not have *any* employment relationship with some employees in the bargaining unit. Indeed, if the unit consists mostly of employees who are solely employed by one joint employer (the user employer), the *majority* of unit employees will have no employment relationship with the other employer (the supplier employer).

To be clear, whenever the Board recognizes this type of multi-employer/non-employer bargaining unit, the "non-employer" businesses—like Tradesmen here, which never employed *any* of the unit members solely employed by Miller & Anderson—will be required to engage in bargaining, even though, as to some or even most individuals in the unit, the businesses *fail* the extremely lenient *Browning-Ferris* joint-employer test. In other words, as to these individuals solely employed by

[13] *Browning-Ferris*, supra, slip op. at 38 (Members Miscimarra and Johnson, dissenting) (emphasis added).

[14] *Browning-Ferris*, supra, slip op. at 16.

[15] *Browning-Ferris*, supra, slip op. at 42 (Members Miscimarra and Johnson, dissenting).

the user employer, the non-employer business is a Board-mandated participant in negotiations even though it does not even have potential (i.e., "reserved") authority to "indirectly" affect employment terms and conditions. *Browning-Ferris*, supra, slip op. at 15–16 (quoted in fn. 7, supra).[16] I recognize my colleagues are motivated by a good-faith desire to further the Act's purpose of encouraging collective bargaining, but I believe the Board cannot reasonably find that a bargaining unit structured in this manner is "appropriate" for the "purposes of collective bargaining." NLRA Sec. 9(a).

The multi-employer/non-employer bargaining contemplated by today's decision is complicated in another way that former Member Johnson and I described in our *Browning-Ferris* dissent: most businesses have more than one client, and most clients have relationships with multiple suppliers. Therefore, in our *Browning-Ferris* dissent, Member Johnson and I depicted a single cleaning company named "CleanCo," which was a joint employer with three clients with the prospect of adding one future client.[17] This simplistic "CleanCo" example looked like Figure 1 below:

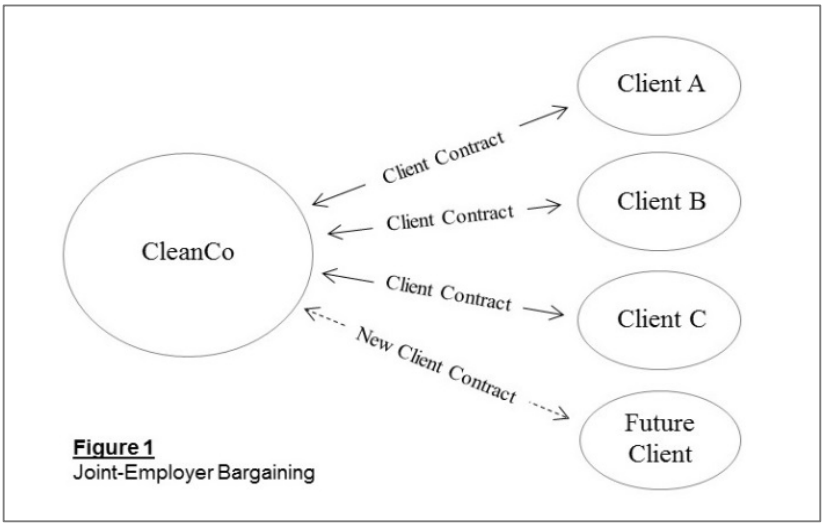

Figure 1
Joint-Employer Bargaining

[16] Contrary to my colleagues' suggestion, I recognize that the Board majority imposes no duty to bargain on the non-employer entity (e.g., the supplier employer) regarding employment terms that relate exclusively to bargaining unit members that entity does not employ (i.e., employees who are solely employed by the user employer). However, this scenario—in which one employer seated at the bargaining table purportedly plays no role in negotiating employment terms of bargaining unit members employed by another employer seated at the same table—highlights the fact that the Board-mandated employer-side participants do not comprise a single "employer," and the resulting negotiations, in the absence of consent, will involve inherent confusion and instability. This becomes even more apparent when the negotiations involve *multiple* non-employer entities (i.e., multiple supplier employers), each of which has no employment relationship *either* with (i) bargaining unit members who are solely employed by the user employer, or (ii) bargaining unit members who are jointly employed by the user employer and each of the *other* supplier employers. See *Gourmet Award Foods, Northeast*, 336 NLRB 872 (2001) (finding appropriate a unit comprising a user employer's solely employed employees plus jointly employed employees supplied by *three* supplier employers); infra fn. 18. In my view, it defies logic and reason to suggest that this type of highly fragmented bargaining involves a single "employer" unit in conformity with Sec. 9(b). Moreover, even if one could accept this characterization, I believe my colleagues do not adequately consider the practical difficulties and substantial challenges this type of bargaining will present for employees, employers and unions alike, given the Board-mandated participation by diverse nonconsenting parties on the "employer" side.

[17] See *Browning-Ferris*, supra, slip op. at 38 (Members Miscimarra and Johnson, dissenting).

Starting with the same "CleanCo" business model, the multi-employer/non-employer bargaining approved by the Board majority today includes all of the complexity associated with *Browning-Ferris* joint-employer bargaining, plus additional variables caused by the fact that one business entity (CleanCo) has no "employer" relationship whatsoever with many bargaining unit employees (those solely employed by Clients A, B, and C). Taking these additional variables into account, the *Browning-Ferris* CleanCo example looks like Figure 2 below:

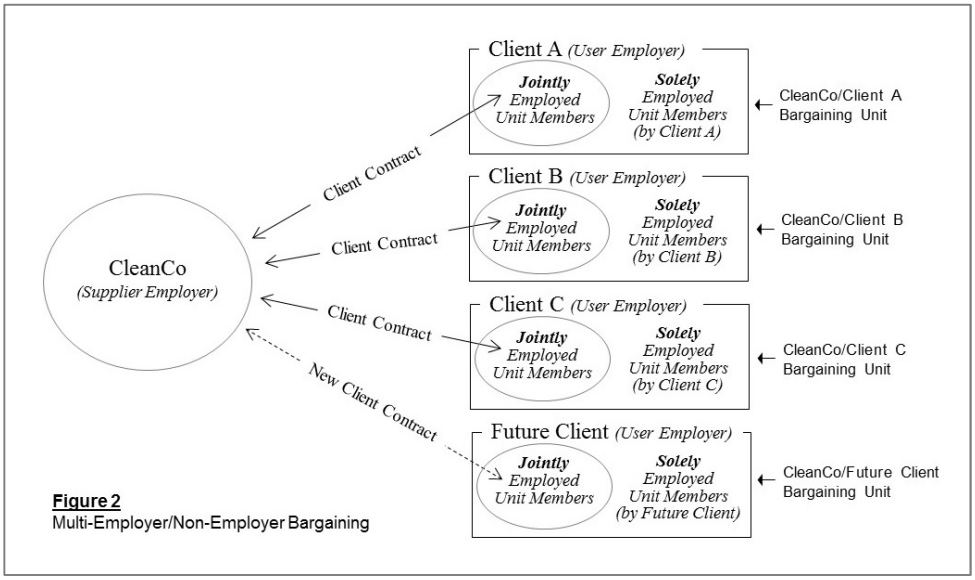

Figure 2
Multi-Employer/Non-Employer Bargaining

It bears emphasis that the four multi-employer/non-employer bargaining units depicted above are a small sampling of potential unit configurations approved by my colleagues today.[18] However, they all suffer from the infirmities that Member Johnson and I discussed in *Browning-Ferris*, and then some. There will be greater uncertainty and instability based on each bargaining unit's inclusion of some employees who lack *any* employment relationship (even an "indirect" one) with a business entity, or multiple business entities, that must nonetheless participate in negotiations. Here, as in *Browning-Ferris*, my colleagues provide no clear answer regarding questions such as (1) how the management parties will determine between or among themselves who is required to bargain over which subject(s) regarding what employees; (2) how disputes will be resolved when the management parties cannot agree;[19] (3) what obligation will exist for the management parties to disclose

[18] The example depicted in Figure 2 involves a single *supplier employer* (CleanCo) and multiple *user employer* clients (Clients A, B and C), resulting in three bargaining units: (1) CleanCo and Client A (with some employees being solely employed by Client A); (2) CleanCo and Client B (with some employees being solely employed by Client B); and (3) CleanCo and Client C (with some employees being solely employed by Client C).

Significantly, the majority's multi-employer/non-employer bargaining unit test would also apply where a single *user employer* (e.g., Client A) obtained personnel from multiple *supplier employers* (e.g., CleanCo and two CleanCo competitors, which I will call TidyCo and NeatCo). In this type of situation, my colleagues' decision today would potentially produce a single bargaining unit consisting of all four entities on the "employer" side—CleanCo, TidyCo, NeatCo *and* Client A—where some employees are solely employed by Client A, other employees are jointly employed by *CleanCo* and Client A, additional employees are jointly employed by *TidyCo* and Client A, and a different group of employees are jointly employed by *NeatCo* and Client A. In this scenario, featuring a single user employer and multiple supplier employers, there would be even *more* diverse interests and conflicts among the employer parties, since each supplier employer would be a direct competitor of the other supplier employers. There would also be more "non-employers," since in addition to each supplier having no employment relationship with Client A's solely employed employees, each supplier would also have no employment relationship with employees provided by the other suppliers.

[19] As former Member Brame has observed, the type of multi-employer/non-employer bargaining required by the Board in *Sturgis*—and approved by my colleagues here—not only will require user and supplier employers, who will have different economic interests, to engage in multi-employer bargaining with the union, but will also entail the need for the management parties to engage in simultaneous negotiations *with each other*. *Sturgis*, 331 NLRB at 1321 fn. 62.

information to the union(s) when the same information may never have been shared between or among the management parties themselves; (4) how client contracts will affect the rights and obligations of the management parties, and whether the client contracts will control bargaining or whether the outcome of bargaining will control what must be negotiated (or renegotiated) in client contracts; or (5) how the Board will address jurisdictional problems that arise when one management party is covered by the NLRA and the other management party is not.[20] On top of all these issues, the NLRA protects neutral parties from secondary picketing that has an object of inducing one employer to cease doing business with another, and one can anticipate arguments that Board-mandated participation of supplier employers in multi-employer bargaining will render supplier employers non-neutral parties who will be denied secondary-boycott protection they would otherwise have under Section 8(b)(4) and 8(e) of the Act. See *M. B. Sturgis*, 331 NLRB at 1322 (Member Brame, dissenting in part) ("[T]he placement of the two groups of employees in the same unit might deny the supplier employer the protection guaranteed by Section 8(b)(4)(ii)(B).").

Moreover, similar to the CleanCo example in *Browning-Ferris*, the above illustration—involving only one service (or supplier) company and three clients (or user employers)—dramatically understates the scope of the problems the majority has created. In the real world, by comparison, many businesses, large and small, rely on services or personnel provided by large numbers of separate vendors, and many service or staffing companies have dozens or hundreds of clients. The Board's responsibility is to discharge the "special function of applying the general provisions of the Act to the complexities of industrial life."[21] Consistent with this responsibility, I believe the Board must recognize that stable bargaining relationships are unlikely to result from the type of multi-employer/non-employer bargaining unit recognized by my colleagues today. For this reason alone, I disagree with the Board majority's decision, which I believe is contrary to one of the Board's primary duties under our statute—to foster reasonable certainty and stable bargaining relationships. See *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. at 362–363; *NLRB v. Appleton Electric Co.*, 296 F.2d at 206; *Northwestern University*, 362 NLRB No. 167, slip op. at 1; see also *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 678–679, 685–686 (1981) (the Board must provide "certainty beforehand" for employers and unions so employers can "reach decisions without fear of later evaluations labeling . . . conduct an unfair labor practice," and so a union may discern "the limits of its prerogatives, whether and when it could use its economic powers . . . , or whether, in doing so, it would trigger sanctions from the Board").

B. The Board Cannot Properly Direct an Election in a Multi-Employer Unit, Absent Consent, Where No Employment Relationship Exists Between Some Unit Employees and One or More Employers

I believe the Board majority's decision is also contrary to our statute. Section 9(a) of the Act provides that employees have a right to representation by a labor organization "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes." Congress was especially clear about the Board's responsibility when evaluating bargaining units under the Act: Section 9(b) states that "[t]he Board shall decide *in each case* whether, in order to *assure to employees the fullest freedom in exercising the rights guaranteed by this Act*, the unit appropriate for the purposes of collective bargaining shall be *the employer unit*, craft unit, plant unit, *or subdivision thereof*" (emphasis added). See generally *Macy's, Inc.*, 361 NLRB No. 4, slip op. at 25–27 (2014) (Member Miscimarra, dissenting) (describing legislative history underlying Section 9(b) of the Act), enfd. No. 15–60022, ___ F.3d ___ (5th Cir. June 2, 2016).

Neither the Act nor its legislative history suggests that Congress contemplated the Board would certify a bargaining unit in which one or more "employer" entities do not have *any* employment relationship with some of the

[20] My colleagues say the Board "will address jurisdictional issues the same way it did before," citing *Management Training Corp.*, 317 NLRB 1355 (1995), where a Board majority held it was appropriate to selectively impose bargaining obligations on one entity (e.g., a private contractor) without determining whether it exercised sufficient control over employment terms to enable it to engage in meaningful bargaining, and even though the Board lacked jurisdiction over an exempt government entity that might otherwise be deemed a joint employer. However, as I have explained elsewhere, *Browning-Ferris* emphasizes the critical need to have participation in bargaining by *all* entities that have actual or potential control over employment terms, even if the control is indirect, never exercised, and only reserved in relevant documentation. Accordingly, I believe the Board majority's position in *Browning-Ferris* cannot be reconciled with the Board majority's holding in *Management Training* that participation in bargaining by all joint-employer entities is not essential. See *Airway Cleaners, LLC*, 363 NLRB No. 166, slip op. at 1–3 & fn. 8 (2016) (Member Miscimarra, concurring). Thus, it remains to be seen whether and how the Board can appropriately address problems arising where the Board lacks jurisdiction over one or more entities deemed joint employers under *Browning-Ferris*, and where the Board lacks jurisdiction over one or more non-employer entities whose participation in multi-employer bargaining is required by the majority's decision in the instant case.

[21] *NLRB v. Erie Resistor Corp*., 373 U.S. 221, 236 (1963); see also *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266–267 (1975) ("The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board.").

unit employees.[22] To the contrary, as noted above, Section 9(a) states that employees may designate or select a representative only in a unit "appropriate" for "the purposes of collective bargaining." In turn, Section 8(a)(5), which sets forth the bargaining duties the Act places on employers, states an employer may not "refuse to bargain collectively with the representatives of *his employees*" (emphasis added). Section 8(b)(3), the source of the bargaining requirements the statute places on unions, likewise states a union may not "refuse to bargain collectively with an employer, provided it is the representative of *his employees* . . ." (emphasis added). This statutory language compels a conclusion that, absent the consent of all parties to engage in multi-employer bargaining, Congress contemplated that bargaining units would consist of employees of an employer that has an employment relationship with *all* employees in the unit.

As explained in *Oakwood* and in former Member Brame's dissenting opinion in *Sturgis*, the Act and its legislative history preclude the Board from certifying multi-employer bargaining units absent the consent of all parties. Section 9(b), quoted above, refers to "the employer unit" as the broadest possible appropriate bargaining unit, and the Act's legislative history reveals that the phrase "or subdivision thereof" in Section 9(b) was intended by Congress to permit the Board to direct elections in bargaining units "not as broad as 'employer unit,' yet not necessarily coincident with the phrases 'craft unit' or 'plant unit.'"[23] When the Act was amended in 1947, Congress specifically considered whether the term "employer" in Section 9(b) should include multi-employer associations. Amendments were proposed that would have expressly precluded multi-employer associations "except where . . . employers have voluntarily associated themselves for the purpose of collective bargaining."[24] However, the conference committee found such language unnecessary because it merely restated existing Board practice.[25] Thus, Section 9(b) of the Act and its legislative history establish that the Board lacks authority to direct an election in a bargaining unit broader in scope than the employees of a single employer. Multi-employer bargaining requires the consent of all parties.[26]

I do not agree with my colleagues' reasoning that the petitioned-for unit is an "employer unit" because "[a]ll the employees in such a unit are performing work for the user employer and are employed within the meaning of the common law by the user employer." Member Brame succinctly responded to the same rationale in *Sturgis*, stating that "having one employer *in common* differs fundamentally from having the *same* employer, and saying otherwise does not paper over the contrary reality."[27] As depicted in Figure 2 above, the inescapable reality is that the multi-employer/non-employer bargaining units my colleagues approve today will consist, in part, of employees with whom one of the management participants does not have *any* employer relationship whatsoever. The first sentence in the Board majority's opinion states the issue in this case as whether, in the context of a user employer/supplier employer relationship, the Board may approve a single bargaining unit consisting, in part, of employees whom "the user alone employs." If the user alone employs certain employees in the bargaining unit, this means the Board is going *beyond* the "employer unit" by requiring the participation of a second management entity (i.e., the supplier employer) that does not

[22] The majority attaches significance to the fact that Sec. 9(b)(3) of the Act expressly precludes the Board from certifying a specific type of bargaining unit—consisting of guards and nonguards—and the Act contains no specific prohibition against having a single bargaining unit consisting of some employees who are jointly employed by two employer entities, and other employees who are solely employed by a single entity and have no employment relationship with one or more other employer entities. However, Sec. 9 also does not expressly prohibit the inclusion of animals in bargaining units, but the Board would be hard pressed to argue that it is appropriate to certify bargaining units that include service dogs, race horses, livestock and beasts of burden. The fact that the Act prohibits one specific type of bargaining unit does not mean Congress gave the Board carte blanche to include employees of multiple employers in a single bargaining unit where one or more "employer" entities have no employment relationship whatsoever with some or most unit employees. Indeed, Sec. 9(a) specifically requires that the Board only certify bargaining units that are "appropriate" for the "purposes of collective bargaining," and my colleagues agree that Sec. 9(b) permits, at most, an "employer unit." As explained in the text, I believe the Board cannot reasonably conclude that a bargaining unit constitutes an "employer unit" when it consists of employees of *multiple* employers, one or more of which have no employment relationship with some or even most unit employees.

[23] H.R. Statement on Conf. Rep. S. 1958, 79 Cong. Rec. 10297, 10299 (1935), reprinted in 1 Leg. Hist. 3260, 3263 (NLRA 1935). See also *Oakwood*, 343 NLRB at 661–662.

[24] House Conf. Rep. No. 510 on R. 3020, reprinted in 2 Leg. Hist. 535–536 (LMRA 1947).

[25] Id. (cited in *M. B. Sturgis*, 331 NLRB at 1315 (Member Brame, dissenting in part)).

[26] "The Board has long adhered to the rule that in order to bind an employer to multiemployer bargaining in the first instance, there must be evidence of that employer's unequivocal intent to be bound by the actions of the multiemployer bargaining representative." *Plumbers Local 669 (Lexington Fire Protection Group)*, 318 NLRB 347, 348 fn. 14 (1995); see also *Callier's Custom Kitchens*, 243 NLRB 1114, 1117 fn. 8 (1979) ("The essence of multiemployer bargaining is a consensual, tripartite relationship between the union, the multiemployer bargaining association, and the individual employer-members of the association."), enfd. 630 F.2d 595 (8th Cir. 1980); *Retail Associates, Inc.*, 120 NLRB 388, 393 (1958) ("[M]utual consent of the union and employers involved is a basic ingredient supporting the appropriateness of a multiemployer bargaining unit . . . ."); see also *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404 (1982).

[27] *M. B. Sturgis*, 331 NLRB at 1318 (Member Brame, dissenting in part).

have any employer relationship with those bargaining-unit employees. See *Oakwood*, 343 NLRB at 662 ("[T]he entity that the two groups of employees look to as their employer is not the same. No amount of legal legerdemain can alter this fact.").

I likewise disagree with my colleagues' rationale that Section 9(b), which states that the Board's bargaining-unit determinations must "assure employees the fullest freedom in exercising the rights guaranteed by this Act," actually *supports* the approval of multi-employer/non-employer bargaining units. Preliminarily, Section 9(b) places an affirmative obligation on the Board to carefully review and make an appropriate bargaining unit determination "in each case," which is far different from suggesting that the Board should indiscriminately approve whatever bargaining unit may result in an election.[28] Similarly, Section 9(b)'s reference to the "rights guaranteed by this Act" requires an evaluation of the petitioned-for unit in light of Act's other provisions, which include the requirement—set forth in Section 9(a)—that elections be conducted in a bargaining unit that is "appropriate" for "purposes of collective bargaining"; and the duty to bargain established in Section 8(a)(5) and 8(b)(3), quoted above, contemplates at a minimum that the employer that participates in collective bargaining will have an employment relationship with the unit employees—i.e., *all* of them.[29]

Based on the above considerations, I do not believe the Board may approve a multi-employer/non-employer bargaining unit, absent the consent of the parties. However, even if the Board had the statutory authority to approve such a unit, I agree with the *Oakwood* majority and the *Sturgis* dissent that, as a matter of policy, the Board should not process petitions for multi-employer/non-employer units absent the consent of all parties. As noted above, the type of bargaining unit my colleagues approve here will produce enormous challenges based on the diverse interests of the multiple management entities who must participate in bargaining, and it will generate immense uncertainty regarding what management party is responsible for negotiating over particular employment terms (and for deciding what competing proposals are acceptable regarding those particular terms). My colleagues' recipe for addressing these challenges and uncertainties—that each management entity will bargain over the terms and conditions it controls—profoundly oversimplifies the situation. As the Board indicated in *Oakwood*, 343 NLRB at 663, "the reality of collective bargaining defies such neat classifications." Moreover, the Board majority's decision today compounds the plethora of unworkable bargaining issues created by the expanded *Browning-Ferris* joint-employer standard. See Part A, supra. As the Board explained in *Oakwood*, "[f]or employees to enjoy the full prospect of effective representation, the Act contemplates that employees be grouped together by common interests *and* a common employer." 343 NLRB at 663. "The nonconsensual mixing of employees of different employers vitiates that basic principle." Id.

C. This Case Should Not Have Been Decided On the Merits Because the Board Was Placed on Notice More Than 11 Months Ago that No Bargaining-Unit Employees Exist

Putting aside my disagreement with the Board majority's overruling of *Oakwood*, the instant case is especially inappropriate to use as a vehicle for overruling existing law to require multi-employer/non-employer bargaining in a unit consisting, in part, of employees with whom one or more of the management participants does not have any employment relationship. As noted previously, the evidence currently available to the Board indicates that the multi-employer/non-employer bargaining unit at issue here ceased to exist years ago. Thus, on July 20, 2015, one of the management entities—Tradesmen International—filed a Motion to Dismiss Petition and Request for Review as Moot, supported by an affidavit, indicating that (i) nobody has been employed in the multi-employer/non-employer unit for *more than 3 years*, (ii) there is no expectation that anyone will ever be employed in the unit, and (iii) the petitioned-for unit is defunct.[30] Instead of ruling on the

[28] As I stated in *Macy's, Inc.*, the Act's "legislative history demonstrates that Congress intended that the Board's review of unit appropriateness would *not* be perfunctory." 361 NLRB No. 4, slip op. at 26 (Member Miscimarra, dissenting) (emphasis in original). Contrary to the suggestion at footnote 37 of the majority opinion, I am not suggesting that "the Act guarantees employers that they will be required to bargain only with respect to a unit to which they have consented." Rather, I believe the Act precludes the Board from finding that a bargaining unit is "appropriate" for the "purposes of collective bargaining" (Sec. 9(a)), or that it consists of an "employer unit" (Sec. 9(b)), when the unit, in fact, includes employees of multiple employers, including one or more entities that have no employment relationship with some unit employees.

[29] My colleagues rely on a number of cases in which the Board approved of bargaining units combining employees solely employed by a store with employees jointly employed by the store and its licensees. See, e.g., *S.S. Kresge Co. v. NLRB*, 416 F.2d 1225 (6th Cir. 1969), enfg. in relevant part *S.S. Kresge Co.*, 169 NLRB 442 (1968). However, as explained in *Oakwood*, those cases are not determinative of the issue presented here "because no party raised, and the Board and the reviewing courts did not consider, the statutory restrictions imposed by Section 9(b) on nonconsensual units that are multiemployer in scope." *Oakwood*, 343 NLRB at 662; see also *M. B. Sturgis*, 331 NLRB at 1317 fn. 49 (Member Brame, dissenting in part).

[30] Tradesmen (the supplier employer), with a supporting affidavit, indicated that the project that was the subject of the instant election

pending Motion to Dismiss on the basis that it pleads facts that would render this proceeding moot, my colleagues have instead proceeded to reach and decide the issue of whether an election can be directed in the petitioned-for unit *if* any unit exists, and then to remand the case to determine *whether* any unit exists, which it almost certainly does not. In other words, they have decided an election case, overruling *Oakwood* in the process, when the available evidence makes it virtually certain that no election will *ever* take place.

For several reasons, I believe these issues should have been handled in the opposite manner: we should have fairly considered and resolved the Motion to Dismiss when Tradesmen filed it.

First, by overruling *Oakwood* to permit an election that will not take place (because the petitioned-for unit does not exist), the Board today essentially issues an advisory opinion, where the available evidence indicates there is no actual case or controversy, and where the absence of any factual context or evidentiary record renders even more abstract the new standards that have been adopted by my colleagues. It is well established the Board does not give advisory opinions except as to narrow jurisdictional questions arising in circumstances not applicable here. *Broward County Port Authority*, 144 NLRB 1539 (1963); *James M. Casida*, 152 NLRB 526 (1965).[31]

Second, we have no shortage of cases involving *actual* employees whose interests will be affected by the Board's resolution of their dispute. Rather than expending the considerable resources required to decide this case, which necessarily operates to the detriment of other parties whose matters are pending before the Board, I believe the Board should have fairly considered and appropriately resolved the Motion to Dismiss. I do not discount the significance of the substantive issues presented in this case, which have also been the subject of extensive briefing. However, the importance of an issue does not warrant the issuance of a decision in the absence of an actual case or controversy. Moreover, given the breadth of the new joint-employer standards adopted in *Browning-Ferris*, the issues presented here will undoubtedly arise in another case involving parties whose dispute has not been rendered moot, and the existence of an evidentiary record in such a case would predictably render any resulting Board decision more concrete and, hopefully, more understandable.

For these reasons, I believe the Board should have decided Tradesmen's Motion to Dismiss before proceeding with the resolution of the merits. In my view, the evidence presented in the Motion and supporting affidavit, and the absence of any response creating a genuine issue of material fact, warrants dismissal (which would effectively uphold, on a different basis, the Regional Director's dismissal of the petition). Alternatively, the Board could have issued an order suspending the notice and invitation to file briefs, similar to action taken by the Board in *Steelworkers Local 1192 (Buckeye Florida Corp.)*, 362 NLRB No. 187 (2015),[32] and remanded this case to the Regional Director for a determination of whether the petition should be dismissed as moot.[33]

CONCLUSION

For the reasons set forth above, I respectfully dissent.

Dated, Washington, D.C. July 11, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

petition was completed on or before July 6, 2012; employees of Tradesmen have not performed any work for Miller & Anderson for more than 3 years; Tradesmen has not employed any employees within the geographic limits of the petitioned-for unit in the past 3 years; and Tradesmen has no expectation of performing unit work in the foreseeable future. Responding to Tradesmen's motion, the Union did not identify any facts that contradicted the information supplied by Tradesmen. Rather, the Union contended that "no factual record exists regarding whether work was or will be performed by the employer(s) in Franklin County."

[31] Under Sec. 102.98 and 102.99 of the Board's Rules and Regulations, an agency or court of any State or territory in doubt whether the Board would assert jurisdiction over the parties in a proceeding pending before such court or agency may file a petition with the Board for an advisory opinion on whether the Board would decline to assert jurisdiction over the parties before the agency or the court (1) on the basis of the Board's current standards, or (2) because the employing enterprise is not within the jurisdiction of the National Labor Relations Act. Otherwise, the Board does not issue advisory opinions, and petitions seeking such opinions are subject to dismissal. See, e.g., *Broward County Port Authority*, above; *James M. Casida*, above.

[32] In *Steelworkers Local 1192*, the Board received a potentially dispositive motion and promptly issued an order suspending a previously issued notice and invitation to file briefs, and the Board ultimately withdrew the notice entirely. See *Steelworkers Local 1192 (Buckeye Florida Corp.)*, 362 NLRB No. 187 (2015).

[33] See *Jeld-Wen of Everett, Inc.*, 285 NLRB 118, 118 fn. 1 (1987) (representation case was remanded by the Board, notwithstanding a pending grant of review, based on proffered evidence suggesting the representation issue was moot); *M. B. Kahn Construction Co.*, 210 NLRB 1050 (1974) (finding "no useful purpose would be served by conducting elections in the units found appropriate" and dismissing representation petitions where evidence showed the petitioned-for units would cease to exist based on imminent completion dates for relevant projects); *Douglas Motors Corp.*, 128 NLRB 307, 308–309 (1960) (dismissing representation petition based on evidence that employer "was in the process of effectuating a program to eliminate all its production operations").

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William Beaumont Hospital *and* Jeri Antilla. Case 07–CA–093885

April 13, 2016

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA, AND MCFERRAN

On January 30, 2014, Administrative Law Judge Susan A. Flynn issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] as modified below, and to adopt the recommended Order as modified and set forth in full below.[3]

I.

The complaint alleges that the Respondent's "Code of Conduct for Surgical Services and Perianesthesia," as maintained and distributed to employees, was unlawful in its entirety. The Code reads in relevant part:

> It is the intention of Beaumont Hospitals to foster effective working relationships among all hospital employees and physicians in order to provide and maintain high quality and safe patient care. Such relationships must be based upon mutual respect to avoid disruption of patient care or to hospital operations.
>
> It is the expectation of hospital management that employees and physicians promote and maintain a professional environment in which all individuals are treated with dignity and respect.
>
> Conduct on the part of a Beaumont employee or physician that is inappropriate or detrimental to patient care of [sic] Hospital operation or that impedes harmonious interactions and relationships will not be tolerated. Transgressors shall be subject to appropriate remedial or corrective action.
>
> Improper conduct or inappropriate behavior or defiance in the following example [sic], which includes but not limited [sic] to the following:[4]
>
> [1.] Willful and intentional threats, intimidation, harassment, humiliation, or coercion of employees, physicians, patients, or visitors.
>
> [2.] Profane and abusive language directed at employees, physicians, patients or visitors.
>
> [3.] Behavior that is rude, condescending or otherwise socially unacceptable. Intentional misrepresentation of information.
>
> [4.] Verbal comments or physical gestures directed at others that exceed the bounds of fair criticism.
>
> . . . .
>
> [5.] Negative or disparaging comments about the moral character or professional capabilities of an employee or physician made to employees, physicians, patients, or visitors.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We correct the judge's inadvertent finding that "the union" was a labor organization within the meaning of Sec. 2(5) of the Act. There is no union involved here.

The Respondent has not excepted to the judge's finding that it violated Sec. 8(a)(1) of the Act by instructing employee Deanna Brandt not to discuss with other employees the Respondent's investigation into her alleged misconduct. Accordingly, we do not pass on the judge's rationale, which included discussion of *Banner Estrella Medical Center*, 358 NLRB 809 (2012), a case decided by a panel that included invalidly appointed Board Members. See *NLRB v. Noel Canning,* 134 S. Ct. 2550 (2014).

[2] We affirm the judge's finding that the Respondent lawfully discharged employees Jeri Antilla and Deanna Brandt. However, in agreeing with the judge that the General Counsel carried his initial burden under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), we find that Antilla and Brandt engaged in protected concerted activity by complaining about staffing and safety, and we observe that their termination notices cite some of their protected activity. We nevertheless agree with the judge's finding that the Respondent established that it would have discharged Antilla and Brandt even in the absence of their protected activity.

In finding that the Respondent met its *Wright Line* rebuttal burden, we rely on evidence of the discharged employees' unprotected intimidating behavior, not on evidence that the Respondent maintained mechanisms for employees to report their safety concerns. Contrary to the Respondent, we do not rely on the evidence concerning discipline meted out to other employees after the alleged unfair labor practices. When assessing the consistency of an employer's disciplinary practices, discipline that preceded the incident is a more reliable indicator.

[3] We shall modify the judge's recommended Order to conform to the violations found and the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified and in accordance with *Durham School Services*, 360 NLRB No. 85 (2014).

[4] In the original document, the numbered items are presented as bullet points. We have added the numbers to facilitate our discussion. The ellipses indicate bullet points that we have omitted.

. . .

[6.] Behavior that is disruptive to maintaining a safe and healing environment or that is counter to promoting teamwork.

Where, as here, a rule does not explicitly restrict activities protected by Section 7, the rule is nevertheless unlawful if (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to Section 7 activity; or (3) the rule has been applied to restrict the exercise of such activity. *Lutheran Heritage Village-Livonia*, 343 NLRB 646–647 (2004). Only the first prong of this test is at issue here.

II.

For the reasons stated by the judge, we affirm her findings that paragraphs 1, 2, and 3, as well as part 1 of paragraph 6 ("Behavior that is disruptive to maintaining a safe and healing environment"), of the Code are lawful.[5] And, in the absence of exceptions, we adopt the judge's finding that paragraph 4 and part 2 of paragraph 6 ("behavior that is. . . counter to promoting teamwork") are unlawful. Unlike the judge, however, we find two additional portions of the Code to be unlawful.

First, in agreement with the General Counsel, we find the language in the introductory paragraph prohibiting conduct that "impedes harmonious interactions and relationships" to be unlawfully overbroad. In *2 Sisters Food Group*, 357 NLRB 1816, 1817 (2011), we found unlawful an employer rule subjecting employees to discipline for the "inability or unwillingness to work harmoniously with other employees." Like the rule there, the Respondent's prohibition is "sufficiently imprecise that it could encompass any disagreement or conflict among employees, including those related to discussions and interactions protected by Section 7, and [] employees would reasonably construe the rule to prohibit such activity." Id. (citation omitted).[6]

Second, we find paragraph 5 unlawful insofar as it prohibits "negative or disparaging comments about the . . . professional capabilities of an employee or physician to employees, physicians, patients, or visitors." This rule is unlawful because it would reasonably be construed to prohibit expressions of concerns over working conditions similar to those that we have found protected in this case.[7]

These conclusions are firmly grounded in the well-established principles that were articulated more than a decade ago in *Lutheran Heritage Village* and that (as we will explain) have been applied without question by Federal courts of appeals. The practical impact of our decision today is modest--an order requiring modification of a few provisions of an extensive employer handbook, the vast majority of which was either unchallenged or upheld. In short, this case is (or at least should be) a relatively unremarkable application of well-established law to uncontroverted fact.

III.

Our dissenting colleague argues, in passing, that we have reached the wrong result under *Lutheran Heritage Village*.[8] The dissent's primary argument, however, is that the Board should break with its current approach, although no party in this case has asked us to do so. Our colleague finds the decision today to be "a tragic example of the problems fostered by the *Lutheran Heritage [Village]* standard"—which, he suggests, has left employers afraid of articulating work rules (to the detriment of employees, patient safety, and a wide range of legitimate employer interests). He then proposes a new stand-

[5] Although the General Counsel contends generally that all of the provisions in the Code are unlawful, he does not specifically except to the judge's finding regarding part 1 of par. 6.

[6] The same unlawfully overbroad language in the Code's introductory paragraph prohibiting conduct that "impedes harmonious interactions and relationships" was used in both Antilla's and Brandt's termination forms. The General Counsel, however, does not contend that the discharges were unlawful because of the reference to the invalid rules. Accordingly, we do not analyze the discharges under *Continental Group*, 357 NLRB 409 (2011).

[7] See, e.g., *Claremont Resort & Spa,* 344 NLRB 832, 832 fn. 4 (2005) (finding unlawful a rule prohibiting "[n]egative conversations about [employees] and/or managers").

We do not, however, find par. 5's prohibition on impugning employees' or physicians' "moral character" to be unlawful, as it would not reasonably be interpreted as prohibiting protected conversations.

[8] In our colleague's view, the rules are lawful under *Lutheran Heritage Village* because the Respondent's employees necessarily would understand that the rules were intended to promote patient care "without regard to any employee's potential exercise or non-exercise of NLRA protected rights." But, for the reasons we have suggested, the rules have a reasonable tendency to chill the exercise of Sec. 7 rights.

That a rule is intended to promote patient care does not mean that it is not overbroad, or that it cannot be applied—perhaps in the name of patient care—to punish employees' protected concerted activity. The Supreme Court has made clear that a hospital rule adopted and defended in the interest of patient care may nevertheless violate the Act. See *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 496–497 (1978). See also *Presbyterian St. Luke's Medical Center v. NLRB*, 723 F.2d 1468, 1474 (10th Cir. 1983) (invalidating, as overbroad, hospital's rule that included statement that "any activity which is disruptive to the care of the patient or atmosphere of patient care will not be tolerated"). Although he minimizes the significance of the possibility, our colleague acknowledges that "[a]t some future time, an employee might engage in protected activity that could violate one of the rules in dispute here." Employees contemplating such activity—for example, pursuing a workplace issue even though it "precipitated some interpersonal conflict" (in our colleague's words) or "criticizing the 'professional capabilities'" of a physician or coworker" who affected working conditions—might well be discouraged from doing so. The real possibility of such a chilling effect suffices to make the rule overbroad.

ard that would shift the focus of the Board's inquiry away from NLRA-protected rights and toward employer interests. With respect, our colleague's critique is misplaced—it misconstrues the underlying facts of this case and the actual impact of our decision today. Moreover, his suggested new approach would provide no greater clarity in the law, and would potentially undermine the essential protections of the Act. Accordingly, we have no difficulty in deciding today to adhere to the Board's established standard for assessing facial challenges to employer rules.

A.

We begin by rejecting the dissent's opening premise that there is a link between Board doctrine and the death of a baby. Nothing we hold today, and nothing in the *Lutheran Heritage Village* standard, has any connection to the tragedy in the background of this case or to the risk of similar incidents in the future. Indeed, our dissenting colleague has chosen a particularly dubious case in which to expound upon the supposedly paralyzing limitations that *Lutheran Heritage Village* can impose on employers seeking to promulgate work rules targeting offensive or unsafe workplace behavior. If anything, the lesson of our decision today is just the opposite.

The Respondent's "Code of Conduct for Surgical Services and Perianesthesia" was adopted well before the incident our colleague seizes on, not in response to it. The Code, in other words, was firmly in place when the incident occurred (and did not prevent it). Today's decision, in turn, largely leaves the Code in place. The General Counsel did not challenge the Code's statement of "intention . . . to foster effective working relationships among all employee and physicians," its directive that "[s]uch relationships must be based upon mutual respect to avoid disruption of patient care or to hospital operations," or its prohibition of "[c]onduct . . . that is inappropriate or detrimental to patient care o[r] Hospital operations." The Board, in turn, is upholding most of the challenged provisions in the Code, including prohibitions against (1) "[w]illful and intentional threats, intimidation, harassment, humiliation, or coercion of employees, physicians, patients or visitors;" (2) "[p]rofane and abusive language directed at employees, physicians, patients or visitors;" (3) "[b]ehavior that is rude, condescending or otherwise socially unacceptable;" (4) "[i]ntentional misrepresentation of information;" and (5) "[b]ehavior that is disruptive to a safe and healing environment."[9]

Moreover, the two hospital staff members whose discharges are at issue here were *not* fired for violations of the Code, and the Board is finding their discharges *lawful*. Nothing about today's decision will change the hospital's ability to fire employees in the future for the type of conduct in question. Indeed, even if the staff members had been fired for violations of Code provisions that were found unlawful, the discharges themselves might nevertheless have been lawful under the Board's 2011 decision in *Continental Group*, supra, which clarified the approach to employer liability for discipline based on unlawfully overbroad rules.[10]

In short, this case largely illustrates that *Lutheran Heritage Village* is no obstacle to a hospital employer seeking to promote safe patient care by legitimately regulating employees' on-the-job interactions.

B.

If this case is demonstrably *not* a "tragic example of the problems fostered by the *Lutheran Heritage [Village]* standard," then it is far from clear why the Board should revisit the standard here. As noted above, no party has asked us to do so, and no Federal court of appeals has rejected the standard in the 12 years during which the Board regularly has applied it. Indeed, the courts have applied *Lutheran Heritage Village* themselves, even striking down certain employer rules that had been upheld by the Board.[11] We are not persuaded that, for more

[9] The Respondent has not challenged the judge's finding that two other Code provisions were unlawful: (1) the prohibition against "[v]erbal comments or physical gestures directed at others that exceed the bounds of fair criticism; and (2) the prohibition against "[b]ehavior . . . that is counter to promoting teamwork." The legality of those Code provisions thus is not before us.

[10] *Continental Group* explained that the Board had "long adhered to and applied the principle that discipline imposed pursuant to an unlawfully overbroad rule is unlawful," but that it was now "appropriate to set limits on its application." 357 NLRB 409, 410. Accordingly, the Board held that:

> [D]iscipline imposed pursuant to an unlawfully overbroad rule violates the Act in those situations in which an employee violated the rule by (1) engaging in protected conduct or (2) engaging in conduct that otherwise implicates the concerns underlying Section 7 of the Act. Nevertheless, an employer will avoid liability . . . if it can establish that the employee's conduct actually interfered with the employee's own work or that of other employees or otherwise actually interfered with the employer's operations, and that the interference, rather than violation of the rule, was the reason for the discipline.

357 NLRB 409, 412. Thus, "it is not unlawful for an employee to discipline an employee pursuant to an overbroad rule, in situations where the employee's conduct is not similar to conduct protected by the Act in the manner" explained in the decision. Id. See, e.g., *Flex Frac Logistics, LLC*, 360 NLRB No. 120 (2014) (upholding discharge pursuant to overbroad rule).

[11] See, e.g., *Flex Frac Logistics, LLC v. NLRB,* 746 F.3d 205, 209 (5th Cir. 2014) (enforcing Board's finding that rule was unlawful); *International Union, UAW v. NLRB*, 520 F.3d 192, 197 (2d Cir. 2008) (reversing Board's finding that rule was lawful); *Cintas Corp. v. NLRB*, 482 F.3d 463, 467–470 (D.C. Cir. 2007) (enforcing Board's finding that rule was unlawful); *Guardsmark, LLC v. NLRB*, 475 F.3d 369,

than a decade, the Board and the courts have been engaged in an analytical exercise that is somehow contrary to the Act and Supreme Court precedent. Nor do we think that our colleague has offered a compelling alternative to the current standard: the test he proposes has a weaker analytical foundation and would be more difficult to apply. In this sometimes difficult area of labor law, the Board should not take a step backward.

1.

The crux of the dissent is its claim—citing the Supreme Court's *Republic Aviation* decision[12]—that the Board must assess all employer rules by applying a balancing test that weighs employees' particular Section 7 interests against the employer's particular business justifications. The First Circuit, however, has explained that "[n]othing in *Republic Aviation* compel[s] the Board to apply a balancing test" in cases like this one and that "[w]hile the Board could have chosen to structure its rule differently and engage in a balancing analysis, [the courts] owe[] deference to its decision not to do so." [13] The District of Columbia Circuit, meanwhile, has endorsed the Board's "focus[] on the text of the challenged rule," explaining that the Board is entitled to judicial deference in its interpretation of Section 8(a)(1) when it "'faithfully applies [its] standard and adequately explains the basis for its conclusion.'"[14]

More broadly, our colleague insists that *Lutheran Heritage Village* takes no account of the "legitimate justifications of particular policies, rules and handbook provisions." This claim reflects a fundamental misunderstanding of the Board's task in evaluating rules that are alleged to be unlawfully *overbroad*. As the *Lutheran Heritage Village* Board explained, quoting the Board's 1998 decision in *Lafayette Park Hotel*, "to determine whether the mere maintenance of certain work rules violates Section 8(a)(1) of the Act, 'the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights.'"[15] The courts, as explained, have endorsed that proposition.[16]

That a particular rule threatens to have a chilling effect does not mean, however, that an employer may not address the subject matter of the rule and protect his legitimate business interests. Where the Board finds a rule unlawfully overbroad, the employer is free to adopt a more narrowly tailored rule that does not infringe on Section 7 rights. (The courts have recognized this fact[17]—which surely explains why no court has viewed *Lutheran Heritage Village* as our dissenting colleague does.) When, in contrast, the Board finds that a rule is *not* overbroad—that employees would not "reasonably construe the language to prohibit Section 7 activity" (in the *Lutheran Heritage Village* formulation)– it is typically because the rule is tailored such that the employer's legitimate business interest in maintaining the rule will be sufficiently apparent to a reasonable employee.[18] Here, too, the *Lutheran Heritage Village* standard demonstrably does take into account employer interests.

It is odd, meanwhile, that our colleague invokes a District of Columbia Circuit decision (*Adtranz*, supra) to criticize the *Lutheran Heritage Village* standard even though the *Lutheran Heritage Village* Board itself explicitly and repeatedly relied upon the court's decision to

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378–380 (D.C. Cir. 2007) (reversing Board's finding that rule was lawful).

[12] *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945) (upholding Board's finding that employer rules prohibiting solicitation and distribution of literature were unlawful).

[13] *NLRB v. Northeastern Land Services, Ltd.*, 645 F.3d 475, 483 (1st Cir. 2011). In *Republic Aviation*, the Supreme Court emphasized the Board's broad discretion to interpret and administer the National Labor Relations Act:

> [T]hat Act left to the Board the work of applying the Act's generally prohibitory language in the light of the infinite combination of events which might be charged as violative of its terms. Thus a 'rigid scheme of remedies' is avoided and administrative flexibility within appropriate statutory limitations obtained to accomplish the dominant purpose of the legislation. . . . [T]hat purpose is the right of employees to organization for mutual aid without employer interference.

324 U.S. at 798. Our dissenting colleague argues that the First Circuit's decision is incorrect, but we find his arguments unpersuasive for the same reasons that we reject his general position here. As we have pointed out, meanwhile, no Circuit has rejected *Lutheran Heritage Village* since it was decided in 2004. Insofar as our colleague argues, in the alternative, that the Board should adopt his position even if not compelled to do so, we decline. Our colleague's approach is not demonstrably superior to that reflected in current Board law.

[14] *Guardsmark*, supra, 475 F.3d at 374. In *Guardsmark*, the District of Columbia Circuit rejected the argument that the absence of evidence of prior enforcement against Sec. 7 activity favored upholding an employer's challenged rule. The court explained that in *Aroostook County Regional Ophthalmology Center v. NLRB*, 81 F.3d 209 (D.C. Cir. 1996), and in *Adtranz ABB Daimler-Benz Transportation v. NLRB*, 253 F.3d 10 (D.C. Cir. 2001), it had "discuss[ed] lack of enforcement," but "d[id] so only after first concluding that the challenged rules were not likely to chill section 7 activity and that their mere maintenance was thus not an unfair labor practice." 475 F.3d at 375–376.

[15] 343 NLRB at 646, quoting *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999).

[16] See, e.g., *Cintas Corp.*, supra, 482 F.3d at 467–468. See also *Double Eagle Hotel & Casino v. NLRB*, 414 F.3d 1249, 1258–1259 (8th Cir. 2005) (quoting *Lafayette Park Hotel*, supra, with approval and upholding principle that discharge pursuant to overbroad rule is unlawful).

[17] See, e.g., *Flex Frac*, supra, 746 F.3d at 210 fn. 4; *Northeastern Land Services*, 645 F.3d at 483; *Cintas Corp.*, 482 F.3d at 378. Accord: *Beth Israel Hospital*, supra, 437 U.S. at 502 (observing that in invalidating a hospital's work rule, the "Board ha[d] not foreclosed the hospital from imposing less restrictive means of regulating organizational activity more nearly directed toward the harm to be avoided").

[18] See, e.g., *First Transit, Inc.*, 360 NLRB No. 72, slip op. at 2–3 (2014).

find that a rule prohibiting "abusive language" was not unlawful on its face.[19] This paradox illustrates another striking aspect of our colleague's position here. He presents the *Lutheran Heritage Village* standard as overly–indeed, impermissibly–protective of employees' Section 7 rights when the Board's decision actually gave greater weight than prior decisions to employers' interests. *Lutheran Heritage Village*, of course, was decided by a divided Board in 2004, with the dissenting Board members (Members Liebman and Walsh) arguing that the majority had "[i]gnored the employees' side of the balance" and had retreated from a broad application of the principle announced in *Lafayette Park Hotel*.[20] Academic commentators, too, saw *Lutheran Heritage Village* as a retrenchment, not an expansion of Section 7 rights.[21] Even so, one commentator argued that the decision reflected a permissible policy judgment by the Board, given its "discretion to set the level of appropriate protection [of Section 7 rights] to weigh . . . legitimate employer interests."[22] Our colleague takes the diametrically opposite view of *Lutheran Heritage Village*—that it subordinates employer interests to Section 7 rights and that it is not a permissible policy choice by the Board. We reject that view, for the reasons we have explained.

2.

Even if the dissent's argument were simply that the Board, while permitted to adopt the *Lutheran Heritage Village* standard, should abandon it for a better approach, our colleague has failed to articulate one. Whatever the flaws in current law might be, the shortcomings in the dissent's standard are glaringly apparent.

Certainly, cases involving allegedly overbroad employer rules and implicating the *Lutheran Heritage Village* standard may raise difficult issues, complicated, too, by the need to harmonize the Board's decisions over time. But this challenge is not a function of the Board's legal standard. Rather, it is inherent in the remarkable number, variety, and detail of employer work rules (and the larger documents in which they appear), drafted with differing degrees of skill and levels of legal sophistication.[23] Already 30 years ago, one legal scholar described the "bureaucratization of work" as having "enmeshe[d] the worker in a 'web of rules.'"[24] This phenomenon, whatever drives it, is largely out of the Board's hands. As the dissent acknowledges, "[n]othing in the [National Labor Relations Act] requires employers to adopt policies, rules and handbook provisions." Our colleague insists, rather, that the "broader premise of *Lutheran Heritage* . . . is the notion that employees are better served by *not* having employment policies, rules and handbooks [emphasis in original]." There is no basis in *Lutheran Heritage Village* or its progeny for that claim. What the decisions demonstrate is that employers who adopt policies, rules and handbooks should take into account employees' rights under the Act—as many employers surely do.[25] This need is hardly new. Decades before *Lutheran Heritage Village*, the Board had found that particular employer rules violated the Act (as *Republic Aviation*, decided in 1945, indicates). Nor has the Board's jurisprudence, before or after *Lutheran Heritage Village*, had any apparent effect on the adoption and maintenance of employer rules as a general matter.

In place of the current standard, the dissent offers a novel balancing test that would be harder to apply, while

[19] *Lutheran Heritage Village*, supra, 343 NLRB at 647.

[20] Id., at 650 (dissent).

[21] See, e.g., Michael C. Harper, Judicial Control of the National Labor Relations Board's Lawmaking in the Age of Chevron and Brand X, 89 Boston U. L. Rev. 189, 229–233 (2009); William R. Corbett, The Narrowing of the National Labor Relations Act: Maintaining Workplace Decorum and Avoiding Liability, 27 Berkeley J. Emp. & Lab. L. 23, 41–45 (2006). Professor Harper writes that *Lutheran Heritage* Village "limited . . . the Board's previous pronouncement in Lafayette Park Hotel that an employer may commit a section 8(a)(1) violation by maintaining a work rule that, although not explicitly directed at protected activity, might chill employees' exercise of their section 7 rights." 89 Boston U. L. Rev. at 230 (fn. omitted). In Professor Corbett's view, "[b]y accepting the D.C. Circuit's Adtranz analysis, the Board majority clearly diverged from its recent precedent analyzing employer rules prohibiting workplace conduct and communications." 27 Berkeley J. Emp. & Lab. L. at 43.

[22] Harper, supra, 89 Boston U. L. Rev. at 232.

[23] Our dissenting colleague compares and contrasts the Board's decisions in various rules cases, arguing that the *Lutheran Heritage Village* standard "has led to arbitrary results." But each challenged rule must be analyzed based on its own language and context, not by "reading particular phrases in isolation," *Lutheran Heritage Village*, supra, 343 NLRB at 646, or by purporting to see clear distinctions where none exist. As the Supreme Court observed in a different context under the Act, "[h]owever difficult the drawing of lines more nice than obvious, the statute compels the task." *Electrical Workers Local 761 v. NLRB*, 366 U.S. 667, 674 (1961). The dissent seems to imagine a "quick, definitive formula as a comprehensive answer" to the problem of analyzing employer rules, but none is apparent to us. Id. Here, as in other areas of labor law, the Board is obligated to bring its experience to bear "on the complexities of the subject which is entrusted to [its] administration," *Republic Aviation*, supra, 324 U.S. at 800, and to deal with "an infinite variety of specific situations." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

[24] Matthew W. Finkin, *The Bureaucratization of Work: Employer Policies and Contract Law*, 1986 Wis. L. Rev. 733, 742 (1986).

[25] See generally Robert A. Gorman & Matthew W. Finkin, *Labor Law: Analysis and Advocacy* §8.2 (2013) (offering "practice points" to employers for drafting rules). To be sure, the Board does not affirmatively police employer rules. The Board's procedures are set in motion only if an unfair labor practice charge is filed by a private person and is determined to have merit by the independent General Counsel. See generally *NLRB v. Food & Commercial Workers Local 23*, 484 U.S. 112, 118–122 (1987) (describing Board procedures). It may be that some employers doubt that their rules will ever be scrutinized by the Board--and their judgment may be correct.

tilted against Section 7 rights in a way that departs from traditional jurisprudence under Section 8(a)(1) of the Act. The Supreme Court's decisions illustrate that where employees' Section 7 rights are implicated, and the Board applies a balancing test, the issue is whether there is a "countervailing [employer] interest that outweighs the exercise of [Section] 7 rights."[26] Indeed, the District of Columbia Circuit has squarely placed on the employer the "obligation to demonstrate its inability to achieve [its] goal with a more narrowly tailored rule that would not interfere with protected activity."[27] Our colleague's proposed test, in contrast, puts a clear thumb on the scale to tilt the balance against Section 7 rights: "[A] facially neutral work requirement should be declared unlawful *only if the justifications are outweighed by the adverse impact* [emphasis added] on Section 7 activity." We have already explained why the authority cited by our colleague for this proposition (the District of Columbia Circuit's decision in *Aroostook County Regional Ophthalmology Center*, supra) does not support his view at all.

It seems highly unlikely, meanwhile, that application of the dissent's test would, in its words, "promote certainty, predictability and stability" in any desirable way. Our colleague would have the Board "engage in a more refined evaluation of [the] significant variables," which includes (1) "differentiat[ing] among different types of NLRB-protected activity" and assessing the weight of each; (2) "mak[ing] reasonable distinctions among the justifications associated" with a challenged rule and giving them varying weight; (3) "mak[ing] reasonable distinctions between different industries and work settings;" and (4) "tak[ing] into consideration any specific events that might be relevant." This "refined evaluation of the significant variables" must be conducted, according to our colleague, "[i]n the complex assortment of work settings throughout the United States" which feature "a near-endless variety of work requirements [that] exist for important reasons."

As a practical matter, the only way that certainty, predictability and stability might result from such a complex exercise would be if adoption of the dissent's test meant that facial challenges to employer rules would rarely succeed. But to effectively limit the Act's reach to the unlawful *application* of facially neutral rules would leave the potential chilling effect of such rules on protected, concerted activity unaddressed. That result is unacceptable if the Act is to be properly enforced.

For all of these reasons, we choose instead the option of adhering to current law, consistent with the judicial decisions applying and endorsing the *Lutheran Heritage Village* standard.

ORDER

The National Labor Relations Board orders that the Respondent, William Beaumont Hospital, Royal Oak, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining rules which employees would reasonably construe to discourage engaging in union or other protected concerted activities, and specifically the following provisions of the Respondent's Code of Conduct for Surgical Services and Perianesthesia:

> (i) The portion of the introductory paragraph prohibiting conduct that "impedes harmonious interactions and relationships" (both as maintained in the Code and as applied on Performance Improvement Plan forms);
>
> (ii) the paragraph prohibiting "[v]erbal comments or physical gestures directed at others that exceed the bounds of fair criticism";
>
> (iii) the paragraph prohibiting "[n]egative or disparaging comments about the professional capabilities of an employee or physician made to employees, physicians, patients, or visitors"; and
>
> (iv) the prohibition on "[b]ehavior that is . . . counter to promoting teamwork."

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the prohibitions set forth in paragraph 1(a), above, or revise them to remove any language that prohibits or may reasonably be read to prohibit conduct protected by Section 7 of the Act.

(b) Notify all current employees that those prohibitions have been rescinded or, if they have been revised, provide them a copy of the revised rules.

(c) Within 14 days after service by the Region, post at its facility in Royal Oak, Michigan, copies of the attached notice marked "Appendix."[28] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized

[26] *Eastex, Inc. v. NLRB*, 437 U.S. 556, 563 (1978).

[27] *Guardsmark*, supra, 475 F.3d at 380.

[28] 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."

representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places 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. If 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 November 15, 2012.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 7 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

3. Substitute the attached notice for that of the administrative law judge.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. April 13, 2016

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, concurring in part and dissenting in part.

With few exceptions, people go to the hospital because they need to, not because they want to. Whatever an individual patient's condition might be, it is often serious, sometimes critical—even a matter of life or death. Hospitals and those who work there bear a heavy obligation to make patient care their paramount concern.

I believe the Board majority disregards these important considerations in finding that the Respondent, William Beaumont Hospital (the Hospital), violated Federal law by maintaining two rules in its Code of Conduct. These rules (a) prohibit conduct that "impedes harmonious interactions and relationships," and (b) prohibit "negative or disparaging comments about the . . . professional capabilities of an employee or physician to employees, physicians, patients, or visitors."

I respectfully dissent from my colleagues' finding that these rules constitute unlawful interference with protected rights in violation of Section 8(a)(1) of the National Labor Relations Act (NLRA or Act). In my view, the rules are supported by substantial justifications unrelated to the NLRA. They predictably would have a minimal impact, if any, on the exercise of rights afforded by NLRA Section 7, which protects (among other things) "concerted" activities that employees engage in for the "purpose" of "mutual aid or protection."[1] Most importantly, as the Board and the courts have recognized, the justifications underlying these rules are especially important in a hospital. When the NLRA was adopted and amended to cover hospital work settings, Congress was not seeking to end "harmonious interactions" in hospitals. Nor was it the intent of Congress to require hospital patients and family members to hear "negative" and "disparaging comments" about the "professional capabilities" of doctors and nurses.

More generally, I believe the time has come for the Board to abandon *Lutheran Heritage Village-Livonia (Lutheran Heritage)*,[2] which renders unlawful all employment policies, work rules and handbook provisions whenever any employee "would reasonably construe the language to prohibit Section 7 activity." This aspect of the *Lutheran Heritage* standard applies to policies, rules and handbook provisions that do not expressly restrict Section 7 activity, were not adopted in response to NLRA-protected activity, and have not been applied to restrict such activity.[3]

[1] For a detailed discussion of the elements of protected Sec. 7 activity, see *Fresh & Easy Neighborhood Market, Inc*., 361 NLRB No. 12, slip op. at 11–23 (2014) (Member Miscimarra, concurring in part and dissenting in part).

[2] 343 NLRB 646 (2004).

[3] This aspect of *Lutheran Heritage* is sometimes called "prong one" because the Board in *Lutheran Heritage* stated:

> If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) *employees would reasonably construe the language to prohibit Section 7 activity*; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

343 NLRB at 647 (emphasis added). For ease of reference, I refer to *Lutheran Heritage* prong one as "*Lutheran Heritage*." Similarly, I use the term "facially neutral" to describe policies, rules and handbook provisions that do not expressly restrict Sec. 7 activity, were not adopted in response to NLRA-protected activity, and have not been applied to restrict NLRA-protected activity.

I have previously expressed my disagreement with the first prong of the *Lutheran Heritage* standard. See, e.g., *Lily Transportation Corp.*,

This case presents a tragic example of the problems fostered by the *Lutheran Heritage* standard. When a hospital obstetrics team is caring for a mother giving birth, people would naturally want to have "harmonious interactions and relationships" among the responsible physicians and nurses. In this case, a full-term newborn baby unexpectedly died, and the ensuing investigation showed the infant's death resulted in part from inadequate communication among Hospital personnel. Separately, when a highly regarded labor and delivery nurse resigned, the Hospital learned that two delivery nurses, Jeri Antilla and DeAnna Brandt, had been "mean," "nasty," "intimidating," "negative" and "bullying." Antilla and Brandt were fired, and my colleagues and I agree these discharges were lawful.

Despite this context, my colleagues find that the Hospital violated Federal law by maintaining a rule against conduct that impedes "harmonious interactions and relationships." My colleagues apply the rudimentary analysis required under *Lutheran Heritage* and conclude that the mere existence of this rule violates Section 8(a)(1) because (i) a Hospital employee would reasonably construe it as prohibiting angry workplace confrontations, (ii) the employee might be engaged in an angry workplace confrontation at some unspecified future time, and (iii) the angry confrontation, depending on its subject matter and the involvement of other employees, may constitute NLRA-protected concerted activity. True, the NLRA sometimes protects conduct that may not be "harmonious."[4] However, it defies common sense to find that a hospital violates Federal law merely by stating that physicians and nurses must promote "harmonious interactions and relationships."

Under *Lutheran Heritage*, reasonable work requirements have become like Lord Voldemort in *Harry Potter*: they are ever-present but must not be identified by name.[5] Nearly all employees in every workplace aspire to have "harmonious" dealings with their coworkers. Nobody can be surprised that a hospital, of all workplaces, would place a high value on "harmonious interactions and relationships." There is no evidence that the requirement of "harmonious" relationships actually discouraged or interfered with NLRA-protected activity in this case. Yet, in the world created by *Lutheran Heritage*, it is unlawful to state what virtually every employee desires and what virtually everyone understands the employer reasonably expects.

I will resist the temptation to launch immediately into an exhaustive recitation of the problems associated with the *Lutheran Heritage* "reasonably construe" standard. However, I believe *Lutheran Heritage* should be overruled by the Board and, if not, repudiated by the courts. In my view, multiple defects are inherent in the *Lutheran Heritage* test:

- The "reasonably construe" standard entails a single-minded consideration of NLRA-protected rights, without taking into account the legitimate justifications of particular policies, rules and handbook provisions. This is contrary to Supreme Court precedent and to the Board's own cases.
- The *Lutheran Heritage* standard stems from several false premises that are contrary to our statute, the most important of which is a misguided belief that unless employers correctly anticipate and carve out every possible overlap with NLRA coverage, employees are best served by not having employment policies, rules and handbooks. One can hardly suggest that it benefits employees to deny them general guidance regarding what is required of them and what standards of conduct they can expect or demand from coworkers. In this respect, *Lutheran Heritage* requires perfection that literally has become the enemy of the good.
- In many cases, *Lutheran Heritage* invalidates facially neutral work rules *solely* because they are ambiguous in some respect. This requirement of linguistic precision stands in sharp contrast to the treatment of "just cause" provisions, benefit plans, and other types of employment documents, and *Lutheran Heritage* fails to recognize that many ambiguities are inherent in the NLRA itself. See fns. 29, 30 and 31, infra.

362 NLRB No. 54, slip op. at 1 fn. 3 (2015); *Conagra Foods, Inc.*, 361 NLRB No. 113, slip op. at 8 fn. 2 (2014); *Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 10 fn. 3 (2014), affd. sub nom. *Three D, LLC v. NLRB*, -- F.3d --, 2015 WL 6161477 (2d Cir. Oct. 21, 2015). In this opinion, I only address *Lutheran Heritage* prong one; I do not reach or pass on other aspects of that decision.

[4] An employee's disagreeable or confrontational behavior in the course of Sec. 7 activity loses the Act's protection if it rises to the level of "opprobrious conduct." *Atlantic Steel Co*., 245 NLRB 814, 816 (1979). However, "labor relations often involve heated disputes 'likely to engender ill feelings and strong responses,'" which means "an employee's right to engage in concerted activity 'permit[s] some leeway for impulsive behavior.'" *Inova Health System v. NLRB*, 795 F.3d 68, 86 (D.C. Cir. 2015) (quoting *Kiewit Power Constructors*, 355 NLRB 708, 711 (2010), enfd. 652 F.3d 22 (D.C. Cir. 2011)); see *NLRB v. Ben Pekin Corp*., 452 F.2d 205, 207 (7th Cir. 1971) (per curiam).

[5] In the *Harry Potter* series, authored by J. K. Rowling, Lord Voldemort (whose name, at birth, was Tom Marvolo Riddle) was the archenemy of Harry Potter and was so feared that almost no witch or wizard dared speak his name, referring to him instead as "You-Know-Who" or "He-Who-Must-Not-Be-Named." See Wikipedia, Lord Voldemort (https://en.wikipedia.org/wiki/Lord_Voldemort).

- The *Lutheran Heritage* "reasonably construe" test improperly limits the Board's own discretion. It renders unlawful every policy, rule and handbook provision an employee might "reasonably construe" to prohibit *any* type of Section 7 activity. It does not permit the Board to recognize that some types of Section 7 activity may lie at the periphery of our statute or rarely if ever occur. Nor does *Lutheran Heritage* permit the Board to afford *greater* protection to Section 7 activities that are deemed central to the Act.
- *Lutheran Heritage* does not permit the Board to differentiate between and among different industries and work settings, nor does it permit the Board to take into consideration specific events that may warrant a conclusion that particular justifications outweigh a potential future impact on some type of NLRA-protected activity.
- Finally, the Board's *Lutheran Heritage* "reasonably construe" test has defied all reasonable efforts to make it yield predictable results. It has been exceptionally difficult to apply, which has created enormous challenges for the Board and courts and immense uncertainty and litigation for employees, unions and employers.

This case presents an opportunity for the Board to take a step in the direction of conducting a more even-handed evaluation of employment policies, work rules and handbook provisions. By declining to take this step, the Board is disadvantaging all parties that have struggled mightily in this difficult area. This includes employees who, increasingly, may find themselves without guidance about what is expected of them in the workplace and what types of conduct may result in discipline or discharge.

What standard should replace *Lutheran Heritage* to evaluate facially neutral rules? The Board must carry out what the Supreme Court has repeatedly described as the Board's duty when determining whether particular work requirements unlawfully interfere with NLRA-protected rights. The Board has the "duty to strike the *proper balance* between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy."[6] Therefore, when evaluating a facially neutral policy, rule or handbook provision, I believe the Board must evaluate at least two things: (i) the potential adverse impact of the rule on NLRA-protected activity, *and* (ii) the legitimate justifications an employer may have for maintaining the rule. The Board must engage in a meaningful balancing of these competing interests, and a facially neutral rule should be declared unlawful only if the justifications are outweighed by the adverse impact on Section 7 activity. When engaging in this analysis, the Board should differentiate among different types of NLRA-protected activities (some of which might be deemed central to the Act and others more peripheral), and the Board must recognize those instances where the risk of intruding on NLRA rights is "comparatively slight."[7] Similarly, the Board should distinguish between substantial justifications—those that have direct, immediate relevancy to employees or the business—and others that might be regarded as having more peripheral importance. The Board should make reasonable distinctions between or among different industries and work settings, and it should take into consideration particular events that might be associated with a specific rule. Finally, the Board may find that an employer may lawfully *maintain* a particular rule, notwithstanding some possible impact on a type of protected Section 7 activity, but conclude that the rule cannot lawfully be *applied* against employees who engage in NLRA-protected conduct.[8]

Paradoxically, *Lutheran Heritage* is too simplistic at the same time it is too difficult to apply. Its single-minded focus precludes reasonable distinctions that the Board should be making in this important area. The Board's responsibility is to discharge the "special function of applying the general provisions of the Act to the complexities of industrial life."[9] Though well-intended, the *Lutheran Heritage* standard prevents the Board from giving meaningful consideration to the real-world "complexities" associated with many employment policies, work rules and handbook provisions.

Based on these considerations, the Board should overrule *Lutheran Heritage* and find that the Hospital did not violate our statute merely by maintaining the disputed

[6] *NLRB v. Great Dane Trailers, Inc*., 388 U.S. 26, 33–34 (1967) (emphasis added). See also *Republic Aviation v. NLRB,* 324 U.S. 793, 797–798 (1945) (referring to "working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments"); *NLRB v. Erie Resistor Corp*., 373 U.S. 221, 229 (1963) (referring to the "delicate task" of "weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing . . . the intended consequences upon employee rights against the business ends to be served by the employer's conduct"). See also *Banner Estrella Medical Center*, 362 NLRB No. 137, slip op. at 13–18 (2015) (Member Miscimarra, dissenting in part).

[7] *NLRB v. Great Dane Trailers, Inc*., 388 U.S. at 34.

[8] See, e.g., *Aroostook County Regional Ophthalmology Center v. NLRB*, 81 F.3d 209, 213 (D.C. Cir. 1996); *Adtranz ABB Daimler-Benz Transportation, N.A. v. NLRB*, 253 F.3d 19, 28 (D.C. Cir. 2001).

[9] *NLRB v. Erie Resistor Corp*., 373 U.S. at 236; see also *NLRB v. J. Weingarten, Inc*., 420 U.S. 251, 266–267 (1975) ("The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board.").

Code of Conduct provisions. I support the aggressive enforcement of our statute, and I do not contend that every policy, rule and handbook provision should be deemed lawful whenever there is some type of justification. Indeed, by balancing the interests described above, the Board would have greater latitude when evaluating the legality of facially neutral policies, rules and handbook provisions.

Accordingly, as explained more fully below, I respectfully dissent in relevant part from the majority's decision.[10]

Background

This case arises in a somber context. In December 2011, a full-term newborn baby died at the Hospital. An investigation concluded that the reasons for the infant's death included a lack of communication among nurses and failures to provide requested assistance. Subsequently, after a highly regarded labor and delivery nurse resigned, the Hospital learned that unnamed "senior nurses" were engaging in "bullying and intimidation." This prompted another investigation, which led to the termination of nurses Antilla and Brandt. Antilla was discharged for "mean, nasty, intimidating, and bullying behavior," and Brandt for "negative, intimidating, and bullying behavior." My colleagues and I agree that both discharges were lawful.

The Hospital's Code of Conduct identifies important justifications relevant to the two rules at issue here. The Code of Conduct states:

> It is the intention of Beaumont Hospitals to foster effective working relationships among all hospital employees and physicians in order to provide and maintain high quality and safe patient care. Such relationships must be based upon mutual respect to avoid disruption of patient care or to hospital operations.
>
> It is the expectation of hospital management that employees and physicians *promote and maintain a professional environment* in which all individual[s] are treated with dignity and respect.[11]

After this introduction, the Code of Conduct sets forth the following rules, including two provisions (italicized below) that my colleagues find unlawful:

> Conduct on the part of a Beaumont employee or physician that is inappropriate or detrimental to patient care of [sic] Hospital operation or *that impedes harmonious interactions and relationships* will not be tolerated. Transgressors shall be subject to appropriate remedial or corrective action.
>
> Improper conduct or inappropriate behavior or defiance in the following example, which includes but [is] not limited to the following:
>
> [1] Willful and intentional threats, intimidation, harassment, humiliation, or coercion of employees, physicians, patients, or visitors.
>
> [2] Profane and abusive language directed at employees, physicians, patients or visitors.
>
> [3] Behavior that is rude, condescending or otherwise socially unacceptable. Intentional misrepresentation of information.
>
> [4] Verbal comments or physical gestures directed at others that exceed the bounds of fair criticism.
>
> [–] Unsolicited physical contact or threats of physical contact.
>
> [–] Written comments or illustrations in medical records or other official documents (except incident reports or other established hospital mechanisms for documenting and resolving concerns) that impugn the character or quality of care provided by a hospital or medical staff member.
>
> [–] Sexual innuendo or improprieties.
>
> [–] Rudeness or refusal to respond to concerns, questions, or requests regarding patient care.
>
> [5] *Negative or disparaging comments about the moral character or professional capabilities of an employee or physician made to employees, physicians, patients, or visitors*.
>
> [–] Negative or disparaging comments regarding religious, ethnic or racial background, disability or sexual orientation made to employees, physicians, patients or visitors.

[10] My colleagues and I agree with the judge's conclusion that certain rules maintained by the Hospital were lawful. No exceptions were filed to the judge's findings that certain other rules violated Sec. 8(a)(1), which means those findings are not before the Board. See fn. 40, infra. Similarly, no exceptions were filed to the judge's finding that the Hospital violated Sec. 8(a)(1) by instructing employee Deanna Brandt not to discuss with other employees the Respondent's investigation into her alleged misconduct, and I do not reach or pass on this finding.

I concur with my colleagues' conclusion that the judge properly found that the Hospital lawfully discharged employees Brandt and Jeri Antilla. However, I do not reach or pass on whether the General Counsel sustained his initial burden under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), which is to prove that protected conduct was a motivating factor in the Hospital's discharge decision. I agree with the judge and my colleagues that, even if the General Counsel satisfied this burden, the Hospital met its burden under *Wright Line* to establish that it would have discharged Brandt and Antilla without regard to their potential involvement in protected activity.

[11] Code of Conduct (emphasis added).

> [6] Behavior that is disruptive to maintaining a safe and healing environment or that is counter to promoting teamwork.[12]

None of the above rules explicitly restricts activities protected by Section 7, nor is there any allegation that any rules were promulgated in response to union activity or have been applied to restrict the exercise of Section 7 rights.

Discussion

A. It is Important to Minimize Conflict and Disruptions in Hospital Work Settings, and These Important Interests Must Be Balanced Against NLRA-Protected Rights

The Board and the courts have long recognized the public interest in protecting patients and family members from needless conflict in hospital work settings. The Supreme Court expressed this point eloquently in *NLRB v. Baptist Hospital*,[13] where the Court stated:

> Hospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity, and where the patient and his family—irrespective of whether that patient and that family are labor or management oriented—need a restful, uncluttered, relaxing, and helpful atmosphere, rather than one remindful of the tensions of the marketplace in addition to the tensions of the sick bed.[14]

In this case, I disagree with my colleagues' finding that the Hospital violated Section 8(a)(1) of the Act by maintaining rules that (a) prohibit conduct that impedes "harmonious interactions and relationships," and (b) prohibit "negative or disparaging comments about the . . . professional capabilities of an employee or physician to employees, physicians, patients, or visitors." In my view, there are two problems with my colleagues' analysis. It applies the *Lutheran Heritage* "reasonably construe" standard, which I believe should be overruled for the reasons set forth in Part B below. And it fails to give adequate consideration to the Hospital work setting here and fails to attach any weight to the compelling justifications associated with the disputed rules, as addressed in Part C below.

B. Lutheran Heritage Should Be Overruled by the Board or Repudiated by the Courts

My colleagues support their findings of illegality based on prong one of *Lutheran Heritage*, under which facially neutral policies, work rules and handbook provisions—which do not expressly restrict Section 7 activity, were not adopted in response to NLRA-protected activity, and have not been applied to restrict NLRA-protected activity—are deemed unlawful whenever any employee "would reasonably construe the language to prohibit Section 7 activity."[15] For the following reasons, I believe the *Lutheran Heritage* "reasonably construe" test should be overruled.[16]

First, the *Lutheran Heritage* "reasonably construe" standard is contrary to Supreme Court precedent because it does not permit *any* consideration of the legitimate justifications that underlie many policies, rules and handbook provisions. These justifications are often substantial, as illustrated by the instant case. More importantly, the Supreme Court has repeatedly required the Board to take these justifications into account. We recognized this in *Lafayette Park Hotel*,[17] where a five-

[12] For ease of reference, I use the same paragraph numbering utilized in the majority opinion. The unnumbered indented paragraphs appear in the Code of Conduct in the sequence set forth in the text, but they are not quoted by my colleagues.

My colleagues and I agree with the judge's finding that pars. 1, 2, and 3, and part 1 of par. 6 ("Behavior that is disruptive to maintaining a safe and healing environment") are lawful. Putting aside the two provisions at issue here (italicized in the text), the judge concluded that paragraph 4 and part 2 of paragraph 6 ("behavior that is . . . counter to promoting teamwork") were unlawful. No exceptions were filed regarding these two provisions, so their legality is not before the Board. Accordingly, I do not reach or pass on the judge's conclusions regarding these provisions.

[13] 442 U.S. 773 (1979).

[14] Id. at 783 fn. 12 (internal quotation marks omitted). The Board has similarly "recognized that the primary function of a hospital is patient care and that a tranquil atmosphere is essential to the carrying out of that function." *St. John's Hospital*, 222 NLRB 1150, 1150 (1976).

[15] 343 NLRB at 647 (quoted more fully in fn. 31, supra).

[16] Even if one applies *Lutheran Heritage*, I believe the majority cannot reasonably conclude that Hospital employees would construe the two work rules at issue here as interfering with NLRA-protected activities. Of all people, the employees of the Hospital—where successive investigations revealed that dysfunctional work relationships directly interfered with patient care and employee retention—would understand that these rules are justified by the importance of providing high-quality and safe health care and avoiding potential liability, without regard to any employee's potential exercise or non-exercise of NLRA-protected rights. See *Lafayette Park Hotel*, 326 NLRB at 825; *St. John's Hospital*, 222 NLRB at 1150. The connection between patient care and the two challenged rules is reinforced by the Code of Conduct's introductory language, which explains (among other things) that the Hospital intended through the Code to "foster effective working relationships among all hospital employees and physicians *in order to provide and maintain high quality and safe patient care*," and that such relationships "must be based upon mutual respect *to avoid disruption of patient care* . . ." (emphasis added). Accordingly, the judge properly concluded that "a reasonable reading of most of the rules shows they are unrelated to and do not prohibit Section 7 activities," and "a reasonable employee would read the rules in the context of the employment setting, a hospital, and understand the lawful purpose of the rules."

[17] 326 NLRB 824 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999).

member Board quoted the Supreme Court's decision in *Republic Aviation v. NLRB*[18] and held:

> Resolution of the issue presented by . . . contested rules of conduct involves "working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. . . . Opportunity to organize and proper discipline are both essential elements in a balanced society."[19]

Nor does *Republic Aviation* stand alone. The Supreme Court elsewhere has similarly required the Board to weigh the interests potentially advanced by a particular work requirement or restriction before the Board concludes that its potential adverse impact on employee rights warrants a finding of unlawful interference with NLRA rights. See *NLRB v. Great Dane Trailers, Inc*., 388 U.S. at 33–34 (referring to the Board's "duty to strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy"); *NLRB v. Erie Resistor Corp*., 373 U.S. at 229 (referring to the "delicate task" of "weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing . . . the intended consequences upon employee rights against the business ends to be served by the employer's conduct"). See also *Banner Estrella Medical Center*, 362 NLRB No. 137, slip op. at 13–18 (Member Miscimarra, dissenting in part). Cf. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 680–681 (1981) ("[T]he Act is not intended to serve either party's individual interest, but to foster in a neutral manner a system in which the conflict between these interests may be resolved.").

Second, *Lutheran Heritage* is contradicted by NLRB case law. For example, the Board has recognized it is lawful for an employer to adopt no-solicitation and no-distribution rules (prohibiting *all* employee solicitation—including union-related solicitation—during working time, and prohibiting *all* distribution of literature—including union-related literature—in work areas).[20] Employers may also lawfully maintain a no-access rule that prohibits off-duty employees from accessing the interior of the employer's facility and outside work areas, even if they desire access to engage in protected picketing, handbilling, or solicitation.[21] Similarly, employers have adopted "just cause" provisions and attendance requirements that cause employees to be disciplined or discharged for failing to come to work, even though employees have a Section 7 right to engage in protected strikes.[22] Each of these rules fails the *Lutheran Heritage* "reasonably construe" test because each one clearly restricts potential Section 7 activity. Yet each requirement has been upheld by the Board.

Third, in many cases involving facially neutral policies, rules and handbook provisions, the Board has engaged in a balancing of competing interests rather than strictly applying the *Lutheran Heritage* "reasonably construe" test. Indeed, in the instant case, the judge correctly reasoned that evaluating whether facially neutral work rules violate Section 8(a)(1) "requires a balancing of competing interests: the right of employees to organize or otherwise engage in protected activity and the right of employers to maintain a level of discipline in the workplace." As noted above, in *Lafayette Park Hotel* the Board attached weight to the justifications underlying particular work rules in addition to their potential adverse

[18] 324 U.S. 793 (1945).

[19] 326 NLRB at 825 (quoting *Republic Aviation v. NLRB*, 324 U.S. at 797–798). The Board in *Lafayette Park Hotel* stated that "[i]n determining whether the mere maintenance of [disputed] rules violates Section 8(a)(1), the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights." However, Member Hurtgen observed that a rule may reasonably chill the exercise of Sec. 7 rights but still be justified by significant employer interests. 326 NLRB at 825 fn. 5. Member Hurtgen noted that no-solicitation rules restrict the exercise of Sec. 7 rights (by subjecting employees to discipline or discharge if they engage in solicitation—including union solicitation—during working time), but these restrictions have been deemed lawful based on Board precedent dating back more than 70 years establishing that "[w]orking time is for work" and that the employer's interest in production outweighs the Sec. 7 right of employees to engage in solicitation during working time. *Peyton Packing Co.,* 49 NLRB 828, 843 (1943), enfd. 142 F.2d 1009 (5th Cir. 1944), cert. denied 323 U.S. 730 (1944). See also fn. 48, infra.

[20] See *Our Way, Inc*., 268 NLRB 394 (1983); *Essex International*, 211 NLRB 749 (1974); *Stoddard-Quirk Mfg. Co*., 138 NLRB 615, 621 (1962); *Peyton Packing*, 49 NLRB at 843. See also discussion in fn. 46 supra.

[21] See *GTE Lenkurt, Inc.,* 204 NLRB 921, 921–922 (1973); *Tri-County Medical Center,* 222 NLRB 1089 (1976). In *GTE Lenkurt*, the Board upheld an employee handbook no-access provision limiting the right of off-duty employees to be on the premises. Stating that determining the legality of the no-access rule "requires a balancing of the employees' Section 7 rights against the employer's private property rights," the Board held that the rule was lawful. 204 NLRB at 921–922. In *Tri-County*, the Board reiterated that a no-access rule applicable to off-duty employees will be lawful, provided that the rule "(1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity." 222 NLRB at 1089.

[22] See, e.g., *Health Management, Inc.*, 326 NLRB 801 (1998) (employee lawfully discharged for just cause for continuing attendance and tardiness problems); *Cambridge Chemical Corp.,* 259 NLRB 1374 (1981) (same); *South Carolina Industries*, 181 NLRB 1031 (1970) (same).

impact on Section 7 rights.[23] In *Caesar's Palace*,[24] the Board upheld a confidentiality rule pertaining to a workplace investigation, even though the rule limited the right of employees to engage in NLRA-protected discussions. The Board's analysis in *Caesar's Palace* has equal application here:

> We agree with the judge that employees have a Section 7 right to discuss discipline or disciplinary investigations involving fellow employees. We also agree that the Respondent's rule prohibiting discussion of the ongoing drug investigation adversely affected employees' exercise of that right. *It does not follow however that the Respondent's rule is unlawful and cannot be enforced*. The issue is *whether the interests of the Respondent's employees in discussing this aspect of their terms and conditions of employment outweigh[] the Respondent's asserted legitimate and substantial business justifications*.[25]

Again, although *Lutheran Heritage* dispensed with any consideration of business justifications, the Board upheld a no-photography rule in a subsequent case, *Flagstaff Medical Center*,[26] in part because the rule implicated "weighty" interests associated with patient confidentiality.[27] In all these decisions, the Board has deemed it necessary, when evaluating the legality of one or more work rules, to consider both Section 7 rights *and* the business justifications associated with a particular rule. As the judge properly recognized in the instant case, any different approach "would ignore the employer's rights in the *Lafayette* balancing test and consider only potential employee rights."

Fourth, *Lutheran Heritage* is predicated on false premises that are inconsistent with the Act and contrary to the Board's responsibility to promote certainty, predictability and stability.[28] Several considerations are relevant here:

- Because the Act protects so many potential concerted activities (including the right to refrain from such activities), a wide variety of facially neutral rules can be interpreted, under some hypothetical scenario, as a potential limitation on some type of Section 7 activity.
- *Lutheran Heritage* requires employers to eliminate all ambiguities from all policies, rules and handbook provisions that might conceivably touch on some type of Section 7 activity, but this disregards the fact that generalized provisions related to employment—including those relating to discipline and discharge—have been deemed acceptable throughout the Act's history.[29]

[23] See, e.g., 326 NLRB at 825 (observing that disputed rule "addresses legitimate business concerns"), 826 (in finding confidentiality rule lawful, observing that "businesses have a substantial and legitimate interest in maintaining the confidentiality of private information"), 827 (noting "legitimate business reasons" for rule requiring employees to secure permission before using the hotel's restaurant or cocktail lounge to entertain friends or guests).

[24] 336 NLRB 271 (2001).

[25] 336 NLRB at 272 (emphasis added) (citing *Jeannette Corp. v. NLRB*, 532 F.2d 916 (3d Cir. 1976)).

[26] 357 NLRB 659 (2011), petition for review granted in part and denied in part 715 F.3d 928 (D.C. Cir. 2013).

[27] Id. at 663. In *Flagstaff*, the Board majority upheld a rule prohibiting employees from taking photographs of patients or hospital property. The majority emphasized the "weighty" privacy interests of hospital patients and the hospital's "significant interest in preventing the wrongful disclosure of individually identifiable health information, including by unauthorized photography." Id. The majority reasoned that "[e]mployees would reasonably interpret [the hospital's] rule as a legitimate means of protecting the privacy of patients and their hospital surroundings, not as a prohibition of protected activity." Id. However, then-Member Pearce relevantly dissented because under *Lutheran Heritage* the analysis turns exclusively on how an employee would "reasonably construe" the no-photography rule in relation to NLRA-protected rights, and he reasoned that "employees would reasonably construe the rule's language to prohibit Section 7 activity." Id. at 670 (Member Pearce, dissenting in part).

[28] One of the Board's primary responsibilities under the Act is to promote labor relations stability. See, e.g., *Northwestern University*, 362 NLRB No. 167 (2015) (Board declines to exercise jurisdiction in relation to scholarship football student-athletes because doing so would not promote stability in labor relations). See also *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996) (describing "the Act's goal of achieving industrial peace by promoting stable collective-bargaining relationships"); *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362–363 (1949) ("To achieve stability of labor relations was the primary objective of Congress in enacting the National Labor Relations Act."); *NLRB v. Appleton Electric Co.*, 296 F.2d 202, 206 (7th Cir. 1961) ("A basic policy of the Act [is] to achieve stability of labor relations.").

The Supreme Court has stressed the need to provide "certainty beforehand" for employers and unions so employers can "reach decisions without fear of later evaluations labeling . . . conduct an unfair labor practice," and so a union may discern "the limits of its prerogatives, whether and when it could use its economic powers . . . , or whether, in doing so, it would trigger sanctions from the Board." *First National Maintenance Corp. v. NLRB*, 452 U.S. at 678–679, 684–686.

[29] Linguistic perfection has not been required in other types of employment provisions enforced by the Board and the courts. As I have stated elsewhere:

> It does not per se violate Federal labor law to use a general phrase to describe the type of conduct that may [result in discipline or discharge]. If it did, "just cause" provisions contained in most collective-bargaining agreements that have been entered into since the Act's adoption nearly 80 years ago would be invalid. However, "just cause" provisions have been called "an obvious illustration" of the fact that many provisions "must be expressed in general and flexible terms." More generally, the Supreme Court has stated, in reference to collective-bargaining agreements, that there are "a myriad of cases which the draftsmen cannot wholly anticipate," and "[t]here are too many people, too many problems, too many unforeseeable contingencies to make the words . . . the exclusive source of rights and duties."

- Another false premise of *Lutheran Heritage* is the notion that employers drafting facially neutral policies, rules and handbook provisions *can* anticipate and avoid all potential interpretations that may conflict with NLRA-protected activities. This disregards the fact that statutory ambiguities pervade the NLRA.[30] Even if employment policies and rules reproduced the full text of the NLRA, they will never attain a level of clarity greater than what Congress incorporated into the statute itself. Therefore, it is likely that one can "reasonably construe" even the most carefully crafted rules in a manner that prohibits some hypothetical type of Section 7 activity.[31]

The broader premise of *Lutheran Heritage*, which is even more seriously flawed, is the notion that employees are better served by *not* having employment policies, rules and handbooks. Nothing in the NLRA requires employers to adopt policies, rules and handbook provisions.[32] Moreover, employees in the United States remain generally subject to the doctrine of employment-at-will, which means employees can be discharged for any reason or no reason at any time.[33] Therefore, it would be lawful for employers to make all decisions regarding the potential discipline and discharge of employees on a case-by-case basis, where no expectations or requirements are communicated in advance. This would impose substantial hardship on employers that strive for consistency and fairness when making such decisions, and employees would not know what standards of conduct they must satisfy to keep their jobs. Also, I believe this would be irreconcilable with the Act's emphasis on stability, certainty and predictability.[34] However, this is the logi-

Triple Play Sports Bar & Grille, 361 NLRB No. 31, slip op. at 11 (Member Miscimarra, dissenting in part) (quoting *Steelworkers v. Warrior & Gulf Navigation Co*., 363 U.S. 574, 578–579 (1960); Archibald Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1491 (1959)) (other citations and internal quotation marks omitted).

Ironically, the Board itself in *Lutheran Heritage* stated: "Work rules are necessarily general in nature . . . . We will not require employers to anticipate and catalogue in their work rules every instance in which [prohibited types of speech] might conceivably be protected by (or exempted from the protection of) Section 7." 343 NLRB at 648. As illustrated by the instant case, however, the Board has lost sight of this language in applying *Lutheran Heritage*.

[30] Nobody can reasonably suggest that employers can incorporate into policies, rules and handbooks the precise contours of Sec. 7 protection when these contours have produced so much disagreement between and among the General Counsel, administrative law judges, different Board members, and the courts. See, e.g., *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB No. 12 (2014) (divided opinions regarding whether a single employee's complaint asserting statutory rights constituted protected concerted activity); *Purple Communications, Inc.*, 361 NLRB No. 126 (2014) (divided opinions regarding whether employees have a statutory right to use employer email systems for Sec. 7 purposes); *D. R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013) (court of appeals rejects Board majority's finding that arbitration agreements containing class-action waivers unlawfully interfere with Sec. 7 activity); *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015) (same). As the Supreme Court stated in one case, some provisions of the Act "could not be literally construed," there was no "glaringly bright line" between permitted and prohibited activity, and "[h]owever difficult the drawing of lines more nice than obvious, the statute compels the task." *Electrical Workers Local 761 v. NLRB*, 366 U.S. 667, 672–674 (1961).

[31] In cases involving important employee benefits documents such as summary plan descriptions that are required under the Employee Retirement Income Security Act (ERISA), substantial *deference* is usually afforded the plan administrator—often, the employer—whose determinations may be deemed final and binding whenever this is stated in relevant benefit documents. See, e.g., *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989) (indicating that a court will not engage in de novo review of a plan administrator's decisions if the "benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan").

By comparison, in Board decisions applying *Lutheran Heritage*, ambiguity in generalized work rule language causes the rule to be held unlawful, in part because the Board also applies the principle that ambiguity must be construed against the drafter. See, e.g., *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, slip op. at 1 (2015); *Sheraton Anchorage*, 362 NLRB No. 123, slip op. at 1–2 fn. 4 (2015); *Hyundai America Shipping Agency, Inc.*, 357 NLRB 860, 870 (2011). Again, the (unattainable) requirement of linguistic perfection, which uniquely applies to facially neutral policies, rules and handbook provisions, stands in stark contrast to the wide latitude with which the Board and courts have always treated generalized language in collective-bargaining agreements. See fn. 57, supra.

[32] Employers are required to maintain certain documentation under state and federal statutes other than the NLRA. For example, employers are required to have procedures to investigate and remedy complaints of various types of workplace harassment to avoid liability under Title VII of the Civil Rights Act of 1964. See, e.g., *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998). ERISA requires employers to have certain plan documents and summary plan descriptions regarding employee benefits. See, e.g., 29 U.S.C. § 1022. The Workers Adjustment and Retraining Notification Act (WARN) requires employers to provide 60 days' written notice to various parties in advance of business changes that constitute a "plant closing" or "mass layoff." 29 U.S.C. § 2101 et seq. Ironically, under *Lutheran Heritage*, these types of documentation, where made available to employees—even though *required* by other legal obligations—would be deemed unlawful by the Board whenever they could be "reasonably construed" to adversely affect NLRA-protected activity.

Putting aside whether an employer's facially neutral rules violate Sec. 8(a)(1), employers must comply with the Act's other provisions. Therefore, if there is a certified or recognized union, for example, the employer's 8(a)(5) obligation to bargain may require negotiations over existing or potential policies, rules or handbook provisions.

[33] There are exceptions to the employment-at-will doctrine where a discharge would violate a statutory requirement or prohibition (for example, Title VII or the Age Discrimination in Employment Act), constitute wrongful discharge in violation of public policy in certain states (see, e.g., *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978)), or violate a "just cause" provision in a collective-bargaining agreement or a similar provision in some other type of employment contract.

[34] See fn. 28, supra.

cal outgrowth of *Lutheran Heritage*, and it may very well be its legacy. Indeed, the remedy in this case, like all other cases that apply prong one of *Lutheran Heritage*, requires rescission of every offending provision contained in the Hospital's Code of Conduct.

Fifth, the *Lutheran Heritage* "reasonably construe" test imposes too many restrictions on the Board. By making legality turn exclusively on whether an employee would "reasonably construe" a rule to prohibit *any* type of Section 7 activity, *Lutheran Heritage* requires a "one-size-fits-all" analysis that gives the same treatment to every potential intrusion on Section 7 rights, however slight it might be and however remote the possibility that employees would actually engage in such protected activity. The "reasonably construe" test permits no consideration of the justifications for a particular rule, which in turn prevents the Board from treating some justifications as warranting greater weight than others. *Lutheran Heritage* prevents the Board from making important distinctions between different types of rules, different business justifications, and different Section 7 rights, and it disregards differences between rules with respect to their potential impact on protected rights. Abandoning *Lutheran Heritage* would permit the Board to engage in a more refined evaluation of these significant variables.[35]

Sixth, *Lutheran Heritage* prevents the Board from considering the unique characteristics of particular work settings and different industries, or specific events that might be associated with a particular policy, rule or handbook provision. The instant case illustrates the problems associated with this limitation. As noted above, the Board and the courts have long recognized the importance of avoiding needless conflict and disruptions in an acute-care hospital setting.[36] And in *Flagstaff*, the Board majority upheld a hospital's no-photography rule—notwithstanding its potential impact on Section 7 activity—after considering the "weighty" privacy interests of patients and the hospital's "significant interest in preventing the wrongful disclosure of individually identifiable health information, including by unauthorized photography."[37] Yet *Flagstaff* dealt merely with "privacy" and the "wrongful disclosure of . . . information," which pale in comparison to the interests implicated in the instant case, where inadequate coordination and dysfunctional interaction among Hospital personnel contributed to an unexpected death. Nonetheless, the majority attaches no weight to the hospital work setting or this event and its contributing causes because this is not permitted by the *Lutheran Heritage* "reasonably construe" standard.

Finally, *Lutheran Heritage* has caused extensive confusion and litigation for employers, unions, employees and the Board itself. The "reasonably construe" standard has defied all reasonable efforts to apply and explain it.[38] Indeed, even with the benefit of hindsight, it is still difficult to understand Board rulings that uphold some facial-

[35] I believe it is *the Board's* responsibility—not the responsibility of employers, unions or employees—to balance the legitimate interests served by a facially neutral policy, rule or handbook provision with the potential infringement on Sec. 7 rights. See *Banner Estrella Medical Center*, 362 NLRB No. 137, slip op. at 13–18 (Member Miscimarra, dissenting in part) (expressing disagreement with the majority's placing on the employer the task of case-by-case "weighing" and "balancing" when attempting to determine whether it is lawful to request nondisclosure of what is discussed during a workplace investigation meeting). This more refined balancing, when conducted by the Board, would permit the Board to develop more detailed standards for specific types of rules, particular types of Sec. 7 activity, and whether or when certain justifications do or do not outweigh a risk of interference with employee rights.

[36] See *NLRB v. Baptist Hospital,* 442 U.S. at 773; *St. John's Hospital*, 222 NLRB at 1150.

[37] 357 NLRB at 663.

[38] See GC Memorandum 15-04 (March 18, 2015); GC Operations Memorandum 12–59 (May 30, 2012); GC Operations Memorandum 12-31 (Jan. 24, 2012); GC Operations Memorandum 11–74 (Aug. 18, 2011). See also U.S. Chamber of Commerce, *Theater of the Absurd: The NLRB Takes on the Employee Handbook* (available at http://www.workforcefreedom.com/sites/default/files/NLRB_Theater%20of%20the%20Absurd.pdf, last accessed December 14, 2015) (criticizing the Board's decisions regarding employee handbook policies as "seem[ing] to run counter to any balanced reading of the NLRA"); Brice, Fifer, and Naron, *Social Media in the Workplace: The NLRB Speaks,* 24 No. 10 Intell. Prop. & Tech. L.J. 13 (2012) (calling the Board's disapproval of some social media rules under the *Lutheran Heritage* test "far from intuitively obvious"); Liss, *Beware That Your Social Media Policies Do Not Draw the Ire of the National Labor Relations Board,* 70 J. Mo. B. 324 (2014) (discussing the difficulty of understanding and applying the Board's recent interpretations of the *Lutheran Heritage* "reasonable employee" standard to rules governing employees' use of social media); Green, *Using Social Networking to Discuss Work: NLRB Protection for Derogatory Employee Speech and Concerted Activity,* 27 Berkley Tech. L.J. 837 (2012) (same); O'Brien, *The National Labor Relations Board: Perspectives on Social Media*, 8 Charleston L. Rev. 411 (2014) (same); Hemenway, *The NLRB and Social Media: Does the NLRB "Like" Employee Interests?,* 38 J. Corp. L. 607 (2013) (citing inconsistencies in the Board's interpretation of social media policies); Link, *Employers Beware,* 284-OCT N.J. Law. 24 (2013) (calling the Board's guidance on social media policies "internally inconsistent at times, and frequently ambiguous"); Logan, *Social Media Policy Confusion: The NLRB's Dated Embrace of Concerted Activity Misconstrues the Realities of Twenty-First Century Collective Action,* 15 Nev. L.J. 754 (2014) ("The Board's inconsistent adaptation of the NLRA to social media policies is 'causing concern and confusion.'"); McNamara, *The Times are Changing: Protecting Employers in Today's Evolving Workplace,* 2011 WL 601173 (2011) (citing the Board's "confusing" application of *Lutheran Heritage* to employer work rules); Rojas, *The NLRB's Difficult Journey Down the Information Super Highway: A New Framework for Protecting Social Networking Activities Under the NLRA,* 51 Washburn L.J. 663 (2012) (asserting that application of the Board's current standards under *Lutheran Heritage* to social networking is "impractical, inefficient, and inconsistent with the purposes of the Act").

ly neutral rules while invalidating others.[39] For example, in the instant case, consider the hard-working judge's careful effort to parse a small number of Board and court decisions cited in her opinion:

- In *Lafayette Park Hotel*,[40] it was *lawful* to have a rule prohibiting "conduct that does not support the . . . Hotel's goals and objectives," even though this arguably encompassed conduct that did not support the Hotel's goal of remaining nonunion, which would prohibit union organizing by employees. However, it was deemed unreasonable to assume, without more, that remaining nonunion was one of the goals encompassed by the rule.
- In *Lafayette Park Hotel* as in a similar case,[41] it was *unlawful* to maintain a rule prohibiting "false, vicious, profane or malicious statements toward or concerning the . . . [employer] or any of its employees" because such statements could occur in the context of activities protected under Section 7.
- In *Adtranz ABB Daimler-Benz Transportation v. NLRB*, the court found it was *lawful* to have a rule prohibiting "abusive or threatening language to anyone on company premises," which the court found required employees to "comply with generally accepted notions of civility."[42] The court deemed this "quite different" from *Lafayette Park Hotel* and a similar Board case,[43] in which the Board found that it was *unlawful* to maintain rules "threatening to punish 'false' statements without evidence of malicious intent."[44]
- In *Lutheran Heritage*,[45] it was *lawful* to maintain rules prohibiting "verbal abuse," "abusive or profane language," and "harassment." Although *Lutheran Heritage* renders unlawful every rule that an employee would "reasonably construe" to prohibit Section 7 activity, the Board stated that a rule would not be unlawful merely because it "*could* be interpreted that way."[46]
- In *Palms Hotel & Casino*,[47] it was *lawful* to have a rule prohibiting "conduct which is . . . injurious, offensive, threatening, intimidating, coercing, or interfering with" other employees because the rule was not "so amorphous that reasonable employees would be incapable of grasping the expectation that they comport themselves with general notions of civility and decorum in the workplace."[48]
- In *Flamingo Hilton-Laughlin*,[49] it was *unlawful* to have a rule prohibiting "loud, abusive or foul language" because this was so broad that it "could reasonably be interpreted as barring lawful union organizing propaganda."[50]
- In *2 Sisters Food Group,*[51] it was *unlawful* to maintain a rule subjecting employees to discipline for "inability or unwillingness to work harmoniously with other employees" because the employer did not "define what it means to 'work harmoniously' (or to fail to do so)," and the rule was "sufficiently imprecise that it could encompass any disagreement or conflict among employees, including those related to discussions and interactions protected by Section 7."[52]
- In *The Roomstore*, it was *unlawful* to maintain a rule prohibiting "[a]ny type of negative energy or attitudes."[53] Similarly, in *Claremont Resort & Spa*, it was *unlawful* to maintain a rule prohibiting "[n]egative conversations about associates and/or managers" because the employer did

[39] Since *Lutheran Heritage* was decided in 2004, the Board has evaluated a variety of facially neutral policies, work rules and handbook provisions. See, e.g., *Quicken Loans,* 359 NLRB No. 141 (2013); *Knauz BMW*, 358 NLRB 1754 (2012); *Costco Wholesale Corp*., 358 NLRB 1100 (2012); *2 Sisters Food Group, Inc.*, 357 NLRB 1816 (2011); *Roomstore*, 357 NLRB 1690 (2011); *Hyundai America Shipping Agency*, supra, 357 NLRB at 860 (2011); *River's Bend Health & Rehabilitation Services*, 350 NLRB 184 (2007); *Inter-Disciplinary Advantage*, 349 NLRB 480 (2007); *Palms Hotel & Casino*, 344 NLRB 1363 (2005); *Claremont Resort & Spa*, 344 NLRB 832 (2005); *Triple Play Sports Bar & Grille*, supra, 361 NLRB No. 31; *Flex Frac Logistics, LLC*, 358 NLRB 1131 (2012), enfd. 746 F.3d 205 (5th Cir. 2014); *Arkema, Inc.,* 357 NLRB 1248 (2011), enf. denied 710 F.3d 308 (5th Cir. 2013); *Tenneco Automotive, Inc.,* 357 NLRB 953 (2011), enfd. in pert. part 716 F.3d 640 (D.C. Cir. 2013); *NLS Group*, 352 NLRB 744 (2008), affd. 355 NLRB 1154, enfd. 645 F.3d 475 (1st Cir. 2011); *Guardsmark, LLC*, 344 NLRB 809 (2005), enfd. in part 475 F.3d 369 (D.C. Cir. 2007); *Cintas Corp*., 344 NLRB 943 (2005), enfd. 482 F.3d 463 (D.C. Cir. 2007). As explained in the text, the conflicting outcomes of these cases are sometimes virtually impossible to rationalize.

[40] 326 NLRB at 824.

[41] *Cincinnati Suburban Press, Inc.*, 289 NLRB 966, 975 (1988).

[42] 253 F.3d at 27.

[43] *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999).

[44] 253 F.3d at 26–27.

[45] 343 NLRB at 646.

[46] 343 NLRB at 647 (emphasis in original).

[47] 344 NLRB 1363 (2005).

[48] Id. at 1368.

[49] 330 NLRB at 287.

[50] Id. at 295.

[51] 357 NLRB at 1816.

[52] Id. at 1817.

[53] 357 NLRB at 1690 fn. 3.

not "clarif[y] any potential ambiguities in its rule by providing examples."[54]

[54] 344 NLRB at 836.

The above cases comprise an extremely small sampling of Board and court cases addressing a single, narrow category of policies, rules and handbook provisions. The disputed rules also occupy a very narrow space that involves promoting civility and respect. Do these cases permit one to understand what the "lawful" rules do correctly and what the "unlawful" rules do incorrectly? I believe the rather obvious answer is no. The above cases yield the following results:

Lawful Rule

- no "abusive or threatening language to anyone on Company premises"
- no "verbal abuse," "abusive or profane language," or "harassment"
- no "conduct which is . . . injurious, offensive, threatening, intimidating, coercing, or interfering with" other employees
- prohibiting "conduct that does not support the . . . Hotel's goals and objectives"

Unlawful Rule

- no "loud, abusive, or foul language"
- no "false, vicious, profane or malicious statements toward or concerning the . . . Hotel or any of its employees"
- no "inability or unwillingness to work harmoniously with other employees"
- no "negative energy or attitudes"
- no "[n]egative conversations about associates and/or managers"

These examples reveal that the *Lutheran Heritage* "reasonably construe" standard, to a substantial degree, has led to arbitrary results. Would an employee "reasonably construe" a difference between prohibiting "abusive or threatening language to anyone on Company premises" (held lawful in *Adtranz*) and prohibiting "loud, abusive, or foul language" (deemed unlawful in *Flamingo Hilton*)? Would employees be unlawfully discouraged from engaging in NLRA-protected activity by a rule prohibiting "false, vicious, profane or malicious statements" (deemed unlawful in *Lafayette Park Hotel*) while perceiving they may freely engage in protected activity when a handbook prohibits conduct that is "injurious, offensive, threatening, intimidating, coercing, or interfering with" other employees (deemed lawful in *Palms Hotel & Casino*)? Here as well, I believe the rather obvious answer is no.

It bears emphasis that the above questions relate to the outcome of cases *that have already been decided*, regarding a *single, narrow category* of rules aimed at fostering workplace civility. The challenges become orders of magnitude greater if one attempts to address, in advance, the entire spectrum of issues that warrant treatment in policies, work rules or handbook provisions. The Board can and should do better in this area, and I believe employees, unions and employers deserve better.

I do not fault my predecessors on the Board who, with good intentions, articulated the "reasonably construe" standard in *Lutheran Heritage*. Section 7 rights deserve protection, and Section 8(a)(1) makes it unlawful for an employer to interfere with, restrain or coerce employees in the exercise of those rights. Additionally, *Lutheran Heritage* contained numerous qualifications that more recent decisions have disregarded.[55] Finally, more than a decade has passed since the Board articulated the *Lutheran Heritage* "reasonably construe" standard. Our experience with this standard has revealed its substantial limitations, as well as its departure from the type of balancing required by Supreme Court precedent and the Board's own decisions. For all of these reasons, *Lutheran Heritage* should be overruled, and the Board should strive to remedy the confusion that this standard has produced.

C. The Board Should Conduct a "Proper Balance" by Considering Justifications Associated with a Facially Neutral Work Rule as well as Any Potential Impact on NLRA-Protected Rights

In this case and all others in which one or more facially neutral policies, rules and handbook provisions are at issue, the Board should resume doing what the Supreme Court has repeatedly required, which is to carry out its "duty to strike the *proper balance* between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy."[56] When discharging this duty, the following considerations would have particular relevance:

- Contrary to the analysis required under the *Lutheran Heritage* "reasonably construe" standard,

[55] For example, the Board majority in *Lutheran Heritage* stated: "Where, as here, the rule does not refer to Section 7 activity, we will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way. To take a different analytical approach would require the Board to find a violation whenever the rule could conceivably be read to cover Section 7 activity, even though that reading is unreasonable. We decline to take that approach." 343 NLRB at 647 (emphasis in original). Thus, the Board majority rejected the view expressed by dissenting Members Liebman and Walsh, who contended that a facially neutral work rule should be deemed unlawful whenever it could be interpreted to encompass Sec. 7 activity. Nonetheless, the latter view has been effectively adopted in many subsequent decisions through application of the principle that ambiguity is construed against the employer as the drafter of the rule. See fn. 31, supra.

[56] *NLRB v. Great Dane Trailers, Inc*., 388 U.S. at 33-34 (emphasis added). See also *NLRB v. Erie Resistor Corp*., 373 U.S. at 229; *Republic Aviation v. NLRB*, 324 U.S. at 797–798; *Banner Estrella Medical Center*, 362 NLRB No. 137, slip op. at 13–18 (Member Miscimarra, dissenting in part); see fn. 34, supra.

the Board must consider at least two things when evaluating a particular policy, rule or handbook provision: (i) its potential adverse impact on NLRA-protected activity, *and* (ii) the legitimate justifications that may be associated with it.[57] The Board must engage in a meaningful balancing of these competing interests, and a facially neutral work requirement should be declared unlawful only if the justifications are outweighed by an adverse impact on Section 7 activities.

- When conducting this balancing, the Board should differentiate among different types of NLRA-protected activities (some of which might be deemed central to the Act and others regarded as more peripheral), and the Board must recognize those instances where the risk of intruding on NLRA rights is "comparatively slight."[58]
- The Board should make reasonable distinctions among the justifications associated with a challenged policy, rule or handbook provision. The justifications for rules dealing with discrimination, harassment, safety or security, for example, might be afforded greater weight than those for rules aimed at increasing sales or productivity. The Board should also make reasonable distinctions between and among different industries and work settings, and it should take into consideration any specific events that might be relevant to a particular policy, rule or handbook provision.
- Even if the Board held an employer could lawfully maintain a particular policy, rule or handbook provision, the Board may still find it unlawful to *apply* the rule in a situation involving NLRA-protected activity. Therefore, if the Board finds that an employer lawfully maintained a "courtesy and respect" rule, the Board may still find that the employer violated Section 8(a)(1) of the Act by invoking the rule to discipline employees involved in an angry workplace confrontation that was protected by Section 7.[59]

Regarding this last point, the Court of Appeals for the D.C. Circuit has criticized the Board's failure to distinguish between the mere maintenance of a facially neutral rule, on the one hand, and circumstances where a rule has been applied to restrict Section 7 activity on the other.[60] In the complex assortment of work settings throughout the United States, a near-endless variety of work requirements exist for important reasons. Many of these requirements are imposed by statutes other than the NLRA. Some address legitimate concerns about workplace violence. Others address the need to ensure employee safety, or they express an understandable desire to foster courtesy among employees in work forces that are increasingly diverse.

The Board needs to refrain from assuming that facially neutral policies, work rules and handbook provisions operate, first and foremost, to extinguish NLRA-protected activity. Such an assumption is especially unwarranted without evidence that a particular rule has been applied to restrict Section 7 activity. In this regard, the Board should take to heart criticism levied by the D.C. Circuit nearly 15 years ago:

> We cannot help but note that the NLRB is remarkably indifferent to the concerns and sensitivity which prompt many employers to adopt the sort of rule at is-

[57] The business justifications associated with a particular policy, rule, or handbook provision may include, for example, non-NLRA legal obligations such as the prevention of discrimination or harassment on the basis of sex, race, age, disability, or other protected factors; the avoidance of workplace violence; efforts to foster occupational safety and health; the protection of trade secrets, intellectual property and customer or client information; and a desire to foster respect, cooperation and courtesy between and among employees (who work in increasingly diverse work forces) or to promote these same qualities in dealings with customers, clients, vendors, and the general public.

The Board's balancing can appropriately consider factors such as the immediacy and relative importance of particular Sec. 7 rights or a particular work requirement's justification. For example, the Board might reasonably invalidate a confidentiality requirement prohibiting disclosure of employee wages (because the employer might lack any reasonable justification for such a requirement, and concerted activity regarding wages is central to the Act's protection). Conversely, the Board might uphold a requirement that employees treat one another with courtesy and respect to the extent the Board concluded, for example, that (i) substantial concerns existed about workplace harassment or violence, and (ii) angry confrontations in the workplace, though sometimes protected by the Act, are not central to the Act's protection.

[58] *NLRB v. Great Dane Trailers*, 388 U.S. at 34.

[59] The appropriate remedy for such a violation would be an order to cease and desist from *applying* the rule to restrict protected activity, not to rescind the rule altogether. See *Marina Del Rey Hospital*, 363 NLRB No. 22, slip op. at 2 (2015).

[60] Thus, in *Aroostook County Regional Ophthalmology Center v. NLRB*, 81 F.3d at 213, the D.C. Circuit stated:

> In the absence of any evidence that [the employer] is imposing an unreasonably broad interpretation of the rule upon employees, the Board's determination to the contrary is unjustified. If an occasion arises where [the employer] is *attempting to use the rule* as the basis for imposing questionable restrictions upon employees' communications, the employees may seek review of the Company's actions at that time. However, *the rule on its face is not unlawful*.

(Emphasis added.) See also *Adtranz ABB Daimler-Benz Transportation v. NLRB,* 253 F.3d at 28 (stating that the Board cannot find a facially neutral policy unlawful based upon "fanciful" speculation, and the Board must "consider the context in which the rule was applied and its actual impact on employees").

> sue here [prohibiting "abusive or threatening language"]. Under both Federal and State law, employers are subject to civil liability should they fail to maintain a workplace free of racial, sexual, and other harassment. Abusive language can constitute verbal harassment triggering liability under State or Federal law. Given this legal environment, any reasonably cautious employer would consider adopting the sort of prophylactic measure contained in the Adtranz employee handbook. . . . Under current law, the only reliable protection is a zero-tolerance policy, one which prohibits any statement that, when aggregated with other statements, may lead to a hostile environment. . . . To bar, or severely limit, an employer's ability to insulate itself from such liability is to place it in a "catch 22."[61]

The court continued:

> We also recognize that the uneven or partial application of a rule against abusive and threatening language could constitute an unfair labor practice if directed against employees seeking to exercise their statutory rights. *Yet the Board's position that the imposition of a broad prophylactic rule against abusive and threatening language is unlawful on its face is simply preposterous*. It defies explanation that a law enacted to facilitate collective bargaining and protect employees' right to organize prohibits employers from seeking to maintain civility in the workplace.[62]

As a final matter, I respectfully disagree with my colleagues' contention that I am advocating a "novel balancing test" that supposedly "puts a clear thumb on the scale to tilt the balance against Section 7 rights." Here, my colleagues emphasize that the Board has applied *Lutheran Heritage* "for more than a decade," and they are "not persuaded" that, throughout that period, "the Board and the courts have been engaged in an analytical exercise that is somehow contrary to the Act and Supreme Court precedent." My colleagues concede that cases implicating *Lutheran Heritage* may raise "difficult" and "complicated" issues, but the majority insists these problems are "inherent in the remarkable number, variety, and detail of employer work rules . . . drafted with differing degrees of skill and levels of legal sophistication."

Most of my colleagues' criticisms deal with matters that have already been addressed, but I believe their observations are especially misplaced in three respects.

First, while arguing that I advocate a standard that "puts a clear thumb on the scale to tilt the balance against Section 7 rights," my colleagues disregard the fact that the *Lutheran Heritage* "reasonably construe" standard does not permit the use of any "scale," and it does not involve any "balance." Under *Lutheran Heritage*, the Board exclusively considers only the potential, hypothetical impact of a particular rule on NLRA-protected activity, even though such activity may never occur, it may lie at the periphery of the protection afforded by our statute, and any adverse impact on Section 7 activity may be substantially outweighed by compelling justifications. Merely requiring the Board to "balance" these considerations does not place a "thumb on the scale" in any direction.[63]

Second, the balancing standard described in this opinion is not "novel." Rather, the balancing of competing interests—specifically, considering the potential impact on NLRA-protected rights along with relevant justifications for particular requirements or restrictions—is mandated by the Supreme Court decisions in *Republic Avia-*

[61] *Adtranz ABB Daimler-Benz Transportation v. NLRB*, 253 F.3d at 27 (internal quotations and citations omitted; emphasis added).

[62] Id. at 27–28 (emphasis added).

[63] Nothing would prevent the Board, after engaging in an appropriate balancing of justifications and NLRA rights, from concluding that a facially neutral rule violates Sec. 8(a)(1), and such a finding would be entitled to reasonable deference on appeal. See, e.g., *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 375–377 (D.C. Cir. 2007) (rejecting employer's argument that facially neutral rule is lawful because it was never applied against protected activity). Indeed, the "balancing" required by the Supreme Court's decisions in *Republic Aviation*, *Erie Resistor* and *Great Dane* mandates only that the Board *consider* business justifications (in addition to the impact of particular rules or requirements on NLRA-protected activity). Moreover, even if the Board concluded that a facially neutral rule could lawfully be *maintained*, the Board could find that the same rule was subsequently unlawfully *applied* to restrict or interfere with NLRA-protected activity. See text accompanying fns 87, supra; see also *Aroostook County Regional Ophthalmology Center v. NLRB*, 81 F.3d at 213; *Adtranz ABB Daimler-Benz Transportation, N.A. v. NLRB*, 253 F.3d at 28. In these respects, it would not unduly restrict the Board or compel a particular outcome for the Board to engage in the "balancing" that is required under Sec. 8(a)(1). The Board would have greater flexibility and could undertake a more refined evaluation of facially neutral work rules, policies and handbook provisions than is permitted by the current *Lutheran Heritage* standard.

Likewise, there is no merit in the majority's suggestion that the "balancing" of competing interests would result in greater certainty and stability only if "facial challenges to employer rules would rarely succeed," and it is not true that such a balancing "would leave the potential chilling effect of such rules on protected, concerted activity unaddressed." Again, an appropriate balancing of justifications and NLRA rights would preserve the Board's ability to conclude that various facially neutral rules, policies or handbook provisions violate Sec. 8(a)(1). Although mere maintenance of various rules would still be unlawful, greater certainty and stability would result from the Board's ability to consider relevant justifications and the impact on NLRA-protected rights, and the Board could draw more understandable distinctions between different types of rules, justifications, work settings and NLRA-protected rights. None of these distinctions is permitted under the single-minded *Lutheran Heritage* "reasonably construe" standard, which makes it predictable that divergent outcomes in multiple cases would defy rational explanation and appear to be arbitrary. See text accompanying fns.66–83, supra.

tion,[64] *Erie Resistor*[65] and *Great Dane*[66] and was conducted by the Board itself in cases such as *Peyton Packing Co.* (decided in 1943),[67] *Stoddard-Quirk Manufacturing Co*. (decided in 1962),[68] *GTE Lenkurt, Inc.* (decided in 1973),[69] *Essex International* (decided in 1974),[70] *Tri-County Medical Center* (decided in 1976),[71] *Our Way, Inc*. (decided in 1983),[72] *Lafayette Park Hotel* (decided in 1998),[73] *Caesar's Palace* (decided in 2001),[74] and *Flagstaff Medical Center* (decided in 2011),[75] among others. My colleagues get one thing right: *Lutheran Heritage* has been in effect "for more than a decade." But this does not preclude a conclusion that *Lutheran Heritage* is contrary to the Act and Supreme Court precedent. In fact, as described at length above, *Lutheran Heritage* constitutes an obvious and completely unexplained departure from the consideration of competing interests that has been deemed necessary in numerous cases decided by the Supreme Court, other courts and the Board.[76]

Third, the above considerations, especially when combined with the Board's practical experience applying *Lutheran Heritage*, compel a conclusion that the *Lutheran Heritage* "reasonably construe" standard has caused enormous problems and needless uncertainty in this important area. It is no surprise that the Board, applying *Lutheran Heritage*, has found that so many legitimate work requirements violate Federal law: the *Lutheran Heritage* "reasonably construe" standard does not permit *any* consideration of the important reasons these work requirements exist. In any event, even if my colleagues disbelieve that *Lutheran Heritage* has created difficulties in this area, this does not resolve the inconsistencies between *Lutheran Heritage* and the Supreme Court's decisions in *Republic Aviation*, *Erie Resistor*, and *Great Dane* as well as numerous other Board and court decisions, nor does it adequately address the other considerations that warrant overruling the *Lutheran Heritage* "reasonably construe" standard.

D. The Hospital's Code of Conduct Provisions At Issue Here Are Lawful Under Section 8(a)(1) of the Act

Applying the analysis outlined above, it remains to determine whether the Hospital violated Section 8(a)(1) by maintaining language in its Code of Conduct that (i) prohibits conduct that impedes "harmonious interactions and relationships" and (ii) prohibits "negative or disparaging comments about the . . . professional capabilities of an employee or physician to employees, physicians, patients, or visitors." This requires engaging in a meaningful balancing of the competing interests associated with these rules, taking into account their justifications and any potential impact on NLRA-protected activities. For several reasons, I believe this analysis warrants a conclusion that the Hospital did not violate the Act based on the mere maintenance of the two rules at issue here.

First, the unique characteristic of hospitals referenced above—the integral connection between patient care and

[64] 324 U.S. at 797–798.
[65] 373 U.S. at 229.
[66] 388 U.S. at 33–34; see supra fn. 34.
[67] 49 NLRB at 843; see supra fn. 47.
[68] 138 NLRB at 621; see supra fn. 48.
[69] 204 NLRB at 921–922; see supra fn. 49.
[70] 211 NLRB at 749; see supra fn. 48.
[71] 222 NLRB at 1089; see supra fn. 49.
[72] 268 NLRB at 394; see supra fn. 48.
[73] 326 NLRB at 824; see supra fns. 45, 51 and accompanying text.
[74] 336 NLRB at 272; see supra fn. 52.
[75] 357 NLRB at 663; see supra fn. 54.
[76] To support its view that the Board may continue to adhere to *Lutheran Heritage* and freely disregard the justifications underlying challenged work rules, the majority cites a single court case, *NLRB v. Northeastern Land Services*, 645 F.3d 475 (1st Cir. 2011), where the court upheld a Board order invalidating a confidentiality rule. The court commented on the *Lutheran Heritage* "reasonably construe" standard and stated that the Board "could have chosen to structure its rule differently and engage in a balancing analysis." Id. at 483. However, the court deferred to the Board's failure to engage in "balancing," and it rejected the employer's argument that "the Board failed to consider the legitimate justification it had for the confidentiality provision." Id. at 482–483. The court asserted that the employer's argument was "at odds with current Board precedent," citing *Lutheran Heritage* and *Lafayette Park Hotel*, and it stated that "[n]othing in *Republic Aviation* compelled the Board to apply a balancing test here." Id.

For several reasons, the decision in *Northeastern Land Services* does not support the Board majority's continued adherence to the *Lutheran Heritage* "reasonably construe" standard. First, the court's deference to *Lutheran Heritage*—specifically, to the failure of that decision to permit any "balancing" or consideration of the "legitimate justification" underlying the rule at issue—is contrary to multiple Supreme Court decisions, including *Republic Aviation*, *Erie Resistor* and *Great Dane*. Second, the court engaged in no analysis of *Republic Aviation* and provided no support for the erroneous statement that "[n]othing in *Republic Aviation* compelled the Board to apply a balancing test." 645 F.3d at 483. Third, although the court deferred to the Board's failure to permit "balancing" in *Lutheran Heritage*, the court misconstrued other "current Board precedent" by failing to recognize that the Board *engaged* in balancing in *Lafayette Park Hotel* (cited in the court's decision) and *Caeser's Palace* (cited in the court's decision and relied upon in the administrative law judge's decision reviewed by the Board and court in *Northeastern Land Services*). Id. at 480, 482. Fourth, *Lutheran Heritage* was a relatively recent case, issued after the judge's decision and before the Board addressed the confidentiality rule in *Northeastern Land Services*, and neither the Board nor the court had the opportunity to consider the extensive confusion that has resulted from *Lutheran Heritage*. Moreover, as noted above, the court in *Northeastern Land Services* acknowledged that the Board "could have chosen to . . . engage in a balancing analysis." Id. at 483. Contrary to *Northeastern Land Services*, I believe the Board is compelled to balance the justifications for specific rules with the potential impact on NLRA-protected rights. However, even if not required, I believe the Board should engage in such an analysis for the reasons explained in this opinion.

the hospital environment—strongly supports a conclusion that substantial justifications warranted these rules.[77]

Second, the record establishes that this particular Hospital had critical needs associated with the two work rules. The Hospital experienced an unexpected death; an investigation attributed the death, in part, to the lack of coordination among Hospital staff and a failure to provide requested assistance; the Hospital received a separate complaint that two nurses in the labor and delivery unit (Antilla and Brandt) had engaged in "bullying and intimidation"; the two nurses were fired for being "mean," "nasty," "negative," "intimidating" and/or "bullying"; and my colleagues and I agree these discharges were lawful. If ever there were a case where substantial, immediate justifications existed for a rule seeking to promote "harmonious interactions and relationships," this is it.[78] And in view of these same facts—particularly issues of liability in relation to an unexpected death—one cannot reasonably doubt that legitimate purposes unrelated to NLRA-protected activity were served by the rule against "negative or disparaging comments about the . . . professional capabilities" of Hospital physicians and employees. It is also significant that the Code of Conduct expressly sets forth the rationale underlying the Hospital's rules by stating: "It is the intention of Beaumont Hospitals to foster effective working relationships among all hospital employees and physicians in order *to provide and maintain high quality and safe patient care*" (emphasis added).

Third, the record establishes that the justifications associated with the two rules at issue here were substantial. The justifications directly affected patients and employees alike, and breakdowns in the labor and delivery unit had severe consequences. As noted previously, in *Flagstaff Medical Center*, which also arose in a health care work setting, the Board upheld a no-photography rule based on the "weighty" privacy interests of patients and the "significant interest in preventing the wrongful disclosure of individually identifiable health information, including by unauthorized photography."[79] The instant case—involving an unexpected death, two investigations, the resignation and discharges described above—implicates even greater concerns than the "weighty" interests the Board deemed controlling in *Flagstaff*.

Fourth, it is also important to consider the potential adverse impact of the Hospital's Code of Conduct on NLRA-protected activities. At some future time, an employee might engage in protected activity that could violate one of the rules in dispute here. This could occur if two employees engaged in concerted activities for mutual aid or protection regarding an employment issue, where the activities involved or precipitated some interpersonal conflict in the workplace (contravening the rule promoting "harmonious" interactions). Two or more employees might similarly engage in protected concerted activities in which the employees criticize the "professional capabilities" of a physician or coworker (contravening the rule prohibiting such comments). However, weighed against the significant justifications described above, I believe there is a "comparatively slight" risk that such incidents would occur, especially in comparision to the substantial benefits that the disputed rules would produce for everyone in the hospital, including patients and employees.[80] A broad range of protected Section 7 activities at the Hospital would not necessarily involve *any* conflict with the two disputed rules. Most importantly, in the event of such a conflict, if the Hospital were to *apply* either or both of the disputed work rules to restrict Section 7 activity, the Board could still find that the Hospital violated Section 8(a)(1), even if the two rules at issue here were declared lawful on their face. Finally, I do not believe a high risk exists that the two disputed rules would be interpreted by employees to discourage their exercise of NLRA-protected rights. Rather,

[77] See *NLRB v. Baptist Hospital*, 442 U.S. at 783 fn. 12; *St. John's Hospital*, 222 NLRB at 1150.

[78] See also *Quality Patient Care in Labor and Delivery: A Call to Action*, which states: "Optimal maternal health outcomes can best be achieved in an atmosphere of effective communication, shared decision-making, and teamwork," and "[i]mproving safety . . . requires teamwork and effective communication at multiple levels within the organization." Indeed, in this three-page statement, the phrase "effective communication" appears six times, and the words "team," "teams," or "teamwork" appear a total of *28 times*. See http://www.acog.org//media/Departments/Patient-Safety-and-Quality-Improvement/Call-to-Action-Paper.pdf?la=en.

In large part, my colleagues declare unlawful the Hospital's rule regarding "harmonious" relationships based on *2 Sisters Food Group*, 357 NLRB at 1816. For several reasons, I believe *2 Sisters* does not warrant a finding that the disputed work rules were unlawful. First, the Board in *2 Sisters* relied on *Lutheran Heritage*, and I believe *Lutheran Heritage* should be overruled for the reasons discussed at length in the text. Second, *2 Sisters* involved a retail food store, not an acute care hospital, which means the unique considerations associated with hospitals, as recognized by the Board and the courts, were not present in *2 Sisters*. Third, the rule invalidated in *2 Sisters* subjected employees to potential discipline for an "inability or unwillingness to work harmoniously with other employees." However, no facts in *2 Sisters* remotely resemble those in this case, including an unexpected death that was revealed, in the ensuing investigation, to have resulted in part from the lack of effective communication among hospital employees. It borders on the absurd to suggest that these two situations are equivalent.

As explained in the text, the *Lutheran Heritage* standard prevents the Board from taking into account the significant factual distinctions between *2 Sisters* and the instant case, which is among the reasons that I believe the *Lutheran Heritage* "reasonably construe" test should be abandoned.

[79] 357 NLRB at 663.

[80] *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. at 34.

I agree with the judge's conclusion that "a reasonable reading of most of the rules shows they are unrelated to and do not prohibit Section 7 activities," and "a reasonable employee would read the rules in the context of the employment setting, a hospital, and understand the lawful purpose of the rules."

Fifth, striking a "proper balance"[81] between the justifications associated with the rules and the risk that they might discourage Section 7 activity supports a finding that maintenance of these rules is lawful. The justifications are substantial, and they are reinforced by the work setting here (an acute care hospital) and by significant events that directly implicated the rules. On the other hand, the rules do not expressly prohibit Section 7 activity, and there is no evidence that they were adopted in response to Section 7 activity or have been applied to restrict such activity. The judge found it is unlikely that employees would associate the rules with NLRA-protected activity. It is also significant that the Board unanimously finds lawful the discharges of employees Antilla and Brandt based on misconduct that, like the misconduct the rules seek to prevent, undermined patient care. As the judge explained:

> The hospital had experienced an unexpected infant death, and this was found to be due, at least in part, to nurses not cooperating with each other, not communicating effectively with each other. If new or inexperienced staff does not feel comfortable asking for assistance or asking questions for fear of being mocked, or humiliated, or yelled at, then there is indeed increased risk to patients.

Conclusion

My colleagues indicate that no "link" exists between "Board doctrine and the death of a baby." It is true that the Hospital promulgated the requirements at issue here, notwithstanding *Lutheran Heritage* and its progeny, and these requirements failed to prevent the tragic events described above. However, the Board compounds this failure by finding it violates Federal law for the Hospital even to maintain a rule fostering "harmonious interactions and relationships" or prohibiting "negative or disparaging comments" about the "professional capabilities" of doctors and coworkers. And *Lutheran Heritage* prevents the Board from attaching *any* weight to justifications that—as illustrated by this case—can mean the difference between life and death.

Unquestionably, Board doctrine has consequences affecting far more than NLRA rights. Yet *Lutheran Heritage* imposes a form of blindness on the Board, requiring that we ignore every important consequence associated with our decisions in this area, and with employment policies, work rules and handbook provisions, *except* their potential impact on the NLRA. This is contrary to the balancing required by the Supreme Court in *Republic Aviation*, *Erie Resistor* and *Great Dane*,[82] and it disregards the Supreme Court's statement that "the Board has not been commissioned to effectuate the policies of the [Act] so single-mindedly that it may wholly ignore other and equally important Congressional objectives."[83] In other words, when Congress gave the Board responsibility to apply our statute to the "complexities of industrial life,"[84] it did not expect the Board to treat "complexities" as if they do not exist.

In *Adtranz ABB Daimler-Benz Transportation v. NLRB*, the D.C. Circuit stated that "America's working men and women are as capable of discussing labor matters in intelligent and generally acceptable language as those lawyers and government employees who now condescend to them."[85] The court sharply criticized the Board's treatment of rules promoting civility in the workplace, and stated:

> Under the Board's reasoning, every employer in the United States that has a rule or handbook barring abusive and threatening language from one employee to another is now in violation of the NLRA, irrespective of whether there has ever been any union organizing activity at the company. This position is not "reasonably defensible." It is not even close. In the simplest terms, it is preposterous that employees are incapable of organizing a union or exercising their other statutory rights under the NLRA without resort to abusive or threatening language.[86]

As the instant case illustrates, not much has changed since this criticism was levied against the Board.

I believe the *Lutheran Heritage* "reasonably construe" standard should be overruled, and the Board must conduct a more refined examination of facially neutral work requirements, taking into account the justifications associated with particular rules in addition to any potential impact on NLRA-protected conduct. The Board should also develop more understandable guidelines based on reasonable distinctions that are not permitted under *Lutheran Heritage*. In the instant case, this warrants a finding that the Hospital did not violate Section 8(a)(1) by maintaining rules promoting "harmonious interactions

[81] Id. at 3334.

[82] Supra fn. 34. See also the text accompanying fns. 46–47supra.

[83] *Southern Steamship Co. v. NLRB,* 316 U.S. 31, 47 (1942).

[84] *NLRB v. Erie Resistor Corp*., 373 U.S. at 236; see also *NLRB v. J. Weingarten, Inc*., 420 U.S. at 266–267.

[85] 253 F.3d at 26.

[86] Id. at 25–26 (emphasis added).

and relationships" and prohibiting "negative or disparaging comments about the . . . professional capabilities of an employee or physician . . . ."

Accordingly, as to these issues, I respectfully dissent.

Dated, Washington, D.C. April 13, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF
THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain rules which employees would reasonably construe to prohibit engaging in union or other protected concerted activities for purposes of collective bargaining or other mutual aid or protection, specifically the following portions of our Code of Conduct for Surgical Services and Perianesthesia:

- The portion of the introductory paragraph prohibiting conduct that "impedes harmonious interactions and relationships" (both as maintained in the Code and as applied on Performance Improvement Plan forms);
- The paragraph prohibiting "[v]erbal comments or physical gestures directed at others that exceed the bounds of fair criticism";
- The paragraph prohibiting "[n]egative or disparaging comments about the professional capabilities of an employee or physician made to employees, physicians, patients, or visitors";
- The prohibition on "[b]ehavior that is . . . counter to promoting teamwork."

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the portions of the Code of Conduct for Surgical Services and Perianesthesia listed above, or revise them to remove any language that prohibits or may reasonably be read to prohibit you from engaging in union or other protected concerted activities for purposes of collective bargaining or other mutual aid or protection.

WE WILL notify you that those rules have been rescinded or, if they have been revised, provide you a copy of the revised rules.

WILLIAM BEAUMONT HOSPITAL

The Board's decision can be found at www.nlrb.gov/case/07–CA–093885 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Darlene Haas Awada, Esq., for the General Counsel.
John P. Hancock, Jr., Esq. and *Rebecca S. Davies, Esq. (Butzel Long),* for the Respondent.

DECISION

STATEMENT OF THE CASE

SUSAN A. FLYNN, Administrative Law Judge. This case was tried in Detroit, Michigan, on May 14–16, 2013. The Charging Party filed the charge on November 28, 2012, and the General Counsel issued the complaint on March 28, 2013.

The complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by discharging employees Jeri Antilla and DeAnna Brandt due to their alleged protected concerted activities. The Respondent filed an answer denying the essential allegations of the complaint and raising affirmative defenses.

The General Counsel orally amended the complaint at the beginning of the trial alleging that the Respondent, through its agent, Anne Ronk, orally promulgated an overly broad rule prohibiting employees from talking with other employees regarding an investigation into alleged misconduct. The General

Counsel again orally amended the complaint during the second day of trial alleging that the Respondent promulgated and maintained the Code of Conduct for Surgical Services and Perianesthesia that includes rules that are overly broad and which employees would reasonably construe as discouraging Section 7 activities. The General Counsel asserts these actions also violate Section 8(a)(1) of the Act. The Respondent denies that the allegations constitute violations of the Act and further contends that the allegation pertaining to the Code of Conduct was untimely raised.

After the trial, the parties filed briefs, which I have read and considered. Based on the entire record in this case, including the testimony of the witnesses and my observation of their demeanor, I make the following

FINDINGS OF FACT

JURISDICTION

The Respondent operates a hospital in Royal Oak, Michigan. During a representative 1-year period, the Respondent derived gross annual revenue in excess of $100,000, and purchased and received goods and materials valued in excess of $5000 directly from suppliers located outside the State of Michigan. Accordingly, I find, and Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent operates several hospitals including one in Royal Oak, Michigan, that includes a Family Birth Center (FBC). The hospital CEO is Shane Cerone; the hospital administrator is Maureen Bowman; the human resources representative is Amy Giannosa. In the Family Birth Center, the director of Women, Children and Psychiatric Services (Maternal Child Health) is Anne Ronk. She supervises the Nurse Manager, Patricia Knudsen, who has 24/7 responsibility for operations. Knudsen supervises the two associate nurse managers: Alissa Amlin (afternoon shift) and Tonyie Andrews-Johnson (midnight shift).

The Family Birth Center includes 20–21 labor/delivery beds, 9 triage beds, and 4 operating rooms (ORs). In the event of a problem, the newborn would be sent to the newborn intensive care unit (NICU). The Charging Party, Jeri Antilla, is a Registered Nurse (RN); DeAnna Brandt is a certified surgical technician. Both worked in the FBC although Brandt also worked at times in the Children's Surgery Center.

The employees of the Respondent's hospitals, including William Beaumont Hospital in Royal Oak, are not unionized.

B. Code of Conduct

Since at least October 9, 2009, the Respondent has maintained a Code of Conduct for Surgical Services and Perianesthesia, which has been distributed to employees. (R. Exh. 6.)

The Code reads as follows, in pertinent part:

> Conduct on the part of a Beaumont employee or physician that is inappropriate or detrimental to patient care of [sic] Hospital operation or that impedes harmonious interactions and relationships will not be tolerated. Transgressors shall be subject to appropriate remedial or corrective action. Improper conduct or inappropriate behavior or defiance in the following example [sic], which includes but not limited [sic] to the following:
>
> Willful and intentional threats, intimidation, harassment, humiliation, or coercion of employees, physicians, patients, or visitors.
> Profane and abusive language directed at employees, physicians, patients or visitors.
> Behavior that is rude, condescending or otherwise socially unacceptable. Intentional misrepresentation of information.
> Verbal comments or physical gestures directed at others that exceed the bounds of fair criticism.
> . . . Negative or disparaging comments about the moral character or professional capabilities of an employee or physician made to employees, physicians, patients, or visitors.
> . . . . Behavior that is disruptive to maintaining a safe and healing environment or that is counter to promoting teamwork.

C. Working Conditions

The nursing staff works on two shifts: days and nights. The weekend night shift (referred to as midnights) generally works from 7 p.m. to 7 a.m., on Friday, Saturday, and Sunday nights. There is a charge nurse[1] on duty on midnights but there is rarely any manager on duty on midnights, although occasionally Andrews-Johnson works Sunday nights. On an average night, there may be 9 to 12 nurses on duty, with a total of approximately 30 nurses assigned to the night shift. (Tr. 603, 604, 653.)

Nurses may transfer between shifts when a position becomes vacant. In such instances, management calls and offers the position to the most senior nurse on the other shift, who could accept or decline. Most nurses prefer the day shift, so experienced nurses are pulled from the night shift to the day shift, and their slots filled by newer, less experienced nurses. New nurses would only be assigned one patient, while the more experienced nurses may be responsible for two or three. Thus, experienced nurses are expected to handle their own patients, as well as assist the less experienced nurses in performing their duties, which causes stress among the nursing staff. In addition, the midnight shift was chronically understaffed at the relevant time period, although the reasons for that are unclear. (Tr. 510, 515–516, 517.)

It is the hospital's practice to assign preceptors (experienced nurses) to mentor new nurses. The new nurse shadows the preceptor and gradually begins performing tasks herself, as she becomes more confident. The period of orientation lasts a minimum of 12 weeks.

D. Response to a Sentinel Event

In December 2011, a "sentinel event" occurred. A sentinel

[1] Charge nurses are not supervisors.

event is defined as a serious incident; in this case, a newborn died unexpectedly. An investigation was conducted and it was determined there were numerous reasons for the child's death. Among those reasons were lack of communication between nursing staff especially during handoffs (when nurses changed shifts) and failure to provide assistance when requested by a nurse. A 4-hour mandatory training session was then presented on four dates in January and February 2012, attempting to address the problems identified in order to ensure there was no recurrence, with a focus on communication.

On March 5, 2012, the hospital CEO, Shane Cerone, went to the midnight shift and met individually with several nurses, seeking feedback and input about the work environment. (R. Exh. 16.) Neither Antilla nor Brandt spoke to Cerone.

The following week, one nurse was added 7 nights a week (the equivalent of three nurses) despite no budgeting for such positions, based on the nurses' complaints about inadequate staffing. (Tr. 535.) Later that year, in the summer, additional nurses were hired, approximately 16 in total. Most were graduate nurses, with no experience; a few had some experience but not in labor and delivery. Two new nurses, Dusta Dukic and Nadia Futalo, began on the midnight shift and did their orientation on that shift; the others received orientation on the day shift, then transitioned to the midnight shift by September 2012. Thus, at the relevant time period, on an average midnight shift, most of the RNs had little experience.

E. Protected Concerted Activity

Many nurses complained to each other about the problems on the midnight shift, especially understaffing and the effects of having a large number of inexperienced or less experienced nurses on that shift, causing a heavier burden to fall on the more experienced nurses. They also felt the situation was unsafe for the patients, and some had concerns about the possibility of losing their nursing licenses if they were held responsible for an error committed by a new nurse on one of their patients.

The Charging Party, Antilla, was one of the nurses who would discuss these issues and complain about problems on the midnight shift. (Tr. 191.) Those discussions often occurred at the nursing station, but sometimes also occurred in the patients' rooms. Antilla testified that she also talked to Amlin about one of the new nurses, Dusta Kukic, after she had precepted her. That feedback was in response to an email from Amlin asking about a particular incident. (GC Exh. 9.) Antilla also said that she had commented to Andrews-Johnson that Andrews-Johnson had scheduled a new nurse for triage when an experienced nurse was needed. Neither of those instances involved concerted activity.

DeAnna Brandt was a surgical technician, and therefore was usually in the OR. However, she, too, discussed the problems of understaffing and inexperienced nurses with nurses. (Tr. 246–247.) In addition, she raised concerns about performance deficiencies with the charge nurses. Brandt testified that she brought such concerns to the charge nurses almost nightly, that she did not characterize as complaints but rather as areas she noted where the nurses needed improvement or extra guidance. She said she also reported back to preceptors about new nurses' performance.

Brandt testified that she did not have the opportunity to talk to Andrews-Johnson about her concerns because Andrews-Johnson was rarely on duty on midnights (Tr. 297–298, 325–326). However, she did testify to a meeting they had on April 16, 2012, when she was issued her performance evaluation. Brandt added written comments regarding a nurse named Maggie and her being unfamiliar with Surgiflo or how to do sponge counts; that newer nurses were unfamiliar with surgical instruments; and that charge nurses sometimes did not call her to open an OR before the patient was brought in. (GC Exh. 18.) Brandt said that Andrews-Johnson did not read those written comments. (Tr. 242.) Brandt testified that she had raised similar concerns with Ronk when Ronk had come to the floor to discuss renovations, although Ronk had told her she was not there to discuss such issues, just the renovations. (Tr. 241–242.)

Lori Post, an RN, testified that she engaged in discussions about short staffing and the inexperienced nurses. (Tr. 74–75, 88–89.) She was unaware whether anyone raised these concerns with management; she did not, other than talking to Cerone earlier, in March 2012. She had told him the unit was unsafe due to short staffing, and that she believed "something" was going to happen. Post felt that, since Diane Glinski had been fired (ostensibly for bullying)[2] approximately 2 weeks after she had spoken to Cerone, most nurses then "clammed up" around management for fear of retaliation.

F. Management Awareness of Protected Concerted Activity

Ronk was unaware of these discussions amongst staff about new nurses and safety concerns. (Tr. 514–515, 536.)

Andrews-Johnson was aware that Antilla and Brandt talked to other nurses about staffing and safety issues working with the new nurses. (Tr. 587–589.) Some of the nurses came to her with their concerns, which she encouraged, so the matters could be addressed. (Tr. 588.)

G. New Nurse's Resignation

One of the new nurses, Tina Wadie, failed to report for duty on October 22, 2012. She called out sick that day, then sent an email on October 23, 2012, to Amlin, Andrews-Johnson, and Lindsay Decker, clinical nurse specialist. In it, she stated that she would not be returning to work although this was her "dream job," since she seemed not to be well-suited for the job and due to bullying and intimidation by unnamed senior nurses. (R. Exh. 9.) Andrews-Johnson forwarded the email to HR and the clinical nurse specialist. (Tr. 573–574.)

This situation concerned management. Ronk felt that Wadie was considered the best qualified of the new hires, and she expected the more experienced nurses to help, not intimidate and drive away, the newer nurses. (Tr. 539.) Andrews-Johnson was concerned that Wadie quit her dream job, without notice, and that Wadie said it made her ill to think about coming to work. (Tr. 574.) The allegations Wadie made in her email, such as the statement about the "right way" and the "night way"

[2] The record shows that Glinski was not in fact fired. She resigned after being confronted about misbehavior (including showing photos of a deceased infant). There were no allegations of bullying against her. (Tr. 520, 567; GC Exh. 25 (g).

of doing things and the need to move patients on within 1 hour, suggested that proper procedures were not being followed on midnights or were being rushed. (Tr. 575–576.)

On October 24, Giannosa was asked by her boss, Mike Dixon, director of human resources, to conduct an exit interview with Wadie. She was directed to ask whether Wadie would be willing to talk to hospital recruiters about taking a position in another unit. Wadie agreed and returned to work.

Giannosa talked to Wadie on at least one other occasion, and Wadie named four employees as problems: Antilla, Brandt, Post, and Michele Wonch. (R. Exh.10; GC Exh. 27.) Wadie told Giannosa that Brandt was nasty, huffy, not nice at all, belittling about everything, sarcastic, condescending, rolling eyes, and made negative comments no matter what you do. Wadie reported that Antilla said there is a "night way" of doing things, sat around a lot and complained about the unit, other new nurses say she is a bully. Tiffany (last name not reported), Antilla, and Post made comments about new nurses and about their nursing licenses.

After speaking with Wadie, Giannosa sent an email to Alonzo Lewis, VP of Maternal Child Health and Women's Health, Bowman, Ronk, Amlin, and Andrews-Johnson, as well as Dixon, Jennifer Mattucci, employment manager, and three recruiters: Marilyn Koski, Laura Velzy, and April Hornyak, advising them of certain issues raised by Wadie and that the concerns would be addressed. (GC Exh. 26.)

H. Investigation

Based on Wadie's statements to her, Giannosa decided to proceed with an investigation.

Then, on October 26, the situation was discussed at a meeting attended by Giannosa, Ronk, Andrews-Johnson, and Amlin; Knudsen was present by telephone (as she was out on extended sick leave). A plan of action was agreed to, that is, that an investigation would be conducted. (Tr. 578–580.) Giannosa assigned that responsibility to Andrews-Johnson, as the first-line supervisor. She was to talk to the newer nurses about their experience on the midnight shift, without mentioning any individuals' names. These were to be open-ended conversations to see if the nurses raised any concerns. (Tr. 538, 540–541.) Giannosa testified that Andrews-Johnson was to interview a random selection from among the nurses hired in the past couple of years.

Andrews-Johnson took notes of each interview and then sent emails to the management group, summarizing the discussion following each one. (R. Exh. 13; Tr. 580.)

At their October 31 meeting, the group reviewed the interview notes that Andrews-Johnson had gathered to date. A preliminary consensus was reached based on the feedback received to date that two employees (Antilla and Brandt) should be terminated and two (Post and Wonch) counseled. (R. Exh. 11; Tr. 541–542, 566.) Andrews-Johnson continued to conduct interviews thereafter.

I. Initial Meeting with Brandt and Nondiscussion Order Given

Initial meetings were held with Antilla and Brandt, to advise them of the nature of the charges against them and provide them the opportunity to reply or to resign before disciplinary action was taken. Ronk met with Brandt, and Andrews-Johnson and Amlin met with Antilla.

On November 2, Amlin told Brandt to see Ronk. Brandt testified that Ronk told her that a nurse had quit and said that Brandt had been mean, nasty, and rude to her, and that an investigation would be conducted. She said Wadie as well as other new nurses had named her as nasty and rude. Ronk inquired whether she had taken any communication classes, and Brandt said she had not. Ronk encouraged her to take some, and said the hospital would pay her for her time in the classes. Ronk further told Brandt to think about her actions and the situation, and that they would talk again after the investigation. Brandt said she was concerned that she might be fired and felt she needed to consult an attorney; Ronk replied that she was not allowed to discuss this with anyone, not even an attorney, as this was hospital business. (Tr. 257, 550; GC Exh. 34.) Ronk, however, testified that she instructed Brandt not to discuss the matter with anyone on the unit. (Tr. 550.) I find Ronk more credible than Brandt regarding their conversation, and specifically regarding the nondiscussion instruction. First, Ronk made contemporaneous notes of the conversation. Second, from those notes it is clear that Ronk made the remark in response to Brandt's statement that she would be approaching the new nurses that weekend to introduce herself and offer any assistance they might want.

Brandt did not discuss the matter with anyone. Ronk admitted in her testimony that she did advise Brandt not to discuss the matter with anyone on staff, as the matter was still under investigation and she was concerned (given the nature of the complaints against Brandt) that such discussions may result in additional allegations of intimidation. Ronk's notes of the meeting confirm that she instructed Brandt not to discuss the meeting with anyone else in the unit (GC Exh. 34).

Brandt later sent Ronk emails indicating that she had registered for classes and that she had applied for other positions at the hospital, outside the FBC. (GC Exhs. 19, 20.)

J. Initial Meeting with Antilla

On November 5, Antilla was asked to meet with Andrews-Johnson and Amlin. She was told that her name had been brought up by a few nurses as being negative, about making comments about her nursing license being on the line and other remarks about new staff, and how she felt new nurses shouldn't be working in labor and delivery. Andrews-Johnson asked Antilla for her side, and Antilla agreed that she had made the three remarks. She said she had expressed concerns about not just her license, but other nurses' nursing licenses. She noted that previously, nurses had been required to have 1–2 years' experience before being assigned to labor and delivery, which was a specialty area, and that longer training periods (orientation) or a nurse residency program would be advisable. She was told that her negativity could be construed as intimidating and bullying, that she had been negative in early 2012 but had improved, and now was being negative again. She was told the reports of her negativity came from new nurses, but no names were revealed. Ultimately, Antilla was encouraged to prepare a reply, and that HR would call her after the investigation was conducted. (R. Exh. 25.)

After meeting with Antilla, Andrews-Johnson reported to

Giannosa, Ronk, and Amlin what had transpired. (Tr. 585.)

K. Decisions to Discipline

Ronk testified that decisions to discipline were made by management and HR. In this instance, the final decisions were made at a meeting on November 8, by Ronk, Knudsen, and Giannosa, with any input from Andrews-Johnson and Amlin. The decision to terminate Antilla and Brandt was based on the statements provided by a number of staff nurses in the course of Andrews-Johnson's investigation, as well as the statements by Wadie. Those statements were accepted as true.

Hospital policy provided that progressive discipline was not required when the infraction was serious, including improper conduct. (R. Exh. 14.) Giannosa testified that Antilla and Brandt's behavior was severe enough to warrant termination because it was a safety concern, as bullying affected the nurses' interactions with each other, discouraged nurses from requesting assistance, and had contributed to the sentinel event of December 2011. (Tr. 453–454, 465–466.) Ronk testified that bullying and intimidating behavior has no place in a labor and delivery setting where teamwork is critical. Such behavior "impedes communication, open communication, staff feeling free to ask questions, ask for help, and that can put a patient's safety at risk." (Tr. 544.)

Although there was no specific testimony as to which manager drafted the basic termination language, it would appear that it was Andrews-Johnson, as the first-line supervisor and the individual who conducted the investigations. She did review the termination documents with Giannosa. (Tr. 39–40, 472.) Giannosa edited and added to them, specifically adding language under the form's future expectations section, as per hospital policy, then returned them to management for review. (GC Exhs. 4, 5; Tr. 41–42, 48, 472, 475.) The documents were signed by all necessary parties and issued to Antilla and Brandt.

Brandt was fired for exhibiting mean, nasty, intimidating, and bullying behavior. (Tr. 472; GC Exh. 5.)

Antilla was fired for exhibiting negative, intimidating, and bullying behavior. (Tr. 475; GC Exh. 4.)

Two nurses, Lori Post and Michele Wonch, were counseled. Neither was terminated because their conduct was not as severe as Antilla and Brandt's. Andrews-Johnson counseled Post; Knudsen was supposed to counsel Wonch. (Tr. 583, 605.) There is a memo in Post's file documenting that counseling but there is none in Wonch's file. (GC Exh. 25 j.) That counseling should have been conducted by Knudsen, as determined by the management group.[3]

L. Issuance of the Discipline

1. Termination of Brandt

On November 8, Brandt was called to a meeting with Ronk, Andrews-Johnson, and Amlin. She was advised that her employment was being terminated and she was given the papers to read. (GC Exh. 5.) At the bottom, under background and related information, counselings from August 2006 and June 2011[4] were noted. Brandt refused to sign the termination but received a copy. She testified that Ronk explained the Respondent's internal grievance process to her, but said that Bowman, who had signed off on the termination, would be the step 1 deciding official. She also said that Ronk said, "Good luck with that." Ronk denied making such remarks about Bowman or step 1. (Tr. 546.) Ronk testified that the meeting lasted approximately 5 minutes as Brandt asked no questions. (Tr. 546, 552.) Andrews-Johnson testified that Brandt said nothing, that Ronk did all the talking, reviewing the termination papers with Brandt. Andrews-Johnson corroborated Ronk's testimony that she did not make such reference to Bowman and the grievance procedure. (Tr. 582.) She agreed that the meeting was very short.

Brandt testified that she was not asked for her side of events. She never submitted a written reply to the charges.

Brandt did not file a grievance. She testified that she was not familiar with the grievance process, so she looked it up online but did not ask HR or anyone else any questions about it. She noted that there was a right of appeal to a panel after the first step. Nonetheless, she did not pursue her grievance rights.

I accept and credit the testimony of Ronk and Andrews-Johnson over that of Brandt. Brandt's testimony regarding looking up the grievance process online supports Ronk and Andrews-Johnson. Brandt may have felt that pursuing a grievance was pointless under the circumstances, but that was her perception, and not based on any attempts by management to discourage her.

2. Termination of Antilla

On November 9, Ronk asked to see Antilla before she began her shift. Antilla met with Ronk and Andrews-Johnson. Ronk told her that, in light of the investigation findings, she was being fired as the ringleader of negativity on the unit. Ronk said her name had been brought up, in a letter from a nurse who recently quit and in discussions with nursing staff, as being intimidating and bullying.

Antilla then explained the stepstool incident to Ronk, that there had not been a stepstool in the room when it appeared it would be needed for a particular delivery, and that afterward, she told the new nurse that she needed to ensure that each delivery room had a stepstool, bag, and mask in case of emergency. She had then gone to the nurses' station and repeated this.

Antilla denied making any statement about the "right way" and the "night way." She also denied saying she hated to work weekends with so many new nurses, since that was her pre-

[3] While it is possible that either the counseling did not occur or that the documentation was not completed due to Knudsen being out on extended medical leave, such is pure speculation as there was no testimony on this point and there is no documentation that it ever occurred. (GC Exh. 25.)

[4] Brandt testified that she had no knowledge of an August 2006 counseling. However, in June 2011, she was written up for a Facebook posting. (GC Exhs. 16, 17.) Brandt had complained on Facebook about working nine shifts, plus covering for other surgical technicians. Ronk told her that she appreciated her hard work but that if she had a problem with someone, she should confront that person rather than post negative comments about the hospital on the internet. At that meeting, Brandt noted some safety concerns in the OR, such as when a nurse did not understand that she had contaminated the sterile field, as well as complaining about the lack of bathroom breaks during a 12-hour shift. Ronk had said she would address those concerns, and apparently did so. Brandt later sent Ronk an email saying she had gotten her breaks and indicating that all was well. (R. Exhs. 7, 8.)

ferred shift, for family reasons.[5]

Ronk then told her the hospital had a zero tolerance for bullying and intimidation, and that, therefore, she was being fired. Antilla then presented the reply letter that Amlin had encouraged her to write. (GC Exh. 12.) Ronk collected her badge, gave her Giannosa's phone number, and reviewed the grievance process with her.

Antilla filed a grievance. In her grievance, Antilla had indicated that she felt the problem was a personality conflict, that her statements were taken out of context, and that she had a good relationship with Wadie, as reflected in Wadie's Facebook posting. (GC Exh. 10.) She met with Ronk, Bowman, and Giannosa for step 1. She lost at the first step, so she filed an appeal to the panel, but lost that as well. She then filed the instant unfair labor practice charge.

III. LEGAL STANDARDS AND ANALYSIS

A. Terminations

The discipline or discharge of an employee violates Section 8(a)(1) of the Act if the employee was engaged in activity that is "concerted" within the meaning of Section 7 of the Act, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the discharge was motivated by the employee's protected concerted activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir 1981), cert denied 455 U.S. 989 (1982); *Correctional Medical Services*, 356 NLRB 277, 278 (2010); *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999) (quoting *FPC Holdings, Inc. v. NLRB*, 64 F.3d 935, 942 (4th Cir. 1995), enfd. 314 NLRB 1169 (1994). If the General Counsel makes such an initial showing of discrimination, then the Respondent may overcome that inference by presenting evidence demonstrating that it would have taken the same action even in the absence of the employee's protected activity. See *Timekeeping Systems, Inc.*, 323 NLRB 244, 244 (1997); *Williamette Industries*, 341 NLRB 560, 563 (2004).

Both Antilla and Brandt did routinely and frequently complain to peers about working conditions, such as understaffing on the midnight shift, and the problems associated with working with inexperienced nurses—additional burdens on the senior staff, risks to the patients, and the potential for losing nursing licenses. It is arguable whether these discussions in themselves initially constituted protected concerted activity, as there was no evidence whatsoever presented that any employee planned to take any action based upon those complaints and there was no concerted purpose, it was mere complaining. While Antilla testified that she "found her passion" in advocating for new nurses and obtaining longer orientation periods for them, it was established that she did not take any action in that direction with management, except in one conversation when she stated that she felt orientation periods should be longer.

Ronk was initially not aware that staff, and specifically Antilla and Brandt, engaged in such discussions or other protected concerted activity until it was revealed in the course of the investigation into the bullying allegations.[6] However, Andrews-Johnson had been aware of those discussions, and that Antilla and Brandt engaged in them. Some nurses brought their concerns directly to Andrews-Johnson and she encouraged them to do so. However, Andrews-Johnson noted in her investigation interview notes the complaints raised by Antilla and Brandt and others, as reported by the interviewees. The other members of the management team, including Giannosa, learned of the complaints through Andrews-Johnson's interview notes. Subsequent to their gaining knowledge of the protected activity, management decided to terminate both Antilla and Brandt. Thus, the General Counsel has met her burden.

However, I find that the Respondent has established that both Antilla and Brandt would have been terminated absent their protected activity.

First, while not determinative, it has been established that other nurses who likewise engaged in similar discussions complaining about working conditions, were not terminated. Most nurses engaged in those conversations and several names were raised in Andrews-Johnson's investigation. Of the four who were deemed the primary offenders, only Antilla and Brandt were terminated. Post was only counseled. While there is no evidence that Wonch was in fact counseled as the management team agreed, that is immaterial, since the decision had clearly been made by the team to counsel her, and not to terminate her.

Second, management witnesses credibly testified, and both Antilla and Brandt agreed, that management did not discourage such conversations among the staff.

Third, the reasons that management has given for the terminations are significant and credible, and were sufficient to justify the terminations. The alleged misconduct must be viewed in context. The General Counsel chooses to interpret the allegations of negativity as directed toward protected concerted activity. I disagree. The hospital had experienced an unexpected infant death, and this was found to be due, at least in part, to nurses not cooperating with each other, not communicating effectively with each other. If new or inexperienced staff does not feel comfortable asking for assistance or asking questions for fear of being mocked, or humiliated, or yelled at, then there is indeed increased risk to patients. Whether one characterizes the conduct as bullying or negative or demeaning is immaterial; it is the underlying conduct that is at issue, not the characterization.

Knudsen testified to being advised of bullying problems within her first month in her current job, in October 2011. (R. Exhs. 26, 27, 28.) An environmental survey (culture of safety survey) was then conducted. (Tr. 611, 615–618; R. Exh. 29.) Knudsen characterized negative behavior as intimidation, mocking, excessive criticism, hoarding knowledge; and behaviors that are not conducive to a safe environment. (Tr. 618.) Because of her concern about the staff comments in response to the survey, Knudsen felt that teambuilding and other training

[5] She did not address the statement that she hated working with the new nurses, just that part of the statement pertaining to working weekends.

[6] Brandt emailed Ronk a document (comments) that Brandt had wanted attached to her performance appraisal the prior year. Ronk testified that she never read those comments, as the decision to terminate her employment was made at approximately the same time, so she had no reason to read the document. (Tr. 552–553.)

was in order. (Tr. 619.) However, the sentinel event occurred while the initial planning was taking place, that altered the strategy. (Tr. 61; R. Exh. 31.) The ensuing investigation into the sentinal event showed that communication, handoffs, and interpretation of fetal tracing, were significant contributing factors. (Tr. 621.) Therefore, a 4-hour mandatory training, or safety symposium, was presented for the nurses, to address those issues. (Tr. 622; R. Exhs. 30, 32, 33, 34, 36, 37, 38.) It was offered four times in January and February 2012.

Four culture of safety surveys were conducted in 2012, to see whether any progress had been made. (Tr. 634.) Several methods were available for staff to report concerns to management. (Tr. 639, 642.)

Then, despite these efforts, in October 2012, Wadie quit her job and gave, as one of the reasons, the treatment of her by other staff.

The management team accepted as true the statements made by the nurses to Andrews-Johnson. Those nurses had no reason to fabricate their reports, and their reports were consistent.

Brandt was fired for exhibiting mean, nasty, intimidating, and bullying behavior. (Tr. 472; GC Exh. 5.) Antilla was fired for exhibiting negative, intimidating, and bullying behavior. (Tr. 475; GC Exh. 4.) Giannosa credibly explained that negative behavior meant the negative attitude exhibited toward the new nurses, belittling, condescending, and demeaning behavior. (Tr. 475.) That is entirely distinct from complaining about working conditions.

Both Antilla and Brandt were terminated due to inappropriate conduct toward other employees, having nothing whatever to do with workplace grievances. They failed to interact with other staff in a professional manner, that was part of the cause for Wadie's resignation, and were uncooperative with other staff, worsening the situation about which they were purportedly so concerned. Neither Antilla nor Brandt acknowledged any awareness of the effect of their behavior and comments on the new nurses.

I accept and credit Ronk's testimony. Ronk testified that when she became aware in October/ November 2012 that Antilla was discussing concerns about staffing with other staff, the fact that she was engaging in such discussions was not of concern to her. (Tr. 514, 536–537.) In fact, the hospital encouraged such discussions. Ronk testified that she would not consider it a problem for staff to discuss these concerns, but that it would be a concern to her as a manager if staff had concerns, because she would want to know about and address or remedy those concerns. (Tr. 515, 536.) Rather, Ronk testified that Antilla and Brandt were terminated because there is no place for bullying and intimidating behavior in a setting such as labor and delivery where teamwork is critical. (Tr. 544.) It impedes open communication, the freedom to ask questions, or to ask for help that can put a patient's safety at risk. (Tr. 544.) This had been made evident in the investigation into the December 2011 sentinel event.

I accept and credit Andrews-Johnson's testimony that the only things that were considered when making her decision to terminate the two were Wadie's feedback and the input from other new nurses from her investigation. (Tr. 586.) The fact that Antilla and Brandt had discussed their concerns with each other, with her, or with other nurses was not a factor in the decision to termination their employment (Tr. 588–589).

Most of the concerns raised by the nurses were well known to management.[7] Management agreed that there were problems with understaffing, and hired more nurses. They were aware that new nurses needed training, and expected the senior staff to assist them during and after their orientation periods. The only area where management was not in agreement with the nurses' concerns was about the risk of losing their nursing licenses due to a mistake by another nurse. However, I find that expressing that misplaced fear was not a factor in the decisions to terminate Antilla and Brandt, and that they would have been terminated even in the absence of making such statements.

The General Counsel notes that at least one employee who complained about the conduct at issue felt that "it wasn't really bullying." That is of no consequence. As I stated above, the characterization of the conduct is not important; it is the conduct itself that is important.

The General Counsel asserts that the allegations were too vague and that neither Antilla nor Brandt could fairly respond without further details. However, they were given descriptions of the conduct and statements at issue, and were given the opportunity to ask questions. Brandt asked no questions and did not file a grievance, electing not to present a defense. Antilla did respond in writing to the charges, and did file a grievance, although her efforts were unsuccessful.

The General Counsel makes much of Antilla's good performance and of the positive Facebook comments, and of Brandt's good performance as well, all of which are immaterial since the terminations were not based on performance, but on conduct. The management team looked at their performance but it did not outweigh the misconduct. It appears that Antilla exhibited a very different attitude toward the new nurses when they were coworkers than when she was acting as charge nurse or preceptor. And, as the record establishes, other senior nurses were more hostile to the new nurses when Antilla was around than they were otherwise. Therefore, she was characterized as the ringleader. It had nothing to do with her complaints about working conditions. There is no dispute that Antilla was an excellent nurse; that fact was recognized by management who used her as a preceptor and as a charge nurse. That good performance does not outweigh the bad judgment she exercised in her conduct toward the new nurses.

The General Counsel is troubled by the conduct of the investigation. Specifically, she argues that it was suspect because only some, and not all, of the new nurses were interviewed, and some of the interviewees were not new nurses. That is irrelevant, since positive or neutral reports would not cancel out the negative ones already received, and there was not a scintilla of evidence presented that Andrews-Johnson improperly selected interviewees or that any interviewee's report was improperly influenced. The General Counsel also expresses concern that

[7] Not only is there no policy prohibiting staff from discussing with each other any issues or concerns, but the hospital encouraged submission to management of such concerns, via several different methods, so such concerns could be addressed. (Tr. 521–533; R. Exhs. 17, 18, 19, 20, 21, 22, 23, 24.)

Ronk had made her own decision that Antilla and Brandt should be terminated by October 29, before all interviews had been conducted. (GC Exh. 34; Tr. 566.) This is of no consequence; three negative reports had been received by that point. There is no magic number of negative reports that would support termination; one may be adequate. It was not necessary to interview all new nurses and certainly it was not necessary that all new nurses reported misconduct by Antilla and Brandt in order to support the terminations.

The General Counsel asserts that the Respondent departed from past practice in terminating Antilla and Brandt, since progressive discipline was not applied. However, no comparable situation had arisen in the past, and the hospital's personnel policy provided for termination without progressive discipline, in appropriate circumstances.

The General Counsel argues that Respondent had tolerated similar behavior in the past, in particular by Wonch. However, this hardly supports the General Counsel's allegation of retaliatory discharge, since Wonch engaged in the same discussions as Antilla and Brandt, and made the same complaints. If the Respondent were engaging in retaliation, then it would be expected that Wonch would have been fired as well. In any event, the allegations made in the past (as well as the current allegations) regarding Wonch were similar but were not of the same level of severity as those raised against Antilla and Brandt.

Finally, the General Counsel contends that Respondent relied upon shifting reasons for the terminations. She finds it significant that the Respondent's Position Statement referenced the Surgical Code of Conduct. That was counsel's opinion and, in any event, it is not a reason for the terminations; the reason was the misconduct. She also finds it compelling that matters such as Antilla's tongue ring were mentioned in the termination notice and that Brandt's conduct during her orientation period was noted. However, these are not different or shifting reasons; they are simply other instances of past problems that were noted. If they were not included in the termination notices, the result would be the same. The investigation was initiated due to complaints about mistreatment of new nurses and that was the reason for both terminations.

Therefore I recommend that these charges be dismissed as to both Antilla and Brandt.

B. Code of Conduct[8]

Determination of the legality of work rules requires a balancing of competing interests: the right of employees to organize or otherwise engage in protected activity and the right of employers to maintain a level of discipline in the workplace.

In determining whether an employer's work rules violate Section 8(a)(1), the Board has held that:

> [A]n employer violates Section 8(a)(1) when it maintains a work rule that reasonablytends to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). In determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights. Id. at 825, 827. Consistent with the foregoing, our inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule *explicitly* restricts activities protected by Section 7…. If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

Lutheran Heritage Village-Livonia, 343 NLRB 646, 646–647 (2004); see *Lafayette Park Hotel*, NLRB 824, 825 (1998), enfd. mem. 203 F.3d 52 (D.C. Cir. 1999).

Thus, where the rules are likely to have a chilling effect on Section 7 rights, their maintenance may be an unfair labor practice even absent evidence of enforcement.

The Respondent's Code of Conduct does not explicitly restrict Section 7 activities, nor was it promulgated in response to union activity, nor has it been applied to restrict Section 7 activities. Thus, the issue at hand is whether employees would reasonably construe the Code of Conduct to prohibit Section 7 activity.

In *Lafayette*, supra, the court found a rule prohibiting conduct that does not support the Respondent hotel's goals and objectives to be lawful, as it is unreasonable to assume, without more, that remaining nonunion is one of those goals. The rules address other legitimate business concerns and the court found unreasonable the position that the rule was ambiguous as to "goals." However, the rule prohibiting making false, vicious, profane, or malicious statements toward or concerning the hotel or any employee was found to be a violation. There were similar results in *Cincinnati Suburban Press, Inc.,* 289 NLRB 966, 975 (1988) (statements are protected absent a showing of reckless disregard for the truth or maliciousness), and *American Cast Iron Pipe Co.,* 234 NLRB 1126, 1131 (1978) (false and inaccurate statements that are not malicious are protected). In the instant case, there is no general prohibition against making false statements. Rather, the Code prohibits intentional misrepresentation of information (which implies malice) and negative or disparaging comments about the moral character or professional capabilities of an employee or physician. The Code's introductory paragraph makes it clear that the hospital's concern is patient care, so, when read in context, the rule has nothing to do with protected activity.

The D.C. Circuit Court distinguished the work rules found unlawful in *Lafayette* and *Flamingo,*[9] restricting speech that is arguably related to protected activities (and merely false), from

[8] The Respondent alleges that this amendment was untimely raised, since the General Counsel became aware of the Code during the investigation some 5 months earlier yet failed to charge any violation until late in the trial. While the charge certainly was raised late in the game and no good reason for the delay was given, I find that the Respondent was not prejudiced by the delay. This is a legal argument only, no witnesses were relevant to the issue and none were called, and this charge would not affect the potential relief if retaliatory discharge were found. I therefore decline to reverse my ruling permitting the amendment.

[9] *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999).

a rule prohibiting "abusive or threatening language" that seeks to maintain basic civility. *Adtranz ABB Daimler-Benz Transportation*, 331 NLRB 291 (2000), vacated in part 253 F.3d 19 (2001). The court noted that an employer's effort to squelch criticism from employees, and threatening to punish "false" statements without evidence of malicious intent is quite different from demanding that employees comply with generally accepted notions of civility that does not, in itself, constitute an unfair labor practice. The court reiterated that it must be considered whether there was enforcement of the rule where the language may be protected, or mere maintenance of the rule. Significantly, the court also observed that threatening and abusive language is not inherent aspects of union organizing or other Section 7 activities. It specifically rejected the argument that the mere "unrealized potential" that "the rule could reasonably be interpreted as barring lawful union organizing propaganda" rendered it facially invalid. Id. at 25–26. Ultimately, it determined that "the Board's position that the imposition of a broad prophylactic rule against abusive and threatening language is unlawful on its face is simply preposterous." Id. at 25. The Board subsequently agreed with and adopted the court's rationale when it decided *Lutheran Heritage* and *Palms Hotel*. In *Lutheran Heritage,* supra, the Board found prohibitions against verbal abuse, abusive, or profane language, or harassment to be lawful. The mere fact that the rule could be read to address Section 7 activity does not make it illegal. See *Lutheran Heritage,* supra at 647 ("we will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way"). Similarly, in *Palms Hotel & Casino*,[10] the Board found lawful a rule that prohibits employees from engaging in conduct which is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with other employees. "Nor are the rule's terms so amorphous that reasonable employees would be incapable of grasping the expectation that they comport themselves with general notions of civility and decorum in the workplace." Id. at 1368. "We are simply unwilling to engage in such speculation in order to condemn as unlawful a facially neutral work rule that is not aimed at Section 7 activity and was neither adopted in response to such activity nor enforced against it." Id at 1368.

However, the Board found unlawful a rule that prohibited loud, abusive, or foul language, as it was so broad that it could be interpreted as barring lawful union organizing propaganda. *Flamingo Hilton-Laughlin*, 330 NLRB at 295. The Board found unlawful a work rule that subjected employees to discipline for the "inability or unwillingness to work harmoniously with other employees." *2 Sisters Food Group,* 357 NLRB 1816, 1816 (2011). In that instance, the employer neglected to define those terms; the prohibition was merely one of a laundry list of rules and "was sufficiently imprecise that it could encompass any disagreement or conflict among employees including those related to Section 7." Id, slip op. at 2. Similarly, a rule prohibiting "any type of negative energy or attitudes" was deemed unlawful. *Roomstore*, 357 NLRB 1690 fn. 3 (2011). A rule prohibiting "negative conversations" about managers was found unlawful, as it had no clarifying language. *Claremont Resort & Spa*, 344 NLRB 832, 836 (2005). In all of those instances, the rules were ambiguous, and those ambiguities must be resolved against the employer.

In the instant case, a reasonable reading of most of the rules shows they are unrelated to and do not prohibit Section 7 activities. To find otherwise would ignore the employer's rights in the *Lafayette* balancing test and consider only potential employee rights.

The Beaumont Code at issue reads as follows:

> Conduct on the part of a Beaumont employee or physician that is inappropriate or
> detrimental to patient care of [sic] Hospital operation or that impedes harmonious interactions and relationships will not be tolerated. Transgressors shall be subject to appropriate remedial or corrective action. Improper conduct or inappropriate behavior or defiance in the following example [sic], which includes but not limited [sic] to the following:
> Willful and intentional threats, intimidation, harassment, humiliation, or coercion of employees, physicians, patients, or visitors.
> Profane and abusive language directed at employees, physicians, patients or visitors.
> Behavior that is rude, condescending or otherwise socially unacceptable. Intentional misrepresentation of information.
> Verbal comments or physical gestures directed at others that exceed the bounds of fair criticism.
> . . . Negative or disparaging comments about the moral character or professional capabilities of an employee or physician made to employees, physicians, patients, or visitors.
> . . . Behavior that is disruptive to maintaining a safe and healing environment or that is counter to promoting teamwork.

(R. Exh. 6.)

Although the introductory paragraph references harmonious relationships, the Code goes on to define in the six bullets the specific types of conduct that are prohibited. The rules are put in context via reference to legitimate business concerns (i.e., patient care, hospital operations, and a safe healing environment), that would tend to restrict their application.

I find that a reasonable employee would read the rules in the context of the employment setting, a hospital, and understand the lawful purpose of the rules.

I find that two of the six work rules (rule 4—"Verbal comments or physical gestures directed at others that exceed the bounds of fair criticism" and rule 6 part 2—"Behavior . . . that is counter to promoting teamwork") challenged by the General Counsel violate Section 8(a)(1). Although neither Antilla nor Brandt nor any other employee was disciplined for violation of the Code, and no employee actually limited their activities based on the Code, those portions of the Code do violate the Board's standards and may reasonably chill the exercise of Section 7 rights. The two terms are ambiguous and undefined in the Code, even when read in context: "comments or gestures that exceed the bounds of fair criticism," and "behavior that is counter to promoting teamwork." Those terms may reasonably be interpreted as prohibiting lawful discussions or complaints that are protected by Section 7 of the Act. Although the Re-

[10] *Palms Hotel & Casino,* 344 NLRB 1363 (2005).

spondent has legitimate concerns regarding appropriate staff behavior, and has a legitimate interest in promulgating work rules to try to maintain a safe atmosphere in the workplace, those portions of the Code are overbroad and ambiguous. "Where ambiguities appear in employee work rules promulgated by an employer, the ambiguity must be resolved against the promulgator of the rule rather than the employees who are required to obey it." See *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992).

However, I find that the other four challenged work rules (1, 2, 3, and 5) as well as the first portion of rule 6 in the Code of Conduct are clear and legitimate when read in context, and could not reasonably be interpreted as prohibiting lawful discussions or complaints. The first prohibits willful and intentional conduct; the second profane and abusive language; the third rude, condescending and otherwise socially unacceptable behavior, as well as intentional misrepresentations (not merely false, and the intent requirement implies a showing of malice); the fifth pertains to statements regarding moral character or professional capabilities; and part 1 of rule 6 behavior disruptive to a safe and healing environment (a hospital), all of which are clear and legitimate, and cannot reasonably be read in context to prohibit protected activities.

Therefore, I find that two of the challenged work rules (rule 4—"Verbal comments or physical gestures directed at others that exceed the bounds of fair criticism" and rule 6 part 2—"Behavior . . . that is counter to promoting teamwork") violate Section 8(a)(1) as alleged but recommend that the charges as to work rules 1, 2, 3, 5, and 6 part 1 be dismissed.

C Nondiscussion Instruction to Brandt

As discussed above, an employer may not impose work rules that reasonably tend to chill employees in the exercise of their Section 7 rights. *Lafayette Park,* supra at 825. The Board has held that to justify a prohibition on employee discussion of ongoing investigations, an employer must show that it has a legitimate business justification that outweighs employees' Section 7 rights. See *Hyundai America Shipping Agency*, 357 NLRB 860, 874 (2011) (no legitimate and substantial justification where employer routinely prohibited employees from discussing matters under investigation).

While in *Caesar's Palace*, 336 NLRB 271, 272 (2001), the confidentiality rule imposed during a drug investigation was held lawful where the rule was necessary to ensure the safety of witnesses and to preserve the integrity of the investigation, no similar rationale was asserted as the reason for the instruction given to Brandt. In *Banner Estrella Medical Center*, 358 NLRB 809 (2012), the Board found the employer's generalized concern with, rather than a determination of a necessity for, protecting the integrity of its investigations was insufficient to outweigh employees' Section 7 rights. In order to minimize the impact on Section 7 rights, it is the employer's burden "to first determine whether in any give[n] investigation witnesses need[ed] protection, evidence [was] in danger of being destroyed, testimony [was] in danger of being fabricated, or there [was] a need to prevent a cover up." *Hyundai,* supra at 874.

In the instant case, the Respondent had no blanket confidentiality rule, and no such rule was routinely issued during investigations. (Tr. 551.) Indeed, even in this investigation where multiple individuals were named, the instruction was only issued to one employee, Brandt. It seems clear that the instruction was not preplanned, but was given in response to Brandt's statement to Ronk that she intended to talk to new nurses and offer to help them. Ronk testified that Andrews-Johnson had advised her that she had learned in the investigative interviews that staff was fearful of retaliation. (Tr. 550–551.) Ronk stated that she told Brandt not to discuss the investigation with others on the unit since she feared the possibility of additional charges of bullying or intimidation.[11] However, while it may have been wise for Brandt to refrain from conversing with the new nurses as she planned, since she now knew that some of them had made negative reports about her, the instruction given to Brandt not to discuss the investigation was overbroad, and did prevent her from discussing the investigation with colleagues as she had the right to do.

Therefore, I find that the nondiscussion instruction issued by Ronk to Brandt violated Section 8(a)(1) of the Act as alleged.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. By issuing and maintaining portions of the Code of Conduct for Surgical Services and Perianesthesia, specifically "Verbal comments or physical gestures directed at others that exceed the bounds of fair criticism" and "Behavior . . . that is counter to promoting teamwork," the Respondent has violated Section 8(a)(1) of the Act.
3. By issuing a nondiscussion directive to an employee, the Respondent has violated Section 8(a)(1) of the Act.
4. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.
5. The Respondent has not otherwise violated the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The Respondent, William Beaumont Hospital, located in Royal Oak, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing or maintaining rules which employees would rea-

[11] Protecting the integrity of the investigation was not given as a rationale. In any event, Andrews-Johnson's investigation was well underway by November 2, the date the nondiscussion instruction was given to Brandt, so there could potentially have been only minimal effects on the investigation.

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

sonably construe to discourage engaging in protected concerted activities, specifically issuing or maintaining two portions of the Code of Conduct for Surgical Services and Perianesthesia: "Verbal comments or physical gestures directed at others that exceed the bounds of fair criticism" and "Behavior . . . that is counter to promoting teamwork" and issuing nondiscussion directives to employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind portions of the Code of Conduct for Surgical Services and Perianesthesia, specifically "Verbal comments or physical gestures directed at others that exceed the bounds of fair criticism" and "Behavior . . . that is counter to promoting teamwork."

(b) Within 14 days after service by the Region, post at its facility in Royal Oak, Michigan, copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. 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 about October 1, 2012.

(c) Within 21 days after service by the Respondent, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated: Washington, D.C. January 30, 2014

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT issue or maintain rules which employees would reasonably construe to discourage engaging in protected concerted activities, specifically, two portions of the Code of Conduct for Surgical Services and Perianesthesia: "Verbal comments or physical gestures directed at others that exceed the bounds of fair criticism" and "Behavior . . . that is counter to promoting teamwork" nor will we issue nondiscussion directives to employees.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL rescind portions of the Code of Conduct for Surgical Services and Perianesthesia, specifically "Verbal comments or physical gestures directed at others that exceed the bounds of fair criticism" and "Behavior . . . that is counter to promoting teamwork."

WILLIAM BEAUMONT HOSPITAL

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/07–CA–093885 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

[13] 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."

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

American Baptist Homes of the West d/b/a Piedmont Gardens *and* Service Employees International Union, United Healthcare Workers-West. Cases 32–CA–025247, 32–CA–025248, 32–CA–025266, 32–CA–025271, 32–CA–025308, and 32–CA–025498

May 31, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On August 9, 2011, Administrative Law Judge Burton Litvack issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief. In addition, both the Respondent and the Charging Party filed cross-exceptions and supporting briefs. The General Counsel filed a brief answering the Respondent's cross-exceptions, and the Respondent filed a reply brief. The Respondent also filed an answering brief to the Charging Party's cross-exceptions.

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

The Board has considered the decision in light of the exceptions and briefs and has decided to adopt the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.[2]

I. FACTS

The Respondent operates a continuing care facility in Oakland, California. Since at least March 2007, the Union has served as the exclusive collective-bargaining representative of a unit of the Respondent's nonprofessional employees in various departments. The parties' most recent collective-bargaining agreement was effective from March 1, 2007, to April 30, 2010. In anticipation of the contract's expiration, the parties commenced negotiations for a successor agreement in February 2010.[3]

As of May, the parties remained at odds over several significant issues, including health care, pensions, and the Respondent's disciplinary policies. On May 25, the Union conducted picketing outside the Respondent's facility, and the employees carried signs bearing slogans such as "no healthcare reductions," "pension now," and "fair wages now." In mid-June, the employees authorized the bargaining committee to call a strike.

On July 9, the Union sent two letters to the Respondent. The first letter notified the Respondent that the employees would commence a strike on Monday, August 2 and continue "unless and until a mutually agreeable resolution has been reached." The second letter advised the Respondent that all of the striking employees "unconditionally offer to return to work at or after 5:00 a.m. on Saturday, August 7, 2010." On August 2, approximately 80 of the 100 unit employees went on strike.

To prepare for the anticipated strike, the Respondent engaged a staffing agency. The Respondent extended temporary employment offers to approximately 60 to 70 employees provided by the staffing agency, at a cost in excess of $300,000. The Respondent informed the staff-

[1] The Respondent and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's conclusions of law and substitute a new remedy, order, and notice to conform to the violations found. We shall also modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11, 13–14 (2010), and to conform with our decision in *Advoserv of New Jersey, Inc.,* 363 NLRB No. 143 (2016). We shall substitute a new notice to conform to the Order as modified and in accordance with *Durham School Services*, 360 NLRB No. 85 (2014).

In the absence of exceptions, we adopt the judge's conclusion that the Respondent violated Sec. 8(a)(1) by engaging in surveillance or creating the impression of surveillance of the employees' union activities. In so doing, however, we do not rely on the judge's finding that security guard Francisco Pinto acted at the Respondent's behest when he appeared to record the employees in the break room during the strike authorization vote.

Because we adopt the judge's conclusion that the Respondent violated Sec. 8(a)(1) by disparately enforcing Rule 33 when it evicted employees Nelson, Henry, and Eastman from its facility, we find it unnecessary to pass on the judge's alternative finding that the Respondent created and applied a new work rule when it evicted Nelson and Henry. In addition, Chairman Pearce and Member Hirozawa note that the General Counsel has not challenged the facial validity of Rule 33 in this proceeding or alleged that the Respondent's maintenance of the rule violates the Act. See, e.g., *Tri-County Medical Center,* 222 NLRB 1089, 1089 (1976); *Saint John's Health Center*, 357 NLRB 2078 (2011). The Board has subsequently found Rule 33 to be facially invalid. See *Piedmont Gardens*, 360 NLRB No. 100 (2014), motion for reconsideration denied 2014 WL 3778513 (2014).

Also, in adopting the judge's conclusion that the Respondent unlawfully failed to provide the Union with the names and addresses of the permanent strike replacements, we decline the Respondent's invitation to overrule well-established precedent holding that the names and addresses of permanent replacements constitute presumptively relevant information. See, e.g., *Tenneco Automotive, Inc.*, 357 NLRB 953, 954–955 (2011), enfd. in relevant part, 716 F.3d 640 (D.C. Cir. 2013); *NTN Bower Corp.*, 356 NLRB 1072, 1072 fn. 3 (2011).

[3] Unless otherwise indicated, all dates referenced herein are in 2010.

ing agency that the length of the jobs would be 3 days.[4] Executive Director Gayle Reynolds testified that by the end of the first day of the strike, "we felt confident that we had enough people to get through a few days."

Despite having the temporary employees committed to work at least through August 5, the Respondent began permanently replacing the striking employees on August 3. From August 3 through 6, the Respondent made approximately 44 offers of permanent employment; some were made to temporary employees provided by the staffing agency, while others were made to some of the Respondent's on-call employees who had continued to work during the strike.

Executive Director Reynolds, who made the decision to hire the permanent replacements, was admittedly motivated by her desire to avoid a future strike at the facility. Her Board affidavit contained the following statement, which was credited by the judge:

> I knew that it would take time to acclimate the new employees to [the Respondent], but the more important consideration for me was that I knew that those replacements would come to work if there was another work stoppage. I assumed that because these people were willing to work during this strike, they'd be willing to work during the next strike.

Reynolds testified that she made the decision to hire the permanent replacements because if the bargaining unit employees decided to engage in future work stoppages, she did not believe that the Respondent could afford to repeatedly engage the staffing agency. She also testified that the cost to engage the staffing agency to supply the initial temporary employees had been $300,000; however, on cross-examination, she conceded that it would have cost the Respondent a lesser amount, $250,000 over the 3-year life of the contract, to fully implement the Union's proposals on wages, health insurance, and pensions—the remaining significant monetary issues of disagreement between the parties with respect to a new collective-bargaining agreement.

On August 6, almost 3 days after it began permanently replacing employees and less than 24 hours before employees were set to return to work, the Respondent began contacting the employees who had been permanently replaced, either by letters sent overnight mail or by telephone, notifying them of their status and informing them that they would be placed on a preferential rehire list. Also on August 6, the fifth and final day of the strike, the Union's attorney, Bruce Harland, placed a telephone call to the Respondent's attorney, David Durham. Harland asked Durham whether he could confirm a rumor that the Respondent was planning to lock out the strikers; Durham replied that he could not confirm the rumor. Later that evening, Durham called Harland and told him that the Respondent would not be locking out the employees, but that the Respondent had permanently replaced approximately 20 of them. Harland responded that such a course of action was "a pretty big deal," and asked why the Respondent was permanently replacing the employees rather than locking them out. Durham replied that the Respondent "wanted to teach the strikers and the Union a lesson. They wanted to avoid any future strikes, and this was the lesson that they were going to be taught."

On the morning of August 7, the striking employees who were scheduled to work that day (approximately 50 to 60 of the former strikers) reported to the Respondent's facility, consistent with the unconditional offer to return to work included in the Union's July 9 letter.[5] At that time, one of the Respondent's security guards advised the group that only some of the employees were permitted to return; others were told that they had been permanently replaced and would be placed on a preferential rehire list.

II. THE JUDGE'S DECISION

The General Counsel alleged that the Respondent violated Section 8(a)(3) and (1) of the Act by permanently replacing—and thereafter failing to reinstate, or belatedly reinstating—striking employees in order to restrain them from exercising rights protected by the Act. The General Counsel argued that the Respondent's decision to permanently replace the striking employees was motivated by an "independent unlawful purpose" within the meaning of *Hot Shoppes, Inc.*, 146 NLRB 802 (1964). The judge rejected this argument, finding that an "independent unlawful purpose" is established only when an employer's hiring of permanent replacements is "unrelated to or extraneous to the strike itself." The judge concluded that the Respondent's motivation for permanently replacing the strikers—to teach the strikers "a lesson" and ensure that employees would not strike again—was related to the underlying strike and, therefore, did not constitute an "independent unlawful purpose" under *Hot Shoppes*. For the reasons set forth below, we disagree and find that the

[4] The Respondent told the individuals to whom it extended offers of temporary employment that it expected to require their services for the week.

[5] During the strike, the Union sent to the Respondent a copy of the same letter that it had sent on July 9, advising the Respondent of the strikers' unconditional offer to return to work on August 7.

Respondent's permanent replacement of the strikers violated the Act.

III. ANALYSIS

The right to strike is protected by Section 7 of the Act. See *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 181 (1967) ("The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms"). Congress and the courts have repeatedly recognized the legitimate use and protected nature of the strike. See *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 234–236 (1963) (citing cases); NLRA Section 13, 29 U.S.C. § 163.[6] Accordingly, "an employer's discouragement of employee participation in a legitimate strike constitutes discouragement of membership in a labor organization within the meaning of Section 8(a)(3)." *Capehorn Industry*, 336 NLRB 364, 365 (2001). Because employees have the right to strike in support of economic demands, an employer violates Section 8(a)(3) by failing to immediately reinstate such employees upon their unconditional offer to return to work. In certain situations, however, an employer may establish a "legitimate and substantial justification" for failing to reinstate striking employees by showing that the strikers' positions have been filled by permanent replacements. See *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333, 345–346 (1938); *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967). However, the permanent replacement of strikers is not always lawful. The Board will find a violation of the Act "if it is shown that, in hiring the permanent replacements, the employer was motivated by 'an independent unlawful purpose.'" *Avery Heights*, 343 NLRB 1301, 1305 (2004) (quoting *Hot Shoppes, Inc.*, 146 NLRB 802, 805 (1964)).

A. Interpretation of Hot Shoppes

This case turns on an interpretation and application of the principles articulated in *Hot Shoppes*. In *Hot Shoppes*, the respondent employer and the union representing its employees were engaged in negotiations for a collective-bargaining agreement. On several occasions during the negotiations, the union threatened to strike if the parties had not reached an agreement by a particular date, and the employer concomitantly advised its employees that, in the event of a strike, all of the strikers would be permanently replaced. When the union reiterated its strike threat at the final bargaining session preceding its previously expressed deadline, the employer—in anticipation of the strike and in order to insure uninterrupted service to its clients—enlisted temporary workers from its facilities in other cities and also began soliciting and processing applications for permanent replacements. The union commenced the strike approximately a week later. On the day the strike began, the employer continued its operations using temporary employees from its other locations who had been flown in over the course of the several preceding days. Beginning on the first day of the strike and for the next 3 days thereafter, however, the employer hired permanent replacements for all of the striking employees. The strikers made an unconditional offer to return to work nearly 2 weeks after the strike commenced.[7] Because the employer had permanently

[6] The Court stated in *Erie Resistor*: "While Congress has from time to time revamped and redirected national labor policy, its concern for the integrity of the strike weapon has remained constant," and "the right to strike is to be given a generous interpretation" 373 U.S. at 234–235.

Citing two other Supreme Court decisions—*NLRB v. Insurance Agents' International Union*, 361 U.S. 477 (1960) and *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965)—the dissent asserts that the Board may not "act as arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining position." That statement is correct but inapplicable to the instant matter. Here, unlike in those cases, the Respondent did not even purport to be acting in support of its bargaining position. To the contrary, the Respondent's admitted purpose was to punish employees for exercising a fundamental statutory right by going on strike. Both decisions are thus consistent with today's holding.

The Court's decision in *American Ship Building* addressed the question whether an employer, after bargaining to impasse, may temporarily lock out employees for the sole purpose of exerting economic pressure in support of its bargaining position. 380 U.S. at 308, 318. In answering that question in the affirmative, the Court emphasized the absence of any contention that the lockout was motivated by hostility to the union or to employees' protected activity. 380 U.S. at 308, 313. The question in *Insurance Agents* was whether the Board properly found that a union violated its duty to bargain in good faith by engaging in certain arguably unprotected pressure tactics away from the bargaining table. The Court emphasized that the Board's approach "involved an intrusion into the substantive aspects of the bargaining process . . . unless there is some specific warrant for its condemnation of the precise tactics involved here." 361 U.S. at 489. The Court found no such warrant. In the instant case, the issue is not either party's good faith in the bargaining process, but rather whether a purpose behind the Respondent's permanent replacement of employees was to punish them for exercising their statutory right to strike. Where, as here, there was such evidence, then there is "some specific warrant" for condemning the tactic and doing so does not make the Board an "arbiter of an economic weapon." In sum, neither *Insurance Agents* nor *American Ship Building* comes close to addressing the issue presented here.

Finally, we question the dissent's premise that the permanent replacement of strikers is a legally protected economic weapon on a par with the statutory right to strike. We note that *Insurance Agents*, which the dissent cites for this proposition, does not even mention permanent replacements. However, no party raises this issue, and we need not reach it in order to resolve this case.

[7] Although several employees had made individual requests for reinstatement prior to the group offer of reinstatement, the Board found that no such requests predated the period in which the employer hired the permanent replacements.

replaced all of the striking employees by that date, it refused to reinstate them.

On those facts, the trial examiner concluded that the employer violated Section 8(a)(3) and (1) of the Act by failing to reinstate the striking employees upon receipt of their unconditional offers to return to work. Specifically, the trial examiner concluded that, in hiring the permanent replacements, the employer acted pursuant to a discriminatory "contrived scheme" to defeat the economic strikers' rights to reinstatement. 146 NLRB at 835. As evidence of this contrived scheme, the trial examiner cited the employer's prestrike declarations that all strikers would be permanently replaced, "the careful planning in advance of the strike, including the securing of the tentative replacements, and the interviewing of applicants who in turn might replace them, and the elaborate, as well as unique, paper record manufactured subsequent to the strike to establish the 'permanency' of the replacements." Id.

The Board rejected the trial examiner's conclusion that the employer's plan to replace the economic strikers was improper, stating:

> We, however, disagree with the Trial Examiner's premise that an employer may replace economic strikers only if it is shown that he acted to preserve efficient operations of his business. The Supreme Court's decision in *Mackay Radio & Telegraph Company*, and the cases thereafter, although referring to an employer's right to continue his business during a strike, state that an employer has a legal right to replace economic strikers at will. We construe these cases as holding that the motive for such replacements is immaterial, *absent evidence of an independent unlawful purpose*.

Id. at 805 (emphasis added) (internal citations omitted).

In analyzing the meaning of "independent unlawful purpose," we first consider the context in which the Board used the phrase in *Hot Shoppes*. As set forth above, the Board's analysis in that case focused on whether the trial examiner erred by inferring unlawful motivation from the mere act of hiring (or planning to hire) permanent replacements. See id. at 805 ("Therefore, we reject the Trial Examiner's conclusion that the plan to replace the economic strikers here was itself improper and that the strike was converted to an unfair labor practice strike on January 4 by [r]espondent's implementation of such plan."). Because the Board found that the alleged unlawful motivation was not established, it did not address whether the motivation at issue would have qualified as an "independent unlawful purpose."

We next consider the fact that the Board used the phrase "independent unlawful purpose" in *Hot Shoppes* in the context of discussing the Supreme Court's decision in *Mackay Radio*, 304 U.S. 333 (1938). Specifically, the Board stated that *Mackay* and its progeny establish that employers may permanently replace economic strikers at will, and that, accordingly, the motive for doing so is immaterial absent evidence of an independent unlawful purpose. In our view, the Board's reference to replacing economic strikers "at will" is consistent with the employment-at-will doctrine, pursuant to which an employer may discharge an employee for any reason or no reason at all, unless the discharge violates clearly mandated public policy. See, e.g., *Talley v. Washington Inventory Service*, 37 F.3d 310, 311 (7th Cir. 1994). This analogy serves as additional basis for the Board's holdings that an employer may hire permanent replacements for any reason at all, unless there is evidence that the employer was motivated by a purpose otherwise proscribed by the Act.[8]

In addition to the factual context of the *Hot Shoppes* decision itself, the broader context of the existing jurisprudence at the time of the decision's issuance sheds further light on the Board's intent. At the time of the *Hot Shoppes* decision, and as noted there by the Board, the Supreme Court had established that an employer possesses the right to permanently replace economic strikers to continue business operations during the strike. *Mackay Radio*, 304 U.S. 333. Nothing in that decision or subsequent decisions, however, suggested that the employer's right in that regard was absolute, i.e., that an employer could lawfully replace economic strikers even if it did so for a purpose prohibited by the Act. Indeed, the Court's language in *Mackay* recognized such a limitation:

> [I]t does not follow that an employer, *guilty of no act denounced by the statute*, has lost the right to protect and continue his business by supplying places left vacant by strikers.

Id. at 345 (emphasis added).

Subsequently, in *Erie Resistor*, the Court found that the employer was guilty of an act denounced by the statute when it hired permanent replacements during a strike and granted them 20 years superseniority. The Court explained that "[w]hen specific evidence of a subjective intent to discriminate or to encourage or discourage union membership is shown, and found, many otherwise innocent or ambiguous actions which are normally incident to the conduct of a business may, without more, be

[8] *American Optical Co.*, 138 NLRB 681 (1962), cited in the dissent, is inapposite. In that case, the evidence showed that the employer's sole motive for replacing economic strikers was to compel the union to accede to its bargaining proposals. Id. at 689.

converted into unfair labor practices." 373 U.S. at 227. In these circumstances, the Court explained:

> Such proof [of discriminatory intent] itself is normally sufficient to destroy the employer's claim of a legitimate business purpose, if one is made, and provides strong support to a finding that there is interference with union rights or that union membership will be discouraged. Conduct which on its face appears to serve legitimate business ends in these cases is wholly impeached by the showing of an intent to encroach upon protected rights. The employer's claim of legitimacy is totally dispelled.

Id. at 227–228. Applying these principles, the Court held that although it had "no intention of questioning the continued vitality of the *Mackay* rule, [it was] not prepared to extend it to the situation" involving permanent replacements accompanied by superseniority—conduct which the Court found was inherently destructive of employees' right to strike. Thus, even assuming that the Court's holding in *Mackay* may be read—as the *Hot Shoppes* Board apparently read it—to presume that an employer's hiring of permanent replacements serves the legitimate business purpose of allowing the employer to protect and continue his operations during a strike, the Court's decision in *Erie Resistor* makes clear that a legitimate business purpose may be "wholly impeached by the showing of an intent to encroach upon protected rights." Therefore, notwithstanding the respondent's right under *Mackay* to continue operations with permanent replacements, the Court agreed with the Board that this business purpose "was insufficient to insulate [the] superseniority plan from the reach of § 8(a)(1) and Section 8(a)(3) . . . ." Id. at 231–232 [9]

Having considered *Hot Shoppes* in light of the foregoing precedent, we conclude that the phrase "independent unlawful purpose" includes an employer's intent to discriminate or to encourage or discourage union membership. Our conclusion is consistent with *Erie* and with the "widely accepted" principle that "otherwise lawful acts can be rendered unlawful when motivated by improper intentions." *RGC (USA) Mineral Sands, Inc., v. NLRB*, 281 F.3d 442, 449–450 (4th Cir. 2002), enfg. 332 NLRB 1633, 1636 (2001) (finding that even assuming that it acted pursuant to a contractual right, the employer could not "act with the intent to punish or discourage protected concerted activity" as to hold otherwise "would be to eviscerate both the rights found in Section 7 . . . and the protection afforded the exercise of those rights by Sections 8(a)(1) and (3)." Id. at 450). Cf. *Movers & Warehousemen's Assn. of D.C. v. NLRB*, 550 F.2d 962, 966 (D.C. Cir. 1977) (even if motivated in part to exert economic pressure in support of a legitimate bargaining position, a "lockout is nevertheless unlawful if also motivated by an intent to interfere with, and thus injure, a labor organization").

As stated above, the judge found that an "independent unlawful purpose" is established only when an employer's hiring of permanent replacements is unrelated to, or extrinsic to, the strike. The dissent would further narrow that definition by requiring that the unlawful purpose be "extrinsic to the parties' bargaining relationship or unrelated to the strike." The dissent's narrow interpretation of *Hot Shoppes* violates the most basic principles of the Act. It is axiomatic that an employer violates the Act when it retaliates against employees for engaging in union or other protected activity, and that the right to strike is fundamental. See, e.g., *Controlled Energy Systems, Inc.*, 331 NLRB 251 (2000); *Frank Leta Honda*, 321 NLRB 482 (1996). It is difficult to imagine that the Board intended the phrase "independent unlawful purpose" to exempt retaliation for exercising a fundamental right, and we decline to give it so strained a reading.[10]

Accordingly, we find that the phrase "independent unlawful purpose" does not require that the unlawful purpose be unrelated or extrinsic[11] to the parties' bargaining

[9] The dissent correctly observes that the Board in *Hot Shoppes*, contrary to the trial examiner, summarily stated that *Erie Resistor* was distinguishable. The Board did not, however, take issue with the underlying principle, nor does it preclude us from finding an "independent unlawful purpose" under different facts from those presented in *Hot Shoppes*.

Belknap v. Hale, 463 U.S. 491 (1983), discussed in the dissent, is not to the contrary. Citing *Hot Shoppes*, the Court pointed out that the Board does not require an employer to show that it was necessary to use permanent replacements in order to keep the business operating. That aspect of *Hot Shoppes*—the proper interpretation of *Mackay*—is not before us.

[10] Furthermore, the dissent's interpretation is contrary to the Supreme Court's holding in *Erie Resistor*, supra. Under the dissent's approach, granting superseniority to nonstrikers, as in *Erie Resistor*, would have been lawful because it was related to the strike.

[11] In support of this proposition, the judge cited *Cone Brothers Contracting Co.,* 135 NLRB 108 (1962), enfd. 317 F.2d 3 (5th Cir. 1963), where the employer provoked union supporters to refuse to cross a picket line so that it could use their refusal as a reason to discharge them in order to disqualify their votes in an upcoming union election. The judge reasoned that because the Board in *Hot Shoppes* cited *Cone Brothers* in discussing the independent unlawful purpose, the phrase should be understood to mean that the hiring of permanent replacements must have an unlawful objective extrinsic to the strike. But the Board made no such finding. The Board simply cited *Cone Brothers* as an example of an independent unlawful purpose that was not demonstrated in *Hot Shoppes*. Further, as the dissent acknowledges, *Cone Brothers* did not involve the permanent replacement of employees.

relationship or the underlying strike in order to fall within the *Hot Shoppes* exception.[12]

Finally, our interpretation is fully consistent with *Avery Heights*, the only post-*Hot Shoppes* Board decision to consider the phrase "independent unlawful purpose," and with the Second Circuit's opinions in that case.[13] *Avery Heights*, 343 NLRB 1301 (2004), vacated and remanded, *New England Health Care Employees Union v. NLRB*, 448 F.3d 189, 195 (2d Cir. 2006), after remand 350 NLRB 214 (2007), enfd. *Church Homes, Inc. v. NLRB*, 303 Fed.Appx. 998 (2d Cir. 2008), cert denied 558 U.S. 945 (2009). In that case, the Board reversed the judge's finding that the employer had possessed an independent unlawful purpose for hiring permanent replacements. In so holding, the Board rejected the judge's conclusion that the employer's act of concealing its intent to hire permanent replacements from the union demonstrated an unlawful motivation to punish the striking employees and break the union's solidarity. The Board did not, however, take issue with the judge's conclusion that at least one of the unlawful motives attributed to the employer—the desire to punish the strikers—would constitute an "independent unlawful purpose," regardless of the fact that it was not extrinsic to the strike. Indeed, the Board's opinion appears to assume that an intent to punish striking employees constitutes an independent unlawful purpose for purposes of *Hot Shoppes*.[14]

On appeal, the Second Circuit vacated the Board's decision and remanded the case, holding that the Board erred in finding that an employer's decision to keep the hiring of permanent replacements secret is not probative of whether the employer had an independent unlawful purpose for the hiring. *New England Health Care Employees Union*, 448 F.3d at 195. Like the Board, the court implicitly presumed that a desire to punish striking employees or to break the union would constitute an "independent unlawful purpose."[15]

For all of the foregoing reasons, we conclude, contrary to the judge, that *Hot Shoppes* does not require the General Counsel to demonstrate the existence of an unlawful purpose extrinsic to the strike but, rather, only that the hiring of permanent replacements was motivated by a purpose prohibited by the Act.[16]

B. Application of Hot Shoppes to the Facts of this Proceeding

The credited testimony establishes that the Respondent offered two reasons for its decision to permanently replace strikers: to punish the strikers and the Union and to

[12] The dissent argues that we have in effect eliminated the term "independent" from the analysis, and that we interpret the phase "independent unlawful purpose" to mean any antiunion or antistrike animus. This is incorrect. As explained, we interpret "independent unlawful purpose" to mean a motive prohibited by the Act. The dissent argues that during a strike or lockout, the parties are engaged in economic warfare, and "*intend to injure one another* in hopes of forcing the other side to surrender." (emphasis in original.) And, the dissent states, the Board gives the parties in a strike situation "wide latitude" to express "strong feelings": the expression of vituperative antiunion sentiment is not in itself unlawful. But the unlawful reasons the Respondent articulated here were not "stray" comments uttered in the heat of the moment. Ultimately, it is one thing for an employer to attempt to force the union to agree to its contract terms, and quite another to discriminate against employees for the express purpose of punishing them for striking. Such a punitive tactic finds no support in Board or court precedent.

[13] Although it was presented with the opportunity to address the issue in at least two other decisions—in which the respective judges concluded that the employers unlawfully permanently replaced striking employees with an "independent unlawful purpose"—the Board declined to do so and instead adopted the judges' alternative conclusions that the strikers were unfair labor practice strikers. See *Nicholas County Health Care Center*, 331 NLRB 970, 970 fn. 3 (2000), enfd. 13 Fed.Appx. 1 (D.C. Cir. 2001) (unpublished); *Pennsylvania Glass Sand Corp*., 172 NLRB 514 (1968), enfd. *General Teamsters and Allied Workers Local Union No. 992 v. NLRB*, 427 F.2d 582 (D.C. Cir. 1970).

The dissent's dire prediction—that our decision today will eliminate an employer's ability to utilize permanent replacements—is unfounded. The fact that this is only the second time since 1964 that the Board has been required to interpret *Hot Shoppes* indicates that use of permanent replacements for unlawful purposes is not a frequent occurrence.

[14] In rejecting the judge's conclusions, the majority stated that the evidence in the case "simply does not establish some kind of nefarious scheme to punish striking employees by hiring permanent replacements." In addition, in concluding that a document cited by the judge in support of his finding of unlawful motive merely demonstrated the employer's desire to obtain an economic advantage in bargaining, the majority stated: "Conspicuously absent from this list is any reference at all to the strikers, much less a reference to a desire to punish them. That is a telling omission." Id. at 1307. The dissent contends that the *Avery Heights* Board cast doubt on the notion that it would be unlawful for an employer to permanently replace employees in order to punish them for striking. The decision is not susceptible of such a reading. Nor, obviously, is the dissent's position consistent with the decisions of the Second Circuit.

[15] On remand, the Board accepted as the law of the case the court's finding that the logical implication of the employer's secret hiring of permanent replacements was an illicit motive. *Avery Heights*, 350 NLRB 214, 215 (2007), enfd. *Church Homes, Inc. v. NLRB*, 303 Fed.Appx. 998 (2d Cir. 2008), cert. denied 558 U.S. 945 (2009). The Board found that the employer's evidence was insufficient to refute the court's inference and, accordingly, concluded that the employer hired the permanent replacements with an unlawful motive and thereby violated the Act.

[16] *Mrs. Natt's Bakery*, 44 NLRB 1099 (1942), cited in the dissent, is not contrary to our decision here. In that case, there was no evidence that the employer engaged in permanent replacement of employees with an independent unlawful purpose. Rather, the facts show only that the employer warned its employees, and then made good on its warning, that they would be permanently replaced if they went on strike. Id. at 1108. On those facts, the Board declined to find that the employer unlawfully refused to bargain and reinstate the economic strikers. Id. Nothing in our decision today mandates a different result.

avoid future strikes. We find that both reasons are independently unlawful within the meaning of *Hot Shoppes*.[17]

As stated above, the Respondent's counsel told the Union's attorney that the Respondent planned to hire permanent replacements because it wanted "to teach the strikers and the Union a lesson." This statement evinces an intent to punish the striking employees for their protected conduct, and plainly reveals a retaliatory motive prohibited by the Act.

In addition, the record establishes that the Respondent made the decision to permanently replace the strikers because Executive Director Reynolds assumed that the permanent replacements would be willing to work in the event of another strike and the Respondent wanted to avoid the cost of hiring temporary employees again in the future. The Respondent's motive is clear from attorney Durham's statement to the Union that the Respondent hired permanent replacements because it "wanted to avoid any future strikes, and this was the lesson that they were going to be taught." This evidence establishes an additional independent unlawful motive, specifically a desire to interfere with employees' future protected activity. See *Parexel International*, 356 NLRB 516, 519 (2011) (noting that actions to prevent employees from engaging in protected activity are generally unlawful and that "the suppression of future protected activity is exactly what lies at the heart of most unlawful retaliation against past protected activity").[18]

We therefore conclude that the Respondent hired the permanent replacements for an independent unlawful purpose. Accordingly, its delay in reinstating certain strikers and its refusal to reinstate others violated Section 8(a)(3) and (1) of the Act. See *Erie Resistor*, 373 U.S. at 227–228.[19]

[17] Under the interpretation of *Mackay* espoused by the Board in *Hot Shoppes*, an employer is not required to articulate a reason for permanently replacing economic strikers. But if the employer does so (or if the evidence otherwise indicates a reason), the Board can and should determine whether that reason is an independent unlawful purpose. Here, the Respondent offered two reasons, both of which were unlawful.

[18] Even under the judge's limited view that an "independent unlawful purpose" is established only when an employer's hiring of permanent replacements is "unrelated to or extraneous to the strike itself," we would find that the Respondent violated the Act. Specifically, we find that the Respondent's motive of preventing future strikes is extrinsic to the employees' current strike activity, and similar to the example given by the judge of an employer who attempts to "unlawfully foment a decertification election." Both are attempts by an employer to thwart future protected activity.

The dissent asserts that Reynolds was "clearly" contemplating strike activity related to the ongoing labor dispute and that her motive therefore was not "independent" of the current strike. Nothing in the statements of Reynolds or Durham compels such a narrow interpretation, and we reject it.

[19] On August 12, 2015, the Respondent filed a motion to dismiss the complaint, arguing for the first time that at the time the underlying complaint was issued, Acting General Counsel Lafe Solomon was serving in violation of the Federal Vacancies Reform of 1998 (FVRA), 5 USC §§ 3345 et seq., and therefore lacked authority to issue the complaint. The Respondent did not raise any question about the authority of the Acting General Counsel (AGC) in its answer to the consolidated complaint or at any time during the extensive federal court litigation of the AGC's petition for a temporary injunction pursuant to Section 10(j) of the National Labor Relations Act, 29 USC §160(j). Nor did the Respondent raise this issue during the hearing before the Administrative Law Judge, in its posthearing brief, or in its exceptions to the Board. Under these circumstances, we find that the Respondent has waived its right to challenge the AGC's authority to prosecute this case, and we reject the Respondent's motion to dismiss as an untimely effort to file additional exceptions. See *The Boeing Co.*, 362 NLRB No. 195, slip op. at 1 fn. 1 (2015).

Even if we were to consider the Respondent's challenge to the authority of the AGC under the FVRA, we would not find it appropriate to dismiss the complaint. On September 28, 2015, General Counsel Richard F. Griffin, Jr. issued a Notice of Ratification in this case which states, in relevant part,

> The prosecution of this case commenced under the authority of Acting General Counsel Lafe E. Solomon during the period after his nomination on January 5, 2011, while his nomination was pending with the Senate, and before my confirmation on November 4, 2013.
>
> The United States Court of Appeals for District of Columbia Circuit recently held that Acting General Counsel Solomon's authority under the Federal Vacancies Reform Act (FVRA), 5 U.S.C. §§ 3345 et seq., ceased on January 5, 2011, when the President nominated Mr. Solomon for the position of General Counsel. *SW General, Inc. v. NLRB,* F.3d, 2015 WL 4666487, (D.C. Cir., Aug. 7, 2015). The Court found that complaints issued while Mr. Solomon's nomination was pending were unauthorized and that it was uncertain whether a lawfully-serving General Counsel or Acting General Counsel would have exercised discretion to prosecute the cases. *Id.* at *10.
>
> I was confirmed as General Counsel on November 4, 2013. After appropriate review and consultation with my staff, I have decided that the issuance of the complaint in this case and its continued prosecution are a proper exercise of the General Counsel's broad and unreviewable discretion under Section 3(d) of the Act.
>
> My action does not reflect an agreement with the appellate court ruling in *SW General*. Rather, my decision is a practical response aimed at facilitating the timely resolution of the charges that I have found to be meritorious while the issues raised by *SW General* are being resolved. Congress provided the option of ratification by expressly exempting "the General Counsel of the National Labor Relations Board" from the FVRA provisions that would otherwise preclude the ratification of certain actions of other persons found to have served in violation of the FVRA. (Citation omitted.)
>
> For the foregoing reasons, I hereby ratify the issuance and continued prosecution of the complaint.

On October 8, 2015, the Respondent filed a supplement to its motion to dismiss arguing that General Counsel Griffin lacked the authority to ratify the actions taken by former Acting General Counsel Solomon because those actions were void under *SW General* and subject to "au-

AMENDED REMEDY

In addition to the remedies provided in the judge's Order as amended above, we shall require the Respondent to offer all of the strikers who have not yet been reinstated full reinstatement to their former jobs, discharging, if necessary, any employees currently in those positions or, if those jobs no longer exist, to substantially equivalent positions. We shall also order the Respondent to make the former strikers whole for any loss of earnings and other benefits, from August 7, 2010, to the date they receive valid offers of reinstatement, in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In addition, in accordance with our recent decision in *Advoserv of New Jersey,* supra, the Respondent shall compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 32, within 21 days of the date the amount of backpay is fixed, either by agreement of Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

ORDER

The National Labor Relations Board orders that the Respondent, American Baptist Homes of the West d/b/a Piedmont Gardens, Oakland, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Engaging in surveillance or creating the impression that it was engaging in surveillance of its employees' union activities.

(b) Disparately enforcing its access rule (Rule 33) by evicting off-duty employees engaged in union activity from the facility.

(c) Refusing to reinstate, or delaying the reinstatement of, striking employees, who were permanently replaced with an independent unlawful purpose, and who made an unconditional offer to return to work.

(d) Failing and refusing to furnish the Union with the names and addresses of the permanent replacement employees whom it hired from outside the organization.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer all of the strikers who have not yet been reinstated full reinstatement to their former jobs, discharging, if necessary, any employees currently in those positions or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed.

(b) Make all former strikers whole for any loss of earnings and other benefits suffered as a result of the refusal to reinstate them on August 7, 2010, in the manner set forth in the amended remedy section of this decision.

(c) Compensate employees entitled to backpay under the terms of this Order for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 32, within 21 days of the date the amount of backpay is fixed, either by agreement or Board Order, a report allocating the backpay award to the appropriate calendar years for each employee.

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tomatic reversal." The Respondent also argues that even if the error were "harmless" under the Administrative Procedure Act, the error at issue is "indelible and permanently prejudicial" under 5 U.S.C §707. We reject the Respondent's arguments.

The Respondent has misstated the holding of *SW General*. In that case, the court recognized that the General Counsel of the National Labor Relations Board is one of several officers expressly exempted from the "void-ab-initio" and "no-ratification" provisions of the FVRA. 796 F.3d at 78–79, citing 5 U.S.C. § 3348(e)(1). Therefore, the court treated the actions of an improperly serving Acting General Counsel as "*voidable*, not void," id. at 79 (emphasis in original), suggesting that any statutory defect in actions could be cured through ratification by a properly appointed General Counsel. See id. at 78–79 (discussing 5 U.S.C. § 3348); see also *Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203 (D.C. Cir.1998); *Federal Election Commission v. Legi–Tech, Inc.*, 75 F.3d 704 (D.C. Cir.1996).

Nor is there merit to the Respondent's argument that any defect in Acting General Counsel Solomon's temporary appointment was "a structural error and thus 'subject to automatic reversal'" or "derivatively tainted" the General Counsel's ratification. The D.C. Circuit rejected a similar argument in *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board*, 796 F.3d 111, 121–124 (D.C. Cir. 2015). The court found that a Copyright Royalty Board decision issued by members appointed in violation of the Constitution's Appointments Clause did not "incurably taint" a validly appointed board from issuing a new decision based on an independent, de novo review of the written record in the earlier proceeding. The court concluded that the Copyright Board was not required to conduct a new hearing, and nothing in the Appointments Clause barred the board from reaching the same conclusion as its predecessor. Id. at 121. For these reasons the court found there was no error that could not be remedied by an independent consideration by a properly appointed board. 796 F.3d at 123–124. See also *Federal Election Commission v. Legi–Tech, Inc*., 75 F.3d 704, 707 and 709 (D.C. Cir.1996) (finding lawful the newly constituted commission's ratification of a pending enforcement action that was decided by a prior commission that was unconstitutionally constituted); *Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, supra (same).

Here, we find that the General Counsel's ratification of the issuance and continued prosecution of the complaint, based on his independent review of the case record, remedied any alleged defect stemming from the Acting General Counsel's appointment under the FVRA.

The Respondent's motion to dismiss is denied.

(d) Within 14 days from the date of this Order, remove from its files any reference to its unlawful failure to reinstate the former strikers, and within 3 days thereafter notify the strikers in writing that this has been done and that the failure to reinstate them will not be used against them in any way.

(e) Provide the Union with the names and addresses of the permanent replacement employees who were hired from outside sources.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Oakland, California, copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places 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. If 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 June 17, 2010.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 32 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. May 31, 2016

[20] 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."

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting in part.

When the Board addresses the legality of economic weapons under the National Labor Relations Act (NLRA or Act), there is a paradox that makes it important to differentiate between what one would prefer to see in collective bargaining, and what role Congress contemplated for economic weapons as part of the collective-bargaining process. The paradox is this: the NLRA was adopted to *eliminate* obstructions to commerce, but it accomplishes that objective by protecting the right of employees, unions, and employers to *utilize* strikes, lockouts, and other economic weapons.[1] What one hopes to see in any collective-bargaining dispute is its successful resolution without any party's resort to economic weapons. But what *Congress* intended was for the Board to preserve the balance of competing interests—including potential resort to economic weapons—that Congress devised as the engine driving parties to resolve their differences and to enter into successful agreements. As the Supreme Court stated in *NLRB v. Insurance Agents' International Union,* 361 U.S. 477, 487–489 (1960), employers and unions in collective bargaining "proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. . . . The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized."

Congress did not empower the Board to pick and choose among economic weapons that parties might invoke in a collective-bargaining dispute. *Insurance Agents,* 361 U.S. at 497 (the Board may not act as "arbi-

[1] Sec. 1 of the Act states: "It is declared to be the policy of the United States to *eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions* when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self- organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection" (emphasis added).

ter of the sort of weapons the parties can use in seeking to gain acceptance of their bargaining positions"). Nor does the Board have "general authority to define national labor policy by balancing the competing interests of labor and management." *American Ship Building Co. v. NLRB,* 380 U.S. 300, 316 (1965).

I do not favor the hiring of permanent replacements to resolve collective-bargaining disputes any more than I favor strikes, lockouts and other types of threatened or inflicted economic injury that are protected under our Act. The *statute* protects these types of economic weapons. Their availability, combined with their "actual exercise on occasion by the parties," *Insurance Agents,* supra, has produced virtually all of the agreements reached in the Act's 80-year history.

It is also clear that collective bargaining and labor-management disputes evoke extraordinarily strong feelings. There is often a sharp clash between seemingly irreconcilable positions. When unions and employees engage in a work stoppage or other industrial action, or when an employer operates during a strike or responds by hiring replacement employees, such tactics are indeed "weapons." *Insurance Agents*, supra. Nobody can be confused about their purpose: they are exercised with the intention of inflicting severe and potentially irreparable injury, often causing devastating damage to businesses and terrible consequences for employees. Congress *protected* such economic warfare—including the hostile emotions that it produces—as the only way bargaining could force parties to resolve intractable disputes based on the acceptance of terms they adamantly opposed, at least initially. Instructive is the court's description of strikes and lockouts, for example, in *NLRB v. Wire Products Mfg. Corp*., 484 F.2d 760 (7th Cir. 1973):

> *The strike is a potent economic weapon which may, and often is, wielded with disastrous effect on its employer target*. Recognition was given to the lockout as a legitimate economic weapon on the part of the employer in *American Ship Building*: "*we cannot see that the employer's use of a lockout solely in support of a legitimate bargaining position is in any way inconsistent with the right to bargain collectively or with the right to strike*."
>
> * * *
>
> The implicit recognition of some degree of equivalency between the respective weapons of economic leverage should not be thwarted via an artificially contrived but substantially unsupported factual basis. *Feelings are intense and deeply held by both parties when a lack of employment occurs, whether as the result of a strike or a lockout. The employees are denied their pay checks. The employer is denied the normal processes of production*. Statements and conduct which could be the basis for inferring animus, which the parties each entertain toward the other, are not difficult to detect. *The standard here, however, is not the existence of an inchoate animus but rather whether that feeling did in fact motivate*. In the legislative scheme, the courts serve some more worthwhile purpose than that of automatically rubberstamping approval of Board determinations. In the consideration of this particular issue, "[a]n unlawful purpose is not lightly to be inferred. In the choice between lawful and unlawful motives, the record taken as a whole must present a substantial basis of believable evidence pointing toward the unlawful one."[2]

The Supreme Court has long recognized that the hiring of permanent replacements is an economic weapon employers may lawfully deploy in response to an economic strike.[3] Thus, in *Mackay Radio*, the Supreme Court stated:

> Although section 13 of the act . . . provides, "Nothing in this Act . . . shall be construed so as to interfere with or impede or diminish in any way the right to strike," *it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them*. The assurance by respondent to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice, nor was it such to reinstate only so many of the strikers as there were vacant places to be filled.[4]

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[2] Id. at 765 (emphasis added) (quoting *American Ship Building Co. v. NLRB*, 380 U.S. at 310, and *NLRB v. McGahey*, 233 F.2d 406, 413 (5th Cir. 1956)). See also *NLRB v. Brown Food Stores*, 380 U.S. 278, 284 (1965) ("[W]e do not see how the continued operations of respondents and their use of temporary replacements imply hostile motivation any more than the lockout itself; nor do we see how they are inherently more destructive of employee rights."); *Central Illinois Public Service Co.*, 326 NLRB 928, 930–931, 934 (1998) (same).

[3] *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345 (1938); see also *Trans World Airlines v. Independent Federation of Flight Attendants*, 489 U.S. 426, 437 (1989); *Machinists Lodge 76 v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 152 (1976); *American Ship Building Co. v. NLRB*, 380 U.S. at 316. In light of these precedents and others, I do not believe that whether the permanent replacement of economic strikers is a legitimate form of economic pressure is reasonably open to question.

[4] 304 U.S. at 345 (footnotes omitted; emphasis added).

In *Hot Shoppes, Inc.*, 146 NLRB 802, 805 (1964), the Board adopted a rule disallowing any scrutiny into an employer's *motive* for hiring permanent replacements. The Board rejected a trial examiner's finding that the employer violated Section 8(a)(3) and (1) by hiring permanent replacements as part of what the trial examiner described as "a contrived scheme to make it possible for the Hot Shoppes management officials to penalize various of the strikers and to defeat their rights to reinstatement."[5] A unanimous Board held:

> We . . . disagree with the Trial Examiner's premise that an employer may replace economic strikers only if it is shown that he acted to preserve efficient operation of his business. The Supreme Court's decision in *Mackay Radio & Telegraph Company*, and the cases thereafter, although referring to an employer's right to continue his business during a strike, state that *an employer has a legal right to replace economic strikers at will*. We construe these cases as holding that *the motive for such replacements is immaterial*, absent evidence of an *independent unlawful purpose*. Therefore, we reject the Trial Examiner's conclusion that the plan to replace the economic strikers here was itself improper and that the strike was converted to an unfair labor practice strike on January 4 by Respondent's implementation of such plan.[6]

In the instant case, Judge Litvack correctly applied the rule of *Hot Shoppes*: employers have the right to hire permanent replacements regardless of motive. The judge also correctly interprets the "independent unlawful purpose" exception. In his view, that exception applies only where the hiring of permanent replacements "is calculated to accomplish another, unlawful purpose, one *unrelated to or extraneous to* the strike itself" (emphasis added). Otherwise, he says, "the entire preceding clause"—i.e., that the employer's motive for hiring permanent replacements is immaterial—is rendered "a nullity." In my view, the judge's reading of *Hot Shoppes* is obviously correct.

My colleagues improperly adopt an interpretation of "independent unlawful purpose" to mean any antiunion or antistrike animus. What *Hot Shoppes* states as an exception, my colleagues make the rule. In their view, "motive is immaterial" means precisely the opposite: motive is material, and only certain motives are lawful. The majority performs a rehab of *Hot Shoppes* that leaves almost nothing standing. One piece of the structure remains intact—the phrase "independent unlawful purpose"—but the original builders would never recognize the place. Using Judge Litvack's apt phrase, the majority has rendered *Hot Shoppes* a nullity.

More is at stake here than the deformation of Board precedent, serious as that is. The predictable result is a substantial rearrangement of the competing interests balanced by Congress when it chose to protect various economic weapons, including the hiring of permanent replacements. Again, the hiring of permanent replacements necessarily occurs only when all parties have resorted to economic warfare: the union and striking employees have exercised their protected rights to inflict economic injury on the employer's business, and the employer has exercised a protected right to respond by measures that inflict economic injury on the union and employees. These are not circumstances for the faint of heart. During such times, parties almost invariably bear animus toward each other. It would be common for the union and employees to widely distribute accusations that the employer is treating employees unfairly because of greed and injustice. It would be equally common for the employer to respond—and believe—that the union and employees are being unreasonable and irresponsible. In most cases, the parties understand that their dispute may cause everybody to experience severe economic injury and, possibly, financial ruin.

The Act does not require parties to maintain Spock-like objectivity towards one another when resorting to economic weapons.[7] Nor is it realistic to believe that parties in these circumstances will remain in a dispassionate state of cool detachment. Yet, under the majority's decision today, if the employer hires permanent replacements, it appears that any evidence of antistrike animus will render unlawful the employer's actions, resulting in potentially debilitating backpay liability. This would represent a structural change in the competing

[5] Id. at 835.

[6] 146 NLRB at 805 (citing *Mackay Radio*, 304 U.S. at 333; *American Optical Co*., 138 NLRB 681, 689 (1962)) (emphasis added).

[7] Mr. Spock—a main character in the well-known television and movie series *Star Trek*—was perhaps best known for his (largely successful) efforts to suppress emotion. His father was from the planet Vulcan, where beings were "noted for their attempt to live by reason and logic." However, even Spock, who had a human mother, experienced a "strained and often turbulent" relationship with his Vulcan father, though it was "rooted in an underlying respect and carefully restrained love." Wikipedia, Spock (http://en.wikipedia.org/wiki/Spock) (last viewed May 23, 2016); Wikipedia, Vulcan (Star Trek) (http://en.wikipedia.org/wiki/Vulcan_(Star_Trek)) (last viewed May 23, 2016). Like other Vulcan males, Spock also periodically experienced "pon farr," which seemingly resulted in a battle to the death between Spock and his friend and captain, James T. Kirk, in the Star Trek second season premiere. Wikipedia, Amok Time (https://en.wikipedia.org/wiki/Amok_Time) (last viewed May 23, 2016).

interests of employees, unions and employers that is contrary to what Congress intended, and what the Supreme Court has recognized, in the statute we are duty-bound to enforce.

Factual Background

On May 25, 2010,[8] at a time when the parties remained at odds in collective bargaining over several major issues (including health care, pensions, and disciplinary policies), the Union picketed the Respondent's facility. The pickets carried signs bearing slogans such as "no healthcare reductions," "pension now," and "fair wages now."

By two letters dated July 9 and delivered simultaneously to the Respondent, the Union notified the Respondent that it planned to call a strike. One letter informed the Respondent that the Union would commence a strike on Monday, August 2 and continue striking "unless and until a mutually agreeable resolution has been reached." The other letter advised that all of the striking employees "unconditionally offer to return to work at or after 5:00 a.m. on Saturday, August 7, 2010." The Respondent's Executive Director, Gayle Reynolds, testified that she found the letters "very ambiguous" as to when the strike would end and that "[she] didn't know really what to believe." In her mind, it was possible that the strike would end after 5 days and the employees would return to work without a contract, leaving open the possibility of further strikes. An alternative possibility, in her view, was that the strike would continue indefinitely, until the parties bridged their divide and negotiated a full collective-bargaining agreement.

To prepare for the strike, the Respondent engaged a staffing agency, Huffmaster, to furnish temporary replacements for its striking workers. This came at considerable expense, upwards of $300,000 for a 5-day period. Of course, this was the Union's purpose in calling a strike: to disrupt the Respondent's operations and inflict economic pain as a means to pressure the Respondent to accept the Union's bargaining demands. Several days into the economic strike, the Respondent decided to hire permanent replacements. Reynolds testified that she made that decision to avoid the expense of repeatedly hiring temporary workers through Huffmaster. She further testified that she was motivated in part by a desire to enable the Respondent to better weather the Union's strike activity.[9] In this regard, Reynolds assumed that, because the replacement workers were willing to work during this strike, they would be willing to work if the Union called another strike during the ongoing labor dispute. Finally, the judge credited testimony by the Union's attorney, Bruce Harland, that the Respondent's attorney, David Durham, told him over the telephone that the Respondent was hiring permanent replacements "to teach the strikers and the Union a lesson" and that the Respondent "wanted to avoid any future strike, and this was the lesson that they were going to be taught."[10]

On August 7, the Union ended its strike without having pressured the Respondent into accepting its demands. The Respondent declined to reinstate 44 of the strikers based on the fact that they had been permanently replaced.

Discussion

Section 8(d) of the Act imposes on employers and unions alike the duty to bargain in good faith over wages, hours, and other terms and conditions of employment. However, good-faith bargaining does not always produce a collective-bargaining agreement, and resort to economic weaponry "is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized." *NLRB v. Insurance Agents' International Union*, 361 U.S. at 489. One well-recognized legitimate economic weapon in the arsenal of employers is the right to permanently replace economic strikers. Supra fn. 3 (collecting cases); *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996) (invalidating, as in conflict with the NLRA, executive order barring federal government from contracting with employers who hire permanent replacements); *Avery Heights*, 343 NLRB 1301 (2004) ("[E]mployers have a right [to hire permanent replacements] to 'fight back' in the economic battle and the right to try to continue operations during a strike."), vacated and remanded on other grounds *New England Health Care Employees Union v. NLRB*, 448 F.3d 189, 195 (2d Cir. 2006), on remand 350 NLRB 214 (2007).

In *Hot Shoppes*, 146 NLRB at 805, the Board explained that an employer's motive in hiring permanent replacements "is immaterial, absent evidence of an independent unlawful purpose." In that case, a union threatened to strike an employer when their negotiations failed to produce an agreement. In response, the employer made several threats to hire permanent replacements. For example, on one occasion prior to the strike, manag-

[8] All dates are in 2010.

[9] Thus, the majority is incorrect when it asserts that "the Respondent did not even purport to be acting in support of its bargaining position." By attempting to reduce the costs imposed by the strike and to bolster its ability to weather this strike and potential future strikes, the Respondent acted in support of its bargaining position.

[10] Durham denied on the stand that he made any such statements. The judge credited Harland over Durham based on demeanor.

er Bank told employee Dorsainvil that the current strike, unlike a prior strike, would be "an economic strike and in that kind of strike, everyone is going to be replaced permanently if they go on strike." Id. at 812.[11] The employer's decision to hire permanent, rather than temporary, replacements was made on advice of counsel: "Counsel advised the management officials not only to hire replacements but *to hire them on a permanent basis*." Id. at 816 (emphasis in original). Relying on this advice, the employer departed from its standard hiring procedure and informed each replacement that he "was being hired on a permanent basis." Id. Shortly before the strike commenced, the employer "*boast*[*ed*] to various commissary employees that [the employer] had 40 or so people already in hotels ready to take their places . . . ." Id. at 814 (emphasis added). There is no suggestion in the trial examiner's extensive decision that Hot Shoppes considered the possibility of retaining temporary replacements for the duration of the strike before deciding to hire permanent replacements. Based on this evidence—and quoting the very language from *Erie Resistor*[12] on which my colleagues rely—the trial examiner found that Hot Shoppes was motivated by a desire to defeat the strikers' right to immediate reinstatement, not simply to continue operations during the strike's duration, and that it thereby violated the Act.

On exceptions, the Board reversed the trial examiner and dismissed the complaint. Importantly, the Board *did not disagree* with the trial examiner's factual finding, amply supported by the record there, that Hot Shoppes had hired the permanent replacements "pursuant to a 'contrived scheme' to defeat the economic strikers' right to reinstatement." Id. at 805. Rather, the Board disagreed with the trial examiner's legal premise that an employer may replace strikers only to preserve efficient operation of the business. According to the Board, the trial examiner's legal premise was inconsistent with *Mackay Radio*, which, "although referring to an employer's right to continue his business during a strike, states that an employer has a legal right to replace economic strikers at will." Id. The Board construed *Mackay Radio* and its progeny as holding that the motive underlying permanent replacement "is immaterial, absent evidence of an independent unlawful purpose," id.[13], and it rejected the trial examiner's conclusion that Hot Shoppes' motive constituted such an independent unlawful purpose. Id. ("[W]e reject the Trial Examiner's conclusion that the plan to replace the economic strikers here was itself improper.").

[11] A year earlier, in a separate case, the Board found that the Respondent had committed unfair labor practices in connection with a prior strike by the Union. *Hot Shoppes, Inc.*, 133 NLRB 3 (1961). In that case the trial examiner, whose decision the Board adopted, found that the strike was an unfair labor practice strike and ordered the Respondent to reinstate the strikers upon their application to return to work.

[12] 373 U.S. at 221. Like the majority in the instant case, the trial examiner in *Hot Shoppes* viewed *Erie Resistor* as materially limiting the holding of *Mackay Radio*. In this regard, the trial examiner quoted and relied on the following language from *Erie Resistor*: "'When specific evidence of a subjective intent to discriminate or to encourage or discourage union membership is shown, and found, many otherwise innocent or ambiguous actions which are normally incident to the conduct of a business may, without more, be converted into unfair labor practices.'" *Hot Shoppes*, 146 NLRB at 835 (quoting *Erie Resistor*, 373 U.S. at 227). The majority bases its expansive interpretation of "independent unlawful purpose" on this very language—disregarding the fact that the *Hot Shoppes* Board *rejected* the trial examiner's finding, based on *Erie Resistor*, that Hot Shoppes' hiring of permanent replacements violated the Act. Indeed, the *Hot Shoppes* Board expressly *distinguished Erie Resistor*. 146 NLRB at 805 fn. 7.

[13] As noted above, in support of its construction of *Mackay Radio*, the Board cited *American Optical Co.*, 138 NLRB at 681. In *American Optical*, the Board, adopting the trial examiner's decision, categorically stated that "[a]n employer's lawful right during a strike called for economic reasons to operate his business by hiring employees permanently to replace strikers *is not challengeable*." 138 NLRB at 688 (emphasis added). The majority finds *American Optical* "not helpful" because the employer there permanently replaced employees to compel the union to accede to its bargaining proposals, and they contend that "this is *not* a case in which the employer acted in support of its bargaining position." I believe the majority's attempt to distinguish *American Optical* is unconvincing. An employer (such as the Respondent) who hires permanent replacements to counter the strike weapon, wielded by the union to pressure the employer to abandon its bargaining position, *is* supporting its bargaining position. Cf. *Central Illinois Public Service Co.*, 326 NLRB at 932 ("[I]t makes little sense to say that the lockout was caused by the [union's] inside game strategy rather than by the respective bargaining positions of the parties.").

Supreme Court precedent supports the irrelevancy of an employer's motive in hiring permanent replacements. In *Belknap v. Hale*, 463 U.S. 491 (1983), the Supreme Court cited *Hot Shoppes* and quoted the passage in which the Board construed *Mackay Radio* as holding that the motive for hiring permanent replacements is irrelevant. Id. at 504 fn. 8. "There are no cases in this Court that require a different conclusion," the Court stated. Id. Significantly, the Court emphasized that *Erie Resistor*, in which my colleagues place such stock, involved a different issue—"an offer of super-seniority to replacements"—and that the *Erie Resistor* "opinion was careful to distinguish cases not involving that element." Id. Thus, *Belknap v. Hale* substantially undermines the majority's view that the holding of *Mackay Radio* was limited or modified by *Erie Resistor*. The Court rejected a similar effort to "expand *Erie Resistor*" in *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 489 U.S. at 436–438.

The majority distorts my position. They assert that, under my approach, "granting superseniority to nonstrikers, as in *Erie Resistor*, would have been lawful because it was related to the strike." But the fact that a prohibited tactic is related to a strike does not lift the prohibition. The granting of superseniority to nonstrikers or crossovers is a prohibited tactic. The permanent replacement of economic strikers is a recognized, legitimate economic weapon.

In four ways, the *Hot Shoppes* decision provides substantial guidance regarding the Board's standards governing permanent replacements.

First, the *rule* of *Hot Shoppes* is that the employer's motive is irrelevant. The *exception* to that rule is where the employer has an "independent unlawful purpose." Obviously, any reasonable interpretation of *Hot Shoppes* must keep the rule the rule, and the exception the exception.[14]

Second, the Board in *Hot Shoppes*—in addition to relying on *Mackay Radio*, supra—cited another case, *American Optical Co*., 138 NLRB at 689, for the proposition that regardless of motive, "an employer has a legal right to replace economic strikers at will." *Hot Shoppes*, 146 NLRB at 805. The Board cited with approval the findings of the trial examiner in *American Optical*, who stated:

> I deem wholly without merit the contention that the Respondent violated Section 8(a)(5) of the Act *by replacing economic strikers as a means of forcing the Union to accede to its bargaining proposals*. If the Respondent had a lawful right to operate its business by replacing its striking employees, which I found it had, *Section 8(a)(5) is not violated merely because the clear effect of this action was to weaken the Union's bargaining position and to make it more amendable* [sic] *to acceptance of the Respondent's proposals*. This was no more unlawful than would have been the successful conduct of the strike of the Union to weaken the position of the Respondent and thus to wring from it the concessions demanded by the Union.[15]

Third, the Board in *Hot Shoppes* distinguished two other cases—*Cone Brothers Contracting Co*.[16] and *NLRB v. Erie Resistor Corp*.[17]—which, according to the Board, did "not lend themselves to an analogy to the situation involved in the instant case." Both cases involved egregious employer misconduct that clearly went beyond merely hiring replacement employees. In *Cone Brothers*, the employer discriminatorily gave certain employees job assignments at a location where the employees were required to cross a picket line erected by one union (the Operating Engineers), and when the employees predictably refused to cross the picket line, the employer designated them "quits" so they would be ineligible to vote in a scheduled representation election involving a different union (the Teamsters).[18] In *Erie Resistor*, the employer unlawfully gave replacement employees and returning strikers a 20-year "super-seniority" credit, which effectively guaranteed that striking employees—unless they abandoned the strike—would always be laid off first.[19] According to the Supreme Court in *Erie Resistor*, even the Board recognized the "permanent replacement" of striking employees was "proper under *Mackay*."[20] Similarly, the Court likewise held: "We have no intention of questioning the continuing vitality of the *Mackay* rule, but we are not prepared to extend it to the situation we have here."[21]

Finally, when the Board in *Hot Shoppes* referred to a possible "independent unlawful purpose" (as an exception to the general rule permitting employers to hire permanent replacements without regard to motive), the Board cited *Cone Brothers*. Especially in conjunction with the other cases described above, the Board's reference to *Cone Brothers* reinforces two propositions: (i) the Board in *Hot Shoppes* meant to leave undisturbed the overriding principle that the hiring of permanent replacements is lawful without regard to motive, and (ii) an "independent unlawful purpose" could exist only if the employer had some unlawful objective involving something *other* than the hiring of permanent replacements and the parties' bargaining relationship. As explained above, in *Cone Brothers* the employer gave discriminato-

[14] *S&F Market Street Healthcare LLC v. NLRB*, 570 F.3d 354, 361 (D.C. Cir. 2009) (court rejects Board exception that would improperly "swallow the rule" that predecessor employment terms are nonbinding on successor employers); *NLRB v. Great Atlantic & Pacific Tea Co*., 340 F.2d 690, 694 (2d Cir. 1965) (court rejects Board finding that layoffs were "inherently" discriminatory because it "effectively reads the required showing of 'motivation' out of the statute"; court reasons that the "exception . . . cannot swallow the rule"); *Tennessee Shell Co.*, 212 NLRB 193, 196 (1974) (Board rejects arguments for more expansive employer waivers of secret ballot elections because otherwise the "exception might well swallow up the rule"), rev. denied mem. 515 F.2d 1018 (D.C. Cir. 1975).

[15] *American Optical Co*., 138 NLRB at 689 (emphasis added).

[16] 135 NLRB 108 (1962), enfd. 317 F.2d 3 (5th Cir.), cert. denied 375 U.S. 945 (1963).

[17] 373 U.S. 221 (1963).

[18] 135 NLRB at 116–117, 127 fn. 29, 135–141. According to the Board, this was a "scheme of placing [the] employees . . . in the position of either crossing the picket line . . . or being placed in a 'quit' status," and the Board concluded that the employer "constructively discharged these employees for the purpose of discouraging union membership in violation of Section 8(a)(3) and (1) of the Act." Id. at 109. The Board upheld the findings of the trial examiner, who concluded the employer "acted throughout with discriminatory intent to utilize the shibboleth of Prestressed's picket line, not only to expose union adherents, but to disqualify them as quits from voting in the coming election." Id. at 140.

[19] The 20-year super-seniority credit was defined as "20 years' additional seniority both to replacements and to strikers who returned to work, which would be available . . . for credit against future layoffs." 373 U.S. at 223.

[20] Id. at 230.

[21] Id. at 232.

ry job assignments to employees to force them to refuse to cross one union's picket line so the employer could designate them as "quits" and later claim they were ineligible to vote in a *different* union's representation election.[22]

These cases demonstrate that the *Hot Shoppes* "independent unlawful purpose" exception is not triggered by an employer's desire to retaliate against union economic warfare with legitimate economic weapons of its own, even if the employer wants to teach strikers a lesson about a strike's lawful consequences. Rather, an "independent unlawful purpose" requires the General Counsel to prove that permanent replacements were calculated to accomplish an unlawful purpose extrinsic to the parties' bargaining relationship or unrelated to the strike itself.

My reading of *Hot Shoppes* is consistent with the Board's common understanding and customary usage of the term "independent," which means "not subject to control by others" and "not requiring or relying on something else: not contingent."[23] Board law has adhered to this definition—for example, when defining the term "independent judgment" for Section 2(11) purposes as "form[ing] an opinion or evaluation by discerning and comparing data" while "*free of the control of others*." *Oakwood Healthcare, Inc.*, 348 NLRB 686, 692–693 (2006) (emphasis added).[24] Also, "where [an administrative law judge's] credibility resolutions are not based primarily upon demeanor . . . the Board itself may proceed to an *independent* evaluation of credibility." *J. N. Ceazan Co.*, 246 NLRB 637, 638 fn. 6 (1979) (internal quotations omitted; emphasis added). In this context, the Board's "independent" evaluation of credibility means without relying on the judge's analysis or determinations. Likewise, the phrase "independent unlawful purpose" in *Hot Shoppes* denotes an unlawful purpose "not contingent" on matters associated with the strike. Accordingly, to be unlawful under *Hot Shoppes,* the "independent" purpose must relate to something other than the employer's sentiments and objectives concerning the strike itself.

My reading is also consistent with *Mrs. Natt's Bakery*, 44 NLRB 1099 (1942). In that case, a union with majority support in a unit of bakers approached an employer for the first time at noon on a Friday, presented a first contract proposal, and threatened to strike if the employer did not accept by 3:30 p.m. that day. The employer's owner asked to be given to the following Monday to consider the union's proposal. In response, the union, after consulting with the employees, repeated that the employees would strike unless the employer signed by 3:30 p.m. The employer's owner then told the union's organizer that "the employees would lose their jobs if they went on strike, and [the union organizer] undertook 'to talk to the boys again'" about possibly delaying the strike. Id. at 1108. Around 3:30 p.m., the employer's owner addressed an assembly of employees. "He asked the employees to wait until Monday for his answer to the proposed contract and warned them that they would be replaced if they went on strike without granting his request." Id. The employees promptly struck. Making good on his threat, the employer hired permanent replacements and refused to reinstate the strikers when the union ended its strike approximately 6 weeks later.

It was clear in *Mrs. Natt's Bakery* that the employer hired permanent replacements as an economic countermeasure to its employees' strike activity, not simply to ensure efficient operation of the enterprise. Nevertheless, the Board dismissed allegations that the employer had refused to bargain in good faith by threatening to permanently replace the strikers and had discriminated against the strikers by following through on his threat and refusing to reinstate them upon the strike's termination. Citing *NLRB v. Mackay Radio & Telegraph Co.*, supra, the Board observed that an employer "may replace employees participating in a purely economic strike," and explained that "[s]ince an employer may in such a setting replace striking employees *with impunity*, it is not unlawful for him to state such an intention." Id. (emphasis added); see Matthew W. Finkin, *Labor Policy and the Enervation of the Economic Strike*, 1990 U. ILL. L. REV. 547, 548 (1990) (explaining that the Board in *Mrs. Natt's Bakery* viewed permanent replacement "as a bludgeon in a contest of economic strength" that is "unfettered by any

[22] Although the Board in *Hot Shoppes* cited *Cone Brothers* as an example shedding light on the phrase "independent unlawful purpose," the *Hot Shoppes* citation begins with the introductory signal "cf." See *Hot Shoppes*, 146 NLRB at 805 fn. 10. This suggests the Board regarded *Cone Brothers* as helpful to an understanding of the phrase "independent unlawful purpose," but *Cone Brothers* was nonetheless an imperfect illustration (no doubt because the alleged discriminatees were not permanently replaced). The introductory signal "cf." is used when "[c]ited authority supports a proposition different from the main proposition but sufficiently analogous to lend support." *Lopez-Rodriguez v. Holder*, 560 F.3d 1098, 1104 fn. 12 (9th Cir. 2009).

[23] *Webster's Third New International Dictionary* 1148 (1971).

[24] In this connection, the Board will not find Sec. 2(11) supervisory authority to discipline unless the exercise of such authority "'lead[s] to personnel action[] without the *independent* investigation or review of other management personnel.'" *Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 2 (2014) (emphasis added) (quoting *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002)). In other words, an employee only has authority to discipline where the issuance of such discipline is not contingent on higher managerial review.

requirement of demonstrable business necessity or the unavailability of less drastic means to resist the strike").[25]

I agree with the judge that the General Counsel failed to prove that the Respondent hired permanent replacements with an "independent unlawful purpose," i.e., an antiunion motive extrinsic or unrelated to the Union's strike activity. As noted above, the evidence indicates that three motives drove the Respondent's hiring of permanent replacements: (1) a desire to avoid the expense of continuing to contract with Huffmaster to furnish temporary replacements; (2) a desire to "teach the strikers and the Union a lesson" so as to "avoid any future strike"; and (3) a desire to enable itself to better weather continued strike activity (if future strikes were not avoided) during the course of an ongoing labor dispute. These motives are directly related to the strike, and they do not reflect antiunion animus independent of the parties' bargaining relationship.[26] Both sides were actively engaged in a contest of economic strength, and both used weapons that Congress has chosen to protect.

I believe the record fails to support my colleagues' conclusion that the Respondent's hiring of permanent replacements involved an "independent unlawful purpose" within the meaning of *Hot Shoppes*, based on a motive to "retaliate against" or "punish" employees for engaging in protected strike activity. The majority finds an "independent unlawful purpose" existed based on Attorney Durham's "teach them a lesson" statement and Executive Director Reynolds's testimony that she thought permanent replacements would likely "come to work if there was another work stoppage." In my view, the majority's holding suffers from several flaws.

First, as explained above, the majority's views are irreconcilable with *Hot Shoppes*, supra, which held that permanent replacement undertaken to oppose strike activity is lawful and that motive is irrelevant. Likewise, I believe the majority's views are contrary to the Board's careful analysis in *Hot Shoppes*—including its reliance on *Mackay Radio*, *Erie Resistor*, *American Optical*, and *Cone Brothers*, supra—which provides clear guidance regarding the contours of the rule (making motivation irrelevant) with only a limited exception (when there is an "independent unlawful purpose").

Second, motive *ought* to be irrelevant because the very nature of economic warfare makes it virtually impossible to distinguish self-preservation from antistrike motives in hiring permanent replacements. As the Supreme Court explained in *NLRB v. Insurance Agents' International Union*, 361 U.S. at 489, Congress fully expected, and sanctioned, the use of economic weapons, including permanent replacement.[27] Indeed, the structure of the Act allows for a variety of permissible economic weapons, each entailing different risks and potential consequences, which the parties are free to select. Under the majority opinion, the Board must attempt to divine whether an employer, in hiring permanent replacements, was acting based on economic self-interest or was instead impermissibly retaliating based on a visceral hostility toward strike activity. This ignores the reality that—when engaging in warfare, including economic warfare—the opposing camps *intend to injure one another* in hopes of forcing the other side to surrender; and absent surrender, one side or both may be annihilated. Given these realities, I do not believe my colleagues can properly disfavor a particular economic weapon merely because ill will may have existed when a party exercised its protected right to use it.[28] In short, the Act contemplates that some categories of economic weapons are permitted, and some are not permitted. The majority invents an additional prerequisite—the absence of strike-related hostility—that effectively renders unavailable an economic weapon that falls into the "permitted" category. By doing so, my colleagues upend the Act's structure and contravene Supreme Court precedent recognizing

[25] The majority's attempt to distinguish *Mrs. Natt's Bakery* is unconvincing. The employer in that case permanently replaced the striking employees precisely because they went out on strike: "Natt stated that the employees would lose their jobs if they went on strike." 44 NLRB at 1108. In other words, the employer permanently replaced the strikers in *retaliation* against them for striking. And the Board held he was free to do so "with impunity."

[26] I disagree with the majority's assertion that Executive Director Reynolds's stated motive of improving the Respondent's ability to weather continued strike activity constitutes an "independent unlawful purpose" unrelated to the strike. Reynolds was clearly contemplating further strike activity during the course of a single, ongoing labor dispute.

[27] Numerous legislative attempts have been made to prohibit the use of permanent replacements. See, e.g., Workplace Fairness Act, S. 55 103d Cong., 1st Sess. (1993). None of these initiatives has been enacted.

[28] Commentators have noted it would be virtually impossible to draw a line between permissible and impermissible motives in hiring permanent replacements. See Cynthia L. Estlund, *Economic Rationality and Union Avoidance: Misunderstanding the National Labor Relations Act*, 71 TEX. L. REV. 921, 952 (1993) (explaining that the rational economic motives underlying permanent replacement "are not different in kind from the motives that underlie a straightforward discrimination discharge"); Julius G. Getman, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act*, 115 U. PA. L. REV. 1195, 1204–1205 (1967) ("In short, an inquiry into the employer's state of mind in such situations [the hiring of permanent replacements] would be difficult and the probable results equivocal. The Board, in fact does not seek to evaluate the employer's state of mind in order to determine the legality of his conduct.").

permanent replacement as a permissible economic weapon. See *Mackay Radio*, supra at 345.[29]

Third, the majority's holding today is contrary to Board and court decisions that find the presence or expression of strong feelings does not render unlawful the exercise of protected rights.[30] In *Longview Furniture Co*., 100 NLRB 301 (1952), enfd. in relevant part 206 F.2d 274 (4th Cir. 1953), the Board stated:

> It is common knowledge that *in a strike where vital economic issues are at stake, striking employees resent those who cross the picket line and will express their sentiments in language not altogether suited to the pleasantries of the drawing room or even to courtesies of parliamentary disputation.* Thus, we believe that to suggest that employees in the heat of picket-line animosity must trim their expression of disapproval to some point short of the utterances here in question, *would be to ignore the industrial realities of speech in a workaday world and to impose a serious stricture upon employees in the exercise of their rights under the Act*.[31]

To the same effect, the Supreme Court stated in *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53 (1966) (holding that the NLRA does not preempt defamation claims):

> *Labor disputes are ordinarily heated affairs*; the language that is commonplace there might well be deemed actionable per se in some state jurisdictions. Indeed, representation campaigns are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions. *Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language* . . . . We note that *the Board has given frequent consideration to the type of statements circulating during labor controversies, and that it has allowed wide latitude to the competing parties*.[32]

Fourth, I believe the majority's subjective standard will effectively preclude many employers from using permanent replacement as a legitimate economic weapon, contrary to Supreme Court precedent stretching back almost to the enactment of the Wagner Act itself. Any stray comment that reflects negativity towards strike participants—whether made by an executive, manager or supervisor—could create a risk of potentially ruinous financial liability. The risk of such liability will no doubt sharply curtail the lawful use of permanent replacement as a legitimate economic weapon. Cf. Brendan Dolan, *Mackay Radio: If It Isn't Broken, Don't Fix It*, 25 U.S.F. L. REV. 313, 317–318 (1991) (asserting that fear of liability, contingent on whether the Board will find a strike is economic in nature, "is enough to preclude many employers from even considering permanently replacing employees on an across-the-board basis"). I believe such a rearrangement of the balance of power between employers and unions is contrary to the Supreme Court's decisions in *American Ship Building* and *Insurance Agents*.[33] I agree with the clear rule embraced by the judge: the hiring of permanent replacements has an "independent unlawful purpose" only if undertaken for an antiunion motive extrinsic to the strike. This is the only reading of *Hot Shoppes* that avoids nullifying its central holding (that motive is immaterial), and I believe this interpretation is required by Supreme Court precedent binding on the Board.

Fifth, as noted above, I disagree with the majority's finding that the facts in this case prove the Respondent hired permanent replacements in order to "punish" striking employees. By hiring permanent replacements, the Respondent was furthering its legitimate interest in countering the Union's potent strike weapon. In my view, the testimony by Executive Director Reynolds (that she believed permanent replacements would enhance Respondent's ability to weather the current strike and future strikes during the ongoing labor dispute) reasonably re-

[29] In arguing that a counter-strike motive constitutes an "independent unlawful purpose," the majority cites *Movers & Warehousemen's Assn. of D.C. v. NLRB*, 550 F.2d 962 (D.C. Cir. 1977). That case did not involve hiring permanent replacements to counter a strike. Rather, it involved a lockout undertaken in part to coerce a union to adopt a certain procedure for employee ratification of a contract offer—an internal union matter and hence a nonmandatory subject of bargaining. The court found the lockout unlawful based on the employers' motive "to interfere with, and thus injure, a labor organization in the exercise of its own internal operating procedures." Id. at 966. That case is obviously distinguishable from this one.

[30] *NLRB v. Wire Products Mfg. Corp.*, 484 F.2d at 760; *Central Illinois Public Service Co.*, 326 NLRB at 930–931.

[31] Id. at 304 (emphasis added).

[32] Id. at 58–60 (emphasis added; citations omitted).

[33] See *NLRB v. Insurance Agents' International Union*, 361 U.S. at 497–498 ("[W]hen the Board moves in this area . . . it is functioning as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands. . . . [T]his amounts to the Board's entrance into the substantive aspects of the bargaining process to an extent Congress has not countenanced."); *American Ship Building Co. v. NLRB*, 380 U.S. at 317 ("Sections 8(a)(1) and (3) do not give the Board a general authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of its assessment of that party's bargaining power.").

flects the fact that certain other measures (temporary replacements or using nonunit personnel) are predictably less effective in the face of potential recurring or intermittent strikes. Along similar lines, Attorney Durham's comment (that hiring permanent replacements would teach strikers "a lesson" in order to "avoid any future strike") does not reflect an unlawful motive, given that the Act contemplates that parties will inflict economic injury by resorting to permissible economic weapons, one of which is the hiring of permanent replacements. Every resort to economic leverage in response to a strike tends to dissuade employees and their union from resorting to the strike weapon again. I believe such an objective is lawful even in relation to potential future disputes, because companies and unions typically have relationships that span multiple negotiations over time; issues such as commitment, resolve and credibility play a major role in collective bargaining; and everyone understands that the handling and resolution of issues in one round of bargaining will predictably affect future negotiations. Cf. *Sociedad Espanola de Auxilio Mutuo Y Beneficencia de P.R.*, 342 NLRB 458, 460, 463 (2004) (manager's statement that lockout was "reprisal" against union, which had threatened to strike, did not establish that lockout was unlawfully motivated), enfd. 414 F.3d 158 (1st Cir. 2005); *Central Illinois Public Service Co.*, 326 NLRB at 928 (unreasonable to infer that lockout was motivated by antiunion motivation from employer's statement that it "was not going to put up with this shit," i.e., the union's "inside game" strategy of working to the rule, which the Board assumed was protected). Again, it bears emphasis that the Respondent here was exercising its own right to protect itself against the Union's strike weapon.[34]

Finally, contrary to the majority's suggestion, I do not believe *Avery Heights* supports an expansive view of the "independent unlawful purpose" exception. There, the theory of the General Counsel's case was that in hiring permanent replacements, the Respondent sought to punish the strikers and break the union's solidarity by replacing a majority of the unit employees—motives that constituted an "independent unlawful purpose," according to the General Counsel. 343 NLRB at 1305. The General Counsel urged the Board to infer such motive from the fact that the employer had concealed its hiring from the union, as well as documentary and testimonial evidence purportedly showing that the employer sought to break the union. The *Avery Heights* Board did not hold that a desire to punish the strikers and break the union's solidarity constitutes an "independent unlawful purpose" under *Hot Shoppes*. Rather, the Board found that the General Counsel's proof was insufficient to establish that the Respondent harbored those motives.

Moreover, my colleagues are incorrect when they claim that the *Avery Heights* Board did not take issue with the judge's conclusion that the unlawful motives attributed to the employer would constitute an "independent unlawful purpose." To the contrary, the Board expressly rejected the notion that a motive to "break the union," if proven, would make the hiring of permanent replacements unlawful. "[E]ven assuming . . . that the [r]espondent's motive was to break the [u]nion's solidarity in the economic battle," the Board stated, "*such an objective is not unlawful*." 343 NLRB at 1307 (emphasis added). Having found the evidence insufficient to establish "some kind of nefarious scheme to punish striking employees by hiring permanent replacements," id., the Board did not have to reach the judge's legal conclusion that such a motive would be an "independent unlawful purpose." The Board cast doubt on the judge's conclusion, however, by finding the hiring of permanent replacements lawful even if it "persuaded some employees that further striking was unwise." Id. Such persuasion was plainly what attorney Durham had in mind when he referred to teaching the strikers a lesson because the Respondent "wanted to avoid any future strike." Thus, the Board's decision in *Avery Heights* supports my finding that the Respondent's hiring of permanent replacements was lawful.[35]

[34] The majority relies on two cases that I believe are completely inapposite—*Controlled Energy Systems, Inc.*, 331 NLRB 251 (2000), and *Frank Leta Honda*, 321 NLRB 482 (1996)—to support their claim that finding the Respondent's hiring of permanent replacements lawful would "violate[] the most basic principles of the Act." Although the majority states "[i]t is axiomatic that an employer violates the Act when it retaliates against employees for engaging in union or other protected activity, and that the right to strike is fundamental," neither *Controlled Energy* nor *Frank Leta Honda* involved an employer who responded to a strike by hiring permanent replacements. In *Controlled Energy*, the employer *discharged* five employees for engaging in an unfair labor practice strike. In *Frank Leta Honda*, after an economic strike ended, the employer *disciplined* former strikers and adversely *changed their working conditions* in retaliation for their strike activity. Discharge, discipline, and adverse changes to working conditions are not legitimate economic weapons; hiring permanent replacements is.

[35] As noted by the majority, on appeal, the Second Circuit held that, absent an adequate explanation, the employer's secret hiring of permanent replacements implied "an illicit motive to break a union." 448 F.3d at 195. The court remanded the case to the Board to consider whether the record contained any evidence of such an explanation. On remand, the Board applied the court's decision as the law of the case and found that the record failed to provide an alternative rationale for the secret hiring, and thus the Board accepted the court's conclusion that the respondent had acted with the aforementioned illicit motive.

In sum, I disagree with the majority's interpretation of "independent unlawful purpose," which reads "independent" out of the phrase entirely. In so doing, I believe the majority effectively overrules the central holding of *Hot Shoppes*, which renders irrelevant an employer's motive in hiring permanent replacements. More fundamentally, I disagree with my colleagues' decision because they effectively invalidate an economic weapon that the Supreme Court declared lawful more than 75 years ago.

As noted previously, I do not favor the hiring of permanent replacements any more than I favor potentially ruinous strikes, lockouts and other economic weapons that Congress affirmatively protected when enacting the National Labor Relations Act. In my view, the majority gives inadequate consideration to the fact that Congress has made the decision to protect this weaponry, and the Board may not—at its initiative—fundamentally change the manner in which Congress has chosen to balance the interests of employees, unions and employers. *Insurance Agents,* 361 U.S. at 497; *American Ship Building,* 380 U.S. at 316. I believe the majority's decision improperly changes the balancing of interests that Congress struck in the Act, as articulated by the Board in *Hot Shoppes* and as recognized by the Supreme Court in *Mackay Radio*, *American Ship Building*, *Insurance Agents*, and other cases.

For these reasons, as to the above issues, I respectfully dissent.[36]

Dated, Washington, D.C. May 31, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

[36] For the reasons stated by my colleagues, I agree that the complaint is properly before the Board for disposition. I also concur in the majority's remaining findings, including its finding that the Respondent violated Section 8(a)(5) and (1) by refusing to furnish to the Union the names and addresses of the permanent replacements. I disagree with the Board's current "clear and present danger" standard and would adopt the Seventh Circuit's "totality of circumstances" standard, under which legitimate concerns about harassment and safety of replacements are balanced against the requesting union's legitimate need for this information. *Chicago Tribune v. NLRB*, 965 F.2d 244 (7th Cir. 1992). Under this standard, an employer does not act unlawfully if it offers reasonable alternatives to accommodate the union's need. In the present case, however, I would affirm the judge's finding of a violation even under the Seventh Circuit's standard.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT engage in surveillance or create the impression of surveillance of our employees' union activities.

WE WILL NOT disparately enforce our access rule (Rule 33) by evicting off-duty employees engaged in union activity from the facility.

WE WILL NOT refuse to reinstate, or delay the reinstatement of, striking employees, who were permanently replaced with an independent unlawful purpose, and who made an unconditional offer to return to work.

WE WILL NOT fail and refuse to furnish the Union with the names and addresses of the permanent replacement employees who were hired from outside the organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL offer all of the strikers who have not yet been reinstated full reinstatement to their former jobs, discharging, if necessary, any employees currently in those positions or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed.

WE WILL make all of the former strikers whole for any loss of earnings and other benefits suffered as a result of our refusal to reinstate them on August 7, 2010.

WE WILL compensate employees entitled to backpay under the terms of the Board's Order for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 32, within 21 days of the date the amount of backpay is fixed, wither by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful failure to reinstate the former strikers, and within 3 days thereafter, notify the strikers in writing that this has been done and that the failure to reinstate them will not be used against them in any way.

WE WILL provide the Union with the names and addresses of the permanent replacement employees who were hired from outside sources.

PIEDMONT GARDENS

The Board's decision can be found at www.nlrb.gov/case/32–CA–025247 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

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Bruce A. Harland, Esq. and *Manuel A. Boigues, Esq.* (*Weinberg, Roger & Rosenfeld*), of Alameda, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. The unfair labor practice charges in Cases 32–CA–25247 and 32–CA–25248 were filed by Service Employees International Union, United Healthcare Workers–West (the Union), on July 26, 2010; the unfair labor practice charges in Cases 32–CA–25266 and 32–CA–25271 through 32–CA–25308 were filed by the Union on August 9, 2010; and the unfair labor practice charge in Case 32–CA–25498 was filed by the Union on November 30, 2010.[1] After completion of investigations, on March 24, 2011, the Regional Director for Region 32 of the National Labor Relations Board (the Board), issued a consolidated complaint alleging that American Baptist Homes of the West d/b/a Piedmont Gardens (Respondent), engaged in, and continues to engage in, unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). Respondent timely filed an answer, essentially denying the commission of the alleged unfair labor practices. Pursuant to a notice of hearing, the above-captioned matters came to trial before the above-named administrative law judge in Oakland, California, on May 16 through 18, 2011. At the said hearing, all parties were afforded the right to call witness, to examine and to cross-examine witnesses, to present any relevant documentary evidence, to argue their respective legal positions orally, and to file posthearing briefs. Said briefs were filed by counsel for the Acting General Counsel, in which counsel for the Union joined, and by counsel for Respondent and have been carefully considered. Accordingly, based upon the entire record herein, including the posthearing briefs and my observation of the credibility of the several witnesses,[2] I make the following

FINDINGS OF FACT

JURISDICTION

At all times material herein, Respondent, a State of California nonprofit corporation, has been engaged in the operation of continuing care retirement communities, including a facility located in Oakland, California, known as Piedmont Gardens and a separate facility also located in Oakland known as Grand Lake Gardens. During the 12-month period immediately preceding the issuance of the instant consolidated complaint, which period is representative, Respondent, in the normal course and conduct of its above-described business operations, derived gross revenues in excess of $50,000 and purchased and received goods and services, valued in excess of $5000, which originated outside the State of California. Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Labor Organization

The Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

The Issues

The consolidated complaint alleges that, on June 17 and 18, Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act by enforcing its no-access rule in such a manner as to require off-duty employees, who were present at the Piedmont Gardens facility to participate in a union strike authorization vote, to leave the said facility and by, through the actions of a security guard, engaging in surveillance of its employees, who were participating in a union strike authorization vote being conducted at the Piedmont Gardens facility. The consolidated complaint next alleges that, from August 2 through 7, certain of Respondent's bargaining unit employees, represented for purposes of collective bargaining by the Union,

[1] Unless otherwise stated, all events herein occurred during 2010.

[2] As is not unusual in these types of proceedings, some of the witnesses, including an attorney who should have known better, failed to heed my warning regarding the consequences of not testifying truthfully.

engaged in a concerted work stoppage and strike, caused in part by the aforementioned unfair labor practices, against Respondent; that, upon the conclusion of their concerted work stoppage and strike on August 7, all of said bargaining unit employees made unconditional offers to return to their former positions of employment; and that Respondent engaged in acts and conduct violative of Section 8(a)(1) and (3) of the Act by belatedly reinstating 13 and refusing to reinstate 25 of said bargaining unit employees. Finally, the consolidated complaint alleges that Respondent engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act by falling and refusing to provide the Union with the names and contact information for permanent strike replacement employees, which information is necessary and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of Respondent's bargaining unit employees.

In its defense, Respondent denies the commission of the alleged unfair labor practices. Further, Respondent alleges that the concerted work stoppage and strike, in which certain of its bargaining unit employees engaged, was motivated by economic concerns and that certain of said employees, who were denied reinstatement at the conclusion of the strike, were lawfully permanently replaced. Finally, Respondent contends that, due to valid security concerns, it lawfully refused to provide the requested information to the Union.

The Alleged Unfair Labor Practices

The Facts

American Baptist Homes of the West, a California nonprofit corporation, maintains a corporate office in Pleasanton, California, and operates continuing care facilities,[3] such as Respondent, and affordable housing communities[4] throughout the western United States including in California, Washington, Nevada, Arizona, and Idaho. Respondent's facility, which is located on 41st Street in the Piedmont section of Oakland, California, provides three levels of care—independent living, assisted living, and skilled nursing[5]—for its 300 current residents and consists of three buildings connected by an inner, enclosed corridor. One, called the Crestmont building, is 16 floors high and consists entirely of apartments for independent living residents. The middle building, called the Garden Terrace building, is a three-story structure with the first floor being a public area and the second and third stories housing Respondent's skilled nursing area. The third building, called the Oakmont building, consists of 11 floors with the first through the seventh comprised of apartments for independent living residents, the eighth through the tenth floors housing the assisted living residents, and the eleventh floor being a public area. The main dining room is on the ground floor of the Garden Terrace building. There are two entrances to Respondent's facility—the main entrance is off 41st Street and a side entrance is off Linda Street, and employees and visitors may enter and exit through either entrance.[6] Gayle Reynolds has been Respondent's executive director and its highest ranking management official since May 1, 2009, and the various department heads report directly to her. The record establishes that since, at least, March 1, 2007, the Union has been the majority collective-bargaining representative of various classifications of Respondent's workers including its dietary department employees, nursing department employees, housekeeping department employees, resident services employees, and general/administration employees, among others, that there are approximately 100 bargaining unit employees, and that the collective-bargaining agreement between Respondent and the Union expired by its terms on April 30.[7]

In January, in anticipation of bargaining for a successor collective-bargaining agreement, the bargaining unit employees selected an 8- to 10-member bargaining committee,[8] and nego-

[3] A continuing care facility is a community where residents pay a substantial upfront fee for receipt of increased levels of care as needed.

[4] An affordable housing community only supplies housing for residents.

[5] Respondent's independent living residents come and go as they please, live in apartments, and pay a monthly fee to Respondent. There is no level of care for these individuals, and Respondent provides a package of mainly hospitality-type services for them and access to a wellness clinic. For meals, these residents' apartments contain kitchens in which they may eat their meals. Respondent maintains a main dining room, which is reserved for independent living residents and serves all meals.

Respondent's assisted living residents, who live in private rooms, also may come and go as they please but require some assistance in caring for themselves. In this regard, Respondent provides supportive services including help in dressing, bathing, and more frequent housekeeping and maintains a licensed vocational nurse and a certified nursing assistant on each work shift for said individuals if needed. The assisted living residents have their own dining room but also may use the main dining room.

Respondent's skilled nursing residents require 24-hour nursing care and reside in rooms for two or four people. They are either bedridden or not. If not bedridden, said residents may leave Respondent's facility in the care of a family member but the director of nursing must be advised of such. Respondent also provides rehabilitation services for those individuals who are recovering from surgery. The skilled nursing residents are permitted to take meals in the main dining room.

[6] A receptionist is stationed at the 41st Street doorway from 8 a.m. to midnight, and a security guard is stationed there during the night. A security guard is stationed at the Linda Street doorway throughout the day.

[7] The expired collective-bargaining agreement was effective from March 1, 2007, through April 30, 2010, and there is no record evidence of any prior bargaining history between the parties.

[8] The members of the bargaining committee team were Sheila Nelson, Sanjanette Fowler, Dapuma Miller, Pierre Williams, Faye Eastman, Matilda Imbukwa, Reginald Jackson, Ebony Harper, and one or two others.

The election of the bargaining committee was conducted in conjunction with a survey in which the bargaining unit employees were asked to rank the issues, which each employee felt important for the bargaining. Shop stewards, including Sheila Nelson, conducted the bargaining committee balloting and distributed and collected the bargaining surveys, all of which was done over a 2-day period in the employees' break room, which is located on the first floor of the Oakmont building. The record evidence is that employees and union officials utilize the break room to conduct all union activities including informational meetings, department meetings, grievance meetings, and other matters,

tiations on a successor contract commenced in February. During the parties' bargaining, which consumed 18 or 19 negotiating sessions and ended on July 9 without an agreement, Respondent's attorney, David Durham, and Myriam Escamilla, the Union's nursing home division director, were the chief spokespersons. As the bargaining progressed from February to early May, certain issues emerged as impediments to a final agreement. The bargaining unit employees' main concern was the discharge and discipline section of the expired agreement, particularly the provisions regarding Respondent's right to discharge employees for violating its rules and policies and its right to adopt or amend said rules and policies "in its sole discretion." In this regard, the Union objected to Respondent's seeming penchant for terminating union stewards or bargaining team members for violations of its chart of infractions[9] and demanded that Respondent agree to implement a progressive disciplinary system for such conduct. The latter constantly rejected the Union's proposals on discipline. Respondent's main concerns during the bargaining were the economic provisions for the successor agreement—specifically the contractual pension and health plans and wages. According to Reynolds, "we proposed to eliminate the SEIU pension plan and replace it with [a] 401(k) plan." The Union wanted to continue with its pension plan and rejected Respondent's proposal. As to health insurance coverage, the contract provided for a Kaiser plan, which Respondent proposed to eliminate and substitute a "health reimbursement" account plan. The Union wanted to continue the contractual Kaiser plan, and rejected Respondent's substitute as the said plan's deductible amounts were higher than the existing Kaiser plan. As to wages, Reynolds testified that Respondent had offered a "pool of money" for wages, healthcare, and pension "so depending on what we spent on pension and healthcare, that's what we had remaining for wages. So the wages could go up or down depending on what . . . we were working with." The Union rejected Respondent's proposal on wages and insisted on its own.

Reynolds was uncontroverted that, by early May, "the majority [of] the conversation was about [the above] issues," with each party being adamant in support of its positions. Then, prior to the scheduled May 12 bargaining session, Escamilla, on behalf of the Union, sent notice, pursuant to Section 8(g) of the Act, to Respondent that "the members of [the Union] will commence informational picketing at 2:30 pm on . . . May 25 . . . and will continue such activity unless, and until, a mutually agreeable resolution has been reached." In fact, Respondent's employees picketed outside Respondent's facility during the afternoon of May 25, carrying signs reading "no healthcare reductions," "no takeaways," "fair wages now," "pension now," and similar language.

The bargaining continued in the same posture subsequent to the May 25 picketing. Then, in early June, the Union and the bargaining committee published a strike vote flyer, which was posted on the bulletin board in the break room and copies of which were available to all bargaining unit employees in the break room. Said flyer was entitled "STRIKE VOTE" and read "Let's Show Management We Are United And Ready to Fight. Management still wants to take away our pension, make us pay a lot more for our health insurance and is offering a raise that's a joke. Our SEIU-UHW bargaining committee is recommending that we vote YES! to authorize a strike to show management that we're serious and won't settle for anything less than what we deserve." Beneath the above message, the negotiating committee requested that the bargaining unit employees vote, "YES," illustrating this with a checkmark in a box, announced that the strike vote would be held on Thursday and Friday June 17 and 18, and set forth the times for the vote. At a bargaining session on June 16, the Union submitted a counterproposal, including the existing wage rates, which Respondent rejected.

On June 17 and 18, a union representative, Donna Mapp, who was present for part of the first day and the entire second day, with members of the employee bargaining committee helping, conducted the strike authorization vote in the breakroom[10] on the announced dates.[11] Sheila Nelson, a day shift housekeeper, a shop steward, and member of the bargaining committee, volunteered to come to Respondent's facility and help with the strike vote during each of the voting periods on the first day of the voting—her day off.[12] The voting occurred without incident during the morning and early afternoon voting periods.[13] Then, according to Nelson, shortly before 3:00 and just prior to the time when employees were required to punch in before starting the afternoon shift,[14] she and Matilda Imbukwa were

and the Union maintains a bulletin board there on which union literature is posted. The record evidence is that it is the only area of Respondent's facility in which employees are permitted to meet and discuss union affairs.

[9] Respondent's work rules and policies are set forth in its so called chart of infractions, which is posted near the door to the employees' break room.

[10] According to Sheila Nelson, a shop steward for the Union and a member of the bargaining committee, the decision was made to have the vote in the break room as "it was the only place we can conduct Union . . . business. That's where the Union is supposed to report to when they enter the building."

The vote was a secret ballot election conducted throughout the 2 days with employees voting before or after their shifts or during break periods. Each bargaining unit employee voted by marking his or her ballot and depositing it into a sealed box. When each employee voted, a bargaining committee member would cross the person's name off a list of bargaining unit employees' names.

[11] The ballot, on which bargaining unit employees cast their votes, was created by the Union from an existing template. Employees were asked to place a check next to one of two questions—"Yes, I authorize the bargaining committee team to call a strike," and "No I do not authorize the bargaining committee team to call a strike." On top of the ballot are the words "Unfair Labor Practice Strike Vote". As to these words, Myriam Escamilla testified that "We always call for unfair labor practice strikes."

[12] The voting periods were 6 to 8 a.m., 12 to 2 p.m., and 4 to 6 p.m.

[13] Asked if any nonbargaining unit employees came into the break room during the afternoon, Nelson testified that, at approximately 12:30, Yuri Flores, an HR person and the assistant to the HR director, Lynn Morganroth, entered the room and asked her if she had seen Sherrita _____, an employee who had recently been terminated. They spoke, and Yuri left the break room.

[14] The timeclock is located next to the break room.

busy conducting the voting[15] when she had cause to turn and observed a facility security guard, identified as Francisco Pinto,[16] sitting at a table 5 to 10 feet behind her. He was "holding up a cell phone, [at eye level], and he was moving it slightly in [my] direction" and "back and forth" to the left and then the right. "So I stared at him, it seemed like about a minute . . . and I was thinking what was he doing. So I looked into the direction that he had the cell phone pointed to, and it was right there where the people were voting. It was like right next to me."[17] After a minute, but no longer than two, of staring at the guard and while he continued to hold the cell phone up, she turned back to helping with the voting. Asked what she believed the guard was doing, Nelson said, "I believed that he was videotaping the people in the room that was voting, and I thought that maybe he was going to use it to get somebody fired."

Matilda Imbukwa, who worked for Respondent as a certified nurse assistant from October 2006, through April 2011, when she was laid off for "reasons being that I was not doing my duties as obligated to," testified that, as a member of the bargaining committee, she helped on the "second day" of the strike vote. According to Imbukwa, who was scheduled to begin working at 3 p.m., she arrived at Respondent's facility at 1:00,[18] and "I . . . went to the break room, and I met with Sheila Nelson and was assisting her with the strike vote." In this regard, employees would come into the break room and she and Nelson gave them ballots on which they would mark off whether they wanted to authorize a strike. Imbukwa testified that, as she entered the break room, "there were a few other employees together with the security guard." She immediately noticed the guard as "he was dressed in his uniform and it had a badge on it and I knew it was him." Nevertheless, as the voting was on-going, she did not take much further interest in him except to notice that Nelson "was staring at him . . . on and off while passing out the [ballots]." Imbukwa further testified that, approximately 30 minutes after arriving, "Sheila Nelson pointed out the security guard, and, when I looked at him, [h]e was holding his phone up in a vertical position and just swinging it from side to side. And then he placed it down, and then a few minutes later he stood up and left." Asked what she believed the guard was doing, Imbukwa averred, "I thought he was taking a picture or video . . . of us to what we were doing."[19] Asked how long she observed the guard holding his cell phone and swinging it from side to side, she stated, "It took approximately 30 to 45 minutes." There is no record evidence that bargaining unit employees, other than Nelson and Imbukwa, observed the actions of the security guard.

Francisco Pinto, testified that he is employed by Guardsmark as a security guard and that he has been assigned to work in such a capacity at Respondent's facility, working the swing shift (4 p.m. to midnight) on Sunday through Tuesday and the day shift on Thursday and Friday. He testified further that he is stationed at the guard's desk at the Linda Street entrance and that his job duties mainly entail patrolling the entire facility inside and outside, checking employees' badges, and making sure that visitors sign in prior to entering the interior of the facility.[20] According to Pinto, he takes a 30-minute lunchbreak each workday in the break room. Asked what he does during his break period, Pinto stated, "I usually don't bring food, so I just go in there and check my phone because I'm not allowed [to do so] during business hours. So . . . I just go in there and check my phone . . ." for ". . . my messages, missed calls, or voicemail that I have." He added that his phone is a Verizon smartphone and described his method for checking for his messages and voicemails—"I just take it out and put it . . . on the table and just check messages or . . . go through my phone." He then demonstrated this by holding the phone in front of his face with his elbows on the witness table. Specifically on June 17, according to Pinto, he worked the day or 8 a.m. to 4 p.m. shift and relieved the receptionist at the 41st Street entrance at noon. She returned "around 1:00" and, "after 1:00 pm," he took his daily meal break. Pinto went to the break room and, when he entered, "it was a lot of employees there, and the Union rep, which is Donna Mapp," was in the room. He went to an empty table and, as always, checked his phone. He said, "employees would stare" at him, but ". . . I wasn't really paying attention to what they were doing, but they were with the Union rep." Pinto denied taking any photographs with his telephone that day, stated he has never done so, denied ever engaging in surveillance of employees at Respondent's facility, and denied being directed to go to the break room that day and take pictures of the employees' activities.[21] Finally, asked if he told anyone what he observed in the break room, Pinto testified, "Well, the guards . . . kind of talk to each other and say how uncomfortable it is when we go to the break room," and the union representative is there. During cross-examination, asked if, on June 17, he telephoned Lynn Morganroth, the HR director, and left a message that the union representative was in the breakroom, he first replied "I don't know" but then responded, "no." Also, he denied leaving such a message with Morganroth's assistant, Yuri Flores. In this regard, I note that

Nelson testified that it was a busy time in the break room as employees were there either on breaks or prior to the start of their work shift.

[15] I note that Nelson must have been incorrect about the time as the early afternoon voting period ended at 2 p.m.

[16] Nelson failed to notice the security guard when he entered the break room. Asked who is allowed to use the break room, Nelson testified, "All of the employees are allowed to use the break room. And the guards do come in there sometimes," eating their lunch.

[17] Nelson believed she pointed out the security guard's actions to Imbukwa.

[18] Imbukwa testified that she did not have permission to arrive 2 hours prior to the start of her work shift. However, "it was not the first time" she came in early before her shift. "When you're in your scrubs and you're scheduled to work that day, you can come in and . . . wait for your time to . . . clock in."

[19] According to Imbukwa, at least three employees voted while the guard manipulated his cell phone.

[20] Gayle Reynolds testified that Pinto "has the authority to stop [persons] at the guard desk before they move beyond the entrance. . . . He has the right to stop [someone] from coming through the door, as well."

[21] Gayle Reynolds corroborated Pinto's assigned duties at Respondent's facility, denied that the guard's duties included taking pictures of employees, and denied that he was authorized to do so. Further, she denied being aware of any pictures Pinto may have taken in the break room.

the Acting General Counsel Exhibit 12 is a June 18 email message from Flores to Morganroth in which the former informed Morganroth that "Yesterday . . . I had a message from the security guard that a union rep was in the break room"

Sheila Nelson next testified that, approximately 15 minutes after she noticed the security guard no longer in the break room and while she was continuing to help with the vote, Gayle Reynolds came into the break room and approached her. According to Nelson, Reynolds asked what she was doing. Nelson just replied "hello." Reynolds then sat down next to Nelson "and said, 'You're not supposed to be here.' And I said, 'Why?' She said, 'because you're not a rep.' I said, 'I'm a Union leader, and I was instructed to be here by Myriam to help with the strike vote.'" At that, Reynolds stood and said, "'You're a Piedmont Gardens employee, and I just checked with Lynn, and, according to the contract, you are not supposed to be in the building when you're not scheduled to work.'" After telephoning Donna Mapp and asking Mapp to inform Escamilla that Reynolds was "kicking" her out of the break room, Nelson gathered the election materials and departed from Respondent's facility.[22]

Gayle Reynolds conceded ordering Nelson to leave Respondent's facility on June 17. According to Reynolds, that afternoon, she received an email from Nelson's supervisor, stating that she was in the break room. Reynolds then decided to investigate whether Nelson was still there and went to the breakroom.[23] Upon entering the room, she observed Nelson "sitting at a table . . . with a laptop computer." She then approached Nelson, "and I said, Sheila, you know you're not supposed to be here when you're not scheduled to work; are you scheduled to work? No, I'm not. So I asked her to leave." At this point, Nelson pointed to the ballot box, and "she told me . . . what she was doing, I didn't know what she was doing before that."

The record reveals that, besides Nelson, Respondent evicted two other employees, who were assisting with the strike authorization vote, from its facility during the 2 days during which the aforementioned voting was conducted—Geneva Henry and Faye Eastman. Henry, who is employed by Respondent as a certified nurse assistant in the skilled nursing area and who works the night shift (11 p.m. to 7:30 a.m.), testified that she volunteered to help Donna Mapp with the strike vote and that, to do so, she arrived at Respondent's facility on June 17[24] at 6 p.m.[25] and went directly to the break room. She further testified that, later in the evening as she and Mapp were preparing to count the ballots, Gayle Reynolds came into the break room and approached her. "She asked me, what are you doing here? You're not on schedule . . . why are you here? And I told her I was taking care of Union business. She said, well, you're going to have to leave. I said, but I'm taking care of Union business. She said, well, you're still going to have to go, and she said you're going to have to take care of your Union business out there on the sidewalk. . . . I just got up, I didn't say nothing."[26]

While Gayle Reynolds did not dispute demanding that Henry leave Respondent's facility, she contradicted Henry as to when the incident occurred. According to her, "I did ask Geneva Henry to leave but it was in the morning, not in the evening, and it was the day after I had spoken to Sheila Nelson—"on Friday." In this regard, Reynolds was confronted with an email she sent to Lynn Morganroth on June 17 at 6:39 p.m., in which she wrote that two employees, one of whom was Geneva Henry, who were not scheduled to work, were at Respondent's facility earlier in the day and that their respective supervisors wanted to know the appropriate discipline for them. Notwithstanding the foregoing, Reynolds, who claimed not to recall "what generated this e-mail," and denied it concerned her conversation with Henry, insisted that "I asked Geneva to leave the day after I talked to Sheila Nelson . . . "and that said conversation occurred "around" 8 a.m., and "I saw her in the break room with another employee. I asked them if they had finished their shifts and they said yes, and I said you're not supposed to be here; you need to leave."[27] When asked if the other employee,

[22] Nelson testified that there were three or four other employees in the break room at the time.

[23] Reynolds denied being aware that the Union was conducting a strike vote on that day prior to entering the break room. She testified that she did not know about this until "when I walked in the break room and talked to Sheila." She added that the Union had not asked permission to conduct such a vote. While testifying she goes into the break room every week or every other week, Reynolds denied seeing the strike vote notice posted on the Union's bulletin board. In this regard, she admitted seeing R. Exh. No. 10, a union flyer, entitled "we'll do whatever it takes to win a good contract," posted on its bulletin board in the break room after the strike vote. The flyer states that 95 percent of the bargaining unit employees had approved a strike because, while the employees' bargaining committee had been working hard to achieve a contract with fair raises and overall improvements, management had "stalled and dragged things out." Also, she admitted seeing R. Exh. 11, another flyer posted on the same bulletin board after the strike vote. Said flyer discusses the bargaining in detail; notes that 96 percent of the bargaining unit had voted in favor of a strike; and states, "We are ready and will not let management scare us into a cheap deal that only benefits them."

[24] During cross-examination, Henry said the night, during which she helped with the strike vote was the last night of the voting.

[25] Henry could not recall whether she was scheduled to work that day.

[26] While Henry was unable to remember whether or not she was scheduled to work that night, she testified that she was habitually early when working and would spend the time before her shift in the break room. "I've been coming there early for years. I use the break room as a regular routine," arriving there between 6:30 and 7 pm. She does this because "I don't want to be out on the street late at night. . . . And I would come in there early and go straight to the break room." Until the start of her shift, she would eat, read books, or listen to music. According to Henry, Gayle Reynolds was well aware that she would come in early as "sometimes I would see her. . . . Everybody knew that I been coming in there for years.

Reynolds conceded being aware that Henry would be inside the facility early and spent her time before clocking in inside the break room. She had no problem with this as Henry did not want to be out on the street late at night.

[27] She recalled that Donna Mapp was present and the two employees were speaking to her. However, she denied being aware of what the employees were doing.

whom she asked to leave the facility on June 18, was Faye Eastman, Reynolds said, "I believe it was on Thursday, June 17th. It was the same time that Geneva was in the break room. She and Faye were together." On this point, she was confronted with an email she sent to Morganroth on June 19 regarding possible discipline for employees who were discovered inside Respondent's facility when not scheduled to be there. Reynolds wrote, "I think we should do courtesy notices. We also need to include Faye Eastman who was in the break room at 7:55 am on Friday morning. I asked her if she had clocked out and she said `yes.' I reminded her that she was not supposed to be on the premises." There is no mention of Henry in said email. Upon viewing the latter email, Reynolds again insisted that she observed Eastman and Henry together in the breakroom at the same time.

With regard to the evictions of Nelson, Henry, and Eastman from Respondent's facility, the record establishes that Respondent's chart of infractions work rule 33, which is quoted in paragraph 7(a) of the consolidated complaint, is its rule, limiting access to its facility. Said rule reads:

> Employees may not clock-in for duty before their shift begins, nor are they to remain on the grounds after the end of their shift, unless previously authorized by their supervisor. Employees must have prior supervisor authorization before working/incurring overtime.

There is no dispute, and Respondent admitted, that, in maintaining said work rule, it has allowed off-duty employees, including shop stewards, to enter its facility under certain circumstances including to pick up paychecks or with its permission and to participate in grievance meetings and disciplinary meetings.. In addition to these instances, Sheila Nelson testified that, in her capacity as a shop steward, she often conducted union-related business with other employees or met with union representatives or other shop stewards in the breakroom prior to the start of her work shift, after the conclusion of her shift, and on her days off. With regard to her practices as a shop steward, she testified that, while her work shift normally started at 7 a.m., "I came in quite often early. Whether it was to pass out flyers or surveys or talk to members . . . I was . . . early a lot of times. I don't remember how many times." She added, "some times I would come in at 6:30, a quarter to 7, any meetings that I had with people would usually only last about 15 minutes before my scheduled time or after work." Nelson recalled two meetings with union agents or other shop stewards prior to the start of her shift and four or five such meetings after the conclusion of her shift and testified that, whenever entering Respondent's facility early prior to her shift or remaining in the building after her shift for union-related matters, she never was questioned as to why she was inside Respondent's facility and never was informed she required Respondent's permission. Further, Nelson recalled entering Respondent's facility on two or three occasions for union-related meetings in the breakroom on her days off. According to her, "as a Union member, we're supposed to enter the main entrance. We sign in and that's allowing either the security guard or the receptionist to know [she] is in the building . . . they would ask me, are you working? I'd say no, I'm here to do Union business today. So he would say okay and I know where to go. I proceed to the break room." Finally, Nelson denied ever asking permission to conduct union-related business inside Respondent's facility on her days off.[28]

Two other employees likewise testified with regard to access to Respondent's facility while off duty. Sanjanette Fowler, who worked as dietary cook for Respondent and was a shop steward, testified that she helped Union Agent, Donna Mapp, conduct the bargaining committee selection voting and the bargaining survey over the two-day voting period in January. According to her, "the second day was actually my day off . . . ," and "I think I was there basically all day." Asked how she gained access that day, Fowler testified, "I came in the normal 41st side. I sign in at the front desk, and I go to the break room." She added that she did not have permission to be inside the building that day; however, no management official questioned her presence that day. Fowler further testified that, on her days off, there were "numerous times" when she would come to Respondent's facility[29] and be in the breakroom "giving members a regular update of what was happening . . . in bargaining." These visits would last "like two hours, two hours or so" depending on how many people would be coming for breaks, and she never requested permission to be inside the building and never was asked to leave. Also, there were "numerous times" on days off when she and Mapp attended grievance meetings with Gayle Reynolds and Lynn Morganroth. Matilda Imbukwa testified that she entered Respondent's facility on June 17, 2 hours prior to the start of her work shift and that she was not required to have Respondent's permission in order to do so. "It was not the first time" she came in early before her shift. "When you're in your scrubs and you're scheduled to work that day, you can come in and . . . wait for your time to . . . clock in." She added that she would always arrive an hour early before her shift and that no supervisor ever informed her she was not allowed to do so.

Asked how chart of infractions rule no. 33 is enforced, Gayle Reynolds testified "if I'm made aware that somebody's in the building who's off schedule, then I will go and find out why they're in the building. But we don't generally police the employees; we expect them to follow the rules."[30] In this regard, she stated she had been unaware that, other than for grievance meetings, Nelson and Fowler had regularly entered and per-

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[28] During cross-examination, Nelson expanded the number of times she had been inside Respondent's facility on her days off for union-related matters to 20 or 30 times. However, she added that most of these were for grievances or for disciplinary meetings when asked to be present by management.

[29] Fowler would always sign the sign-in sheet upon entering Respondent's facility.

[30] Asked if prior to June 2010, she ever enforced Respondent's access policies by demanding that an employee leave the building, Reynolds conceded, "I can't think of any specific instance."

Respondent offered evidence that an employee had once been advised she should not be in an area of the facility while not on the clock. However, contrary to the events in these matters, the employee was found in a work area, and Reynolds testified that it was a shop steward who spoke to the employee and not a management official.

formed union business inside Respondent's facility on their days off. Finally, I note that the above work rule does not mention off-duty employees' access to Respondent's facility on their days off and that Respondent itself was uncertain as to whether Nelson or Henry, in fact, acted in violation of rule no. 33. Thus, on June 17, Reynolds was forced to consult with HR director Morganroth as to what work rule had been violated by Nelson and Henry, and, at 7:30 p.m., Morganroth sent an answering email to Reynolds, writing that rule 34, which concerns visitor access to the facility, rather than rule 33 is the "closest infraction" and "we have a practice of not permitting employees to be on premise without supervisor approval or business with HR. I looked through the handbook and couldn't find any helpful language other than the visitor language." In any event, other than being evicted from Respondent's facility, neither Nelson, Henry, nor Eastman was disciplined for being inside Respondent's facility, while off duty, on either June 17 or 18.

The record evidence is that in excess of 90 percent of the participating bargaining unit employees voted to authorize the employees' bargaining committee to call a strike.[31] Further, subsequent to the strike vote, given the language of the Union's poststrike authorization vote flyers, it appears that the bargaining unit employees were becoming increasingly perturbed over and frustrated with the on-going successor contract negotiations and what they perceived as Respondent's adamant and unacceptable positions on the economic and language issues, which, the employees believed, "only [benefitted] the company and not us." According to Sheila Nelson, with matters in this posture, pursuant to the bargaining unit employees' mandate, the bargaining team[32] reached its decision as to when the strike would commence on July 9 during a bargaining session that day before a Federal mediator. This "occurred during a . . . caucus . . . . The Employer was not in the room and the bargaining team was discussing several things. We were discussing what had happened at the strike vote with Gayle kicking me out of the building and kicking a couple other people out of the building that day. And we were discussing the surveillance with the security. We were discussing that they weren't willing to move on the language that would . . . give the employees job security. And Gayle and her union busting had been sending out memos contaminating the workers. So we kind of looked at our options. We had some ULP's already pending, and we . . . asked Myriam if we could go on a ULP strike."

More specifically, according to Nelson, "Sanjanette and myself, we talked about me getting kicked out of the building . . . and the security guard. Matilda spoke about the security guard also, the surveillance, and how we . . . would file charges . . . for what he had done."[33] Then, "Gloria and some of the people that had been there from the strike prior, because there had been a strike [during] their last bargaining . . . so they were talking about what happened with that. . . . They went on a one or two-day strike and got locked out. . . . I think it was 2007 they were talking about. So we were talking . . . and . . . I was asking Sanjanette . . . what are we going to do . . . because we felt like we were being put under a lot of pressure. We were frustrated . . . the members wanted to go on strike . . ." because of the contract negotiations, and ". . . they had their strike vote and so . . . it was on us, the bargaining team, to make a decision to . . . do something." Then, ". . . we asked if anyone felt that they didn't want to go on a strike vote, if anyone disapproved, because we asked if anyone approved, we asked if anyone disapproves, can you raise your hand. Then, nobody raised their hands. So we . . . asked Myriam if we could go on a . . . ULP strike. . . . And that's how we ended up going on strike." Nelson concluded, saying it was after the caucus ended that Escamilla informed Respondent that the bargaining unit employees would engage in a strike. Finally, during cross-examination, after denying the reason the bargaining committee called a strike was to place pressure upon Respondent to agree to contract terms Nelson was confronted with her pretrial affidavit wherein she stated, "The purpose of the strike is to put pressure on the Employer to reach an agreement with the Union for a new contract." Notwithstanding her pretrial affidavit admission, Nelson insisted that the strike was "a ULP strike, and the purpose . . . was to put pressure on the Employer."

Sanjanette Fowler testified that "the whole bargaining team" was involved in the strike discussions on July 9 and that ". . . one issue . . . the team discussed was the surveillance of the . . . security guard coming in the break room surveilling the strike vote. . . . We [were]' discussing . . . the contract language and the way the management was treating the workers." Asked if anything else was mentioned, Fowler said, "that's it." As to surveillance, "I remember Sheila was very upset when she was inside the break room during the strike vote when the security guard came inside there watching her during [the] strike vote." Concerning contract language, according to Fowler, "we just wanted more language inside the contract that . . . would give workers more job security," including the portion ". . . where the management could adopt and amend policies . . . whenever they felt like it." Also, they discussed management's unfair treatment of employees including ". . . when we went back to the facility and tried to talk to the workers . . . they threw us out of the building." Then, Fowler testified, "after we get finished discussing all the things that was going on, we just came to the

[31] While the ballot, upon which the bargaining unit employees cast their votes, may have had the words "unfair labor practice strike vote" at the top, given Myriam Escamilla's admission, said words appear to have been nothing more than union boilerplate language. Moreover, of course, the alleged unfair labor practices herein had not yet occurred at the time of the printing of the ballots. Further, given the language of R. Exh. No. 1, the union flyer establishing the strike vote, and R. Exh. Nos. 10 and 11, union flyers published subsequent to the strike vote, contract economic and language concerns seem to have been the only motivating factors underlying the bargaining unit employees' strike authorization vote.

[32] The bargaining committee members, who were in attendance at the July 9 bargaining session were Sheila Nelson, Sanjanette Fowler, Matilda Imbukwa, Faye Eastman, Pierre Williams, Dapuma Miller, Yordanos Sega, and Gloria McNeal.

[33] In fact, the unfair labor practice charge, relating to the alleged surveillance or creating the impression of surveillance, is Case 32–CA–25248, filed by the Union on July 26 or over 2 weeks subsequent to the asserted strike vote.

conclusion that we just going to go ahead and go on strike." There was no formal vote, just a general consensus. After this discussion, "we told [Escamilla] that the bargaining team had come to the conclusion that we want a strike."

During cross-examination, as to what the bargaining committee discussed during the caucus on July 9, Fowler denied that they spoke about Respondent's proposals on pensions, health insurance, and wages or the Union's proposal on employee discipline. Rather, "the discussion we talked about was the unilateral changes . . . and the way the employees was being treated and the contract language."[34] Asked if the reason for the strike was that the negotiations had broken down, Fowler said, "it could have been one of the reasons but that is not the exact reason why we called the strike." On this point, however, she admitted telling a Board agent in her pretrial affidavit that negotiations had not worked out, so we were on strike. Again, denying that the purpose of the strike was to place pressure upon Respondent to agree to the Union's demands, she admitted stating in her affidavit, "we began striking at the Piedmont Gardens. . . . The purpose of the strike is to put bargaining pressure on the Employer." Then asked if the bargaining committee sought authorization from the bargaining unit employees to call a strike in order to put pressure on Respondent, Fowler conceded saying this in her affidavit. Finally, Fowler admitted that, on July 9, after the bargaining committee decided to call the strike, the members returned to Respondent's facility and told a group of bargaining unit employees that mediation had not resulted in an agreement and ". . . [they] weren't getting anywhere so [they] had no other choice but to go on strike" and that a reason for the strike was the contract language.[35]

Also, regarding the bargaining committee meeting on July 9, Matilda Imbukwa testified that "we discussed a few issues. One . . . was . . . because they're going to put a cap on the healthcare, surveillance . . . used against the employees . . . amongst other things." As to surveillance, Imbukwa recalled that it was the breakroom incident and ". . . use of the phone to take pictures" by the security guard.[36] After initially stating she could not recall, Imbukwa remembered that other issues the committee members discussed were salary, Respondent's chart of infractions, and "the incidents of the Union members being whisked out of the building." She added that Sheila and Sanjanette spoke about this and that "Sheila was talking about the incident that happened during the strike vote. And Sanjanette was talking about an incident that happened early on . . . when we had left the meeting and we has gone to tell the employees what happened in the meeting . . . and then a few minutes later, the management came and told us to leave the building." Asked how they decided to go on strike, Imbukwa recalled, "we raised our hands, all of us, and said, yeah, we could go on strike." Finally, Imbukwa did not know how the other bargaining unit employees were informed of the decision of the bargaining committee members on July 9.

Regarding the Union's strike procedure, Myriam Escamilla testified that "the Union's procedure is to have the members to authorize bargaining committee to call a strike. And at some point, the members of the committee . . . at Piedmont Gardens decided to go on strike on July 9, that's when they made the final decision." Then, "when . . . they decided, they call us in the room. And we came back and they told us, 'we decided we're going to strike and for this many days.'" Thereupon, each member of the committee was charged with talking to specific people in their department "to see if they would support the strike or not." This involved "multiple" one-on-one sessions between July 9 and the start of the strike "to assess whether or not people will walk out and what days they will be at the picket line." Asked for the purpose of these conversations, Escamilla said "one was to understand if people will be comfortable waking out and . . . being on the picket line. . . . Second, figure out what time . . . they will picket. Third, if they had any questions about what was happening with the contract negotiations with all the issues that were remaining . . . leading to the strike." She added that, subsequent to July 9, the Union published nothing to the bargaining unit employees regarding what was discussed by the bargaining committee on that date and no other strike vote was taken.

Upon being informed by the bargaining committee members that they had decided to engage in a strike against Respondent, Myriam Escamilla sent two letters, dated July 9, to Respondent. In the first, she wrote, "Pursuant to Section 8(g) of the National Labor Relations Act, you are hereby informed that [your bargaining unit employees] will commence a strike at 9:00 a.m. on Monday, August 2, 2010, and continue such activity unless and until a mutually agreeable resolution has been reached." In the second letter, she wrote, "All employees participating in the Unfair Labor Practice strike and withdrawal of labor at Piedmont Gardens . . . scheduled to begin on . . . August 2, 2010, unconditionally offer to return to work at or after 5 a.m. on Saturday, August 7, 2010. This request is made . . . on behalf of all employees it represents as well as all employees who honor its picket lines at Piedmont Gardens on the above date." Subsequently, as scheduled, approximately 80 of the 100 bargaining unit employees, employed by Respondent, commenced their 5-day concerted work stoppage and strike against Respondent on August 2. Mostly, the strikers confined themselves to the 41st Street side of Respondent's facility.

With regard to the motivating factor, which, Nelson and Fowler admitted informing Board agents, was to put pressure on Respondent to bargain, or factors underlying the concerted

[34] Asked to describe the unilateral changes, Fowler stated, "we talked about the surveillance of when the security came inside the break room." Also, "kicking the steward out the building . . . during the strike vote. . . ."

[35] During redirect examination, counsel for the General Counsel asked Fowler a blatantly leading question—". . . When you went back to the facility on July 9 . . . do you remember telling employees that one of the reasons for the strike was that management was . . . telling employees to get out of the building—to which Fowler answered, "yes."

[36] Imbukwa testified that Sheila Nelson spoke about this, saying "there was a security guard in the break room and he was . . . swinging his phone from side to side and he left immediately."

During cross-examination, Imbukwa was confusing, stating that, when Union representatives voiced concerns about Respondent's "surveillance," they were discussing its use of security cameras throughout the building and that the discussion before the strike vote concerned this type of surveillance—"the security surveillance, yes . . . throughout the building, yes."

work stoppage and strike, the record evidence is that the picket signs, which employees carried, other than simply reading the Union's generic "ULP Strike," failed to specify any asserted unfair labor practices. Rather, according to Nelson, other picket signs read "one percent can't pay the rent," and "Union busting has got to go," and protested Respondent's healthcare proposals. In addition to the picket signs, according to Gayle Reynolds, strikers chanted slogans such as "one percent won't pay the rent;" "Piedmont Gardens, you're no good, you don't treat us like you should;" and "No peace, no contract." Further, a striking bargaining unit employee, Keiyana Kemp, was quoted in a local newspaper, stating "I'm struggling. I'm working hard and a 1.5 percent raise is not going to do anything for me and my family and on top of that they want me to pay for my medical expenses out of pocket. Now with three kids and the money we are making—I can't even live right now." Of critical import as to motive is a letter, dated August 6, which the Union, on behalf of the bargaining unit employees, sent to Oakland Mayor Ron Dellums. Said letter states:

> We, the undersigned members of SEIU-UHW and employees of Piedmont Gardens, have been bargaining for a new contract since February with American Baptist Homes of the West. We have proposed common sense disciplinary rules as well as modest economic improvements. Management, however, has refused to move away from its harmful disciplinary policies and, instead, has sought to dramatically cut our healthcare and eliminate our pension fund entirely. As a result, this past Monday, we began a five-day ULP strike to protest [Respondent's] actions. . . .

At 5 a.m. in the morning of August 7, pursuant to their unconditional offer to return to work,[37] 50 to 60 of the former striking employees, who were scheduled to work that day, gathered at the 41st Street entrance to Respondent's facility in order to report for work. They were met by a security guard, who told them that "no one is entering the building." One employee, Bayou Zegenech, was scheduled to begin his work shift at that hour, and the guard announced that there was a list of employees, who would be allowed to return but that he needed to obtain an updated copy of the list. At that point, the guard and a union representative escorted Zegenech into the facility. A few minutes later, Zegenech returned with the following letter, which stated:

> Please be advised that your previous position at Piedmont Gardens has been filled by a permanent replacement employee, so we are not in a position to reinstate you to your former position at his time.
>
> All staff members who have been permanently replaced will be placed on a 'preferential rehire list." We will try to fill vacancies for substantially equivalent positions that become vacant in the future from this list. . . .[38]

In fact, the record discloses that 38 former strikers were permanently replaced by Respondent.[39] In the above regard, Gayle Reynolds testified that, having received advance notice of the bargaining unit employees' concerted work stoppage and strike, prior to August 2, Respondent had made arrangements for the hiring of temporary replacement employees. Thus, after having unsuccessfully attempted to do so itself, Respondent contracted with Huffmaster, "a strike management company," to supply temporary workers, and, by August 2, "we probably hired 60 to 70 people" to temporarily staff the jobs of its striking employees.[40] According to Reynolds, Respondent informed Huffmaster that the length of the jobs would be 3 days, and "when we were making offers to people on a temporary basis, we said we thought it would be for [a] . . . week." She added that, by the evening of the first day of the strike, "we felt confident that we had enough people to get through a few days."

Reynolds further testified that she was the management official who decided to hire permanent replacements and that, beginning on August 3 and continuing through August 6, Respondent made 44 offers of permanent employment to some of the temporary replacement employees and to "our employees who came to work during the strike who were largely on-call employees." As to the rationale for her decision, she stated that the cost of hiring temporary replacements was a burden to Respondent. On this point, Reynolds said that the cost to engage Huffmaster was in excess of $300,000 out of which sum, the latter paid the wages of the temporary replacements.[41] This cost was significant to Respondent as "our revenues come from our residents' monthly fees" and "in order to fund these kinds of things, we have to raise the monthly fees". According to Reynolds, the "economic reality" was that Respondent could not afford to operate in this manner whenever the bargaining unit employees decided to engage in a concerted work stoppage. Further, "I was concerned . . . that our residents were at risk and I was concerned that if the employees didn't come back from the strike, we wouldn't have the people we needed to

[37] There is no dispute that, during the strike, the Union sent to Respondent a copy of the aforementioned unconditional offer to return letter.

[38] Gayle Reynolds testified that, in anticipation of them offering to return to work on August 7, Respondent sent these letters out to the striking bargaining unit employees, as well as attempting to reach them by telephone, on the night of August 6.

[39] They are Shervin S. Amorsolo, Arturo Bariuad, Zegenech Bayou, Maggie Bellinger, Yuhanes Beraki, Donnita Bradley, Pacita Bumatay, Marieth Romero Carmona, Tamika Cato, Calvin Christian, Bonnie Conley, Judith Coston, Besima Ferhatovic, Sanjanette Fowler, Crystal Grayson, Elisa Haile, Monique Higgins, Keiyana Kemp,Brenda Lane, Kathlyn Largent, Johnny Lee, Linda Lee, Gloria McNeal, Salvador Miranda, Michael Morrow, Sheila Nelson, Janie Ragsdale, Michelle Reynolds, Josephine Santos, Yordanos Sega, Paramjit Sekhon, Palwinder Singh, Denesha Singleton, Carmen Smith, Mhret Weldeabzhi, Pierre Williams, Rose Zelaya, and Nebiat Zeray.

[40] According to Reynolds, "most of them" came from Huffmaster and were transported to work in a van.

[41] While Respondent expanded $300,000 on replacement workers utilizing Huffmaster, Reynolds admitted that implementing the Union's requests on economic items over the term of a successor collective-bargaining agreement would have cost only $250,000.

provide services to our residents. I was concerned that if they did [return] from the strike and went on strike again that we wouldn't . . . be able to recruit the people we needed to provide services to our residents." Asked, by counsel for the General Counsel, if it was true that one of the reasons that Respondent hired permanent replacements is that it wanted employees who would work in the event of another strike, Reynolds answered, "The people who had come to work that week had already demonstrated that they would come to work during a strike. . . . I had an expectation . . . but there was no guarantee. It was a probability." Then, asked was it true that her primary reason for hiring the permanent replacements was that they had demonstrated that they would work in the event of another strike, Reynolds averred, "I can't answer that yes or no." However, when confronted by her pretrial affidavit, in which she stated that, while she knew it would "take time" to acclimate the permanent replacements to Respondent, the latter had made offers to only those replacements who were qualified, and the "more important" consideration was that they would work during another work stoppage, Reynolds admitted it was a true statement as ". . . they had demonstrated that they were willing to work during the strike."

Finally, with regard to Respondent's rationale for deciding to hire permanent replacements, Bruce Harland, the Union's attorney, testified that, on the morning of August 6, he made a telephone call to David Durham, Respondent's attorney "because I had heard a rumor that the strikers would be locked out, and I wanted to verify that with him and work out some arrangement in terms of return to work." Harland asked whether Durham could confirm the rumor; the latter said that "he couldn't confirm it . . . that he had a conference call scheduled with [Respondent] . . . in the afternoon, and that he would call me after that conference call." That evening, at approximately 6:00 or 6:30, Durham called Harland and, according to the latter, said he had news for Harland but not the news he wanted to hear. "And he says . . . 'we're not going to lock out the . . . strikers. We're going to actually permanently replace about 20 or so employees.'" Harland responded that the news was serious and asked for the names of the replaced striking employees. Durham promised to get him a list later that night. Then, Harland testified, he said "'You know, this is a pretty big deal. What is the reason for permanently replacing them as opposed to locking them out,'" and Durham "told me . . . that Piedmont Gardens wanted to teach the strikers and the Union a lesson. They wanted to avoid any future strikes, and this was the lesson that they were going to be taught." Harland stated he replied "'okay.' And I hung up."

While confirming the contents of their initial conversation, Durham testified to a different version of their evening conversation. According to Durham, he telephoned Harland from outside of an Oakland restaurant and began by saying he had news for the Union's attorney. "And I said that Piedmont Gardens had permanently replaced a number of the strikers." Harland replied, asking if Durham meant "'locked them out,'" and Durham replied, "'No, permanently replaced.'" Harland responded that the news was "'pretty heavy'" and asked how many employees would be affected. Durham replied that he did not "know for sure, 20, 25, but I'd let him know more later." Harland then asked if Durham knew the names, and the latter said he would get him a list. "And then Bruce said, 'this is pretty heavy as I said. Why did the company permanently replace people?' And I said, 'Bruce, we all know permanent replacements happen in strikes.'" Durham then said he would get Harland the list of the permanently replaced employees,[42] and the conversation ended.

Twelve days after the conclusion of the strike, on August 19, on behalf of the Union, Myriam Escamilla sent a 5-page information request letter to Respondent's attorney Durham. Included amongst the requests was information pertaining to the names and addresses of the permanent replacement employees, their job classifications, and their hourly wage rates. In her letter, Escamilla explained that the Union "needs this information to effectively perform its duty as the exclusive representative of the workers employed at your [facility]" and "to permit the Union to bargain intelligently with the employer as to wages and benefits" Approximately 3 weeks later, in a letter dated September 6 to Escamilla, Respondent's attorney Durham wrote that the names and addresses of the permanent replacement employees, who were already employed by Respondent, were enclosed. However, as to those permanent replacements, who "came from the outside," he wrote, "the Employer has a legitimate concern that providing the information might lead to harassment or possibly violence by the Union or its supporters. As you know, some of their people were subjected to abuse and threats . . . during the strike. They also have legitimate privacy and confidentiality concerns that must be considered. So in lieu of providing the information in the form of your request, we have identified them by initials."[43] Regarding the job classifications and hourly wage rates of the permanent replacements, who were hired from outside sources, Respondent provided the information but with the employees identified by their initials. In fact, General Counsel Exhibit 5 is the document with the name and addresses of permanent replacement employees; 23 are indentified with just initials without their home addresses. Also, General Counsel Exhibit 6 is the document containing the job classifications and wage rates of the permanent replacements; 23 are identified with just their initials. For each of the documents, the parties stipulated that the permanent replacement employees, who were identified by their initials, were hired from outside sources. Escamilla testified that she did not respond to Durham's September 6 letter as "we felt that the allegations of violence and accusations of . . . threats of violence against . . . replacements were bogus and completely ridiculous. . . ," and "we felt that we would better by filing a charge with the NLRB." She added that the Union has received no other documents from Respondent, indentifying the permanent replacements, who were hired from

[42] There is no dispute that, since August 7, 13 of the permanently replaced individuals have been reinstated. They are employees Bariuad, Bradley, Cato, Grayson, Higgins, Lane, Largent, Lee, McNeal, Santos, Sekhon, Weldeabzghi, and Zeray.

[43] There is no record evidence of any harassment of the permanent replacements after the conclusion of the strike. Likewise, there is no record evidence of threats of violence or actual violence directed against them.

outside sources and that she is unaware of any threats to replacement workers, harassment of them, or picket line violence during the period of the strike.

Reynolds testified that, by the time Respondent responded to the Union's information request, the strike had been over for a month, and most of the strikers had been reinstated and were working alongside the permanent replacements. Asked if she observed any instances of harassment, she stated, "No, I would say that the employees did a good job of melding all the different areas from which they came. Whether they had gone on strike. Whether they were Union employees who hadn't gone on strike or if they were permanent replacements." Nevertheless, asked why Respondent only provided the initials of permanent replacements, who were hired from outside sources, Reynolds testified, "I was very concerned about how that information would be used . . . some of the employees have expressed . . . fears for their safety . . . . I didn't know what was going to happen to [the information]. We were just reluctant to hand it over." Therefore, "we decided to provide initials . . . and ask to bargain about . . . some other solution or . . . find some agreement about what would be done with that information." However, the Union never requested to bargain.

Respondent justified its response to the Union's request for the names and addresses of the permanent replacement employees by occurrences during the strike. According to Reynolds, several employees expressed safety concerns. She identified them as Janona, Moussa Sissoko, Liya Hagos, Alem Zewdu, and Ara Armstrong. "There were a couple others, but I don't remember their names. Janona is a nonstriking certified nursing assistant; she was "unhappy" with the Union and "concerned" for her safety as she was constantly "yelled at" for crossing the picket line. Sissoko, a nonstriking bargaining unit employee whose name and address Respondent gave to the Union, spoke to Reynolds "the week before the strike; how was he going to get to work safely, was his concern." Hagos "was afraid that people would bother her while she was walking to work." Zewdu, a nonstriking bargaining unit employee whose name and address Respondent gave to the Union, "had the same concerns that Liya did because they would walk together." Ara Armstrong was a temporary employee, and "she wanted to know how she was going to get to work." Besides these four workers, Jesus Navarez, a nonstriking bargaining unit employee who drives a van used to transport residents for medical appointments, reported to her that, on one occasion, pickets surrounded his vehicle and would not allow him to proceed up the street. Also, some replacements reported having to cover their faces as they crossed the picket line, and, as a result, Respondent allowed them to use another door as an entrance into the facility. For such employees, during the strike, Respondent offered to drive people to the nearest BART terminal and to escort them through the picket line and provided them with an emergency phone number. Finally, as justification for Respondent's failure to provide the aforementioned requested information, Respondent offered a series of anti-Semitic and death threats to Lynn Morganroth, the HR director, which were mailed in early 2010 to her home and her work addresses and one of which was related to the Union.

Legal Analysis and Findings

As set forth above, the consolidated complaint alleges that Respondent engaged in acts and conduct, violative of Section 8(a)(1) of the Act, by discriminatorily enforcing its no-access policy on June 17 and 18 by requiring off-duty employees, who were present at its facility to participate in a union strike authorization vote, to leave the facility and, through a security guard, by engaging in surveillance of employees, who participated in the strike authorization vote. Next, the consolidated complaint alleges that Respondent violated Section 8(a)(1) and (3) of the Act, by belatedly reinstating 13 employees and permanently replacing and refusing to reinstate 25 employees who, after participating in a concerted work stoppage and strike, caused, in part, by Respondent's unfair labor practices, had ended their strike and unconditionally offered to return to their former positions of employment. Finally, the consolidated complaint alleges that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to provide to the Union the names and addresses of permanent strike replacement employees.

Initially, regarding the Acting General Counsel's allegation that Respondent violated Section 8(a)(1) of the Act by engaging in unlawful surveillance of the bargaining unit employees' strike authorization vote on June 17, in comparison to Francisco Pinto, I found Sheila Nelson and Matilda Imbukwa to have been the more credible witnesses. Nelson impressed me as being a candid witness, and, while Imbukwa's account of the time she spent watching Pinto's activities obviously was implausible, I, nevertheless, believe she was an honest witness and truthful as to what she observed. Pinto, on the other hand, did not impress me as being a veracious witness; in particular, his demonstration as to how he held his cell phone (out in front of his face) seemed incompatible with his explanation for having his phone out—checking voicemail messages. Accordingly, I find that, at some point between 1 and 3, during the early afternoon voting period on June 17, while Nelson and Imbukwa were assisting bargaining unit employees in casting their strike authorization ballots, Pinto entered the break room, sat at a table behind Nelson and Imbukwa, took his cell phone out, held it out in front of him at eye level, and began moving it from side to side as if recording the voting activities. I further find that Nelson noticed Pinto's actions, observed him for approximately a minute, and pointed out the security guard's activities to Imbuka, who also observed Pinto for a short period of time.

The central issue, as to this allegation, is, of course, is whether Pinto's acts and conduct may be attributed to Respondent. At the outset, I believe that Respondent was well aware that, at specified times on June 17 and 18, its bargaining unit employees would be voting on whether to authorize their bargaining committee to call a strike. Thus, the vote was publicized by a flyer, which was posted on the Union's bulletin board in the break room. While she professed to have no knowledge as to the vote, Gayle Reynolds admitted entering the break room sometimes on a weekly basis and having observed other bargaining-related flyers posted on the bulletin board. In these circumstances, I do not believe that she failed to notice the strike vote flyer affixed to the bulletin board and believe that Pinto entered the break room and engaged in his actions at Respondent's behest. However, assuming Pinto had not been

directed to engage in his actions, the Board applies the common law principles of agency, and "apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the agent to perform the acts in question." Thus, "the test is whether, under all the circumstances, the employees 'would reasonably believe that the employee in question [the alleged agent] was reflecting company policy and speaking and acting for management.'" *GM Electrics*, 323 NLRB 125, 125 (1997); *Southern Bag Corp.*, 315 NLRB 725, 125 (1994). Herein, the record establishes that Pinto was stationed at the Linda Street entrance to Respondent's facility, monitored access into the building through that entrance, and possessed the authority to prevent people from entering. In these circumstances, I believe that bargaining unit employees may reasonably have believed that Pinto acted as Respondent's agent when either recording or pretending to record the strike authorization voting inside the break room on June 17. *Poly-America, Inc. v. NLRB*, 260 F.3d 465, 483 (5th Cir. 2001); *Opryland Hotel*, 323 NLRB 723, 723 fn. 3 (1997).

As to whether Pinto's acts and conduct were unlawful, there can be no doubt, and I find, that he either actually recorded the strike authorization voting or, at least, created the impression that he was engaging in surveillance of Nelson's union activities and of those bargaining unit employees casting strike authorization ballots. While routine observation of Section 7 activity on an employer's property may not be violative of the Act, "an employer violates Section 8(a)(1) when it surveils employees engaged in [union activities] by observing them in a way that is `out of the ordinary' and thereby coercive." *Aladdin Gaming, LLC*, 345 NLRB 585, 586 (2005). Pinto's acts certainly comprised more than casual observation; the Board has long held that acts of "photographing and videotaping . . . clearly constitute more than mere observation . . . because such pictorial recordkeeping tends to create fear among employees of future reprisals." *National Steel & Shipbuilding Co.*, 324 NLRB 499, 499 (1997); *Fairfax Hospital*, 310 NLRB 299 (1993). Based upon the foregoing, I find that security guard Pinto's patently unlawful acts in the breakroom on June 17 were attributable to Respondent and that, therefore, the latter violated Section 8(a)(1) of the Act.

Next, concerning the Acting General Counsel's allegation that, acting on Respondent's behalf, Gayle Reynolds violated Section 8(a)(1) of the Act by discriminatorily enforcing Respondent's no access rule to evict employees who participated in the strike authorization vote, there is no dispute that, on June 17, Reynolds evicted employee, Sheila Nelson, from Respondent's facility while she was helping to conduct the strike authorization vote and that, subsequently, she also evicted employees, Geneva Henry and Faye Eastman, both of whom were also assisting with the strike vote. With regard to Nelson, there is also no dispute as to what occurred, and I find that Reynolds entered the break room shortly after security guard Pinto's unlawful surveillance, that she confronted Nelson, and that she demanded that Nelson immediately leave Respondent's facility.[44] As to Henry, as between the employee and Reynolds, I perceived Henry as being the more reliable witness. In other circumstances, I might have believed Reynolds merely was honestly mistaken in maintaining she acted against Henry's presence inside Respondent's facility on the morning of June 18; however, when, despite being confronted with her own conflicting emails, she obdurately insisted her testimony was correct, I think Reynolds was being disingenuous. Thus, I credit Henry and find that Reynolds discovered her helping with the strike authorization vote in the break room after 6 p.m. on June 17 and promptly demanded that Henry leave the building. Finally, in these circumstances, and again noting her own conflicting email, I find that Reynolds expelled Eastman from Respondent's facility on the morning of June 18, also because she helped with the strike authorization vote.

While paragraph 7 of the consolidated complaint assumes the facial validity of Respondent's chart of infractions rule 33 and clearly alleges only that Respondent unlawfully disparately enforced it against off-duty employees, who were inside its facility on June 17 and 18 assisting with the strike authorization voting,[45] given the record evidence, I think it may be more correctly argued that Respondent's actual unlawful acts and conduct involve applying a new work rule to Sheila Nelson, whose day off was June 17, and, perhaps, to Geneva Henry, who also may have been off-duty that day, in order to thwart their activities in support of the Union. Thus rule 33 does not, on its face, pertain to the access rights of employees on their days off or while off-duty for any other reason; on June 17, Reynolds was forced to consult with HR director Morganroth as to which chart of infractions rule Nelson and Henry had violated; and, in her reply email to Reynolds, Morganroth, who presumably should have known, expressed confusion and could not specify which, indeed if any, of Respondent's chart of infractions rules Nelson had violated earlier that day. Given the foregoing, the conclusion is warranted that Reynolds conjured and applied a new work rule to Nelson, and, since the former invoked this new rule for the first time in order to evict Nelson and later Henry from Respondent's facility upon discovering each was assisting with the strike authorization vote, Reynolds's actions were violative of Section 8(a)(1) of the Act. *Nashville Plastic Products*, 313 NLRB 462, 463 (1963).

[44] I reiterate my belief that, notwithstanding her less than convincing denial, Reynolds was well aware that the bargaining unit employees were engaged in a strike authorization vote on June 17. Moreover, as I believe that it was not a coincidence Reynolds entered the break room just 15 minutes after Pinto's unlawful surveillance and, giving no credence to his denial, that he probably reported Nelson's presence there to Respondent's management, I think Reynolds entered the break room aware that Nelson was assisting the strike authorization vote.

[45] Nevertheless, in explicating her underlying theory for the allegation in her posthearing brief, citing *Tri-County Medical Center*, 222 NLRB 1089 (1976), counsel for the Acting General Counsel inexplicably asserts that Respondent's rule is "unlawful" on its face as it fails the third prong of the *Tri-County* test—a no-access rule is valid only if such "applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity." Id. at 1089.

Moreover, regarding Respondent's alleged discriminatory enforcement of rule 33, assuming it applies to off-duty employees as well as to employees, who enter its facility prior to their work shifts or remain after their work shifts, Respondent admitted that it permits off-duty employees to enter its facility under certain circumstances including to obtain their paychecks and that off-duty shop stewards are permitted to enter in order to participate in grievance activities and disciplinary meetings. In addition, I credit shop stewards Nelson and Fowler that, on their days off, each has entered Respondent's facility in order to engage in union-related activities and has never been either questioned about her presence inside the facility or asked to leave despite having signed in with the receptionist or a security guard. Finally, there is no record evidence that Respondent previously had enforced chart of infractions rule 33 against any employee for being inside its facility while off-duty. Accordingly, as I believe Reynolds was acutely aware of the strike authorization voting in the break room on June 17 and 18, I find that she disparately invoked Respondent's chart of infractions rule 33 by evicting employees Nelson, Henry, and Eastman from the facility upon discovering each was assisting with the voting. In these circumstances, Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act. *Benteler Industries*, *Inc.*, 323 NLRB 712, 715 (1997); *Opryland Hotel*, supra, at 731; *Baptist Memorial Hospital*, 229 NLRB 45, 45 fn. 4 (1977).

I next turn to the allegation that Respondent engaged in acts and conduct, violative of Section 8(a)(1) and (3) of the Act, by belatedly reinstating 13 employees and permanently replacing and refusing to reinstate 25 other employees for engaging in the August 2 through 7 concerted work stoppage and strike. An employer violates Section 8(a)(1) and (3) of the Act by failing to reinstate striking employees on their unconditional offer to return to work, unless the employer establishes a legitimate and substantial business justification for failing to do so. *NLRB v. Fleetwood Trailor Co.*, 389 U.S. 375, 378 (1967); *Capehorn Industry*, *Inc.*, 336 NLRB 364, 365 (2001). The employer establishes a legitimate and substantial business justification when the record evidence establishes that the positions, claimed by the strikers, are filled by permanent replacements. *Fleetwood Trailor*, supra; see *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333, 345–346 (1938). Counsel for the Acting General Counsel presents alternative theories underlying the unfair labor practice allegations.

The first, of course, is that the said concerted work stoppage and strike was an unfair labor practice strike and that, therefore, upon the Union's unconditional offer to abandon the strike and return to work on behalf of each striker, Respondent was obligated to have immediately reinstated each to his or her former position of employment. As to this, in *Golden Stevedoring Co.*, *Inc.*, 335 NLRB 410 (2001), the Board held "that a work stoppage is considered an unfair labor practice strike if it is motivated at least, in part, by the employer's unfair labor practices, even if economic reasons for the strike were more important than the unfair labor practice activity. . . . It is not sufficient, however, merely to show that the unfair labor practices preceded the strike. Rather, there must be a causal connection between the two events. . . . In sum, the unfair labor practices must have 'contributed to the employees' decision to strike.'" Id. at 411; *RGC (USA) Mineral Sands, Inc.*, 332 NLRB 1633, 1634 (2001). Concerning the latter conclusion, analysis of its decisions discloses that the Board has used numerous phrases[46] to emphasize the same point—the state of mind of strikers must be that their concerted work stoppage and strike was, at least, in part motivated by their employer's unfair labor practices. *Pennant Foods Co.*, 347 NLRB 460, 469 (2006). Put another way, whenever a reasonable inference may be drawn that an employer's unfair labor practices played a part in the decision of the employees to strike, said concerted work stoppage is an unfair labor practice strike. *Post Tension of Nevada, Inc.*, 352 NLRB 1153, 1162–1163 (2008); *Child Development Council of Northeastern Pennsylvania*, supra. Further, the burden is on the employer to establish that the strike would have occurred even if it had not committed unfair labor practices. *Post Tension of Nevada*, supra at 1163. Finally, once unfair labor practice strikers make unconditional offers to abandon the strike and return to work, they must be returned to their former positions of employment or, if said jobs no longer exist, to substantially equivalent positions even if permanent replacements must be discharged in order to do so. *Pennant Foods Co.*, supra at 470; *Cal Spas*, 322 NLRB 41 (1996).

Bluntly stated, contrary to the Acting General Counsel, for the below-stated reasons, I do not believe that Respondent's bargaining unit employees' August 2 through 7 strike against Respondent constituted an unfair labor practice strike. At the outset, there is no dispute that, on the afternoon of May 25, the bargaining unit employees engaged in informational picketing outside of Respondent's facility, carrying placards identifying the parties' contentious bargaining issues (healthcare, a pension plan, and wages); that, on June 17 and 18, the bargaining unit employees participated in a strike authorization vote, voting yes or no on whether to "authorize the bargaining committee team to call a strike,"[47] and that, in setting the strike authorization vote, the employees' bargaining committee identified successor contract bargaining issues ("Management still wants to take away our pension, make us pay . . . more for our health insurance, and is offering a raise that's a joke") as their motivation. In these regards, while over 90 percent of the bargaining unit employees voted to authorize their bargaining committee to call a strike and while the unfair labor practices, which I have found herein, occurred in the midst of the voting, there is no record evidence regarding whether any bargaining unit employees, other than members of the bargaining committee, witnessed or were cognizant of said acts or as to the dissemination of information pertaining to them. In these circumstances, I believe the

[46] Did the employer's unfair labor practices "have anything to do with" causing the strike? *Child Development Council of Northeastern Pennsylvania*, 314 NLRB 845, 845 fn. 5 (1994). Were they a "contributing cause" of the strike? *R & H Coal Co.*, 309 NLRB 28, 28 (1992). Was the unfair labor practice conduct "one of the causes" of the strike? *Boydston Electric*, 331 NLRB 1450, 1452 (2000).

[47] Given Union Agent Escamilla's admission that "we always call for unfair labor practice strikes," I find no significance to the words "unfair labor practice strike vote" on the top of the ballot or, indeed, to the Union's use of said words on any document or strike placard.

result of the strike authorization vote was that the bargaining unit employees authorized their bargaining committee to call an economic strike against Respondent.

Given the foregoing, the issue, then, is whether, at the time it commenced, Respondent's bargaining unit employees' concerted work stoppage and strike had metamorphosized into an unfair labor practice strike. On this point, there is no dispute that, during a break in the July 9 bargaining session between Respondent and the Union, with no prospect of an imminent breakthrough on a successor collective-bargaining agreement,[48] eight members of the bargaining unit employees' bargaining committee discussed engaging in a strike against their employer. Based upon their respective, uncontroverted testimony, I find that, during said conversation, in addition to bargaining concerns, committee members, Sheila Nelson, Sanjanette Fowler, and Matilda Imbukwa, each mentioned security guard Pinto's surveillance on June 17 and Reynolds' eviction of Nelson later that same day and that, at the conclusion of their discussions, the negotiating committee members decided to engage in a strike[49] against Respondent and informed Escamilla as to their decision. Finally, with regard to the asserted transformed rationale for the concerted work stoppage and strike, there is no credible record evidence[50] that, between July 9 and August 2, either union agents or the eight members of the bargaining unit employees' negotiating committee, ever informed Respondent's other bargaining unit employees that the economic strike, which they had authorized their bargaining committee to call, had morphed into a strike to, at least, partially protest and redress their employer's unfair labor practices. In this regard, the Union published no materials on the subject; while bargaining committee members did meet individually with fellow bargaining unit employees, the subject of these meetings appears to have concerned procedural matters pertaining to each employee's participation in the strike; and, after June 17 and 18, bargaining unit employees never again voted on the rationale for their concerted work stoppage and strike against Respondent.

Although not explicitly stated in her posthearing brief, counsel for the Acting General Counsel's position appears to be that, as the bargaining unit employees' negotiating committee was authorized to call a strike and as the eight members discussed the above unfair labor practices in deciding whether to do so, the August 2 through 7 concerted work stoppage and strike was an unfair labor practice strike.[51] Taking a contrary position, counsel for Respondent argues that, while "members of the union bargaining committee testified as to why they decided to strike, this is no substitute for evidence that the general membership knew of, and was motivated by, the . . . unfair labor practices." I agree with counsel for Respondent. In this regard, I reiterate my view that Respondent's bargaining unit employees authorized their negotiating committee to call a strike against Respondent for economic reasons. Indeed, such was the recommended course of action by their bargaining committee. Moreover, while bargaining unit employees arguably may leave to the discretion of their majority bargaining representative or an authorized negotiating committee the decision as to the type of concerted work stoppage and strike in which the employees may eventually engage, the indisputable record evidence herein is that the specific grounds, which were recommended to the bargaining unit employees for authorizing their negotiating committee to call a strike, concerned Respondent's bargaining positions. Put another way, Respondent's bargaining unit employees did not vote in a vacuum. Further, there is no record evidence that, other than the eight members of the negotiating committee, the other 92 bargaining unit employees were aware of the acts, which constituted Respondent's unfair labor practices;[52] at no point prior to its commencement, did the members of the bargaining committee inform the entire bargaining unit that their concerted work stoppage and strike would be, at least, partially intended to protest unfair labor practices; and, of course, notwithstanding the magnitude, the entire bargaining unit never was asked to confirm the changed rationale for their concerted work stoppage and strike, which, arguably, had been adopted by the bargaining committee.. In my view, given that Respondent's unfair labor practices did not involve the collective-bargaining process and are not of the so-called hallmark variety, the entire bargaining unit's lack of knowledge of them and lack of an opportunity to vote to confirm them as rationale for the concerted work stoppage and strike left its original underlying economic rationale unchanged. *C-Line Express*, supra. Further, there can be no contention that knowledge of the negotiat-

[48] I note that, in almost a 3-week period between the strike authorization vote and the July 9 bargaining session, bargaining concerns, rather than asserted unfair labor practices, were the sole concern of the Union's published flyers for the bargaining unit employees.

[49] While Nelson testified that the committee members told Escamilla, they wanted to engage in an unfair labor practice strike, Fowler testified they told Escamilla only that they wished to engage in a strike, Imbukwa recalled only that the committee voted to engage in a strike, and Escamilla testified that she was only told the committee members voted to go on strike. Accordingly, I do not rely upon Nelson's testimony on this point.

[50] I give no credence to Fowler's response to a leading question by counsel for the Acting General Counsel.

[51] Notwithstanding that I expressed being "troubled" by the Acting General Counsel's contention, counsel for the Acting General Counsel ignored my concern, failing to discuss it in her posthearing brief.

[52] In analogous strike conversion cases, the Board and the courts require that the General Counsel establish bargaining unit employees' knowledge of the alleged unfair labor practices. Thus, in *C-Line Express*, 292 NLRB 638 (1989), the Board reversed an administrative law judge's finding that an economic strike had been converted into an unfair labor practice strike as there was no evidence "to indicate that the strikers were even aware of the Respondent's unlawful [behavior]." Id. at 639. Likewise, in *F.L. Thorpe & Co., Inc. v. NLRB*, 71 F.3d 282 (8th Cir. 1995), notwithstanding that the parties stipulated that the respondent had committed several serious unfair labor practices, including conditioning reinstatement of employees upon their resignation from the union, the court rejected the Board's finding that said acts and conduct converted an economic strike into an unfair labor practice strike as the record "lacked evidence of sufficient dissemination of the employer's unlawful condition among the striking employees." Id. at 290.

ing committee's discussions on July 9 may be imputed to the remainder of the bargaining unit employees. In an analogous strike conversion case, *Facet Enterprises*, *Inc.*, 290 NLRB 152 (1988), the Board required explicit evidence of the bargaining unit employees' knowledge of their employer's alleged unfair labor practices in order to find that an existing strike was, in fact, an unfair labor practice strike. The General Counsel argued that the said strike was an unfair labor practice strike from its inception. However, the Board determined that, at the time the bargaining unit employees gave authorization to the labor organization, which represented them, to commence a strike, the only grounds offered by the union were economic issues. Later, during bargaining, an unfair labor practice issue arose; nevertheless, the labor organization failed to inform the bargaining unit employees of said act prior to the commencement of their strike. Subsequently, after the commencement of the strike, the labor organization informed the membership of the employer's unlawful acts, and the employees voted to confirm the strike. In those circumstances, the Board held that the strike had not been an unfair labor practice strike at its inception and had been converted to such a status only when the unit employees were informed of the respondent's actions and, with that knowledge, voted to remain on strike. Id. at 154. In contrast, in the instant matters, the eight bargaining committee members never informed their fellow unit members of Respondent's asserted unfair labor practices or the changed rationale for their concerted work stoppage and strike and, of course, the bargaining unit employees never voted to confirm whatever decision the bargaining committee reached. The critical nature of these failings can not be emphasized more forcefully.

Besides the aforementioned, notwithstanding the respective, uncontroverted testimony of employees Nelson, Fowler, and Imbukwa regarding what was said on July 9 prior to the bargaining committee's decision to call the concerted work stoppage and strike against Respondent, I am not convinced that the bargaining committee actually was motivated by either Pinto's unlawful surveillance or Reynolds' unlawful evictions of employees in deciding to call for the August 2 through 7 concerted work stoppage and strike against Respondent. Thus, while asserting that bargaining committee members informed Escamilla they wanted to have an unfair labor practice strike and later denying the committee called the strike in order to place pressure upon Respondent to agree to new contract terms, Sheila Nelson was impeached by her pre-trial affidavit in which she stated "The purpose of the strike is to put pressure on the Employer to reach an agreement with the Union for a new contract." Likewise, after denying that the purpose of the strike was to put pressure on Respondent to agree to the Union's bargaining demands, Sanjanette Fowler was impeached by her pretrial affidavit in which she stated, "We began striking at the Piedmont Gardens. . . . The purpose of the strike is to put bargaining pressure on the Employer." Also, she admitted that, on July 9, after the bargaining committee's decision, she returned to Respondent's facility and informed co-workers that the earlier bargaining session had not resulted in any agreement, that the employees had no choice but to strike, and that a reason for the strike was contract language. Moreover, during the 5-day strike and picketing outside of Respondent's facility, strikers carried placards and chanted slogans identifying economic concerns as the basis for the concerted work stoppage and strike, and, other than a boilerplate "ULP Strike" message on one or more signs, no striker carried a placard specifying any unfair labor practice as the basis for the strike. *Mauka, Inc.*, 327 NLRB 803, 804 (1999). In this regard, of course, one striker told a reporter that economic concerns, a minuscule raise offer and health insurance, were the strikers' issues. Finally, and of critical import as to motivation, is the Union's August 6 letter to Oakland Mayor, Ron Dellums, seeking his support for the strike. Rather than identifying any unfair labor practices as underlying issues, the Union mentioned only the new contract bargaining, writing "We have proposed common sense disciplinary rules as well as modest economic improvements. Management, however, has refused to move away from its harmful disciplinary policies and, instead, has sought to dramatically cut our healthcare and eliminate our pension fund entirely." Based upon the above reasons, and the record as whole, I restate my conclusion that Respondent's bargaining unit employees voted to authorize their negotiating committee to call an economic strike against Respondent and that such remained the entire underlying basis for the August 2 through 7 concerted work stoppage and strike against Respondent.

Counsel for the Acting General Counsel's alternate theory, underlying the consolidated complaint allegation that Respondent violated Section 8(a)(1) and (3) of the Act by belatedly reinstating 13 former strikers and permanently replacing and refusing to reinstate 25 other former striking employees, is that "Respondent had an independent unlawful purpose for hiring the permanent replacements." As support for this theory for the violation, counsel relies upon the Board's decision in *Hot Shoppes, Inc.*, 146 NLRB 802 (1964), which concerned an economic strike and the hiring of permanent replacement employees by the employer. In reversing the trial examiner, who concluded that an employer may replace economic strikers only to preserve the efficient operation of his business, the Board held, "The Supreme Court's decision in *Mackay Radio & Telegraph Co.*, and the cases thereafter, although referring to an employer's right to continue his business during a strike, state that an employer has a legal right to replace economic strikers at will. We construe these cases as holding that the motive for such replacements is immaterial, absent evidence of an independent unlawful purpose." Id. at 805. There exists no Board acknowledgement of the *Hot Shoppes* exception to an employer's otherwise unfettered right to hire permanent replacement employees until *Avery Heights*, 343 NLRB 1301 (2004).[53]

[53] This is not to say that the Board had no occasion to do so. Thus, in *Choctaw Maid Farms*, 308 NLRB 521 (1992), responding to a contention of the General Counsel that the hiring of permanent replacements was discriminatory and unlawful, the administrative law judge wrote, "the law allows an employer to hire permanent replacements. What its state of mind might be in exercising that right is irrelevant." Id. at 528. The Board did not discuss the issue. Likewise, in *Nicholas County Healthcare Center*, *Inc.*, 331 NLRB 970 (2000), notwithstanding that, utilizing the *Hot Shoppes'* rationale, the administrative law judge found an unlawful purpose for the hiring of permanent replacements, the Board declined to pass on his findings.

Therein, the General Counsel argued to the Board that, in secretly hiring permanent replacement employees, an employer had an independent unlawful purpose—breaking the Union's solidarity and punishing a majority of the striking bargaining unit employees. After noting an employer may establish a business justification for failing to reinstate striking employees, who make an unconditional offer to return to work, by showing their jobs had been filled by permanent replacements, the Board held that "a violation will still lie if it is shown that, in hiring the permanent replacements, the employer was motivated by `an independent unlawful purpose.' . . . Apart from such a purpose, the employer's motive for hiring permanent replacements is immaterial." Id. at 1305. While failing to explicate the meaning of the *Hot Shoppes* exception, the Board concluded that there was no record evidence of any independent unlawful motive underlying the Respondent's hiring of the permanent replacements at issue. Subsequently, the Second Circuit Court of Appeals reversed[54] the Board, and, in *Avery Heights*, 350 NLRB 214 (2007), the latter accepted the court's remand and, as the law of the case, found, in agreement with the court, that the respondent had an independent unlawful motive for hiring the permanent replacements at issue.

Counsel for the Acting General Counsel argues that there exists "compelling evidence" herein establishing Respondent's independent unlawful motive for hiring permanent replacements. Initially, counsel points to the telephone conversation between the Union's Attorney, Bruce Harland, and Respondent's attorney, David Durham on the evening of August 6. In this regard, having considered the credibility of each, Harland impressed me as being the more veracious witness. In contrast, Durham's demeanor was that of a witness, merely attempting to bolster his client's legal position, and, therefore, I shall rely upon Harland's account of their conversation. Accordingly, I find that, after Durham informed Harland that, rather than a lockout, Respondent would permanently replace approximately 20 of the striking employees and promised to furnish him with a list of the names of the striking employees, who had been permanently replaced, Harland asked for Respondent's reason for permanently replacing the strikers rather than imposing a lockout. To this, Durham replied "that Piedmont Gardens wanted to teach the strikers and the Union a lesson. They wanted to avoid any future strikes, and this was the lesson that they were going to be taught." Next, counsel for the Acting General Counsel points to Respondent's arguably discriminatory rationale for converting the status of strike replacement employees from temporary to permanent. Thus, Gayle Reynolds admitted that, in making offers to these individuals, rather than their qualifications for the work, the "more important" and, I think unlawful, consideration was that they would work during another work stoppage, and "they had demonstrated that they were willing to work during the strike." *Planned Building Services*, *Inc.*, 347 NLRB 670, 708 (2006); *National Fabricators*, *Inc.*, 295 NLRB 1095, 1096 (1989).

Absent from either the Board's decision in *Hot Shoppes, Inc.* or in the initial *Avery Heights* decision is any explanation for, or analysis of, precisely what the Board meant by the phrase "independent unlawful purpose" in the above-quoted *Hot Shoppes* language. In this regard, counsel for the Acting General Counsel intuits the Board as meaning that "an employer is free to hire permanent replacements for any non-discriminatory reason, but where anti-union discrimination is shown to be the reason for the hiring of permanent replacements, a Section 8(a)(3) violation is established." I disagree. At the outset, I think that the words, "independent unlawful purpose," obviously have significance or the Board would not have used them and note that the Board relied upon its decision in *Cone Brothers Constructing Co.*, 135 NLRB 108 (1962), for the above phrase. Thus, one portion of *Cone Brothers* involves a finding that the employer therein deliberately provoked pro-union drivers to refuse to cross a picket line and, thereby, engage in a sympathy strike, which the employer then exploited to unlawfully terminate the drivers with the ultimate goal of challenging their ballots as nonemployees in a scheduled representation election—an obvious unfair labor practice. I think, in *Hot Shoppes*, the significance of *Cone Brothers*[55] to the Board was that the employer's actions therein were ultimately designed to accomplish an unrelated, unlawful purpose extrinsic to the discharges. In these circumstances, I find compelling counsel for Respondent's contention that the "independent unlawful purpose" exception means that the hiring and use of permanent replacements by the employer is calculated to accomplish another, unlawful purpose, one *unrelated to or extraneous to* the strike itself. For example, by hiring permanent replacements, an employer actually may be attempting to unlawfully foment a decertification election. Indeed, if such is not the correct interpretation and one accepts counsel for the Acting General Counsel's interpretation, the words, "independent unlawful purpose," render the entire preceding clause a nullity, and the Supreme Court's summation of the *Hot Shoppes* language, in *Belknap, Inc. v. Hale*, 463 U.S. 491, 504 fn. 8 (1983)—that an employer's motive for hiring permanent replacements is "irrelevant—" would be meaningless. Put another way, surely, if the Supreme Court meant that when evidence of discriminatory motive is established, the hiring of permanent strike replacements would be violative of Section 8(a)(3) of the Act, it would have so stated. Accordingly, I agree with the above-quoted ruling of the administrative law judge in *Choctaw Maid Farms*, supra, and conclude that, when, as in the instant matters, bargaining unit employees engage in an economic strike against their employer and the said employer exercises its right to hire permanent replacements in the striking employees' stead, whatever factors, lawful or unlawful, contributed to, or motivated, the employer's state-of-mind in reaching its decision, unless designed to accomplish an unlawful, extraneous purpose, are utterly irrelevant. In these circumstances, inasmuch as the factors involved

[54] The Second Circuit disagreed with the Board on the record evidence, finding that the employer's secret hiring of permanent replacements was probative of an "illicit" motive to break the union. *New England Health Care Employees Union v. NLRB*, 448 F.3d 189, 196 (2d Cir. 2006).

[55] *Cone Brothers* did not involve the hiring of permanent replacements by the employer.

in Respondent's decision to hire permanent replacements, its desire to teach its striking bargaining unit employees a lesson and its desire to hire individuals, who would cross a picket line in the event of future strikes, were directly related to its bargaining unit employees' August 2 through 7 economic strike, given Respondent's unquestioned right to do so, it's underlying motivation for hiring permanent replacement employees was, and remains, irrelevant. Accordingly, for all the above-stated reasons, Respondent did not violate Section 8(a)(1) and (3) of the Act by failing and refusing to reinstate 25 of its bargaining unit employees, who engaged in the above economic strike and by belatedly reinstating 13 of said employees, and, therefore, I shall recommend dismissal of paragraphs 10 and 11 of the consolidated complaint.

Finally, I turn the consolidated complaint allegation that Respondent engaged in acts and conduct, violative of Section 8(a)(1) and (5) of the Act by failing and refusing to provide to the Union the names and home addresses of its newly hired permanent replacement employees. In this regard, there is no dispute, and I find, that 12 days after the conclusion of the August 2 through 7 strike, in a letter dated August 19, the Union sent an information request to Respondent for certain items, including the names and addresses of the permanent replacement employees, and that, in a letter dated September 6, Respondent's attorney replied, writing that, inasmuch as Respondent has a legitimate concern as to possible harassment and possible violence, in the pertinent wage rate and job classification documents it would identify the permanent replacement employees, who were hired from outside sources, only by their initials and without their home addresses. In fact, in the accompanying wage rates and job classification documents, Respondent indentified the permanent replacement employees, who were hired from outside sources, only by their initials and failed to set forth their respective home addresses. There is also no dispute that Respondent has continued to withhold the names and addresses of its permanent replacement employees, who were hired from outside sources.

It is, of course, well settled Board law that the names and addresses of bargaining unit employees constitute presumptively relevant information, which must be furnished to a labor organization upon request. *Beverly Health & Rehabilitation Services*, 346 NLRB 1319, 1326 (2006); *Stanford Hospital & Clinics*, 338 NLRB 1042, 1043 (2003). Likewise, the Board has also held that the names and addresses of permanent strike replacement employees is presumptively relevant information, which must be supplied to a requesting labor organization upon request. *Beverly Health & Rehabilitation*, supra; *Metta Electric*, 338 NLRB 1059, 1065 (2003); *Grinnell Fire Protection Systems Co.*, 332 NLRB 1257, 1257–1258 (2000).[56] However, an employer may withhold such requested information if it can establish that there is a clear and present danger that the information would be misused by the labor organization. Id. An employer may establish the existence of such a "clear and present danger" upon a showing of acts of bodily injury, acts of property damage, acts of intimidation, the throwing of rocks or other harmful objects, threats of violence, and similar acts and conduct not only at or near the picket line but also at the replacements' residences. *Brown & Sharpe Mfg. Co.*, 299 NLRB 586, 590 (1990). Herein, there is no record evidence of any such acts of misconduct directed against any replacement employees, who were hired from outside sources, and, other than strikers surrounding a vehicle on one occasion and some mild and typical strike argot, there exists no evidence of acts of arguable misconduct directed toward nonstriking bargaining unit employees. Further, Gayle Reynolds testified that, by the time Respondent replied to the Union's information request, the strike had been over for more than a month and that most of the strikers had been reinstated and were working alongside the replacement employees without any instances of harassment. Therefore, rather than objective concerns, it appears that, at the time it refused to give to the Union the names and addresses of certain of the permanent replacements, whatever concerns Respondent may have had were, at most, subjective in nature without factual support.

Nevertheless, citing *Good Life Beverage Co.*, 312 NLRB 1060 (1993), counsel for Respondent argues that, when the employer has legitimate and substantial confidentiality concerns regarding the information sought by a labor organization, it is "entitled" to discuss these concerns with the labor organization in order to "develop mutually agreeable protective conditions" for disclosure of the information. Id. at 1062. However, contrary to counsel, *Good Life Beverage* involves financial information, and, as the Board noted, ". . . requests for financial information frequently raise confidentiality questions," which, unlike herein, pertain to the nature of the information sought. In addition, Respondent relies upon two cases involving requests for information pertaining to strike replacement employees. Thus, in *Webster Outdoor Advertising Co.*, 170 NLRB 1395 (1968), the union requested to examine the employer's payroll records to determine the wage rates of strike replacements. While it is true that the employer did not "categorically" reject the union's request, expressing reluctance to turning over the information until receiving assurances had been given and legitimate need established, the Board noted "that replacements had been harassed, threatened, and assaulted by some of the striking employees," and one striker had been "convicted in state court for assaulting a replacement with a gun." Id. at 1396. Of course, no similar incidents of harassment, assaults, or threats occurred to Respondent's permanent replacement employees. Also, in *Page Litho, Inc.*, 311 NLRB 881 (1993), while it is true that, "given the facts of this case," the Board refused to find an unlawful refusal to transmit information to a union after the latter agreed to having the employer provide the requested payroll information with the strike replacements' names excised, the Board did find that the employer's subsequent refusal to provide the names of strike replacement employees was unlawful when the employer's refusal occurred 4 months after the conclusion of the strike and the last reported incidents of strike misconduct occurred. As the Board noted it would be an "unfortunate precedent" to hold "that on the basis

[56] Counsel for Respondent urges that the line of Board cases, holding such information as presumptively relevant, should be overruled. Such, of course, is the province of the Board, not that of an administrative law judge.

of past strike misconduct, an employer could foreclose for an indefinite length of time the opportunity for the bargaining representative to obtain the names of some of its bargaining unit members." Id. at 882–883. Herein, of course, not only were there, at worst, minor incidents of picket line misconduct but also the strike had concluded over for a month before Respondent replied to the information request and strikers and replacement employees were working well together in the jobsite. In these circumstances, I believe that Respondent's refusal to transmit the names and addresses of certain of its permanent replacement employees to the Union was violative of Section 8(a)(1) and (5) of the Act. *Beverly Health & Rehabilitation*, supra; *Page Litho*, supra.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By either enforcing its chart of infractions rule 33 in a disparate manner or implementing a new work rule and evicting off-duty bargaining unit employees from its facility in order to deter said employees from assisting the Union with a strike authorization vote, Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act.
4. By, through a security guard, engaging in surveillance or creating the impression it was engaging in surveillance of its bargaining unit employees, who were assisting with or participating in a strike authorization vote, Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act.
5. By failing and refusing to furnish the Union with the names and addresses of its permanent strike replacement employees, who were hired from outside sources, which information is presumptively relevant, Respondent has engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act.
6. Respondent's above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.
7. Unless specifically found above, Respondent engaged in no other unfair labor practices.

REMEDY

Having found that Respondent has engaged in, and continues to engage in, serious unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act and Section 8(a)(1) of the Act. I shall recommend that it be ordered to cease and desist therefrom and to engage in certain affirmative acts. As I have found that Respondent has unlawfully failed and refused to provide the Union with the names and addresses of permanent replacement employees, who were hired from outside sources, I shall recommend that it be ordered to do so. In addition, I shall recommend that it be ordered to post a notice, setting forth its obligations herein.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[57]

ORDER

The Respondent, American Baptist Homes of the West d/b/a Piedmont Gardens, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Either enforcing the chart of infractions rule 33 in a disparate manner or implementing a new work rule by evicting off-duty bargaining unit employees from its facility in order to deter said employees from assisting the Union with a strike authorization vote;

(b) Engaging in surveillance or creating the impression it was engaging in surveillance of its bargaining unit employees, who were participating in a strike authorization vote;

(c) Failing and refusing to furnish the Union with the names and addresses of permanent replacement employees, who were hired from outside sources, which information is presumptively relevant;

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Provide the Union with the names and addresses of its permanent replacement employees, who were hired from outside sources;

(b) Within 14 days after service by the Region, post at its facility in Oakland, California, copies of the attached notice marked "Appendix."[58] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. 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 June 17, 2010;

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official

[57] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[58] 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."

on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges that Respondent violated Section 8(a)(1) of the Act by belatedly reinstating or refusing to reinstate former striking employees

Dated, Washington, D.C., August 9, 2011.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT either enforce the chart of infractions rule 33 in a disparate manner or implement a new work rule by evicting our bargaining unit employees from our facility in order to deter said employees from assisting Service Employees International Union, United Healthcare Workers–West, herein called the Union, with a strike authorization vote.

WE WILL NOT engage in surveillance or create the impression we are engaging in surveillance of our bargaining unit employees who participate in a strike authorization vote.

WE WILL NOT fail and refuse to furnish the Union with the names and addresses of permanent replacement employees, hired from outside sources, which information is presumptively relevant.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL furnish the Union with the names and addresses of permanent replacement employees, who were hired from outside sources.

AMERICAN BAPTIST HOMES OF THE WEST D/B/A
PIEDMONT GARDENS

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Equinox Holdings, Inc. *and* Service Employees International Union, Local 87. Case 20–RC–153017

August 26, 2016

ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

The Employer's Request for Review of the Regional Director's Decision and Certification of Representative is denied as it raises no substantial issues warranting review.[1]

Dated, Washington, D.C. August 26, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting in part:

I agree with most of the conclusions reached by my colleagues in this case, who uphold the Regional Director's Decision and Certification of Representative. Contrary to my colleagues and the Regional Director, however, I would grant the Employer's Request for Review as to a portion of Employer Objection 2, which alleges it was objectionable for the Union to use terminated employee Jared Quarles as a Union observer in the election held in the Employer's Pine Street facility.

Quarles brandished a gun at work in the presence of other employees, and he proclaimed that he possessed the weapon "in case any fuckers want to get crazy."[1]

[1] We do not rely on *First Student, Inc.*, 359 NLRB No. 120 (2013), cited by the Hearing Officer. See *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).

Contrary to the dissent, we find that the Employer has not established that the Regional Director's decision to overrule its objection to Jared Quarles' service as the Union's election observer warrants review. Quarles was terminated shortly before the election, although the Petitioner did not know of that fact until the morning of the election, when it would have been too late to select and train a substitute. In any event, the record is devoid of evidence that Quarles engaged in any misconduct during his service as an election observer; nor has the Employer demonstrated that his participation as an observer prejudiced it. See *Embassy Suites Hotel, Inc.*, 313 NLRB 302, 302 (1993) ("[T]he Board will not find the use of a nonemployee as an observer to be objectionable, absent evidence of misconduct by that observer or of prejudice to another party by the choice of that observer."); accord *Fleet-Boston Pavilion*, 333 NLRB 655, 656 (2001).

Nor do we agree with the dissent that review is nonetheless warranted because of a purported incident where Quarles allegedly brandished a gun in front of several employees in a lunch room. First, the Regional Director adopted the hearing officer's finding that this allegation was unsubstantiated: it was based on uncorroborated hearsay testimony of the Employer's manager. Accordingly, the hearing officer reasonably drew an adverse inference against the Employer for failing to call as witnesses the employees who allegedly observed this incident. Second, although the "gun brandishing" was allegedly reported to the manager by an unnamed employee 4 days before the election, the manager's uncredited testimony failed to disclose when the alleged incident took place, including whether it even occurred within the critical period leading up to the election. Third, there is no evidence whatsoever, hearsay or otherwise, that the alleged incident, if it even occurred, had anything to do with the union campaign.

The dissent challenges our questioning of whether the "gun brandishing" incident ever occurred, citing in support fn. 5 of the Decision and Certification of Representative. There, the Regional Director, referencing the "alleged" incident, states that "I accept *the finding* that Quarles brandished an imitation gun." (emphasis added). But the hearing officer, whose finding the Regional Director purports to adopt, made no such finding. The hearing officer merely accepted that Quarles had the imitation gun at work on June 15 based on its discovery that day.

What is known is that, on June 15, the Employer's manager called the police and reported that Quarles had a gun in his possession. Quarles was briefly handcuffed and detained for possessing a gun, only to be released when the police determined that the "weapon" was not a real handgun, but a replica "airsoft" gun. Although the Employer thereafter terminated Quarles, we do not find that the Regional Director erred in finding that the events of June 15 did not render Quarles' service as an election observer objectionable. As discussed above, Quarles engaged in no misconduct during the election and, except for acting as an observer, he did not serve in any capacity as an agent of the Union; to repeat, there is no evidence linking his possession of the airsoft gun to the Union or the organizing campaign. Cf. *McFarling Bros. Midstate Poultry & Egg Co.*, 123 NLRB 1384, 1392 (1959) (finding that it was not objectionable for an employee, who had threatened another employee with a knife 3 months prior to the election, to serve as an observer for the union where, among other things, the cause of the altercation did not involve the union and the observer held no office in the union).

Although we share our colleague's concerns regarding violence in the workplace, in this instance we find that the Regional Director did not make a clearly prejudicial error or depart from Board precedent in finding that Quarles' service as the Union's election observer would not warrant setting aside the election. See Board's Rules and Regulations, Sec. 102.67 (c).

[1] Because the Regional Director specifically "accept[ed] the finding that Quarles brandished an imitation gun," Decision and Certification of Representative at 5 fn. 5, I respectfully disagree with my colleagues insofar as they overrule this objection on the basis that the brandishing incident may not have occurred. While accepting that Quarles brought a gun to the workplace on June 15, 2015, and that the confrontation with the police described herein ensued, also on June 15, the majority posits that the brandishing incident may have occurred on some other date. Assuming arguendo that this is so, then Quarles brought a gun to the workplace more than once, which would only reinforce the conclusion that Objection 2 should be sustained. This is so even if, as the majority further speculates, the brandishing incident predated the criti-

During his last appearance at the workplace—4 days prior to serving as an election observer—the police were summoned regarding his possession of the gun and Quarles was confronted by the police, who led him away in handcuffs in the presence of five or six unit employees. Later, after the police had questioned Quarles and determined that the weapon was an "airsoft" gun,[2] they escorted Quarles from the facility,[3] and his employment was terminated soon thereafter. As one would expect, reports about this incident were disseminated to other employees, including various bargaining-unit employees at the Market Street facility and at least four or five unit employees at the Pine Street facility. Quarles did not return to the workplace until he appeared 4 days later as an election observer for the Union at the Pine Street facility. The Respondent terminated Quarles' employment prior to the election, but there is no evidence that employee-voters were aware that his employment had been terminated.

My colleagues decline to review the decision of the Regional Director, who concluded that the gun-brandishing incident combined with Quarles' presence at the election as a union observer did not warrant setting aside the election. The Regional Director reasoned that Quarles' gun-brandishing in the workplace and his "ambiguous proclamation" (that he possessed the gun "in case any fuckers want to get crazy") were "wholly unrelated" to the election. Therefore, according to the Regional Director, "[i]t follows that [Quarles'] conduct would not have the tendency to interfere with employee free choice in the election." As to Quarles' presence as a union election observer at Pine Street, the Regional Director stated that "[b]y all appearances, Quarles belonged and was welcome there."[4] The Regional Director also reasoned that "Quarles' service as an election observer a mere 4 days later further demonstrated to employees that his 'offense' was not considered serious." Finally, the Regional Director concluded: "In these circumstances, when notice was short, the election was imminent, and when [Quarles'] asserted 'offense' fell far short of its initial appearance, it was not unreasonable or objectionable for the Petitioner to utilize Quarles as its observer" (citations omitted).

Regarding this aspect of the Employer's Objection 2, I respectfully disagree with my colleagues and the Regional Director. For several reasons, I believe Quarles' presence as an election observer warrants granting the Employer's Request for Review and setting aside the election.

First, I believe that brandishing a realistic-looking gun in or near the workplace constitutes extremely serious misconduct. And the notoriety of such an incident is magnified when, understandably, the police are summoned, apprehend and handcuff the employee, lead him away wearing handcuffs in the presence of coworkers, and then escort him out of the facility. An "airsoft" gun is designed to closely resemble a real firearm, and the conduct of the police here demonstrates that they initially believed it was a lethal weapon. Likewise, the Regional Director found that an employee who saw Quarles brandishing the gun "seemingly mistook it" for an actual firearm. Moreover, employees who saw the police leading Quarles away in handcuffs reasonably would have believed the police had determined that the situation was dangerous enough to warrant Quarles' removal and potential arrest. Although I respect the contrary views of the Regional Director, I do not believe anyone familiar with issues of workplace violence—or who reads the newspaper or watches network news coverage of workplace violence—can reasonably find that anyone believed Quarles' actions were "not considered serious."

Second, I believe the Board cannot reasonably conclude that employees' fears about Quarles' gun-brandishing would have dissipated either because the police eventually established that Quarles' weapon was an "airsoft" gun or because Quarles was not wearing handcuffs when he was ultimately removed from the facility by the police. There is no evidence that employees were advised at any time that the gun was non-lethal, nor is it reasonable to conclude that, after employees witnessed the events summarized above, including Quarles being led away by the police in handcuffs, employees' fears about Quarles would be eased by the fact that Quarles was no longer wearing handcuffs while be-

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cal period. See *Dresser Industries*, 242 NLRB 74 (1979) (considering pre-petition conduct that added "meaning and dimension" to post-petition conduct).

[2] As the Regional Director noted, "airsoft" guns are "replica firearms, or a special type of air guns used in airsoft [a combat-type game], that fire spherical projectiles of many different materials, including (but not limited to) plastic and biodegradable material." There is a wide range of different airsoft guns, with different types of firing mechanisms, that closely resemble an array of real-life weapons. Airsoft guns are "designed to be non-lethal" while appearing to be a "realistic" version of the weapon they are modeled after. https://en.wikipedia.org/wiki/Airsoft_gun (last visited July 8, 2016).

[3] When Quarles was escorted out of the workplace after police questioning, he was not wearing handcuffs, but he remained accompanied by the police.

[4] Quarles' employment having been terminated prior to the election, the Employer's attorney during the pre-election conference challenged Quarles' presence as an observer for the Union, but the Regional Director attached significance to the lack of evidence that voters were aware of these facts.

ing escorted out of the facility by the police.[5] I believe at least three uncontroverted facts are material here: (1) a potentially determinative number of employees understood that Quarles brandished a weapon at work and was led away in handcuffs by the police; (2) after police questioning, Quarles was removed from the workplace by the police; and (3) the next time Pine Street employees encountered Quarles was the Board-conducted election held 4 days later, where Quarles was the Union's observer.

Third, contrary to the Regional Director, I do not believe the Board can reasonably find that the above events are "wholly unrelated" to the election. The test for objectionable conduct is not whether particular facts constitute a "worst case scenario" that would have even more clearly interfered with employee free choice.[6] An election must be set aside when the record establishes that a party's actions "reasonably tended to interfere with employee free choice in the election." *Barton Nelson, Inc.*, 318 NLRB 712 fn. 3 (1995) (citing *House of Raeford Farms*, 308 NLRB 568 (1992), enfd. mem. 7 F.3d 223 (4th Cir. 1993)). Even when dealing with the conduct of employees who are not agents of a party (i.e., the company or union), a hallmark characteristic of objectionable conduct is the creation of reasonable fear for one's physical safety or a fear of reprisal for one's sentiments about union representation. *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984).[7] Contrary to the Regional Director, when a gun-brandishing employee proclaims that he brought the gun to work "in case any fuckers want to get crazy," and is thereafter removed from the workplace by the police (with or without handcuffs), I disagree that employee-voters would reasonably conclude, when they encounter the same person 4 days later as the Union's election observer, that the individual's prior actions must have been "not considered serious."[8] In this respect, I believe the Regional Director's logic is circular. The *question* here is whether Quarles' presence as an observer, in light of events 4 days earlier, reasonably tended to interfere with employee free choice by giving rise to reasonable fears about safety or reprisals. When answering this question, it is improper, in my view, to reason that Quarles' participation in the election as an observer must mean employees could not have been threatened or intimidated by his presence. I find similarly unpersuasive, for the same reason, the Regional Director's statement regarding Quarles' role as a Union observer that "[b]y all appearances, Quarles belonged and was welcome there."

There is no evidence that any employees learned that the gun Quarles brandished at work was non-lethal. Consequently, the record establishes that (i) a determinative number of voters at the Pine Street location were familiar with facts giving rise to reasonable fears about their safety based on the presence of Quarles, and (ii) employees would reasonably connect Quarles' unexplained appearance at the election as the Union's observer—4 days after Quarles' removal from the workplace by the police—with his prior misconduct. Here, it is noteworthy that under the Board's election procedures, observers play a significant role. Those procedures, among other things, *require each voter to identify him- or her-*

[5] The mere fact that Quarles was not wearing handcuffs when exiting the facility would not necessarily diminish any employee's fears about Quarles' gun-brandishing at work, his statement that he had the gun "in case any fuckers want to get crazy," and his removal from the workplace by the police. Cf. FindLaw, *What Procedures Must the Police Follow While Making an Arrest?* (http://criminal.findlaw.com/criminal-procedure/what-procedures-must-the-police-follow-while-making-an-arrest.html) (last viewed July 8, 2016) (rules regarding police custody vary by jurisdiction, but an officer "need not use handcuffs," and an individual is considered to be under arrest when he or she "reasonably believes that [he or] she is not free to leave").

[6] Clearly, it would have been worse if Quarles brandished a real weapon, proclaimed he would shoot anyone who opposed the Union in the election, and then appeared 4 days later as the Union's election observer. However, that these facts would have been worse does not mean they establish a minimum threshold regarding what constitutes objectionable conduct that warrants setting aside an election.

A separate issue here is whether the Union inappropriately used Quarles as an observer when his employment had been terminated prior to the election. In this regard, the Board's Casehandling Manual states that observers "should be employees of the employer, unless a party's use of an observer who is not a current employee of the employer is reasonable under the circumstances." NLRB Casehandling Manual, Part Two (Representation Proceedings), Sec. 11310.2, para. 2 (citation omitted). Because I would find that the election must be set aside based on Quarles' earlier misconduct and the other events described in the text, I do not reach or pass on the reasonableness of using Quarles as a Union observer when he was no longer an employee (which the Union only learned on the morning of the election).

[7] When applying the *Westwood Horizons Hotel* standard, I do not believe an election should be set aside only if there is a "*general atmosphere* of fear and reprisal" (emphasis added) because this may improperly be interpreted to suggest that an election cannot be set aside unless the offending conduct affected nearly all eligible voters, regardless of how close the tally and how serious the misconduct. In fact, the Board has properly set aside elections based on serious misconduct affecting a determinative number of voters. E.g., *Robert Orr–Sysco Food Services*, 338 NLRB 614 (2002); *Smithers Tire*, 308 NLRB 72 (1992); *Buedel Food Products Co.*, 300 NLRB 638 (1990); *Steak House Meat Co.*, 206 NLRB 28 (1973).

Because I find Quarles' service as an election observer warrants overturning the election, I find it unnecessary to pass on whether the Regional Director properly denied the Employer's request to reopen the record or for rehearing with respect to its allegation that union observers created the impression of surveillance. I join my colleagues in denying review in other respects.

[8] As noted previously, the Regional Director found that "Quarles's service as an election observer . . . demonstrated to employees that his [gun-brandishing] 'offense' was not considered serious."

self by name to each observer. According to the Board's Casehandling Manual:

- Observers "represent their principals, carrying out the important functions of challenging voters and generally monitoring the election process."[9]
- Observers "assist the Board agent in the conduct of the election."[10]
- Observers may be assigned "to act as ushers" who guide voters to the checking table.[11]
- When voters present themselves at the checking table, the observers are seated there—along with the Board agent—and each voter's name must be checked off by each observer.[12]
- Significantly, every voter receives a ballot *only after each observer is "satisfied as to the voter's identity*."[13]

The Board in this case is not required to determine the precise point when prior misconduct by a party's election observer may create sufficient concerns about "fear and reprisal" to warrant setting aside the election. *Westwood Horizons Hotel*, 270 NLRB at 803. Wherever we might draw the line, surely the facts presented here fall on the objectionable side of that line. An election cannot reasonably be upheld where a party's observer brandishes a gun in the workplace, proclaims that he has the gun "in case any fuckers want to get crazy," is removed from the workplace by the police, terminated, and next reappears in the workplace, 4 days later, presiding over a Board-conducted election as a party's observer, to whom each voter must give his or her name in order to receive a ballot. I agree that our elections should not be lightly set aside, and many cases in this area may present close questions. Unlike my colleagues, however, I do not believe this is one of them.

Accordingly, I agree with otherwise denying review, but as to the above issue, I respectfully dissent.

Dated, Washington, D.C. August 26, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

[9] NLRB Casehandling Manual, Part Two (Representation Proceedings), Sec. 11310.3.

[10] Id.

[11] Id., Sec. 11322.

[12] Id., Sec. 11322.1, paras. 1, 4, 5.

[13] Id., Sec. 11322.1, para. 4 (emphasis added).